



# Constituting the Tribunal

This Direction is given under section 19A of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

## 1. About this Direction

### **Application**

- 1.1 This Direction outlines how the Administrative Appeals Tribunal (AAT) is to determine which member or members will constitute the Tribunal for the review of a decision or for the purposes of any other proceeding in the AAT. It applies to all proceedings in the AAT.<sup>1</sup>
- 1.2 This Direction sets out:
  - (a) the legislative provisions that govern how the Tribunal can be constituted;
  - (b) our procedures for determining who will constitute the Tribunal for a proceeding;
  - (c) matters that may be taken into account when deciding who will constitute the Tribunal;
  - (d) information relating to when the Tribunal can be reconstituted;
  - (e) our procedures and approach where a court remits a case to the AAT to be heard and decided again.
- 1.3 This Direction has been developed to:
  - (a) provide readily accessible information on law, policy and procedure relating to how the Tribunal is constituted;
  - (b) promote consistency in our approach to constituting Tribunals; and
  - (c) enhance the transparency of our operations.
- 1.4 This Direction has effect from 20 July 2015.

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<sup>1</sup> Proceedings in the AAT include applications for review of a decision, other applications that can be made to the AAT and incidental applications made in the course of, or in connection with, such applications or proposed applications: see the definition of 'proceeding' in subsection 3(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act). The Tribunal constituted for the purposes of an incidental application, such as an application to extend the time for making an application for a review of a decision, may differ from the Tribunal constituted to conduct the review of the decision.

## **Interpretation**

1.5 In this Direction:

**decision-maker** means:

- (a) the person who made the decision that is the subject of the application for a review of a decision; or
- (b) where the AAT Act provides otherwise or has been modified by another enactment, the person who has the obligations of a decision-maker;

and any representative;

**presidential member** means the President or a Deputy President of the AAT;

**we** or **us** refers to the AAT;

**you** refers to an applicant or other party who is not a decision-maker and any representative.

## **2. How can the Tribunal be constituted?**

### **General rules**

2.1 In general, the Tribunal can be constituted by 1, 2 or 3 members.<sup>2</sup> The Tribunal cannot include more than one member who is a Judge but can include more than one Deputy President who is not a Judge, Senior Member or Member.<sup>3</sup>

2.2 In most cases, the Tribunal is constituted by 1 member.

### **Special requirements**

2.3 Specific rules apply to constituting the Tribunal in certain circumstances. These special requirements can relate to:

- (a) the number of members who must constitute the Tribunal;
- (b) whether the Tribunal must include one or more members of a particular kind; or
- (c) whether certain members are prohibited from constituting the Tribunal.

2.4 Special requirements for constituting the Tribunal are found in the following Acts:

- *Administrative Appeals Tribunal Act 1975*;
- *Archives Act 1983*;
- *Commonwealth Electoral Act 1918*;
- *Freedom of Information Act 1982*;
- *Insurance Acquisitions and Takeovers Act 1991*;
- *Insurance Act 1973*;
- *Life Insurance Act 1995*.

<sup>2</sup> Paragraph 19B(1)(a) of the AAT Act.

<sup>3</sup> Paragraph 19B(1)(b) of the AAT Act. The President of the AAT must be a Judge of the Federal Court of Australia and Judges of the Federal Court of Australia and the Family Court of Australia may be appointed as Deputy Presidents of the AAT: subsections 7(1) and (2) of the AAT Act.

Refer to **Attachment A** to this Direction for a description of the circumstances in which the special requirements apply and the nature of those requirements.

### ***Rules relating to a member who has conducted an ADR process***

- 2.5 If a member has conducted an alternative dispute resolution process (ADR process) in relation to a proceeding and you or the decision-maker notify us before the hearing that you or they object to that member participating in the hearing, that member cannot be a member of the Tribunal as constituted for the purposes of the proceeding.<sup>4</sup>
- 2.6 This rule applies to any ADR process conducted by the AAT, including a case appraisal, conciliation, conference, mediation or neutral evaluation.

