

Inquiry into the ART bills

Restoring trust in administrative review

The Administrative Review Tribunal Bill represents a dramatic improvement on the politicised appointments process that undermined trust in and the operations of the Administrative Appeals Tribunal. However, further changes are needed to ensure that appointments to the ART are open and free from political influence.

Submission

Bill Browne

Based on a study by Dr Deb Wilkinson and Liz Morison

February 2024

ABOUT THE AUSTRALIA INSTITUTE

The Australia Institute is an independent public policy think tank based in Canberra. It is funded by donations from philanthropic trusts and individuals and commissioned research. We barrack for ideas, not political parties or candidates. Since its launch in 1994, the Institute has carried out highly influential research on a broad range of economic, social and environmental issues.

OUR PHILOSOPHY

As we begin the 21st century, new dilemmas confront our society and our planet. Unprecedented levels of consumption co-exist with extreme poverty. Through new technology we are more connected than we have ever been, yet civic engagement is declining. Environmental neglect continues despite heightened ecological awareness. A better balance is urgently needed.

The Australia Institute's directors, staff and supporters represent a broad range of views and priorities. What unites us is a belief that through a combination of research and creativity we can promote new solutions and ways of thinking.

OUR PURPOSE - 'RESEARCH THAT MATTERS'

The Institute publishes research that contributes to a more just, sustainable and peaceful society. Our goal is to gather, interpret and communicate evidence in order to both diagnose the problems we face and propose new solutions to tackle them.

The Institute is wholly independent and not affiliated with any other organisation. Donations to its Research Fund are tax deductible for the donor. Anyone wishing to donate can do so via the website at <https://www.australiainstitute.org.au> or by calling the Institute on 02 6130 0530. Our secure and user-friendly website allows donors to make either one-off or regular monthly donations and we encourage everyone who can to donate in this way as it assists our research in the most significant manner.

Level 1, Endeavour House, 1 Franklin St
Canberra, ACT 2601
Tel: (02) 61300530
Email: mail@australiainstitute.org.au
Website: www.australiainstitute.org.au
ISSN: 1836-9014

Summary

In 2022, The Australia Institute published a detailed study that found appointments to the Administrative Appeals Tribunal (AAT) to have become increasingly politicised. The study made ten recommendations to restore accountability and integrity to the AAT appointments process, including a spill of all AAT positions (in other words, all members having to reapply for their positions under new independent processes).

The appointments process for the AAT's replacement, the Administrative Review Tribunal (ART), is described in the Administrative Review Tribunal Bill 2023 (the ART Bill). The process requires merits-based appointments and public advertisements for positions.

However, the ART Bill does not go as far as it should to ensure that appointees are independent and impartial, or that the appointment process is at arms-length from the government of the day. Several key elements of the Australia Institute's recommendations are missing from the ART Bill. The eight changes described below are needed to restore trust in administrative review and ensure that appointments to the ART are both open and free from political influence.

Recommendations

The ten recommendations made by The Australia Institute in our 2022 study are only partly reflected in the ART Bill as it currently stands. We recommend that Parliament amend the bill to:

1. Introduce a cooling-off period before those with party roles can be appointed to the ART;
2. Require ART decisions to always include at least one legally qualified member;
3. Broaden the types of legal experience that make one eligible for appointment on the basis of one's legal experience, but require a longer period of experience;
4. Enshrine assessment panels in legislation as selection panels, and limit the Minister to only making appointments from among candidates recommended by the panels;
5. Require that assessment/selection panels:
 - (a) include legal experts not employed by the government or political parties currently in government; and
 - (b) are not made up of a majority of Australian Government bureaucrats and contractors.
6. Require that appointees:
 - (a) do not work as lobbyists;
 - (b) have not worked for a government department whose decisions are reviewed by the ART within the last four years; and

- (c) are not serving members of the defence force, or currently employed or contracted by the government;
- 7. Require all appointees to the tribunal to resign political party memberships, and to resign from the ART before standing for party pre-selection;
- 8. Require publication of details of the qualifications and prior work experience for all members of the ART.

Introduction

The Australia Institute welcomes the opportunity to make a submission to the inquiry into the Administrative Review Tribunal Bill 2023 (the ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023.

