



1 February 2024

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Inquiry into the Administrative Review Tribunal Bill 2023 (Cth)

Dear Secretary,

The Centre for Public Integrity thanks the Committee for the opportunity to make a submission to its inquiry into the Administrative Review Tribunal Bill 2023 (Cth).

The Centre is a non-partisan think tank led by integrity experts from academia, public policy, and the judiciary.

In our view, the Bill in its current form will not protect against precisely the kind of behaviour that led to its predecessor's abolition. We therefore welcome this inquiry process as an opportunity to amend the Bill in order to ensure that appointments to Australia's apex administrative tribunal will be genuinely transparent and merit-based.

It is also an important opportunity to include a robust statutory review clause, given the scale of the reform that the Bill proposes to introduce.

Should the Committee require anything further, we would be pleased to assist.

Sincerely,

Dr Catherine Williams
Executive Director

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Researcher

Abolition of the Administrative Appeals Tribunal

On 16 December 2022, Attorney-General the Hon Mark Dreyfus KC MP announced the abolition of the Administrative Appeals Tribunal (**AAT**). The Tribunal's public standing had, as the Attorney-General put it, *'been irreversibly damaged as a result of the actions of the former government over the last nine years'*, which he described as including the appointment of *'as many as 85 former Liberal MPs, failed Liberal candidates, former Liberal staffers and other close Liberal associates without any merit-based selection process'*.¹ This *'fatally compromised the AAT, undermined its independence and eroded the quality and efficiency of its decision-making'*.²

The Attorney-General declared that the Albanese Government was *'committed to restoring trust and confidence in Australia's system of administrative review'* and would create a new body, a central feature of which was to be a *'transparent and merit-based selection process for the appointment of non-judicial members'*.

This new body is the Administrative Review Tribunal proposed to be established by the Administrative Review Tribunal Bill 2023 (Cth) (**the Bill**). Regrettably, in respect of the essential features of a transparent and merit-based appointments process, the proposed Bill rates very poorly against comparators. In its current form, it will not protect against precisely the kind of behaviour that led to its predecessor's abolition (see Table 1).

Table 1. Comparison of appointment processes

	ABC/SBS Acts	AAT Guidelines	ART BILL
Requirement to advertise	✓	✓	✓
<i>Specificity in respect of requirement</i>	✓	✓	X
Mandated involvement of assessment panel in appointments process	✓	✓	X
Requirement to appoint only panel-endorsed candidates	X	X however, requirement for the Attorney-General to use the panel report to recommend non-judicial appointments for Cabinet approval	X
Requirement to table statement of reasons in respect of appointment contrary to panel advice	✓	X	X

¹ Mark Dreyfus, 'Albanese Government to Abolish Administrative Appeals Tribunal' (Media Release, 16 December 2022) <<https://www.markdreyfus.com/media/media-releases/albanese-government-to-abolish-administrative-appeals-tribunal-mark-dreyfus-kc-mp/>>.

² Ibid.

Guidelines for appointments to the AAT

Following the abolition of the AAT, the Government announced Guidelines for appointments to the Administrative Appeals Tribunal (**the Guidelines**).³ The purpose of the Guidelines was to facilitate the making of appointments before legislation establishing the new body was enacted. Salient requirements of the Guidelines include the following:

- Public advertisement of available positions; at a minimum on the APSJobs website and in the national press⁴
- Assessment of applicants' claims against the selection criteria by a panel⁵
- Report provided by the panel setting out the applicants it considered and found suitable for appointment and including its reasoning⁶
- Use of the panel report by the Attorney-General to recommend non-judicial appointments for Cabinet approval⁷

It is evident from these requirements that the benefit of requiring minimum forms of advertising and involving selection panels in the appointments process was previously recognised by the Government, which makes it difficult to understand the failure to include such provisions in the Bill itself.

Comparable legislation

Currently, Australia's best-practice legislated appointment standards are those relating to the appointment of non-executive Directors to the Boards of the Australian Broadcasting Corporation and Special Broadcasting Service.

This process, provided for under Part IIIA of the *Australian Broadcasting Corporation Act 1983* (Cth) (**ABC Act**) and Part 3A of the *Special Broadcasting Service Act 1991* (Cth) (**SBS Act**), is detailed in Appendix A to this submission, and graphically represented at Figure 1 below.

