

*James Goh\**

## **SECURING THE ADMINISTRATIVE APPEALS TRIBUNAL'S INDEPENDENCE: TENURE AND MECHANISMS OF APPOINTMENT**

[A]ny member who allowed himself or herself to be persuaded as to an outcome by partisan or political rhetoric by a Minister, any other administrator or the popular press would be unworthy of the trust and confidence placed in him or her by His Excellency the Governor-General and untrue to the oath or affirmation of office which must be taken before exercising the Tribunal's jurisdiction. For those members who do not enjoy the same security of tenure as judges, that may call at times for *singular moral courage and depth of character*.<sup>1</sup>

The Honourable Justice John Alexander Logan

### I INTRODUCTION

The Administrative Appeals Tribunal ('AAT') plays a pivotal role in Australian merits review. For the members of the AAT to adequately play this important role to the standard required, it is necessary that it be independent from undue influence, in a similar vein to the judiciary. Recent controversies surrounding the mass media criticism of the AAT demonstrate an alarming risk that the current mechanism of AAT member appointment may expose the AAT to undue influence by the government of the day.

This paper, after reviewing the background of the AAT and the concerns of the present state of affairs, turns to analysis of several theoretical reforms which may assist in securing the AAT's independence. Several of these proposals are flawed, in that as a side effect they detract from the AAT's flexibility. Nevertheless, the inadequacies of the current system mandate an examination of the possible reforms which may secure the future of independent merits review at the AAT.

### II BACKGROUND

#### A *Role of the AAT*

Since its creation in 1975 as a response to the 'Kerr Committee Report',<sup>2</sup> the AAT has played an important role in the merits review of government decisions. Exercising executive power, the AAT is a general tribunal,<sup>3</sup> with jurisdiction to review

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<sup>1</sup> *Singh (Migration)* [2017] AATA 850 (16 June 2017), [18] (emphasis added).

<sup>2</sup> Commonwealth, *Report of the Commonwealth Administrative Review Committee*, Parl Paper No 144 (1971).

<sup>3</sup> See generally Juliet Lucy, 'Merits Review and the 21<sup>st</sup> Century Tribunal' (2017) 24 *Australian Journal of Administrative Law* 121.

administrative decisions made under more than 400 Commonwealth Acts.<sup>4</sup> Such merits review of government decisions forms a crucial aspect of ensuring both executive accountability and protection from the arbitrary exercise of government power. Indeed, the Honourable Justice Kerr, former President of the AAT, once remarked that '[w]e should never forget how unique and important is the right we have as Australians to seek independent merits review of a public official's decision.'<sup>5</sup>

In reviewing an administrative decision, it is the role of AAT members to stand afresh in the shoes of the original decision maker, and make the 'correct or preferable decision'.<sup>6</sup> This is primarily an exercise in statutory interpretation in the context of any given matter's particular facts, with regard only being had to ministerial policy to the extent that it is consistent with the relevant statute.<sup>7</sup>

### B *Need for Independence*

It naturally follows that AAT members must be independent in order to effectively discharge their duties. Members must be positioned such that their decisions are not influenced by outside considerations, particularly by the government of the day.<sup>8</sup> Were it otherwise, there could be little confidence in the AAT's ability to perform its crucial administrative justice role with impartiality and fairness. Indeed, a Joint Select Committee once stated that 'the independence of appointees to Commonwealth tribunals is of fundamental importance to the effective working of those tribunals'.<sup>9</sup> It is a testament to the importance of this independence, that despite independence not being explicitly evident in the AAT's values,<sup>10</sup> its importance is nevertheless near universally accepted.<sup>11</sup>

In the context of tribunal member appointment, two aspects of independence are of primary concern. Firstly, a member must have freedom from undue influence by government and other external forces.<sup>12</sup> Secondly, a member must possess freedom from retaliation through denial of re-appointment.<sup>13</sup>

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<sup>4</sup> See, eg, Lord Justice Carnwath et al, 'An Overview of Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008) 1, 3.

