

**Senate Select Committee on Administration of Sports Grants**

**Submission by Susanna Connolly and Professor Graeme Orr**

This submission consists of the research paper ‘The Regulation of Pork-Barrelling in Australia’, which is overleaf.

This paper is work by Susanna Connolly, a final year Arts-Law student and research assistant at UQ Law School. It was supervised by Graeme Orr for the LLB(Hons) Advanced Research Project course this year.

Graeme was already invited to appear before the Committee prior to Covid-19 delaying the Committee hearings, and prior to this paper being written. He can talk generally to the topic.

We offer the paper to the Committee and its Secretariat, given the relative lack of legal analysis on the topic to date in Australia. The Committee and its Secretariat are free to draw on the paper in compiling their report. Given the paper is unpublished, others are asked to make contact with us before directly quoting from it.

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## THE REGULATION OF PORK BARRELLING IN AUSTRALIA

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### I INTRODUCTION

Allegations of pork barrelling, or the distribution of public funds to targeted electors for partisan purposes, are a recurring theme in Australian politics.<sup>1</sup> However, pork barrelling in Australia has received only limited consideration by legal scholars. As allegations of pork barrelling again dominate the nation's headlines,<sup>2</sup> it is timely to comprehensively examine and evaluate the regulation of pork barrelling in Australia.

This paper will explore the practice of pork barrelling in Australia, its regulation and potential for reform. The paper will commence in Part II by broadly examining the nebulous concept of pork barrelling. This will include exploring the definitional issues of the term and its pejorative character, the influence of different electoral systems on pork barrelling and the forms of 'pork' that can be distributed. The intractable distinction between ordinary political conduct and improper pork barrelling for the purposes of regulation will then be explored. Finally the negative consequences of pork barrelling, even in its less egregious forms, will be explored to highlight the benefit of regulation which promotes the proper management of public money. Part III will then explore Australian case studies of pork barrelling, specifically the 1993 and 2019 sports rorts affairs of Ros Kelly and Bridget McKenzie. The case studies will be used to highlight the prevalent and sometimes excessive pork barrelling practices in Australia, and the application and effect of the regulatory regime. Part IV will then outline the different components in Australia's pork barrelling regulatory regime including the offence of electoral bribery, financial legislation and regulation including the *Commonwealth Grants Rules and Guidelines 2017* (Cth), administrative law, ministerial standards, caretaker conventions and the oversight functions of the Auditor-General and the media. Part V then evaluates the current regulatory regime of pork barrelling by assessing both the incentives and deterrents of engaging in pork barrelling in Australia. It is concluded that the regulatory regime provides important oversight mechanisms and standards against which pork barrelling conduct can be judged, and may contribute to systemically improving grants administration; however, there is an absence of an effective enforcement mechanism.

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<sup>1</sup> Tim Prenzler, Bricklyn Horne and Alex McKean, 'Identifying and Preventing Gray Corruption in Australian Politics' in Peter Kratoski and Maximilian Edelbacher (eds), *Fraud and Corruption* (Springer, 2018), 63.

<sup>2</sup> Jack Snape, 'Federal government targeted marginal seats in potentially illegal sports grants scheme, auditor-general reports', *ABC News* (online), 15 January 2020 <<https://www.abc.net.au/news/2020-01-15/government-sport-grants-targeted-marginal-seats-audit-office/11870292>>; David Speers, 'Bridget McKenzie's sport grant cash splash is a particularly brazen example of pork-barrelling', *ABC News* (online), 16 January 2020 <<https://www.abc.net.au/news/2020-01-16/bridget-mckenzie-saga-pork-barrelling-brazen-example/11874224>>; Andrew Tillet and Tom McIlroy 'Why the sports grants scandal won't go away', *Australian Financial Review* (online), 3 February 2020 <<https://www.afr.com/politics/federal/sports-grants-scandal-refuses-to-go-away-20200203-p53x5a>>.

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Finally Part VI briefly highlights options for further regulation including extending caretaker conventions, enforcing the *Commonwealth Grants Rules and Guidelines 2017* (Cth) and establishing a national integrity commission.

## II PORK BARRELLING AS A NEBULOUS CONCEPT: DEFINITIONS, FORMS, CRITICISMS AND DEFENCES

The concept of pork barrelling is not novel. The term dates back at least two centuries, and the practice can be traced back even further.<sup>3</sup> Moreover, despite legal scholars giving only limited attention to pork barrelling, political scientists and economists have long been interested in targeted local-level spending for partisan purposes.<sup>4</sup> However, despite the longstanding interest, the concept of pork barrelling is nebulous and its regulation raises intractable questions. This part will address these issues by first exploring the definition of pork barrelling and its pejorative character. The different forms of pork barrelling in different electoral systems and the diverse types of ‘pork’ will also be considered. Subsequently, the paper will attempt to reconcile the ordinary political practice of pork barrelling in Australia with the conception of pork barrelling as an improper use of public funds for partisan purposes. This will involve consideration of the imprecise concept of ‘public purpose’ and ‘partisan purpose’ and the nature of politics more broadly. Finally, the adverse consequences of pork barrelling, even its less excessive practices, will be outlined to underline the need for regulation which promotes the proper management of public resources.

### A *Definitional and Etymological Issues*

Pork barrelling is a commonly used phrase; however, its definition is not self-evident. Hoare defines pork barrelling as the ‘selective geographical allocation of publicly-controlled funds and resources for the purpose of gaining votes from electors in the locations so advantaged’.<sup>5</sup> Leigh similarly defines pork barrelling as ‘the practice of targeting expenditure to particular districts based on political considerations’.<sup>6</sup> This paper defines pork barrelling as the distribution of public resources to targeted electors for partisan purposes. The geographic element of the definition has been excluded as electoral factors may incentivise demographic-based pork barrelling rather than traditional geographic-based pork barrelling. The proposed definition also recognises ‘pork’ can take many forms, and therefore adopts the broad term ‘public resources’. Finally, the chosen definition avoids the broad concept of ‘political purpose’, and instead adopts the marginally narrower concept of ‘partisan purposes’. The difficulty in disentangling public and partisan purposes in the distribution of public resources will be explored further below.

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<sup>3</sup> 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, 279.

<sup>4</sup> Ibid 280.

<sup>5</sup> Anthony Hoare, ‘Transport Investment and the Political Pork Barrel: A Review and the Case of Nelson, New Zealand’ (1992) 12(2) *Transport Reviews* 133, 134.

<sup>6</sup> Leigh (n 3) 279.

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The pejorative undertones of the phrase ‘pork barrelling’ is a separate issue. The term is often thrown around sensationally by political opponents and commentators alike. The pejorative connotations may cause the phrase to obscure more than it informs and undermine efforts to constructively evaluate political conduct and its regulation. However, the phrase is common shorthand for the more protracted ‘distribution of public funds to targeted electors for partisan purposes’. Therefore, the phrase will be used throughout the paper; however, the deprecatory aspects of the term are not endorsed.