By contrast, the proposed process for ART appointments is set out at Figure 2 and described further below.

³ Attorney-General's Department (Cth), 'Guidelines for Appointments to the Administrative Appeals Tribunal (AAT)' (15 December 2022) <<https://www.ag.gov.au/legal-system/publications/guidelines-appointments-administrative-appeals-tribunal-aat>>.

⁴ Ibid. See guideline 3.

⁵ Ibid. See guideline 6.

⁶ Ibid. See guideline 10.

⁷ Ibid. See guideline 12.

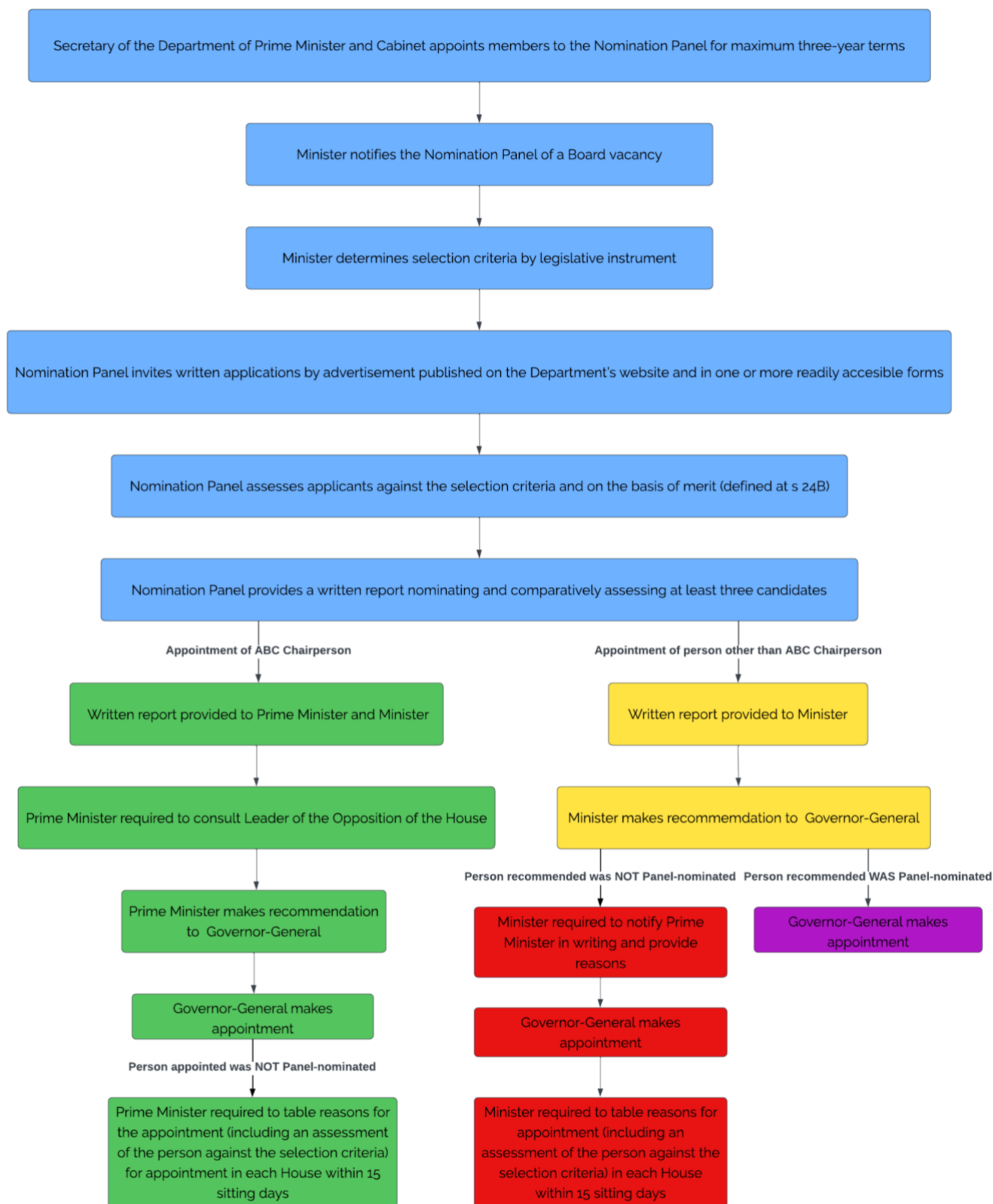


Figure 1. Appointments process under the ABC Act⁸

⁸ Process used for the appointment of non-executive Directors.

