

Towards a better AAT appointments process



24 November 2021

Towards a better AAT appointments process
Submission to the Senate Standing Committee inquiry into the performance and
integrity of Australia's administrative review system

Danielle Wood, Owain Emslie, and Rebecca Joiner

Towards a better AAT appointments process

Overview

We welcome the opportunity to present our views to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the performance and integrity of Australia's administrative review system.

Our submission focuses on one issue raised in the terms of reference, related to the selection process for members of the Administrative Appeals Tribunal (AAT).

The AAT plays a critical role in Australia's democracy and legal framework, by enabling merits review of administrative decisions made under Commonwealth law. It is vitally important that the AAT's processes are of high quality and independent of government.

The process for appointment of new members to the AAT is very opaque. The Attorney-General has ultimate responsibility for selecting members, and in practice is able to make 'captain's picks' of candidates who have bypassed a formal merit-based recruitment process.

About 21 per cent of members appointed to the AAT have direct political affiliations, almost all to the Coalition Government that has appointed them. Appointees with political affiliation are less likely to come from a legal background and are appointed for longer terms, on average, than other appointees.

The proportion of members with party affiliations has increased substantially in the past five years. A Freedom of Information response on one round of applications highlighted a much higher

proportion of politically affiliated appointees among the Minister's direct picks than via the AAT merit-based process.

'Captains picks' that favour mates or political colleagues are inconsistent with the principles of good government and decision-making in the national interest. Further, they risk undermining the effective functioning of the Tribunal and its actual or perceived independence.

The process for AAT appointments should be improved to ensure candidates are shortlisted only via a merit-based process. The Attorney-General should only be able to select candidates who have been assessed as suitable by an independent panel. This change is necessary to ensure that this important appeal body remains independent of government and staffed with the best possible candidates.

Table of contents

Overview	1
1 The appointment process for the AAT does not adequately protect its independence or the quality of the institution	3
2 The AAT needs a better appointments process.....	10
3 References	14

1 The appointment process for the AAT does not adequately protect its independence or the quality of the institution

The process for appointment of new members to the AAT is very opaque. The Attorney-General has ultimate responsibility for selecting new members, and in practice is able to make 'captain's picks' of candidates who have bypassed any recruitment process.

Our analysis suggests 21 per cent of AAT members have a direct political affiliation, almost all to the Coalition Government that has appointed them. This share has increased significantly in the past five years.

The current process for appointing tribunal members does not provide sufficient safeguards to ensure decision-making in the national interest. Current processes risk undermining the effectiveness of the AAT and its actual or perceived independence.

1.1 The important role of the AAT

The AAT plays a critical role in Australia's democracy and legal framework, by enabling merits review of administrative decisions made under Commonwealth law.

The AAT facilitates access to justice by permitting members of the public to have a government decision that affects them reviewed by an independent, expert body.¹

As such, the AAT is a key mechanism for government accountability. The availability of independent review increases public confidence in government decision-making because it enables transparency.² It is important for public trust that the government is seen to be supporting and upholding the independence of the AAT.

1.2 The appointment process for AAT members is opaque and affords a high degree of ministerial discretion

Under legislation, members to the AAT are appointed by the Governor-General.³ In practice, the decision is made by the Attorney-General, who makes a recommendation to Cabinet which is then signed off by the Governor-General.⁴

As part of this decision-making process, the President of the AAT will make recommendations to the Attorney-General, based on the AAT's need for new members and reappointments.

The AAT's website says the recommendations provided by the AAT are made on the basis of merit.⁵ However, the Attorney-

¹ Bedford (2019).

² Bedford (2019).

³ *Administrative Appeals Tribunal Act 1975*, s (6(1)).

⁴ Attorney-General's Department (2021a).

⁵ Attorney-General's Department (2021a).

Towards a better AAT appointments process

General is not limited to those candidates recommended by the President of the AAT and can recommend to Cabinet other candidates not included in the President's recommendations.

There is little transparency around the Attorney-General's decision-making process and how merit is considered. This is particularly true when the Attorney-General puts forward additional candidates who had not been recommended by the AAT President (see Box 1.1).

