

Handbook of ART Legal Procedure

Chapter 6: Constitution and Reconstitution

Current as at 28 August 2025

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6. CONSTITUTION AND RECONSTITUTION

6.1 Constitution of the Tribunal

Under the *Administrative Review Tribunal Act 2024* (the ART Act, or the Act), the Tribunal is comprised of the President, who must be a Judge of the Federal Court of Australia (the Federal Court), Deputy Presidents, who may be Judicial or non-Judicial, senior members, and general members. A Judicial Deputy President must be a Judge of the Federal Court or the Federal Circuit and Family Court of Australia (Division 1).¹

For the purposes of a particular proceeding in the Tribunal, the Act requires that the Tribunal be constituted to a particular member or members according to specified rules. The powers to constitute (or reconstitute) the Tribunal lie with the President; however they have largely been delegated, in most cases to Jurisdictional Area Leaders (JAL) and/or List Leaders and/or the guidance and appeals panel (GAP) Registrar.²

The powers, rules, and procedures relating to the constitution or reconstitution of the Tribunal for the purposes of a proceeding are set out in the ART Act and associated instruments. For proceedings generally, they are set out in Part 4 Division 4 of the Act. Constitution of the Tribunal following the remittal of a matter back to the Tribunal from a court is dealt with in Part 7 Division 4. These provisions are discussed below. Special rules apply for proceedings in the Intelligence and Security jurisdictional area. These are set out in Part 6 Division 3.

These provisions commenced on 14 October 2024, when the Tribunal was established replacing the Administrative Appeals Tribunal (AAT). Under transitional provisions, proceedings commenced in the AAT and not finalised before 14 October 2024 (transition time) must be continued and finalised by the ART, and anything done in or in relation to the proceeding before that time continues to have effect.³ Accordingly, the constitution of any proceeding that was lawfully done before transition time continues to have effect.

6.2 Constitution power

The constitution power is contained in s 37 of the Act which applies to all constitutions and reconstitutions of the Tribunal. The general *rules* for constitution are set out in s 39 and its exceptions in ss 40 – 42 relating to the GAP.

Section 37 provides that the President may direct which member or members are to be assigned to constitute the Tribunal for the purposes of a particular proceeding. It also sets out

¹ *Administrative Review Tribunal Act 2024* (the Act), s 10 and s 4 definitions. Unless otherwise specified, all references to legislation are to the *Administrative Review Tribunal Act 2024*, No. 40, 2024, and all references and hyperlinks to commentaries are to materials prepared by Legal Services.

² *Administrative Review Tribunal (President's Functions and Powers) Delegation No. 2 of 2025*, 23 April 2025. 'Jurisdictional Area Leader' is defined in s 4 of the Act; 'GAP Registrar' means a staff member who is engaged as, or performing the duties of, Registrar of the Guidance and Appeals Panel; 'List Leader' means a Deputy President or a Senior Member assigned by the President to lead one or more Lists under s 198(1) of the Act: see s 5 of the Delegation.

³ *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024*, Schedule 16, Pt 5.

the requirements for directions, and a requirement to notify parties that the proceeding has been constituted.

In making a direction under s 37, the President (or delegate) must comply with the requirements specified in the Act and any other requirements specified in the practice directions.⁴

Requirement for a written direction?

It is implicit in s 37 of the ART Act that a direction as to how the Tribunal is to be constituted is not required to be in writing. Subsections (1) and (2) simply provide that the President may direct which member or members are to constitute the Tribunal for the purposes of a proceeding; and subsection (4) clarifies that *if* a direction is made in writing, the direction is not a legislative instrument.⁵

The Tribunal's practice varies depending on the case management system in use for the proceeding but in general a written direction is prepared for the President or their delegate to sign. In the absence of a written direction in relation to a particular proceeding, whether the Tribunal was properly constituted for that proceeding will be a question of evidence. Under the presumption of regularity, where a public official or authority purports to exercise a power, a rebuttable presumption arises that all conditions necessary to the exercise of that power have been fulfilled;⁶ so, for example, if a member of the Tribunal conducts a review, there is a rebuttable presumption that the Tribunal was properly constituted for the purposes of that proceeding. If that presumption is rebutted by evidence that the Tribunal was not properly constituted, whether that procedural defect results in invalidity of its decision will depend on whether that defect is considered to be of a character that Parliament intended that outcome.⁷

Consultation requirement

Under the *rules* for constitution (discussed below), for some types of proceeding at least one of the members of the constituted Tribunal must be the President or a Deputy President (either Judicial or non-Judicial). Before directing that a Judicial Deputy President is to constitute the Tribunal for the purposes of a proceeding, the President must consult the Chief Justice of the relevant court.⁸

Notice requirement

Once the President (or delegate) constitutes the Tribunal for the purposes of a proceeding,

⁴ s 37(3). There are currently no relevant practice directions.

⁵ By contrast, AAT Act s 19A(1)(a) provided that the President may give *written* directions in relation to these matters; however in the context of a similarly worded provisions in the Migration Act as in force in 2000 it has been held that if the Principal Member or delegate were to give a direction other than in writing it would not invalidate the Tribunal's authority to proceed with the review, *a fortiori* where it is the Principal Member or delegate who constitutes himself or herself as the member: see *Cabal v MIMA (No 4)* [2000] FCA 1806 at [56].

⁶ See eg *McLean Bros & Rigg Ltd v Grice* [1906] HCA 1; (1906) 4 CLR 835 at 849, *Minister for Natural Resources v NSW Aboriginal Land Council* (1987) 9 NSWLR 154 at 164 and *McHugh v MICMSMA* [2020] FCA 416 at [329]-[337].

⁷ See *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [91]-[93].

⁸ s 38. This is a new provision which recognises the responsibility the Chief Justice of a court has to ensure the court's workload can be appropriately discharged: EM at [281]-[382].

each party to the proceeding (other than a non-participating party⁹) must be given written notice that the Tribunal has been constituted, and if the Tribunal is constituted by the GAP,¹⁰ the notice must state this.¹¹ The notice does not however need to specify who is to constitute the Tribunal, or who is to preside.¹²

These are new requirements, was added to provide greater visibility to parties as to the progress of their matter;¹³ however the Act is silent on when the notice must be provided.

6.3 Rules for constitution of the Tribunal

The *general rule* is that for a particular proceeding the Tribunal must be constituted by one, two, or three members,¹⁴ but cannot have more than one member who is a Judge.¹⁵ The Tribunal may be constituted by more than one member only if the President (or delegate) considers it appropriate (a) because the proceeding raises a complex issue, or (b) because one or more of the members have particular relevant expertise, or (c) in the interests of justice.¹⁶ If the Tribunal is constituted by more than one member for the purposes of a proceeding, the President (or delegate) must direct which member is to preside.¹⁷

The general rule in s 39 is subject to exceptions where an application for review has been referred to the GAP.

Exceptions – Guidance and appeals panel

Part 5 of the Act establishes a GAP within the Tribunal, which is a way of constituting the Tribunal at a more senior level for the review of some primary decisions, or the re-review of some Tribunal decisions.¹⁸ The GAP has the power to hear and determine review applications referred to it by the President that raise an issue of significance to administrative decision-making,¹⁹ and to review and determine Tribunal decisions referred to it by the President that may contain a material error of fact or law or that raise an issue of significance to administrative decision-making.²⁰

Constitution rules for s 122 referrals

If the President refers an *application for review* of a decision to the GAP under s 122 because the application raises an issue of significance to administrative decision-making, the Tribunal *must* be constituted for the purposes of the proceeding by 2 or 3 members, one of whom must

⁹ Defined in s 61. See [Part 2 'Conduct of the Review'](#).

¹⁰ See below.

¹¹ s 37(6) and (7).

¹² s 37(5).

¹³ See Explanatory Memorandum (EM) to the Administrative Review Tribunal Bill 2023 at [379]-[380]. Unless otherwise stated, all references to the EM are to this document.

¹⁴ s 39(1).

¹⁵ s 39(3).

¹⁶ s 39(2).

¹⁷ s 37(2).

¹⁸ s 121. Simplified outline of Part 5 Guidance and appeals panel. For details see the [Guidance and Appeals Panel home page](#).

¹⁹ s 122.