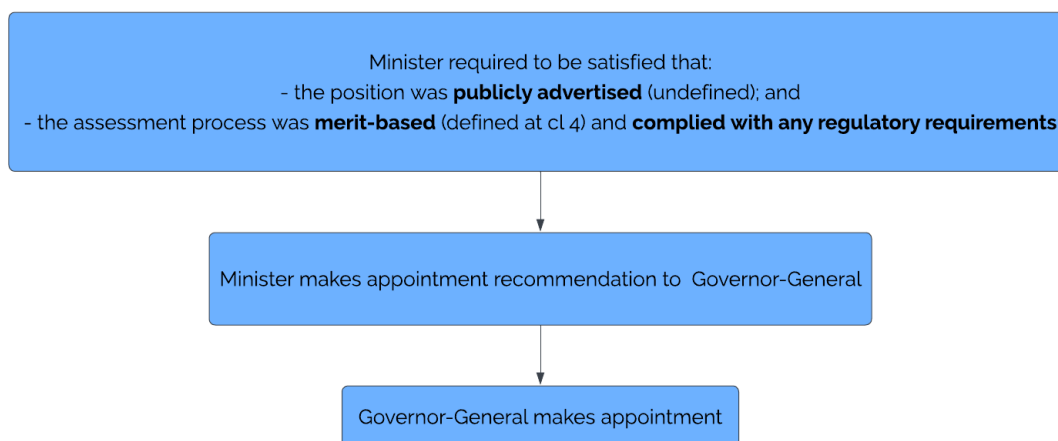


Figure 2. Appointments process under the ART Bill⁹

Appointments under the Administrative Review Tribunal Bill

Regrettably, the process for the appointment of members proposed by the Bill is inferior to those which are established by the Guidelines and the ABC and SBS Acts.

Division 3 of Part 8 of the Bill sets out its member appointment provisions.

Clauses 205, 207 and 208 require that before recommending, to the Governor-General, that a person be appointed as President, Non-Judicial Deputy President, or senior or general member, the Minister must be satisfied that:

- the position was publicly advertised; and
- the assessment process was merit-based and complied with any requirements in the regulations.¹⁰

The reason for the omission of this requirement in relation to the appointment of Judicial Deputy Presidents is unclear, given that the requirement appears in relation to the appointment of the President (who will also be a member of the judiciary).

Requirement to publicly advertise positions

We welcome the Bill's requirement that positions be publicly advertised. In our view, however, this requirement should be set out with greater specificity (as in the Guidelines and ABC/SBS Acts). This specificity should extend to a minimum number of days for which an advertisement must be available.

⁹ Process proposed to be used for the appointment of Presidents, Non-Judicial Deputy Presidents, senior members, and general members, and the Principal Registrar.

¹⁰ As noted above, pursuant to clause 227 this process also applies to Registrars. Given their administrative function we do not propose that the recommendations set out in this paper should apply to them.

While these are, of course, matters that can be dealt with by regulation (and we note that the Act requires compliance with requirements set out in the regulations), their significance in ensuring genuine openness in the appointments process is such that they should be enshrined in primary legislation.

Requirement that assessment process be merit-based

The requirement that appointments be merit-based is problematic in light of the definition of "merit-based" at clause 4 of the Bill.

Clause 4 states that an assessment for an appointment is only merit-based if:

- (a) an assessment is made of the comparative suitability of the candidates for the duties of the office, using a competitive selection process; and
- (b) the assessment is based on the relationship between the candidates' skills, expertise, experience and knowledge and the skills, expertise, experience and knowledge required for the duties of the office; and
- (c) the assessment takes into account the need for a diversity of skills, expertise, lived experience and knowledge within the Tribunal.

We welcome the inclusion of a definition that requires an assessment of comparative suitability taking into account skills, expertise, experience and knowledge, as well as the recognition of the need for a diversity of skills, expertise, lived experience and knowledge within the Tribunal. We consider this to be a model provision which should be adopted generally in legislation establishing public office appointment processes.

