

Submission on the Administrative Review Tribunal Bill



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Summary

I welcome the opportunity to provide input to the Senate Legal and Constitutional Affairs Legislation Committee on the Administrative Review Tribunal Bill 2023.

The Administrative Appeals Tribunal is being replaced by a new body – the Administrative Review Tribunal – at least in part because of concerns about political stacking.

To build public confidence in the new body, the government should ensure a best-practice appointments process, at arms-length from political interference.

A 2022 Grattan Institute report recommended a better appointments process for all public boards, tribunals, and statutory appointments:

- All public board, tribunal, and statutory appointments should be advertised, along with the selection criteria for each position;
- An independent panel should do the shortlisting;
- The minister should choose from the shortlist, or redefine and republish the selection criteria, but should not directly select any candidate not shortlisted;
- A new Public Appointments Commissioner should oversee the process and report to parliament.

The Administrative Review Tribunal Bill 2023 implements some elements of our recommended appointments process, notably requiring all positions to be advertised.

But the Bill could be improved by requiring independent panels to assess candidates, specifying guardrails for ministerial discretion, and including oversight by a Public Appointments Commissioner.

The Administrative Appeals Tribunal has represented one of the more egregious examples of political stacking in recent years, but political appointments are not unique to the AAT.

Australia needs greater transparency and oversight of its public appointments system to build public confidence that governments are appointing the best candidates.

A best-practice appointments process for all public board, tribunal and statutory appointments would reduce jobs for mates, improve our institutions, and ultimately enhance Australia's political culture.

Further detail about the need for and nature of these reforms is provided in the **attached** Grattan Institute report, *New politics: A better process for public appointments*.

1 The Administrative Appeals Tribunal has a problem with political appointments

Appointments to the Administrative Appeals Tribunal represent one of the most egregious examples of political stacking in Australia in recent years.

1.1 The independence of the AAT has been undermined by political appointments

The Administrative Appeals Tribunal (AAT) is an independent expert body that plays a critical role in government accountability and access to justice. Members of the public can ask the AAT to review a government decision that affects them.¹ The independence of the AAT is therefore critical to upholding public trust and confidence in government decision-making.²

But the AAT has become a frequent target for political appointments in recent years. AAT appointments have the trifecta for risk of politicisation: roles on the tribunal are prestigious, pay well (full-time members earn between \$207,310 and \$530,630 per year),³ and come with considerable power given members make consequential judgments on government decisions.

In 2022, there were 320 members of the AAT.⁴ Of these, 70 – or 22 per cent – had a direct political affiliation.⁵ It is unlikely that such a high proportion of politically affiliated people would emerge from a completely merit-based recruitment process.

If experience in politics was judged to be useful for the AAT, we would expect to find members with political connections on both sides of politics. Yet of the 70 politically affiliated members, 64 (91 per cent) were connected to the party that appointed them.

AAT members with political affiliations are also, on average, appointed for longer terms than members without political affiliations (Figure 1.1). The appointment term and decision to reappoint is at the discretion of the government, subject to a maximum term of seven years.

1.2 Political appointments to the AAT have grown over time

AAT appointments appear to have become more politicised over time (Figure 1.2). The number of members has increased substantially since 2015 because of the amalgamation of the Migration Review Tribunal, Refugee Review Tribunal, and Social Security Appeals Tribunal with the AAT. This has coincided with a significant number, and a much higher share, of politically affiliated candidates being appointed.

¹ The AAT can review decisions made under more than 400 Commonwealth Acts and legislative instruments: Administrative Appeals Tribunal (2024) and Bedford (2019).

² Bedford (2019).

³ Remuneration Tribunal (2023).