²⁰ s 128.

be the President or a Deputy President.²¹

Constitution rules for s 128 referrals – issues of significance

If the President refers a decision of the Tribunal to the GAP under s 128 on the basis that the Tribunal decision raises an issue of significance to administrative decision-making, the Tribunal *must* be constituted for the purposes of the proceeding by 2 or 3 members, one of whom must be the President or a Deputy President, and unless the parties agree otherwise, none of the members can be a person, or one of the persons, who constituted the Tribunal for the purposes of the proceeding in which the Tribunal decision was made.²²

Constitution rules for s 128 referrals – material error

If the President refers a Tribunal decision to the GAP on the basis that the decision may have been materially affected by an error of fact or law, and is not satisfied that the decision raises an issue of significance to administrative decision-making, the Tribunal must be constituted for the purposes of the proceeding by 1 or 2 or 3 members. Unless the parties agree otherwise, none of the members can be a person, or one of the persons, who constituted the Tribunal for the purposes of the proceeding in which the Tribunal decision was made.²³

If the GAP is constituted by a single member, they must be more senior than the most senior person involved in making the Tribunal decision; and if constituted by more than one member, the presiding member must be more senior than the most senior person involved in making the Tribunal decision.²⁴

6.4 Power to reconstitute the Tribunal

‘*Reconstitute the Tribunal*’, in relation to a proceeding, is defined to mean revoke the direction made under s 37(1) in relation to the proceeding and make another direction under that provision in relation to the proceeding.²⁵

Subdivision D of Part 4 of the Act deals with reconstitution of the Tribunal, including when a matter *must* be reconstituted for specified reasons.

The grounds upon which a matter may, or must, be reconstituted depend on whether or not the hearing of a proceeding has commenced. Notably, the powers to reconstitute *before* the hearing starts (s 43), are wider because at that stage reconstitution is likely to involve less disruption to the proceeding and the parties. In comparison, reconstituting the Tribunal for the purposes of a proceeding *after* the hearing has started (s 44) is intended to be more confined because it will involve more disruption, and also because it may be seen as impinging upon

²¹ s 40.

²² s 41.

²³ s 42.

²⁴ s 42. Subsection 42(7) sets out the order of seniority of members for the purposes of this provision.

²⁵ s 4.

the independence of the Tribunal.²⁶

Reconstitution before hearing commences

Under s 43 of the Act,²⁷ the President (or delegate) may reconstitute the Tribunal at any time before the start of the hearing of a proceeding. There are no specified grounds upon which a matter can be reconstituted prior to the hearing of a proceeding commencing. Rather, this provision is broad enough to encompass any reason. It is intended to give the President the power and flexibility to reassign which member or members will deal with particular proceedings in response to, for example, changing availability of members, changing priorities, or resourcing constraints, or to avoid potential conflicts of interest.²⁸

This power is also available to be exercised if, before the hearing commences, s 89 (eligibility of person conducting dispute resolution process to sit as a member) applies in relation to the member, or one of the members, constituting the Tribunal for the purposes of the proceeding.²⁹

The President has delegated this power to JALs, List Leaders and the GAP Registrar.³⁰

Reconstitution after hearing commences

The President may reconstitute the Tribunal after the hearing of a proceeding commences, in any of the following specified circumstances:

- *member unavailable* - where the member, or one of the members, who constitutes the Tribunal for the purposes of the proceeding stops being a member, or is for any reason unavailable, or is directed by the President not to take part in the proceeding;³¹ or the President considers that reconstituting the Tribunal is in the interests of achieving the quick and efficient conduct of the proceeding;³²
- *member's involvement in dispute resolution process* - where the member, or one of the members, who constitutes the Tribunal for the purposes of a proceeding becomes ineligible to sit as a member under s 89 because of involvement in a dispute resolution process;³³
- *conflict of interest or bias* – where the President (or delegate) is satisfied that the member or a member constituting the Tribunal for the purposes of a proceeding has a conflict of interest or actual or apprehended bias in relation to the proceeding;³⁴ and
- *referral to GAP after hearing starts* – the Tribunal must be reconstituted for the purposes of a proceeding if the application to which it relates is referred to the GAP

²⁶ EM at [410]-[411].

²⁷ equivalent to AAT Act s 19D(1).

²⁸ EM at [404].

²⁹ Under s 89, a member who has been involved in a dispute resolution process in relation to a proceeding may no longer continue to take part in the proceeding if a party objects. In that case, the Tribunal must be reconstituted. See EM at [412].

³⁰ *Administrative Review Tribunal (President's Functions and Powers) Delegation No.2 of 2025*, Sch 1 item 7.

³¹ s 44(1)(a)(i), (ii) and (iii) respectively; equivalent to AAT Act s 19D(2)(a)(i), (ii) and (iii).

³² s 44(1)(b), equivalent to AAT Act s 19D(2)(b).

³³ s 45. This is a new provision, intended to give effect to s 89 (equivalent to AAT Act s 34F). See EM at [411].

³⁴ s 46. This is new, with no AAT equivalent.

under s 122.³⁵

Reconstitution - unavailability of member etc.

The President may reconstitute the Tribunal at any time after the start of the hearing of a proceeding if the member or one of the members constituting the Tribunal for the purposes of the proceeding stops being a member or is for any reason unavailable.³⁶ The President has delegated this power to JALs, List Leaders and the GAP Registrar.³⁷

A member may generally be regarded as 'unavailable' in this context if, for example, the member is ill, dies, resigns, or takes leave.³⁸ However, while this provision is expressed in broad terms, it would not encompass matters such as conflict of interest or bias, which are addressed under a separate provision (discussed below).³⁹ 'Unavailable' in this context also does not extend to a member who is, by order of a court, precluded from being constituted as the Tribunal on a particular review.⁴⁰

The Tribunal may also be reconstituted at any time after the start of the hearing if the member or one of the members constituting the Tribunal is directed by the President not to take part in the proceeding,⁴¹ or the President considers that reconstituting the Tribunal is in the interests of achieving the quick and efficient conduct of the hearing.⁴² These powers have not been delegated and are only available to the President.

Note that these particular reconstitution powers can only be exercised if the President (or delegate) considers that it is in the interests of justice, and has consulted each member who as result would cease to be a member of the Tribunal as constituted if it is reasonably practicable to do so (see discussion [below](#)).⁴³

Reconstitution - Member directed not to take part

The President may also reconstitute the Tribunal at any time after the start of the hearing of the proceeding if the member or one of the members constituting the Tribunal is directed by the President not to take part in the proceeding.⁴⁴

Subsection 44(3) authorises the President to direct that a member not take part in a proceeding if he or she considers that it is in the interests of justice to do so and has consulted

³⁵ s 47. This is new, with no AAT equivalent.

³⁶ s 44(1)(a)(i) and (ii). Equivalent to AAT Act s 19D(1) and (2)(a)(i) and (ii).

³⁷ *Administrative Review Tribunal (President's Functions and Powers) Delegation No.2 of 2025*, Sch 1 item 8.

³⁸ See, for example, *obiter dicta* in *MZZZW v MIBP* [2015] FCAFC 133 at [87] considering the reconstitution powers in s 422(1)(b) of the Migration Act as in force in August 2013 which was in similar terms to AAT Act s 19D(2)(a)(ii), and now s 44(1)(a)(ii) of the Act.

³⁹ See ss 45, 46 and 47. Contrast AAT Act where s 19D (equivalent to ART Act s 44) was the only provision for reconstitution and was construed to cover such circumstances as where a member makes him or herself unavailable due to a perceived conflict of interest or where the circumstances of the case could give rise to reasonable apprehension of bias.

⁴⁰ See *obiter dicta* in *MZZZW v MIBP* [2015] FCAFC 133 at [87] considering the reconstitution powers in s 422(1)(b) of the Migration Act as in force in August 2013 which was in similar terms to AAT Act s 19D(2)(a)(ii) and now s 44(1)(a)(ii) of the Act. And see also s 183(2), discussed [below](#).

⁴¹ s 44(1)(iii). The president may direct that a member not take part in a proceeding of the Tribunal if the President considers that it is in the interests of justice to do so; and has consulted the member if it is reasonably practicable to do so: s 44(3).

⁴² s 44(1)(b).

⁴³ s 44(2). Equivalent to AAT Act s 19D(5).