### B *Pork Barrelling in Different Electoral Systems*

Different electoral systems produce different electoral incentives,<sup>7</sup> and therefore different forms of pork barrelling. In distinguishing between different forms of pork barrelling, Hoare presents a tripartite model which differentiates between pork barrelling targeted at individual seats, safe seats and marginal seats.<sup>8</sup> Individual seat pork barrelling involves politicians using their influence to direct public resources into their personal electorate to increase their likelihood of re-election.<sup>9</sup> Individual seat pork barrelling is most common where there is weaker party discipline and more individually powerful politicians, such as in the United States.<sup>10</sup> In contrast, safe seat and marginal seat pork barrelling are more common where there is strong party discipline, such as in Australia and the United Kingdom.<sup>11</sup> In these electoral systems, safe seat pork barrelling is more likely if the government holds a large majority, as the marginal electorates are of less importance to the election outcome.<sup>12</sup> Conversely, marginal seat pork barrelling is expected when the government holds only a slim majority, as parliamentary parties have a strong, collective incentive to secure support in marginal electorates, where small swings may dictate whether an election is won or lost.<sup>13</sup> Therefore, as Australia has a strong party system and tendency for slim majority governments, pork barrelling tends to focus on marginal electorates. However, instances of safe seat and individual seat pork barrelling still simultaneously occur as political parties wish to reward their loyal supporters and certain ministers hold sufficient power to secure disproportionate public resources for their electorate.<sup>14</sup>

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<sup>7</sup> Hannah Kite and Eric Crampton, ‘Antipodean Electoral Incentives: The Pork Barrel and New Zealand’s MMP Electoral Rule’ (Paper presented at the New Zealand Association of Economists Annual Conference, 27-29 June 2007) 1.

<sup>8</sup> 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, 65; Anthony Hoare, ‘Transport Investment and the Political Pork Barrel: A Review and the Case of Nelson, New Zealand’ (1992) 12(2) *Transport Reviews* 133, 134.

<sup>9</sup> 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, 66.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> David Denemark, ‘Partisan Pork Barrel in Parliamentary Systems: Australian Constituency-Level Grants’ (2000) 62(3) *The Journal of Politics* 896, 898; Gaunt (n 9) 73.

<sup>14</sup> Denemark (n 13) 896.

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It has also been suggested pork barrelling may be reduced through the implementation of multi-member electorates as electors are uncertain which representative to reward for delivering certain ‘pork’ to their electorate.<sup>15</sup> However, it is more likely pork barrelling simply takes a different form. Preliminary research suggests that in Mixed Member Proportional (MMP) voting systems, such as New Zealand’s, where each elector has one vote for a district representative and one vote for a party, district-elected politicians engage in geographic based pork barrelling, while party-elected politicians engage in demographic based pork barrelling.<sup>16</sup> This suggests rather than reducing pork barrelling practices, multi-member electorates instead change the form of pork barrelling resulting in more demographic based pork barrelling. Overall, pork barrelling involves self-interested politicians or governments seeking to maximise their likelihood of re-election.<sup>17</sup> Therefore, although different electoral systems may alter the form of pork barrelling behaviour, to the extent electioneering continues to be regarded as a competition for votes, perennial concerns of pork barrelling will persist.<sup>18</sup>

### C Types of Pork

The ‘pork’ distributed to targeted electors by politicians can take many forms. The pork may be infrastructure projects such as the construction of a hospital or school,<sup>19</sup> the relocation of a statutory agency into an electorate,<sup>20</sup> or the promise of jobs in the lucrative construction of submarines.<sup>21</sup> However, a particularly prevalent form of pork barrelling is achieved through the administration of discretionary grant programs. Such programs tend to be regional in nature and provide ministers with discretion in determining which applicants receive grant funding. Grants are also a significant aspect of government spending, with billions of dollars of public funds distributed via Commonwealth grants each year.<sup>22</sup> For these reasons, discretionary grants are an ideal vehicle for delivering pork. In fact, discretionary grants are almost synonymous with allegations of pork barrelling and overt partisan influence in the allocation of public resources.<sup>23</sup> Therefore, when examining the regulation of pork

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<sup>15</sup> Leigh (n 3) 280.

<sup>16</sup> Kite and Crampton (n 7) 3.

<sup>17</sup> Gaunt (n 9) 65.

<sup>18</sup> Graeme Orr, *Dealing in Votes: Electoral Bribery and Its Regulation in Australia* (PhD Thesis, Griffith University, 2004), 3.

<sup>19</sup> Stephanie Anderson, ‘Sophie Mirabella’s Wangaratta hospital claim a ‘staggering revelation’, Bill Shorten says’, ABC News (online), 22 April 2016 <<https://www.abc.net.au/news/2016-04-22/mirabella-victorian-hospital/7350008>>.

<sup>20</sup> David Donaldson, ‘Robbing Canberra to pay Armidale: cost analysis doesn’t support ‘national interest’’, *The Mandarin* (online), 28 November 2016 <<https://www.themandarin.com.au/72996-robbing-canberra-pay-armidale-cost-analysis-doesnt-support-national-interest/>>.

<sup>21</sup> Andrew Tillet ‘The States Slug it Out in Submarine Warfare’, *Australian Financial Review* (online), 9 August 2019 <<https://www.afr.com/politics/federal/the-states-slug-it-out-in-submarine-warfare-20190808-p52f8y>>.

<sup>22</sup> Auditor-General (Cth), *Development and Approval of Grant Program Guidelines*, Report No. 36 (2011-12), [1].

<sup>23</sup> Joanne Kelly, *Strategic Review of the Administration of Australian Discretionary Government Grant Programs*, 2nd Review (2008, Commonwealth of Australia, Canberra) 4.

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barrelling in Australia, this paper will focus on the use of such grants, and the regulation of the administration of grants programs.

D *Pork Barrelling: Ordinary Political Conduct or Improper Use of Public Funds*

Pork barrelling is considered an ordinary aspect of electioneering in Australia. Yet certain incidences of pork barrelling are branded political corruption.<sup>24</sup> The difficulty reconciling these two facts highlights an intractable question when dealing with the regulation of pork barrelling: how can ordinary political conduct which represents an acceptable form of pork barrelling be distinguished from the improper use of public funds for partisan purposes which deserve sanction?

The nebulous concepts of ‘public purpose’ and ‘partisan purpose’ are largely responsible for the intractability of a delineation between proper and improper pork barrelling. In reality, it is doubtful any governmental decision is made in a vacuum free from partisan considerations. To expect otherwise, may require politicians to act as saints and ‘renounce their very politicality’.<sup>25</sup> In relation to allegations of corrupt conduct, unrelated to pork barrelling, then Premier of New South Wales Nick Greiner decried that it would be the ‘death of politics’ if it was illegal for a political party to make decisions in any way influenced by political considerations, such as ‘paying particular attention to the needs of marginal seats’.<sup>26</sup> Further many politicians regard securing and delivering ‘pork’ to their electorate as a function of representing and advocating for their electorate. However, while administration of public funds for pure public purposes may be unworkable and incompatible with political practice, at a minimum, the government can be expected to restrain from blatantly and excessively misusing public funds for partisan purposes.

The boundary between acceptable pork barrelling and improper and corrupt conduct may be crossed once a public purpose rationale for the distribution becomes untenable. Although there is no set criteria for when this occurs, relevant factors tend to include unjustified inconsistency with merit-based advice, excessiveness, brazenness, timing and appearances. Ministers frequently exercise discretion to depart from department advice on merits of applications. However, when this departure is unjustified, or the justification is implausible, the guise that partisan benefits are only and incidental consequence become dubious and concerns of impropriety are raised. This is made more blatant when the distribution is excessively skewed towards marginal or targeted seats. Concerns are further compounded when the announcement or distribution of grants occur in close proximity to an election, with even the Auditor-

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<sup>24</sup> Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia: The Discussion We Need* (Springer, 2020) 12.

<sup>25</sup> Graeme Orr, ‘The Australian Experience of Electoral Bribery: Dealing in Electoral Support’ (2010) 56(2) *Australian Journal of Politics and History* 225, 240.

<sup>26</sup> Independent Commission Against Corruption, *Report on Investigation into the Metherell Resignation and Appointment* (1992) 92.

