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Australian Government

Department of the Prime Minister and Cabinet

SECRETARY

Ref: EC20-000008

The Hon Scott Morrison MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

I refer to your letter of 17 January 2020 in which you requested my advice, under clause 7.4 of the *Statement of Ministerial Standards* (the Standards), on recent matters arising in relation to the application of the Standards to Senator the Hon Bridget McKenzie, currently the Minister for Agriculture.

Specifically, you sought my advice on any apparent breaches of the Standards in relation to Senator McKenzie's administration of the Community Sport Infrastructure Grant Program (the Program), as then Minister for Sport. Concerns are raised by the recent report by the Auditor-General, *Award of Funding under the Community Sport Infrastructure Program* (the ANAO report), and subsequent public reporting concerning Senator McKenzie's membership of certain organisations. My advice is provided at Attachment A. Your request for advice is at Attachment B and the ANAO Report is at Attachment C.

In preparing my advice I wrote to Senator McKenzie on two occasions, on 22 and 24 January 2020 (Attachment D) seeking answers to several questions. I received her response on 24 January 2020 (Attachment E). I also considered publicly available information and records of my department.

The questions I asked Senator McKenzie were aimed at establishing facts relating to her knowledge of the administration of the Program in order to inform my advice to you. I met with Senator McKenzie on 29 January 2020 to discuss her response, after which she provided some further information by email on 29, 30 and 31 January 2020.

The Standards are principles-based and consistent with that I have formed my advice to you on the basis of whether a reasonable person would consider

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whether the principles of integrity and fairness have been met. I did not have access to all of the material on which the findings of the ANAO report are based.

My advice only relates to apparent breaches of the Standards. It does not cover the matter of whether or not the Minister had legal authority to provide final approval for eligible applications. I note you have sought advice from the Attorney-General on this legal matter. In my advice to you, I have accepted the fact that the Minister provided final approval and apply the principles of the Standards to that fact.

As a general observation, it is of the utmost importance that Ministers promptly and completely declare their private interests to the Parliament and to you, in accordance with the Standards. In order to maintain the trust of the Australian people, Ministers must be vigilant in avoiding any perceived or actual conflict between their ministerial responsibilities and their private interests.

In relation to the Government's consideration of the ANAO's recommendation 4, where the Minister is the final approver, this should include a requirement for official records to be maintained, which would also provide a basis for Ministers to demonstrate they have followed the Standards' fairness requirements.

Whilst not material to my conclusions, my review of the data available to me raises some concerns about the ANAO's analysis and conclusions. I propose to raise these concerns with the Auditor-General.

I understand that this advice is being sought for the consideration of the Governance Committee of Cabinet.

Yours sincerely

Philip Gaetjens
1 February 2020

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Advice to the Prime Minister relating to apparent breaches of the Statement of Ministerial Standards by the Minister for Sport in administering the Community Sport Infrastructure Grant Program

Summary

All Ministers are expected to conduct themselves in line with the Statement of Ministerial Standards (the Standards) in order to maintain the trust of the Australian people.

In addition to the expectations that Ministers should act at all times to the highest possible standards of probity, the following sections of the Standards are particularly relevant in this case:

In recognition that public office is a public trust, therefore, the people of Australia are entitled to expect that, as a matter of principle, Ministers will act with due regard for integrity, fairness, accountability, responsibility, and the public interest... (1.2)

Ministers must also comply with any additional requirements for declarations of interests to the Prime Minister as may be determined by the Prime Minister, and notify the Prime Minister of any significant change in their private interests within 28 days of its occurrence. (2.2)

Ministers must be able demonstrate that they have taken all reasonable steps to observe relevant standards of procedural fairness and good decision making applicable to decisions made by them in their official capacity. (3.1)