In 2022, the Australia Institute concluded a major piece of research into the Administrative Appeals Tribunal (AAT), entitled *Cronyism in appointments to the AAT: An empirical analysis*.¹ This study—the largest and most comprehensive domestic study of the practice of cronyism in relation to appointments to a government agency ever conducted—found that there had been a sharp rise in the proportion of political appointments to the AAT during the tenure of the Abbott, Turnbull and Morrison governments. Ten recommendations for reforming the AAT emerged from the study, including a spill of positions.

This submission provides a summary of *Cronyism in appointments to the AAT*, with an eye to the report's implications for any successor to the AAT. It also assesses the proposal for the Administrative Review Tribunal (ART) against the ten recommendations emerging from the study.

The Australia Institute would welcome the opportunity to discuss research findings in further detail.

¹ Wilkinson & Morison (2022) *Cronyism in appointments to the AAT*,
<https://australiainstitute.org.au/report/cronyism-in-appointments-to-the-aat/>

The politicised AAT

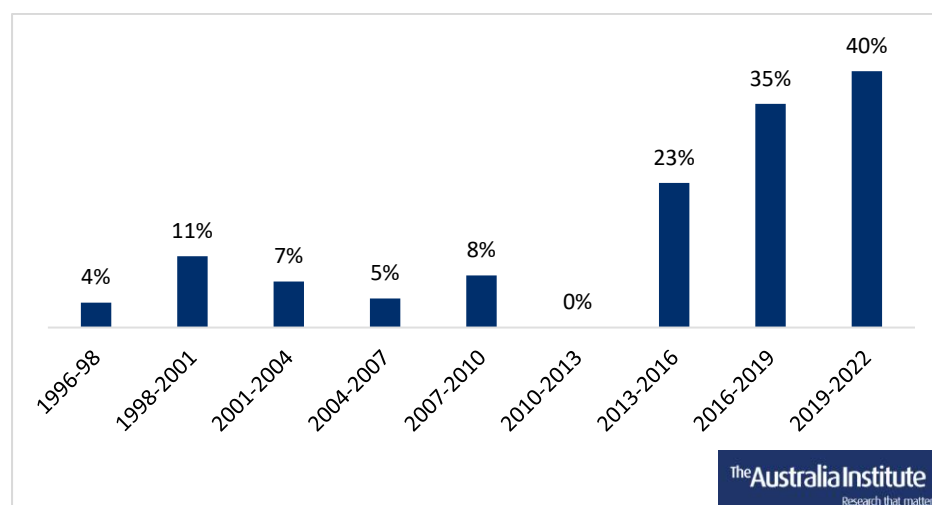
Cronyism in appointments to the AAT analysed all 974 new appointments made to the AAT and its precursor tribunals over the period 1996 to 2022.

The study defined a “political appointment” as the appointment of a person who, prior to that appointment, had worked for a political party with representation at the federal level in either a paid or voluntary capacity. This included those who had worked as elected representatives, advisers and other staffers, party officials, candidates, pre-selection candidates and for party-affiliated organisations. The definition did not extend to those who had been engaged by a party as a consultant, worked at senior levels of the bureaucracy, provided non-ongoing pro-bono advice, or were found to be party members but had no other publicly available record of political service. This definition means that the findings on the number of political appointments are likely to be conservative.

Under the Howard and Rudd/Gillard/Rudd administrations, political appointees accounted for 6% and 5% of all appointees respectively. By contrast, under the Abbott/Turnbull/Morrison administrations, political appointees accounted for 32% of all new appointments.

During the Abbott/Turnbull/Morrison period, the proportion of political appointments grew steadily, reaching its peak during the tenure of the second Morrison government. During the 2013–16 Abbott/Turnbull government’s tenure, 23% of appointments were political; this figure rose to 35% under the 2016–19 Turnbull/Morrison government, and then to 40% under the 2019–22 Morrison government. During the entire Abbott/Turnbull/Morrison era, a total of 236 tribunal appointments were made.

Figure 1: Percentage of political appointments by government (1996 to 2022)



Source: Australia Institute original research.

The loss of norms of good governance from 2013 onwards is also indicated by the fact that political appointees were both more likely to become Senior Members, and that such appointees were less likely to have legal qualifications. This is significant because Senior Members are supposed to provide leadership on legal matters. Over the entire study period (1996–2022), just over a quarter (26%, seven of 27 appointees) of all political appointees appointed as Senior Members lacked legal qualifications. By contrast, only 1% (just one of 80) of non-political appointees appointed as Senior Members lacked such qualifications.

