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Regulating the Rorts: The Legal Governance of Grants Programs in Australia

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Abstract

Numerous recent scandals have surfaced relating to the Australian government allegedly engaging in 'pork barrelling', that is, the partisan channelling of grants funding to government electorates, instead of merit-based allocation. Yet the probity of the use of public money is crucial towards preserving public trust in Australian democratic institutions. This article will critically analyse the legal accountability mechanisms for grants funding through public finance legislation, 'soft law' such as grants, guidelines and ministerial standards, and the availability of legal redress. It will also examine political accountability mechanisms, including the operation of parliamentary committees, the Auditor-General and the Ombudsman. The author argues that although political regulation provides transparency in the government's use of public funds, it remains ineffective to combat the government's deeply entrenched incentives to allocate grants in a partisan manner. As such, it is contended that stronger legal accountability in terms of enforceable rules and regulations is required to reform grants regulation towards improving the probity and accountability of the use of public funding.

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I Introduction

The Australian Government provides billions of dollars' worth of grants annually to a wide range of stakeholders in numerous policy areas, including social services, business support, emergency relief, and research and innovation.[1] In 2021, 29,649 discretionary grants worth $19.8 billion dollars

1. Grants are defined under the Commonwealth Grants Rules and Guidelines 2017 as: An arrangement for the provision of financial assistance by the Commonwealth or on behalf of the Commonwealth: under which relevant money or other CRF money is to be paid to a grantee other than the Commonwealth and which is intended to help address one or more of the Australian Government's policy outcomes while assisting the grantee achieve its objectives: *Commonwealth Grants Rules and Guidelines 2017* (Cth) r 2.3 ('*Grants Rules and Guidelines*').

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were awarded by the Commonwealth to a wide range of individuals, community groups, sports bodies, indigenous organisations and for-profit organisations.[2] It is well-recognised that governments provide grants to individuals and groups with the aim of achieving governmental policy outcomes, while assisting the public to achieve their own objectives.[3]

However, in recent times, there have been numerous scandals relating to the Commonwealth and state governments allegedly abusing grants funding programs. For instance, in 2021, in the 'Car Park Rorts' affair, the Auditor-General found that a federal car park construction fund worth $389 million was administered ineffectively, and the Minister had allocated the grants with 'inadequate assessment' for eligibility, with 77 per cent of sites provided to government electorates, instead of areas of real need with congestion issues.[4] This followed close on the heels of the 2019 'Sports Rorts' affair, which resulted in the resignation of the federal Sports Minister, following allegations that she had intervened in the Community Sport Infrastructure Grant program to gain political advantage for the Liberal-National Coalition in the 2019 federal election, whilst in a position of conflict of interest.[5] More recently, in 2022, the Auditor-General found that 54 per cent of funding decisions on the $184 million Safer Communities Fund 'did not have a clear basis for the decision recorded'.[6]

Although this article focuses on the federal level of politics, it should also be noted that States have had issues with the biased allocation of grants funding. For example, the New South Wales Auditor-General found that the approval processes of the Stronger Communities Fund 'lacked integrity', as $252 million of funding was approved before the state election, with 96 per cent of funds going to Coalition electorates.[7]

A strong criticism is that governments have been engaging in 'pork barrelling', that is, the distribution of public funding to government electorates in a partisan manner, rather than proper merit-based allocation. This is a significant issue because it means that communities with the greatest needs are not being funded in favour of less meritorious — or even unmeritorious — programs. This represents a misuse of public funds by politicians for political gain, which impedes the broader public interest.

Pork barrelling poses a problem for democracy because the probity of the expenditure of public funding is crucial towards preserving public trust in Australian democratic institutions. In considering how to foster and maintain public trust, a number of critical questions emerge: what is the history and context of grants politicisation in Australia? What are the constitutional, legal and political mechanisms that regulate grants programs in Australia? And, crucially, how can the regulatory system be reformed to ensure that public funds are insulated from government abuse?

This article shows that pork barrelling is an intractable problem across multiple governments over many decades and takes different forms based on electoral systems. Where governments have the discretion to allocate grants, there is a strong incentive to do so in a partisan fashion to their

2. Australian Government, 'Grant Award Published', *GrantConnect* (Web Page) <https://www.grants.gov.au/Reports/GaPublishedShow?AgencyStatus=0&DateType=PublishDate&DateStart=01-Jan-2021&DateEnd=31-Dec-2021>.
3. Joanne Kelly, *Strategic Review of the Administration of Australian Government Grants Programs* (Review, 17 March 2008) 16–18.
4. Auditor-General of Australia, *Administration of Commuter Car Park Projects within the Urban Congestion Fund* (Auditor-General Report No 47, 28 June 2021) 6, 10, 11 ('*Administration of Car Park Projects*').
5. Auditor-General of Australia, *Award of Funding Under the Community Sport Infrastructure Program* (Auditor-General Report No 23, 15 January 2020) 9–11 ('*Community Sport Infrastructure Program*').
6. Auditor General of Australia, *Award of Funding under the Safer Communities Fund* (Auditor-General Report No 16, 14 February 2022) 6.
7. NSW Auditor-General, *Integrity of Grant Program Administration* (Auditor-General's Report, 8 February 2022) 2.

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benefit, although the form it takes depends on the opportunity structures provided by the electoral system in which it occurs. Governments in Australia have strong incentives to strategically allocate public funds for the partisan benefit of their party to improve their electoral prospects. This means that the temptation of pork barrelling is deeply entrenched across governments of all political persuasions.

Although the topic of pork barrelling has received some attention in the field of political science,[8] there is limited legal consideration of the constitutional, legislative and political regulation of grants programs.[9] While it may be tempting to dismiss pork barrelling as a political issue, rather than a legal one, the ongoing and pervasive rorting of the public purse for the political gain by those who hold the purse strings shows that political regulation is failing to hold politicians to account. In addition, the increasingly brazen actions of politicians demonstrate the weaknesses of relying on purely political means to achieve accountability. For example, former NSW Premier Gladys Berejiklian, whose office was caught red-handed shredding documents relating to pork barrelling grants, contended to the NSW Independent Commission Against Corruption that pork barrelling was 'not unique or uncommon' and even claimed that this was part of democracy.[10] The fact that some politicians will disingenuously try to claim a practice of misusing public funds is legitimate points to the strong need for legally enforceable rules and regulations to counter the opportunistic behaviour of politicians and the deep-seated, inherent temptation to use taxpayer resources for the benefit of those in control of the distributive process.

This article will first examine the history, context and prevalence of grants politicisation in Australia (Part II). Following this, the constitutional context for grant funding will be scrutinised (Part III). The article will then undertake an analysis of the legal and political accountability mechanisms for grants administration, including the identification and investigation of grant mismanagement internally via the Department of Finance, as well as external review through scrutiny bodies such as the Auditor-General, the Ombudsman and parliamentary committees. It will then analyse the legal accountability framework of public finance legislation, and 'soft law' such as grants guidelines and ministerial standards. Following this, the article will examine the potential for rectification through sanctions and the ability for legal challenge of government grants (Part IV). Based on this analysis, the article proposes reforms to the legal regulation of grants administration towards combating the deeply ingrained desire by politicians to abuse the system (Part V). Due to the complexity and variety of laws examined, this article is confined to considering Commonwealth laws, although many of its recommendations will also be applicable at the state level.

The author argues that although political regulation is effective to bring to light governmental abuse of public funds, it remains ineffective to combat the government's deeply entrenched incentives to allocate grants in a partisan manner. In addition, legal accountability is deficient due to

8. Michael Di Francesco, 'A Signal Failure: Sports Grants, Public Servants, and Traffic Lights' (2020) 79(4) *Australian Journal of Public Administration* 584; Susanna Connolly, 'The Regulation of Pork Barrelling in Australia' (2020) 35(1) *Australasian Parliamentary Review* 24; Andrew Leigh, 'Bringing Home the Bacon: An Empirical Analysis of the Extent and Effects of Pork Barrelling in Australian Politics' (2008) 137 *Public Choice* 279; Clive Gaunt, 'Sports Grants and the Political Pork Barrel: An Investigation of Political Bias in the Administration of Australian Sports Grants' (1999) 34(1) *Australian Journal of Political Science* 63.
9. An exception is Anne Twomey, '"Constitutional Risk," Disrespect for the Rule of Law and Democratic Decay' (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 293, which focusses on the concept of constitutional risk and the 2019 'Sports Rorts' affair.
10. Christopher Knaus, 'Gladys Berejiklian Says Pork Barrelling Would Not "Be a Surprise to Anybody" — But it's not Democracy Either', *The Guardian* (online), 1 November 2021 <https://amp.theguardian.com/australia-news/2021/nov/02/gladys-berejiklian-says-pork-barrelling-would-not-be-a-surprise-to-anybody-but-its-not-democracy-either>.

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the lack of effective enforcement measures. To redress this, the article makes recommendations to reform grants funding regulation in Australia in a manner that will strengthen the probity and accountability of the use of public funds.

II Grants Politicisation: History, Context and Prevalence

There are definitional issues in determining whether grants allocations have been politicised, and there may be room for disagreement as to whether public funding has been misused. While there is no bright line delineation as to what constitutes a proper compared to an improper use of public funds, there are several indicators of the politicisation of grants allocations. These include the disproportionate allocation to government or marginal electorates compared to opposition electorates, proximity of time to an election, departure from departmental merit-based advice or negative reports from the Auditor-General about the administration of the grant.[11] As such, this article defines politicisation of grants funding as the allocation of public funds to government or marginal electorates for predominantly partisan reasons, rather than based on merit. This suggests that grants funding has been allocated contrary to public interest and skewed towards the interests of the political party in power.