## **3. Procedure for constituting the Tribunal**

### ***Who determines how the Tribunal will be constituted?***

- 3.1 The AAT Act provides that the President is to give directions in relation to:
- (a) the members who are to constitute the Tribunal for the purposes of a proceeding; and
  - (b) if there is more than one such member – the member who is to preside.<sup>5</sup>
- 3.2 In accordance with subsection 10A(2) of the AAT Act, the President has delegated these powers to Deputy Presidents and Senior Members of the AAT.
- 3.3 The ultimate decision as to how the Tribunal is to be constituted for the purposes of a proceeding is, subject to any legislative requirements, at the discretion of the President or his or her delegate.

### ***Which member will preside if the Tribunal is constituted by more than one member?***

- 3.4 If the Tribunal is constituted by more than one member, the President or his or her delegate will usually direct that the following member is to preside at the hearing:
- (a) if the Tribunal includes the President – the President;
  - (b) if the Tribunal does not include the President but includes one other presidential member who is a Judge – that Judge;
  - (c) if the Tribunal does not include a presidential member who is a Judge but includes one Deputy President – that Deputy President; or
  - (d) if the Tribunal does not include a presidential member but includes one Senior Member – that Senior Member.

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<sup>4</sup> Section 34F of the AAT Act. Please note that ADR processes are only conducted in Divisions other than the Migration and Refugee Division and the Social Services and Child Support Division.

<sup>5</sup> Subsection 19A(1) of the AAT Act.

- 3.5 If the Tribunal is constituted by more than one member and:
- (a) does not include a presidential member who is a Judge but includes 2 or more Deputy Presidents; or
  - (b) does not include a presidential member but includes 2 or more Senior Members;

the President or the relevant Division Head will direct which member should preside taking into account the expertise and experience of the members.

- 3.6 If the Tribunal is constituted by more than one Member, the President or his or her delegate will direct which member should preside taking into account the expertise and experience of the members.

***Specific matters relating to constituting the Tribunal in a Division other than the Migration and Refugee Division or Social Services and Child Support Division***

- 3.7 In general, the President or his or her delegate will determine how the Tribunal is to be constituted for the purposes of a proceeding at the time it is to be listed for a hearing.
- 3.8 The President or his or her delegate may take into account any recommendations or suggestions as to how the Tribunal should be constituted made by:
- (a) an AAT member or Conference Registrar who has dealt with the proceeding during the pre-hearing process; or
  - (b) you or the decision-maker.
- 3.9 You or the decision-maker may write to us to suggest that a Tribunal with particular knowledge, expertise or experience be constituted for the purposes of a proceeding and provide reasons for this view. Any such communication should be lodged with us no later than at the time you or the decision-maker lodge a Hearing Certificate. If we do not require a Hearing Certificate, any such communication should be lodged with us no later than 7 days after the final conference, conciliation or other ADR process.

***Specific matters relating to constituting the Tribunal in the Migration and Refugee Division***

- 3.10 In a proceeding relating to a protection visa or that involves gender issues, the President or his or her delegate may take into account any recommendations or suggestions in relation to the gender of the member(s) who should constitute the Tribunal made by:
- (a) an AAT member or staff member; or
  - (b) you.
- 3.11 You should inform us at the earliest opportunity of any factors relating to the proceeding that would make it appropriate that a member of a particular gender conduct the review.<sup>6</sup>

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<sup>6</sup> For more information, see the AAT's Migration and Refugee Division [Guidelines on Gender](#).