Having considered the findings of the Australian National Audit Office (ANAO) Report into the Community Sport Infrastructure Grant Program (the Program), and information gained through my subsequent inquiries, I conclude that, in exercising her role as decision maker for the Program, Senator McKenzie acted within the remit of the *Community Sport Infrastructure Grant Program: Program Guidelines (August 2018)* (the Guidelines). I note in particular Section 8.1 of those Guidelines which give the Minister “final approval” rights, and specify that “other factors may be considered when deciding which projects to fund”. This Ministerial discretion is not constrained by the Guidelines. I also note Senator McKenzie’s advice that her decisions were intended to ensure a fair spread of grants according to state, region, party, funding stream and sport, in addition to the criteria assessed by the Australian Sports Commission (Sport Australia), and that the data available to me supports this advice. Finally, I note that I found no evidence that the outcomes of the Minister’s decisions were biased towards marginal or targeted seats.

There were, in my view, some significant shortcomings with respect to the Minister's decision making role. Key among these were the lack of transparency for applicants around the other factors being considered, and the disconnect between the assessment process run by Sport Australia and the assessment and decision making process in the Minister's Office. This lack of transparency coupled with the significant divergences between projects recommended by Sport Australia and those approved by the Minister has given rise to concerns about the decision-making.

I considered whether a reasonable person might conclude that these shortcomings were inconsistent with the principles of fairness and good decision making outlined under Sections 1.2 and 3.1 of the Standards. I also considered the question of fairness in the context of community expectations, and specifically from the perspective of applicants to the program. It was clear however in the program guidelines that the Minister was the final approver and that she could consider other factors in making her decisions.

There has been considerable commentary on the ANAO's reference to the Minister's decisions being influenced by the identification of 'marginal' and 'targeted' electorates in a records obtained by the ANAO. After careful analysis of the outcomes of the Minister's decisions, I can find no basis for the suggestion that political considerations were the primary determining factor in the Minister's decision to approve the grants. This is consistent with the Minister's advice to me that she has never seen this spreadsheet and that neither she nor her staff based their assessments on it.

On the question of any conflict of interest, I note that Senator McKenzie was a member of the Wangaratta Clay Target Club at the time she approved funding under the Program to that organisation. I consider the Minister's approval of funding to an organisation of which she is a member represents an actual conflict of interest which should and could have been avoided, and is an apparent breach of the Standards.

The timing is such that the potential of conflict should have been clear to the Minister. By failing to put appropriate arrangements in place to avoid the potential for conflict, such as asking another Minister to make any decisions relating to organisations of which she was a member, the Minister has failed to maintain the trust of the Australian people.

I accept that the actual personal benefit of her membership of the Club may be negligible and that the Minister may not have considered the interest to be significant. However, the Minister's failure to declare and manage the conflict that arises between her responsibility for approving funding under the Program and her interests as a member of the Club, fails to meet the Standards.

Senator McKenzie was at the relevant time (and remains) a member of the Bendigo branch of Field and Game Australia and approved grants for two branches of Field and Game Australia under the Program. While the Minister

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was not a member of either branch that received a grant, her approval of funding to those branches could be perceived as a conflict of interest because of her membership of Field and Game Australia.

The Minister failed to declare her membership of either of these organisations in a timely manner, as required by the Standards. Neither had been declared at the time of her decision making in relation to the grants. I consider this failure to declare is an apparent breach of the Standards.

Should you and the Governance Committee of Cabinet agree with my view in respect of the application of the Standards in this case, a decision in relation to any sanction is a matter for you and the Committee.

Background

Ministerial accountability

As you said in your address to the Australian Public Service in 2019,

Ministers are accountable to the Parliament and to the public through our democratic process for the policies of the Government... ultimately it is the Minister who must decide, whether approve or not approve, to provide comment, feedback, as they appreciate, because ultimately it is the Minister who will be held accountable by the public. And that's how it should be.

A central tenet of our system requires decision-making authority to reside with elected Ministers. Ministers will be advised, and recommendations will be provided by the Australian Public Service. Those recommendations and that advice may be accepted or rejected by the Minister; it is Ministers who must be accountable for decisions.