The ability of governments to redistribute funds at a local level in a discretionary and potentially partisan manner leaves open the door to political manipulation. Literature on the partisan allocation of discretionary grants has tended to focus predominantly on the United States, with its single member district plurality system, where the incentive for pork barrelling is particularly strong.[12] The rigid separation of the legislature and executive in the US, coupled with its weak party structure within a single member district plurality system and centralised committee-based legislative process, leads to incentives for individual legislators to shore up personal support through their local districts.[13] The belief is that politicians who 'bring home the bacon' are electorally rewarded for doing so.[14]

By contrast, in parliamentary systems with strong mass parties, pork barrelling is submerged within a disciplined party system, as each parliamentarian has a limited ability to secure funding for their own electorates.[15] There is also potentially a distinction between a representative arguing for benefits for their own electorate, compared to the party in power seeking to keep its member in Parliament. Nevertheless, countries with single-member electorates such as Australia are more predisposed to pork barrelling than countries with multi-member electorates (such as Greece, Spain and Norway), as voters in multi-member systems are unsure which politician to reward for a particular benefit.[16] In addition, there are incentives for the central cabinet in single-member electorates to strategically apportion funding to marginal local constituencies to enhance their electoral prospects.[17] The distribution of funds is also expected to have a partisan character, with an

11. Connolly (n 8) 30.
12. Bruce Cain, John Ferejohn and Morris Fiorina, 'The Constituency Service Basis of the Personal Vote for US Representatives and British Members of Parliament' (1984) 78(1) *American Political Science Review* 110.
13. David Denemark, 'Partisan Pork Barrel in Parliamentary Systems: Australian Constituency-Level Grants' (2000) 62(3) *The Journal of Politics* 896, 897.
14. Ibid, quoting Robert M Stein and Kenneth N Bickers, 'Congressional Elections and the Pork Barrel' (1994) 56(2) *The Journal of Politics* 377, 377.
15. Denemark, 'Partisan Pork Barrel in Parliamentary Systems' (n 13) 897.
16. Thomas D Lancaster, 'Electoral Structures and Pork-barrel Politics' (1986) 7(1) *International Political Science Review* 67, 71.
17. Denemark, 'Partisan Pork Barrel in Parliamentary Systems' (n 13) 898.

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incentive to skew the distribution of funds towards the party in power.[18] The introduction of outcome budgeting in Australia with the enactment of the *Financial Management and Accountability Act 1997* (Cth) (now merged into the *Public Governance, Performance and Accountability Act 2013* (Cth) ('*PGPA Act*')) further enabled this, as it meant that discretionary grants are 'a key source of administrative freedom and rarely appear separately in the appropriation bills', resulting in both an expansion of ministerial discretion and a lack of transparency in the allocation of grants funding.[19]

Due to the ample opportunity and incentives for politicians to distribute funds in a partisan manner, the politicisation of grants programs has had long provenance in Australia by all sides of politics. The practice of targeting funding to government electorates for political reasons has existed for centuries.[20] While there is an abundance of research on this topic in the United States,[21] there has been relatively little study of the practice in Australia, given the comparatively tight political control exercised by political parties over individual politicians.[22] Prior to 1993, discussion of the issue in Australia was subsumed into more general consideration of the question of electoral corruption, particularly the use of electoral legislation to 'control the bringing of improper influences to bear on voters and on candidates',[23] including bribery of voters, and 'treating', or the 'provision of food, drink or entertainment' to influence electors.[24] In public discussion, the question of pork barrelling in the distribution of money between elections tended to be conflated with that of corruption during elections, as well as more general forms of political corruption such as that existing during the 1980s in Queensland, under then Premier Joh Bjelke-Petersen.[25] However, the blunt conflation of *quid pro quo* corruption such as direct bribery of individuals, to a more general inducement for voters in an electorate to elect a member whose party has engaged in pork barrelling, does not encapsulate the complexities of the issue of misuse of grants allocation processes. The spotlight was shone upon this issue during the mid-1990s, when the first 'Sports Rorts' affair in the period of the Keating Labor Government first concentrated public attention on the particular form of impropriety we are considering here: the allocation of grants for partisan purposes, rather than according to merit. In the 1993 'Sports Rorts' affair, the Auditor-General found anomalies in the allocation of the $30 million Community Recreational and Sporting Facilities Grants Program, and noted that the department's administration of the program was weak.[26] The Minister resigned as a result of this controversy.[27]

Since then, empirical studies have consistently shown that successive governments of all political persuasions have distributed discretionary grants funds in a partisan manner to government-held electorates. This included the Labor Government's 1993 $60 million Community Recreational

18. Ibid 899.
19. Kelly (n 3) 7.
20. Leigh (n 8) 279.
21. See, eg, Dianna Evans, Greasing the Wheels: Using Pork Barrel Projects to Build Majority Coalitions in Congress (Cambridge University Press, 2004).
22. Leigh (n 8) 280.
23. P D Finn, 'Electoral Corruption and Malpractice' (1977) 8 *Federal Law Review* 194, 194.
24. Ibid 208.
25. See, eg, the conflation of the 'Car Park Rorts' scandal with the corruption issues besetting the Bjelke-Petersen government in Queensland during the 1980s: Paul Bongiorno, 'Why There'll be No Federal Anti-Corruption Commission before the Next Election', *The New Daily* (online), 6 July 2021 <https://thenewdaily.com.au/news/politics/australian-politics/2021/07/06/paul-bongiorno-federal-anti-corruption-commission/>.
26. Auditor-General of Australia, *Community Cultural, Recreational and Sporting Facilities Program* (Audit Report No 9, 15 November 1993) vii.
27. Tony Wright, 'From the Archives, 1994: Ros Kelly Quits over "Sports Rorts" Affair', *The Sydney Morning Herald* (online), 16 January 2020 <https://www.smh.com.au/politics/federal/from-the-archives-1994-ros-kelly-quits-over-sports-rorts-affair-20200116-p53rxw.html>.

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and Sporting Facilities Grants Program (the first 'Sports Rorts' incident),[28] the Coalition Government's 1998 $1.2 billion Natural Heritage Trust Environmental Fund,[29] and the Coalition Government's Roads to Recovery, Stronger Families and Communities, Sustainable Regions, and Regional Partnerships in 2001–4.[30] In these three examples, the government retained power in the elections, which suggests that pork barrelling may potentially be effective towards attaining electoral success. However, it is arguable that these grants may not have been crucial to the strong electoral victories in 1993 or 2004, and possibly not to the narrower victory in 1998. The frequency of pork barrelling regardless of which political party is in power may lead to the risk of the public being inured to such improprieties, despite the misuse of taxpayer funds. At any rate, these election successes may have reinforced the perception that pork barrelling may result in successful electoral outcomes.

Following these continual controversies, the Commonwealth Government commissioned a comprehensive strategic review of grants administration, which reported in 2008.[31] The Review recommended that whole-of-government guidance be issued on grants that aligned with the financial management legislation, and that a public database for grants be created.[32] This led to the development of the *Commonwealth Grants Rules and Guidelines* as a legislative instrument to the *Financial Management and Accountability Act 1997* (Cth) (but such rules are not possible under the *Commonwealth Authorities and Companies Act 1997* (Cth), covering corporate Commonwealth bodies).[33] In addition, the centralised publication of grants was initiated via the GrantConnect website.[34] The reforms thus standardised policy direction across the federal government on grants administration and enhanced the transparency of grants awarded.

The financial management framework was overhauled in 2013. The *PGPA Act* was introduced, which combined the previous *Financial Management and Accountability Act 1997* (Cth) and the *Commonwealth Authorities and Companies Act 1997* (Cth) ('*CAC Act*').[35] The *CAC Act* was

> designed to cover corporate bodies (both established by statute and under the *Corporations Act*) which enjoyed ownership of the funds they used; the [2013 Act] rejects this criterion as unsound on the ground that these, like other bodies, enjoy the use of public funds. It makes distinct provision only for Commonwealth companies subject to the disciplines of the *Corporations Act* [*2001* (Cth)].[36]

Nevertheless, the previous provisions were carried forward: the Commonwealth can make grant rules for non-corporate Commonwealth entities, but not corporate Commonwealth entities. There was no overt documentation for the reason for this delineation in 1997, but in that year, the *Review of GBE Governance Arrangements* ('Humphry Report') recommended that 'all new GBEs [government business enterprises] should be companies' and all existing GBEs in statutory form 'should

28. Gaunt (n 8) 63.
29. David Denemark, 'Pork Barrel Politics' (1998) 70(6) *Australian Quarterly* 3, 4.
30. Leigh (n 8) 280.
31. Peter Grant, *Strategic Review of the Administration of Australian Government Grants Programs* (Review, 31 July 2008).
32. Ibid 23, 27.
33. See, eg, *Commonwealth Grant Guidelines 2013*, issued under Regulation 7A of the *Financial Management and Accountability Act 1997* (Cth).
34. Australian Government, *GrantConnect* (Web Page) <https://www.grants.gov.au/>.
35. Yee-Fui Ng, 'In the Moonlight? The Control and Accountability of Government Corporations in Australia' (2019) 43(1) *Melbourne University Law Review* 303, 320 ('In the Moonlight?').
36. *Public Governance, Performance and Accountability Act 2013* (Cth) ('*PGPA Act*'); Ibid.

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become companies'.[37] This suggested an assumption that statutory corporations would not be used going forward, and government companies would be the preferred structure. It follows from this line of reasoning that government companies under the *CAC Act*, as ostensibly arms' length commercial entities, should not be distributing public money in the form of grants, nor be governed by grant rules. As we will see, this exclusion in 1997 has created significant loopholes in the grants administration framework, as there are a significant number of statutory corporations today,[38] including those that distribute grants.

Despite the reforms to the grants schemes, as discussed above, pork barrelling scandals have continued to plague Australian governments in recent years, where the Auditor-General has issued numerous reports on the partisan distribution of discretionary grant funding.[39] Thus, it is clear that pork barrelling of grants funds continues, and shortcomings in the regulation of grants administration persist.

III Grants Funding: The Constitutional Context

Before delving into the legal and political regulation of grants administration, it is necessary to examine the constitutional superstructure that overlays Commonwealth grants funding. The *Australian Constitution* provides for the appropriation powers of the Commonwealth. Section 81 provides that all moneys received by the Commonwealth executive shall form a consolidated revenue fund, and that moneys appropriated from the consolidated revenue fund must be 'for the purposes of the Commonwealth'. Section 83 provides that all appropriations must be made by law. This means that appropriations have to be statutorily authorised by Parliament.[40]

The cases of *Williams v Commonwealth* ('*Williams (No 1)*')[41] and *Pape v Commissioner of Taxation* ('*Pape*')[42] limited the Commonwealth executive's power to expend the money it had appropriated under sections 81 and 83 by drawing a firm distinction between appropriation and expenditure. Although the constitutional jurisprudence relating to the Commonwealth's spending power has ebbed and flowed over time with alternatively broad and narrow views of the power,[43] it was previously assumed that the *Appropriations Acts* were sufficient statutory authorisation for spending.[44] The High Court in *Pape* overturned this assumption and found that although the power to appropriate money from the consolidated revenue fund was broad, sections 81 and 83 were not

37. Richard Humphry, *Review of GBE Governance Arrangements* (Report, March 1997) 34.
38. As of August 2022, there are 71 statutory corporations: 'Flipchart of PGPA Act Commonwealth Entities and Companies', *Australian Government: Department of Finance* (Flipchart, 2022) <https://www.finance.gov.au/sites/default/files/2022-06/Flipchart1July2022-FINAL.pdf> ('*PGPA Act Flipchart*').
39. This includes the $389 million 'Car Park Rorts' affair, the $100 million 2019 'Sports Rorts' affair, and the Regional Jobs and Investment Packages controversy: Auditor-General of Australia, *Administration of Car Park Projects* (n 4); Auditor-General of Australia, *Community Sport Infrastructure Program* (n 5); Auditor-General of Australia, *Award of Funding Under the Regional Jobs and Investment Packages* (Auditor-General Report No 12, 5 November 2019) ('*Regional Jobs and Investment Packages*').
40. *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 450 (Isaacs J); *Brown v West* (1990) 169 CLR 195, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
41. (2012) 248 CLR 156 (*'Williams (No 1)'*).
42. (2009) 238 CLR 1 (*'Pape'*).
43. Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (Butterworths, 4th ed, 2017) 397–405.
44. See, eg, *Combet v Commonwealth* (2005) 224 CLR 494. See Anne Twomey, 'Pushing the Boundaries of Executive Power: Pape, the Prerogative and Nationhood Powers' (2010) 34 Melbourne University Law Review 313, 313–14.