## 4. Relevant considerations in constituting the Tribunal

### *Matters that may be taken into account*

- 4.1 The President or his or her delegate may have regard to any of the following matters in deciding who will constitute the Tribunal for the purposes of a proceeding:
- (a) any legislative requirements relating to constituting the Tribunal;
  - (b) the degree of public importance of the matters to which that proceeding relates;
  - (c) the status of the position or office held by the person who made the decision that is to be reviewed by the Tribunal;
  - (d) the degree to which the matters to which that proceeding relates concern the security, defence or international relations of Australia;
  - (e) the degree of financial importance of the matters to which that proceeding relates;
  - (f) the degree of complexity of the matters to which that proceeding relates, including whether the proceeding raises novel legal issues or issues in relation to which conflicting views have been expressed in previous decisions of the Tribunal;
  - (g) the nature and likely complexity of the hearing;
  - (h) the degree to which it is desirable for any or all of the persons who are to constitute the Tribunal to have particular knowledge, expertise or experience in relation to the matters to which that proceeding relates;
  - (i) whether there are any factors in relation to the proceeding that would make it appropriate for a member of a particular gender to conduct the review;
  - (j) the availability of particular members for the purposes of the proceeding;
  - (k) whether any particular member has an interest, pecuniary or otherwise, that could conflict with the proper performance of his or her functions in relation to the proceeding;
  - (l) whether a member has conducted an ADR process in relation to the proceeding and whether you or the decision-maker has notified the Tribunal under section 34F of the AAT Act that he or she objects to that member participating in the hearing; and
  - (m) such other matters as the President or his or her delegate considers relevant.

## 5. Reconstituting the Tribunal

- 5.1 The Tribunal may be reconstituted before the hearing of a proceeding commences and, in limited circumstances, after a hearing has commenced. In exercising the powers to reconstitute the Tribunal, the President or his or her delegate may have regard to the matters specified in paragraph 4.1 above.

### ***Reconstitution before a hearing commences***

- 5.2 At any time after a direction is given as to the persons who are to constitute the Tribunal for the purposes of a proceeding but before the hearing commences, the President or his or her delegate may revoke the direction and give a further direction as to who will constitute the Tribunal.<sup>7</sup>

### ***Reconstitution after a hearing commences***

- 5.3 After a hearing has commenced but before a decision has been given, the Tribunal may be reconstituted in the following limited circumstances:
- (a) where the member, or one of the members, who constitutes the Tribunal:
    - (i) stops being a member; or
    - (ii) is for any reason unavailable; or
    - (iii) is directed by the President not to continue to take part in the proceeding;<sup>8</sup>  
or
  - (b) the President considers that the reconstitution is in the interests of achieving the expeditious and efficient conduct of the proceeding.<sup>9</sup>
- 5.4 The power to reconstitute the Tribunal where a member stops being a member or is for any reason unavailable for the purposes of the proceeding may be exercised by the President or his or her delegate. The power to reconstitute the Tribunal in other circumstances may only be exercised by the President personally.

## **6. How will the Tribunal be constituted on remittal from a court?**

- 6.1 Where a court orders that a case be remitted to the Tribunal, unless the court has ordered that the Tribunal be differently constituted, the President or the relevant Division Head will determine whether the case is to be heard and decided again by the Tribunal as previously constituted or by a differently constituted Tribunal.
- 6.2 In general, the President or the Division Head will direct that a case be remitted to the Tribunal as previously constituted unless the circumstances indicate that it would be preferable for the Tribunal to be differently constituted. Remitting a case to the Tribunal as previously constituted will usually cause it to be finalised more expeditiously, less expensively and more efficiently than before a differently constituted Tribunal.
- 6.3 In deciding whether a case should be remitted to the Tribunal as previously constituted or to a differently constituted Tribunal, matters to which the President or the Division Head will have regard include:
- (a) whether the member or members who previously constituted the Tribunal is or are available to hear and decide the case again within a reasonable period of time;
  - (b) whether a real question of actual or apprehended bias may arise if the case were heard and decided again by the previously constituted Tribunal;

<sup>7</sup> Subsection 19D(1) of the AAT Act.

<sup>8</sup> Paragraph 19D(2)(a) and subsections 19E(5) and 19F(5) of the AAT Act.

<sup>9</sup> Paragraph 19D(2)(b) of the AAT Act.

- (c) whether the nature of the error of law which affected the original decision indicates that the case should be heard and decided again by a differently constituted Tribunal;
  - (d) any recommendation made by the court as to how the Tribunal should be constituted when it hears and decides the case again.
- 6.4 If the President or the Division Head determines that the case should be heard by a differently constituted Tribunal, the President or the Division Head will:
- (a) decide who is to constitute the Tribunal; or
  - (b) refer the case to a delegate of the President to decide who is to constitute the Tribunal.
- 6.5 In deciding who will constitute the Tribunal, regard may be had to the matters specified in paragraph 4.1.