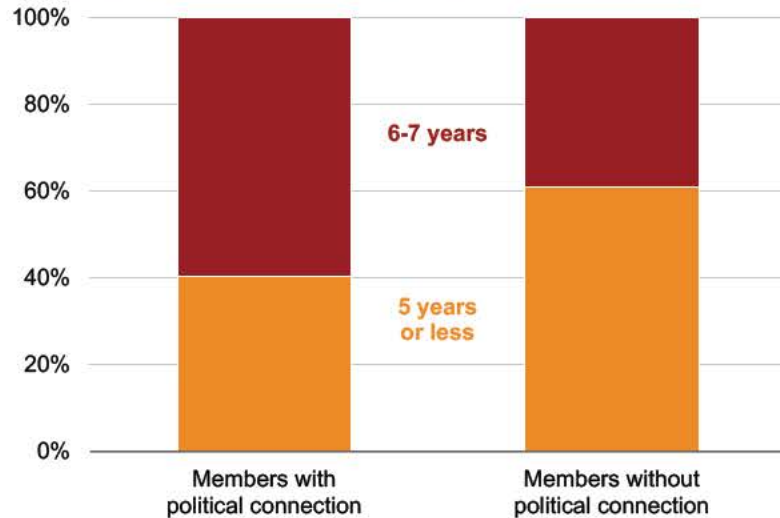
⁴ Including new appointees, as at April 2022.

⁵ About half are former political advisers, one third are former politicians, and the remainder are former party officials or candidates.

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Figure 1.1: AAT members with political connections are more likely to be appointed for longer terms

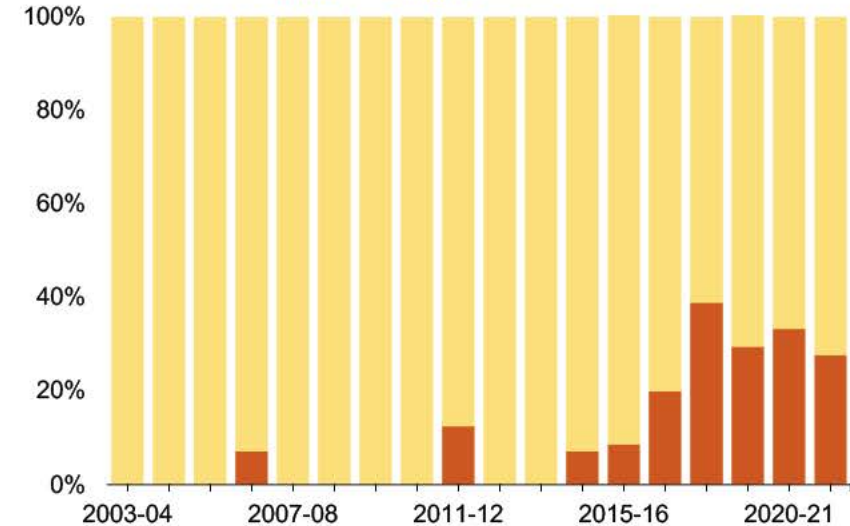
Proportion of current members by specified appointment term



Note: All political connections are to the same political party as the appointing government.
Source: Grattan analysis of AAT annual reports, media releases, and table of statutory appointments (as at 14 April 2022).

Figure 1.2: Politically affiliated appointments to the AAT have increased in recent years

Share of new members **with** and **without** political links to the appointing party



Notes: No new members commenced in 2019-20. Only includes members with connections to the same political party as the appointing government.
Source: Grattan analysis of AAT annual reports, media releases, and table of statutory appointments (as at 14 April 2022).

In the 12 years before the amalgamations, just 3 per cent of new members had political connections to the appointing government. In the seven years since, 18 per cent of new members had political connections to the appointing government – and 31 per cent since 2017-18. Many of these appointments were made on ‘election eve’ – in the final days before the caretaker period commenced in the lead-up to the past two federal elections.

One possible reason that political appointments appear to have grown over time is that many ex-politicians and staffers looking for

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paid work post-politics no longer have a pre-politics career to fall back on.⁶ Political parties may also be looking for somewhere to 'park talent' until their side of politics returns to government.

Whatever the reasons though, appointing so many members with political connections risks undermining the performance and independence of the AAT, as well as public confidence in its decisions.