<sup>5</sup> Justice Duncan Kerr, 'Challenges Facing Administrative Tribunals: The Complexity of Legislative Schemes and the Shrinking Space for Preferable Decision Making' (Speech delivered at the Council of Australasian Tribunals Victoria Twilight Seminar, Melbourne, 18 November 2013) <<http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-duncan-kerr-chev-lh-presid/challenges-facing-administrative-tribunals>>.

<sup>6</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419 (Bowen CJ and Deane J).

<sup>7</sup> See, eg, *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 640 (Brennan J); see also *Hneidi v Minister for Immigration and Citizenship* (2009) 50 AAR 252, 264 [50] (Besanko J).

<sup>8</sup> Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals, Parliament of Australia, *Tenure of Appointees to Commonwealth Tribunals* (1989) xi.

<sup>9</sup> *Ibid* 17.

<sup>10</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 2A; see also Gabriel Fleming, 'Tribunals in Australia: How To Achieve Independence' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008) 86, 100; cf *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8(1)(a)(i).

<sup>11</sup> See, eg, Fleming, above n 10, 86.

<sup>12</sup> Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals, above n 8, 35.

<sup>13</sup> *Ibid*.

The nature of the AAT's work in reviewing government decisions necessitates that it be free from undue interference by government. By way of example, in 2015 the AAT reviewed a decision as to whether a freedom of information request should be granted for access to the diary of the Attorney-General,<sup>14</sup> who wields considerable influence over AAT membership reappointment. It is therefore vital that AAT members have this independence, lest fear of retribution impede their capacity to impartially approach such decisions. Indeed, in the words of Robert Todd, then AAT Deputy President:

[i]t is the essence of the AAT that it be independent. That is the very purpose of its existence. Government is a party in every case before it. This makes the AAT uniquely vulnerable unless its members ... are secure from political influence. Because of this vulnerability, and because the AAT lacks the constitutional, historical and traditional protections enjoyed by the Courts, it is in some respects in even greater need of guarantees of independence than are the Courts.<sup>15</sup>

The current mechanism of AAT member appointment risks compromising this independence of AAT members, and therefore impeding their ability to impartially discharge their duties.

### C *Current Mechanism of AAT Member Appointment*

Under the current system, the Governor-General appoints the AAT membership,<sup>16</sup> on the advice of the Federal Executive Council. Whilst requirements are imposed regarding the qualifications necessary for appointment, they are so broad as to provide only very limited restrictions on this appointment discretion.<sup>17</sup>

Unlike the judicial officers of Chapter III courts,<sup>18</sup> AAT members do *not* enjoy the security of tenure until retirement age,<sup>19</sup> save where they are also such a judicial officer. Instead, AAT members are appointed for a fixed term up to a seven year maximum, and are eligible for re-appointment at their term's end.<sup>20</sup> Notably, there is no express minimum term length. Frequently members are appointed for terms as small as three years or even less<sup>21</sup> — well below the seven year maximum. At their term's end, it is entirely up to the discretion of the Governor-General in Executive Council<sup>22</sup> as to whether a member is reappointed.

This system affords various benefits. Crucially, it provides for a high degree of flexibility in member appointment — a consideration of high importance for a

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<sup>14</sup> *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of Information)* [2015] AATA 995 (22 December 2015).

<sup>15</sup> Steering Committee of the Review of the Administrative Appeals Tribunal, *Report of the Review of the Administrative Appeals Tribunal* (1991) 100 [6.16].

<sup>16</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 6(1).

<sup>17</sup> *Ibid* s 7(3)

<sup>18</sup> See generally *Australian Constitution* ch 3.

<sup>19</sup> *Cf* *ibid* s 72.

<sup>20</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 8(3).

<sup>21</sup> Administrative Appeals Tribunal, *Administrative Appeals Tribunal Table of Statutory Appointments* (1 July 2017)

<<http://www.aat.gov.au/AAT/media/AAT/StatutoryAppointments.pdf>>.