It is therefore vital that Ministers act according to the highest standards of probity, as stated in the Foreword to the Standards and must do so in a manner that is open to public scrutiny and explanation.

Additionally, and as you pointed out in letters to all Ministers and Assistant Ministers after the 2019 election, it is necessary for all Ministers to ensure that there is nothing in their private interests that could foreseeably conflict with their ministerial responsibilities.

The Program

After funding was provided in the 2018-19 budget, the Program was established in 2018 to ensure that more Australians have access to quality sporting facilities, encouraging greater community participation in sport and physical activity.

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In summary, the Program was administered by Sport Australia. The Guidelines outlined that all eligible applications would be assessed against three weighted selection criteria, with final funding approval being provided by the Minister for Sport after which successful applicants would enter into a funding agreement with Sport Australia. The Guidelines further set out that funding announcements were expected from 1 November 2018 onwards and that projects were expected to be completed by 30 June 2019.

Applications opened on 2 August 2018 and closed on 14 September 2018. Sport Australia received 2056 project proposals seeking more than \$396.6 million in Australian Government funding. Funding totalling \$100 million was awarded to 684 projects across three rounds completed in December 2018, February 2019 and April 2019.

Fairness and Transparency of Ministerial Process

The Guidelines published in August 2018 were approved by the then Minister.¹ They clearly set out both eligibility criteria and assessment (selection) criteria which would be applied to grant applications.² Against each of three assessment criteria (community participation, community need, and project design and delivery), the Guidelines identified weighting to be given to ten sub-criteria in clear terms. It was against these criteria that grant applicants drafted their submissions. It was also against these criteria that Sport Australia provided recommendations to the Minister, including scoring each application out of 100.

For completeness I note that section 8.1 *Final Approval* of the Guidelines set out that:

The Minister for Sport will provide final approval. In addition to the application and supporting material, other factors may be considered when deciding which projects to fund.

The Report found that the Minister's Office relied on a "parallel" assessment process to identify which applications should be awarded funding and that the parallel process drew upon considerations other than those identified in the Guidelines.³ The Report also found that the Minister's Office applied considerations that were inconsistent with the Guidelines and that it was this parallel process that predominantly informed the Minister's funding decisions.⁴

In her response to questions in my letter of 22 January 2020, Senator McKenzie stated that "No parallel process was conducted." She further noted that under the

¹ Minister's answer to Question 1 in my letter of 22 January 2020

² Guidelines, sections 5 and 6.

³ ANAO Report, paragraph 10.

⁴ *ibid.*

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guidelines, "... the Minister is entitled to consider other factors when deciding which projects to fund."⁵

In her letter, Senator McKenzie also noted that "In order to ensure geographic spread and fairness across communities and funding streams a spreadsheet was kept updated by my staff. This was the basis in determining final grant recipients, and was provided to Sport Australia. Electorates were noted on this record."⁶

Senator McKenzie characterised her Office's additional process as "not part of the assessment criteria. It was an assessment to ensure a fair spread of grants according to state, party, funding stream and sport, as outlined in Appendix 5 of the ANAO report."⁷ The Minister's Office provided to the ANAO a list of 14 further considerations or principles which the Office applied in considering the final approval of applications.⁸ Nevertheless, the Minister maintains⁹

The process I followed in my deliberation of funding decisions was consistent with the published guidelines.

As stated in Appendix 5 of the ANAO report the ranking from Sport Australia's assessment, which I understood to reflect the assessment criteria of community participation, community need and project design and delivery, was my key decision factor. Points 3 to 16 reflect additional factors.

Senator McKenzie also provided further information relating to the assessment process and, in particular, her exercise of ministerial discretion to ensure a fair spread of grants. As noted above, the Guidelines provide for the Minister to consider other factors in addition to the application and supporting material (which I take to include the assessment as per the published selection criteria) in granting final approval for the successful applicants.

