



# AAT Bulletin

ISSUE NO. 8/2012

19 NOVEMBER 2012

The *AAT Bulletin* is a weekly publication containing a list of recent AAT decisions and information relating to appeals against AAT decisions. The Bulletin occasionally includes information on legislative changes that affect the AAT and other important developments.

It is recommended that the Bulletin be read on-line. This has the advantage of allowing the reader to use hyperlinks to access the full text of cases and other internet sites mentioned in the Bulletin.

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## AAT Recent Decisions

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This section of the Bulletin provides information about decisions recently published by the AAT. Only AAT decisions that have been published on [AustLII](#) have been included. Full copies of the decisions can be accessed through the hyperlinks provided below.

### Bankruptcy

[Phillips and Inspector-General in Bankruptcy](#) [2012] AATA 788; 13/11/2012; Deputy President SA Forgie and Dr R McRae, Member

Objection to discharge on three grounds including special grounds – Whether evidence supports grounds – Whether applicant had a reasonable excuse for conduct or failure constituting special ground.

Contribution assessments – Whether remuneration assessed as being received less than reasonable remuneration.

CORPORATIONS – interpretation of s 206A – Offences of strict liability distinguished from offences in which strict liability applies to a particular physical element of the offence – Determining fault element for other physical elements – Offences distinguished from earlier formulations of offences under uniform Corporation Codes.

PRACTICE AND PROCEDURE – Standard of proof – Balance of probabilities – Relevance of *Briginshaw v Briginshaw* principles in considering whether contravention of s 206A for the purposes of making an administrative decision.

PRACTICE AND PROCEDURE – Whether Tribunal made decision to extend time for lodgement of application without power – Whether issue can be reconsidered under appropriate head of power.

PRACTICE AND PROCEDURE – Decision deemed to have been made under Bankruptcy Act – Whether application for review lodged within reasonable time – Whether special circumstances justifying Tribunal’s entertaining application – Meaning of “entertaining” – Distinguished from an application having been “made”.

PRACTICE AND PROCEDURE – Jurisdiction – Whether determined by Tribunal’s power to entertain or whether application must be “made”.

## Compensation

[Martinez and Comcare](#) [2012] AATA 795; 14/11/2012; Professor RM Creyke, Senior Member and Dr B Hughson, Member

Commonwealth Employees – Adjustment disorder – Date of injury – Whether contributed to by employment to a significant degree – Whether reasonable administrative action – Whether taken in a reasonable manner in respect of employment – Conduct of meetings – Formal or informal performance appraisal – Whether adequate consideration of personal circumstances – Decision under review set aside and remitted.

[Pantic and Comcare](#) [2012] AATA 790; 13/11/2012; Professor RM Creyke, Senior Member and Dr B Hughson, Member

Permanent impairment sustained prior to 1988 – Entitlement to lump sum compensation under *Compensation (Commonwealth Government Employees) Act 1971 (Cth)* (1971 Act) section 39(4) – Weekly incapacity payments received between 1990 and 2004 under *Safety, Rehabilitation and Compensation Act 1988 (Cth)* (1988 Act) – Whether precluded from entitlement to lump sum compensation under section 1971 Act 39(14) – Decision under review affirmed.

[Piljic and Military Rehabilitation and Compensation Commission](#) [2012] AATA 794; 14/11/2012; Senior Member RG Kenny

Claim for compensation for hiatus hernia and gastro oesophageal reflux disease – Claims under the *Safety, Rehabilitation and Compensation Act 1988 (Cth)* – Relevance of the *Commonwealth Employees Compensation Act 1930 (Cth)* and the *Compensation (Commonwealth Employees) Act 1971 (Cth)* – No medical evidence in support of claim – Decision under review affirmed.

## Corporations

[Whitchurch and Australian Securities and Investments Commission](#) [2012] AATA 784; 12/11/2012; Senior Member Dr KS Levy, RFD

Australian Securities and Investment Commission – Managed Investment Schemes – Responsible entity – Compliance plan – Removal of auditor – Considerations under ASIC Regulatory Guides – Permission for removal refused – Decision under review affirmed.

## Defence

[Blake and Secretary, Department of Defence](#) [2012] AATA 780; 9/11/2012; Ms R Perton, Member

Defence Home Ownership Assistance Scheme – Subsidy certificate – Applicant former member of Australian Army – Inability to utilise certificate within validity period – Application for fresh certificate – Application refused as only one certificate available to former member – Lack of discretion to take account of reasons why initial certificate not utilised – Decision under review affirmed.