1.3 The Attorney-General can bypass the appointments process

AAT members are officially 'appointed' by the Governor-General,⁷ but in practice AAT members are selected by the Attorney-General, who makes a recommendation to Cabinet, which is then signed off by the Governor-General as a matter of formality.

Normally the President of the AAT makes recommendations to the Attorney-General on AAT appointments, reappointments, and promotions 'on the basis of merit'.⁸ But the Attorney-General can also select their own candidates outside of this process, without publishing reasons. This provides the opportunity for ministers to nominate political friends and colleagues, without them going through a merit-based selection process.

It is not clear what Attorneys-General take into account when selecting their own candidates. In response to a Freedom of Information (FOI) request, some records were provided to Grattan

Institute relating to one round of AAT appointments under the previous government.⁹ The documents show that after the Attorney-General's department received the AAT President's recommendations, the Attorney-General's office recommended 19 additional appointments.

Of the 19 'ministerial picks', 10 (53 per cent) had a direct political affiliation with the Coalition and three had other personal connections to the Coalition. One is a known Liberal Party member, one is a friend of former Health Minister Greg Hunt (as stated in Hansard), and one was former Attorney-General Christian Porter's debating coach. Many of these candidates, who were subsequently appointed to the AAT, were not known to the department. In many cases, the department had to request contact details and CVs.

In December 2022, the new government issued new guidelines for AAT appointments, seemingly to address this issue.¹⁰ But under the legislation, the only formal requirement is that an AAT member must have been enrolled as a legal practitioner for at least five years or have 'special knowledge or skills relevant to the duties of a member'.¹¹ 'Special knowledge or skills' is not defined (and rarely justified by the appointing minister), but it appears to be regularly drawn on in choosing members, especially those with a direct political connection. Only about half of the politically affiliated AAT members have a law degree, compared to 60-to-80 per cent of the members without political affiliations.¹²

⁶ See Daley (2021, Figure 4.3). A recent study found that more than half of former Victorian MPs took at least six months to find paid work post-politics, and most reported that their efforts to set up new careers were hampered by their time in politics. The study suggests several ways to better support outgoing MPs that don't require gifting public appointments: Nethery et al (2022).

⁷ *Administrative Appeals Tribunal Act 1975*, s. 6(1).

⁸ Attorney-General's Department (2021a).

⁹ Attorney-General's Department (2021b), for appointments in early 2019.

¹⁰ Attorney-General's Department (2022).

¹¹ *Administrative Appeals Tribunal Act 1975*, s. 7.

¹² Some members have little or no online presence, so we were unable to determine whether they have legal qualifications.

2 The Administrative Review Tribunal needs a better appointments process

The Administrative Appeals Tribunal is being replaced by a new body – the Administrative Review Tribunal – because of concerns about political stacking.¹³

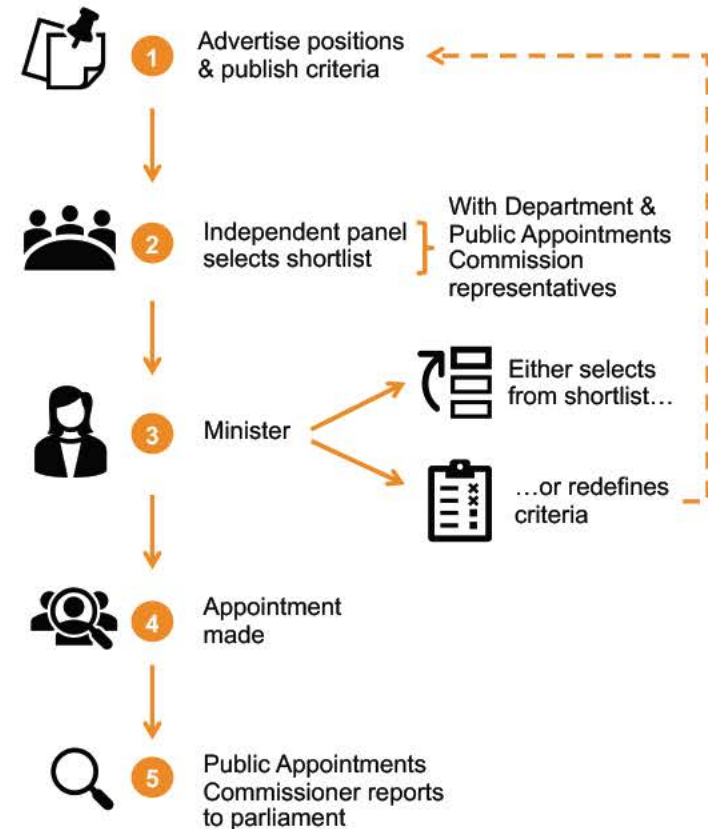
To build public confidence in the new body, the government should ensure a best-practice appointments process, at arms-length from political interference.

