Mr Grant Hehir

Auditor General

Australian National Audit Office

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Dear Mr Hehir

**Administration of Commuter Car Park Projects within the Urban Congestion Fund**

The above Audit made observations about compliance of car park project selection with a National Partnerships Agreement and the *National Land Transport Act (2014)*.

These were to the effect: proposed projects should comply with both; the Department of Infrastructure etc. should advise the Minister on whether that is the case; there were certain deficiencies in that regard.

In my view the program suffered deficiencies beyond those identified in the Audit.

Following the High Court’s 2014 decision in Williams (No. 2) more is needed to authorise Commonwealth Government spending than compliance of a proposal with the text of legislation. Rather, any legislative cover of spending must be supported by a Constitutional Head of power or ‘nationhood’.

In that decision, the Court also observed compliance with an intergovernment agreement – such as National Partnerships – is incapable of conferring authority on the Commonwealth. Similarly, State cooperation and even State wishes are irrelevant to the coverage of Commonwealth legislation and, therefore, Government spending.

The decision was the Commonwealth could not legislate - to allow payments - for school chaplains because such legislation could not be supported by the Constitution. Commentators noted application of the principles could mean other Commonwealth payment types are equally unsupported. This included payments related to public transport and certain roads - because land transport is not among the Commonwealth’s heads of power, and therefore any valid legislation must rely on other heads.

Commuter carparks appear, at first glance, to be in the same position as school chaplains. They may not be eligible for Commonwealth funding because they are unable to be covered by legislation, including the *National Land Transport Act,* due to the lack of connection with a Constitutional head of power.

Constitution section 51 (xxxiii) does give the Commonwealth power to legislate with respect to railway construction and extension. However, it is at least arguable commuter carparks generally – and certainly some specifically - do not involve railway construction and are not incidental to such activities.

An alternative source of power for Commonwealth spending is Constitution section 96 - conditional grants to States. That section requires Parliament to set any grant conditions. However, it appears Parliament has not directly authorised any Commonwealth grant to States on condition monies be used for carpark construction.

The Department of Infrastructure etc. should have sought expert advice about whether Constitutional mechanisms enable the Commonwealth Government to spend on carparks and other like non-Commonwealth purposes. The potential of legislation such as the *National Land Transport Act* to be such a mechanism should have been explored by the Department. Exploration should have included whether that Act involves an effective delegation of Parliament’s section 96 powers, and if so, to whom and the requirements for the exercise of any such delegation.

Given the relevance of that issue to Parliament, the advice should have been forwarded to the Minister and tabled. I note in that regard, the Senate’s repeated concerns with Government seeking and exercising delegated Parliamentary authority.

The legality of spending issue is significant beyond carparks, touching much of the Commonwealth’s infrastructure activities. It also is not a matter confined to the present Government. In the 2019 election campaign the Opposition promised funding – if elected - for similar proposals.

In summary, the Audit report was valuable in pointing out the failure to follow appropriate processes for use of public monies. However, it would be enhanced by discussion of the potential that even were all such processes scrupulously followed, the Government’s car park program may be unlawful because it cannot be supported by any legislation.

Given that, I suggest you:

1. consider obtaining legal advice on the validity of spending programs whose objects do not clearly fall within Commonwealth heads of power; and
2. recommend to Parliament the issue in (a) be reviewed.

Yours sincerely

J Austen

23 July 2021