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General warning that particular care should be taken in the lead up to a federal election.<sup>27</sup> Concerns of impropriety are further heightened when the optics are jarring, such as a candidate, yet to be elected, presenting a giant novelty cheque.<sup>28</sup>

It is apparent there is no distinct delineation between acceptable pork barrelling and the improper use of public funds. If there was, it would likely be insensitive to the context and conduct of political realities. However, there is a limit. As outlined above, a judgement of impropriety may be more likely when a minister disregards department advice on the merits of applications and unjustifiably favours applicants in marginal or targeted electorates, particularly when the distortion is excessive and a federal election is proximate. Such a judgement is also made easier by the presence of an apparent smoking gun, such as an erased whiteboard or a colour-coded spreadsheet. Part V will explore how the regulatory regime sets standards which can also inform judgements of the propriety of pork barrelling conduct.

### E *Problematic Consequences of Pork Barrel Politics*

Pork barrelling, even in its less excessive and blatant forms, is problematic. The practice inherently involves the disproportionate allocation of public resources to certain electorates. In this sense, pork barrelling can pervert electoral politics,<sup>29</sup> undermine balanced policy making, waste public funds and undercut electoral concepts of equality of treatment and opportunity.<sup>30</sup> Further, the distribution of public resources for partisan purposes, is unlikely to align with value for money objectives, and may result in the ineffective and inefficient application of public funds.<sup>31</sup> Therefore, it is important to explore the accountability mechanisms which regulate both ordinary and egregious pork barrelling practices.

### III AUSTRALIAN CASE STUDIES OF PORK BARRELLING

As outlined above, allegations of pork barrelling are an enduring and predictable element of Australian politics. According to Richard Mulgan, a quintessential Australian pork barrel scandal includes ‘sensational newspaper headlines, mock outrage from the opposition benches, wounded protestations of innocence from ministers, and, at the centre, a trenchant report from [the] Auditor-General’.<sup>32</sup> These elements of pork barrelling controversies, in addition to other accountability mechanisms, will be explored through the use of two Australian case studies of pork barrelling.

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<sup>27</sup> Auditor-General (Cth), *The Design and Conduct of the Third and Fourth Funding Rounds of the Regional Development Australia Fund*, Report No. 9 (2014-15), [19].

<sup>28</sup> David Speers, ‘The sports rorts saga has become a political vulnerability that can't be explained away’, *ABC News* (online), 2 February 2020 <<https://www.abc.net.au/news/2020-02-02/morrison-bridget-mckenzie-sports-rort-political-vulnerability/11917884>>.

<sup>29</sup> Orr (n 18) 217.

<sup>30</sup> Renaud Egretau, ‘The Emergence of Pork-Barrel Politics in Parliamentary Myanmar’ (2017) *Trends in South East Asia* 4, 4-5; Orr (n 18) 217.

<sup>31</sup> Leigh (n 3) 298.

<sup>32</sup> Richard Mulgan, ‘Pork barrelling to one politician is just pragmatic rule bending to the next’, *Canberra Times* (online), 1 May 2012 <<https://www.canberratimes.com.au/story/6170898/pork-barrelling-to-one-politician-is-just-pragmatic-rule-bending-to-the-next/>>.

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Although there are numerous examples of brazen pork barrelling in Australia, the practice of pork barrelling is best analysed through case studies exploring the two sports rorts affairs. The 1993 and 2019 sports rorts affairs occurred on different sides of politics and epitomise excessive pork barrelling in Australia. Both incidences involved the alleged maladministration of regional community sports grant programs and had remarkable parallels in the alleged misconduct, exposure of the allegations and eventual consequences.

#### A *Sports Rorts 1.0: ALP and Ros Kelly*

In 1993, the Labor government was embroiled in the original sports rorts affair for its administration of a \$60 million Community Recreational and Sporting Facilities Grants Program.<sup>33</sup> The minister responsible, Ros Kelly, famously used a whiteboard to record the grant assessment process. The timing of the program prompted initial suspicion, with allocations coinciding with federal elections.<sup>34</sup> Central in the ventilation of the scandal was a critical report by the Auditor-General which found the administration of the program was weak.<sup>35</sup> The report noted discrepancies in the distribution of grants, but was unable to make a finding in relation to partisan bias due to the inadequate decision-making records.<sup>36</sup> As is typical in pork barrelling scandals, Ros Kelly defended the disproportionate distribution of funding to Labor held seats as reflecting socio-economic needs rather than partisanship.<sup>37</sup> However, a subsequent statistical analysis found strong support that the allocation was based primarily on partisan rather than socio-economic needs.<sup>38</sup> Following almost a month of controversy, the scandal ultimately concluded with Ros Kelly's resignation as minister.<sup>39</sup> However, Kelly maintained her denial of any wrongdoing and insisted there was no proof of political bias or corruption in the administration of the program.<sup>40</sup>

#### B *Sports Rorts 2.0: LNP and Bridget McKenzie*

In 2019, allegations emerged that the Coalition government had been involved in a remarkably similar sports rorts affair involving the administration of over \$100 million in grants. Suspicions were again raised by the proximity of the grants administration to a federal election coupled with a Liberal candidate handing over a giant novelty cheque while campaigning in the key seat of Mayo.<sup>41</sup> Again, an

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<sup>33</sup> Gaunt (n 9) 63.

<sup>34</sup> Ibid.

<sup>35</sup> Auditor-General (Cth), *Community, Cultural, Recreational and Sporting Facilities Program*, Report No 9 (1993) vii.

<sup>36</sup> Ibid.

<sup>37</sup> Gaunt (n 9) 63.

<sup>38</sup> Ibid.

<sup>39</sup> Dowding, Keith, Chris Lewis and Adam Packer, 'The Pattern of Forced Exits from the Ministry' in Keith Dowding and Chris Lewis (eds) *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU E Press, 2012) 121.

<sup>40</sup> Gaunt (n 9) 64.

<sup>41</sup> Patrick Durkin and John Kehoe, 'McKenzie claims she 'reverse pork barrelled'' *The Australian Financial Review*, 17 January 2020, 3.



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Auditor-General report was pivotal in providing legitimacy to the pork barrelling allegations. The Auditor-General's report concluded the award of grant funding was not informed by an appropriate assessment process and the successful applicants were not those who had been assessed as most meritorious.<sup>42</sup> Instead, the Auditor-General found evidence of distribution bias, with applications from marginal and targeted electorates receiving more funding than if a merit-based approach had been followed.<sup>43</sup> Rather than a whiteboard, the Minister's office used a colour-coded spreadsheet which recorded the analysis of electorate status including marginal and targeted electorates.<sup>44</sup> The second sports rorts scandal was particularly controversial as 43% of approved grant applications were in fact ineligible to receive funding.<sup>45</sup> Further the lawfulness of the Minister's involvement in the allocation of the grants was questioned, as there was no apparent lawful authority for her interference in Sport Australia's administration of the program.<sup>46</sup> Finally, it was later revealed the Minister sent a final list of projects for approval to Sports Australia after the election had been called and the government had shifted to a caretaker role, which traditionally requires avoiding any unnecessary major expenditure decisions.<sup>47</sup> The second sports rorts affair gained significant traction with political commentators. Anthony Whealy QC, a former judge and current chairperson of the Centre for Public Integrity, commented that the conduct was a 'clear case of corrupt conduct by any reasonable standard'.<sup>48</sup> Again, after a protracted controversy, the minister responsible resigned. However, like Ros Kelly, Bridget McKenzie maintained there was no impropriety in the distribution of the grants. McKenzie in fact alleged she engaged in 'reverse pork barrelling' to ensure the fairer distribution of grants.<sup>49</sup> Her eventual resignation was on the narrower conflict of interest ground of failing to declare her membership to a club that received funding.<sup>50</sup> Notably, there has been no admission by the government of pork barrelling let alone improper distribution of public funds for partisan purposes.

