



Administrative
Appeals Tribunal

AAT Bulletin

Issue No. 38/2017

18 September 2017

The *AAT Bulletin* is a weekly publication containing information about recently published decisions and appeals against decisions in the AAT's General, Freedom of Information, National Disability Insurance Scheme, Security, Taxation & Commercial and Veterans' Appeals Divisions. The Bulletin also regularly includes a sample of decisions recently published in the AAT's Migration & Refugee Division and Social Services & Child Support Division. It occasionally includes information on legislative changes that affect the AAT.

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.

The AAT does not make any representation or warranty about the accuracy, reliability, currency or completeness of any material contained in this Bulletin or on any linked site. While the AAT makes every effort to ensure that the material in the Bulletin is accurate and up-to-date, you should exercise your own independent skill and judgement before you rely on it. Information contained in this Bulletin is not legal advice and is intended as a general guide only. You should rely on your own advice or refer to the full cases and legislation in relation to any proceedings.

Enquiries regarding this publication may be directed to aatweb@aat.gov.au.

Contents

AAT Recent Decisions	3
Citizenship	3
Compensation.....	3
Education and Research	5
Migration.....	5
Practice and Procedure.....	7
Social Security	7
Veterans' Affairs.....	9
Appeals.....	10
Appeals lodged	10
Recent developments	11
AAT Video Guides.....	11

AAT Recent Decisions

This section of the Bulletin provides information about all decisions recently published in the AAT's General, Freedom of Information, National Disability Insurance Scheme, Security, Taxation & Commercial and Veterans' Appeals. This list also includes selected child support decisions published by the Social Services & Child Support Division and examples of recent decisions published by the Migration & Refugee Division. 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.

Citizenship

[Atkins and Minister for Immigration and Border Protection](#) (Citizenship) [2017] AATA 1438 (8 September 2017); Ms DK Grigg, Member

General residency requirements not satisfied – whether close and continuing association with Australia – decision under review affirmed

[VDQS and Minister for Immigration and Border Protection](#) (Citizenship) [2017] AATA 1420 (31 August 2017); Deputy President JW Constance

CITIZENSHIP – citizenship by descent – Applicant born outside of Australia – whether a parent of the Applicant was an Australian citizen at the time of the Applicant's birth – meaning of parent – not limited to biological parent – ordinary meaning of parent – parent's conduct before, at the time of and after the birth – decision set aside and remitted for reconsideration

[YMPL and Minister for Immigration and Border Protection](#) (Citizenship) [2017] AATA 1458 (12 September 2017); Brigadier AG Warner, Member

Application for Australian citizenship by conferral – whether applicant of good character – meaning of good character – proof of identity – requirement for overseas penal clearance – cogent reasons to depart from Citizenship Policy – decision under review set aside and remitted to Respondent

Compensation

[Ascic and Comcare](#) (Compensation) [2017] AATA 1436 (7 September 2017); LM Gallagher, Member

Former Commonwealth employee – depression and acute paranoid reaction to perceived stress in employment – superannuation pension – invalidity retirement – independent review of determinations – average weekly earnings – normal weekly earnings

[Ceric and Prosecur Australia Pty Ltd](#) (Compensation) [2017] AATA 1448 (13 September 2017); Deputy President JW Constance

Injury – back strain – liability accepted – whether ceased to suffer the effects of the injury – compensation for medical treatment – compensation for incapacity – decision set aside and remitted for reconsideration

[Cockburn and Military Rehabilitation and Compensation Commission](#) (Compensation) [2017] AATA 1433 (8 September 2017); Dr P McDermott RFD, Deputy President and Dr G Maynard, Member

Applicant completed national service full-time in 1956 and part-time from 1956 to 1958 – Applicant commenced smoking during national service – Applicant continued to smoke cigarettes – Applicant developed prostate cancer in 2010 – Whether the applicant commenced smoking and established a habit of smoking due to national service – Whether applicant’s smoking contributed to the development of prostate cancer to a “substantial degree” – Applicant’s cancer cannot be connected to a substantial degree to smoking – Decision under review affirmed

[Cooney and K & S Freighters Pty Ltd](#) (Compensation) [2017] AATA 1460 (13 September 2017); The Hon. D Cowdroy OAM QC, Deputy President

Compensation for injuries resulting in incapacity – applicant failed to engage in the employment offered – whether the applicant was offered suitable employment – the applicant was not offered suitable employment – whether it was reasonable in all the circumstances for the applicant to resign – applicant’s resignation was reasonable – the applicant does not have capacity to earn equivalent to NWE – the decision under review is set aside and remitted