<sup>22</sup> See generally *Australian Constitution* ss 62-4.

tribunal with fluctuating needs over time.<sup>23</sup> However, the events surrounding the mass denial of AAT member reappointment in 2017,<sup>24</sup> raise concerns that this system may expose the AAT to risks of undue political influence.

#### D *Concerns regarding the Current Mechanism*

In the early years of the AAT's life, Sir Anthony Mason remarked that one significant respect in which the AAT fell short of the judicial model, was that 'it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge.'<sup>25</sup> Under the current system of AAT member reappointment, this remains a concern.

Whilst legislation dictates that decisions regarding member appointment are at the Governor-General's discretion,<sup>26</sup> by firmly established constitutional convention, such discretion is exercised only on the advice of the Federal Executive Council, composed of the Commonwealth Ministers,<sup>27</sup> with the Attorney-General taking chief responsibility in this instance.<sup>28</sup> In this regard it is perhaps telling that many media sources perceive AAT membership appointment as being directly at Attorney-General's discretion.<sup>29</sup> Indeed, it is the Attorney-General themselves who makes announcements regarding AAT member appointments.<sup>30</sup>

Functionally, this means that the discretion regarding AAT member appointment lies with Cabinet — the very people whose administrative decisions the AAT reviews in many instances. This being so, there exists a clear risk of political considerations, or even aspirations of retribution, influencing the decision of whether a member is reappointed. In effect, this appointment mechanism could be said to make members' reappointment prospects dependent on the goodwill of the government of the day.

Recent years have seen a maelstrom of media criticism levied at the AAT. The Honourable Peter Dutton, Minister for Immigration and Border Protection, has publically expressed his dissatisfaction with the AAT for reversing a large number of visa decisions made by himself and his delegates.<sup>31</sup> Much of the media followed suit,

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<sup>23</sup> See, eg, Fleming, above n 10, 99-100.

<sup>24</sup> See generally Ben Doherty, 'Refugee Tribunal Members Lose Contracts after Peter Dutton Criticisms', *The Guardian* (online), 2 June 2017 <<https://www.theguardian.com/australia-news/2017/jun/02/contracts-wont-be-renewed-for-refugee-review-tribunal-members>>.

<sup>25</sup> Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 130.

<sup>26</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 6(1).

<sup>27</sup> See generally *Australian Constitution* ss 62-4; see also Australian Government Solicitor, *Australia's Constitution: With Overview and Notes by the Australian Government Solicitor* (Parliamentary Education Office, revised ed, 2001) xi.

<sup>28</sup> See, eg, Administrative Review Council, 'Better Decisions: Review of Commonwealth Merits Review Tribunals' (Report No 39, Administrative Review Council, 1995) 80 [4.48] <<https://www.arc.gov.au/Documents/ARC+REPORT+39.pdf>>.

<sup>29</sup> See, eg, Michael Koziol, 'George Brandis Clears Out "Infuriating" Administrative Appeals Tribunal', *Sydney Morning Herald* (online) 28 June 2017 <<http://www.smh.com.au/federal-politics/political-news/george-brandis-clears-out-infuriating-tribunal-20170628-gx0711.html>>.

<sup>30</sup> See, eg, Attorney-General for Australia Senator George Brandis, 'Appointments to the Administrative Appeals Tribunal' (Media Release, 25 February 2016).

<sup>31</sup> See, eg, 2GB, 'Peter Dutton Vs Appeals Tribunal', *Sydney Live*, 19 June 2017 (Peter Dutton) <<http://www.2gb.com/podcast/peter-dutton-vs-appeals-tribunal/>>; see generally Emma Ryan,

heavily criticizing the AAT for these migration decisions.<sup>32</sup> In 2017, in the midst of this extremely turbulent media atmosphere, an unprecedentedly large number of AAT members with expiring terms were not reappointed.<sup>33</sup> Whilst one cannot conclude with any certainty that these AAT members were denied reappointment as political reprisal from the government, this is certainly the common perception,<sup>34</sup> which itself is almost equally damaging to the tribunal's independence.

