

PACKED, STACKED AND ATTACKED:

THE IMPORTANCE OF ADMINISTRATIVE TRIBUNAL REFORM THAT LEARNS FROM THE PAST AND SUFFICIENTLY PROTECTS MEMBER INDEPENDENCE

I INTRODUCTION

Federal Australian tribunals have contradictory imperatives to maintain both a level of independence from primary decision makers while being bound by a constitutional reality that they exist in and are affected by the same executive branch as those primary decision makers. The public have come to expect, and indeed take for granted, the existence and fairness of merits review notwithstanding these structural risks nor any policy influences of a government of the day. They must, however, recognise that merits review is a check on executive power provided by parliament.¹ It is an unenthusiastic concession from those who currently wield political power. This context has characterised the Administrative Appeals Tribunal (AAT), which has been mired in actual and attempted political influence widening the distance between public expectations of independence and reality. In its rebirth, the current Attorney General has taken steps to rectify many issues with the AAT through the Administrative Review Tribunal (ART) Bill. Whilst introducing structural improvements in areas, a continuing practice of leaving safeguard requirements as discretionary or up to convention risks continued weak legislative protections against influence by this and future governments. This essay will first discuss why member independence affects achieving tribunal objectives, then it will discuss the efficacy of changes being made in areas affecting ART members' independence.

II OBJECTIVES OF MERITS REVIEW AND POLITICS

“A person aggrieved by a decision of a Commonwealth official ... will generally feel that the decision was wrong on the facts or merits of the matter”.² The AAT provided appellants an opportunity to have the merits of their matter reconsidered, however, as it exercised executive authority, it was subject to the policies of the government of the day. Per Drake, the political process in determining policy involves

¹ Where the executive typically commands a working majority in the lower house.

² Commonwealth, *Commonwealth Administrative Review Committee Report* (Parliamentary Paper No 144, 1971).

voters, ministers and parliament - not the tribunals which adopt a practice of “applying lawful ministerial policy”.³ Doing so “effectively, efficiently and fairly” is the new ART’s objective.⁴ But how does member independence affect this objective? While “applying lawful ministerial policy” ought to elicit consistent results (Drake), independent review members need the skills and confidence to think independently and challenge original decisions when appropriate.⁵ The Robodebt scheme illustrated the potential effect of a politicised AAT membership in failing to detect the unlawful nature of a government’s policies in any of the reviews it considered.⁶ Hence, achieving tribunal objectives through securing its independence does not necessarily mean making a tribunal that overturns more primary decisions, but rather enhancing public trust in the quality of decisions.

III MEMBER TENURE

AAT members do not possess security of tenure until retirement age but rather are appointed on predetermined renewable fixed terms up to 7 years.⁷ It has been a generally held view that such a system provides a high degree of flexibility to the tribunal in dealing with fluctuating needs over time.⁸ AAT members are however generously paid for their work which has been argued to increase the incentive for members to act in a way beneficial to attaining reappointment.⁹ The Executive Committee, especially during the time preceding the expiry of a member’s term, may have indirect influence over the member’s behaviour. As the member reviews the decisions of a government’s ministers and departments, those same ministers via the Executive Committee possess the discretion to determine their reappointment.¹⁰ This influence can be more overtly exerted with the Executive Committee’s discretion to determine member terms. Many appointments have been made with terms shorter than a parliamentary term (3 years) to ensure

³ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 (‘Drake 2’), 645 (Brennan J).

⁴ Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth), 2 [9].

⁵ *Drake 2* (n 2) 644 (Brennan J).

⁶ Matthew Groves and Greg Weeks, ‘Tribunal Justice and Politics in Australia: The Rise and Fall of the Administrative Appeals Tribunal’ (2023) 97(4) *Australian Law Journal* 27, 289.

⁷ *Administrative Appeals Tribunal Act 1975* (Cth) s 8(3).

⁸ James Morgan, ‘Securing the Administrative Appeals Tribunal’s independence: Tenure and mechanisms of appointment’ (2018) 43(4) *Alternative Law Journal* 302, 304.

⁹ Groves and Weeks (n 5) 290.

¹⁰ Morgan (n 7) 304.

the same government can revisit a member's appointment before an election.¹¹ Likewise, some appointments are made for 7 years to secure a member's term for the life of the next one/two parliamentary term/s.¹²

The new ART Bill takes steps to address the potential arbitrary use of the tenure discretion by increasing transparency and therefore accountability. There is now a default and maximum 5 year term length.¹³ Shorter appointments are permitted but individual reasons must be provided on the appointing instrument.¹⁴ Whilst not airtight, increased scrutiny may have governments reconsider using tactics of the past. A more fit for purpose solution would be to fix term lengths to five years and evenly stagger expiry years to balance tenure security, flexibility to scale and the typical number of appointments a government is entitled to make per parliamentary term. Such a solution will however limit this and future government's influence over the new ART makeup and is not being considered.