**Justice Duncan Kerr**  
**President**

**14 July 2015**

## Attachment A – SPECIAL REQUIREMENTS FOR CONSTITUTING TRIBUNALS

This attachment sets out the special requirements that apply to constituting the Tribunal in particular circumstances: see paragraph 2.4 of this Direction. The table identifies:

- the Acts and the particular provisions that create the special requirements;
- when the special requirements apply; and
- what the special requirements are.

Further relevant information is included in the Notes column.

Enactment	Relevant Provision	Description as to when a special requirement applies	Requirement(s)	Notes
<i>Administrative Appeals Tribunal Act 1975</i>	Subsection 19E(2)	<p>The special requirement applies to a proceeding in the Security Division of the AAT in relation to:</p> <ul style="list-style-type: none"> <li>• review of an adverse or qualified security assessment given under the <i>Australian Security Intelligence Organisation Act 1979</i> (ASIO Act); or</li> <li>• review of the Tribunal's findings on an application for review of an adverse or qualified security assessment given under the ASIO Act.</li> </ul>	<ol style="list-style-type: none"> <li>1. The Tribunal must be constituted by a presidential member and 2 other members</li> <li>2. The Tribunal as constituted cannot include certain members: see Notes</li> </ol>	<p>A presidential member must not participate in the proceeding if he or she is, or has been, the Director-General of Security or an ASIO employee or ASIO affiliate (within the meaning of the ASIO Act): subsection 19E(3).</p> <p>The presidential member presides at a hearing of the proceeding: subsection 19E(4).</p>

For further information about the AAT, please call us on **1800 228 333** or go to [www.aat.gov.au](http://www.aat.gov.au).

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Enactment	Relevant Provision	Description as to when a special requirement applies	Requirement(s)	Notes
<i>Administrative Appeals Tribunal Act 1975</i>	Subsection 19F(2)	The special requirement applies to any proceeding in the Security Division of the AAT in relation to a review of a decision of the Director-General of the National Archives of Australia under the <i>Archives Act 1983</i> relating to a record of the Australian Security Intelligence Organisation.	<p>1. The Tribunal must be constituted by either 3 presidential members or a presidential member alone</p> <p>2. The Tribunal as constituted cannot include certain members: see Notes</p>	<p>A presidential member must not participate in the proceeding if he or she is, or has been, the Director-General of Security or an ASIO employee or ASIO affiliate (within the meaning of the ASIO Act): subsection 19F(3).</p> <p>If the Tribunal is constituted by 3 presidential members, the presiding member is:</p> <ul style="list-style-type: none"> <li>(a) if the President is one of the members – the President;</li> <li>(b) if the President is not one of the members but one or more Judges is – the most senior (or only) Judge; or</li> <li>(c) if paragraphs (a) and (b) do not apply – the Deputy President whom the President or his or her delegate directs to preside: subsection 19F(4).</li> </ul>
<i>Administrative Appeals Tribunal Act 1975 (AAT Act)</i>	Subsection 19C(1)	The special requirement applies to an application to the AAT under subsection 69A(2) of the AAT Act for review of a taxing of costs in another proceeding in the AAT.	1. The Tribunal must be constituted by a particular member: see Notes	<p>The following member must constitute the Tribunal:</p> <ul style="list-style-type: none"> <li>(a) the member who constituted the Tribunal for the purposes of the other proceeding; or</li> <li>(b) if the Tribunal was constituted by more than one member for the purposes of the other proceeding – the member who presided for those purposes.</li> </ul> <p>If the member who is to constitute the Tribunal under subsection 19C(1) has stopped being a member, is for any reason unavailable, or is directed by the President not to take part in the review proceeding, the President must direct another member to constitute the Tribunal: subsection 19C(2).</p>