[Koker and Comcare](#) (Compensation) [2017] AATA 1432 (4 September 2017); Deputy President G Humphries

COMPENSATION – Compensation for injuries resulting in incapacity – psychological sequela of a physical injury – effective or operative cause of injury – secondary psychological injury – entitlement under s 19 – AE in the formula – novus actus interveniens – reviewable decision affirmed in part, remitted in part

[Mitchell and Military Rehabilitation and Compensation Commission](#) (Compensation) [2017] AATA 1421 (4 September 2017); Deputy President G Humphries

COMPENSATION – Military Compensation – smoking – disease – contributed to, to a material degree – whether Applicant a credible witness – evaluative threshold – reviewable decision affirmed

[Napier and Comcare](#) (Compensation) [2017] AATA 1452 (13 September 2017); Senior Member T Tavoularis

Medical treatment – therapeutic treatments – previously accepted injuries – where Applicant suffers from a number of accepted injuries – where Applicant has received treatments for long period of time – whether treatments were “therapeutic” – whether treatments were reasonable in the circumstances – whether Applicant still suffered from injury – whether present injury work-related – whether Comcare liable for medical treatments – whether Comcare liable for incapacity for work – whether Comcare liable for household assistance – treatments not reasonable in the circumstances – present injury not work-related – decisions under review affirmed

[Ommundson and Australian Postal Corporation](#) (Compensation) [2017] AATA 1422 (4 September 2017); Senior Member L Kirk; Dr W Isles, Member

COMPENSATION – postal worker – knee injury – whether Applicant suffered an injury (other than a disease) or an aggravation of a disease – whether injury or aggravation of disease resulted in incapacity for work or impairment – whether aggravation of disease is not an injury by reason of s 7(7) of SRC Act – Tribunal not satisfied that Applicant suffered an injury or an aggravation of a disease – decision under review affirmed

[Trisna-Halim and Comcare](#) (Compensation) [2017] AATA 1423 (1 September 2017); Deputy President BW Rayment

COMPENSATION – accepted bilateral carpal tunnel syndrome condition – whether employment contributed to aggravation to a significant degree – whether repetitive keyboard and mouse use exacerbates symptoms of carpal tunnel syndrome – decision under review set aside

[Yanku and Comcare](#) (Compensation) [2017] AATA 1454 (13 September 2017); Ms S Taglieri, Member

Workers' compensation – Disease – Aggravation of ailment – Liability for previously accepted injury – Whether continuing contribution from employment – Cervical spondylosis – Nociceptive and non-nociceptive contribution – Decision under review affirmed

Education and Research

[Currie and Secretary, Department of Education and Training](#) [2017] AATA 1431 (1 September 2017); Ms DK Grigg, Member

HIGHER EDUCATION — late withdrawal – whether any special circumstances exist- decision under review affirmed

Migration

[Engi and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 1450 (12 September 2017); Senior Member MJ McGrowdie

Mandatory visa cancellation – failure to pass character test – substantial criminal record – discretion to revoke mandatory cancellation of applicant's visa – Ministerial Direction No. 65 applied – protection of the Australian community – nature and seriousness of the relevant conduct – risk to community should conduct be repeated – expectations of Australian community – strength, nature and duration of ties – extent of impediments if removed – decision set aside and substituted with decision revoking mandatory cancellation

[Kuffour and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 1424 (5 September 2017); The Hon. Justice Stevenson, Deputy President

IMMIGRATION AND CITIZENSHIP – partner visa refusal – failure to pass the character test – repeated dishonest and deceitful tactics used in order to secure entry into Australia – primary considerations – protection of the Australian community – expectations of the Australian community – impact on family members – Tribunal finds that the protection of the Australian community and the expectations of the Australian community outweigh the best interests of minor children in Australia and the impact on family members – decision affirmed

[Nguyen and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 1455 (12 September 2017); Senior Member E Fice

Application seeking review of decision to refuse grant of Partner Visa – applicant does not satisfy character test due to substantial criminal record – applicant convicted of importing drug precursor – total term of imprisonment of three years – applicant’s offending of a serious nature but on lower end of seriousness scale – applicant assessed as having low risk of re-offending – applicant has made genuine efforts to rehabilitate during imprisonment – granting of visa in best interests of applicant’s children and partner – refusal of visa would impact on applicant’s partner’s business – Australian community would expect applicant be given a second chance – decision under review set aside and substituted with decision granting Partner Visa

[Sipanisi and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 1434 (8 September 2017); Miss EA Shanahan, Member