This lack of transparency provides the opportunity for ministers to nominate their political friends and colleagues, without having them tested through a merit selection process.

The only specified requirement for an AAT member candidate is that they must have been enrolled as a legal practitioner for at least five years or '*in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a member*'.⁶ In practice, this provides largely unfettered ministerial discretion.

1.3 Many current AAT members have a political affiliation

There are currently 336 members of the AAT. Of these, we estimate that 69, or 21 per cent, have a direct political affiliation.⁷

We categorise an appointee as having a direct political affiliation if the person has previously worked in politics – as a politician, advisor, or employee of a political party (see Box 1).

Of the 69 politically-affiliated members, 64 are affiliated with the Coalition, the party that appointed them (see Figure 1.1).

Box 1: How we identify political affiliations

This submission takes a conservative approach to identifying political affiliations, focusing on appointees with direct political experience rather than other political or ideological links.

We categorise an appointee as having a direct political affiliation if they have previously worked in politics – as a politician, advisor, or employee of a political party. We also categorise an appointee as politically affiliated if they have held party official roles, such as a secretary or president of a party branch. We also include anyone who has gained, or actively sought, preselection as a candidate for a political party.

We do not categorise appointees as politically affiliated for other links such as having attended party fundraisers, being a personal associate of a minister, or more general ideological alignment to a particular party.

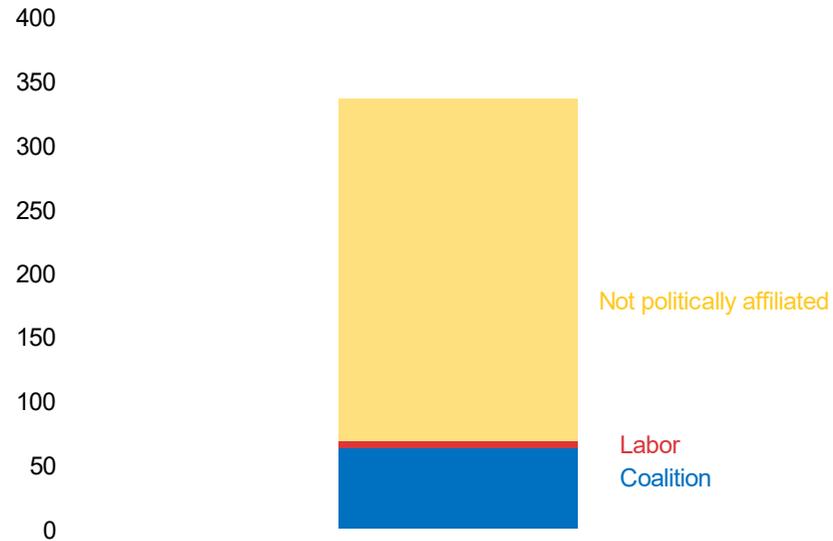
⁶ *Administrative Appeals Tribunal Act 1975*, s 7.

⁷ Landis-Hanley, J. (2019) and Grattan analysis.

Towards a better AAT appointments process

Figure 1.1 Most current AAT members with political affiliations are from the Coalition

Count of AAT members, by political affiliation



Sources: AAT annual reports, Hansard, Commonwealth Government media releases, Australian Electoral Commission records, Grattan analysis.

Note: All politically affiliated appointees have been appointed since 2013, so by a Coalition Government.

The politically affiliated members are less likely to have had legal training – about 52 per cent have had some legal training, compared to 75 per cent of non-politically affiliated members.⁸

AAT members with political affiliations are also, on average, appointed for longer terms than those members without political affiliations (see Figure 1.2). The appointment term and decision to reappoint is at the discretion of the Government, subject to a maximum term of seven years.