Enactment	Relevant Provision	Description as to when a special requirement applies	Requirement(s)	Notes
<p><i>Administrative Appeals Tribunal Act 1975</i></p>	<p>Subsection 36D(3)</p>	<p>The special requirement applies to the following decisions that the Tribunal may make under the AAT Act:</p> <ul style="list-style-type: none"> <li>• a decision under subsection 36(3) or 36B(3) of the AAT Act as to whether information or matter that is the subject of a certificate issued by the Commonwealth Attorney-General under subsection 36(1) or the Attorney-General of a State or Territory under subsection 36B(1) should be disclosed to all or any of the parties to the proceeding; or</li> <li>• a decision under paragraph 36A(2)(b) or 36C(2)(b) of the AAT Act as to whether a witness at a hearing must answer a question where the Commonwealth Attorney-General under subsection 36A(1) or the Attorney-General of a State or Territory under subsection 36C(1) has informed the Tribunal that the answering of the question would be contrary to the public interest.</li> </ul>	<p>1. The Tribunal must be constituted by a member who is a Judge of the Federal Court of Australia</p>	<p><i>General information</i></p> <p>Under the AAT Act, the Attorney-General of the Commonwealth or a State or Territory may:</p> <ul style="list-style-type: none"> <li>• certify that the disclosure of information concerning a specified matter, or the disclosure of any matter contained in a document, would be contrary to the public interest – see subsections 36(1) and 36B(1); or</li> <li>• inform the Tribunal that the answering of a question by a witness would be contrary to the public interest – see subsections 36A(1) and 36C(1).</li> </ul> <p>If the reason or reasons given by an Attorney-General do not relate to either of the following areas:</p> <p>(a) security, defence or international relations of Australia; or</p> <p>(b) deliberations or decisions of the Cabinet or a Committee of the Cabinet;</p> <p>the Tribunal may decide:</p> <p>(a) that the information or matter should be disclosed to all or any of the parties to the proceeding – see subsections 36(3) and 36B(3); or</p> <p>(b) that the answering of the question would not be contrary to the public interest – see paragraphs 36A(2)(b) and 36C(2)(b).</p>

Enactment	Relevant Provision	Description as to when a special requirement applies	Requirement(s)	Notes
<i>Archives Act 1983</i>	Subsection 46(2)	<p>The special requirement applies to any proceeding in relation to an application made to the AAT for review of a decision refusing to grant access to a record that is:</p> <ul style="list-style-type: none"> <li>• claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b) of the <i>Archives Act 1983</i>; and</li> <li>• not a record of the Australian Security Intelligence Organisation.</li> </ul>	1. The Tribunal must be constituted by either 3 presidential members or a presidential member alone	<p>If the Tribunal is constituted by 3 presidential members, the presiding member is:</p> <ul style="list-style-type: none"> <li>(a) if the President is one of the members – the President;</li> <li>(b) if the President is not one of the members but one or more Judges is – the most senior (or only) Judge; or</li> <li>(c) if paragraphs (a) and (b) do not apply – the Deputy President whom the President or his or her delegate directs to preside; subsection 46(3) of the <i>Archives Act 1983</i>. <p><i>General information</i></p> <p>Paragraphs 33(1)(a) or (b) of the <i>Archives Act 1983</i> provide that a record is exempt if it contains:</p> <ul style="list-style-type: none"> <li>• information or matter, the disclosure of which could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth ; or</li> <li>• information or matter communicated in confidence by or on behalf of a foreign government or an international organisation to the Commonwealth, the disclosure of which would constitute a breach of confidence.</li> </ul> <p>Note also that a special requirement exists under section 19F of the AAT Act in relation to applications for review of a decision of the Director-General of the National Archives of Australia in respect of a record of the Australian Security Intelligence Organisation.</p> </li></ul>

Enactment	Relevant Provision	Description as to when a special requirement applies	Requirement(s)	Notes
<i>Commonwealth Electoral Act 1918</i>	Subsection 141(6)	<p>The special requirement applies to the review of any of the following decisions that have been made by the Australian Electoral Commission at first instance or on reviewing a decision of a delegate of the Commission:</p> <ul style="list-style-type: none"> <li>• to register, or refuse to register, a political party under Part XI;</li> <li>• to grant, or to refuse, an application under subsection 134(1) to change the Register of Political Parties;</li> <li>• to uphold, or refuse to uphold, an objection under subsection 134A(1) to the continued use of a name by a political party; or</li> <li>• to deregister a political party under subsection 137(6).</li> </ul> <p>The special requirement also applies to the review of a decision of the Australian Electoral Commission under subsection 141(2) to refuse to allow a person further time to make an application for reconsideration of any of the above decisions of a delegate of the Commission.</p>	1. The Tribunal must be constituted by 3 members, at least one of whom is a Judge of the Federal Court of Australia	The Tribunal may be constituted by more than one member who is a Judge. Subsection 141(6A) of the <i>Commonwealth Electoral Act 1918</i> provides that paragraph 19B(1)(b) of the AAT Act does not apply in relation to the review of any of the decisions referred to in this entry.