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<sup>42</sup> Auditor-General (Cth), *Award of Funding under the Community Sport Infrastructure Program*, Report No. 23 (2019-20) 6.

<sup>43</sup> Ibid [24].

<sup>44</sup> David Speers, 'The sports rorts saga has become a political vulnerability that can't be explained away', ABC News (online), 2 February 2020 <<https://www.abc.net.au/news/2020-02-02/morrison-bridget-mckenzie-sports-rort-political-vulnerability/11917884>>.

<sup>45</sup> McIlroy, Tom, 'Hundreds of sports projects were ineligible, says Auditor-General', *The Australian Financial Review* (online), 13 February 2020 <<https://www.afr.com/politics/federal/late-hundreds-of-sports-projects-were-ineligible-says-auditor-general-20200213-p54017>>.

<sup>46</sup> Anne Twomey, 'Ministers like Bridget McKenzie have no discretion to break the rules', ABC News (online), 2 February 2020 <<https://www.abc.net.au/news/2020-02-02/bridget-mckenzie-sport-grants-minister-rules/11922152>>.

<sup>47</sup> Paul Karp, 'Bridget McKenzie gave Sport Australia final list of grant projects in caretaker period', *The Guardian* (online) 27 February 2020 <<https://www.theguardian.com/australia-news/2020/feb/27/bridget-mckenzie-gave-sport-australia-final-list-of-grant-projects-in-caretaker-period>>; Department of Prime Minister and Cabinet, *Guidance on Caretaker Conventions* (2018).

<sup>48</sup> Anthony Whealy, 'Sports rorts expose Coalition's tame corruption-watchdog plan', *The Australian Financial Review* (online), 22 January 2020 <<https://www.afr.com/politics/federal/sports-rorts-expose-coalition-s-tame-corruption-watchdog-plan-20200121-p53tah>>.

<sup>49</sup> Durkin and Kehoe (n 41).

<sup>50</sup> Jennifer Hewett, 'Bridget McKenzie's head is a start' *The Australian Financial Review* (online), 3 February 2020 <<https://www.afr.com/policy/economy/bridget-mckenzie-s-head-is-a-start-20200202-p53wzw>>.

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## IV REGULATION OF PORK BARRELLING IN AUSTRALIA

There is no offence of pork barrelling in Australia. However, the use of government grants to target electors for partisan gain does not escape regulation. Many accountability mechanisms operate to constrain, and sometimes permit, pork barrelling. This paper will explore the role of electoral bribery, financial legislation and regulations, administrative law, ministerial standards, caretaker conventions, the Auditor-General and the media in regulating pork barrelling in Australia.

A *Electoral Bribery*

The offence of electoral bribery is one mechanism which may regulate pork barrelling in Australia. Section 326 of the *Commonwealth Electoral Act 1918* (Cth) provides that a person shall not provide or receive, or offer to provide or receive, any kind of benefit with the intention of influencing the vote or candidature of a person at a federal election. Electoral bribery is a serious offence, with even a single briberous offer by a candidate potentially voiding their election.<sup>51</sup> However, the offence does not apply in relation to a declaration of public policy or a promise of public action.<sup>52</sup> The public policy exemption is said to recognise the reality of electioneering in Australia which centres on giving, or promising to give, government-created benefits to electors.<sup>53</sup> Therefore, while government grants to targeted electors may arguably constitute providing benefit with the intention of influencing votes, the public policy exemption means pork barrelling will rarely, if ever, amount to electoral bribery.<sup>54</sup>

The case of *Scott v Martin* is an exception to this rule.<sup>55</sup> Mr Martin, the Labor party candidate for Port Stephens, was unseated for engaging in excessive largesse using government grants in the 1988 New South Wales election. In the election petition, applying a civil standard of proof, Needham J of the New South Wales Supreme Court held Mr Martin had committed electoral bribery by engaging in pork barrelling. The pork barrelling was particularly brazen and continued until the morning of the election. Needham J, in his judgement, commented that:

...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 political party advantage.<sup>56</sup>

However, at the time, the New South Wales electoral bribery offence did not have a public policy exemption and it is presumed this may have otherwise operated to exempt the conduct.<sup>57</sup> Further the

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<sup>51</sup> Orr (n 18) 1.

<sup>52</sup> *Commonwealth Electoral Act 1918* (Cth) s 326(3).

<sup>53</sup> Colin Hughes, 'Electoral Bribery' (1998) 7 *Griffith Law Review* 209, 210.

<sup>54</sup> *Commonwealth Electoral Act 1918* (Cth) s 326(3).

<sup>55</sup> (1988) 14 NSWLR 663.

<sup>56</sup> *Scott v Martin* (1988) 14 NSWLR 663, 673.

<sup>57</sup> Hughes (n 53) 213.

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correctness and the precedential value of the decision has been doubted,<sup>58</sup> and no further cases of pork barrelling have been successfully challenged in Australia under electoral bribery laws. Instead, the case can be regarded as a warning shot calling for more discrete or moderate pork barrelling.<sup>59</sup> Therefore, as a strict legal offence, the role of electoral bribery in regulating pork barrelling is limited.

However, ‘metaphorical electoral bribery’ rather than a strict legal conception may play a more valuable role in the regulation of pork barrelling. Graeme Orr suggests the power of electoral bribery can be its use as a powerful rhetorical device, rather than a formal legal offence, which can be ‘applied as a pejorative to demark a species of electoral conduct that is not unlawful per se, but whose honour and desirability is questioned because of its functional resemblance to the offence of electoral bribery’.<sup>60</sup> Therefore, the offence of electoral bribery can meaningfully contribute to the regulation of pork barrelling by providing a serious legal context to debates of the ethicality and propriety of alleged pork barrelling practices.

## B *Financial Legislation and Regulations*

Pork barrelling is also regulated by financial legislation and regulations which govern the expenditure of public funds. The key components of the financial legislative framework for the purpose of grant based pork barrelling are the *Public Governance, Performance and Accountability Act 2013* (Cth) and the *Commonwealth Grants Rules and Guidelines 2017* (Cth).

### 1 *Public Governance, Performance and Accountability Act 2013* (Cth)

In 2013, the Coalition government introduced the *Public Governance, Performance and Accountability Act 2013* (Cth) which created a new overarching framework for financial regulation. The *Public Governance, Performance and Accountability Act 2013* (Cth) establishes general duties and obligations for all officials in relation to the use and management of public resources.

Relevant to the regulation of pork barrelling, section 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) provides a minister must not approve a proposed expenditure unless the minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of the relevant money. ‘Proper’ is defined as ‘efficient, effective, economical and ethical’.<sup>61</sup> On balance, it is unlikely the disproportionate favouring of applicants in targeted electorates, contrary to merit-based advice, particularly when those applicants have been deemed ineligible, would satisfy the criteria of ‘efficient, effective, economical and ethical’ expenditure of public expenditure. Therefore, excessive

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<sup>58</sup> Orr (n 18) 219.

<sup>59</sup> Ibid 223.

<sup>60</sup> Ibid 230.

<sup>61</sup> *Public Governance, Performance and Accountability Act 2013* (Cth) s 8 (definition of ‘proper’).

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pork barrelling may breach section 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth). However, the consequences of a minister breaching this obligation are limited.

There are no civil or criminal penalties under the *Public Governance, Performance and Accountability Act 2013* (Cth) for breaching the relevant duties. Employment-related sanctions are possible for public servants,<sup>62</sup> secretaries of departments, heads of executive agencies,<sup>63</sup> and officials of a corporate Commonwealth entity.<sup>64</sup> However, the same is not true for ministers. Further, accountable authorities are only required to report 'significant non-compliance' with the *Public Governance, Performance and Accountability Act 2013* (Cth) to the relevant minister and Finance Minister.<sup>65</sup> Depending on the structure of the grants program, this reporting requirement may or may not be enlivened.