However, the paragraph (a) requirement of a 'competitive selection process' is vague and unable to guarantee the Government's promise of merit-based appointments.

In our view, the only way to guarantee that appointments to the proposed Administrative Review Tribunal are merit-based is to:

- I. mandate the use of appropriately-constituted assessment panels in the appointments process; and
- II. preferably, require that the Minister makes appointments from a shortlist created by these panels; or
- III. alternatively, in the case that that option (II) cannot be achieved, require that the Minister table a statement of reasons in any case where an appointment is made against panel advice.

Assessment panels

In respect of the role that assessment panels may play in the proposed ART appointments process, we note that clause 209(1) of the Bill confers upon the Minister power to establish

assessment panels to assess candidates for appointment. At no other point in the Bill are assessment panels referred to, with no requirement to establish a panel or involve one in a selection process — let alone for the Minister to act only on the advice of the panel by appointing from amongst its shortlisted candidates (or, at a minimum, report to the Parliament where it deviates from the panel's list). The use of panels in the ART appointment process as currently proposed is therefore entirely discretionary.

Pursuant to clause 209(2), the regulations may 'make provision for or in relation to assessment panels'. It is our view that any provisions relating to the function or composition of assessment panels would be best placed in primary, rather than secondary, legislation.

For the reasons described above, we make the following recommendations in respect of the proposed appointments process.

Recommendation 1: Establish specific minimum requirements relating to advertising of positions at clauses 205(2)(b)(ii), 207(2)(b)(ii), and 208(2)(b)(ii) of the Bill.

These should combine the minimum requirements established by Guidelines and the ABC/SBS Acts and require that positions are advertised on the APSJobs website, the Department's website, in the national press and in at least one additional form readily accessible by potential applicants.

Recommendation 2: Mandate the use of appropriately-constituted assessment panels in the appointments process.

Recommendation 3: Make appointments genuinely independent of the executive, by requiring that the Minister only appoint candidates assessed as suitable by the assessment panel.

Recommendation 4: If recommendation 3 is unable to be achieved, require that the Minister table a statement of reasons in any case where an appointment is made contrary to panel advice.

Statutory review clause

The ART Bill in its current form lacks a statutory review clause. We strongly support the inclusion of such a clause, considering the scale of reform that the Bill seeks to achieve.

Any such clause should:

- specify who is qualified to undertake the review;
- mandate the minimum issues to be considered;
- require that the review report be commenced within a specified time, and completed within a specified time; and
- require that the completed report be tabled within a specified time.

Recommendation 5: Insert a review clause structured as follows.

- (1) The Minister must cause a review to be undertaken of the first 3 years of the operation of:**
 - a) this Act; and**
 - b) the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024**
- (2) The review must commence no later than 3 years and one month after the day on which the Act commences.**
- (3) The review must be completed no later than 12 months after the day on which it commences.**
- (4) The review must be conducted by an expert panel comprised of 3 members appointed by the Minister.**
- (5) The 3 members of the expert panel must include:**
 - a) a former judge of the High Court of Australia, or of the Federal Court of Australia, or of a Supreme Court of a State or Territory;**
 - b) a person with experience in community advocacy and engagement relating to matters dealt with by the Act; and**
 - c) a person with significant knowledge or experience relating to matters dealt with by the Act**
- (6) A proposed member of the expert panel must not be any of the following**
 - a) a current employee or executive of any entity to which the Public Governance, Performance and Accountability Act 2013 (Cth) applies;**
 - b) a current employee or executive of a registered political party; or**
 - c) a current or former Member of federal Parliament, or a current or former member of a state or territory Parliament.**
- (7) The review must include, but is not limited to, consideration of:**
 - a) the Act's provisions in respect of appointments and eligibility**
 - b) the Act's provisions in respect of the Administrative Review Council**
 - c) the Act's provisions in respect of issues of significance;**
 - d) the Act's provisions in respect of the guidance and appeals panel; and**
 - e) emerging practice both domestically and internationally in respect of any matter dealt with by the Act**
- (8) The review must include an opportunity for any interested person, including members of the public, to make written submissions on the operation of this Act.**
- (9) An entrusted person must, if requested to do so by the persons undertaking the review, assist them in:**
 - a) conducting the review; and**
 - b) preparing the written report.**
- (10) The Minister must cause a copy of a report of the review to be laid before each House of Parliament as soon as reasonably practicable after the review is completed, and at most seven days after it is completed.**

Appendix A

The appointment of non-executive Directors to the Boards of the Australian Broadcasting Corporation and Special Broadcasting Service is provided for under Part IIIA of the *Australian Broadcasting Corporation Act 1983* (Cth) (**ABC Act**) and the *Special Broadcasting Service Act 1991* (Cth) (**SBS Act**). Below is a description of the salient features of that process: citations provided are to the ABC Act, but the process is mirrored in the SBS Act.