Mandatory cancellation of a Class TY Subclass 444 Special Category (Temporary) Visa – request for revocation of mandatory cancellation – substantial criminal record – drug and alcohol abuse – convicted for multiple offences in February 2016 – detained in youth justice centre for 20 months – previous convictions and shorter sentences for offences in 2013 and 2014 – convicted of assault, criminal damage and arson while imprisoned – unacceptable risk of re-offending – acquisition of training, certificates of competence and higher secondary education in prison – New Zealand citizen – protection of Australian community – expectations of Australian community – decision affirmed

[TKBP and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA (4 September 2017); Senior Member L Kirk

MIGRATION – mandatory visa cancellation – special category (temporary) visa – character test – substantial criminal record – applicant sentenced to a term of imprisonment of 12 months or more – protection of the Australian community – best interests of minor children – expectations of the Australian community – other considerations – decision affirmed

[Van Lith and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 1459 (14 September 2017); Senior Member T Tavoularis

Visa Refusal – Applicant is a citizen of New Zealand – Applicant applied for Bridging visa – s 501 character test applied – history of offending – Applicant does not pass character test in s 501(6) – whether discretion to refuse visa should be exercised – whether considerations in Direction No. 65 weigh in favour of refusing visa – visa should be refused – decision under review affirmed

Practice and Procedure

[Eccles and National Disability Insurance Agency](#) [2017] AATA 1457 (13 September 2017); Ms S Taglieri, Member

PRACTICE AND PROCEDURE – Jurisdiction – National Disability Insurance Scheme – Requests for plan review, s 48 – Deemed decision and deemed review by CEO – Whether there is a reviewable decision for the purposes of s 103 – Distinction between plan review request and request to CEO to review decision about supports included in a participant plan – The Tribunal has jurisdiction to review deemed decision in relation to request for plan review

[McLean and Australian Securities and Investments Commission](#) [2017] AATA 1416 (5 September 2017); Senior Member T Tavoularis

INTERLOCUTORY PROCEEDING – Stay Application – ASIC banning order – whether desirable or appropriate in the circumstances to stay decision under review – refusal to stay the operation or implementation of the decision under review

[VMQD and Commissioner of Taxation](#) (Taxation) [2017] AATA 1430 (31 August 2017); The Hon. D Cowdroy OAM QC, Deputy President

PRACTICE AND PROCEDURE – appeal of interlocutory decision to the Federal Court of Australia – application for a stay until proceedings in the Federal Court of Australia are finalised – application for Respondent to file Statement of Facts, Issues and Contentions first – whether applicant will be denied procedural fairness if stay is not granted – whether the T documents contain sufficient particulars to enable the applicant to file a Statement of Facts, Issues and Contentions

Social Security

[Bensemam and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 1462 (14 September 2017); Ms DK Grigg, Member

Disability support pension – DSP – whether medical conditions fully diagnosed, fully treated and fully stabilised – whether 20 points or more under the impairment tables during the relevant period – whether continuing inability to work – decision under review affirmed

[Cummins and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 1426 (5 September 2017); Senior Member AC Cotter

SOCIAL SECURITY – Newstart allowance – overpayment – where applicant provided information regarding income and employment in May 2016 upon commencing paid employment – where applicant provided different information upon review of entitlement to Newstart in June 2016 – whether applicant owed a debt to the Commonwealth in respect of overpaid benefit – whether debt ought to be recovered – whether special circumstances make it desirable to waive the debt

[Dernaj and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 1449 (13 September 2017); Miss EA Shanahan, Member

Pensions benefits and allowances – application for disability support pension – end stage renal failure – long term haemodialysis – no plan for renal transplantation – condition permanent, fully diagnosed but not fully treated and stabilised – impairment point rating not attracted – decision affirmed

[Drury and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 1437 (11 September 2017); Ms DK Grigg, Member

FAMILY ASSISTANCE – parenting payment – overpayment – how calculated – where no administrative error – where no special circumstances – decision under review affirmed

[Ferede and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 1427 (5 September 2017); Ms DK Grigg, Member

SOCIAL SECURITY – Youth Allowance – overpayment – where applicant did not notify of change of circumstances – where no administrative error – where no special circumstances – hearing in the absence of the parties - decision under review affirmed

[Helm and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 1439 (8 September 2017); Senior Member J Sosso

Disability support pension – Impairment Tables – where Applicant has several conditions – whether conditions are fully diagnosed, treated and stabilised – points allocation – whether conditions attract points under the Impairment Tables – relevant period – meaning of “fully” – decision under review affirmed