Overall, section 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) sets a standard for ministerial decision-making in relation to public funds, requiring ministers to be satisfied expenditure is effective, efficient, economical and ethical. However, the limited consequences for breaching this obligation, mean the utility of the law is in its assistance in informing judgements on the propriety of ministers conduct, rather than in its strict legal application. While legal consequences are unlikely to flow from a pork barrelling related breach of the *Public Governance, Performance and Accountability Act 2013* (Cth), the breach of these standards gives more force to criticisms of pork barrelling practices and strengthens allegations that the conduct was improper or corrupt.

## 2 *Commonwealth Grants Rules and Guidelines 2017* (Cth)

Pork barrelling administered through government grants are also regulated by the *Commonwealth Grants Rules and Guidelines 2017* (Cth), a legislative instrument made under subsection 105C(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth). The guidelines are a recent innovation in the regulatory framework. The earliest version of the guidelines, then titled the *Commonwealth Grant Guidelines: Policies and Principles for Grants Administration (2009)* (Cth), were introduced by the Rudd Government in 2009 following the 2008 Strategic Review of the Administration of Australian Government Grant Programs<sup>66</sup>. The federal grant guidelines have significantly enhanced the framework of grants administration, promoting proper use and management of public funds and establishing transparent and accountable decision-making processes.<sup>67</sup>

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<sup>62</sup> *Public Service Act 1999* ss 13(4) and 15.

<sup>63</sup> *Ibid* ss 59, 67 and 29.

<sup>64</sup> *Public Governance, Performance and Accountability Act 2013* (Cth) s 30.

<sup>65</sup> *Ibid* s 19.

<sup>66</sup> Peter Grant, *Strategic Review of the Administration of Australian Government Grant Programs, 1<sup>st</sup> Review* (2008, Commonwealth of Australia, Canberra); Joanne Kelly, *Strategic Review of the Administration of Australian Discretionary Government Grant Programs, 2nd Review* (2008, Commonwealth of Australia, Canberra).

<sup>67</sup> Auditor-General (Cth), *Development and Approval of Grant Program Guidelines*, Report No. 36 (2011-12), [1]; Auditor-General (Cth) (n 27) 31].

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The current guidelines include both mandatory requirements and best practice guidelines in the administration of Commonwealth grant programs. Consistent with section 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth), the *Commonwealth Grants Rules and Guidelines 2017* (Cth) provide that the purpose of grants administration is to promote the proper, or efficient, effective, economical and ethical, use and management of public resources.<sup>68</sup> The guidelines also recommend the use of competitive, merit-based selection processes based on defined selection criteria.<sup>69</sup> This recommendation is significant in the regulation of pork barrelling as competitive, merit-based selection processes constrain ministerial discretion and reduce the opportunity of partisan purposes to influence the selection process. The *Commonwealth Grants Rules and Guidelines 2017* (Cth) also require the reasons for the approval of grant applications, relative to the grant guidelines and value for money principles, to be recorded in writing.<sup>70</sup> This promotes transparency of reasoning in grants administration and should moderate the blatancy of pork barrelling practices. It also prevents ministers escaping scrutiny by recording reasons on a whiteboard which are later erased.<sup>71</sup>

Particularly protective against pork barrelling, the *Commonwealth Grants Rules and Guidelines 2017* (Cth) also require (a) the development of guidelines for grant programs, (b) the provision of written advice on the merits of applications and (c) special reporting requirement in situations that may raise concerns of partisan purposes.

*(a) Requirement to develop guidelines*

The *Commonwealth Grants Rules and Guidelines 2017* (Cth) mandate the development of grant opportunity guidelines for all new grant opportunities.<sup>72</sup> These guidelines should be clear, consistent, well documented and include the grant's objectives and purpose, eligibility criteria, clear assessment criteria, weighting of assessment criteria and the approval process.<sup>73</sup> Depending on the form of guidelines adopted, this requirement can constrain the discretion available to award funding to applications based on their electorate rather than merit. The presence of clear guidelines also improves transparency and accountability, and facilitates later analysis of approved applications in relation to these guidelines.

*(b) Requirement to receive on merits of applications*

The *Commonwealth Grant Rules and Guidelines 2017* (Cth) require that prior to a minister acting as a decision-maker in the administration of grants, the minister must first receive written advice on the

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<sup>68</sup> *Commonwealth Grants Rules and Guidelines 2017* (Cth) reg 2.1.

<sup>69</sup> *Ibid* reg 11.5 and 13.10.

<sup>70</sup> *Ibid* reg 4.5 and 4.10(b).

<sup>71</sup> Gaunt (n 9) 63.

<sup>72</sup> *Ibid* reg 4.4(a).

<sup>73</sup> *Commonwealth Grants Rules and Guidelines 2017* (Cth) reg 8.6.

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merits of the grant applications.<sup>74</sup> The written advice must include, at a minimum, the merits of the proposed grants in relation to both the grant guidelines and value for money principles,<sup>75</sup> and whether the application fully, partially or in no way satisfies the guidelines.<sup>76</sup> This requirement again facilitates transparency and accountability, and enables an analysis of discrepancy between approved grant applications and those recommended for approval by departments based on a merit-based assessment.

*(c) Special reporting requirements*

The *Commonwealth Grants Rules and Guidelines 2017* (Cth) also impose additional reporting requirements on ministers approving grants either in their own electorate or contrary to department advice, two classes of conduct which traditionally raise suspicion of pork barrelling.<sup>77</sup> The guidelines maintain the freedom of ministers to approve grants in their own electorate and contrary to merit-based advice, but requires the reporting of both instances to the Finance Minister and when deviating from department advice, the recording of reasons for the different conclusion.<sup>78</sup> This framework recognises that ministers, departments and expert panels may reasonably disagree on the merits of projects relative to guidelines and preserves the ability of ministers to exercise their lawful discretion in the allocation of grants. However, the requirements act a safeguard reporting process which provide greater transparency on the occurrence of such decisions and allows scrutiny of the reasons for departing from merit-based advice.

Overall, the *Commonwealth Grants Rules and Guidelines 2017* (Cth) provide a robust framework for informed, transparent and accountable grant administration. The framework recognises ministers may legitimately disagree with department advice. However, compliance with the *Commonwealth Grants Rules and Guidelines 2017* (Cth) are not enforced and consequences do not necessarily follow non-compliance. Again, the utility of the *Commonwealth Grants Rules and Guidelines 2017* (Cth) appears to be in its assistance in informing judgement on the ethicality of alleged pork barrelling conduct, rather than in its strict enforcement. However, the *Commonwealth Grants Rules and Guidelines 2017* (Cth) also provide a framework which facilitate systemically better decisions.

## C Administrative Law

The practice of pork barrelling is also regulated by administrative law. The administrative decision of a minister to award or deny government funding may be challenged by judicial review.<sup>79</sup> Administrative decision-makers, including ministers, must act within the scope of their legal powers, or their decision will be ultra vires. Decision-makers must have lawful authority, act for a proper purpose, take into

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<sup>74</sup> Ibid reg 4.10(a).

<sup>75</sup> Ibid reg 4.6 and 4.10(a).

<sup>76</sup> Ibid reg 4.7.

<sup>77</sup> Ibid reg 4.11(a) and 4.12(a).

<sup>78</sup> Ibid reg 4.11(a) and 4.12(a).

<sup>79</sup> *Australian Constitution* s 75; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 39B.