Nomination Panel

Central to the merit-based process which the ABC and SBS Act seek to guarantee is the role of the Nomination Panel. Under ss 24A and 24E of the ABC Act, a Nomination Panel must be established consisting of a Chair and at least two, and not more than three, other members.¹¹ Members of the Panel are appointed by the Secretary of the Department of the Prime Minister and Cabinet for maximum three-year terms, and the Secretary is required to give notice on the Prime Minister's Department's website of each appointee to the Panel (s 24F). The Nomination Panel is not subject to direction by the Government (s 24C) and it has all the privileges and immunities of the Crown in right of the Commonwealth (s 24D).

Selection criteria

Under s 24W(1), the Minister is required to determine selection criteria by legislative instrument. The Minister is also able to provide to the Nomination Panel a written notice of additional selection criteria (s 24W(2)).

Selection process

The Nomination Panel is required to conduct a selection process for all Board appointments (s 24B(1)(a)). It must:

- invite written applications for Board vacancies by advertisements published on the Department's website, as well as in one or more forms readily accessible by potential applicants (s 24B(3));
- assess all applicants against the specified selection criteria (s 24B(1)(b));
- assess all applicants on the basis of merit, defined at s 24B(2) (s 24B(1)(c)); and
- provide a written report to the Minister (in the case of a Board appointment other than the Chairperson), or to the Prime Minister and Minister (in the case of the appointment of the Chairperson). This report must nominate at least three candidates for appointment and contain a comparative assessment of them (s 24B(1)(d)).

¹¹ Pursuant to s 3 of the *Special Broadcasting Services Act 1991* (Cth), the Nomination Panel referred to in that Act is the same as the Nomination Panel established at s 24A of the *Australian Broadcasting Corporation Act 1983* (Cth). The requirements established in respect of a merits-based appointments process by the ABC Act are mirrored in the SBS Act, though only the ABC Act provisions are cited in this study.

If the Nomination Panel gives the Prime Minister a report nominating candidates for appointment as Chairperson, the Prime Minister is required to consult the Leader of the Opposition in the House of Representatives before making a recommendation to the Governor-General (s 24X(1)).

If the Minister recommends to the Governor-General a person for appointment as a Non-Executive Director (other than Chairperson) who was not nominated by the Nomination Panel, the Minister is required to provide to the Prime Minister in writing the name of the person and the reasons for preferring that person (s 24X(3)).

Should a person who was not nominated be appointed, the Minister (or Prime Minister, in the case of Chairperson appointments) is required to table reasons, that include an assessment of the person against the selection criteria, in each House within 15 sitting days of the appointment (ss 24X(4); 24X(2)).

Under s 12 (5AB) of the ABC Act, a former parliamentarian or senior political staff member can only be appointed as a non-executive Director if they have been nominated by the Nomination Panel.

Definition of merit

Section 24B(2) provides that an appointment is made on the basis of merit if:

- (a) an assessment is made of the comparative suitability of the applicants for the duties of that Director, using a competitive selection process; and
- (b) the assessment is based on the relationship between the applicants' experience, skills and competencies and the experience, skills and competencies genuinely required for the duties of that Director; and
- (c) the assessment focuses on the capability of the applicants to achieve outcomes related to the duties of that Director; and
- (d) the assessment is the primary consideration in nominating the candidates for that appointment.

We note that the description of the nature of the assessment required at paragraph (b) of clause 4 of the ART Bill, and the paragraph (c) requirement to consider the need for diversity within the Tribunal, is superior to this definition.

Additional transparency measures

Under s 24Y, the Prime Minister's Department's annual report must include a statement in relation to each Board appointment completed in the relevant financial year.