That AAT members may be denied reappointment as a result of government displeasure with their decisions, or at least that there is a widespread perception that reappointment may be denied on such a basis, is an alarming prospect. This state of affairs creates a clear risk that members may be pressured into making certain decisions so as to maintain their own job security. Their impartiality being so compromised, that fundamental independence necessary to discharge members' duties is weakened. Indeed, in discussing the history and role of the AAT, the Honourable Justice Logan remarked that:

any member who allowed himself or herself to be persuaded as to an outcome by partisan or political rhetoric by a Minister, any other administrator or the popular press would be unworthy of the trust and confidence placed in him or her ... For those members who do not enjoy the same security of tenure as judges, that may call at times for *singular moral courage and depth of character*.<sup>35</sup>

Furthermore, this state of affairs presents concerns that public faith in tribunals could be undermined. Academic literature generally suggests that tribunal member appointment must be apolitical, and not based (or seen to be based) upon an individual's sympathy with the government of the day's policy.<sup>36</sup> It is widespread public perception that this mass denial of member reappointment is the government 'clear[ing] the decks of the troublesome Administrative Appeals Tribunal'<sup>37</sup> as political reprisal for making decisions the government deems objectionable. This being so, how can the public have confidence in the integrity of the appointment process?

It is perhaps curious then, that much of the media has in fact *praised* what it perceives as a deeply political intervention in member reappointment. Nevertheless, the principle at stake remains the same. The AAT's role cannot be effectively performed without independence from improper influence of the government of the day. At the bare minimum, this reappointment system will 'serve as a reminder that tribunal members are continually dependent upon the executive government of the day.'<sup>38</sup>

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<sup>32</sup> 'Lawyers Unleash on Dutton Visa Debacle', *Lawyers Weekly* (online), 14 June 2017 <<https://www.lawyersweekly.com.au/biglaw/21288-lawyers-unleash-on-dutton-visa-debacle>>.

<sup>33</sup> See, eg, Janet Albrechtsen, 'Defiant Tribunal Welcomes Fake Jetset Refugees', *The Australian* (online), 30 May 2017 <<http://www.theaustralian.com.au/opinion/columnists/janet-albrechtsen/defiant-tribunal-welcomes-fake-jetset-refugees/news-story/91f0cab6e325ae94878b4461368cc4ec>>.

<sup>34</sup> See, eg, Doherty, above n 24; Koziol, above n 29.

<sup>35</sup> Ibid.

<sup>36</sup> *Singh (Migration)* [2017] AATA 850 (16 June 2017), [18] (emphasis added).

<sup>37</sup> See, eg, Fleming, above n 10, 95-6.

<sup>38</sup> Koziol, above n 29.

<sup>39</sup> Paul Dawson, 'Tenure and Tribunal Membership' (1997) 4 *Australian Journal of Administrative Law* 140, 155.

These events are demonstrative of an alarming risk that AAT independence could be compromised.

This article now turns to several measures which may prove fruitful in securing the AAT's independence. However, many such options present tangential concerns of their own, and should be explored with caution.

### III POSSIBLE REFORMS

#### A *Tenured Appointment*

Structured as a quasi-judicial body which exercises executive power, the AAT borrows much from the judicial model. Yet one persistent point of distinction between the AAT and the judiciary, is that AAT members do not enjoy tenure until retirement age. This security of tenure is constitutionally guaranteed for judicial officers of Chapter III courts,<sup>39</sup> yet conspicuous by its absence for AAT members.