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consideration relevant factors and ignore irrelevant factors, and act reasonably. Further, they must afford procedural fairness and impartiality. The enabling legislation and legislative instruments may influence the considerations that can be taken into account and the purposes for which the grants can be made. While also relevant, soft guidelines developed by departments are non-binding. Although the *Commonwealth Grants Rules and Guidelines 2017* (Cth) are a legislative instrument, their relevance in interpreting proper purposes and relevant considerations will depend on the specific grants framework, including the enactment it is made under and whether the requirements are incorporated in any way. Therefore, the relevance of administrative law in regulating pork barrelling will depend in each case on the specific grant programs legislative framework and alleged conduct. However, in egregious cases, where it can be established the decision-maker considered partisan interests and electorate status or acted for partisan purposes, administrative law may be capable of intervening to regulate pork barrelling.

The Bridget McKenzie sports rorts affair may provide a test case for the role of administrative law in regulating pork barrelling. Both Slater & Gordon and Maurice Blackburn have indicated proceedings may be commenced on behalf of unsuccessful grant applicants.<sup>80</sup> The possible grounds would include the apparent lack of legal authority for Bridget McKenzie acting as decision-maker,<sup>81</sup> and considering electorate and partisan gains as an irrelevant consideration and improper purpose.<sup>82</sup>

However, although judicial review can be used as an accountability mechanism, its function is likely limited. Judicial review requires a private plaintiff and private funding, many relevant guidelines are non-binding and the judiciary are traditionally reluctant to interfere with governmental decisions regarding allocation of scarce resources.<sup>83</sup> Therefore, the strict legal role of judicial review in the regulation of pork barrelling is uncertain, but likely limited. However, the grounds of judicial review can provide standards for proper administrative decision-making and inform debates about the propriety of ministers.

#### D Ministerial Standards

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<sup>80</sup> Paul Karp, 'Sports clubs that missed out in \$100m grants program could bring class action', *The Guardian* (online), 19 January 2020 <<https://www.theguardian.com/australia-news/2020/jan/19/sports-clubs-that-missed-out-in-100m-grants-program-could-bring-class-action>>; Alison Eveleigh, 'Club denied funding takes legal action in 'sports rorts' scandal', *Lawyerly* (online), 5 March 2020 <<https://www.lawyerly.com.au/legal-action-taken-in-sports-rorts-scandal>>; Samantha Hutchinson and Tammy Mills, 'Country tennis club takes legal action after 'sport rort' scandal', *Sydney Morning Herald* (online), 4 March 2020 <<https://www.smh.com.au/national/country-tennis-club-takes-legal-action-after-sports-rort-scandal-20200304-p546xl.html>>.

<sup>81</sup> Auditor-General (Cth) (n 42) [8], [13] [2.14]-[2.19].

<sup>82</sup> Anne Twomey, Submission No 14 to Senate Select Committee on Administration of Sports Grants, Parliament of Australia (20 February 2020).

<sup>83</sup> Peter Cane, 'The Function of Standing Rules in Administrative Law' (1980) *Public Law* 303, 312; Administrative Review Council, *The Scope of Judicial Review* (Discussion Paper, 2003) [3.18].

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The Statement of Ministerial Standards further regulates ministerial conduct in possible pork barrelling.<sup>84</sup> Pursuant to the Statement of Ministerial Standards, ministers must exercise their statutory powers in a lawful and disinterested manner,<sup>85</sup> make decisions unaffected by bias or irrelevant considerations such as considerations of private advantage or disadvantage,<sup>86</sup> and be prepared to demonstrate that the sole objective of their public actions and decisions were advancing the public interest.<sup>87</sup> The improper distribution of public resources to targeted electors for partisan purposes contravenes these standards of expected conduct. Significantly, if the Prime Minister determines a minister failed to comply with the ministerial standards in a substantive and material manner, the Prime Minister may require the minister to resign.<sup>88</sup>

Compared to the previous accountability mechanisms, an established breach of ministerial standards may result in a clear sanction through the loss of a ministerial position. Notably, Bridget McKenzie resigned her ministerial position following a revelation she had breached the ministerial standards, albeit on the narrow ground of conflict of interest. However, the reluctance of successive governments to accept any allegations of pork barrelling likely limits the likelihood ministerial standards will be used to directly sanction pork barrelling, rather than a lesser, secondary breach. The ministerial standards present an enforceable mechanism to regulate conduct. However, even if not enforced, the ministerial standards can again inform a debate as to the propriety of alleged pork barrelling conduct.

#### E *Caretaker Conventions and Election Period Promises*

Caretaker conventions may also regulate, or fail to regulate, pork barrelling during election periods. Pursuant to caretaker conventions, following dissolution of Parliament prior to an election the government assumes a ‘caretaker’ role and must avoid making any avoidable major policy decisions, making significant appointments and entering major contracts or undertakings.<sup>89</sup> Therefore, the government is constrained from approving significant grants once the House of Representatives is dissolved prior to an election. This is evidenced in the controversy which surrounded the revelation that Bridget McKenzie’s office sent an email to Sports Australia amending grant approval decisions after dissolution of Parliament in 2019.<sup>90</sup>

While the caretaker conventions prevent governments from entering a major undertaking to grant funding during the election period, the caretaker conventions do not proscribe promises or

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<sup>84</sup> Department of Prime Minister and Cabinet, *Statement of Ministerial Standards* (2018).

<sup>85</sup> Ibid cl 1.3.

<sup>86</sup> Ibid cl 3.2.

<sup>87</sup> Ibid cl 14.1.

<sup>88</sup> Ibid 15.1.

<sup>89</sup> Department of Prime Minister and Cabinet, *Guidance on Caretaker Conventions* (2018) 1.

<sup>90</sup> Paul Karp, ‘Bridget McKenzie gave Sport Australia final list of grant projects in caretaker period’, *The Guardian* (online), 27 February 2020 <<https://www.theguardian.com/australia-news/2020/feb/27/bridget-mckenzie-gave-sport-australia-final-list-of-grant-projects-in-caretaker-period>>.



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announcements of grants during the election period. In 1998, Colin Hughes raised the possibility of prohibiting promising or making gifts in the election period.<sup>91</sup> However, Hughes emphasised this would not resolve all concerns of pork barrelling as the government would know when the election would be called, and therefore need only make the promises or announcements early enough to circumvent the new restrictions.<sup>92</sup> Nonetheless, prohibiting the announcement or promising of grants in the election period would likely reduce the electoral incentive of pork barrelling as the salience of any promised grants in the electorate would reduce as their distance from election day increases.

While promises made in the election period are currently permitted, the grants must still be administered in compliance with the *Public Governance, Performance and Accountability Act 2013* (Cth) and the *Commonwealth Grants Rules and Guidelines 2017* (Cth) outlined above. Therefore, the administering authority must create guidelines, record reasons, receive advice on the merits and comply with special reporting requirements. It is typically best practice for an election grant to be funded through a separate grant opportunity to be used exclusively for administering election commitments.<sup>93</sup> This avoids the inequitable preferencing of election commitments over other applicants in an existing grant program.<sup>94</sup> This practice was used to deliver the Coalition's 2013 election promises of grants for CCTV and lighting in the first round of the Safer Streets Program. Predictably, the program was dogged by allegations of pork barrelling.<sup>95</sup> The Auditor-General conducted a performance audit and found the design of the closed, non-competitive program's guidelines to deliver the election commitments were sound.<sup>96</sup> However, the Auditor-General found the department made generous assumptions about the quality of the election commitment proposals, facilitating the approval of all but one of the election commitments.<sup>97</sup> This highlights how generous guidelines or generous merit-based assessments can undermine efforts to ensure the proper administration of public funds in compliance with the *Commonwealth Grants Rules and Guidelines 2017* (Cth) when administering election promises.

