Making independent bodies independent

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The nature of the problem

As previously identified by the Democratic Audit of Australia, the making of politically-tainted appointments to non-departmental public agencies can undermine the public value of these institutions and obstruct democratic processes.[1] In most cases, independence from government is one of the major reasons for the establishment of these agencies. Parliament has decided that certain functions would be performed more effectively if they were vested in an autonomous or semi-autonomous organisation that is shielded from undue political interference. The most obvious example is judicial and quasi-judicial bodies where independence is essential to upholding the rule of law and avoiding perceptions of bias.

The same principles apply in relation to organisations like the ABC and SBS that are intended to perform a democratic function (i.e. the free exchange of information and ideas) that requires a degree of separation from government. Consequently, when the separation between the government and a public agency is reduced as a result of political appointments, the ability of the organisation to perform its intended function can be diminished. Politically-compromised processes can also result in the appointment of substandard candidates to positions of authority an lead to management difficulties.

Similar problems arise in relation to independent government inquiries or review panels. Technically, these review panels could be classified as a type of non-departmental public agency. Although they often lack legislative backing, they are established by governments to perform a public service and are generally intended to have a degree of autonomy from ministers and associated departments. The need for independence stems from the functions that these panels perform, which generally involve the review of government policy or the actions of a department, public agency or some other government official.

As with other public agencies, when the independence of these panels is compromised their ability to perform their desired functions can be undermined. Review panels that contain political appointees are often unwilling to provide advice that is contrary to that desired by government. In the worst cases, the process can degenerate into a cynical exercise to justify government action or inaction. However, even where there is no intent to deceive, political appointments that are made in accordance with a process that lacks transparency can undermine public confidence in the inquiry and other government institutions.

There are numerous examples of political appointments to review panels. At the federal level, recent notable examples include:

- the appointment of Warwick Parer, the president of the Queensland Liberal Party and former Howard Government Minister for Resources and Energy, to chair an inquiry into the energy market in 2002;

[1] See Meredith Edwards, 2004, 'Appointments to public sector boards in Australia: Cronyism or competence?' Democratic Audit of Australia, July; and Barry Hindess, 2004, *Corruption and Democracy in Australia*, Democratic Audit of Australia Report No.3.

- the appointment of Grant Tambling, a former parliamentary secretary in the Howard Government, to chair an inquiry into the Mandatory Renewable Energy Target scheme in 2003; and

- the appointment of former Telstra CEO and director of the Australian Nuclear Science and Technology Organisation, Ziggy Switkowski, to head a review into uranium mining, uranium enrichment and nuclear power in 2006.

There are many other examples at both the Federal and State levels of these types of appointments and there is no reason to believe that the Coalition is more likely than the Labor Party to engage in this type of behaviour. These are merely some high-profile examples of a widespread problem.

How are appointments currently made?

The processes that apply to the appointment of review panels are malleable and provide considerable scope for politically-motivated decisions. However, there are variations depending on the nature of the inquiry.

Where an inquiry is established by a federal minister, the most relevant requirements are usually those set out in the *Financial Management and Accountability Act 1997* (Cwlth) (FMA Act), the Prime Minister's *A Guide on Key Elements of Ministerial Responsibility*, the *Cabinet Handbook* and the *Federal Executive Council Handbook*.[2] In cases where the inquiry is required by law, appointment processes may also be prescribed under the enabling legislation.

The framework established by these documents provides few safeguards to prevent political appointments. The *Financial Management and Accountability Regulations 1997* merely stipulate that ministers must not approve a proposal to spend public money (for example, to pay members of an independent inquiry) unless they are satisfied that the proposed expenditure 'is in accordance with the policies of the Commonwealth' and that it 'will make efficient and effective use of the public money'.[3] Statutory requirements like these are notoriously hard to enforce because of problems associated with standing (i.e., whether private individuals are entitled to take legal action to enforce the requirements) and the costs and time lags associated with legal proceedings. These problems are compounded in this case as a result of the ambiguity associated with the restrictions, which make them virtually useless as a means of constraining the powers of ministers to make political appointments to review panels.

The *Guide on Ministerial Responsibility*, *Cabinet Handbook* and *Federal Executive Council Handbook* contain similar broad requirements, only they suffer from the further

[2] Where an inquiry is established by a department or public agency subject to the FMA Act, in addition to the general requirements that apply to ministers under the *Financial Management and Accountability Regulations 1997*, they are required to 'have regard to' the *Commonwealth Procurement Guidelines* and to make a written record of any deviations from the Guidelines.