The Administrative Review Tribunal Bill 2023 implements some elements of Grattan Institute’s recommended appointments process. But the Bill could be improved by requiring independent panels to assess candidates, specifying guardrails around ministerial discretion (Section 2.1), and including oversight of a Public Appointments Commissioner (Section 2.2).

2.1 Our recommended appointments process

The federal government should adopt a more transparent and merit-based process for all public board, tribunal, and statutory appointments (see Figure 2.1).

Figure 2.1: A better process for public appointments



Note: If a minister chooses to redefine the selection criteria, the new criteria should be published, but the position need not be re-advertised. The panel can assess the existing pool of candidates against the new criteria or broaden the pool.

¹³ Dreyfus (2022).

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All public appointments should be advertised, and the selection criteria published

Advertising public appointments and selection criteria provides transparency on what the minister is looking for before an appointment is made.

Ministers should seek advice in developing the selection criteria, including from their department and the relevant board. For example, they might ask the board to assess current skills and expertise and identify gaps that need to be filled in line with current and emerging priorities for the board.¹⁴

The minister would also be able to suggest candidates for assessment, or encourage a candidate to apply. Competition for positions would then help in finding the best person for the job.

An independent panel should do the shortlisting

An independent panel should assess applications for public board, tribunal, and statutory appointments against the selection criteria and provide a shortlist of suitable candidates to the minister.¹⁵

The make-up of the panel should not be subject to ministerial direction. The relevant departmental secretary and a new Public

Appointments Commissioner (or their representatives) should be on the panel (see Section 2.2). For statutory appointments to the public service, the Public Service Commissioner would replace the Public Appointments Commissioner.¹⁶

The Commissioner should select the remaining members of the panel, which might include the chair of the body, relevant subject-matter experts, and/or community representatives. A diverse group involved in assessing applications and preparing the shortlist gives the best chance of making appointments in the public interest. Panel members' names should be published, to enable public scrutiny of the panel's independence.

Ministers should choose from the shortlist

Ministers should retain the discretion to choose a candidate.¹⁷ But ministers should choose from the panel's shortlist, which should include only candidates who have been assessed as suitable for the position and are recommended by the panel.¹⁸

There may still be circumstances where shortlisted candidates are no longer suitable, or the job requirements have changed. In these circumstances, the minister should publish new selection criteria, and ask the independent panel to revisit the shortlist given the new criteria.

¹⁴ Edwards (2006).

¹⁵ The size of the shortlist would depend on the number of positions required and the breadth of suitable candidates, but as a guide, a shortlist of at least three suitable candidates is required for ABC and SBS board positions. For longer shortlists (more than three candidates for one position), the panel should provide a ranking of the candidates.

¹⁶ This includes all statutory appointments under the federal Merit and Transparency policy. Statutory appointments to the ACCC and Productivity

Commission are excluded under the policy (APSC (2018)) – these appointments should be overseen by the new Public Appointments Commissioner.

¹⁷ In representative democracies such as Australia's, ministers usually have ultimate responsibility for public appointments.