⁴⁴ s 44(1)(a)(iii). Equivalent to AAT Act s 19D(2)(a)(iii).

the member if it is reasonably practicable to do so (see discussion [below](#)).⁴⁵

Neither the power to direct that a member not take part in a proceeding nor the power to reconstitute in those circumstances has been delegated. At present, they can only be exercised by the President personally.

Reconstitution - Quick and efficient conduct of a proceeding

Under s 44(1)(b) the President may reconstitute a matter at any time after the start of the hearing of a proceeding if the President considers that reconstituting the Tribunal is in the interests of achieving the quick and efficient conduct of the proceeding.⁴⁶ This power has not been delegated and can only be exercised by the President personally.

Interests of justice and consultation with member concerned

There are limitations on reconstituting the Tribunal after the hearing starts for any of the reasons specified in s 44(1).

Firstly, the President (or delegate) must be satisfied that it is in the interests of justice to do so.⁴⁷ The circumstances that might engage this provision are intended to be broad. For example, the President may form the view that a particular proceeding should be dealt with by members of a particular gender, due to the nature of the applicant and the evidence involved, which may not become apparent until after the hearing commences.⁴⁸ However they would generally not encompass matters such as conflict of interest or bias, which are addressed under a separate provision (discussed [below](#)). Ultimately whether it is in the interests of justice for a proceeding to be reconstituted will turn upon the particular facts of each case.

Secondly, the President must consult with each member who would cease to be a member of the Tribunal as constituted if it is reasonably practicable to do so.⁴⁹ There is no specified statutory process for the consultation, but it is to be done in a way which is considered reasonable in all the circumstances.⁵⁰

Reconstitution – involvement in dispute resolution process

Section 45 enables the President to reconstitute the Tribunal at any time after the start of the hearing of a proceeding if s 89 (eligibility of person conducting dispute resolution process to sit as a member) applies in relation to the member, or one of the members constituting the Tribunal for the purposes of the proceeding.⁵¹ The President has delegated this power to JALs,

⁴⁵ s 44(3). Equivalent to AAT Act s 19D(5).

⁴⁶ s 44(1)(b), equivalent to AAT Act s 19D(2)(b).

⁴⁷ s 44(2)(a). Equivalent to AAT Act s 19D(6).

⁴⁸ EM at [410].

⁴⁹ s 44(2)(b). Equivalent to AAT Act s 19D(6)(b).

⁵⁰ See for example *1419015 (Migration)* [2016] AATA 3075 at [49]–[54] in which the President detailed his consultation with the presiding Member before deciding whether or not exercise his power in s 19D(2)(a)(iii). The Member in that case agreed to take no further action in the case until seven days after the President's decision was made. That decision was made under the provisions that applied before 14 October 2024 but which are relevantly the same as those that apply under the ART Act.

⁵¹ s 45. Equivalent to AAT Act s 19D(1) and (2)(a)(i) and (ii).

List Leaders and the GAP Registrar.⁵²

Dispute resolution processes are provided for in Part 4 Division 6 Subdivision C of the Act, to promote the objective of providing an informal, flexible, and non-adversarial method of merits review.⁵³ Under s 88(1)(a), evidence of things said or done for the purpose of a dispute resolution process is not admissible in a proceeding in the Tribunal. To ensure that this protection is not undermined, s 89⁵⁴ provides that a member who has been involved in a dispute resolution process in relation to the proceeding may no longer continue to take part in the proceeding if a party objects.⁵⁵ The reconstitution power in s 45 is a new provision intended to give effect to those protections. The requirement for a member to cease taking part in a proceeding, and the power for the President to reconstitute the Tribunal if so, protects the integrity and confidentiality of dispute resolution processes.⁵⁶

Reconstitution – conflict of interest or bias

The President may reconstitute the Tribunal at any time after the start of the hearing of a proceeding if satisfied that the member or one of the members constituting the Tribunal for the purposes of the proceeding either (a) has a conflict of interest in relation to the proceeding or (b) has an actual or apprehended bias in relation to the proceeding.⁵⁷ This is a new provision, added to promote the Tribunal's objective of providing a method of review that is fair and just, and promoting public trust and confidence in the Tribunal. The President has delegated this power to JALs.⁵⁸ As noted above, the broad power under s 43 is also available for reconstitution to avoid potential conflicts of interest or bias before the hearing starts.

Reconstitution – as GAP after hearing starts

The President *must* reconstitute the Tribunal for the purposes of a proceeding if, at any time after the start of the hearing of the proceeding, the application is referred to the GAP by the President under s 122.⁵⁹ The President has delegated this power to the GAP Registrar.⁶⁰ Under the instrument of delegation the President must be consulted prior to the exercise of the power.⁶¹

General requirements for reconstitution

As noted above, 'reconstituting the Tribunal' means revoking the s 37(1) direction and making another direction under that provision. This triggers the notification requirements under ss 37(5), (6) and (7); and the rules for constitution will apply: either the general rules in s 39, or the exception in s 40 if the application to which the proceeding relates is referred to the GAP.

⁵² *Administrative Review Tribunal (President's Functions and Powers) Delegation No.2 of 2025*, Sch 1 item 9.

⁵³ EM at [584].

⁵⁴ Equivalent to AAT Act s 34F.

⁵⁵ See EM at [595].

⁵⁶ EM at [411].

⁵⁷ s 46. Equivalent to AAT Act s 19D(1) and (2)(a)(i) and (ii).

⁵⁸ *Administrative Review Tribunal (President's Functions and Powers) Delegation No.2 of 2025*, Sch 1 item 10.

⁵⁹ s 47.

⁶⁰ *Administrative Review Tribunal (President's Functions and Powers) Delegation No.2 of 2025*, Sch 1 item 11.

⁶¹ *Administrative Review Tribunal (President's Functions and Powers) Delegation No.2 of 2025*, Sch 1 item 11 Column 4.

These requirements and rules are discussed [above](#).

In contrast to the AAT Act which it replaced, the ART Act does not expressly stipulate that when reconstituting the Tribunal (whether before or after the start of the hearing), the President must have regard to the Tribunal's objective set out in s 9.⁶² However it is intended that the President, the Principal Registrar, members and staff consider that objective as they discharge their functions.⁶³ As such, when reconstituting (or constituting) the Tribunal, the President or delegate will be expected to consider the Tribunal's objective of providing an independent mechanism of review that: is fair and just; ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits; is accessible and responsive to the diverse needs of parties to proceedings; improves the transparency and quality of government decision-making; and promotes public trust and confidence in the Tribunal.⁶⁴

Where a proceeding has been reconstituted, the Tribunal as reconstituted must continue the proceeding; and *may* have regard to any record of the proceeding before the Tribunal as previously constituted, including a record of any evidence taken in the proceeding, and any document or thing relating to the proceeding given to the Tribunal as previously constituted.⁶⁵ This means it does not need to start again, the proceeding can continue smoothly, parties do not need to re-provide evidence or documents, and disruptions caused by the reconstitution can be kept to a minimum, thus promoting the objective of resolving applications quickly and with as little expense as possible. However the reconstituted Tribunal also has discretion to inform itself on any matter in any manner it sees fit.⁶⁶

Which provision is applicable? - Whether the hearing 'has commenced'

Whether the hearing 'has commenced' for the purposes of the reconstitution provisions will be clear in most cases; but will be less clear if there has been no hearing, for example because the parties consented to a decision on the papers,⁶⁷ or the applicant did not attend the scheduled hearing.⁶⁸ In these circumstances, having regard to the stated purposes of the distinct reconstitution provisions (including minimising disruption where the hearing has commenced, and avoiding a perception of interference with the Tribunal's independence), whether the hearing may properly be considered to have 'commenced' may depend on the circumstances, and how far the proceeding has progressed. For example, if an application has been dismissed for non-attendance at the scheduled hearing but the member subsequently became unavailable before the dismissal was confirmed or the matter reinstated, it would likely be regarded as engaging s 44. This is because a hearing had by then been scheduled even though the applicant did not attend, and the proceeding had progressed to a point where the member had been able to elect to dismiss the application.

⁶² Contrast AAT Act s 19D(7), referring to s 2A.

⁶³ EM at [224].

⁶⁴ s 9. Broadly equivalent to AAT Act s 2A.

⁶⁵ s 48. Broadly equivalent to AAT Act s 19D(4).

⁶⁶ EM at [421]-[422].