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sufficient bases for the expenditure of funds,[45] and the power for the Commonwealth executive to spend must be found in valid legislation or in the *Constitution*.[46] This was affirmed in *Williams (No 1)*, where the majority of French CJ, Gummow, Bell and Crennan JJ found that, apart from limited exceptions, the Commonwealth will need statutory authority to enter into contracts and spend public money, due to the principle of responsible government.[47] In *Williams (No 2)*, the High Court confirmed that there needed to be a valid Commonwealth head of legislative power for legislation authorising financial expenditure.[48] In sum, this means that the Commonwealth executive requires statutory authority to spend public money on grants programs, within a recognised head of Commonwealth legislative power.

The legislative authorisation for grants can take several forms. For the 'ordinary services and functions of government', section 23 of the *PGPA Act*, which empowers non-corporate Commonwealth entities to enter into arrangements relating to the affairs of the entity, serves as sufficient authorisation.[49] Further, following the *Williams (No 1)* case, section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) was introduced, which empowers the Commonwealth government to 'enter into, vary or administer a grant of financial assistance if it is specified in Schedule 1AA or Schedule 1AB' to the *Financial Framework (Supplementary Powers) Regulations* (Cth).[50] However, as *Williams (No 2)* makes clear, this authorisation is only valid where there is a Commonwealth head of legislative power.[51] Where neither of these situations apply, then specific legislation within the Commonwealth's legislative competencies must provide the Commonwealth with the power to enter into the financial arrangement.[52] This means that Commonwealth funding to individuals or organisations in areas without obvious heads of legislative power may be susceptible to constitutional challenge, such as in the areas of education, the environment, sports or the arts, provided the High Court rules that the person who makes the challenge has sufficient standing to bring an action.[53] However, as Twomey points out, the constitutional risk of individuals challenging grant decisions by government is low, as recipients of grants are normally happy to receive the funds, and others do not have standing to challenge such decisions.[54]

Despite the strength of case law subjecting executive expenditure to parliamentary scrutiny, a broader issue is the interrelationship between Parliament and the executive over the control of public money. Although Australia's system of responsible government is predicated upon Parliament providing oversight over executive spending,[55] the reality is that Parliaments tend to rubber stamp the executive's decisions over grants distribution for constitutional, institutional and practical reasons. As Bateman notes:

45. *Pape* (n 42) 55 (French CJ), 73 [178], 75 [186] (Gummow, Crennan and Bell JJ), 103, 105 [296] (Hayne and Kiefel JJ), 210, 213 (Heydon J).
46. Ibid.
47. *Williams (No 1)* (n 41), 179–80 [4] (French CJ), 239 [161] (Gummow and Bell JJ), 357–58 [542]–[544] (Crennan J).
48. *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 ('*Williams (No 2)*').
49. *Grants Rules and Guidelines* (n 1) 10.
50. See Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 6th ed, 2018) 76–7.
51. *Williams (No 2)* (n 48).
52. Ibid.
53. Shipra Chordia, Andrew Lynch and George Williams, 'Williams v Commonwealth [No 2]: Commonwealth Executive Power and Spending after Williams [No 2]' (2015) 39(1) *Melbourne University Law Review* 306, 326, 328.
54. Twomey, 'Constitutional Risk' (n 9) 296.
55. Terence Daintith and Yee-Fui Ng, 'Executives' in Cheryl Saunders and Adrienne Stone (eds), *Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 587.

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> Despite enacting gargantuan tax and appropriation statutes, the financial powers of parliaments are ceremonial and passive, while executives' are practical and potent. Executive organs carry out all financial planning, possess a veto over financial legislation, exercise broad delegated statutory power over public expenditure … supervise the wider executive's use of economic resources and dictate the form and content of public accounts.[56]

Constitutional provisions constrain the ability of the Senate compared to the House of Representatives, where the government has the majority. Sections 53 and 54 of the *Constitution* limit the Senate's ability to amend annual appropriation acts to only that expenditure which is not part of the 'ordinary annual services' of government.[57] The definition of 'ordinary annual services' of government has been continually renegotiated between the government and Parliament; however, under the current compact, grants to States, individuals or entities would not be within that definition.[58]

More significantly, section 56 of the *Constitution* restricts the introduction of appropriation bills to the House of Representatives, which effectively gives the executive the ultimate power to determine the content of spending legislation, leaving Parliaments with only a power to either ratify the executive's decision or block supply, triggering a reformulation of government.[59] As blocking supply is the 'nuclear option', it is generally not practicable to invoke. Even apart from this constitutional straitjacket, the Senate would generally be reluctant to block government spending programs due to the political consequences of any potential public uproar if individuals or groups do not receive proposed government benefits. In addition, the Senate does not have the resources to closely scrutinise the thousands of grants program that are proposed by the government each year. These factors leave the Senate in a supine position relative to the government in public finance. Therefore, the executive is preeminent in controlling the public purse.

Section 96 of the *Constitution* is another relevant provision, as it provides the ability of the Commonwealth to provide financial assistance to the States on such terms and conditions as it sees fit.[60] This provision has been interpreted expansively by the High Court to enable the Commonwealth to provide tied grants to the States with onerous terms and conditions without a head of legislative power, exacerbating the vertical fiscal imbalance between the Commonwealth and the States.[61] The constitutional interpretation of section 96 has been roundly criticised by academics, but the orthodoxy has remained unchanged.[62] Due to its broad interpretation, section 96 is an alternative mechanism for Commonwealth funding programs where it is otherwise not possible due to a lack of head of Commonwealth legislative power.

Thus, constitutional provisions specify broad parameters for the use of Commonwealth public funds, generally requiring parliamentary authorisation of funding based on the principle of

56. Will Bateman, Public Finance and Parliamentary Constitutionalism (Cambridge University Press, 2020) 1.
57. *Australian Constitution* ss 53–4. See Charles Lawson, 'Re-invigorating the Accountability and Transparency of the Australian Government's Expenditure' (2008) 32 Melbourne University Law Review 879, 911; Charles Lawson, 'Should Parliament Determine the Accountability, Transparency and Responsibility Standards for the Australian Government?' (2012) 19 *Australian Journal of Administrative Law* 73, 76.
58. The agreement between the Senate and the government is in the 'Compact of 1965', which has been subject to several amendments. See Harry Evans, *Odgers' Australian Senate Practice* (Australian Government Publishing Service, 14th ed, 2016) 386–91.
59. Bateman (n 56) 222.
60. See, eg, Brendan Gogarty, 'Making Sense of s 96: Tied Grants, Contextualism and the Limits of Federal Fiscal Power' (2019) 42(2) *Melbourne University Law Review* 455; Shipra Chordia, 'Section 96 of the Constitution: Developments in Methodology and Interpretation' (2015) 34(2) *University of Tasmania Law Review* 54; Cheryl Saunders, 'Towards a Theory for Section 96' (Pt 1) (1987) 16(1) *Melbourne University Law Review* 1.
61. Chordia (n 60) 54.
62. Saunders (n 60).

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responsible government, while more generous provisions apply to grants channelled through the States. However, due to constitutional, institutional and practical factors, parliamentary control over public finance is an illusion, rather than the practical reality of executive governance. This points to the need for more robust legal and political regulation of grants administration.

IV Legal and Political Regulation: From Investigation to Rectification

This article will now examine the legal and political regulation of grants administration by reference to three main stages. The first is the initial reporting and investigation of agency grants administration by scrutiny bodies, which brings to light any mismanagement or politicisation of grants processes. Second, the legal accountability framework will be examined, including the *Commonwealth Grants Rules and Guidelines 2017* (Cth) and ministerial codes of conduct. The third aspect is rectification, which involves consequences of breaches of the rules, such as providing remedies to those aggrieved or imposing sanctions on those who transgress the rules.

A *Reporting and Investigation: Scrutiny Bodies*

The first facet of accountability is the 'information' stage, that is, the identification, reporting and investigation of issues relating to grants administration.[63] This is conducted by way of political regulation through scrutiny bodies, in particular internally via the Department of Finance and externally via the Auditor-General, Ombudsman and parliamentary committees.

1 *The Department of Finance.* There is, within the *Commonwealth Grants Rules and Guidelines 2017* (Cth) ('*CGRGs*'), an internal monitory role assigned to the Department of Finance. This may arguably be seen as a first, albeit weak, line of defence. The Department of Finance has policy stewardship for the *CGRGs* and, while the application of rules is ultimately the responsibility of the grant program entities, the Department of Finance does review and advise entities on compliance with the Commonwealth Grants Policy Framework.

One issue that seems to recur is that the design of grants administrative arrangements — that is, the selection criteria and its application, record-keeping, and eligibility and funding decisions — is not being scrutinised sufficiently at the inception phase. For example, in the case of the 2019 'Sports Rorts' program, in Senate Committee hearings, senior Finance officers argued that while they advised on the Commonwealth Grants Policy Framework application, the overall intention of the *CGRGs* within existing governance frameworks is to devolve responsibility for the legality and policy design of the grant program to grant program entities.[64] This creates an issue of the inconsistent application of standards, and the abrogated role of central agencies.