Overall, caretaker conventions partially regulate pork barrelling through the proscription of final approval of grant funding during election periods. However, the bulk of pork barrelling involves promises and announcements of funding during election periods and this falls outside the remit of

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<sup>91</sup> Hughes (n 53) 213.

<sup>92</sup> Ibid.

<sup>93</sup> Department of Finance, *Australian Government Grants – Briefing, Reporting, Evaluating and Election Commitments (RMG 412)* (2018) [38].

<sup>94</sup> Ibid.

<sup>95</sup> Richard Mulgan, 'Pork barrelling and failed process: when public servants defy the rule of law', *Canberra Times* (online), 6 July 2015 <<https://www.canberratimes.com.au/story/6064827/pork-barrelling-and-failed-process-when-public-servants-defy-the-rule-of-law/digital-subscription/>>; Stephen Easton, 'Safer streets? Audit adds meat to pork-barrelling accusations', *The Mandarin* (online), 9 June 2015 <<https://www.themandarin.com.au/37667-safer-streets-audit-adds-meat-pork-barrelling-accusations/>>.

<sup>96</sup> Auditor-General (Cth), *The Award of Funding under the Safer Streets Programme*, Report No. 41 (2014-15).

<sup>97</sup> Ibid.

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current caretaker conventions and are instead regulated like any other governmental discretionary grants.

#### F *Auditor-General*

As evidenced in the two sports rorts scandals, the Auditor-General plays an integral role in the regulation of pork barrelling in Australia. The Auditor-General is an independent officer of the Parliament, protected with a ten year statutory term and supported by the Australian National Audit Office (ANAO).<sup>98</sup> The Auditor-General is responsible for auditing Commonwealth entities, including conducting performance audits which examine the performance of government programs, particularly whether the public resources are being used economically, efficiently, effectively and ethically.<sup>99</sup> It is typically such performance audits which raise concerns of pork barrelling conduct.

The Auditor-General is given extensive powers under the *Auditor-General Act 1997* (Cth) to access documents and information in the performance of its functions. The Auditor-General may direct a person to provide any information, produce any documents in their custody or under their control, and attend and give evidence before the Auditor-General.<sup>100</sup> The Auditor-General may require a person verify the information they provide on either oath or affirmation.<sup>101</sup> Further, the Auditor-General may enter and remain on any premises occupied by the Commonwealth or certain related entities, and demand full access to any documents or property and examine and make copies of such documents.<sup>102</sup> Finally, the privilege against self-incrimination is abrogated in respect of the Auditor-General's investigative powers.<sup>103</sup> Gabrielle Appleby and Grant Hoole characterise the Auditor-General's powers as providing 'the most robust and flexible capacity to serve as an integrity-promoting institution... combined with the strongest institutionalised protections for independence and the greatest transparency attaching to its final reports'.<sup>104</sup>

The Auditor-General has published numerous performance audits which raise concerns of apparent skew in funding towards government-held electorates or marginal seats.<sup>105</sup> In this way, the Auditor-General has been vital in ventilating serious allegations of pork barrelling and uncovering government maladministration. In addition to the powers outlined above, the sheer resources the Auditor-General can direct to a performance audit is invaluable. The current Auditor-General Grant Hehir estimated

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<sup>98</sup> *Auditor-General Act 1997* (Cth) s 8(1) and 39; *Auditor-General Act 1997* sch 1 item 1.

<sup>99</sup> *Ibid* s 17.

<sup>100</sup> *Ibid* s 32(1).

<sup>101</sup> *Ibid* s 32(2).

<sup>102</sup> *Ibid* s 33(1).

<sup>103</sup> *Ibid* s 35.

<sup>104</sup> Senate Select Committee on a National Integrity Commission, Parliament of Australia (Report, 2017) [2.128].

<sup>105</sup> Auditor-General (Cth) (n 27) [16].

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auditors spent more than 3800 hours reviewing the Bridget McKenzie sports grants.<sup>106</sup> The Auditor-General's independent and thorough reports provide credibility and legitimacy to otherwise unsubstantiated allegations of pork barrelling. Further, the media can then extract and publish the key findings of performance audits, informing the public of the allegations of pork barrelling. Further, beyond exposing individual instances of pork barrelling, the Auditor-General has also contributed to identifying systemic issues with the administration of grants and developing solutions, including through the *Commonwealth Grants Rules and Guidelines 2017* (Cth).

The Auditor-General is a crucial element in the pork barrelling regulatory regime, providing important institutional oversight on parliamentary spending, including detecting and exposing the improper distribution of public funds to targeted electors for partisan purposes. However, beyond recommendations and negative publicity, no significant deterrent necessarily flows from a critical Auditor-General report. However, although the consequences of a critical audit report may be questioned, the Auditor-General provides critical oversight and its audits are an important touchstone which can be referenced by the public in evaluating the propriety of alleged pork barrelling.

### G Media

A free and independent media is an important component in the regulatory framework of pork barrelling in Australia.<sup>107</sup> The media promotes accountability through subjecting parliamentary conduct to close scrutiny and raising allegations of improper distribution of public funds. Rodney Tiffen asserts 'publicity in the media is how corruption is made visible to the public, but generally the media are secondary rather than primary in its exposure'.<sup>108</sup> Reflecting this, a central role of the media is publishing key findings of the Auditor-General performance audits which reveal pork barrelling concerns.

To varying degrees, negative media coverage may deter pork barrelling practices. Critical and unrelenting media coverage of pork barrelling allegations can be the catalyst of minister resignations, as seen in the case of both Ros Kelly and Bridget McKenzie. Alternatively, coverage of pork barrelling may be minimal and amount to little, as seen in the successive regional sports programs.<sup>109</sup> This highlights the inconsistency of media as an accountability mechanism.<sup>110</sup>

Therefore, the media provide an important oversight function in the regulation of pork barrelling, particularly through informing the public of suspected and substantiated pork barrelling allegations.

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<sup>106</sup> Tom McIlroy, 'Hundreds of sports projects were ineligible, says Auditor-General', The Australian Financial Review (online), 13 February 2020 <<https://www.afr.com/politics/federal/later-hundreds-of-sports-projects-were-ineligible-says-auditor-general-20200213-p54017>>.

<sup>107</sup> Maurice Kennedy, *Cheques and Balances* (Politics and Public Administration Group, Research Paper No. 16 2001-02) [2.354].

<sup>108</sup> Rodney Tiffen, *Scandals: Media, Politics & Corruption in Contemporary Australia* (UNSW Press, 1999) 255.

<sup>109</sup> Ibid 254.

<sup>110</sup> Ibid 249.

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However, the inconsistency of coverage and consequences means the media should not be a primary accountability mechanism for the regulation of pork barrelling.<sup>111</sup>

## V EVALUATION OF PORK BARRELLING REGULATION

Evidently, pork barrelling at the national level in Australia is regulated by various, interacting accountability mechanisms including electoral bribery, financial legislation and regulations, administrative law, ministerial standards, caretaker conventions, the Auditor-General and the media. An evaluation of this regulatory regime must have regard to the intractability of a fixed boundary between proper political conduct and the improper distribution of public resources for partisan purposes. However, although the boundary of proper conduct may be imprecise, an effective regulatory regime would ideally deter politicians from engaging in excessive and blatant pork barrelling. Therefore, this part will evaluate the pork barrelling regulatory regime through consideration of the incentives and deterrents of engaging in excessive and blatant pork barrelling. The desire of politicians and political parties to maximise their likelihood of election in a contest for votes is a strong incentive for pork barrelling.<sup>112</sup> However, it is unclear whether the regulatory regime outweighs this incentive.