⁶⁷ s 106(2).

⁶⁸ s 99.

Effect of error in the reconstitution process

There is some authority to suggest that even if the wrong legislative provision is relied upon in reconstituting the Tribunal there will not be a jurisdictional error invalidating the Tribunal decision. However these cases have concerned the constitution and reconstitution provisions in the Migration Act and may not provide the same guidance in the considerably more detailed ART Act provisions. Nevertheless, those cases suggest that merely referring to the wrong legislative provision when reconstituting the Tribunal will not result in jurisdictional error invalidating the Tribunal's decision, provided the correct statutory procedures are complied with in substance.⁶⁹ On the other hand, if the Tribunal has purported to rely on the wrong provision (rather than simply referring to the wrong provision by mistake), whether this will invalidate the resulting Tribunal decision is likely to similarly depend on whether the procedures for the correct provision have nevertheless been complied with and if not, whether departure from those procedures is considered to be material to the decision.

6.5 Constitution following court remittal

There are a number of avenues of judicial review or appeal from decisions of the Tribunal, under a range of enactments and under the Constitution, each of which can result in the remittal of a matter back to the Tribunal to be decided again.

One such pathway for certain Tribunal decisions⁷⁰ is provided for under Part 7 of the ART Act. Under s 172(1), a party to a proceeding in the Tribunal may appeal to the Federal Court on a question of law from the decision of the Tribunal in the proceeding.⁷¹ The Federal Court has jurisdiction to hear and determine the appeal⁷² or transfer the appeal to the Federal Circuit and Family Court of Australia (Division 2).⁷³ If an appeal is made under these provisions, the Federal Court, or Federal Circuit Court, may remit the matter to be decided again by the Tribunal.⁷⁴

Other pathways are available:

- under the Migration Act Part 8, specifically ss 476 and 476A – which specify when a party can make an application to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) in relation to migration or protection decisions
- the *Child Support (Registration and Collection) Act 1988* s 99 – which permits a party to appeal to the Federal Circuit and Family Court of Australia (Division 2) on a question of law, from a decision of the ART

⁶⁹ See for example *SZLQK v MIAC* [2008] FMCA 633 and *SZFTD v MIAC* [2007] FMCA 1930 where the Court held that the then Principal Member had the power to constitute and reconstitute the Tribunal and that power had been exercised notwithstanding that the constitution schedule referred to the wrong section of the relevant Act (in this case the provisions of the Migration Act which were repealed on 1 July 2015). *SZFTD* was followed in *SZGIC v MIAC* [2008] FMCA 784 at [24]. This issue was not raised on appeal: *SZGIC v MIAC* (2009) 109 ALD 101.

⁷⁰ This avenue of appeal is not available for most decisions made under the Migration Act (see s 474AA of that Act. Instead, Part 8 of the Migration Act applies.

⁷¹ Equivalent to AAT Act s 44(1).

⁷² s 176.

⁷³ s 179(1).

⁷⁴ s 176(2), s 179(4).

- the *Judiciary Act 1903* s 39B
- the *Administrative Decisions (Judicial Review) Act* ss 5 and 8, and
- s 75(v) of the Constitution.

Appeals under ART Act s 172 form a relatively small proportion of court applications from Tribunal decisions. The bulk of such applications are under Part 8 of the Migration Act.

Source of power to constitute following court remittal on appeal under s 172

Constitution of the Tribunal following the remittal of a matter back to the Tribunal from a court on an appeal under s 172 of the ART Act is dealt with in Part 7 Division 4 of the Act. Subsection 183(1)⁷⁵ provides that the Tribunal does not need to be constituted for the review by the person (or persons) who made the decision that was appealed to the Court. This allows the President (or delegate) to constitute the Tribunal in the most efficient and effective manner, having regard to its caseload and available members.⁷⁶

Subsection 183(2) makes it clear that constituting the Tribunal for the review following a court remittal pursuant to a Pt 7 appeal is *not* a reconstitution.⁷⁷ This aims to avoid doubt by clarifying that the President is constituting the Tribunal afresh for the remitted matter, and as such is not restricted by the detailed rules for reconstitution in Part 4 Division 4 Subdivision D of the Act.⁷⁸ Thus, regardless of whether the Tribunal is constituted by the member (or members) who made the decision that was appealed, the relevant source of power will be the general constitution power having regard to the general rules in s 39 or one of the exceptions,⁷⁹ and *not* any of the reconstitution powers.⁸⁰ However, as is the case for reconstituted matters, the Tribunal may have regard to any record of the proceeding in the Tribunal prior to the appeal (including a record of any evidence taken in the proceeding) and any document or thing relating to the proceeding given to the Tribunal prior to the appeal, unless doing so would be inconsistent with the directions of the court.⁸¹

Source of power to constitute following other court remittals

Part 7 of the ART Act deals only with court remittals when an appeal has been made to the Federal Court under s 172. It does not deal with avenues of appeal or judicial review available

⁷⁵ Equivalent to AAT Act s 44(6)(a).

⁷⁶ EM at [1020].

⁷⁷ This is consistent with the Court's opinion in *SZGLL v MIAC* [2008] FMCA 631 where the Court considered that, following remittal of a matter by a court, the Tribunal should be 'constituted' under s 421 of the Migration Act as then in force and not 'reconstituted' in the s 422 or s 422A sense.

⁷⁸ EM at [1021]. This has no equivalent in the AAT Act. Contrast s 44(6)(b) which deals with what the Tribunal may have regard to following a court remittal 'whether or not the Tribunal is reconstituted'. However there is some authority for the proposition that when a case is remitted to the Tribunal, it is the constitution power and not the 'reconstitution' power that is exercised: *SZGLL v MIAC* [2008] FMCA 631 at [72]-[78], considering the constitution and reconstitution provisions of the Migration Act as in force in November 2005, with reference to *NBMB v MIAC* [2008] FCA 149 at [40]. See e.g. *AZAAA v MIAC* [2009] FCA 554, considering the constitution and reconstitution provisions of the Migration Act as then in force, with reference to *NBMB v MIAC* [2008] FCA 149 at [40].

⁷⁹ Sections 40, 41, or 42 discussed above.

⁸⁰ By contrast, the language of AAT Act s 44(6), indicating that the Tribunal may but need not be 'reconstituted', suggests that the term 'reconstituted' is used in the sense of constitution to a different member, and judicial consideration of that provision tends to use the language of reconstitution.

⁸¹ s 184. Broadly equivalent to AAT Act s 44(6)(b).

under the Migration Act, the *Child Support (Registration and Collection) Act 1988*, the *Judiciary Act 1903* s 39B, the *Administrative Decisions (Judicial Review) Act*, or the Constitution. For remittals following Court applications made under these enactments, the ART Act is silent on matters of constitution.

However, having regard to the overall statutory context, it appears the same principles would apply as for Pt 7 appeals. That is, where a matter is remitted by a court other than pursuant to an appeal under Part 7, it would seem that constitution of the Tribunal for the purposes of the fresh review will be governed by either the general rules for constitution in s 39 or one of the exceptions in ss 40 - 42, and not by any of the reconstitution powers. This is because, firstly, the reconstitution powers, whether before or after the hearing starts, assume that the Tribunal has already been constituted for the purposes of the proceeding, and that a decision has not been made. Secondly, and significantly, s 48 stipulates that if the Tribunal is reconstituted for the purposes of a proceeding, the Tribunal as reconstituted must *continue* the proceeding. This would generally relate to an on-going Tribunal review and not to a case that had been finalised and remitted to the Tribunal following external judicial review,⁸² although it may depend on the terms of the court's orders in a particular case.

Constitution – same or different member?

Whether it is appropriate in a particular case to constitute the Tribunal by the same member (or members) who made the decision that was appealed or by a different member (or members) will depend on the circumstances. Cases decided under the Migration Act or the AAT Act prior to the establishment of the ART can provide guidance.