2 *The Auditor-General.* The Commonwealth Auditor-General is the principal actor who investigates federal grants administration, providing scrutiny both in terms of periodic audit-like oversight and 'fire alarm' responses to political problems.[65] The Auditor-General's reports of agency spending, which encompass both the regularity and quality of performance, are an essential support for

63. Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 1998) 30.
64. Evidence to Senate Committee on Administration of Sports Grants, Parliament of Australia, Canberra, 22 July 2020, 33–40 (Stein Helgeby, Deputy Secretary, Governance and Resource Management, Department of Finance) ('Public Hearing on Sports Grants').
65. Barry R Weingast, 'Caught in the Middle: The President, Congress, and the Political-Bureaucratic System' in Joel D Aberbach and Mark A Peterson (eds), *The Executive Branch* (Oxford University Press, 2005) 312, 329–30.

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parliamentary supervision of public finance. The Auditor-General is a statutory office-holder with significant coercive powers and a high level of independence, who is now attached to Parliament rather than to the executive.[66]

The Auditor-General has taken a broad oversight role over grants administration. Their office has conducted several systemic audits on the general operation of the federal grants system, including the administration of grants reporting across government, as well as the development and approval of grants program guidelines within government agencies.[67] The Auditor-General previously issued 'Better Practice Guides' providing whole-of-government guidance for government agencies on grants administration from 1994, following the first 'Sports Rorts' affair.[68] These grants guides were updated several times before they were discontinued in 2017, as they were seen to be duplicating the *CGRGs*, discussed below.[69]

Besides a systemic monitoring role across government, the Auditor-General has also conducted numerous ad hoc 'fire alarm' audits on individual agency grant administration of specific programs, based on complaints from Opposition MPs.[70] This includes investigating details of the selection process, departmental roles and ministerial intervention, statistics of how many grants were approved by Ministers against agency advice and the percentage allocation to government electorates.

The Auditor-General is thus the primary officer who brings to light mismanagement of grants by government and plays a pivotal role in monitoring and investigating grants administration.

3 *The Ombudsman.* The Commonwealth Ombudsman has also investigated the maladministration of grants programs, normally based on complaints. Although the Ombudsman's investigations on grants administration are sporadic, rather than regular like the Auditor-General, they have made significant contributions in identifying maladministration of grants programs, as well as broader systemic issues relating to grants administration.

In terms of maladministration of grants programs, in one investigation, the Ombudsman found that 'AusIndustry's failure to ensure that the substance of the reasons for decisions were recorded in the Board's minutes and communicated to the complainant' of a R&D Start Grant amounted to 'defective administration', as per the Compensation for Detriment Caused by Defective Administration (CDDA) scheme guidelines.[71] The Ombudsman also investigated the Australian Film Commission's grant assessment processes for a particular grant (Strand I) and concluded that their 'arrangements for assessing and deciding applications do not reflect contemporary best practice, and leave the agency open to criticism from its clients or external scrutineers'.[72] This was due to the Commission's failure to consistently and fully apply the assessment criteria, ensure adequate

66. *Auditor-General Act 1997* (Cth) ss 18B, 32–3.
67. See, eg, Auditor General of Australia, *Administration of Grants in the Australian Public Service: Performance Audit* (Auditor General Report No 32, 15 May 1997); Auditor-General of Australia, *Administration of Grant Reporting Obligations* (ANAO Audit Report No 21, 24 January 2012); Auditor-General of Australia, *Development and Approval of Grant Program Guidelines* (Auditor General Report No 36, 30 May 2012).
68. Australian National Audit Office, *Implementing Better Practice Grants Administratio*n (ANAO Better Practice Guide, December 2013); Australian National Audit Office, *ANAO Best Practice Guide for the Administration of Grants* (1994).
69. Australian National Audit Office, *Review of ANAO Better Practice Guides* (2018).
70. See, eg, *Administration of Car Park Projects* (n 4) 11.
71. Commonwealth Ombudsman, Department of Industry, Tourism and Resources: Failure to Provide Adequate Reasons for a Decision Refusing an R&D Start Grant Application (Report No 13, 2007) 2 ('Failure to Provide Adequate Reasons').
72. Commonwealth Ombudsman, *Australian Film Commission: Investigation into the Assessment of Film Funding Applications* (Report No 2, 2007) 14.

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record-keeping, provide unsuccessful applicants with reasons for decisions and address conflicts of interest.[73]

Significantly, the Ombudsman's investigations include one on the administration of the National Landcare Program by state government instrumentalities[74] which, as we will see below, is not subject to legal regulation under the *CGRGs*. The Commonwealth Ombudsman criticised the department's failure to recognise a conflict of interest in the grant being for a property owned by the sole signatory to the application and found that the grant 'should not have been approved' as it did not comply with program guidelines.[75]

In conjunction with the Commonwealth Ombudsman's investigation, the NSW Ombudsman conducted a parallel investigation into State issues.[76] These investigations discovered systemic issues in the way the grants program was administered, including: coordination issues between the Commonwealth and States in the maintenance of records, the need to improve 'monitoring of the funding agreement between the States and the Commonwealth',[77] and the need for clearer delineation of the roles of the Commonwealth department and State officers.[78] This shows the benefits of coordination between federal and State oversight bodies in multi-jurisdictional issues involving section 96 grants from the Commonwealth to the States.

The Commonwealth Ombudsman also addressed broader issues relating to grants specifically to regional and remote Indigenous organisations; finding that 'complex grant requirements and a failure to adequately support Indigenous organisations to meet reporting requirements increase the risk that these organisations will fail, even where the programs are being delivered successfully', and proposed best practice principles for grants administration in that area.[79]

Thus, Ombudsman investigations, although infrequent, have made substantive contributions to the systemic operation of grants administration in Australia.

4 *Parliamentary Committees.* In Australia, Parliaments have a strong constitutional role as overseers of the activities of the executive. Parliamentary committees in Australia have emerged as a strong method of holding the executive to account.[80]

Although parliamentary committees are highly partisan avenues of conflict and drama, where each parliamentarian tries to score points and get media coverage for their own benefit, or that of their political party, Opposition and minor party MPs have strong incentives to uncover improper government behaviour. As John Lenders, former Victorian Labor Treasurer observed, the Opposition and minor parties, who are ideologically opposed on every other issue, have a common interest of holding government to account.[81]

73. Ibid.
74. Commonwealth Ombudsman, *Report under Section 35A: Investigation into a Complaint about the Department of Primary Industries and Energy's administration of the National Landcare Program in relation to a grant to a Community Landcare Group* (Report, 1996) 3.
75. Ibid 16–7.
76. Ibid.
77. Ibid 4.
78. Ibid 3–4.
79. Commonwealth Ombudsman, Office for the Arts, Department of the Prime Minister and Cabinet: Administration of Funding Agreements with Regional and Remote Indigenous Organisations (Report No 16 of 2010, December 2010) 1.
80. Gareth Evans, 'Scrutiny of the Executive by Parliamentary Committees' in J R Nethercote (ed), *Parliament and Bureaucracy* (Hale and Iremonger, 1982) 78, 79.
81. Interview with John Lenders (Melbourne, 14 March 2014), quoted in Yee-Fui Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2016) 325–26 ('*Ministerial Advisers in Australia: The Modern Legal Context*').

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Parliamentary committees have been active in scrutinising government mismanagement of grants funding, with committees set up for both 'Sports Rorts' affairs in 1993[82] and 2021,[83] and the 'Car Park Rorts' affair,[84] which have called and questioned the Minister and government officials responsible for the programs, and taken submissions from a range of academic experts and government departments. These hearings have brought to light important details about the grants allocation processes, as well as evidence of ministerial interference in grants decision-making, including the role of the Prime Minister's Office in the allocation of grants to marginal electorates. Controversies of this nature tend to be extensively reported in the media, creating public awareness and outrage about pork barrelling. Parliamentary committees have therefore been effective in exposing the politicisation of grants allocations.

B *Legal Accountability: Rules and Standards*

The legal framework for grants regulation will now be examined, and in particular, the Commonwealth grants administration rules and ministerial standards.

1 *Commonwealth Grants Administration Rules.* The Commonwealth has a sophisticated legislative financial management framework in the form of the *PGPA Act*. The *PGPA Act* is a 'product of evolution of financial management legislation over 30 years, and provides a comprehensive regime for the management of public funds, requiring departments, statutory authorities and government companies to provide financial accountability to Parliament'.[85]

The *PGPA Act* specifies that Ministers must not approve an expenditure of public funds unless they are satisfied that the expenditure would be a proper use of money; defined in the Act as an 'efficient, effective, economical and ethical' use of money.[86] A distribution of grant funding in an improper way may be seen to breach this section of the *PGPA Act*. However, at this high level of abstraction, it may be difficult to prove what constitutes an improper allocation of funds absent specified guidelines. As such, it is necessary to delve deeper into the *PGPA Act* to determine whether there has been a proper use of funds.

Under the *PGPA Act*, all entities are classified either as non-corporate Commonwealth entities — including 'departments and non-statutory agencies that are legally part of the Commonwealth — or corporate entities, that by reason of their legislative foundation enjoy separate legal existence'.[87] The distinction between non-corporate and corporate Commonwealth entities is stark in terms of grants as, under the *PGPA Act*, the Finance Minister may make grants rules for non-corporate Commonwealth entities by legislative instrument,

82. House of Representatives Standing Committee on Environment, Recreation and the Arts, *The Community Cultural, Recreational and Sporting Facilities Program: A Review of a Report on Efficiency Audit by the Auditor-General* (Report No 20 of 1994, February 1994).
83. Senate Committee on Administration of Sports Grants, *Select Committee on Administration of Sports Grants: Final Report* (Report, 18 March 2021).
84. Finance and Public Administration References Committee, *The Administration and Expenditure of Funding under the Urban Congestion Fund (UCF)* (Report, 2 December 2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/AdminoftheUCF>.
85. Yee-Fui Ng, 'Political Constitutionalism: Individual Responsibility and Collective Restraint' (2020) 48(4) *Federal Law Review* 455, 461, citing Ng, 'In the Moonlight?' (n 35).
86. *PGPA Act* (n 36) s 7.
87. Ng, 'In the Moonlight?' (n 35) 320.

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but not for corporate Commonwealth entities.[88] As we will see below, this has caused issues in several of the pork barrelling scandals.