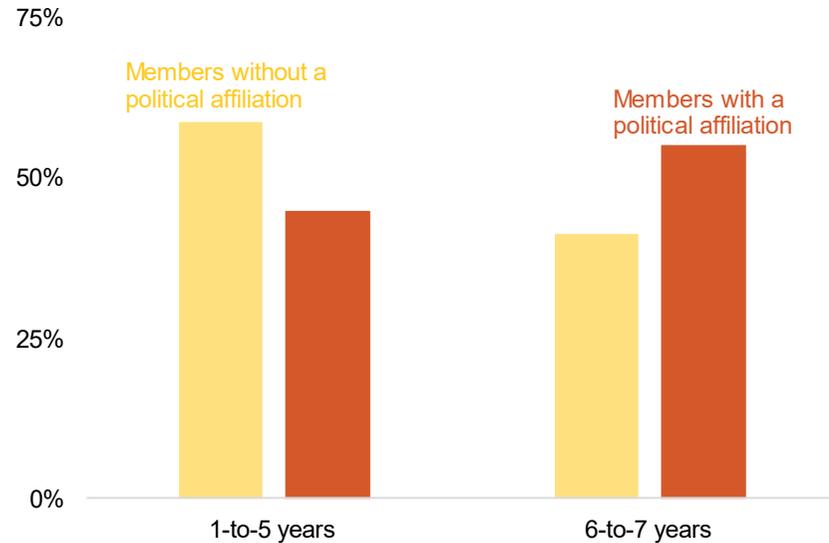
⁸ In a 2018 statutory review of the AAT, Ian Callinan QC, former Justice of the High Court, recommended: 'All further appointments, re-appointments, or renewals of appointment to the Membership of the AAT should be of lawyers, admitted or qualified for admission to a Supreme Court of a State or Territory or

the High Court of Australia, and on the basis of merit (a possible exception is appointment to the Taxation and Commercial Division to which competent accountants might be appointed)'. Callinan, I. D. F. (2019). The Government has not acted on this recommendation.

Towards a better AAT appointments process

Figure 1.2: Politically affiliated AAT members are more likely to be appointed for longer terms

Proportion of current members with specified appointment term



Source: AAT annual reports, 2018-19 media releases, Grattan analysis.

1.4 Political affiliated appointments are becoming more common and are concentrated in ministerial picks

The number of people with political affiliations appointed to the AAT has increased in recent years. Since 2015 the number of new members appointed has increased each year as the functions of the AAT broadened with the amalgamation of the Migration Review Tribunal, Refugee Review Tribunal, and Social Security Appeals Tribunal with the AAT. This has coincided with a

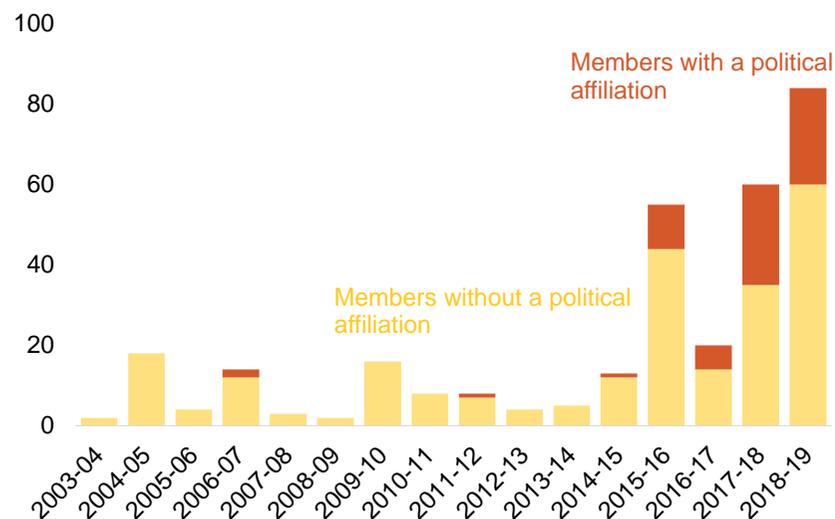
significant number, and much higher share, of politically affiliated candidates being appointed (see Figure 1.3).

In the 12 years before 2015-16, 4 per cent of appointees had political affiliations, compared to 29 per cent in the five years since.