Political appointees were also generally less likely to have legal qualifications than non-political appointees (45% of political appointees had legal qualifications, compared to 59% of non-political appointees), and were as a whole less educated than their non-political counterparts (10% of political appointees had identified education levels below the level of a bachelor's degree, compared to 2% cent of non-political appointees). Even when they did have legal qualifications, political appointees were likely to have less legal experience than non-political appointees: only 3% of non-political appointees with legal qualifications had less than six years of legal experience at the time of first appointment, compared to 17% of political appointees.

Despite this, political appointees were *more* likely to be appointed as Senior Members than non-political appointees. Between 1996 and 2022, 23% of political appointees were appointed as Senior Members, compared with 9% of non-political appointees. Political appointees were also more likely to be appointed on a full-time basis than non-political appointees, with 47% of political appointees receiving full-time appointments, compared to only 22% of non-political appointees.

One consistent trend over the entire study period was that all administrations were far more likely to appoint political appointees who had served the appointing party or parties: under the Howard government, 79% of political appointments went to those who had served the Coalition; under the Rudd/Gillard/Rudd administrations, 90% of appointments went to those who had served the Labor Party; and under the Abbott/Turnbull/Morrison administrations, 89% of appointments were those who had served the Coalition.

There was considerable variability in the qualifications and experience of political appointees over the study period. While some political appointees had legal qualifications and significant legal experience, others had low education levels and no professional experience outside of their political employment.

Since the study was released

Since the Australia Institute's research was released, conservative MPs have joined the Labor government in acknowledging the politicisation of the AAT. When the Albanese Government's National Anti-Corruption Commission bills would have empowered AAT members to approve surveillance warrants, several senior Liberals expressed their lack of confidence in members to do so impartially. The bills were revised to require approvals to come from superior court judges.²

The implications of a politicised tribunal go well beyond the approval of warrants. The AAT is responsible for life-changing decisions, including deportations, NDIS payments, child support, visas, veterans' entitlements and Commonwealth workers' compensation. That such decisions were made by a tribunal subject to a politicised appointment process is unfair to applicants and undermines confidence in government decision-making. The implications of this fact are significant, and are addressed in the recommendations made in *Cronyism in appointments to the AAT*.

² Lewis and Ison (2022) *Labor in retreat on anti-corruption watchdog warrants*, <https://www.theaustralian.com.au/nation/politics/labor-in-retreat-on-anticorruption-watchdog-warrants/news-story/5a9b07b2ad93612b5ce64bca01b04dda>; Whinnett and Lewis (2022) *Political stack to hold power over secret bugs*, <https://www.theaustralian.com.au/nation/political-stack-to-hold-power-over-secret-bugs/news-story/6c01eb49dff168db9b0a2b071eb2a7ac>

The proposed ART appointments process

The proposed ART would require qualified appointments, public advertisements for positions and a clear role for the ART President in the appointments process.

Cronyism in appointments to the AAT made ten recommendations to restore independence to the AAT appointments process. These recommendations also apply to the ART. While the ART Bill represents a clear improvement over the AAT appointments process, it does not address all ten recommendations in full.

The following section sets out the recommendations made in *Cronyism in appointments to the AAT*, along with the progress made in addressing those recommendations:

- 1. An independent Commission of Inquiry into appointments to the AAT, with a particular focus on the period 2014 to 2022, should be conducted. This inquiry should have the power to compel people to give evidence.**
- 2. As soon as possible after Parliament is resumed, special legislation should be introduced into Parliament revoking, where legally possible, all membership positions on the AAT. This is the simplest, quickest and most effective way of restoring the independence, impartiality, capacity and integrity of the organisation. All new appointments and re-appointments should be made in line with the criteria set out below.**

The Albanese Government satisfied recommendation 2 by abolishing and replacing the AAT altogether. The recommended commission of inquiry has not taken place, and should do so, because it remains necessary to understand how and why appointments to the AAT became politicised, and how cronyism can be prevented in government appointments more generally.

- 3. All people who have worked in either a paid or unpaid role for a party with representation at the federal level (for example, former elected representatives, advisers, candidates and party office holders (broadly described)) should be ineligible for appointment to the AAT until at least four years has elapsed from the date at which they last undertook that paid or unpaid role. All people appointed to the AAT should also be required to publicly declare any past political activity that fits within the above definition that was undertaken within the preceding eight years.**

This recommendation emerged from the worrying growth in politicised appointments to the AAT observed between 2014 and 2022. (While the data suggests that politicised

appointments were made by earlier governments, it also suggests that they were made far less frequently.)