The *CGRGs* establishes the Commonwealth grants policy framework under the *PGPA Act*.[89] The *CGRGs* provide both mandatory requirements and best practice guidance in relation to grants administration.[90] Under these rules, government officials must 'develop grant opportunity guidelines for all new grant opportunities', issue revisions where there are significant changes and advise Ministers on the relevant legislation and rules regarding grants administration.[91] Officials must also have regard to key principles of grants administration, including achieving value for money, governance and accountability, as well as probity and transparency.[92]

Where a government official approves the grant, they must 'record, in writing, the basis for the approval relative to the grant opportunity guidelines' and how it achieves value for money.[93] Where the Minister approves the grant, officials must advise Ministers in writing about the application and selection processes utilised, including the selection criteria, as well as which grant applications fully, partially and do not meet the selection criteria.[94]

Where a Minister approves a grant within their own electorate, they must write to the Finance Minister advising of the details.[95] Although Ministers may approve grants not recommended by government officials, they must report all occurrences to the Finance Minister annually, including 'a brief statement of reasons (ie the basis of the approval for each grant)'.[96]

Therefore, there is a detailed set of requirements laid out by the *CGRGs*. However, these rules only apply to non-corporate Commonwealth entities. This is a major omission, as there are three main structures for grant programs:

- The first is where the Minister is empowered to make discretionary grant decisions. For example, in the Regional Jobs and Investment Packages, a Ministerial Panel of four Ministers decides on which applications to fund.[97] The Panel is provided with departmental advice on eligible applications, with recommendations on which projects to fund, which the Ministerial Panel can choose to ignore.[98]
- The second is where an entity independent of the Minister is empowered to make the grant decisions. For instance, in the 2019 'Sports Rorts' affair, the Australian Sports Commission's enabling legislation, the *Australian Sports Commission Act 1989* (Cth), provides that the Commission itself has the power to decide and make grants.[99] There is no ability to delegate the Commission's functions to the Minister.[100] However, the Minister may issue directions to the Commission on its policies and practices, which must be gazetted and laid before both

88. *PGPA Act* (n 36) s 105C. This is not a disallowable instrument: at s 105C(2).
89. Australian Government Department of Finance, *Commonwealth Grants Rules and Guidelines 2017* (Cth) <https://www.finance.gov.au/government/commonwealth-grants/commonwealth-grants-rules-and-guidelines> (2017) ('*CGRGs*').
90. Ibid 5.
91. Ibid 11.
92. Ibid.
93. Ibid.
94. Ibid 12.
95. Ibid.
96. Ibid 13.
97. Auditor General of Australia, *Regional Jobs and Investment Packages* (n 39).
98. Ibid.
99. *Australian Sports Commission Act 1989* (Cth) s 8(1)(d).
100. Ibid s 54.

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Houses of Parliament within 15 sitting days of that House after giving that direction.[101] The result of this legislative scheme is that Australian Sports Commission is the legal decision-maker in terms of sports grants, although the Minister may alter these arrangements by gazetted directions.

- The third is where the Commonwealth government channels the money through the States under s 96 of the *Constitution*, such as through a national partnership agreement. For example, in the 'Car Park Rorts' incident, investment projects related to land transport matters were approved by the Minister under the *National Land Transport Act 2014* (Cth) ('*NLT Act*').[102] Projects funded under the *NLT Act* were governed by the National Partnership Agreement on Land Transport Infrastructure Projects, entered into by the Commonwealth, State and Territory governments.[103] The urban congestion fund payments were made to the States for the purposes of the *Federal Financial Relations Act 2009* (Cth).

The scope of the *CGRGs* is inadequate as it only covers the first category of grants, administered by a non-corporate Commonwealth entity, such as a government department.

Where grants are administered by a corporate Commonwealth entity, as in the second scenario, the *CGRGs* do not apply. As explained in Part II above, this was a policy decision that was taken at the inception of the *Financial Management and Accountability Act* in 1997, which was carried forward in the *PGPA Act* in 2013. Nevertheless, the *CGRGs* 'apply to third parties, including non-government organisations and corporate Commonwealth entities, where they undertake grants administration on behalf of the Commonwealth'.[104]

The exclusion of statutory corporations from the ambit of the *CGRGs* fails to account for the significant changes in the structure of the executive since the 1970s and 1980s, where the 'new public management' movement led to the large-scale 'restructuring of government to create more arms-length bodies',[105] including statutory corporations, accompanied by a slew of 'privatisations in the 1990s'.[106] Although the numbers of these statutory corporations have been reduced from their peak in the 1990s, a large number of these bodies remain, undertaking a variety of functions.[107]

There are well-recognised reasons to utilise statutory corporations to remove areas of executive activity from departmental management or control.[108] Governments establish these structures to lessen ministerial responsibility for certain activities, avoid rules relating to government employment, create a more efficient operating regime or handle technical or regulatory activities involving long-term interests that should be insulated from short-term political manoeuvring, such as the operation of the Reserve Bank.[109] Thus, the insulation of grants administration from political

101. Ibid s 11.
102. *National Land Transport Act 2014* (Cth) s 9.
103. National Partnership Agreement on Land Transport Infrastructure Projects <https://federalfinancialrelations.gov.au/sites/federalfinancialrelations.gov.au/files/2021-01/land_transport_infrastructure_np.pdf>.
104. *CGRGs* (n 89) 8.
105. Ng, 'In the Moonlight?' (n 35) 315.
106. Ibid 315, citing John Marsden, 'Reforming Public Enterprises: Case Studies Australia' (Research Paper, Public Management Service, Organisation for Economic Co-Operation and Development, 1998) 13–4.
107. As of August 2022, there are 98 Commonwealth agencies and statutory authorities, 71 statutory corporations and 18 Commonwealth companies: *PGPA Act Flipchart* (n 38).
108. Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 58–61, 95–102, 128–32.
109. John Goldring, 'Accountability of Commonwealth Statutory Authorities and "Responsible Government"' (1980) 11(4) *Federal Law Review* 353, 357–60. See Terence Daintith and Yee-Fui Ng, 'Legal Form and Function in the Public Sector: The Government-Owned Company in the United Kingdom and Australia' (2020) 136 (April) *Law Quarterly Review* 292, 307.

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control through the vehicle of an arm's length statutory corporation is becoming increasingly common, including, for example, through the Australian Sports Commission (as in the 2019 'Sports Rorts' affair),[110] the Australia Council[111] and Australian Renewable Energy Agency.[112] However, under the current rules, these grant programs are not subject to the *CGRGs*.

In addition, the *CGRGs* do not apply to the third scenario, where payments are made to the States under section 96 of the *Constitution*, including payments under the *Federal Financial Relations Act 2009* (Cth).[113] This is another major omission, as many grant programs are channelled to the States through section 96 grants, as States may be better equipped in certain policy areas to manage programs at a local level.

A further issue is that there are no enforcement mechanisms set out in the *CGRGs*, or the *PGPA Act*, for breaches of the rules.[114] There are therefore no legal repercussions if Ministers or government officials breach the rules.

2 *Ministerial Standards.* The *Code of Conduct for Ministers* provides that Ministers must act with integrity, through 'the lawful and disinterested exercise of the statutory and other powers available to their office'.[115] Thus, Ministers must exercise their public functions, including the award of grants, impartially rather than in a manner that promotes party political advantage. In addition, under the *Code*, Ministers must act with fairness by ensuring that their official decisions comply with procedural fairness and 'are unaffected by bias or irrelevant consideration, such as considerations of private advantage or disadvantage'.[116] Thus, if a Minister made grant decisions on the basis of political considerations for the benefit of themselves, their close associates or their political party, this would be a breach of that relevant standard. However, it should be noted that since the case of *Padfield v Minister of Agriculture, Fisheries and Food*, which held that a Minister's discretionary decision under statute was subject to judicial review where refusal would frustrate legislative policy,[117] few Ministers are ever completely candid about acting for political advantage.

Ministerial standards are enforced internally within the core executive, with breaches adjudicated by the Prime Minister.[118] The Prime Minister may seek the advice of their departmental Secretary regarding allegations of misconduct against Ministers or may refer the matter to an independent authority.[119] If there is a breach of the standards, the Prime Minister may ask the offending Minister to stand aside or resign.

The enforcement of the ministerial code in the case of grants administration is likely to be based on political considerations by the Prime Minister, such as whether negative media coverage might impact upon the government's electoral prospects, the standing of the Minister within the party and

110. Auditor-General of Australia, *Community Sport Infrastructure Program* (n 5).
111. Auditor-General of Australia, *Efficiency of the Australia Council's Administration of Grants* (ANAO Report No 7 of 2017–18, 22 August 2017).
112. Auditor-General of Australia, *Grant Program Management by the Australian Renewable Energy Agency* (Auditor-General Report No 35 of 2019–20, 30 April 2020).
113. Administration of Car Park Projects (n 4) 18.
114. The only enforcement mechanism in the *PGPA Act* relates to termination of employment for Commonwealth officials who breach their personal duties under the Act, including the duty of care and diligence, to act honestly, in good faith and for a proper purpose, and to properly use information and their position: *PGPA Act* (n 36) s 30.
115. Australian Government, *Code of Conduct for Ministers* (June 2022) 4 <https://www.pmc.gov.au/sites/default/files/resource/download/code-of-conduct-for-ministers.pdf >.
116. Ibid 5.
117. [1968] AC 997.
118. *Code of Conduct for Ministers* (n 117) 10.
119. Ibid.

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the personal relationship between the Prime Minister and the offending Minister. As such, the application of the *Code of Conduct for Ministers* to the exercise of ministerial discretion in allocating grants funds is dependent on a fluid and subjective political calculus determined by the Prime Minister, buttressed by the adversarial processes of parliamentary and electoral politics. The enforcement of ministerial codes of conduct within the executive is thus a highly contingent accountability mechanism.

C Rectification, Remedies and Sanctions: Legal Challenge of Government Grants Agreements

The third aspect of accountability is the issue of rectification, that is, whether there are consequences for breaching the rules, such as sanctions for misbehaviour or remedies for those aggrieved.

As noted above, there are no legal sanctions for breaches of the *CGRGs* or the *PGPA Act* provisions relating to grants. This is a major issue, as it means that politicians can breach grant guidelines with impunity, and there is no legal deterrence of undesirable behaviour by Ministers and government officials.

There are also few if any remedies for aggrieved recipients (or non-recipients) of government grants. Government grant agreements sit within a nebulous area, as they are arguably not traditional contracts, but rather gifts on conditions, which are not legally enforceable, unless made in the form of deed under seal.[120] Case law has held that certain government agreements are unenforceable as contracts, as they are 'non-contractual schemes'.[121] Consequently, neither party is bound by the agreement, meaning that recipients of Commonwealth grant money are unable to enforce the agreement.[122] Even if there is a contract, intended third party beneficiaries of a government grant agreement would be unable to directly enforce the contract due to the doctrine of privity of contract.[123]

Despite the inability of recipients of government grants to seek remedies through contract law, administrative law remedies may be available in limited circumstances. There are two main avenues of judicial review: review under section 75(v) of the *Constitution* and statutory judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*').