IV APPOINTMENT PROCESS

A *Appointments before elections*

Prior to the 2022 May Australian federal election, the Governor-General on the recommendation of the Morrison Executive Council, reappointed 26 members of the AAT to new terms prior to the expiry of the term they were serving.¹⁵ One such member was Karen Synon, who was reappointed as a Deputy President effective May 9 despite her previous appointment expiring December 16 later that year.¹⁶ This is of issue because whereas the December expiry fell after the election, giving a successfully elected government the choice to determine Ms Synon and others' position, the early reappointment effectively provided the former government additional AAT appointments. Applying this practice to the extreme would essentially

¹¹ Administrative Appeals Tribunal, *Administrative Appeals Tribunal Table of Statutory Appointments* (13 March 2024) <http://www.aat.gov.au/AAT/media/AAT/StatutoryAppointments.pdf>.

¹² *Ibid.*

¹³ Administrative Review Tribunal Bill 2023 (Cth) s 208(5).

¹⁴ *Ibid* s 208(6).

¹⁵ Senator the Hon Michaelia Cash, 'Appointments to the Administrative Appeals Tribunal' (Media Release, 4 April 2022).

¹⁶ Administrative Appeals Tribunal, *Administrative Appeals Tribunal Table of Statutory Appointments* (13 March 2024) <http://www.aat.gov.au/AAT/media/AAT/StatutoryAppointments.pdf>.

extend the maximum appointable term of a member friendly to a government, from 7 years to the life of the government plus 7 years. Naturally, there are undecided legal questions relating to this practice raised by Mason and Katz regarding the validity of these appointments since a government could not likewise act to appoint a judge whose retirement/resignation fell outside their term.¹⁷

Episodes like this are problematic to fulfilling tribunal goals as they can be perceived as cronyism and undermines public confidence in candidate quality and tribunal decisions. To date, concentrating appointments before an election is not expressly prohibited by the AAT Act but rather caretaker government conventions, where governments ought not to make permanent and major appointments.¹⁸ Unfortunately, the ART Bill endorses and formalises this practice by allowing reappointments to be made up to 6 months before a member's term expires.¹⁹ There likewise is no codification of caretaker conventions as it relates to these appointments. This means that this and future governments, should they choose, may again secure favoured ART members' tenures for over a parliamentary term beyond an approaching election, since default appointments are 5 years long.

B *Minister's discretion and Appointment Panels*

Like courts, tribunals have always lacked control over their membership, which is typically an "unbridled power" exercised by the executive limited only by legislation, "tradition, constitutional convention and responsible government".²⁰ Also like courts, the Governor-General's role in appointments is established firmly by convention that he only acts upon Executive Council advice.²¹ So while the AAT Act does impose qualifications on members, they are viewed as so broad as to "provide only very limited restrictions on this appointment discretion".²² Under the AAT Act, a member must either be a lawyer (at least 5 years) or possess "special knowledge or skills".²³ Notwithstanding only one of these conditions need to be met,

¹⁷ Groves and Weeks (n 5) 291.

¹⁸ Department of the Prime Minister and Cabinet, 'Guidance on Caretaker Conventions' (2021) 3.

¹⁹ Administrative Review Tribunal Bill 2023 (Cth) s 208(8).

²⁰ Groves and Weeks (n 5) 286-287.

²¹ Australian Government Solicitor, *Australia's Constitution: With Overview and Notes by the Australian Government Solicitor* (Parliamentary Education Office, revised ed, 2001) xi.

²² Morgan (n 7) 304.

²³ *Administrative Appeals Tribunal Act 1975* (Cth) s 7(3)(b).

the “merit” like criteria is ineffective as “unless merit is broken down into its constituent elements, the concept becomes almost wholly subjective”.²⁴ Governments have and will find it reasonably easy to find prospective members amenable to certain policy perspectives.

In 2008, the Rudd Government attempted to qualify the selection process with a system of expressions of interests.²⁵ However, upon a change in government, this policy was rescinded in 2013. The ART Bill introduces the concept of assessment panels a Minister may create to evaluate prospective members.²⁶ Indeed the explanatory memorandum of the bill states that an expectation should exist that the panel evaluate candidates before a minister’s selection.²⁷ Independent assessment goes a long way to providing assurance that candidates are genuinely qualified and deserving of their appointment. The Law Council of Australia fairly notes that despite this expectation, the bill places no obligation that this panel be created, nor that the Minister must consult them.²⁸ Combined with the fact the bill provides the government discretion as to what factors to assess, this bill provides no safeguard that this panel need be used. A future government can bypass this process without legislative change, similar to how the Administrative Review Council (ARC) was discarded in 2015.²⁹

C *Publication of appointments*

The current AAT Act does not require the government nor Governor -General to publish appointments in any consistent manner. By convention, governments have generally published appointments individually in the Government Gazette.³⁰ However, when the Morrison Executive Committee made appointments in the waning days of the 46th Parliament (May 2022), a single page press release grouping 40+ appointments was provided without relevant or adequate information regarding members’ appointment length and start

²⁴ Lenny Roth, *Judicial Appointments Briefing Paper No 3/2012* (NSW Parliamentary Library Research Service, 2012) 3.

²⁵ Groves and Weeks (n 5) 287.

²⁶ Administrative Review Tribunal Bill 2023 (Cth) s 209(1).

