



**The Hon Christian Porter MP**  
Attorney-General  
Minister for Industrial Relations  
Leader of the House

31 JAN 2020

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

Dear Prime Minister *Prime Minister*

I refer to your letter dated 17 January 2020 in relation to the Auditor-General's *Report No.23 2019-2020 Award of Funding under the Community Sport Infrastructure Program (Report)*.

You have asked me for advice in light of the comments made by the Auditor-General in the Report concerning the Minister for Sport's role in the award of grants by the Australian Sports Commission (**Sport Australia**) under the Community Sport Infrastructure Program (**Program**).

Naturally, if I or any legal practitioner were to provide comprehensive legal advice on the legality of any particular individual grant or process, it would be necessary to obtain all of the relevant facts and circumstances in relation to that particular matter. You have not requested any such advice, and it is plainly not the purpose of this letter to give any such advice.

Accordingly, given that your request relates to comments by the Auditor-General regarding legal power and ministerial decision-making (rather than to any individual grant), my advice is necessarily confined to the general legal issue raised by the Auditor-General concerning the Minister's involvement in the Program, which has been left somewhat unresolved in the Auditor-General's report. Specifically, I refer to the finding in the Report that "[i]n the absence of a section 11 direction, there was no legal authority evident to the ANAO under which the Minister was able to be the approver of CSIG program grants to be paid from the money of Sports Australia".<sup>1</sup>

Having consulted with AGS in the preparation of this advice, I consider that the Auditor-General's assumption arising out of his apparent interpretation of section 11 of the Australian Sports Commission Act 1989 (**Act**) is, with respect, not correct.

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<sup>1</sup> See paragraph 2.19 of *Auditor-General Report No.23 2019-2020 Award of Funding under the Community Sport Infrastructure Program*.

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As a preliminary point, under Australia's Westminster system of government, Ministers, who are members of the Executive, may perform a wide variety of functions, including performing a role in the administration or functions of a government agency within their portfolio, without specific statutory authority. Their authority in this respect derives not from statute but rather from the office that they hold as a Minister.

In Australia, the non-statutory executive power of Ministers is complemented by a range of statutory powers.

In relation to Sports Australia, the Act confers broad powers on the relevant Minister regarding Sports Australia, which are consistent with the Minister having administrative responsibility and general oversight in relation to its administration. This includes, but is not limited to, the broad direction-giving power in section 11 of the Act.

Ministerial direction-giving powers are common in legislation establishing statutory authorities but they are rarely exercised. There is not necessarily any legal imperative or other requirement for a Minister to use a specific statutory directions power in order to perform a role in the administration or functions of a government agency within that Minister's portfolio. In the rare circumstances in which a ministerial direction is given, the purpose of the direction is ordinarily to resolve some intractable disagreement between the authority and the relevant Minister.

Indeed, it would be onerous and unnecessary to require a formal ministerial direction every time a Minister and statutory authority agreed to a Minister playing some role in the administration of the authority.

As such, the Auditor-General's apparent finding at paragraph 2.19 that the absence of a section 11 direction necessarily rendered the Minister's involvement as being without legal authority is, respectfully, incorrect.

Of course, in any particular decision making process, it is important that agencies and Ministers have a clear understanding of their respective roles and responsibilities. If an agency or its responsible Minister has concerns or doubts about the legal basis underpinning a decision making process or some other interaction between agency and Minister, then legal advice should be sought in relation to the specific decision making process or interaction.

I trust that this advice is of assistance. Please let me know if you have any questions or would like to discuss.

Yours sincerely

**s. 22(1)(a)(ii)**

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