

# Public Appointments Framework

## Guaranteeing merit and independence

Briefing paper

June 2022

The processes relating to Commonwealth public appointments are frequently opaque,<sup>1</sup> with the public unable to have confidence in appointees' independence and merit. This is particularly problematic in the case of appointments to critical accountability institutions like the Administrative Appeals Tribunal. For the public to have confidence in these bodies, their members must be – and be seen to be – impartial.

In order to promote merits-based, transparent appointments, and restore public trust in appointees' independence, the Centre for Public Integrity has developed a Public Appointments Framework consisting of the following recommendations:

- 1) The existing Commonwealth Merit and Transparency Policy (*the Policy*) be strengthened by the inclusion of additional requirements relating to:
  - Clear criteria and appropriate minimum eligibility thresholds
  - Public advertising of vacancies
  - Independent selection panels
  - The making of appointments on the basis of panel recommendations
- 2) The requirements of this bolstered Policy be enshrined in legislation and their application broadened.
- 3) A joint cross-party parliamentary committee be established in order to provide an additional protection in respect of specific appointments, and to provide ongoing oversight and accountability of the integrity of appointment processes.

### Politicised appointments undermining public trust

For the purposes of this briefing paper, the term 'public appointments' includes any appointment made to a position that constitutes an accountable authority under the *Public Governance Performance and Accountability Act 2013 (Cth) (PGPA Act)*. This captures relevant appointments to all corporate and non-corporate Commonwealth

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<sup>1</sup> The term 'public appointments' is used in this briefing paper to include any appointment made to a position that constitutes an accountable authority under the *Public Governance Performance and Accountability Act 2013 (Cth) (PGPA Act)* (this is further explicated below).

entities, as well as to Commonwealth companies,<sup>2</sup> and includes positions like Department Secretaries, statutory offices like that of the Auditor-General, and government boards like the Australian Broadcasting Corporation Board.

On 4 April 2022, a week before the former Government entered caretaker mode, the former Attorney-General made six appointments to the Administrative Appeals Tribunal that were reportedly linked to the Liberal party – amongst them a former New South Wales Liberal Minister, and chief of staff to Scott Morrison, both of whom were appointed senior members.<sup>3</sup> These roles are handsomely remunerated, with full time employees receiving at least \$330,000.<sup>4</sup> Accusations have also been made of politicisation in respect of appointments to the Fair Work Commission.<sup>5</sup>

In addition to such reported cases, publicly available information about appointment processes suggests that they frequently lack sufficient robustness (the process for appointments to the ABC/SBS Boards, set out at Appendix A, is a notable exception).<sup>6</sup> The *Commonwealth government business enterprises – governance and oversight guidelines* state that “Additional processes for identifying board candidates such as public advertising or the use of executive search processes may be undertaken by agreement with Shareholder Ministers, to help ensure appointments are drawn from the best possible field of candidates [emphasis added]”,<sup>7</sup> and a recent invitation to members of the public to submit an expression of interest for appointment to the AAT advises that “The AAT may decide to conduct an interview process to assess the suitability of candidates [emphasis added]”.<sup>8</sup>

In these circumstances there is a clear case for overhauling public appointment processes in order to increase independence, transparency and promote public trust, via our proposed Public Appointments Framework.

## Clear criteria

Public appointments should only be made on the basis of clear criteria to be agreed upon by the relevant agency head and Minister.

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<sup>2</sup> For example, Departments are non-corporate Commonwealth entities, the Reserve Bank of Australia is a corporate Commonwealth entity and NBN Co Limited is a Commonwealth company.

<sup>3</sup> Paul Karp, “Pru Goward among six Liberal-linked appointments by Coalition to Administrative Appeals Tribunal”, The Guardian, 4 April 2022

<https://www.theguardian.com/australia-news/2022/apr/04/pru-goward-among-six-liberal-linked-appointments-by-coalition-to-administrative-appeals-tribunal> accessed 20 June 2022.

<sup>4</sup> Ibid.

<sup>5</sup> Paul Karp, “Coalition stacking Fair Work Commission with mates, Labor says”, The Guardian, 7 April 2018 <https://www.theguardian.com/australia-news/2018/dec/07/coalition-stacking-fair-work-commission-with-mates-labor-says> accessed 20 June 2022.

<sup>6</sup> The ABC/SBS Board appointment process is a robust process at all stages except its conclusion, where the Prime Minister can table reasons justifying the appointment of a person who has not been recommended by the Independent Nomination Panel (see below).

<sup>7</sup> Department of Finance, *Government Business Enterprises (GBEs) (RMG 126)* <https://www.finance.gov.au/publications/resource-management-guides/government-business-enterprises-gbes-rmg-126> accessed 20 June 2022.

<sup>8</sup> Attorney-General's Department, *Expressions of Interest for Appointment to the Administrative Appeals Tribunal* <https://www.ag.gov.au/about-us/careers/statutory-appointments/expressions-interest-appointment-administrative-appeals-tribunal> accessed 20 June 2022.