There may be reasons in some cases why constituting the Tribunal to the same member may be undesirable. In some cases, a fair minded observer might reasonably apprehend that a member who has already made an unfavourable decision will not bring an open mind to the review. This will clearly be the case where the original decision was set aside due to actual or apprehended bias.⁸³ A similar concern arises where the member previously made adverse credibility findings in relation to the applicant or their witnesses.⁸⁴

For example, while not dealing with a court remittal, the Court in *SZBL Y v MIAC* held that, in circumstances where the Tribunal had affirmed the delegate's decision on credibility grounds but later recalled and reconsidered its decision in response to new information, the matter should have been constituted to a different member for the second decision.⁸⁵ It would

⁸² See *SZGLL v MIAC* [2008] FMCA 631 at [73]. This was an application for judicial review of a decision made by the Tribunal following a previous court remittal. The applicant had argued that where a decision was remitted by a court to be reconsidered according to law, the Tribunal must be reconstituted under s 422A of the Migration Act and since it was not the Tribunal did not have jurisdiction. The Court rejected the contention, with reference to *NBMB v MIAC* [2008] FCA 149 where Flick J stated at [40] that '[t]he decision of the initial Tribunal having been set aside, the exercise of the power conferred by s 421(2) (which provided for how the Tribunal was to be constituted) thereafter arose for consideration'. See also *AZAAA v MIAC* [2009] FCA 554 where Mansfield J reached a similar conclusion, holding that following a court remittal the Tribunal could be 'reconstituted' to a different member under s 421.

⁸³ See e.g. *MICMSMA v CQZ15* [2021] FCAFC 24 at [88]-[119] and cases there cited.

⁸⁴ In *MZZXM v MIBP* [2015] FCCA 609, the Court commented at [57] that if the Tribunal had made extensive findings of credibility adverse to the applicant it would at least be prudent to refer the matter to another Member for rehearing on remittal, but in the circumstances of the case, where the Member on remittal considered the applicant's submissions made after the first decision and more recent country information, no reasonable apprehension of bias arose.

⁸⁵ *SZBL Y v MIAC* [2007] FCA 765; (2007) 96 ALD 70 at [32], considering the operation of the former Refugee Review Tribunal under Part 7 of the Migration Act.

otherwise be open for a fair minded and informed person to reasonably apprehend that the original member would not bring an impartial mind to bear in making the second decision.

However, constitution to the same member upon remittal from a court where the first review was conducted without a hearing will not of itself give rise to a reasonable apprehension of bias.⁸⁶ Rather, what is relevant will be the processes and findings of the Tribunal as previously constituted.

Power of court to direct how Tribunal is to be constituted

In the Migration Act context, questions have arisen as to the power of a court to direct how the Tribunal is to be constituted upon a remittal. The High Court in *MIMA v Wang* held that, where it was ‘necessary to do justice’ to a matter, the Full Federal Court had the power to remit a matter to the original Tribunal.⁸⁷ However, the majority decided that such an order did not preserve the findings of the original member that were favourable to the outcome of the application.⁸⁸ In a different statutory context, the Full Federal Court in *SZEPZ v MIMA* expressed the view that there must be real doubt as to whether the Federal Magistrates Court could direct how the Tribunal should be constituted, having regard to the express constitution powers then conferred by the relevant Act.⁸⁹ Nonetheless, orders were still made from time to time that a matter be remitted to a differently constituted Tribunal. In those circumstances the President of the Tribunal (or their delegate) has had regard to a Court’s view when considering how the Tribunal is to be constituted for the reconsideration.

The ART Act context is different. If an appeal is made under Part 7 Subdivision A, the Federal Court may make any order it considers appropriate because of its decision, including but not limited to remitting a matter to be decided again by the Tribunal with or without taking additional evidence.⁹⁰ In this context, if a court remits a matter to be decided again by the Tribunal, there appears to be no restrictions on the court ordering how the Tribunal is to be constituted, although it appears that this is now rare. If the court does make such an order, the President (or delegate) will necessarily have regard to the court’s orders when constituting the Tribunal for the purposes of the fresh review.

Progressing court remittals where the remitting judgment is the subject of an appeal

Following a court remittal, an appeal from that judgment may be lodged in a higher court. The Tribunal generally waits for the appeal period to lapse before progressing the matter. If an appeal is lodged, the Tribunal generally waits for the outcome of the appeal. This is because

⁸⁶ In *MZZYD v MIBP* [2014] FCCA 1894, the Tribunal decision was quashed on the basis of a denial of procedural fairness after the applicant did not attend the hearing due to illness. On remittal, the matter was constituted to the same Member. In dismissing the applicant’s claim of perceived bias, the Court noted there was no criticism at judicial review in the first instance of the process, findings or behaviour of the Member suggesting bias, and that the applicant had the opportunity at the second hearing to address the lack of evidence upon which the original decision had turned. Upheld on appeal in *MZZYD v MIBP* [2015] FCA 60.

⁸⁷ *MIMA v Wang* (2003) 215 CLR 518 in the context of s 481(1) of the Migration Act as then in force.

⁸⁸ *MIMA v Wang* (2003) 215 CLR 518 at [18], [45], [68]–[78]. Note that the case considered the use of the remittal power of the Federal Court under s 481 of the Migration Act, which has since been repealed, and it is unclear whether the Courts retain any power to direct who is to constitute the Tribunal where relief is granted by writ of mandamus.

⁸⁹ *SZEPZ v MIMA* (2006) 159 FCR 291 at [36] in the context of Migration Act s 420 as then in force. See also *MZXRE v MIAC* [2009] FCAFC 82; (2009) 176 FCR 552 at [5].

⁹⁰ Section 176(1)(c) and (2)(b). Equivalent to AAT Act s 44(4) and (5).

if the appeal is successful, the Tribunal decision may be valid (and operative) such that the Tribunal would not need to be constituted for a further review.⁹¹ Where a matter remitted by a court is not itself subject to an appeal but is likely to be affected by the appeal of another Tribunal matter, the Tribunal may await the outcome of that appeal before progressing the matter.

Despite the Tribunal's general practice of awaiting the outcome of an appeal, there may be circumstances where the Tribunal considers it appropriate (and / or necessary) to progress a matter that is subject to an appeal in a court. This may include, for example, where the applicant is in immigration detention or where an applicant seeks to have their matter progressed, and there is no stay on the orders of the Court.⁹²

The Federal Court in *FAK19 v MICMSMA (No 2) (FAK19)* considered the application of an applicant to have the Tribunal progress their remitted matter.⁹³ The matter concerned a Tribunal decision in the General Division where the Full Court of the Federal Court had remitted the matter to the Tribunal to be determined in accordance with the law. The Minister had then applied for special leave to appeal to the High Court from the judgment and that application had not yet been determined. The Tribunal had issued a direction to the effect that it would only progress the matter once the outcome of the Minister's special leave application in the High Court was known.⁹⁴ The applicant was in correctional custody but faced the prospect of being taken into immigration detention at the end of his sentence as he did not hold a visa. If, however, the Tribunal made a favourable decision, his visa cancellation would be set aside and he would be a lawful non-citizen. In finding in favour of the applicant's application to have the matter progressed at the Tribunal, the Court held that the Tribunal was required to comply with the orders of the Court to determine the application in accordance with the law.⁹⁵ The Court noted that it was open to the Minister or Tribunal to seek a stay on the orders of the Court to suspend the operation of the orders pending the outcome of the special leave application, but that in the absence of a stay, the orders remained operative and binding on the Tribunal.⁹⁶ The Court acknowledged that the Tribunal's efforts in progressing the review on remittal might ultimately prove to be a waste of its resources if the first decision was found to not contain jurisdictional error, and there may be some uncertainty about which decision was the operative decision until the special leave application was determined, but that this was the consequence of not applying for a stay.⁹⁷

In general, however, where an appeal has been lodged from a court remittal to a higher court, unless the circumstances of the case suggest otherwise (such as the circumstances in

⁹¹ This circumstance is not expressly contemplated by s 182; however, if a court remittal is overturned on appeal then arguably Part 7 Div 4 dealing with matters remitted to the Tribunal would no longer apply.

⁹² The Tribunal would generally progress a matter to ensure that an applicant's time in immigration detention is not prolonged because of the Tribunal's delay.

⁹³ *FAK19 v MICMSMA (No 2)* [2021] FCA 1571.

⁹⁴ *FAK19 v MICMSMA (No 2)* [2021] FCA 1571 at [7]. The directions were made on the basis that a decision of the High Court may nullify any decision of the Tribunal and therefore, the matter did not require prioritisation.