Towards a better AAT appointments process

Figure 1.3 The number of people with political affiliations appointed to the AAT has increased in recent years

Count of AAT appointments, by political affiliation



*Note: Does not include members amalgamated from the Migration Review Tribunal, Refugee Review Tribunal, and Social Security Appeals Tribunal.
Sources: AAT annual reports, Hansard, Commonwealth Government media releases, Australian Electoral Commission records, Grattan analysis.*

FOI records obtained by Grattan Institute suggest that politically affiliated appointments are concentrated among ‘captain’s picks’ by the Minister (Box 2).

Box 2: Ministerial picks versus AAT recommendations

In response to a Freedom of Information (FOI) request, some records have been provided to Grattan Institute relating to one round of AAT appointments that started in late-2018 and finished in early 2019.⁹

The documents show the President of the AAT wrote to the Attorney-General’s Department in late-2018 with recommendations for appointments, reappointments, and promotions of AAT members.

Emails exchanges between the Attorney-General’s office and department, after the department received the President’s recommendations, show that the Attorney-General then recommended several additional appointments. Many of these candidates, who were subsequently appointed to the AAT, were not known to the department.¹⁰

Of the 18 additional appointments advanced by the Minister and disclosed in these FOI records, 10 (55 per cent) had a direct political affiliation with the Coalition and three had other connections to the Coalition but do not meet our definition of a direct political affiliation.¹¹

⁹ Attorney-General’s Department (2021b).

¹⁰ In many cases, the department had to request the contact details and CVs of the new appointments.

¹¹ One is a friend of Health Minister Greg Hunt (as stated in Hansard), one is an LNP member, and one is former Attorney-General Christian Porter’s debating coach.

Towards a better AAT appointments process

1.5 Why this matters

We do not seek to argue that any specific appointees with political affiliations were not appointed on merit. However, the high share of AAT member appointments with direct political affiliations and the fact that they are almost exclusively from the same side of politics as the appointing Minister raise concerns that factors other than the merit of candidates might be influencing choices.

This is reinforced by the rising prevalence of appointments of people with political affiliations, and the FOI information which demonstrates that there was a much higher proportion of politically affiliated appointees among the Minister's 'captain's picks' than via the AAT merit-based process.

Why does this matter?

First, it raises probity concerns. Ministers are required under the Ministerial Code to exercise their Ministerial Discretion with the sole objective of advancing the public interest.¹² They are also required by law to make 'efficient, effective, economical, and ethical' use of public funds.¹³

AAT members are paid between \$193,990 and \$496,560 per year.¹⁴ They make important decisions on administrative law appeals.

Bypassing merit selection processes, particularly to appoint a former colleague or mate, is unlikely to serve the national interest, nor be an efficient use of public funds. It is not consistent with the high standards the public have the right to expect from their elected officials. Over time, this type of conduct can contribute to an erosion of public trust in national interest decision-making.

Second, there is a risk that 'captain's picks' lack the necessary skills and experience to effectively carry out their responsibilities.¹⁵ They have not been tested through a merits-based process, nor actively compared to other candidates.

Several members of the AAT made submissions to the Callinan review highlighting their concerns about the impact of political appointments on the management and efficiency of the AAT.¹⁶

Third, there is a risk that appointees with political affiliations may be less willing to make a decision that might embarrass or upset the government that appointed them, undermining the actual or perceived independence of the Tribunal.

¹² Australian Government (2018).

¹³ *Public Governance, Performance and Accountability Act 2013*.

¹⁴ Remuneration Tribunal (Judicial and Related Offices – Remuneration and Allowances) Determination 2021 (Cth), Table 3A – Total remuneration for Part 3 office-holders.

¹⁵ Edwards, M. (2006); In the US, Gallo, N. and Lewis, D. E. (2012) showed that federal programs administered by political appointees don't perform as well as

programs run by other appointees or career executives. In Australia, AAT members with political affiliations were found to have performed worse on average – 17 per cent were achieving under performance targets, compared to 9 per cent of members without political affiliation: Grattan analysis of Commonwealth Government (2021); see also Robin (2021).

¹⁶ Callinan, I. D. F. (2019).