Judicial review under section 75(v) of the *Constitution* is available where remedies are sought against an 'officer of the Commonwealth'. This would be available for grants decisions, which are decided by Ministers or public servants. There is thus no issue regarding the availability of constitutional judicial review.

Statutory judicial review under the *ADJR Act* is available when decisions are of an administrative character made under an enactment.[124] Grants decisions fulfil these criteria as are final and conclusive,[125] and are of an administrative character, as they are made by Ministers or

120. Seddon (n 50) 114–17.
121. *Australian Woollen Mills v Commonwealth* (1954) 92 CLR 424, 462–63; *Milne v Attorney-General for Tasmania* (1956) 95 CLR 460; *Logan Downs Pty Ltd v Commissioner for Railways* [1960] Qd R 191; *Administration of the Territory of Papua New Guinea v Leahy* (1961) 105 CLR 6. See Seddon (n 50) 115–17.
122. Seddon (n 50) 116.
123. Ibid 115.
124. *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') s 3.
125. Australian Broadcasting Tribunal v Bond (1990) 170 CLR 32.

public servants under a regulatory scheme. The constitutional requirement for there to be a legislative scheme underpinning Commonwealth grant programs (discussed in Part III above) facilitates the jurisdiction under the *ADJR Act*, which requires a decision to be made 'under an enactment'.[126] Judicial review of decisions made under the *CGRGs* has not been expressly excluded from the *ADJR Act*. Although a few specific provisions of the *PGPA Act* are excluded from the ambit of *ADJR Act* review, these do not deal with grants allocation.[127] Apart from two very specific exceptions, unsuccessful applicants are able to obtain reasons for grants decisions.[128]

In short, it is possible for applicants for government grants to challenge grants administration under both constitutional and statutory judicial review (with a few limited exceptions) if there are any breaches of the grounds of judicial review.[129]

Government grants decisions have been successfully challenged by unsuccessful grant applicants and set aside by the courts on the basis of error of law in the interpretation of the scope of the legislation,[130] and breach of procedural fairness.[131] There would be other possible grounds as well, such as where the decision-maker acted unreasonably or irrationally in making the grants.[132] In the 2019 'Sports Rorts' incident, the Beechworth Lawn Tennis Club launched a challenge in the Federal Court concerning the legality of the Community Sport Infrastructure grants program, arguing that Sport Australia was inappropriately acting under direction from the government about which projects to fund.[133] However, the tennis club withdrew its legal challenge in 2022, after subsequently being granted half of its requested funding by the Victorian government; thus, the legality of the 'Sports Rorts' scheme was not ultimately tested in the courts.[134]

126. Cf *Barnett v Minister for Housing & Aged Care* (1991) 31 FCR 400, where Heerey J held that a decision to refuse a capital grant under a non-statutory grants scheme did not involve a decision made under an enactment under the ADJR Act.
127. The exclusions are: decisions by the Federal Court on stays of proceedings (*PGPA Act* (n 36) s 15), the power of accountable authorities of non-corporate Commonwealth entities to enter into arrangements (*PGPA Act* (n 36) s 23), and the Finance Minister's power to form and acquire shares in companies (*PGPA Act* (n 36) s 85).
128. *ADJR Act* (n 126) schs 2(h) and (i) exclude from the duty to give reasons 'decisions of the Commonwealth Grants Commission relating to the allocation of funds' (advising the federal government on the distribution of GST revenue to States and Territories) and 'decisions under section 51 of the *Public Governance, Performance and Accountability Act 2013* [(Cth)]' (allowing the Finance Minister to make amounts appropriated available to Commonwealth entities).
129. See, eg, *Santa Sabina College v Minister for Education* (1985) 58 ALR 527 (regarding *States Grant (Education Assistance Participation and Equity) Act 1983* (Cth)).
130. *VIP Airfreight Pty Ltd v Australian Trade Commission* (1990) 23 FCR 451 (regarding interpretation of 'technical services' under *Export Markets Development Act 1974* (Cth)); *Santa Sabina College v Minister for Education* (n 130) (regarding *States Grant (Education Assistance Participation and Equity Act 1983* (Cth)).
131. In *Rowan v Cornwall (No 5)* (2002) 82 SASR 152, Debelle J held that a grant to a women's shelter was terminated in circumstances leading to a lack of natural justice: at [349]–[350]. In *Kooma Aboriginal Corp for Land v Goolburri Reg Council of the Aboriginal & Torres Strait Islander Commission* (1999) 55 ALD 473, Spender J held that the decision to withdraw funding of an aboriginal corporation operating a radio station did not comply with procedural fairness and was to be set aside.
132. *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 229–34 (Lord Greene MR); *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332, 364 [68] (Hayne, Kiefel and Bell JJ).
133. Paul Karp, 'Lawyers seek Sports Rorts Documents from Sport Australia in Federal Court', *The Guardian* (online), 3 February 2021 <https://www.theguardian.com/australia-news/2021/feb/03/lawyers-seek-sports-rorts-documents-from-sport-australia-in-federal-court>.
134. Paul Karp, 'Sports Rorts Legal Challenge Dropped after Tennis Club Given Alternative Funding', *The Guardian* (online), 17 September 2022 <https://www.theguardian.com/law/2022/sep/17/sports-rorts-legal-challenge-dropped-after-tennis-club-given-alternative-funding>.

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A major issue with judicial review is that the main remedy an unsuccessful grant applicant could achieve is the court setting aside the decision, and remitting 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. The court would not order the decision-maker to approve the grant application, which is what the unsuccessful applicant really wants.

Challenges to grant decisions via judicial review have been successful where the decision-maker misapprehended the scope of their authority under legislation or failed to follow proper procedures. However, judicial review applications do not enable challenges solely on the basis of pork barrelling, that is, the biased apportionment of grant money to marginal electorates, as courts do not tend to question the merits of government decision-making on public policy matters. This is because the merits of decisions are seen to be the province of the executive and legislature, while the judiciary is confined to the legality of decisions. For example, in *Peninsula Anglican Boys School v Ryan*,[135] Wilcox J held that the Minister, as the decision-maker, was not obliged to give an affected person notice of policy considerations taken into account in making a decision to refuse a capital grant for a school.[136] In addition, Wilcox J held that the Minister, who is responsible to Parliament, has a breadth of discretion on policy grounds, if the decision is made legally:

> [A]s the history of the [grant] application goes, there is room for differences in opinion about the reasonable course to take, under the circumstances … Education policies are often controversial. But it is not a mere formality for me to say that I indicate no view upon such matters. It would be wrong for me to do so. They are matters for determination by the Minister, who is accountable to [P]arliament and to the public, and not for the court. The sole function of the court in this case is to consider whether the decision of the Minister is invalid in point of law.[137]

Therefore, there is no scope for courts to intervene in decisions to allocate grants on a partisan basis, as this would be an intrusion into the policy decisions of Ministers. Further, it is also not possible for judicial review on the ground of bias levied against the Minister seeking to allocate funding disproportionately to government-held or marginal electorates, as that would be seen to be a policy decision. At any rate, the bias rule in administrative law is set at a lower bar for Ministers compared to judges, and courts are less willing to impute a perception of bias on Ministers as decision-makers.[138] Thus, courts would tend not to question a decision by a Minister to allocate grant funding to one particular constituency and not another, as this would be seen to be a policy decision outside the remit of the courts.

The only circumstance where a court has intervened based on partisan political considerations is in an electoral bribery case of *Scott v Martin*.[139] In that case, Needham J found that a candidate for election who presented cheques drawn from a range of State government departments to local groups within his electoral district had engaged in electoral bribery, and consequently declared the election of that candidate void. Needham J held that:

135. (1985) 7 FCR 415.
136. Ibid 430.
137. Ibid 431.
138. *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 540 [105].
139. (1988) 14 NSWLR 663.

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> The respondent's actions were not, in my opinion, corrupt in the ordinarily accepted meaning of that word; unfortunately, in modern times, there seems to be an accepted view that public moneys are in the unrestricted gift of those in power. In some cases, the temptation is to use such resources for purposes of party political advantage.[140]

However, this case can be seen as an anomaly, as modern electoral legislation, such as the *Commonwealth Electoral Act 1918* (Cth), contains an exception to electoral bribery for 'a declaration of public policy or a promise of public action'.[141] Thus, in general, courts would not seek to intrude into the merits of partisan grant decisions due to the policy nature of these decisions. The polycentric nature of most grants decisions and the fact that grants decision-making involves the competitive allocation of public resources mean that judicial review has only a limited role to play as an accountability mechanism.

Therefore, the only prospect for court challenge of grant decisions is within the strictures of administrative law, such as where the decision-maker has made an error of law in interpreting the scope of the legislation, or has failed to follow proper processes. Apart from the grounds of judicial review, applicants for government grants are unable to challenge the merits of decisions on the basis that grants were made in a politically motivated manner. Even with a successful challenge in judicial review, the court would at the most only set aside the decision and remit it back to the decision-maker to be remade in accordance with the law, rather than order the decision-maker to approve the grant application. This means that grant applicants may mount a successful judicial review challenge, but still not achieve a positive outcome for themselves, that is, the approval of their grant application.

One potential option beyond judicial review is the tort of misfeasance in public office. This applies to public officials guilty of 'conscious maladministration', which involves 'abuses of power by public officers who either knew they were breaking the law or recklessly decided that this might be so'.[142] The elements of the tort are (1) the defendant being a holder of public office, (2) exercising power that was an incident of that office, (3) the exercise of power must be unlawful or invalid and (4) the exercise of power must be made in bad faith, that is, with malice or reckless indifference to the likelihood of harm to the plaintiff. However, several essential elements of the tort are not made out in the circumstances of Ministers deciding grant applications in a partisan fashion. For one, the allocation of grants by Ministers is not done unlawfully, as Ministers have the statutory powers to allocate grants and, as analysed above, the partisan allocation of grants does not contravene the *PGPA Act* or the *CGRGs*, which clearly provide leeway for Ministers to make grant decisions and override the recommendations of public servants. In addition, there is no bad faith as Ministers are not acting with targeted malice against unsuccessful applicants in the grants allocations process, and unsuccessful applicants cannot prove they suffered any harm. There is thus no viable challenge through the tort of misfeasance in public office.