In making an assessment of the impact of the other factors, the ANAO report found that 41 per cent (91) of the 224 first round approvals by the Minister were not included in the 426 initially supported by the Sport Australia Board. It is relevant to note that the Minister's decision making took into account the possibility of additional funding being made available under the Program, which was not apparent to Sport Australia when the first cohort of recommendations was made to the Minister.

The ANAO found that in the first round of Program funding, while the Sport Australia Board had recommended 426 applications for funding, it did not submit

⁵ Minister's response to question 4 in my letter.

⁶ Minister's response to question 12 in my letter.

⁷ Minister's response to question 9 in my letter.

⁸ ANAO Report, Appendix 5.

⁹ Minister's response to question 6 in my letter.

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those to the Minister as her office had already informed Sport Australia that she had approved 236 applicants. The Minister's Office had been provided with a copy of 422 recommended projects before the Board's consideration: this consideration resulted in a slightly amended list of 426 recommended projects approved by the Board. Rather than submit that list, Sport Australia provided the Minister with a brief that contained 221 recommended applicants, informed by her list of 236. The Minister finally approved 224 applicants on 21 December 2019.

In the second round, the ANAO found that 70 per cent (162) of the Minister's 232 final approvals were not in Sport Australia's 204 recommended projects. I note that these recommendations were not considered by the Minister. In the third round, the ANAO found that 73 per cent (167) of the Minister's 228 final approvals were not in Sport Australia's 245 recommended projects.

I cannot reconcile such large variations in the final approval results compared to recommendations based on the published assessment criteria with the Minister's view that the published assessment criteria were the "key decision factor". I find that other factors had a material impact on the Minister's final approvals being different from Sport Australia's own recommendations.

It could be argued that the selection criteria against which applications were assessed would be the dominant deciding factor in approvals, with other factors being made transparent and published or made known with respect to further rounds of the Program. On this interpretation, questions could arise around procedural fairness, but the guidelines did not require publication of reasons for approval.

The lack of transparency in the process, with no consultation, revisions to the published Guidelines, or any indication that distributional impacts would be taken into account, provided no line-of sight to or for the members of the community applying for the grants. This was in part a result of the clear disconnect throughout the period of the Program between the assessment process undertaken by Sport Australia and the Minister's final approval process.

Those submitting grant funding applications had, in my view, a right to more fully understand the basis on which the funding decisions were being made. As the ANAO observed,¹⁰ Sport Australia "was unable to communicate the full and actual reasons for the rejection of their application, or otherwise provide those applicants with advice on the reasons for their application being unsuccessful." Future grant program guidelines should take this into account.

Two additional factors that relate to the reference to good decision making in the fairness section of the Standards are the systematic application of the additional factors and the maintenance of appropriate records. In response to my question "Did your office weight its assessment criteria ... [the other factors referred to

¹⁰ See 4.26 in the ANAO Report

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above] ...to ensure a systematic approach and unbiased outcomes?”, the Minister replied she “...was satisfied that a systematic approach was used to ensure there was fairness in awarding grants across state, sport type and funding stream.” In the absence of any records, there is no evidence to support that they were applied systematically.

With respect to record keeping, I note that the Minister acknowledges that because Sport Australia is not subject to the Commonwealth Grant Rules and Guidelines (CGRG) “...there is no requirement for ministerial decisions to be documented in the way we would normally expect of a department.” And while “...working documents were authored by ministerial office staff to support decision making and to ensure fairness in grant distribution across sports, states electorates and funding streams...records not required to be kept were destroyed.”

Where the Minister was the final approver and approvals departed materially from official recommendations (whether or not they were delivered to the Minister and her office), I am concerned there is no evidence of the reasons that supported the Minister’s final approvals.

I acknowledge there was no formal requirement under the CGRGs, or the Sport Australia Grant Management Framework for the Minister to retain records of decisions. My observation is that this lack of contemporary evidence and reasoning has contributed to community concern over the Program outcomes.