²⁷ Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth), 178 [1237].

²⁸ Law Council of Australia, Submission No 28 to House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (2 February 2024) 43.

²⁹ Groves and Weeks (n 5) 292.

³⁰ D. Crowe, “Secrets and allies in stacked tribunal”, *Sydney Morning Herald* (23 September 2022).

date.³¹ The AAT register was updated 3 months later and media and scholar attention regarding the lawfulness of some of these appointments was only triggered over 4 months after the announcement.³²

The ART Bill makes no change in the legislative wording surrounding appointment procedures. The sole and undefined (in both the ART and Acts Interpretation Act) criteria is that appointments are done so by “written instrument” which remains identical to the wording in the AAT Act.³³

V MEMBER BACKGROUNDS

In 2022, an Australia Institute report studying AAT appointments found that political appointments as a proportion of total appointments had reached 40%.³⁴ The majority of these appointees were previously an elected representative or adviser.³⁵ These political appointees had different career experiences to other members in that they tended to have less legal or other tertiary education and less legal work experience.³⁶ They also tended to have spent the period immediately before appointment involved in politics. Indeed there are recounts of a Deputy President reading administrative law textbooks on their vacation to prepare for their unexpected appointment to the AAT.³⁷ The trouble with such practices is that it potentially seats subpar candidates and can increase inconsistency between decisions.

AAT Decisions (2015 - 2022)

	62 ALP Appointees				111 LNP Appointees			
	Raw		Adjusted per member		Raw		Adjusted per member	
Affirmed	6,397	82%	103	82%	16,328	90%	147	83%
Set Aside	1,418	18%	23	18%	1,813	10%	29	16%

³¹ Senator the Hon Michaelia Cash, ‘Appointments to the Administrative Appeals Tribunal’ (Media Release, 4 April 2022).

³² Administrative Appeals Tribunal, *Administrative Appeals Tribunal Table of Statutory Appointments* (13 March 2024) <http://www.aat.gov.au/AAT/media/AAT/StatutoryAppointments.pdf>.

³³ Administrative Review Tribunal Bill 2023 (Cth) s 208(1).

³⁴ Debra Wilkinson and Elizabeth Morison, ‘Cronyism in appointments to the AAT’ (Discussion paper, The Australia Institute, May 2022) 20.

³⁵ *Ibid* 19.

³⁶ *Ibid* 25-28.

³⁷ Groves and Weeks (n 5) 288.

We can observe said inconsistencies by analysing trends in the raw data provided by the Kaldor Centre Data Lab.³⁸ Whilst ALP and LNP appointee decisions adjusted per member are very similar (82-18 and 83-16), ALP appointee decisions are consistent across their cohort whereas LNP decisions are not (82-18, 82-18 and 90-10, 83-16). This data suggests that there is greater variance in decisions by LNP appointees specifically at a time where LNP political appointments were at their highest. It is, however, important to note the limitations of this data and dangers in accepting it as is since it does not consider individual case circumstances.³⁹

The ART Bill addresses qualification concerns by changing the “special knowledge or skills” criteria to 5+ years “specialised training or experience”.⁴⁰ This raises the minimum standard for members. The Bill does not however directly address issues of political appointments by instituting an exclusion period for elected representatives, advisers and staffers, per some recommendations.⁴¹

VI CONCLUSION

Whereas courts enjoy constitutional and case law protection against executive and legislative influence over their institutional integrity, tribunals as part of the executive do not.⁴² This is why legislative protections are so important to securing systems that promote tribunal independence. The ART represents a renewal initiative by a first term government to overhaul a politically influenced institution whose independence has long been questioned by critics and members of the current government alike.⁴³ However, the measures in the ART Bill currently only provides some guarantees of the tribunal’s independence. This essay uses the words “by convention” and “tradition” numerous times because going

³⁸ Kaldor Centre for International Refugee Law, ‘AAT data’, *Kaldor Centre Data Lab* (Spreadsheet, 18 March 2024) <<https://www.unsw.edu.au/kaldor-centre/our-resources/kaldor-centre-data-lab>>.

³⁹ Kaldor Centre for International Refugee Law, ‘AAT explanatory statement for Kaldor Centre’, *Kaldor Centre Data Lab* (Explanatory Statement, 5 August 2022) <<https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/kaldor-centre/2023-05-data/2023-05-AAT-Statement-to-Kaldor-Centre-050822.pdf>>.

⁴⁰ Administrative Review Tribunal Bill 2023 (Cth) s 208(4)(b).

⁴¹ The Australia Institute, Submission No 58853531 to Attorney-General’s Department, *Administrative Review Reform Issues Paper* (May 2023) 4.

⁴² Groves and Weeks (n 5) 286-287.

⁴³ J. Macmillan, “Federal Government slammed for stacking Administrative Appeals Tribunal with ‘Liberal mates’”, *Australian Broadcasting Corporation* (22 February 2019).

forward, many tribunal best practices continue to only be secured through these unenforceable means. With only partial safeguards to the strength of its independence, this bill only moderately achieves the goals of improved appellant experiences and effective, efficient and fair review as relevant to those respects.