Towards a better AAT appointments process

The AAT's independence is particularly vulnerable when it comes to migration decisions. The Migration and Refugee Division of the AAT is charged with reviewing migration decision-making but is also subject to direction from the Immigration Minister, who can reduce the tribunal's scope of review.¹⁷

The Law Council of Australia has raised a related concern about the practice of reappointing AAT members just before elections but well in advance of the expiry of their terms.¹⁸ The Council says this practice '*may give rise to a reasonable apprehension that decisions are affected by political considerations and therefore compromise the reputation of the Tribunal*'.¹⁹

The Callinan review summarises an anonymous submission that highlights these twin concerns:

*It is submitted that appointments pre-amalgamation, often requiring advertisement of positions and interviews of candidates, were better made than now. Non-lawyer Members encounter difficulties doing the work. The submitter asserts that there have been 'political appointments', disposed to make politically popular decisions.*²⁰

Finally, there is a broader concern that a culture of patronage is created if ministers start to use appointments to well-paid or powerful roles to reward friends and those loyal to them.

MPs or advisors may be less willing to 'rock the boat' if such action is expected to decrease their chances of desirable appointments.²¹ Further, where ministers use appointments in this way, this can also be used to encourage other potentially eligible individuals from outside politics to 'tow the political line' for fear of being blacklisted. This risk becomes more acute the more widespread the culture of ministers making appointments using the lens of personal or political interest. This will be explored further in a 2022 Grattan Institute report.

¹⁷ Ng, Y. F. (2012).

¹⁸ Law Council of Australia (2019).

¹⁹ Law Council of Australia (2019).

²⁰ Callinan, I. D. F. (2019).

²¹ Daley, J. (2021). See also, e.g., Law Council of Australia (2018).

2 The AAT needs a better appointments process

The process for AAT appointments should be improved to ensure all candidates have been selected via a merit-based process. The Attorney-General should only be able to select candidates who have been assessed as suitable by an independent panel.

This will ensure greater transparency around how AAT appointment decisions are made. Our recommended appointment process is shown in Figure 2.1, and outlined below.

2.1 All AAT appointments should be advertised with published selection criteria

Advertising all AAT positions and the selection criteria for each position would provide transparency around what the Attorney-General is looking for before an appointment is made.

The selection criteria would be agreed with the Attorney-General before the appointment process commences. In setting the selection criteria, the Attorney-General would be able to determine the job requirements and set parameters for assessment.

The Attorney-General should seek advice in developing the selection criteria, including from their department and the AAT. For example, they might ask the Tribunal to identify gaps in skills or expertise that need to be filled in line with current and emerging

priorities for the Tribunal.²² The Attorney-General would also be able to suggest candidates to the panel for assessment, or encourage a candidate to apply to the panel. Competition for positions would then help find the best person for the job.

Currently head-hunting approaches are common,²³ but this sort of process can miss many outstanding candidates about whom the recruitment firm, panel, department, and/or minister is unaware.²⁴ Advertising allows for unexpected expressions of interest and doesn't preclude running a head-hunting process in parallel.

Advertising is not unduly onerous; it is basic widespread practice in the public and private sectors. All public service positions are required to be advertised, selection criteria are published, and recruitment processes are ultimately overseen by the Public Service Commissioner. It is remarkable that appointments to public bodies such as the AAT – which have important decision-making powers and are often well-remunerated – are subject to so little basic transparency of process.

²² Edwards, M. (2006).

²³ AusTender data shows about \$3 million worth of 'executive search' contracts in 2019-20.

²⁴ Executive search processes often also limit the diversity of candidates, because boards tend to be looking for other people like themselves: Doldor et al (2012); Merilainen et al (2013).

Towards a better AAT appointments process

2.2 An independent panel should do the shortlisting

An independent panel should assess applications for AAT appointments against the selection criteria and provide a shortlist of suitable candidates to the Attorney-General.²⁵

An independent panel should be empowered to deliberate on the relative merits of different candidates through the shortlisting process. The panel should not be subject to ministerial direction, so as to support public trust in the process and outcome.

