



10 July 2018

Senate Standing Committees on Environment and Communications
Inquiry into the Great Barrier Reef 2050 Partnership Program

By email only: ec.sen@aph.gov.au

Dear Secretariat

Great Barrier Reef 2050 Partnership Program

1. Environmental Justice Australia is grateful for the opportunity to make this submission to the inquiry into the *Great Barrier Reef 2050 Partnership Program*.
2. Our submission focuses on term of reference (d).

The process of granting funding to the Great Barrier Reef Foundation for the Great Barrier Reef 2050 Partnership

3. In our submission we attempt to determine whether the funding is a 'grant' or 'procurement' and, as a result, the relevant processes the government should have adhered to in 'granting funding' to the foundation.
4. What we know is limited. The Federal Government described the funding in its 29 April 2018 media release as a \$444 million 'investment'. It used the word 'investment' eight times in that release.
5. The release said the funding is subject to an 'agreement to tackle crown-of-thorns starfish, reduce pollution into the Reef and mitigate the impacts of climate change'.¹
6. The Great Barrier Reef Foundation, in its media release published 29 April 2018, describes the funding as an 'investment' and a 'partnership' with the Australian government.²
7. In Senate Estimates on 21 May 2018, government representatives were repeatedly asked about the nature of the funding and the process behind the decision to give it to the Great Barrier Reef Foundation. The exchange below, at p20 of the transcript, reveals the funding is anticipated to be the subject of a 'grant agreement'.³

Senator Keneally: How can you say that the government did due diligence without knowing what the process is?

¹ <http://www.oshfrydenberg.com.au/guest/mediaReleasesDetails.aspx?d=563>

² <https://www.greatbarrierreef.org.au/test/news/ha-f-a-b-on-do-ars-to-build-great-barrier-reefs-resilience>

³ <http://par.nfo.aph.gov.au/parInfo/download/committees/estimates/77fdd401-e0bc-4b48-80ce-2273acc779a4/toc.pdf/Environment%20and%20Communications%20Legislation%20Committee%202018-05-21-6124.pdf> p20

Mr Knudson: I think we have talked about the fact that we are in the process right now of doing some extensive consultation with the foundation which will then lead to a grant agreement that will have extensive detailing of the diligence that has been brought to bear prior to the final grant decision being made.

8. Money which ends up being given pursuant to a grant agreement is, it would seem, a grant.
9. However, if goods or services are purchased by the Commonwealth that assist the Commonwealth in meeting its own goals, then that is procurement.
10. The *Commonwealth Grants Rules and Guidelines Information Sheet: Frequently Asked Questions* states:⁴

Q1: How can I tell if I am undertaking a procurement or a granting activity?

A: Sometimes it can be difficult to distinguish between a grant and a procurement, particularly where a procurement is on behalf of a third party. With a grant, the recipient receives financial assistance from the Commonwealth to help achieve its own goals (consistent with Commonwealth goals), whereas in a procurement, the Commonwealth is usually purchasing goods and/or services that assist the Commonwealth in achieving its own goals.

11. Evidence suggests that the intention behind the 'investment' is for the Commonwealth to achieve its own goals. Statements at Senate Estimates confirmed 'the government wanted to make a significant and record investment in terms of reef health and has gone down the pathway of doing so through the foundation'. Page 21 of the transcript reveals:

Senator Birmingham: [cont...] in the budget process and went through a process of identifying that the government wanted to make a significant and record investment in terms of reef health and has gone down the pathway of doing so through the foundation.

12. Thus, the funding appears driven by government goals, and is therefore properly categorised as procurement, despite the government using the term 'grant'.
13. The government's goals then needed a vehicle, and the foundation was 'identified'. Also on 21 May 2018 at Senate Estimates at p21 of the transcript:

Senator Birmingham: Senator, the process for identifying the foundation was not a grant process in the sense of a competitive grant process. The foundation, is well placed, having raised tens of millions of dollars previously, to be able to administer investments in the reef and associated programs.