⁹⁵ *FAK19 v MICMSMA (No 2)* [2021] FCA 1571 at [52]–[55]. The Court held that the finding of non-compliance by the Tribunal was 'plainly open' by reference to the Tribunal's decision not to conduct a substantive hearing until it was known that the orders of the Court were preserved by the High Court, and that the review was required to be conducted at the earliest practicable opportunity but it was not necessary to be more specific than that. Although noting that the original order of the Court was not a writ of mandamus, the Court ordered that the Tribunal make a return to the Court within 42 days as to the determination of the review or show cause as to why it has not been done.

⁹⁶ *FAK19 v MICMSMA (No 2)* [2021] FCA 1571 at [55].

⁹⁷ *FAK19 v MICMSMA (No 2)* [2021] FCA 1571 at [63]–[64].

FAK19), the preferable and pragmatic approach is to await the outcome of the appeal before progressing the matter.

6.6 Review proceedings following reconstitution or court remittal

The Tribunal's task after it has been freshly constituted will vary depending on whether it was reconstituted under Subdivision D (whether before or after hearing starts) or newly constituted following a court remittal.

Review proceedings following reconstitution under Subdivision D

If the Tribunal is reconstituted under Subdivision D for the purposes of a proceeding,⁹⁸ the reconstituted Tribunal *must* continue the proceeding⁹⁹ and *may* have regard to any record of the proceeding before the Tribunal as previously constituted,¹⁰⁰ including a record of any evidence taken in the proceeding, and any document or thing relating to the proceeding given to the Tribunal as previously constituted.¹⁰¹ This would extend, for example, to an audio recording of a hearing held by a member prior to the reconstitution of the Tribunal, or a written summary of such a hearing made by the previous Tribunal.¹⁰²

Whether any procedural steps previously taken need to be taken again for the purpose of continuing the proceeding will ultimately depend on whether in all the circumstances the parties have had a reasonable opportunity to present their case and the obligations in s 55 (and those under jurisdictional specific enactments such as the Migration Act) have been discharged.

Review proceedings following court remittal

Where a matter has been remitted by a court under Part 7 Division 4 of the Act, the newly constituted Tribunal may similarly have regard to any record of the proceeding in the Tribunal prior to the appeal (including a record of any evidence taken in the proceeding), and any

⁹⁸ Under Part 4 Division 4 Subdivision D.

⁹⁹ s 48 (if reconstituted under Part 4 Division 4 Subdivision D), s 184 (if constituted under Part 7 Division 4). These provisions are broadly equivalent to AAT Act s 19D(4).

¹⁰⁰ s 19D(4) of the AAT Act. See also *SZEPZ v MIMIA* (2006) 159 FCR 291 at [39] and *MIAC v SZGUR* (2011) 241 CLR 594 at [50], which considered now repealed sections of the Migration Act, such as s 422(2) and 422A(3), which concerned the reconstitution of the Tribunal and were similar in effect to s 19D(4) of the AAT Act, and where the Court noted it appeared to be the better view that the Tribunal was entitled to have regard to such material.

¹⁰¹ s 48; equivalent to AAT Act s 19D(4). Several judgments have considered now repealed sections of the Migration Act, such as ss 355(4) and 355A(3), and ss 422(2) and 422A(3), which concerned the reconstitution of the Tribunal and were similar in effect to s 48. In relation to reconstitution following the retirement or resignation of the Presiding Member, see *Liu v MIMA*; *Ahmed v MIMA* (2001) 113 FCR 541; *NADG of 2002 v MIMIA* [2002] FCA 893; *SZARJ v MIMIA* [2004] FMCA 557; *SZFAS v MIMA* (2006) 201 FLR 312 at [16].

¹⁰² *MZXSP v MIAC* [2008] FMCA 374 at [42]; *MZABH v MIBP* [2015] FCCA 1111 at [24]. In *MZXSP*, in circumstances where the member who had constituted the Tribunal had ceased to be a member, the Court held that 'record' includes a draft decision and accordingly, the reconstituted Tribunal could include verbatim passages from a draft decision prepared by the previous member so long as it brought an independent mind to the review. In that case, the reconstituted Tribunal sent a further letter under s 424A of the Migration Act as then in force and conducted a further hearing, but only slightly altered the draft decision of the former member. In considering whether the reconstituted Tribunal discharged its statutory obligations, the Court found that as it had carefully considered the draft decision and made some amendments after conducting a hearing and sending a further s 424A letter to the applicant, it brought an independent mind to the process, and therefore was entitled to adopt verbatim the reasoning of the previous member. While this case concerned provisions predating the ART Act, the Court's reasons would appear to be equally applicable to s 48.

document or thing relating to the proceeding given to the Tribunal prior to the appeal, *unless doing so would be inconsistent with the directions of the court*.¹⁰³

This is intended to promote the quick and efficient resolution of the matter.¹⁰⁴ Thus, although the Tribunal on remittal must consider the matter afresh, it is nevertheless expressly entitled to have regard to what has previously taken place in the proceeding unless doing so would be inconsistent with the directions of the court.

For remittals following court applications made under other avenues of appeal or judicial review, the ART Act is silent on matters of procedure. However, subject to anything specified in the court's orders or outlined in the court's reasons, there seems no reason why the newly constituted Tribunal could not similarly have regard to any record of the proceeding in the Tribunal prior to the appeal (including a record of any evidence taken in the proceeding), and any document or thing relating to the proceeding given to the Tribunal prior to the appeal, to the extent that these records remain available to the Tribunal on remittal. For procedural issues arising specifically under the Migration Act in relation to proceedings in the migration and protection jurisdictional areas, see [below](#).

Role of findings of fact of previous Tribunal

The Tribunal as constituted following a remittal is not bound by any findings on the review made by the Tribunal as previously constituted. The Tribunal must determine the review by dealing with the issues as they present themselves at the time of its determination and according to the facts as the Tribunal finds them to be at that time.¹⁰⁵

Further, reliance upon the reasoning of a previous Tribunal may in some circumstances indicate that the Tribunal has not completed its task of conducting a review.

However, if the Tribunal departs from the facts as found in the applicant's favour by the previous Tribunal, it may be desirable to explain why in the decision record.¹⁰⁶

For migration and protection reviews, if the Tribunal proposes to adopt some parts of the previous Tribunal's decision, such as its adverse findings on particular claims or the applicant's credibility, the Tribunal's proposal to do that and the material that it proposes to use may need to be put to the applicant under ss 359A if the material that it proposes to rely upon amounts to a rejection, denial or undermining of the applicant's claims and would be the reason, or part of the reason, for the Tribunal affirming the decision under review.¹⁰⁷ Even if the Tribunal puts

¹⁰³ s 184; broadly equivalent to AAT Act s 44(6)(b). In relation to reconstitution following remittal under the relevant provisions pre 14 October 2024, see *SZHXB v MIMA* (2006) 234 ALR 743 applying *SZEPZ v MIMA* (2006) 159 FCR 291; *SZ/BW v MIAC* [2008] FCA 160 and *SZMFJ v MIAC* [2009] FMCA 771, not disturbed on appeal: *SZMFJ v MIAC* (2009) 107 ALD 134. See also *SZHKA v MIAC* (2008) 172 FCR 1 J at [22], *SZGEP v MIAC* [2008] FCA 1798 at [32], and *SZMQS v MIAC* [2008] FMCA 1643 at [19], not disturbed on appeal: *SZMQS v MIAC* [2009] FCA 184, and *MIAC v WZANC* [2010] FCA 1391. In relation to court remittals other than under Part 7 Division 4, see 6.3.28 – 6.3.29 above. The legislation is silent as to how the Tribunal is to proceed in these cases.

¹⁰⁴ EM at [1023].

¹⁰⁵ *SZFYW v MIAC* [2008] FCA 1259 at [9]; *SZHKA v MIAC* [2008] FCAFC 138 at [18] per Gray J.

¹⁰⁶ *SZFYW v MIAC* [2008] FCA 1259 at [11]-[12]. This was a third review after two earlier court remittals. As is apparent from the judgment at first instance, *SFYW v MIAC* [2008] FMCA 813, the appellant's complaint was that the Tribunal had rejected many of the claims that had been accepted by the first two Tribunals.