Consistent with the existing Federal Government Merit and Transparency Policy, the Secretary of the Attorney-General's Department and the Public Service Commissioner (or their representatives) should be on the panel. The Commissioner should select the remaining members of the panel. Panel members' names should be published, to enable public scrutiny of its independence.

2.3 The Attorney-General should choose from the shortlist

The Attorney-General should retain the discretion to choose a candidate from the panel's shortlist. But the Attorney-General should choose *only* from the shortlist, which should only include candidates who have been assessed as suitable for the position and are recommended by the panel.

There may still be circumstances where shortlisted candidates are no longer suitable or the AAT's requirements have changed. In

²⁵ The size of the shortlist would depend on the number of positions required and the breadth of suitable candidates, but as a guide, a shortlist of at least three suitable candidates is required for ABC and SBS board positions. If the minister

these circumstances, the Attorney-General should publish new selection criteria and ask the independent panel to revisit the shortlist given the new criteria.

By both approving the criteria at the beginning of the process and choosing from the final shortlist, the Attorney-General would retain ultimate responsibility for Tribunal appointments. But the merit-based shortlist process and the advertising of the roles would provide an assurance that the chosen candidate has been tested against a broad field and is suitable for the role.

2.4 Independent oversight of public appointments

There is currently little oversight of AAT appointments. The Commonwealth Government Merit and Transparency Policy used to apply to AAT appointments, but in 2015 the Government exempted the AAT from the policy.²⁶

The Public Service Commissioner's role should be strengthened and expanded to provide transparency and oversight of public appointments. The Commissioner should oversee each stage of the appointments process, including by sitting on the assessment panel and endorsing the recommendation report provided to the Attorney-General.

Although reappointments should not be expected to go through the same process as initial appointments, they should not be automatic. The Commissioner should still be actively involved in

is to be required to choose from the shortlist (Section 2.3), the shortlist could be slightly longer to allow the minister greater choice.

²⁶ Commonwealth Government (2019), Tuesday 19 February 2019, p 93.

Towards a better AAT appointments process

reappointment processes, which should involve an independent review of the performance of the incumbent and the publication of a decision to reappoint.

This requirement will be particularly important in the transition to the new process we recommend, because many of those coming

up for re-appointment will be 'captain's picks' selected under the current processes.

Towards a better AAT appointments process

Figure 2.1: Grattan Institute recommendations

	Current process	Grattan proposal
Ultimate responsibility	Attorney-General appoints (with Cabinet approval)	Attorney-General maintains responsibility, but appointments must have been shortlisted by independent panel
Advertised with criteria	Yes – expressions of interest sought annually	Attorney-General signs off on criteria The role must be publicly advertised Requirements for advertising detailed in a Public Appointments Code
Process published	No – appointments protocol not published	Detailed in a publicly available Appointments Code owned by Public Service Commission
Independent panel	No – AAT President makes recommendations to Attorney-General	Independent panel provides recommendations to minister Attorney-General's Department Secretary and the Commissioner (or their representatives) sit on the panel The Commissioner should select the remaining representative(s) to sit on the panel The process for how panel is selected and who sits on panel is transparent
Conditions on ministerial discretion	No – Attorney-General may select candidate not recommended by AAT President	Attorney-General must choose from panel shortlist or re-run the process Attorney-General can also put forward candidates for the panel to assess
Oversight / transparency	No – only oversight is Cabinet	Expand the remit of the Public Service Commissioner to provide oversight Commissioner audits appointments and reports compliance annually
Exemptions to standard process	Attorney-General may select candidate not recommended or not on the AAT's shortlist	Restricted circumstances (e.g. acting appointments only for specified limited term) and Commissioner must be consulted