14. Further details were sought by Senator Keneally. At p36 of the transcript of the 21 May 2018 estimates, it was confirmed that the government decided to give the money to the foundation as 'an appropriate vehicle':

Senator Birmingham: The government made a budget decision to make a record investment into the reef, informed by advice from a range of sources, including the authority, as we usually would, in relation to the budget bids that ministers make about their portfolio priorities. The government then considered the foundation to be

⁴ <https://www.finance.gov.au/sites/default/files/commonwealth-grants-rules-guidelines-faqs.pdf> p2

an appropriate vehicle to deliver that investment in the reef and rightly commenced negotiations with the foundation about how that might occur. As you have heard before, those negotiations are ongoing. I am surprised that the Labor Party and the Greens are so critical—

15. This confirms the funding is procurement, and should be subject to a tender process.
16. There has also been criticism of the relationship of foundation directors with fossil fuel producing industry, and the positions held by the Great Barrier Reef Marine Park Authority head and foundation board member, Dr Reichelt.
17. Given these issues, and to avoid the perception of conflict of interest, it would have been prudent to characterise the funding as a procurement and embark on a transparent tender process.

Grants approvals

18. This section is premised upon the government's categorisation of the funding as a grant. When Commonwealth Departments give grants the process to follow is contained in the *Commonwealth Grants Rules and Guidelines 2017 (CGRGs)*.
19. The CGRGs have certain requirements which call for information from the decision makers. With respect to *Key resource management legislative requirements* which are dealt with under Chapter 3 of the CGRGs:
 - (a) did the relevant officials make the Minister aware of the requirements under the *Public Governance Performance and Accountability Act 2013 (PGPA Act)*?
 - (b) is there legal authority to support the arrangement?
 - (c) has the accountable authority approved the proposed commitment of the money, in writing?
20. The Minister is bound by s 71 PGPA Act. The following questions should be asked:
 - (a) did the Minister make reasonable inquiries, and if so, was he satisfied that the expenditure would be a 'proper' use of the relevant money?
 - (b) did the Minister record the terms of the approval in writing as soon as practicable after the approval was given?

Recommendation 1

The government publish a statement about the Great Barrier Reef 2050 Partnership Program's compliance with s 71 PGPA Act, including the requirements to make reasonable inquiries and that the expenditure be a proper use of the relevant money.

Recommendation 2

The government publish the record of the terms of the approval of funding to the Great Barrier Reef Foundation and the date on which that record was made.

21. With respect to grants-specific processes and requirements, dealt with under Chapter 4 of the CGRs, officials *must* provide written advice to the Minister. That advice, *must*, at a minimum:
- (a) explicitly state that the spending proposal being considered for approval is a 'grant';
 - (b) provide information on the applicable requirements of the PGPA Act and Rule and the CGRs (particularly any ministerial reporting obligations), including the legal authority for the grant;
 - (c) outline the application and selection process followed, including the selection criteria, that were used to select potential grantees; and
 - (d) include the merits of the proposed grant or grants relative to the grant opportunity guidelines and the key principle of achieving value with relevant money.

Recommendation 3

The government publish the written advice to the Minister on the Great Barrier Reef Foundation grant pursuant to chapter 3 of the CGRs, and the date of that advice.

22. The requirements for Ministers in addition to the PGPA Act requirements are set out at CGRs 4.10:

In addition to the requirements under the PGPA Act, where the proposed expenditure relates to a grant or group of grants, the Minister:

- a. must not approve the grant without first receiving written advice from officials on the merits of the proposed grant or group of grants. That advice must meet the requirements of the CGRs (see paragraph 4.6); and
- b. must record, in writing, the basis for the approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money.

Recommendation 4

The government publish the record of the basis for the Great Barrier Reef Foundation approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money.

Grants administration and outcomes

23. The CGRs contain 7 key principles for grants administration by accountable authorities at 6.2. They include proportionality, achieving value with relevant money, governance and accountability and probity and transparency. Of course, it is almost impossible for the accountable authority to seek good governance, probity and transparency for any grant with a pre-determined recipient.
24. In order to allow accountable authorities to have significantly robust policies and procedures, in our view, the government should not have pre-determined the recipient.

25. This equally applies to risks involving the grant opportunity. Officials are obliged to identify risks such as involving the relationship to the parties to the grant agreement: CGRGs 7.10.
26. The CGRGs set out guidance for both officials and Ministers. A Minister is not an official: s 13(4) PGPA Act.
27. Officials are guided on proportionality, and a balance is to be struck by officials between risks and transparency: CGRGs 9.1. The way the government has acted with respect to 'a record investment for reef health' in choosing the recipient is out of step with the proportionality requirements on officials.
28. CGRGs 10 and 11 deals with outcomes and achieving value. It is difficult to square these requirements for this record investment with respect to 'reef health' given the impacts of climate change and this exchange, which took place at Senate Estimates on 21 May 2018:

Senator Di Natale: What is the biggest threat to the Great Barrier Reef at the moment?