## Immigration

[Demillo and Minister for Immigration and Citizenship](#) [2012] AATA 805; 16/11/2012; Mr D Letcher, QC, Senior Member

Visa cancellation – Character test – Substantial criminal record – Application of Direction 55 under the *Migration Act 1958* – Decision under review affirmed.

[Paerou and Minister for Immigration and Citizenship](#) [2012] AATA 798; 15/11/2012; Senior Member JL Redfern

Visa cancellation – Procedure for visa cancellation hearings – Non-payment of application fee – Failure of applicant to serve written statements before hearing – Character test – Substantial criminal history – Seriousness of conduct and risk of further offending – Protection of Australian community outweighing all other factors – Decision under review affirmed.

[Temo and Minister for Immigration and Citizenship](#) [2012] AATA 782; 12/11/2012; Deputy President RP Handley and Deputy President R Deutsch

Visa cancellation – Ministerial discretion under s 501 of the *Migration Act 1958* – Direction 55 – Applicant has substantial criminal record – Applicant in Australia since being a young child – Decision under review set aside and decision substituted that the Minister's discretion under s 501 not be exercised.

[Uelese and Minister for Immigration and Citizenship](#) [2012] AATA 793; 14/11/2012; Senior Member G Ettinger

Class TY Subclass 444 Special Category (Temporary) visa – Cancellation – Character test – substantial criminal record – Protection of the Australian community – Real risk of re-offending – Whether nature of the risk is unacceptable – Strength, duration and nature of ties to Australia – Best interest of minor children – Other considerations – Decision under review affirmed.

## Social Security

[Burgess and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs](#) [2012] AATA 783; 12/11/2012; Mr P Wulf, Member

Pensions, benefits and allowances – Disability support pension – Rent assistance – Definition of rent – Maximum amount of rent assistance payable – No entitlement to extra rent assistance – Pensioner concession card – Start date of concession card – Expiry date of concession card – Details correctly recorded – Decisions under review affirmed.

PRACTICE AND PROCEDURE – Reviewable decisions – Claim for review of compensation entitlement under *Victims Support and Rehabilitation Act 1996* (NSW) – No jurisdiction for review.

PRACTICE AND PROCEDURE – Reviewable decisions – Claim for payment for Emergency Medical Equipment Payment – Date of commencement of provisions relating qualification for payment – Claim for payment made prior to commencement – No decision to reject claim able to be made at that time – No reviewable decision made.

**Dayal and Secretary, Department of Education, Employment and Workplace Relations**

[2012] AATA 787; 13/11/2012; Ms R Perton, Member

Austudy – Fresh claim following cancellation for reasons unrelated to study – Maximum amount of time allowed for certain postgraduate studies – Claim refused – Service of notice advising outcome – Failure to apply to Social Security Appeals Tribunal within 13 weeks of notification – No practical outcome possible as date of effect of decision after applicant no longer studying – Decision under review affirmed.

**Halls and Secretary, Department of Education, Employment and Workplace Relations**

[2012] AATA 802; 15/11/2012; Ms R Perton, Member

Newstart allowance – Variable income – Overpayment – Debt to Commonwealth – Waiver – Whether sole administrative error – Whether special circumstances exist – Decision under review set aside and substituted.

**Hodges and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs** [2012] AATA 796; 15/11/2012; Senior Member RG Kenny

Benefits and entitlements – Cancellation of pensions by Centrelink in error – Deemed receipt of notices of decisions – Review of decisions and new claims made more than 13 weeks after notices of decisions given – Calculation of start date for new claim – Start date referable to favourable decision – Decisions under review affirmed – Reference to scheme for compensation for detriment caused by defective administration.

**Kahler and Secretary, Attorney-General's Department** [2012] AATA 786; 13/11/2012; Mr P Wulf, Member

Australian Government Disaster Recovery Payment – Claim – Whether stranded in principal place of residence – Whether no access to water – Not adversely affected – Decision under review affirmed.

**Test and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs** [2012] AATA 801; 16/11/2012; Mr P Wulf, Member

Pensions, benefits and allowances – Entitlement to Disability Support Pension – Physical, intellectual or psychiatric impairment – Fully documented and diagnosed – Not fully treated and stabilised – Reports of medical practitioners – Decision under review affirmed.