[HLYB and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 1435 (8 September 2017); Mr DJ Morris, Member

SOCIAL SERVICES – DSP Debt – Overpayment – partner and combined asset details provided – Department failed to update records – Applicant sent periodic notices about partner status and assets – Debt to the Commonwealth – sole administrative error accepted for part of debt period – failure to update details promptly – special circumstances discretion not enlivened for remainder of debt – decision affirmed

[Manasse and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 1461 (14 September 2017); Ms DK Grigg, Member

Disability support pension – DSP – whether 20 points or more under the impairment tables during the relevant period – decision under review affirmed

[Psomiadis; Secretary, Department of Social Services and](#) (Social services second review) [2017] AATA 1428 (6 September 2017); Ms DK Grigg, Member

SOCIAL SECURITY – disability support pension – DSP – whether medical conditions permanent – decision under review set aside

[PTWB and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 1453 (16 August 2017); Deputy President K Bean

Disability Support Pension – Departmental review of applicant’s ongoing qualification for DSP – DSP cancelled – Whether applicant satisfied criteria for DSP as at date of cancellation – Conditions not fully treated or fully stabilised – Impairments do not attract 20 points under Impairment Tables – Decision under review affirmed

[Secretary, Department of Social Services and Stretch](#) (Social services second review) [2017] AATA 1429 (4 September 2017); Dr P McDermott RFD, Deputy President

SOCIAL SECURITY – Disability support pension – Eligibility – Whether respondent entitled to disability support pension under Agreement on Social Security between Australia and New Zealand – Whether also required to satisfy section 94(1) – Respondent has multiple conditions: diabetes, depression, spinal condition, osteoarthritis, heart condition and sleep apnoea – Whether applicant severely disabled under Article 2(2) of the Agreement – Whether severe impairment under section 94 of the Act – Whether continuing inability to work – Decision under review set aside and substituted

[Wason and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 1456 (13 September 2017); Senior Member PE Nolan

DISABILITY SUPPORT PENSION – whether Applicant had conditions that were fully diagnosed, treated and stabilised during relevant period – whether Applicant had 20 impairment points – spinal condition – hypertension – hearing impairment – where conditions were not listed on application – cannot be assigned impairment points – decision under review is affirmed

Veterans' Affairs

[MacDonald and Repatriation Commission](#) (Veterans' entitlements) [2017] AATA 1451 (18 August 2017); Senior Member A Nikolic AM CSC

VETERANS' ENTITLEMENTS – eligibility for payment of pension bonus – where applicant received social security benefit after special date of eligibility – decision under review affirmed

Appeals

This section of the Bulletin provides information about appeals that have been lodged or finalised against decisions in the AAT's General, Freedom of Information, National Disability Insurance Scheme, Security, Taxation & Commercial and Veterans' Appeals Divisions. Information is only included about appeals relating to AAT decisions that have been published on [AustLII](#). Full copies of the decisions can be accessed through the hyperlinks provided below.

Appeals lodged

CASE NAME	AAT REFERENCE
Diep v Minister for Immigration and Border Protection	[2017] AATA 1319
Samson v Secretary, Department of Social Services	[2017] AATA 1229

Recent developments

This section of the *Bulletin* contains information about recent legal or other developments that may be of interest to members and staff. Please forward any contributions you wish to be included in the *Bulletin* or suggestions for topics to LegalAndPolicy@aat.gov.au.

AAT Video Guides

A series of six [video guides](#) for the AAT website have been developed and are now publically available on our website to assist users of the Tribunal to better understand our processes.

The video guides provide an accessible and engaging way for applicants to visualise some of the more common interactions they may have with the Tribunal.

© Commonwealth of Australia 2016



With the exception of the Commonwealth Coat of Arms and any third party material, this work is licensed under a [Creative Commons Attribution 3.0 Australia Licence](https://creativecommons.org/licenses/by/3.0/au/). Content from this publication should be attributed as: Administrative Appeals Tribunal, *AAT Bulletin*.

To the extent that copyright subsists in third party material, it remains with the original owner and permission may be required to reuse the material.

The terms under which the Coat of Arms can be used are detailed on the following website: <http://www.itsanhonour.gov.au/coat-arms/>.

Enquiries regarding the licence are welcome at aatweb@aat.gov.au.

This licence is limited to the *AAT Bulletin* and does not extend to the full text of AAT decisions. Separate licence terms for AAT decisions can be found on [AustLII](https://www.austlii.edu.au/au/other/dfat/page/aat.html).