This is consistent with the existing requirement of the Merit and Transparency policy that "selection for agency heads and statutory office holders should be made against a set of selection criteria" (cl 2.6.1).

Careful consideration also needs to be given to the minimum legislated criteria required to perform certain statutory appointments (see "*The Administrative Appeals Tribunal: a special case*" below).

### **Public advertising**

Public advertising of public appointment vacancies is vital for the transparency of the process. Consistent with the Merit and Transparency Policy (cl 2.6.2), vacancies – along with the established criteria, and information about the independent selection panel (set out below) – should be advertised with Australian Public Service jobs and the national media for a minimum set period.

Public advertising is also important because it ensures that the vacancy is visible to the greatest number of potential applicants, increasing the talent pool.

### **Independent selection panel**

An independent selection panel must be formally established and involved in the recruitment process for public appointments. This panel must consist of, at a minimum, the relevant agency head and the Australian Public Service Commissioner (or their representative), with the latter able to nominate additional members. The names of all panel members must be included in the vacancy advertisement as a transparency measure.

Rather than convene a new panel each time a statutory vacancy is to be filled, the ABC/SBS Board Nomination Panel model set out at Appendix A could be adopted (with some modification in respect of the process via which members are appointed to this panel), and function as a standing panel responsible for all appointments to a relevant agency, or to a portfolio under which a number of agencies fall, for a set period.<sup>9</sup> In the case that such a standing panel were to be appointed, there could be capacity to appoint one additional person on an ad hoc basis in order to allow for specific input from representatives of the body to which a person is being appointed.

The panel would have the following roles:

- assessing applicants against the published criteria
- producing a shortlist of interviewees
- conducting the interview process
- producing a shortlist of recommended candidates for the relevant minister.

In the case of a lack of panel consensus on the recommended candidate shortlist, a majority decision would suffice.

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<sup>9</sup> See Appendix A.

The independence of the panel process would be bolstered by the adoption of the recommendation by the 2019 Independent Review of the Australian Public Service, led by David Thodey AO, in respect of secretaries' tenure: specifically, the Review recommended that the *Public Service Act 1999* (Cth) be amended in order to allow termination only on legislated grounds, or that the APS Commissioner and PM&C Secretary develop a policy governing what must be done before the Prime Minister is provided with advice in relation to a proposed termination govern the termination of secretaries' appointments. A reform of this kind would allow for greater confidence in the ability of Secretaries to act independently of any political pressure.

#### *Additional protection for specific appointments*

Where the appointment is to a position that would have oversight of the Public Service Commissioner, it would be appropriate that the Commissioner should not sit on the panel and a judge of the Federal Court should sit in their place.

### **Appointments to be made on the basis of panel shortlist**

Ministers (or in relevant cases the Governor-General, on the advice of the Minister) must only appoint persons shortlisted by the panel. Such a requirement would strike the right balance between allowing the relevant Minister to retain an appropriate degree of discretion, while still providing for a robust appointment process.

#### *Additional protection for specific appointments*

There are a number of public appointments that are of such significance they would benefit from an additional guarantee of merit and independence, and in relation to which it is desirable that the parliament plays a role: these include the Auditor-General, who is an independent officer of the parliament, other officers who report directly to the parliament (as presumably the Commissioners of the to-be-established Integrity Commission will do), and those who provide vital oversight and accountability of government, including the Ombudsman and Electoral Commissioner.

In respect of these appointments we propose that a joint cross-party parliamentary standing committee on appointments be established, and that its composition rules should ensure it is not executive-dominated. Once the relevant Minister has determined which panel-shortlisted candidate to appoint, the committee should be consulted by the Minister in respect of the proposed appointment, with its opinion to be tabled in both Houses.

### **Report to be tabled when appointment is made**

Upon the Governor-General making an appointment, the relevant Minister must table in both Houses a report from the panel confirming that the appointee meets all selection criteria, and stating their qualifications and experience. Such a requirement would increase transparency of the appointments process, and thereby public trust.

### **Oversight of the integrity of appointment processes**

The proposed joint cross-party parliamentary standing committee on appointments should also play a role in facilitating oversight and accountability of the integrity of appointment processes. It could do this by receiving on a quarterly basis information from Departments about any statutory appointments made, and reporting to the Parliament on whether those appointments comply with the established framework. A full audit could be undertaken after three years of operation.

### **Application of new framework**

The Centre for Public Integrity recommends that the requirements of this bolstered Policy apply to appointments to any position defined as an 'accountable authority' under the PGPA Act. This would effectively capture relevant appointments to all corporate and non-corporate Commonwealth entities, as well as to Commonwealth companies.

In order for the Policy to be effective, it must be enshrined in legislation. This could be achieved either by it being included in the governing statute of each agency to which relevant appointments are made, with it being made to apply to relevant bodies which are not established by statute via the PGPA Act, or by the Policy being integrated into the PGPA Act and made to apply to any position defined as an 'accountable authority' under that Act.