Since tribunal members review governmental decisions, formal affiliation with the government of the day is more concerning in a tribunal member than in most other government appointments. We continue to recommend that a four-year cooling-off period be required before those who have served in party roles are eligible for an ART appointment, and that this period should be specified in the ART Bill.

- 4. If AAT decisions continue to be made by one member only, all people appointed to the AAT should possess legal qualifications that allow them to practice as a legal practitioner (regardless of whether or not they have completed their final professional year required for entry as a legal practitioner). Deputy Presidents should have at least 16 years' experience as a legal practitioner, legal academic, legal bureaucrat, public prosecutor or jurist post enrolment on a full-time equivalent basis, Senior Members 12 years, and Members at least 8. The Minister may be given discretion to appoint a person with fewer years' legal experience but only in exceptional circumstances. Furthermore, the capacity to appoint a person who does not have the requisite level of experience should be curtailed such that a Deputy President must have no less than 14 years full-time equivalent experience as a legal practitioner, legal academic, legal bureaucrat, public prosecutor or jurist, Senior Members no less than 10 years, and Members no less than 6. All reasons for exceptions should be tabled in Parliament.**

Members without legal qualifications

Unlike the AAT, the ART Bill allows for decisions to be made by more than one member.³ Given this, it is appropriate that not all ART members be required to have legal qualifications. However, where ART decisions are made by a group of two or more members, such a group should always include at least one member *with* legal qualifications—something not required by the current ART Bill.

Extent of legal qualifications required

The ART Bill requires those appointed on the basis of their legal qualifications to have been enrolled as a legal practitioner for a certain amount of time: 10 years for a Deputy President, seven years for a Senior Member and five years for a general Member.⁴

However, time spent enrolled as a legal practitioner is not a reliable measure of legal experience: a person can be enrolled without actively practicing law, and conversely, a person can gain legal experience without practising.

The Australia Institute recommends requiring a longer period of legal experience, but not necessarily as a legal practitioner: those with experience as a legal academic, legal

³ ART Bill, s 383,

https://www.aph.gov.au/Parliamentary_Business/Bills_LEgislation/Bills_Search_Results/Result?bld=r7117

⁴ ART Bill, ss 207(3)(a), 208(3)(a) and 208(4)(a)

bureaucrat, public prosecutor or jurist should also qualify, provided they have legal qualifications.

Alternatives to legal qualifications

Governments misused the option to make appointments to the AAT based on relevant “special knowledge or skills”. *Cronyism in appointments to the AAT* found that the public administration experience of political appointees to the AAT, including those who had been elected representatives, varied significantly. Many such appointees appeared to have no experience in public administration outside their political work, and some had little or no such experience even in the course of their political work.

The ART Bill would help protect against such appointments by being much more specific, requiring “specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal” for the same duration as the legal experience it is replacing (seven years for a Senior Member and five years for a general Member).⁵

5. All people appointed to the AAT should be appointed for a period of at least five years.

The ART Bill requires that appointments are for five years unless the reasons for the shorter period are specified by the Minister.⁶

The ART Bill also requires that members cannot be reappointed more than six months before their term expires, and that the Minister seek and take into account the President’s advice about the person’s performance.⁷ These requirements reduce the risk that a reappointment is—or appears to be—transactional or based on a member’s decision-making record, and also stops a government from reappointing its preferred members *en masse* ahead of an election that it might lose. They will also help ensure that poorly-performing members are not reappointed, even if they are politically connected or useful to the government.

6. All people appointed to the AAT should be appointed through an open and transparent selection process. Ministers may request that certain people be asked to nominate for appointment, but Ministers should not be able to appoint people who have not been recommended for appointment by a selection panel. In constructing the selection panel, care should also be taken to ensure that it includes legal experts who are not employed by the Australian Government or the appointing party, and that Australian Government bureaucrats, or people otherwise engaged by the Australian Government as contractors, do not possess a majority on the panel.