Nothing in the *Australian Constitution* precludes a comparable security of tenure being conferred on tribunal members as well.<sup>40</sup> As such, it is important to query why AAT members do not have retirement age tenure. Certainly, tenure would yield great benefits for AAT independence. Without fear of reappointment denial for decisions the government of the day may find objectionable, the risk of an AAT member being influenced by political rhetoric or other irrelevant factors would be greatly reduced. Indeed, it is partially for this very reason that tenure is regarded as so integral for judicial officers.

Despite such substantial benefits, tenure for tribunal members has long been opposed. Indeed, there are sound reasons to suppose that retirement age tenure would prove problematic for the AAT. Critically, it is often considered that flexibility is an extremely important consideration for Australian tribunals,<sup>41</sup> and that tenured appointment for *all* tribunal members would compromise this flexibility.<sup>42</sup> In response to a Joint Select Committee Report on tenure of appointees to Commonwealth tribunals,<sup>43</sup> the Commonwealth Government commented that:

[t]here is a need to strike a balance between the independence to be derived from appointments to a stated retirement age and the benefits that can arise from the ability to make new appointments. That balance should be struck having regard to the circumstances of the particular case.<sup>44</sup>

The circumstances of the AAT are those of fluid and ever changing needs over time. At a given point in time, by virtue of the present circumstances and its evolving jurisdiction, the AAT may have need of members with appropriate specialized expertise, to discharge its duties in relation to particular subject matter.<sup>45</sup> Over time,

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<sup>39</sup> *Australian Constitution* s 72.

<sup>40</sup> See generally *Australian Constitution*; see also Dawson, above n 38, 148.

<sup>41</sup> See, eg, Dawson, above n 38, 148-9.

<sup>42</sup> See, eg, Administrative Review Council, above n 28, 82 [4.55].

<sup>43</sup> Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals, above n 8.

<sup>44</sup> Commonwealth Government, 'Government Response to Conclusions and Recommendations of Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals' (Government Response, Commonwealth Government, 1990).

<sup>45</sup> See generally Dawson, above n 38, 148-50.

these needs of the AAT will change. Whilst a given member with specialized expertise may have been integral at the time of appointment, there can be no guarantee that they will ‘remain so indefinitely in the light of changing circumstances and demands.’<sup>46</sup> Tenured appointment for all members would therefore risk reducing the ability to ensure AAT members are appropriate for the needs of the time.<sup>47</sup>

Accordingly, beneficial though it may be to securing the AAT’s independence, the consequential drawbacks of tenured member appointment may make such a change inadvisable. Indeed, as stated by the Administrative Review Council:

[i]ndependence of review tribunals and their members is essential, but there is no reason why protecting that independence need detract from the ability of review tribunals to respond to the changing needs of their users.<sup>48</sup>

### B *Minimum Fixed Terms*

Another reform which could prove beneficial in securing the AAT’s independence, is that of minimum terms for appointment. If retirement age tenure for members is inadvisable, it is important that AAT members be appointed for a fixed term of reasonable length. Certainly, where a member’s appointment term is too short, any sense of security that they may possess is diminished.<sup>49</sup> Security of tenure does not necessarily equate to tenure until retirement age. Rather, it necessitates that the individual’s tenure is secure such that they cannot be influenced by external considerations.

It is said that to ensure security of tenure for independence purposes, appointment of tribunal members should be for *five years*.<sup>50</sup> Notably, where an AAT member is appointed for such time, their term extends beyond the length of the electoral cycle. Crucially, at least in the early years of their term, this limits the extent to which the member may be improperly influenced by the government of the day, as that government may well be dissolved by their term’s expiration. Moreover, a term of such length may be necessary for members to build the knowledge and skill required to effectively discharge their duties in major jurisdictional areas.<sup>51</sup> An amendment to s 8 of the *Administrative Appeals Tribunal Act 1995* (Cth), requiring that AAT members be appointed for a minimum term of at least five years, would guarantee that members enjoy the corresponding independence benefits.