Another potential remedy is for an unsuccessful applicant to seek redress via the Compensation for Detriment caused by Defective Administration ('CDDA') scheme, which only applies to

140. Ibid 672.

141. See, eg, *Commonwealth Electoral Act 1918* (Cth) s 326(3). See Colin Hughes, 'Electoral Bribery' (1998) 7 *Griffith Law Review* 209, 212–14.

142. Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 3; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, LexisNexis, 2021) 1149–52.

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non-corporate Commonwealth entities (ie it does not apply to corporate Commonwealth entities).[143] This administrative scheme seeks to provide compensation to members of the public where there is no legal remedy, but there may be a 'moral' justification to provide compensation.[144] Payment may be made where a claimant suffers detriment caused by 'a specific and unreasonable lapse in complying with administrative procedures', 'an unreasonable failure to institute appropriate administrative procedures', giving ambiguous advice, and an unreasonable failure to give proper advice.[145] Three out of four of these criteria require 'unreasonableness', which would limit the ambit and efficacy of potential claims.[146] Another significant limitation of the CDDA scheme is that compensation is at the discretion of the department or agency and is not reviewable by the tribunals or courts.[147] The costs that an unsuccessful applicant may be able to recover include the cost of retaining external consultants and lawyers to prepare their grant application, but not the entire value of the grant.[148]

As discussed above, the Ombudsman has indicated in an investigation that they regarded that AusIndustry had defectively administered a grants program and suggested that the CDDA scheme may be applicable.[149] In that investigation, the Departmental Secretary 'rejected the conclusion of defective administration', but stated that he was 'prepared to review the CDDA matter in the light of any substantiated claim made by the applicant'.[150] However, the final outcome for the applicant is not on the public record, and the decision to provide the remedy remained in the department's discretion. On the whole, the Ombudsman has suggested that agencies have adopted 'defensive and legalistic approaches' to CDDA decision-making.[151] The CDDA is therefore a weak option for redress, as it will not provide compensation to the value of a successful grant, does not apply to corporate Commonwealth entities and is not a reliable remedy, given that it is completely at the agency's discretion.

In short, there is no strong prospect for rectification where grants are distributed in a partisan manner due to the limitations of judicial review and other legal mechanisms, and the financial management legislative framework has a loophole where no sanctions can be imposed on those who breach the *CGRGs*.

V Evaluation, Recommendations and Reform

As we have seen above, the legal and political regulation of grants programs operates through a complex network of legislation, 'soft law' guidance, and the operation of scrutiny bodies. The previous section has shown that political regulation, involving the initial identification of grant

143. Commonwealth Ombudsman, *Compensation for Defective Administration* (Fact Sheet) 1 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0026/35594/Compensation-for-defective-administration.pdf>.
144. Ibid.
145. Department of Finance and Deregulation, *Scheme for Compensation for Detriment caused by Defective Administration* (Resource Management Guide No 409, 17 November 2022) <https://www.finance.gov.au/publications/resource-management-guides/scheme-compensation-detriment-caused-defective-administration-rmg-409>.
146. Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis, 2019) 299–300.
147. Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration: Administration of Decision-Making under the Scheme for Compensation for Detriment caused by Defective Administration* (Report No 11, August 2009) 19 ('*Compensating for Defective Administration*').
148. Ibid.
149. *Failure to Provide Adequate Reasons* (n 71) 2.
150. Ibid.
151. *Compensating for Defective Administration* (n 147) 1.

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maladministration and investigation of issues through the scrutiny bodies of the Auditor-General, Ombudsman and parliamentary committees, is effective in bringing to light any bias or partisanship in the apportionment of grant funding. However, parliamentary committees cannot always be expected to provide dispassionate, non-partisan reviews of a grants program, because the committees are made up of parliamentary colleagues of those responsible for the program and their Opposition, who may later be in government. Auditors-General, despite having a more neutral vantage point, are always examining programs from the preceding election, which was fought long ago and likely won by the party-in-government using the benefits of the grants schemes being examined. A Minister may lose his or her cabinet position, but the larger effect on the election outcome was long ago written in stone. For the same reason, reliance on Ministerial Codes of Conduct, which would have an offending Minister front the Prime Minister to answer for their malfeasance, seems ironic at minimum: the Prime Minister retained their power in part because of these distributive schemes, and the schemes likely were put into place with the leader's knowledge and support. Thus, due to temporal and political reasons, political accountability has not been effective in preventing the ongoing practice of pork barrelling in government. To compound this, the legal regulation of grants funding has been deficient, due to the loopholes in the coverage of the *CGRGs*, the lack of enforcement mechanisms for breaches of the rules, as well as the lack of remedies for those aggrieved by grant decisions.

There are significant and prevalent problems in the grants allocation process by Ministers in Australia, who have utilised discretionary grants programs to distribute funds opportunistically for partisan purposes. The recent 'Car Park Rorts' and McKenzie 'Sports Rorts' affairs have shown that the politicisation may be occurring at the highest levels of government in a centralised way, with evidence that a ministerial adviser in the Prime Minister's Office was involved in the allocation of grants in both schemes administered by line departments.[152] This raises another important matter, which is to what extent advisers in a Minister's office have 'independent agency' — that is, legal authority — in the administration of grants programs. In several recent pork barrelling scandals, ministerial advisers have allegedly been giving directions to public servants and making decisions in the absence of clear direction from Ministers, as well as inserting themselves into the administration of these programs. This too potentially represents an area ripe for regulation, where grants guidelines should clarify that ministerial advisers have no legal authority over grants administration.[153]

At a general level, the prevalence of pork barrelling has been a problem that has plagued multiple governments across different electoral systems. This is because pork barrelling distributive politics reflect an intrinsic conflation of discretionary authority and access to the public purse. Where governments have the discretion to allocate grants, there is a strong incentive to do so in a partisan fashion to their benefit, although the form it takes depends on the opportunity structures provided by the electoral system in which it occurs. Pork barrelling in Australia assumes a distinctly different form than in the United States. In the US, the locus of discretionary power is the hands of key individuals in legislative committees who seek to dissociate themselves from the vagaries of party fortunes, and parties do not become government, whereas in Australia, parties assume the mantle of government and thus have incentives to use ministerial discretionary authority for the benefit of their party, lest they lose government at the next election. This means that the temptation of pork barrelling is systemic, universal and deeply entrenched.

152. Evidence to Senate Standing Committee on Rural and Regional Affairs and Transport, Parliament of Australia, Canberra 19 July 2021, 9 (Brian Boyd).

153. See generally Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (n 81).

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The early reforms of grants regulation in Australia have focussed on the transparency imperative in providing centralised public disclosure of all Commonwealth grants through the GrantConnect website.[154] This website provides a public database of grant opportunities as well as grants awarded. The recipients and amount of all government grants are listed and searchable on this website. Government grants must be published on this website within 21 days of a grant agreement taking place.[155] This is a commendable initiative as transparency in government is a democratic ideal, based on the notion that an informed citizenry is better able to participate in government, thus providing an obligation on government to provide public disclosure of information.[156] Enhanced transparency also goes towards the prevention of corruption; as the saying goes: 'sunlight is … the best of disinfectants'.[157] The comprehensive and centralised publication of grant outcomes allows the public and interest groups to scrutinise how grants are allocated.

To further enhance transparency, the *CGRGs* could be amended to require Ministers to report to Parliament on all grants they have approved that were not recommended by government officials, including a statement of reasons. Currently, the requirement is only to report to the Finance Minister, who does not have an incentive to publicise this information, as they are part of the core executive. However, a requirement to report the approval of non-recommended grants to Parliament is likely to be more effective in achieving transparency, given that the Opposition and minor parties may publicise this information to embarrass the government.

However, it is acknowledged that transparency alone is inadequate to stop the deep-seated incentives for politicians to utilise partisan grant allocation for their political benefit. Thus, transparency has to be combined with other accountability mechanisms.

Another important aspect of grants administration reform is to enhance the skills of the public service in grants administration. As discussed, one recurring issue is that the design of administrative arrangements for grants programs, such as the selection criteria, who applies them and how, record-keeping, and who decides eligibility and funding, is not being scrutinised and questioned sufficiently at the inception phase. The Auditor-General has criticised the handling of grants by certain departments on a number of occasions as being ineffective, 'not fully informed by an appropriate assessment process or sound advice', or in breach of the *CGRGs*.[158] This suggests that public servants would benefit from upskilling in terms of grants administration. The Department of Finance should play a greater role in actively scrutinising and advising agencies that may be less experienced at designing grants schemes, on the probity of their grants administration processes. Alternatively, there could be specialised grants administration training for public servants or independent advice on grants administration could be commissioned, such as by hiring a probity adviser to provide advice on grants funding. Centralised grants training for public servants exists in the United Kingdom. The Government Grants Academy, run by the UK Cabinet Office, is tasked to

154. Australian Government, *GrantConnect* (Web Page) <https://www.grants.gov.au/>.
155. The reporting on grants on the GrantConnect website has been mandatory since 31 December 2017. Australian Government, 'Grant Awards' *GrantConnect* (Web Page) <https://www.grants.gov.au/ga/list>.
156. Daniel J Metcalfe, 'The History of Government Transparency' in Padideh Ala'I and Robert G Vaughn (eds), *Research Handbook on Transparency* (Edward Elgar, 2014) 247, 249.
157. Louis D Brandeis, *Other People's Money and How the Bankers Use It* (Frederick A Stokes Company, 1914) 92.
158. For example, the Auditor-General has reported that the car park construction fund was administered ineffectively by the department in the 2021 'Car Park Rorts' affair: *Administration of Car Park Projects* (n 4). The Auditor-General found that the award of funding under the Supporting Reliable Energy Infrastructure Program 'was not fully informed by an appropriate assessment process or sound advice on the award of grant funding. Aspects of the approach did not comply with the Commonwealth Grants Rules and Guidelines (CGRGs)': Auditor-General of Australia, *Award of Funding under the Supporting Reliable Energy Infrastructure Program* (Auditor-General Report No 31, 18 March 2021) 6.

develop a strategy for increasing grant-making capability across government, including developing training modules covering specialisms and key areas of weakness in the grant-making process.[159]

The upskilling of the public service will enable them to design grants criteria and guidelines in a robust manner and to provide better advice to Ministers in conducting their roles in administering government grants. However, this reform, while improving departmental grants administration, does not prevent the issue of pork barrelling, that is, in terms of Ministers overriding merit-based recommendations by public servants and allocating funds in a partisan manner.