#### *The Administrative Appeals Tribunal: a special case*

Pursuant to the *Administrative Appeals Tribunal Act (1975)* Cth, the Administrative Appeals Tribunal is responsible for conducting merits review of administrative decisions made under Commonwealth laws. As a consequence of this, it is critically important that the public has confidence in the decisions of the Tribunal.

The appointment practices of successive governments have compromised the agency's independence to such an extent that public confidence in it can only be restored by its dissolution and the establishment of a new body with robust appointment rules. Indeed, the Senate Legal and Constitutional Affairs References Committee recommended in its March 2022 interim report "*The performance and integrity of Australia's administrative review system*" that the Tribunal be disassembled and a new federal administrative review system established by 1 July 2023.<sup>10</sup>

The Centre for Public Integrity proposes that the recommendations set out in this paper in respect of appointment processes apply to appointments to any replacement body, with one variation: the membership of the independent selection panel for Tribunal appointments should include a Federal Court judge nominated by the Chief Justice, as well as the President of the Tribunal (and the Public Service Commissioner).<sup>11</sup>

We also recommend that minimum eligibility criteria for appointment to certain positions at the Administrative Appeals Tribunal be tightened. Under s 7 of the *Administrative Appeals Tribunal Act 1975* (Cth), while a person is not eligible for appointment as

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<sup>10</sup> Senate Legal and Constitutional Affairs References Committee, *The performance and integrity of Australia's administrative review system* [https://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Adminreviewsystem/Interim\\_Report](https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Adminreviewsystem/Interim_Report) accessed 20 June 2022 at p. 96.

<sup>11</sup> This concept is inspired by the Victorian Department of Justice's proposal for such a Tribunal Council to oversee appointments to the Victorian Civil and Administrative Tribunal. This Tribunal Council proposal was, regrettably, not adopted.

President unless they are a Federal Court judge, a person can be appointed Deputy President, senior member or member if they have no legal qualification but "*in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a Deputy President*". Possession of a legal qualification should be a minimum requirement for appointment as Deputy President or senior member, with an additional requirement that such appointees have been enrolled as practitioners for at least five years. In recognition of the value that non-legally qualified members can bring in the form of highly specialised expertise, they should continue to be eligible for appointment as members but unable to make single member decisions (with the effect that a legally-qualified member would be involved in the making of every Tribunal decision).

## Conclusion

For the community to be able to have confidence in public appointments, they need to be made via a robust, transparent process that guarantees merit and independence. In order to achieve this, we propose a new Public Appointments Framework:

- 1) The existing Commonwealth Merit and Transparency Policy (*the Policy*) be strengthened by the inclusion of additional requirements relating to:
  - Clear criteria and appropriate minimum eligibility thresholds
  - Public advertising of vacancies
  - Independent selection panels
  - The making of appointments on the basis of panel recommendations
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## About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham, Geoffrey Watson SC and Professor Gabrielle Appleby. More information at [www.publicintegrity.org.au](http://www.publicintegrity.org.au).<sup>12</sup>

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<sup>12</sup> A note on the research methodology for this briefing paper can be [found here](#).

## Appendix A

### A precedent for merits-based appointments

*Case study: ABC and SBS non-executive Director appointments*

The appointment of non-executive Directors to the Boards of the ABC and SBS is provided for under Part IIIA of the *Australian Broadcasting Corporation Act 1983* (Cth) (**ABC Act**) and the *Special Broadcasting Services Act 1991* (Cth) (**SBS Act**).

#### *Nomination Panel*

Central to the merit-based process that these Acts 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.<sup>13</sup> 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.

#### *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, which is 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)).

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<sup>13</sup> 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 recommending candidates for appointment, 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)).

Should a person who is not nominated be appointed, the Prime Minister is required to table reasons, which include an assessment of the person against the selection criteria, in each House within 15 sitting days of the appointment (s 24X(2)).

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

#### *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.

### **Appointment process steps**

1. Members are appointed to the Nomination Panel by the Secretary of the Department of the Prime Minister and Cabinet for maximum three-year terms, with appointees' names published on PM&C website.
2. The Minister notifies the Nomination Panel of a Board vacancy
3. The Minister determines selection criteria by legislative instrument
4. The Nomination Panel invites written applications by advertisements published on the Department's website, as well as in one or more forms readily accessible by potential applicants
5. The Nomination Panel assesses applicants against these selection criteria and on the basis of merit
6. The Nomination Panel provides a written report recommending at least three candidates, and comparatively assessing them, to:
  - a. the Prime Minister and the Minister, in the case of an ABC Chairperson appointment. The Prime Minister must consult the Leader of the Opposition in the House before recommending the appointment of a Chairperson to the Governor-General; or
  - b. the Minister, in the case of all other appointments.
7. The Minister, or the Prime Minister in the case of the appointment of an ABC Chairperson, must recommend to the Governor-General a person for appointment. If the Minister recommends a person who was not amongst the Nomination Panel's recommendations, the Minister must notify the Prime Minister in writing and provide reasons. If the Governor-General appoints that person, the Minister must table these reasons (which must include an assessment of the person against the selection criteria) in each House within 15 sitting days.