However, such change would suffer from similar inadequacies as tenured appointment — encroaching on the all-important flexibility of the AAT. It is noted that for its more specialized jurisdictions, the AAT may well have need of members

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<sup>46</sup> Administrative Review Council, above n 28, 82 [4.55].

<sup>47</sup> See, eg, *ibid*; Dawson, above n 38, 148-9; see generally Council of Australasian Tribunals, ‘Tribunal Independence in Appointments: A Best Practice Guide’ (Guide, Council of Australasian Tribunals, August 2016) 14-5 <[http://www.coat.gov.au/images/Tribunal-Independence-in-Appointments\\_COATBestPracticeGuide-2016-Final-web-interactive.pdf](http://www.coat.gov.au/images/Tribunal-Independence-in-Appointments_COATBestPracticeGuide-2016-Final-web-interactive.pdf)>; see generally Robin Creyke, ‘Tribunal Membership: Lessons from Method Acting’ (Paper presented at the Best Practice for Tribunals: A Model for South Australia Symposium, Adelaide, 14 June 2013) 7-8.

<sup>48</sup> Administrative Review Council, above n 28, 82 [4.56].

<sup>49</sup> See, eg, *ibid* 82 [4.61].

<sup>50</sup> See, eg, Council of Australasian Tribunals, above n 47, 14; see, eg, Creyke, above n 47, 7.

<sup>51</sup> See, eg, Creyke, above n 47, 7.

with corresponding specific knowledge, but may only require their skills for substantially less than five years.<sup>52</sup> For example, on review the AAT may have one of its more specialized jurisdictions moved elsewhere.

As such, requiring minimum length appointments may also prove an unwise reform, as it would impede the capacity to ensure that AAT membership is appropriate for its needs at any given time.

### C *No Reappointment*

Given that the present anxieties surrounding the AAT's independence largely stem from concerns that denial of reappointment may be wielded as retribution, it is important to examine why members should be eligible for reappointment at all.

Consider circumstances where the legislative framework stipulated that AAT members cannot be reappointed at their term's end — meaning members must serve a single term and then depart. Such change has in fact even been suggested in the past.<sup>53</sup> Even if Cabinet wanted to reappoint a given member, it would be unable to do so. In many respects, this would grant AAT members the ultimate freedom from undue government influence. With the certainty that they must move on at their terms' end regardless of the government's amiability towards them, the possibility of reappointment being denied for decisions with which the government disagrees, will not weigh on members' minds. This being so, members would be truly free to reach the 'correct and preferable decision'<sup>54</sup> free from undue influence.

Yet an approach such as this also suffers from several key weaknesses. As before, the flexibility of the AAT is extremely important. Impeding the AAT from retaining experienced members where they may otherwise be ideal for the role is extremely problematic in this regard<sup>55</sup> — limiting the extent to which the AAT may meet the needs of the time. Indeed, academics note that:

[t]o prevent reappointment altogether is undesirable primarily because it precludes maintaining members who make an invaluable contribution to the operation of a tribunal. While this contribution may not be continuous, recognizing that the needs of tribunals and their users change over time, some members may be considered suitable for more than one term.<sup>56</sup>

Moreover, it is important that the AAT have the capacity to attract and retain skilled and experienced members in order to effectively discharge its duties.<sup>57</sup> Without the prospect of ongoing remuneration beyond a first term, there is a concern that AAT membership may not be seen as an attractive enough employment option for high

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<sup>52</sup> See, eg, *ibid* 7-8.

<sup>53</sup> Steering Committee of the Review of the Administrative Appeals Tribunal, above n 15, 99 [6.9].

<sup>54</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419 (Bowen CJ and Deane J).

<sup>55</sup> See, eg, Administrative Review Council, above n 28, 82 [4.58].

<sup>56</sup> Dawson, above n 38, 155-6.