¹⁸ For longer shortlists (more than three candidates for one position), the panel should provide a ranking of the candidates, and ministers who choose a lower-ranking candidate should table their reasons in parliament.

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2.2 Establish a Public Appointments Commissioner

Australia needs a Public Appointments Commissioner to oversee the hundreds of board and tribunal appointments that the federal government makes each year.

The new Commissioner should report to parliament, at least annually, on all board and tribunal appointments made, and any exceptions to the best-practice appointments process outlined in here (including if a minister overrules the panel and appoints someone not on the shortlist).

The Australian Public Service Commissioner should be involved in all statutory appointments to the public service (that is, agency heads). This builds on their knowledge and experience and is consistent with the Australian Public Service Commissioner's stewardship of the federal government's Merit and Transparency policy.

The independence and impartiality of the Public Appointments Commissioner and Public Service Commissioner roles is essential to the integrity of public appointments processes. Appointees to these roles should be agreed with the Leader of the Opposition, similar to the existing legislated approach for integrity agency

heads at the federal level.¹⁹ This was also recommended by the independent Thodey review of the public service.²⁰

2.3 Gaps in the Administrative Review Tribunal Bill 2023

The Administrative Review Tribunal Bill implements some elements of our recommended appointments process (Section 2.1) – including requiring that positions are publicly advertised.

But other elements are incomplete or absent.

The Bill allows for a minister to establish an assessment panel (Clause 209) but does not *require* an *independent* panel.

The minister must be 'satisfied' that a candidate 'was assessed as suitable' through a process that was 'merit-based'. 'Merit-based' is defined in the Bill, but not who makes the assessment.

The new appointments process also lacks the oversight of a Public Appointments Commissioner (Section 2.2) who could report to Parliament and provide further information on the process when questions inevitably rise about an appointment.

¹⁹ See *Independent National Security Legislation Monitor Act 2010*, s. 11, and *Inspector-General of Intelligence and Security Act 1986*, s. 6(3).

²⁰ Thodey et al (2019, p. 289).

3 Australia needs a transparent, merit-based selection process for all public appointments

Australia needs greater transparency and oversight of its public appointments system to build public confidence that governments are appointing the best candidates. The appointments process outlined in Section 2.1 should apply to all public board, tribunal, and statutory appointments.

3.1 This is not just an AAT problem

The Administrative Appeals Tribunal represents one of the most egregious examples of political stacking, but political appointments are not unique to the AAT.

Grattan Institute's 2022 report, *New politics: A better process for public appointments*, shows political appointments are common across many powerful, prestigious, and well-paid boards.

The federal government makes hundreds of appointments each year to regulatory and economic agencies, courts and tribunals, and cultural institutions. Our research found that, across all federal government appointees, 7 per cent have a direct political connection. But this figure rises to 21 per cent among those positions that are well paid, prestigious, and/or powerful.²¹

3.2 Why it matters

Politicisation of public appointments has real, pervasive consequences for Australian democracy, for three reasons.

First, Australia misses out on some of the best people to run key institutions. Appointing people based on their political pedigree

rather than their skills and talents erodes the leadership of important institutions and wastes taxpayers' money.

Second, jobs for mates introduces the risk of actual or perceived politicisation of the decisions of independent organisations. These risks range from accusations of politically skewed exhibitions at the Australian War Memorial, to concerns of political bias in the decisions and recommendations of independent tribunals and agencies.

Third, when governments view appointments as trinkets to reward friends and allies, it promotes an environment of political patronage. People become more afraid to speak their minds, including valid criticism of government policy, lest they cut off their chances of a future appointment or reappointment.

A best-practice appointments process for all public board, tribunal, and statutory appointments – as detailed in Section 2.1 – would reduce jobs for mates, improve our institutions, and ultimately enhance Australia's political culture.

Further detail about the need for and nature of these reforms is provided in the **attached** Grattan Institute report, *New politics: A better process for public appointments*.

²¹ Wood et al (2022).

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