¹⁰⁷ See *MZZZW v MIBP* [2015] FCAFC 133 in which the Full Federal Court found that the Tribunal's proposal to adopt parts of

findings of the previous Tribunal and its proposed reliance on those findings to an applicant under s 359A, the Tribunal still assesses the evidence before it afresh in order to conduct a review (as required by s 348).¹⁰⁸

Procedural requirements under the Migration Act following reconstitution or court remittal

In the migration and protection context there is some divergence of judicial opinion as to what procedures a *reconstituted* Tribunal, or a *newly constituted* Tribunal following a court remittal,¹⁰⁹ is obliged to follow in order to complete the proceeding. In some circumstances, courts have held that the Tribunal is simply required to undertake what remains to be done in the review without interrupting the process, picking up and carrying on from the steps that have already been taken. In other cases, the Court has required the Tribunal to start the process again. Whether it is necessary to do so depends upon the particular procedure in issue and whether or not the matter was newly constituted following remittal from a court.

Invitations to comment on adverse information

Generally speaking, it is not necessary for the Tribunal to resend an invitation under s 359A of the Migration Act to comment on adverse information issued by the previously constituted Tribunal. This is the case regardless of whether or not the matter was constituted following remittal by a Court or reconstituted for some other reason.

In *SZEPZ v MIMA*, a Full Court of the Federal Court found that, where a Tribunal decision has been set aside by a court and the matter remitted for reconsideration owing to a jurisdictional error, it does not follow that all the steps and procedures taken in arriving at that invalid decision are themselves invalid.¹¹⁰ The Tribunal still has before it the material that was obtained when the decision that had been set aside was made and is obliged to continue and complete the particular review and not to commence a new review.¹¹¹ As a consequence, the

the first Tribunal's decision was 'information' for the purpose of s 424A [s 359A] as it would have been a reason or part of the reason for the decision to affirm the delegate's decision and it would be more than mere disclosure of a proposed and prospective reasoning process. Note that the Court's finding appears to be an expansion of the term 'information'. *MZZZW* was distinguished in *BFE15 v MHA* [2019] FCA 414 at [49]–[51] where the Court held that, in circumstances where the Tribunal referred to the first Tribunal's decision, its summary of facts and reproduced the first Tribunal's reasons, the Tribunal did not impermissibly have regard to the first Tribunal's reasons as the Tribunal gave its own detailed consideration to the applicant's evidence on the issue and formed its own view on the plausibility of the evidence.

¹⁰⁸ See e.g., *BKX23 v MICMA* [2023] FCA 585 at [34] where the Federal Court held that the Tribunal did not fall into error where it accepted the findings and reasoning of a previous Tribunal and formed its own conclusion on the issue. This judgment concerned an AAT decision affirming a decision not to revoke the cancellation of the applicant's partner visa on character grounds. In affirming the decision, the Tribunal considered the state of the mental health care the applicant may receive if returned to his home country and in doing so, it relied on the findings of a different Tribunal member (the MRD Tribunal) in its review of a refusal to grant the applicant a protection visa. The Court considered that the Tribunal hadn't blindly adopted the reasoning and findings of the MRD Tribunal, but rather, it took the MRT decision as evidence or material before it (as it was entitled to do), applied its own mind to the issue and, in the absence of any evidence presented to the contrary, accepted the MRD Tribunal's conclusions on the issue. The Tribunal stated it accepted and adopted the findings of the MRD Tribunal, and the Court noted the use of the word 'adopt' was unfortunate and the language of 'accept' more accurately reflected what the Tribunal had done. Upheld on appeal in *BKX23 v MICMA* [2023] FCAFC 184.

¹⁰⁹ Note that prior to the introduction of the ART Act, the term 'reconstitution' was used interchangeably to describe scenarios. However, as noted above, the Act now makes it clear that a constitution following a court remittal is not a reconstitution.

¹¹⁰ *SZEPZ v MIMA* (2006) 159 FCR 291 at [39]. In hearing an application for special leave to appeal this decision, the High Court found there was insufficient doubt as to the correctness of the reasoning by the Full Court to warrant a grant of special leave: *SZEPZ v MIAC* [2008] HCATrans 91 at [305].

¹¹¹ See also *MZXRE v MIAC* (2009) 176 FCR 552 at [5], where North and Rares JJ commented that it would be wrong to suggest that following a remittal whatever had been done by the original Tribunal had to be redone. See also *SZNRK v MIAC* [2010] FMCA 182 at [9].

Tribunal in that case was entitled to rely upon a s 424A [s 359A] letter that had been sent by the previous Member.¹¹²

However, there are limitations. If the obligation under s 359A has not been properly or fully discharged by the first Tribunal (for example, because a previous letter was sent to the wrong address, did not give the prescribed period of notice or did not adequately particularise the adverse information), the Tribunal may be required to send a further invitation. This will also be the case if there is new information that would be the reason or a part of the reason for affirming the delegate's decision, or if the relevance of the adverse information is different from that described in the previous letter.

Hearing obligation

The general rule in s 55(1)(a) of the Act – the need to ensure each party to a proceeding is given a reasonable opportunity to present their case – differs from the hearing requirements set out in the Migration Act prior to transition, and its scope is as yet unclear. While it's important to remain focused on the current statutory obligations, judicial consideration of the Migration Act provisions as discussed below may provide some guidance.

In some circumstances, constitution of the Tribunal to a different member will likely require the Tribunal to invite the applicant to a further hearing before it. This is the case where the matter has been remitted by a court. However, it may not necessarily be required where the Tribunal has been reconstituted for other reasons (e.g. the unavailability of the original Member due to illness).

The Full Federal Court observed in *Liu v MIMA* that where an applicant has given evidence to a Tribunal Member, reconstitution of the Tribunal generally does not require that the applicant be given another opportunity to appear before it to present arguments and give evidence under the hearing obligations in (the now repealed) s 360 or 425 of the Migration Act.¹¹³ This general proposition would not apply, however, if the hearing obligation was not properly discharged by the first Tribunal (e.g. if relevant issues were not discussed at the initial hearing; if the issues before the reconstituted Tribunal were not the same as those before the first Tribunal; if the interpreting was deficient; or if there was evidence of actual or apprehended bias affecting the first Tribunal). The correctness of *Liu* was subsequently confirmed by the Full Federal Court in *AEK15 v MIBP* which held that a new hearing would not always be required in a case reconstituted because of member unavailability and that it was necessary to consider whether, in the particular circumstances of each case, the hearing obligation had been fulfilled by the previously constituted Tribunal.¹¹⁴ The same reasoning would seem to apply in the ART Act s 55(1)(a) context.

¹¹² See also *SZMRA v MIAC* [2008] FMCA 1570 where the Tribunal was held not to have breached s 424A in circumstances where it had relied on a s 424A letter sent by the previous Tribunal and the evidence of the applicant's response to that letter.

¹¹³ *Liu v MIMA*; *Ahmed v MIMA* (2001) 113 FCR 541.

¹¹⁴ *AEK15 v MIBP* [2016] FCAFC 131. Seven months after a hearing with the first Member, the Tribunal wrote to the applicant advising him that the Member who conducted the hearing was no longer available, another member would finish the review, all the available information and record of hearing would be before that new member, and invited the applicant to contact the Tribunal with any queries. The Court found no error in the reconstituted Tribunal proceeding to make its decision without inviting the applicant to a further hearing, as the applicant had shown no reason why a second hearing invitation before the reconstituted Tribunal was required.

It has also been suggested that it would be inappropriate for the reconstituted Tribunal to make adverse credibility findings based on the applicant's demeanour during an earlier hearing at which the Member was not present.¹¹⁵ If on the other hand, the reconstituted Tribunal makes an adverse credibility finding only on purely objective grounds, for example, inconsistencies between an applicant's account of certain events and credible country information which was put to the applicant, and no issues of demeanour arise, then a further hearing would not generally be required.¹¹⁶

A distinction can be drawn however between cases reconstituted because of member unavailability and those constituted following a court remittal. In *SZHK v MIAC*, a Full Court of the Federal Court was unanimous in holding that, in the circumstances before it, the Tribunal was obliged to hold a further hearing because new issues had arisen for the member constituting the Tribunal following the remittal.¹¹⁷ However, Gyles J, with whom Gray J agreed, additionally found that the opportunity to be provided by virtue of (now repealed) s 425 [hearing obligation] is not provided by an appearance before another Tribunal Member on an earlier occasion.¹¹⁸ His Honour distinguished *Liu* on the basis that the Court in that case dealt with a reconstitution in circumstances where the original Member had resigned, whereas in the cases at hand, the earlier Tribunal decision had been remitted for reconsideration by a court. The majority's reasoning also suggests that other procedures would have to be repeated by the reconstituted Tribunal. However, as the matter did not need to be decided, those comments are *obiter*.¹¹⁹

The majority reasoning in *SZHK* was relied on in *NBKB v MIAC* to support a conclusion that a second Tribunal member was required to raise with the applicant again any live issues, even if they were put to the applicant and discussed at the hearing before the original Tribunal member, in order to comply with ss 360/425.¹²⁰ This reasoning appears to extend the decision in *SZHK*, but as a judgment of the Federal Court in its appellate jurisdiction, it provides some

¹¹⁵ See *SZARJ v MIMIA* [2004] FMCA 557 at [23]–[24]. See also *MIBP v WZARH* [2015] HCA 40, which although not directly applicable to MRD reviews given that it related to common law procedural fairness in the IMR context, provides some further guidance.