<sup>57</sup> See, eg, Fleming, above n 10, 99-100; see generally Creyke, above n 47, 7.

calibre applicants.<sup>58</sup> This is particularly so given the current tendency for members to be appointed only for relatively short terms.<sup>59</sup>

Consequently, to deny members any prospect of reappointment at all beyond their first term, is also not an attractive solution to these independence concerns.

#### D *Independent Reappointment Committee*

The key to securing the AAT's independence may lie in the method by which members are reappointed. As discussed, the present mechanism of AAT member appointment poses a risk of political factors influencing the decision of whether a given member should be reappointed. It is therefore desirable to reform the procedure of reappointing AAT members to exclude political considerations playing a role.

The establishment of an independent committee to assess the suitability of AAT members for reappointment as they approach the end of their term may be a fitting solution. Indeed, such reform has been proposed for Australian tribunals in the past.<sup>60</sup> This committee would be empowered to independently make its own recommendation as to a member's suitability for reappointment. The legislation creating this body should set out the objective criteria by which the committee would make recommendations.<sup>61</sup>

Ideally, the committee should be vested with the power to make a binding recommendation upon the Governor-General as to whether members should be reappointed. This would remove near all risk of the reappointment mechanism being commandeered for retributive purposes. Failing this, if the recommendations to the Governor-General are not made binding, then it should be mandatory that Cabinet's reasons for acting against a recommendation be made public. Such transparency should at minimum provide greater protection against misuse of the reappointment mechanism, and reinforce the AAT's independence accordingly.<sup>62</sup>

Crucially, it would be an independent committee advising the Governor-General regarding member reappointment, as opposed to Cabinet. Such reform would likely greatly reduce the risk of political retribution against members through the reappointment mechanism.

Indeed, similar systems are employed in some Australian tribunals, to great positive effect. For example, appointment to the South Australian Civil and Administrative Tribunal ('SACAT') may be determined with reference to the selection criteria and assessment of an independent panel.<sup>63</sup> Notably, the existence of this panel is not mandatory, but rather at the Minister's discretion.<sup>64</sup> However, where this panel does exist, its selection criteria and assessment of candidates *must* be considered in deciding whether a given candidate should be appointed as a SACAT member.<sup>65</sup>

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<sup>58</sup> See, eg, Administrative Review Council, above n 28, 82 [4.58].

<sup>59</sup> See generally Creyke, above n 47, 7.

<sup>60</sup> See, eg, Dawson, above n 38, 156.

<sup>61</sup> See generally, Administrative Review Council, above n 28, 79.

<sup>62</sup> See, eg, Fleming, above n 10, 95-7.

<sup>63</sup> *South Australian Civil and Administrative Tribunal Act 2013* (SA) ss 19(2), 19(4)(a)-(b).

<sup>64</sup> *Ibid* s 19(2).

<sup>65</sup> *Ibid* s 19(4)(a)-(b).

Certainly, this panel has consistently been utilized in practice, with the effect of greater transparency in appointments, an often recognised key characteristic of tribunal independence.<sup>66</sup> Such systems do not guarantee against reappointment denial as political retribution, but at least provide an added guard against it.

#### IV CONCLUSION

Given the AAT's principal role in reviewing government decisions, it is naturally important that it be free from inappropriate influence from external forces, such as the government of the day. Without such critical independence, AAT members could never be truly free to disagree with decisions made by government officials. The present mechanisms surrounding AAT member reappointment present a clear avenue through which political retribution may be wrought, posing a significant risk to the AAT's independence. Reform is clearly needed both to secure the AAT's independence, and to ensure that public confidence may be maintained in the integrity of the merits review process.

Many possible reforms to this system, whilst beneficial regarding independence, present tangential problems of their own. However, establishing an independent committee to make reappointment determinations, remains a sound and promising reform — minimising the troubling lack of transparency and risk of political reprisal in appointments. The implementation of such a scheme would likely prove beneficial in securing the AAT's independence, and ensuring the integrity of Australian merits review is maintained through future years.

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<sup>66</sup> See, eg, Fleming, above n 10, 95-7.

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