Towards a better AAT appointments process

3 References

- Attorney-General's Department (2021a). Expressions of Interest for Appointment to the Administrative Appeals Tribunal. Accessed 15 November 2021. <https://www.ag.gov.au/about-us/careers/statutory-appointments/expressionsinterest-appointment-administrative-appeals-tribunal>.
- (2021b). Freedom of information disclosure log. FOI21/056. <https://www.ag.gov.au/rights-and-protections/freedom-information/freedom-information-disclosure-log>.
- Australian Government (2018). Statement of Ministerial Standards. <https://www.pmc.gov.au/sites/default/files/publications/statement-ministerialstandards-3.pdf>.
- Bedford, N. (2019). "AAT: Importance, Independence and Appointments". Australian Public Law. <https://auspublaw.org/2019/04/aat-importance-independence-and-appointments/>.
- Callinan, I. D. F. (2019). Report on the Statutory Review of the Tribunals Amalgamation Act 2015. Attorney-General's Department. <https://www.ag.gov.au/legal-system/publications/report-statutory-reviewtribunals-amalgamation-act-2015>.
- Commonwealth Government (2019). Commonwealth of Australia Hansard, Senate Legal and Constitutional Affairs Legislation Committee. Remuneration Tribunal (Judicial and Related Offices – Remuneration and Allowances) Determination 2021 (Cth). <https://www.remtribunal.gov.au/document-librarysearch/remuneration-tribunal-judicial-and-related-offices-remuneration-andallowances-determination-2021-compilation-no-1>.
- (2021). Commonwealth of Australia Hansard, Senate Standing Committee on Legal and Constitutional Affairs. LCC-AE21-78. <https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=3154e032-b2c1-4d79-9108-dd4f237335d7>.
- Daley, J. (2021). Gridlock: removing barriers to policy reform. Grattan Institute. <https://grattan.edu.au/report/gridlock>.
- Doldor et al (2012). Doldor, E., Vinnicombe, S., Gaughan, M. and Sealy, R. Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms. Equality and Human Rights Commission. <http://thinkethnic.com/wp-content/uploads/2012/02/Gender%20Diversity.pdf>.
- Edwards, M. (2006). "Appointments to Public Sector Boards in Australia: A comparative assessment". University of Canberra, Corporate Governance ARC Project. <https://apo.org.au/sites/default/files/resource-files/2006-09/apo-nid4205.pdf>.
- Gallo, N. and Lewis, D. E. (2012). "The Consequences of Presidential Patronage for Federal Agency Performance". Journal of Public Administration Research and Theory 22.2, pp. 219–243. <https://doi.org/10.1093/jopart/mur010>.
- Griffiths, K. and Wood, D. (2020). "Vested interests, money, and the democratic deficit". Grattan Institute. <https://grattan.edu.au/news/vested-interests-money-andthe-democratic-deficit>.
- Landis-Hanley, J. (2019). "A who's who in the AAT zoo". Crikey. <https://www.crikey.com.au/2019/09/24/a-whos-who-in-the-aat-zoo>.
- Law Council of Australia (2018). Statutory Review of the Tribunals Amalgamation Act 2015. Law Council of Australia. <https://www.lawcouncil.asn.au/tags/submissions>.
- (2019). "AAT appointments must be transparent and merit-based". Law Council of Australia. <https://www.lawcouncil.asn.au/media/mediareleases/aat-appointments-must-be-transparent-and-merit-based>.
- Merilainen et al (2013). Merilainen, S., Tienari, J. and Valtonen, A. "Headhunters and the 'ideal' executive body". Organization 22.1, pp. 2–22. <https://journals.sagepub.com/doi/10.1177/1350508413496578>.
- Ng, Y. F. (2012). "Tribunal independence in an age of migration control". Australian Journal of Administrative Law 19.4, pp. 203–225. <https://www.lawcouncil.asn.au/media/mediareleases/aat-appointmentsmust>.
- Robin, M. (2021). "Liberal-aligned AAT members' productivity laid bare". Australian Financial Review. <https://www.afr.com/rear-window/liberal-aligned-aatmembers-productivity-laid-bare-20211011-p58z0h>.
- Wood et al (2018). Wood, D., Daley, J. and Chivers, C. A crisis of trust: The rise of protest politics in Australia. Report No. 2018-05. Grattan Institute. <https://grattan.edu.au/report/a-crisis-of-trust/>.