The ART Bill requires appointees to be assessed as suitable through a merit-based and publicly advertised process. To be merit-based, this process must:

⁵ ART Bill, ss 208(3)(a) and 208(4)(a)

⁶ ART Bill, ss 208(5), 208(6)

⁷ ART Bill, ss 208(8), 208(9)

- (a) Include an assessment of the comparative suitability of the candidates;
- (b) Be based on the relationship between the candidate's qualifications and those required of a member; and
- (c) Take into account the need for diversity of skills and experience within the ART.⁸

The ART Bill also requires the Minister to seek and take into account the advice of the ART President regarding whether the appointment would meet the ART's operational needs.⁹

The ART Bill allows, but does not require, the Minister to set up assessment panels to assess candidates for appointment.¹⁰ The explanatory memorandum identifies an expectation that these panels will be used, and that only candidates deemed suitable by these panels will be considered by the Minister.¹¹ Since January 2023, this has been the practice of the Albanese Government for appointments to the AAT.¹²

In the past, Ministers misused the discretion they were allowed on appointments in order to make politicised appointments to the AAT. While the ART Bill's requirement for a merit-based assessment is a major improvement, it still leaves a great deal of discretion in the hands of the Minister. The ART Bill should be revised to require selection panels, and limit the Minister to only making appointments from among candidates recommended by the panels.

Further, rules should be introduced to require that any ART assessment/selection panel includes legal experts not employed by the Australian Government or political parties currently in government, and also that Australian Government bureaucrats and contractors do not represent a majority on the panel. The current regulations do not meet this standard, instead requiring that panels consist of the Secretary of the Attorney-General's Department or their delegate, the AAT President or their delegate and a member appointed by the Attorney-General.¹³

7. All members of the AAT should be required to publish details of their qualifications and prior work experience covering the level of experience required for appointment as detailed above. Details should be published in annual reports and include the first date of admission as an Australian legal practitioner (where applicable).

There is no equivalent to this recommendation in the ART Bill. Such a requirement should be introduced to ensure that members of the public, politicians, academics and journalists can

⁸ ART Bill Explanatory Memorandum, pp 169–170

⁹ ART Bill, ss 207(2)(a), 208(2)(a)

¹⁰ ART Bill, s 209

¹¹ ART Bill Explanatory Memorandum, pp 178–179

¹² ART (Consequential and Transitional Provisions No. 1) Bill Explanatory Memorandum, p 221

¹³ Attorney-General's Department (2022) *Guidelines for appointments to the Administrative Appeals Tribunal*, <https://www.ag.gov.au/legal-system/publications/guidelines-appointments-administrative-appeals-tribunal-aat>

scrutinise the qualifications of AAT members and hold the Minister to account for members' appointments.

- 8. Conflict of interest provisions should be amended to preclude the concurrent appointment of people who are working as lobbyists or who have worked for a government department whose decisions are reviewed by the AAT in the four years prior to appointment. People serving as current members of the defence force (not in the Defence Force Reserves) should be ineligible for appointment as should people currently employed or contracted by the Australian Government.**

The ART Bill does not prevent the appointment of lobbyists, or of those who have recently worked for a government department whose decisions are reviewed by the ART. Given that ART members are responsible for reviewing government decisions, a perceived closeness to certain governments or departments subject to such review could give rise to conflict of interest concerns.

The Australia Institute also recommends that those serving as members of the defence force, or currently employed or contracted by the Australian Government, should be ineligible for appointment. The ART Bill instead requires that salaried members must receive the President's approval to engage in paid work, and that sessional members must not engage in paid work where there is a conflict of interest risk. It also explicitly excludes service in the Australian Defence Force from being subject to these restrictions.¹⁴

- 9. All appointees should be required to resign their membership of a political party whilst serving on the AAT. Members who wish to stand for pre-selection should similarly be required to resign their appointment to the AAT prior to re-joining the relevant party.**

Party memberships and candidates for pre-selection do not seem to be addressed in the ART Bill. See also recommendation 3 above.

- 10. All recommended changes to appointment criteria and the process for appointment should be reflected in the AAT's enabling legislation.**

As discussed in recommendation 6 above, while the ART Bill anticipates the use of assessment panels by the Minister to ensure the suitability of all appointees, it makes no explicit requirement to this effect.

¹⁴ ART Bill, ss 4, 216

Conclusion

The ART Bill describes a merits-based and transparent appointments process that can restore confidence in administrative review. It would be a major improvement on the politicised and closed process used for AAT appointments.

However, the seriousness of the politicisation of AAT, the doubt it casts over life-changing decisions affecting real people and the damage it has done to public confidence necessitates further tightening the appointments process.