**Webster and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs** [2012] AATA 797; 15/11/2012; Senior Member RG Kenny

Pensions, benefits and allowances – Applicant in receipt of disability support pension – Request for unlimited portability – Applicant experiencing health problems but not terminally ill – Applicant not prevented for travelling to Australia by accident or by hospitalisation – Decision under review affirmed.

**Ye and Secretary, Department of Education, Employment and Workplace Relations** [2012] AATA 800; 15/11/2012; Dr P McDermott, RFD, Senior Member

Pensions, benefits and allowances – Parenting payment – Qualifying residence requirements – Permanent visa holder – Minimum 104 week's residence – Qualifying residence exemptions – Newly arrived residents waiting period – Decision under review affirmed.

## Taxation

[Bezuidenhout and Commissioner of Taxation](#) [2012] AATA 799; 15/11/2012; Senior Member BJ McCabe

Objection decision – Foreign sourced income – Whether applicant was a foreign resident – Objection decision affirmed.

[Daniels and Commissioner of Taxation](#) [2012] AATA 792; 14/11/2012; Senior Member RW Dunne

Applicant failed to disclose overseas income – Tax audit by respondent – Capital gains tax – disposal of shares in company in Panama – Assessment of net capital gain – Administrative penalty – Recklessness – Applicant requested issue of summonses of respondent's officers to give evidence – Issue of summonses refused – Failure of applicant to attend hearing – Review proceedings conducted in applicant's absence – Objection decision under review affirmed.

[Peach and Commissioner of Taxation](#) [2012] AATA 781; 9/11/2012; Senior Member BJ McCabe

Self-managed superannuation funds – Access to funds prior to retiring age – Conditions for release – Severe financial hardship – Compassionate grounds – Discretion to exclude amounts from assessable income – Objection decision affirmed.

## Veterans' Affairs

[Norris and Repatriation Commission](#) [2012] AATA 785; 13/11/2012; Senior Member RG Kenny

Benefits and entitlements – Disability pension payable at 90% of general rate – Eligibility for intermediate or special rate of pension – Incapacity from war-caused conditions not sufficient to prevent applicant undertaking remunerative work for more than 20 hours or 8 hours per week in parts of the assessment period – Applicant not prevented by reason of incapacity from war-caused conditions, alone or substantially, from continuing to undertake remunerative work – No loss of salary, wages or earnings that would not be suffered if free from incapacity – Decision under review affirmed.

[O'Dowd and Repatriation Commission](#) [2012] AATA 789; 13/11/2012; Senior Member E Fice

Disability Pension – Post traumatic stress disorder – Agoraphobia – Was the disease a war-caused disease – Standard of proof – Balance of probabilities – Traumatic events – Operational service – Hypothesis – Reasonable hypothesis – Royal Australian Navy – Vietnam – Philippines – Alcohol – Rosacea – Decision under review affirmed.

[Woodall and Repatriation Commission](#) [2012] AATA 803; 16/11/2012; Senior Member J Handley and Dr K Breen, Member

Veteran was receiving pension at 50 per cent of the general rate – VRB found generalized anxiety disorder and hypertension war caused and remitted the application for assessment of pension entitlement – Applicant had been in full time employment and declared redundant – Respondent decided an entitlement of temporary special rate and notified applicant it would revert to 100 per cent of the general rate at a future date – Applicant advised to make claim for an increase in pension if he considered his service disabilities had not improved - that application was made – Respondent not satisfied applicant was incapacitated by war-caused injuries alone – Decision made to pay pension at 100 per cent of general rate - that decision reviewed in this application – Applicant made more than 70 job applications, all unsuccessful – Whether those applications made within the assessment period – Whether entitled to the benefit of s 24(2)(b) – Incapacity not by war-caused injuries alone – Decision affirmed.

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## Appeals

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This section of the Bulletin provides information about appeals against AAT decisions that have been lodged or finalised. Only appeals in relation to AAT decisions that have been published on [AustLII](#) have been included. Full copies of the decisions can be accessed through the hyperlinks provided below.

### Appeals lodged

CASE NAME	AAT REFERENCE
<b>Comcare v Burke</b>	<a href="#">[2012] AATA 706</a>
<b>Commissioner of Taxation v Nash</b>	<a href="#">[2012] AATA 719</a>
<b>Theo v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs</b> (Further appeal from Federal Magistrates Court)	<a href="#">[2012] AATA 58</a>

### Appeals finalised

CASE NAME	AAT REFERENCE	COURT REFERENCE
<b>Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous (No 2)</b>	<a href="#">[2012] AATA 355</a>	<a href="#">[2012] FCA 1275</a>





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