A radical proposal that would completely remove the partisan element of grants administration is to transfer the responsibility for grants administration from politicians to public servants. Another possibility is to introduce an independent statutory body that makes grants determinations, with Ministers specifying the criteria for democratic participation but being unable to override grants decisions. This will wrest control of this aspect of discretionary spending from those who relish the dishonest political gains it provides and completely insulate grants administration from any political pressures. Public servants, making decisions based on clearly defined criteria, would be more likely to make decisions based on merit. One disadvantage is that this reform may put too much power in the hands of public servants, who are not directly accountable to the electorate. However, it is noted that decisions of public servants would be subject to judicial review. Another issue is that Ministers may nevertheless seek to unduly influence public servants to allocate grants according to their desires. Thus, the institutional independence of public servants remains an issue, with senior public servants on fixed term contracts being particularly susceptible to ministerial pressure. However, if a public servant acted under the dictation of the Minister, this would be a ground of judicial review. Despite the benefits of such a proposal, this kind of wholesale reform is not realistic from a political point of view, given the strong incentives for politicians to retain the power to distribute discretionary funding.

Given that the removal of ministerial discretionary authority over grants allocation is unlikely to occur in the near future, there are nevertheless other reforms that should be considered to improve the existing system. This article has shown that the current legal regulation of grants funding has been deficient, due to the loopholes in the coverage of the *CGRGs*, the lack of enforcement mechanisms for breaches of the rules, as well as the lack of remedies for those aggrieved by grant decisions.

The implementation of whole-of-government rules in the form of the *CGRGs* has been a positive measure, which provides detailed guidance on the selection and allocation processes for grants. However, these are beset by loopholes where, due to definitional and structural issues, the rules do not apply to major grant programs conducted through corporate Commonwealth entities and through the States, as discussed in Part IV above.

The government has taken promising first steps by agreeing that *CGRGs* should be extended to corporate Commonwealth entities, in line with the recommendation of the Auditor-General following the 2019 'Sports Rorts' affair,[160] although this has yet to be implemented. Alongside this reform, the *PGPA Act* should be amended to enable the Commonwealth to make legislative instruments relating to Commonwealth corporate entities, in addition to non-corporate Commonwealth entities. In addition, it is recommended that the *CGRGs* be extended to payments made to the States towards achieving Commonwealth grants programs. The extension of the coverage of the

159. United Kingdom Cabinet Office, *Guidance for General Grants* (31 August 2021) 9 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896334/Grants-Standards-Guidance-INTRO.pdf>.

160. Public Hearing on Sports Grants (n 64) 33. The proposed *Public Governance, Performance and Accountability Amendment (Grant Rules for Corporate Commonwealth Entities) Rules 2020* (Cth) will implement the changes proposed by the Auditor-General.

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CGRGs to both corporate Commonwealth entities and grants channelled through the States will ensure that the regime of detailed policy guidance applies uniformly to all grants programs across the Commonwealth, irrespective of the structure of the programs.

Further, internal and external monitoring of compliance and sanctions for breaches of the *PGPA Act* grants provisions and the *CGRGs* should be introduced, so that there is centralised scrutiny of grants administration and repercussions for non-compliance with the rules. Under the current legislation, breaches of the *CGRGs* by Ministers or public officials attract no sanction, and there is therefore no legal disincentive from breaking the rules. These sanctions could include significant fines to individuals who breach the rules, which would reduce the benefits accrued from pork barrelling.

One possibility to bolster enforcement is to internally police compliance with grants rules by ensuring that the Department of Finance conducts regular audits of agencies on compliance with the grants guidelines. As the Auditor-General's critical reports have shown,[161] there has been a growing trend for public servants to give non-compliant advice to government and a failure of central agencies to take any responsibility for compliance with the rules they establish, under the guise of devolution of responsibility. The entrenchment of the responsibility of the Department of Finance as a central agency in auditing compliance, in addition to their roles in establishing the rules (including the *CGRGs*) and training public servants, will improve grants administration across government.

However, the Department of Finance is an administrative body that lacks independence from the core executive and thus does not have the incentive to strongly enforce breaches of the rules. Hence, alongside this internal auditing mechanism, another potentially more effective option is to provide power to external scrutineers to impose sanctions for breaches of the *CGRGs* and *PGPA Act*, such as a statutory commissioner introduced to police financial governance under the *PGPA Act*. Increasing both internal and external scrutiny of agency grants administration, in addition to implementing repercussions for breaching the rules, may deter undesirable conduct and thereby improve the performance of public officials in administering public funds responsibly.[162]

Another potential reform option is to expand legislation such as the *Government Procurement (Judicial Review) Act 2018* (Cth) ('*GPJR Act*') to cover grants and thereby provide standing and remedies to those who have been denied grants due to the allocation process not being on merit. The *GPJR Act* enables judicial review in the Federal Court or Federal Circuit Court for breaches of the *Commonwealth Procurement Rules* ('*CPRs*') by non-corporate Commonwealth departments and agencies, specified statutory corporations and wholly owned government companies.[163] A supplier also has the statutory ability to complain to a relevant Commonwealth entity about a contravention of the *CPRs*, which the Commonwealth entity is obliged to investigate.[164]

In a judicial review proceeding under the *GPJR Act*, the Court has the power to order an injunction to prevent a Commonwealth entity from engaging in conduct that breaches the *CPRs* and to order the Commonwealth entity to take actions directed by the Court.[165] In addition, the Court may order the payment of compensation for a contravention of the *CPRs*, although this is limited to expenditure incurred by the supplier in preparing a tender, and making or resolving a complaint.[166] If the *GPJR Act* is extended to grants, this would provide unsuccessful grant applicants with a

161. See above (n 158).
162. Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020) 45–6.
163. *Commonwealth Procurement Rules* (*CPRs*) are issued by the Minister for Finance under section 105B(1) of the *PGPA Act*. *Commonwealth Procurement Rules 2022* (Cth), as at 1 August 2022. Specified statutory corporations are listed in the *Public Governance, Performance and Accountability Rule 2014* (Cth) s 30.
164. *Government Procurement (Judicial Review) Act 2018* (Cth) s 18.
165. Ibid s 9.
166. Ibid s 16.

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mechanism for making a complaint to the government agency administering the grant that must be investigated, as well as streamlined standing for judicial review, and potentially more effective remedies in terms of an injunction or compensation for costs.

In this vein, it is noted that some grant processes involve procurement to select a contractor to determine grant allocation and administer the funding once recipients have been chosen. There is therefore a significant crossover between the application of the *CPRs* and the *CGRGs*, and it is argued that the two should be combined. Rather than being seen as questioning the merits of government decision-making on public policy matters, it is arguable that the issue of pork barrelling should be construed as holding the government to account for the expenditure of public funds (in the same way as procurement), thus enabling greater transparency and accountability. An overarching problem in terms of reforms of this nature is that any regulatory reforms would require legislation being passed to put those new mechanisms into place — thus requiring politicians to put shackles on their own wrists in terms of grants administration. There is therefore no political will for governments to introduce these and other accountability mechanisms. The most likely avenue of change, much like the establishment of anti-corruption commissions, is for the government or Opposition parties to electorally campaign based on integrity reforms, including reform of grants administration, and then when in government be politically compelled to fulfil their election promises. Nevertheless, the strengthening of these rules and regulations are essential to combating the deep-seated incentives of politicians to continue to misuse the system of grants funding.

VI Conclusion

The governance of grants in Australia is a multifaceted network of legislation and 'soft law' policy guidance of grants rules and ministerial standards, alongside the operation of scrutiny bodies such as the Auditor-General, Ombudsman and parliamentary committees.

This article has shown that the existing legal accountability mechanisms provide more loopholes than rigorous legal requirements to hold those who approve grants responsible to the public good. There are significant gaps in the financial management framework and *CGRGs*, which do not cover major methods of structuring grants, such as through a government corporation or through payments to the States. In addition, penalties for breaching the guidelines are contingent on the application of political standards, meaning that Ministers and public servants may escape penalties in certain circumstances. There is also limited ability for those who are aggrieved by government grant decisions to challenge such decisions via judicial review, as partisan grant allocations are seen to be policy matters beyond the province of the courts. Thus, the legal accountability system as it stands is deficient in preventing, deterring and punishing governments who allocate grant funding in a partisan fashion, rather than according to merit.

Similarly, a variety of mechanisms of political accountability, including reviews by parliamentary committees, the Ombudsman and even the Auditor-General fall short in prompting the compliance of political actors, especially government Ministers with broad discretionary powers in their portfolios, to a regularised system of responsible, unbiased distribution of government funds for the public's benefit. The result is an ongoing rorting of the public purse for the political gain of those who hold the purse strings.

The existing system is therefore inadequate in its quest to hold accountable those who distribute millions of dollars of taxpayer funds in the form of government grants, thus endangering public trust. This article has shown how partisan-based pork barrelling is endemic across political systems and pervades all political parties across many decades. Indeed research has routinely proven partisan bias in the distributive process.

There should thus be reforms to four main aspects of grants administration: the scope of the *CGRGs*, enforcement and sanctions for breaches, transparency and the professionalism of the public service on grants administration. The *CGRGs* should be extended to encompass all major grants

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structures, including through government corporations (which the government has now agreed to) and when money is channelled through the States. In addition, there should be penalties for breaches of the rules that are enforceable through the *PGPA Act* by external scrutineers, alongside increased internal auditing by the Department of Finance. Another option is to extend the applicability of the *GPJR Act* to grants, to enable more streamlined standing and potentially more effective remedies. Transparency should be enhanced by requiring grants that are approved contrary to public service advice to be reported to Parliament. Public servants should be provided with centralised training on grants administration to enable them to better advise Ministers on compliance with grants rules. These reforms will enhance the governance of grants administration by imposing legal and political measures to deter pork barrelling, supported by the upskilling of public service advice.

The constitutional framework for the expenditure of public money in Australia is grounded firmly upon the notion of responsible government; that the executive is responsible to Parliament for the use of public money. The repeated pork barrelling controversies by successive Australian governments undermine a basic tenet of our democracy: that public money should be administered responsibly by our elected officials. In a context where public faith in democracy and political institutions is declining,[167] it is imperative that governments seek to improve the management of public funds in Australia. Reform of the grants administration system is required to improve the probity, accountability and transparency of the use of public funding.

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167. The most recent Australian Election Study found that only 30 per cent of the public believe people in government can be trusted: Sarah Cameron et al, *The 2022 Federal Election: Results from the Australian Election Study* (Report, 2022) <https://australianelectionstudy.org/wp-content/uploads/The-2022-Australian-Federal-Election-Results-from-the-Australian-Election-Study.pdf>.

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