Mr Knudson: The largest threat to the reef is climate change.

Senator Di Natale: The largest threat is climate change, and yet on the chairman's panel of the foundation you have the CEOs of the biggest polluters in Australia?

29. Mr Frydenberg's press release refers to the 'mitigation of the impacts of climate change'. The funding includes:⁵
 - \$100 million harnessing the best science to implement reef restoration and funding science that supports Reef resilience and adaption.
30. The focus is the mitigation of impact on the reef, or in other words, adaptation to climate change impacts. It does not focus on the mitigation of climate change itself. Dr Reichelt, in evidence before the Senate Committee, stated (Transcript p33):

In the long run the steady rise in global ocean temperatures continues to be the single biggest risk to the health of the Great Barrier Reef. We acknowledge the national and international efforts to reduce greenhouse gas emissions to meet the goals of the Paris agreement, and I am sure this committee is extremely aware of the importance of meeting these targets if the health of tropical coral reefs is to be secured.

While this national and global effort is underway, the recent boost to our capability to increase protection measures on the reef creates very significant opportunities to reduce these local pressures and build reef health. To assist the committee in relation to barrier reef matters, we have officials present today from the authority who will be able to provide information on our expenditure and programs, and officials from the department who will be able to provide information on the Australian government's reef investment, the reef 2050 plan, and the implementation of the governance review of the authority. I understand that comes under program 1.1.

⁵ <http://www.oshfrydenberg.com.au/guest/mediaReleasesDetails.aspx?d=563>

31. The Australian government's failure to limit or halt new fossil fuel extraction in accordance with the climate goals of the Paris Agreement is acute.⁶ We are of the view that if Australia continues to export fossil fuels without limits and in a manner inconsistent with the Paris Agreement, then expenditure for local resilience and adaption works are pointless, and are not value for money.

Recommendation 5

The decision to provide the funding be revoked on the basis it does not adequately deal with climate change. Any new decision must deal with mitigation of climate change and the source of carbon emissions, including from Australia's fossil fuel exports.

Grants governance and accountability

32. CGRGs 12 deals with governance and accountability.

12.1 Grants administration should be underpinned by solid governance structures and clear accountability of all parties involved.

33. Unfortunately, this requirement is impossible for the officials administering any grant to the foundation given the lack of transparency and governance structures the government has shown to date. CGRGs 12.2 states:

Ministers, accountable authorities, officials and grantees all have their respective roles to play in achieving the applicable government outcomes and should be held accountable for the ways in which they fulfil their roles.

34. The exchanges at Senate Estimates on 21 May 2018 above illustrates failure to achieve proper maintenance, awareness and availability of grants administration documentation and processes required by CGRGs 12.6.

35. With respect to probity and transparency CGRGs 13 states:

13.1 Probity relates to ethical behaviour. Establishing and maintaining probity involves applying and complying with public sector values and duties such as honesty, integrity, impartiality and accountability.

13.2 Transparency refers to the preparedness of those involved in grants administration, including officials and grantees, to being open to scrutiny about grants administration and grant opportunity processes. This involves providing reasons for decisions and the provision of two-way information to government, the Parliament, potential grantees, grantees, beneficiaries and the community. Transparency provides assurance that grants administration is appropriate and that legislative obligations and policy commitments are being met.

36. On the evidence available to us, it appears that the decision relating to granting the foundation \$444 million was not impartial, not appropriately documented nor reported, and is certainly not publicly defensible.

⁶ See for example: http://pr.ceofo.org/content/uploads/2016/09/OCI_the_skys_mt_2016_FINAL_2.pdf

Procurement

37. This section is premised upon our view and recommendation that the funding is properly considered procurement. The *Commonwealth Procurement Rules (CPRs)* are the relevant rules for Commonwealth procurement.⁷
38. We note from the outset that procurement does not include grants or investments and reiterate our view that the proper construction of the funding, based on evidence at Senate Estimates, is that it should be procurement.⁸
39. The CPRs contain requirements for government officials, including the requirement for competitive tenders. But these requirements are impossible to follow given the decision already made to award funding to the foundation.

Recommendation 6

The \$444 million funding be found to be a 'procurement' based on its origin to achieve Commonwealth goals, not a grant; therefore it must be distributed by competitive tender in accordance with the *Commonwealth Procurement Rules*.

Yours sincerely

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⁷ <https://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/>

⁸ CPRs at 2.9: www.finance.gov.au/sites/default/files/commonwealth-procurement-rules-1-an-18.pdf