While the strict legal application of the offence of electoral bribery to pork barrelling is limited, allegations of bribery can be used as a powerful rhetorical device which marks the seriousness of alleged pork barrelling and informs debates of the propriety of the pork barrelling.<sup>113</sup> Financial legislation and regulations, particularly the *Commonwealth Grants Rules and Guidelines 2017* (Cth), provide more definitive guidance on the propriety of pork barrelling conduct. The definitive standards and best practice guidelines in the *Commonwealth Grants Rules and Guidelines 2017* (Cth) provide a robust framework for informed, transparent and accountable grants administration. However, the absence of an enforcement mechanism for ministers limits their strict legal use in deterring pork barrelling. Instead, the clear standards of the *Commonwealth Grants Rules and Guidelines 2017* (Cth), and their possible breach, can inform debates on the ethicality of alleged pork barrelling and assist in systemically improving grant administration. Administrative law may be a useful mechanism to enforce proper decision-making and deter excessive pork barrelling; however, the utility is limited by the requirement of a privately funded plaintiff and the traditional reluctance of courts to intervene. Ministerial standards provide further guidelines for the proper conduct of ministers. Distinct from other accountability mechanisms, ministerial standards have an enforcement mechanism whereby the Prime Minister can require the resignation of a minister for a serious breach. While resignation for pork barrelling may or may not be enforced under ministerial standards, the standards also provide a further touchstone which can be used when evaluating the propriety of alleged pork barrelling. Caretaker conventions somewhat limit excessive pork barrelling through proscribing the formal approval of significant grants in the

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<sup>111</sup> Ibid 255.

<sup>112</sup> Orr (n 18) 3.

<sup>113</sup> Ibid 216, 230.

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election period. However, promises of grants can nevertheless be made during election periods. The Auditor-General is a further integral component of the pork barrelling regulatory regime, providing crucial oversight and detecting excessive use of public resources for partisan purposes. The findings of the Auditor-General also provide legitimacy to allegations of pork barrelling. However, a sanction does not necessarily flow from a critical Auditor-General report. It is often the media's coverage of the Auditor-General's findings which can lead to sufficient controversy to produce a political sanction, such as resignation. However, the media is an inconsistent accountability mechanism.

Overall, a fundamental threshold in the regulation of pork barrelling is the initial determination that alleged pork barrelling falls beyond proper political conduct and is an improper use of public resources. As outlined above, the current regime provides important standards upon which such a judgement can be made. This is evidenced in the Bridget McKenzie sports rorts affair where the Minister's conduct was criticised for committing bribery, for breaching obligations under the *Public Governance and Proper Administration Act 2017* (Cth) and the *Commonwealth Grants Rules and Guidelines 2017* (Cth), for the potential unlawfulness of her decision under administrative law, for her non-compliance with ministerial standards and for her apparent contravention of caretaker conventions. An Auditor-General report provided thorough analysis of her conduct and made a finding of disproportionate allocation of funding. The media then publicised these allegations and eventually Bridget McKenzie resigned.

Therefore, the regulatory regime has important oversight institutions and provides a sound framework for debate surrounding the propriety of alleged pork barrelling, including clear standards and decision-making frameworks which promote accountability and transparency. However, the regime is limited by the absence of sufficient enforcement mechanisms. This leads to a sense that the regulation of pork barrelling is incomplete. The public is informed in its consideration of the propriety of pork barrelling allegations, but cannot expect consistent sanctions or even acknowledgment of wrongdoing. This raises concerns, similar to those of Rodney Tiffen, that 'public responses are dulled into an alienated and indiscriminate weariness, into the belief that 'they all do it', an attitude which is detrimental to hopes of reform and corrosive of democratic accountability'.<sup>114</sup>

## VI OPTIONS FOR FURTHER REGULATIONS

Finally, this part will briefly outline a number of options for further regulation including the extension of caretaker conventions, the enforcement of the *Commonwealth Grants Rules and Guidelines 2017* (Cth) and the establishment of a federal integrity commission. It is, however, recognised that the power to implement any proposed reform is held by those who will be regulated.<sup>115</sup>

### A Extension of Caretaker Conventions

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<sup>114</sup> Tiffen (n 108) 1.

<sup>115</sup> Orr (n 18) 301.

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As outlined in Part IV, it has previously been proposed that caretaker conventions could be extended to proscribe the promising of specific grants during the election period.<sup>116</sup> Colin Hughes reasoned such an extension would not resolve concerns of pork barrelling as the Government would know when the election would be called, and therefore need only make the promises or announcements early enough.<sup>117</sup> However, the prohibition of promising grants in the election period would likely reduce the electoral incentive of pork barrelling, with the salience of any promised grants in the electorate reducing as their distance from election day increases. Therefore, although the extension of the caretaker conventions would not stop pork barrelling altogether, it is one option which may deter the practice.

#### B *Enforcement of Commonwealth Grants Rules and Guidelines 2017 (Cth)*

A key limitation of the current regime is the absence of enforcement mechanisms. As emphasised above, the *Commonwealth Grants Rules and Guidelines 2017 (Cth)* are a significant element in the regulatory regime which provide detailed standards and a robust framework for informed, transparent and accountable grant administration. However, there are no consequences for ministerial non-compliance with the *Commonwealth Grants Rules and Guidelines 2017 (Cth)*. The strength of the *Commonwealth Grants Rules and Guidelines 2017 (Cth)* in regulating excessive pork barrelling would be enhanced through the addition of an enforcement mechanism. This may be achieved through attaching the *Commonwealth Grants Rules and Guidelines 2017 (Cth)* to the ministerial standards through a requirement that ministers comply with the guidelines.

#### C *Federal Integrity Commission Against Corruption*

Ultimately, the concerns regarding the adequacy of the regulation of pork barrelling may be largely addressed through the implementation of a strong federal anti-corruption commission vested with sufficient jurisdiction, strong investigative powers and the ability to enforce standards of proper conduct. The Auditor-General provides meaningful institutional oversight, secured by its institutional independence, strong investigative powers and the provision of public reports.<sup>118</sup> However, a federal integrity commission would go further, addressing concerns of enforceability and possibly achieving the impossible by deterring politicians from engaging in excessive and blatant pork barrelling.

### VII CONCLUSION

Overall, this paper has provided an insight into the regulation of pork barrelling in Australia. The nebulous concept of pork barrelling was explored including its definition and forms. The paper attempted to grapple with the difficult distinction between ordinary political practice and improper use of public resources for partisan purposes. The 1993 and 2019 sports rorts affairs were examined as case

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<sup>116</sup> Hughes (n 53) 213.

<sup>117</sup> Ibid.

<sup>118</sup> Senate Select Committee on a National Integrity Commission, Parliament of Australia (Report, 2017) [2.128].

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studies of pork barrelling in Australia and its regulation. The diverse and interacting accountability mechanisms which regulate pork barrelling in Australia were then considered including electoral bribery, financial legislation and regulations, administrative law, ministerial standards, caretaker conventions, the Auditor-General and the media. An evaluation of the regulatory regime explored the different roles and limitations of each accountability mechanism. It was concluded that the regulatory regime provides important oversight, contributes to systemically improving the administration of grants and provides a sound mechanism through which the propriety of alleged pork barrelling can be evaluated. However, the lack of enforcement mechanisms limit the effectiveness of the regulatory regime in deterring excessive pork barrelling. Reform options to address these limitations were briefly highlighted including the extension of caretaker conventions, the enforcement of the *Commonwealth Grants Rules and Guidelines 2017* (Cth) and the establishment of a federal integrity commission. Overall, the enduring nature of pork barrelling concerns in Australian politics means a thorough understanding of the regulation of pork barrelling and its limitations will likely be useful in evaluating the seemingly inevitable next pork barrelling scandal.

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