Findings

I find there were significant shortcomings in the process undertaken by the Minister and her office that give rise to issues around the fairness and probity of that process. These need to be weighed up against the requirements of and discretion afforded to the Minister by the Guidelines. The Guidelines clearly and publicly identify the Minister as having final approval authority and the right to consider other factors. This discretion was not constrained in any way by the Guidelines. While there may be differing views about the fairness of the process, the Minister used the discretion she was afforded. Accordingly, I do not believe there is a basis for you to find that the Minister has breached the Standards in this respect.

Further, while I consider that an additional (undisclosed) process was conducted within the Minister’s Office, I do not find evidence that this process was unduly influenced by reference to ‘marginal’ or ‘targeted’ electorates. The ANAO Report places very significant import on a spreadsheet prepared in November 2018 which identified ‘marginal’ and ‘targeted’ electorates, as well as an associated briefing note.¹¹ The Report goes on at 4.24 to suggest that this was the basis of the Minister’s process. I do not find evidence of this. The data indicates that applications from ‘marginal’ or ‘targeted’ seats were approved by the Minister at

¹¹ ANAO Report, at 3.20.

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a statistically similar ratio (32 per cent) compared with the number of applications from other electorates (36 per cent). In terms of the comparison between those recommended by Sport Australia and those approved by the Minister, 180 'marginal' and 'targeted' projects were recommended by Sport Australia, and 229 were ultimately approved by the Minister, representing a 27 per cent increase. This is smaller than the overall percentage increase of projects recommended (505) to projects funded (684) of 35 per cent.

After careful analysis I can find no basis for the suggestion that political considerations were the primary determining factor in the Minister's decision to approve the grants. This is consistent with the Minister's advice to me that she has never seen this spreadsheet and that neither she nor her staff based their assessments on it.

Whilst not the central aspect of the advice you sought, I note the Minister's criticisms of Sport Australia with respect to its assessment process and the detail provided to her and her office. The Minister's comments and those in the ANAO Report relating to the administration of the program by Sport Australia give rise to a number of questions including the detail of advice provided to the Minister, proposals to depart from the published Guidelines and the adoption of the Minister's final approvals before submitting its own recommendations in funding rounds one and two and the lack of advice with respect to publishing revised guidelines. In my view, however, the appropriate response to these perceived shortcomings was not to rely on the non-transparent consideration of other factors, and to create a divide between Sport Australia's assessment and the Minister's final approvals, but for the Minister to direct and work with Sport Australia to ensure an effective, fair and transparent process.

The ANAO Report also found that the Sport Australia Board did not play the role set out in section 8 and its influence in the ultimate decision-making process was negligible.

The Standards clearly establish (section 1.3 (iii)) that Ministers are accountable for the actions of staff in their Office. At a number of points in her letter to me of 24 January 2019, Senator McKenzie refers to actions taken by her Office. In accordance with the Standards, Senator McKenzie is accountable for those actions and I have taken this approach in forming my advice to you.

Conflicts of Interest

Section 2.2 of the Standards requires Ministers to declare and register their personal interests. Ministers must also comply with additional requirements placed upon them by you and notify you of any significant change in their private interests within 28 days. Immediately following your appointment as Prime Minister in August 2018, you wrote to all Ministers including Senator McKenzie requiring, inter alia, that they identify all organisations of which they are a member.

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Senator McKenzie advised that she does not consider her membership of certain sporting organisations created any conflict of interests with her funding decisions under the Program.

Wangaratta Clay Target Club

It was reported in the media that Senator McKenzie was a member of the Wangaratta Clay Target Club (the Club, WCTC) at the time she approved the Round 2 Grant of \$35,890 for the Club. Senator McKenzie has confirmed to me in her letter that she became a member of the Australian Clay Target Association (ACTA) through its affiliate club the Wangaratta Clay Target Club on 29 January 2019.