Enactment	Relevant Provision	Description as to when a special requirement applies	Requirement(s)	Notes
<i>Freedom of Information Act 1982</i>	Subsection 58B(2)	The special requirement applies to any proceeding in relation to an application made to the AAT for review of a decision refusing to grant access to a document in accordance with a request, being a document that is claimed to be an exempt document under section 33, 34 or 45A of the <i>Freedom of Information Act 1982</i> .	1. The Tribunal must be constituted by either 3 presidential members or a presidential member alone	<p>If the Tribunal is constituted by 3 presidential members, the presiding member is:</p> <ul style="list-style-type: none"> <li>(d) if the President is one of the members – the President;</li> <li>(e) if the President is not one of the members but one or more Judges is – the most senior (or only) Judge; or</li> <li>(f) if paragraphs (a) and (b) do not apply – the Deputy President whom the President or his or her delegate directs to preside: subsection 58B(3) of the <i>Freedom of Information Act 1982</i>.</li> </ul> <p><i>General information</i></p> <p>Section 33 of the <i>Freedom of Information Act 1982</i> sets out the circumstances in which documents affecting national security, defence or the international relations of the Commonwealth are exempt from disclosure.</p> <p>Section 34 sets out the circumstances in which documents relating to Cabinet or a committee of the Cabinet are exempt from disclosure.</p> <p>Section 45A sets out the circumstances in which documents relating to the Parliamentary Budget Office prepared in relation to a confidential request are exempt from disclosure.</p>

Enactment	Relevant Provision	Description as to when a special requirement applies	Requirement(s)	Notes
<i>Insurance Acquisitions and Takeovers Act 1991</i>	Subsection 67(5)	<p>The special requirement applies in relation to:</p> <ul style="list-style-type: none"> <li>• a review of a decision made under the Act; and</li> <li>• a request under subsection 41(2) of the AAT Act for an order staying or otherwise affecting the operation or implementation of a decision made under the Act.</li> </ul>	1. The Tribunal as constituted cannot include certain members: see Notes	A non-presidential member must not sit as a member of the Tribunal if he or she is a director or employee of a company or body carrying on insurance business or life insurance business (whether in Australia or elsewhere).
<i>Insurance Act 1973</i>	Subsection 63(12)	<p>The special requirement applies in relation to:</p> <ul style="list-style-type: none"> <li>• a review of a decision made under the Act; and</li> <li>• a request under subsection 41(2) of the AAT Act for an order staying or otherwise affecting the operation or implementation of a decision made under the Act.</li> </ul>	1. The Tribunal as constituted cannot include certain members: see Notes	<p>A non-presidential member must not sit as a member of the Tribunal if he or she is a director or employee of:</p> <ul style="list-style-type: none"> <li>(a) an entity of any kind carrying on insurance business or life insurance business (whether in Australia or elsewhere); or</li> <li>(b) a body corporate related to such an entity.</li> </ul>

Enactment	Relevant Provision	Description as to when a special requirement applies	Requirement(s)	Notes
<i>Life Insurance Act 1995</i>	Subsection 237(3)	<p>The special requirement applies in relation to:</p> <ul style="list-style-type: none"> <li>• a review of a decision made under the Act; and</li> <li>• a request under subsection 41(2) of the AAT Act for an order staying or otherwise affecting the operation or implementation of a decision made under the Act.</li> </ul>	1. The Tribunal as constituted cannot include certain members: see Notes	A non-presidential member must not sit as a member of the Tribunal if he or she is a director or employee of a company or body carrying on insurance business or life insurance business (whether in Australia or elsewhere).