[3] The same requirements apply in relation to entering contracts under which money may become payable (see *Financial Management and Accountability Regulations 1997*, Reg. 13).

weakness of having no statutory backing. The *Guide on Ministerial Responsibility* states that ministers should 'perform their public duties not influenced by fear or favour' and that ministers 'should not exercise the influence obtained from their public office … to gain any improper benefit for themselves or another'.[4] It also states that:

> [s]ubject to provisions in legislation or other formal documents relating to the establishment of government bodies or positions, government appointments are to be made on the basis of merit, taking into account the skills, qualifications, experience and any special qualities required of the person to be appointed.[5]

The *Cabinet Handbook* and *Federal Executive Council Handbook* establish a process whereby approval must be obtained from the Prime Minister or Cabinet for 'significant Government appointments', which are defined as including 'appointments to significant non-statutory tribunals, advisory bodies and commissions of inquiry'.[6] In addition, the *Cabinet Handbook* notes that:

> … ministers must ensure that the person being proposed is appropriately qualified and has experience relevant to the position … ; due regard must be paid to the Government's policy of encouraging an increase in the number of appointments of women; … [and] careful attention must also be paid to the need to have an appropriate geographical balance in appointments.[7]

The establishment of a process that encourages merit-based appointments and that provides for the vetting of appointment decisions is a step in the right direction. However, these processes leave considerable scope for political appointments. Indeed, it is doubtful whether a requirement that the Prime Minister or Cabinet approve appointments provides any protection against this risk and, in some cases, it may only exacerbate the problem. Further, the disintegration of constitutional conventions regarding responsible government has undermined the practical value of guidelines of this nature as a means of constraining ministerial power. If governments are not transparent and ministers are not held responsible for their indiscretions, there is no incentive for compliance. In the end, guidelines like these can amount to little more than window dressing.

Suggested solutions

No process will ever eradicate political appointments to public agencies; the best that can be hoped for is the establishment of a system that minimises the risk of this occurring. One way of achieving this is to establish a separate public agency, similar to the Commissioners for Public Appointments established in the United Kingdom, that is responsible for making appointments or for regulating appointment processes. The agency could be responsible for appointments to all public agencies, including review

[4] John Howard, 1998, *A Guide on Key Elements of Ministerial Responsibility*, Canberra, Commonwealth of Australia, p. 11.
[5] Ibid.
[6] Department of the Prime Minister and Cabinet, 2004, *Cabinet Handbook*, 5th edn, Commonwealth of Australia, Canberra, p. 24. See also Department of the Prime Minister and Cabinet, 2000, *Federal Executive Council Handbook*, Commonwealth of Australia, Canberra. Under the Howard Government, the requirement for appointments to be approved by the Prime Minister has been read broadly, meaning that most appointments to public agencies are vetted by the Prime Minister's office before they are made.
[7] Department of the Prime Minister and Cabinet, 2004, *Cabinet Handbook*, 5th edn, Canberra, Commonwealth of Australia, p. 25.

panels, and ideally the appointment process would be merit-based, transparent and audited regularly by the Auditor-General.[8]

Possibly the most realistic option would be to limit the agency's role to managing the appointment process and providing a short-list of suitable appointees to the responsible minister. The minister would be free to ignore the list provided by the agency. However, if they did so, the minister would be required to publish reasons for the decision.[9]

Critics may claim that any attempt to ensure that all appointments to review panels are merit-based and made through an arms-length process would unduly restrict the government's capacity to develop and implement its policy agenda. For example, to undertake certain inquiries it may be necessary for the reviewers to have an understanding of, and commitment to, the government's policy objectives. The Federal Government's appointment of Warwick Parer to conduct the energy market review could arguably be defended on these grounds, as might its appointment of Ray Braithwaite, a former National Party MP, to the Telecommunications Service Inquiry and the Regional Telecommunications Inquiry. Yet, in these cases, the relevant inside knowledge and predispositions could be incorporated into the selection criteria, which would be made publicly available. In this way, individuals with close ties to a particular government or political party could still be appointed to inquiries; only the appointment process would be more transparent and open to public scrutiny.

The other potential problem is the risk that the agency that is put in charge of the appointment process could itself be subject to politically-motivated appointments. To reduce this risk, all appointments to the agency could be subject to some form of parliamentary scrutiny and approval.[10]

There appears to be little momentum in Australia for more transparency in appointments to public bodies. Yet, if current systems remained unchanged there is a risk of growing distrust of government institutions and public withdrawal from democratic processes. Failure to reform current appointment processes will also jeopardise the effectiveness of public agencies and the efficient use of public resources.

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[8] For further discussion on possible options for reform, see Meredith Edwards, forthcoming, *Appointments to Public Sector Boards in Australia: A Comparative Assessment*, Issues Paper No. 3, Corporate Governance ARC Project, Canberra, University of Canberra.

[9] The minister could also be required to publish the short-list to enable a comparison between the appointee and the agency's nominees. However, the benefits gained by the publication of the list should be weighed against the potential negative impacts on the short-listed nominees and the capacity to attract quality candidates in the future.

[10] For example, appointments could be approved by a parliamentary committee or by a two-thirds majority in both houses.