- 25 January 2019 – Senator McKenzie visited the WCTC and signed a membership form
- 29 January 2019 – Australian Clay Target Association (ACTA) registered Senator McKenzie's membership through the WCTC
- 4 February 2019 – Senator McKenzie formally signed off on the funding for approved projects in Round 2 of the Program, including \$35,890 for the WCTC

In relation to the chronology of decision-making regarding the Club, Senator McKenzie noted that:

on and after 29 January 2019, there was no assessment by my office of the WCTC project. As is made clear in the ANAO Report changes made to the list of approved projects between 29 January 2019 and 4 February 2019 involved removing projects rather than adding or changing approvals. On February 4 2019, I formally signed off on the Round 2 projects. This formal sign off did not involve any further assessment by myself or my office of the WCTC project as that work had concluded in mid-January.

On this basis, Senator McKenzie asserts that there was no conflict, perceived or actual, with respect to the Club.

While I accept Senator McKenzie's evidence that the assessment of the Club's application by her Office had concluded before Senator McKenzie became a Club Member, she did not approve the grant to the Club until 4 February 2019, by which time she had become a member.¹² I consider that, at that point, there was an actual conflict of interest that Senator McKenzie should have avoided. There were measures that could have been taken at that time to avoid the conflict, such as recusing herself and referring any decision in relation to the Club's funding application to another Minister.

¹² The fact that all relevant consideration and decision-making was complete before 25 January, but the decision was not made until 4 February adds to the perceived lack of transparency throughout this process.

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Senator McKenzie also had an obligation, established by the principles outlined in the Foreword to the Standards and at section 2.2 of the Standards, to declare her membership of the Club to the Prime Minister.

In this case timeliness was particularly important as Senator McKenzie was considering approving grants to sporting clubs. It is imperative that Ministerial declarations are kept up to date in real time. In my view, whenever a Minister's interests change, that change should be reflected in their declaration as soon as practicable. The Standards require that any "significant change" to Ministers' private interests be declared to the Prime Minister within 28 days (at 2.2).

After reviewing documents held by the Prime Minister's Office and the Department of the Prime Minister and Cabinet, there is no evidence that Senator McKenzie declared her membership of the Club to the Prime Minister until after the 2019 election.

Senator McKenzie asserts in her letter to me that her declaration of a membership of the ACTA in June 2019 was sufficient, since the WCTC is an affiliate member of the ACTA. In my view, whilst this may be sufficient in terms of the structure of the ACTA and WCTC, it does not address the matter of the late declaration of the membership.

Field and Game Australia

I understand Senator McKenzie joined Field and Game Australia before 2018 and did not declare this membership to the Prime Minister until 13 June 2019. Senator McKenzie advised that her membership of Field and Game Australia relates to the Bendigo Branch which did not receive funding under the Program.

However, Senator McKenzie approved grants for two branches of Field and Game Australia under the Program; the Northern Territory Field and Game Association was awarded \$500,000, and Warrnambool Field and Game was awarded \$50,000.

The Minister's approval of funding to those branches could be perceived as a conflict of interest because of her membership of Field and Game Australia.

Findings

In my view, Senator McKenzie is in apparent breach of the Standards in two respects.

Firstly, she had an obligation to declare her membership of both sporting organisations in a timely manner. She did not do so until June 2019. Her office has advised that her membership of Field and Game Australia predates your 2018 letter. This should have been declared at that time. As Minister for Sport, I consider her membership of WCTC to fall within the definition of a "significant

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change” under Section 2.2 of the Standards that should have been reported to you within 28 days under ordinary circumstances.

Further, the Minister’s membership of WCTC created an actual conflict of interest where that organisation had applied for and receiving funding under the Program, with the Minister’s decision being made after she became a member. This conflict should have been declared to you and managed. I consider the failure to do this is also an apparent breach of the Standards.

Philip Gaetjens
Secretary
Department of the Prime Minister and Cabinet
1 February 2020

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