¹¹⁶ In *MIBP v WZARH* [2015] HCA 40, the reasoning of Kiefel, Bell and Keane JJ turned on the fact that the second IMR had rejected a central aspect of the respondent's claim, not just on the basis of inconsistencies in the respondent's account of certain important events, but also the second reviewer's impression of how that account was given. The latter goes to demeanour which can only be properly assessed by personal observation.

¹¹⁷ *SZHK v MIAC* (2008) 172 FCR 1, *SXGOD v MIAC* [2008] FCAFC 138. Other circumstances where a further hearing may be required is where a previous hearing had been affected by apprehended bias or a failure to give the applicant an opportunity to present arguments and give evidence in relation to the issues in the review: see *SZJRH v MIAC* [2007] FMCA 2037 at [22].

¹¹⁸ This is in contrast to the reasoning in a number of earlier judgments which involved matters that had previously been remitted by the Court for reconsideration: *NBKM v MIAC* [2007] FCA 1413 at [36]; *SZIBW v MIAC* [2008] FCA 160 at [35]; *SBRF v MIAC* (2008) 101 ALD 559 at [24]. In *SZKGF v MIAC* [2008] FCAFC 84, a Full Court indicated that it would be inclined to this view although the matter was unnecessary to decide: at [9]. A more recent Full Federal Court in *AEK15 v MIBP* [2016] FCAFC 131 expressed their view, in *obiter*, that in a case such as *SZHK*, the Tribunal as reconstituted did not have to start the entire review process from scratch following the remittal. Its duty was to conduct a review under s 414, and it need not proceed on the basis that every step or procedure which had been taken by the previously constituted Tribunal was also invalid (at [51]). However, as *obiter* comments only, *SZHK* remains the relevant authority that a fresh opportunity to appear before the Tribunal must be given following remittal to the Tribunal by a Court.

¹¹⁹ cf *MZXRE v MIAC* (2009) 176 FCR 552 at [5], where North and Rares JJ commented that it would be wrong to suggest that following a remittal whatever had been done by the original Tribunal had to be redone. The Court held the comments of Gyles and Gray JJ in *SZHK v MIAC* (2008) 172 FCR 1 do not go so far as to set down a requirement for a new hearing in every remitted matter. The Court considered that there is a limited class of cases in which the Tribunal would be required to invite the applicant to a further hearing. This includes cases where the decision was set aside for apprehended bias or a breach of procedural fairness, where new issues are raised, and where the matter is reconstituted to a different Member. This reasoning was not required to be considered by the Full Court on appeal:

¹²⁰ *NBKB v MIAC* (2009) 106 ALD 525.

guidance.¹²¹

Summary

Ultimately, while judicial consideration of the hearing obligations under the Migration Act can provide guidance, ultimately the question is whether the applicant has been given a reasonable opportunity to present their case in all the circumstances and the Tribunal's statutory obligations have been discharged. Where the applicant's credibility is an issue, a fresh hearing is likely to be required, in order to give the applicant the opportunity to present their case before the new member, and in order for the member to assess for themselves the applicant's credibility.

Reasons for remittal

Where a matter has been remitted by a court, it is generally not necessary for the Tribunal in its decision to expressly address the reason for remittal.

It was suggested in *SZGUW v MIAC* that upon remittal the Tribunal should make clear on the face of its reasons the jurisdictional error which was identified in the earlier decision and how the Tribunal as presently constituted discharged the relevant obligation.¹²² The Court considered that a failure to do so would give rise to an inference that the Tribunal did not properly discharge its obligations.¹²³ However, the Federal Magistrates Court in applying this judgment held that the Tribunal is under no legal obligation to include in its decision an express explanation as to why the Tribunal did not consider that it had made the same error of jurisdiction which had been identified in the previous decision. It was moreover observed that the judgment of the Federal Court in *SZGUW v MIAC* regarded the absence of discussion as no more than confirmatory of a perceived defect in the reasoning process.¹²⁴ Thus a failure to expressly discuss the basis of the remittal is unlikely to amount to jurisdictional error in and of itself. What is important is that the error is not repeated.

6.7 Recusal requests

On rare occasions, an applicant requests that the member who has been constituted their matter recuse themselves and that their matter be constituted to another member. If an applicant or applicants make such a request, it is usually on the basis that they consider the member is biased against them, or there is a reasonable apprehension of bias.¹²⁵

Where a recusal request is made, the member who has been constituted for the review

¹²¹ The High Court declined to grant the Minister's special leave application, finding that the Court's approach to s 425 did not appear in the circumstances of the case to disclose any error warranting the grant of special leave: *MIAC v NBKB* [2009] HCATrans 289.

¹²² *SZGUW v MIAC* (2009) 108 ALD 108.

¹²³ *SZGUW v MIAC* (2009) 108 ALD 108, at [21].

¹²⁴ *SZGUW v MIAC* [2010] FMCA 145 at [33]–[34]. Undisturbed on appeal: *SZGUW v MIAC* [2010] FCA 475. See also *BRGAN of 2008 v MIAC* (2009) 112 ALD 617, at [57].

¹²⁵ The circumstances which may lead an applicant to reach a conclusion that the particular member constituted to their review is biased against them vary from matter to matter.

determines the request in the first instance.¹²⁶

When determining the request, the member considers whether there is a risk of actual or apprehended bias if they proceed with the matter. In relation to apprehended bias, for a claim to be made out an applicant or applicants would need to demonstrate that the member may have proceeded with a closed mind, and did not act with impartiality. Robust questioning at hearing would not, of itself, generally give rise to an apprehension of bias.

The test for apprehended bias was stated by the High Court:

Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that ... a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

...The question is one of possibility (real and not remote), not probability.¹²⁷

There are no set procedures when determining a recusal request. The member would decide whether the request can be determined on the material provided by the applicant or whether there is a need for the applicant to provide further submissions or make arguments in support of their request. The recusal request would generally be determined prior to proceeding further with the review application and the determination communicated to the applicant. If the applicant makes the request at the hearing, it would generally be determined prior to proceeding further with the review.

There is no requirement for a member to provide reasons for why they have decided to recuse themselves, or why they have decided not to,¹²⁸ although they might choose to do so.

Note, too, as discussed above, the President or delegate may reconstitute the Tribunal for the purposes of a particular proceeding under s 43 (at any time) or s 46 (after the hearing starts) if the President, or delegate, is satisfied that the member, or one of the members, who constitutes the Tribunal for the purposes of the proceeding has a conflict of interest or an actual or apprehended bias in relation to the proceeding.

Last updated/reviewed: 23 June 2025

¹²⁶ See *QYFM v MICMSMA* [2023] HCA 15 where in *obiter dicta* the majority stated that the approach that a single judge should consider and determine any request for their recusal themselves was generally accepted. See also *Re PMMC/WJPJ and Australian Prudential Regulations Authority* [2009] AATA 801 where Member Frost noted that it was the general approach that when an application is made for a judge or tribunal member to recuse him or herself from a hearing, the decision whether to disqualify is generally made by that person (at [27]).

¹²⁷ *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 at [6] and [7].

¹²⁸ Note that 'statement of reasons' for a decision, is defined to mean a written statement in relation to the decision that: (a) sets out the findings on material questions of fact; and (b) refers to the evidence or other material on which the findings are based; and (c) explains the reasons for the decision: s 4.