



Administrative
Appeals Tribunal

AAT Bulletin

Issue No. 51/2016

19 December 2016

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
Child Support.....	3
Compensation	3
Corporations	4
Employment law	4
Freedom of Information	4
Immigration and Citizenship.....	4
National Disability Insurance Scheme.....	6
Practice and Procedure.....	6
Social Security.....	6
Taxation.....	8
Transport.....	8
Appeals	9
Appeals lodged.....	9
Appeals finalised	9
AAT 2016 End of Year Arrangements	10

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.

Child Support

[KJKB and Child Support Registrar](#) (Child support second review) [2016] AATA 1019 (13 December 2016); Deputy President JW Constance

Child support – percentage of care – actual care – care period – changes to care arrangement – inconsistent evidence establishing nights of care – decision relating to sons set aside and substituted – decision relating to daughter affirmed

Compensation

[Bryant and Comcare](#) (Compensation) [2016] AATA 1030 (15 December 2016); Senior Member J Sosso

Workplace injury – cervical spondylosis – where condition of applicant suffered prior to employment – whether the employment of the applicant significantly contributed to the onset of the condition – whether employment contributed to a significant degree to the aggravation of underlying cervical spondylosis – decision under review affirmed

[Graham and Comcare](#) (Compensation) [2016] AATA 932 (5 September 2016); Senior Member NA Manetta

Rehabilitation and Compensation – “normal weekly earnings” – Section 8 of *Safety, Rehabilitation and Compensation Act 1988* – whether increases in salary for employees judged “fully effective” are to be included in calculation of compensation paid to injured employees by s 8(6) – such increases are not included as they must be earned – decision under review affirmed

[Hawker and Comcare](#) (Compensation) [2016] AATA 1008 (29 November 2016); Professor. M McGrowdie, Senior Member

Medical treatment – ongoing massage therapy – whether treatment was reasonable for the employee to obtain – decision set aside and substituted

[Patdu and Australian Postal Corporation](#) (Compensation) [2016] AATA 1031 (15 December 2016); Ms R Perton, Member

Workers' compensation – injury to right thumb and carpal tunnel syndrome – whether conditions work-related – disappearing ganglion – right thumb injury determined to be work-related – insufficient evidence to link carpal tunnel syndrome to work – decision under review set aside and substituted

Corporations

[McCormack and Australian Securities and Investments Commission](#) [2016] AATA 1021 (14 December 2016); Senior Member E Fice

Banning order – whether conduct in relation to a financial product or a financial service – whether conduct misleading or deceptive – purpose of banning order – purpose not achieved where conduct occurred in highly unusual circumstances and behaviour was an aberration – decision set aside

Employment law

[Reardon and Secretary, Department of Employment](#) [2016] AATA 1027 (15 December 2016); Miss EA Shanahan, Member

Fair Entitlements Guarantee Act 2012 (FEG Act) – professional photographer – 5 years employment on a casual basis – full time employment for just under 12 months – employer in administration – in accordance with Act paid annual leave entitlements and one week's pay in lieu of notice – conflict between FEG Act and *Fair Work Act 2009* – definitions of casual work – decision affirmed

Freedom of Information

[Gallagher and Secretary, Department of Immigration and Border Protection](#) (Freedom of Information) [2016] AATA 1025 (13 October 2016); The Hon. D Cowdroy OAM QC, Deputy President

Access to documents – whether “exempt document” – whether release of documents contrary to public interest – whether “substantial adverse effect on the proper and efficient conduct of the operation of an agency” – decision under review affirmed

Immigration and Citizenship

[DMTJ and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1018 (13 December 2016); Deputy President SA Forgie

Visa refusal – failure to pass character test – whether discretionary power to refuse grant of visa should be exercised – decision affirmed

[Harris and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1015 (12 December 2016); Senior Member E Fice

Visa cancellation – character grounds – substantial criminal record – original decision not revoked – review sought – whether there is another reason why the original decision should be revoked – decision affirmed

[Passells and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1033 (15 December 2016); Senior Member CR Walsh

Mandatory cancellation of applicant's visa – applicant has substantial criminal record and does not pass the character test – primary considerations and other relevant considerations considered – decision under review affirmed

[Rahman and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1034 (16 December 2016); Professor R Deutsch, Deputy President

Application for citizenship – good character – driving offences – debts owing to Commonwealth and New South Wales governments – mitigating factors – applicant claimed to suffer mental health condition – insufficient evidence of mental health condition – decision affirmed

[Katambwe and Minister for Immigration and Border Protection](#) (Citizenship) [2016] AATA 989 (5 December 2016); Dr G Hughes, Member

Application for citizenship by conferral – requirement that decision maker be satisfied that the person is of "good character" – application of citizenship policy – requirement for a penal clearance certificate – where applicant unable to provide a penal clearance certificate from Tanzania for a period of 2 years – decision affirmed

[Ravi and Minister for Immigration and Border Protection](#) (Citizenship) [2016] AATA 1022 (14 December 2016); Deputy President SA Forgie

Application for citizenship by conferral – applicant unable to satisfy criteria – whether Tribunal may exercise ameliorative powers under s 22B(1A) of the *Australian Citizenship Act 2007* – decision affirmed

PRACTICE AND PROCEDURE – in order to exercise its powers under s 43 of the *Administrative Appeals Tribunal Act 1975* the decision under review must be precisely identified – the power of the decision-maker to make that decision must be precisely identified – it cannot be assumed that the power of a delegate to make a decision will be the same as those of the delegator of that power

PRACTICE AND PROCEDURE – power of Tribunal to remit aspects of decision on review – remittal power limited to those matters in relation to which the person making the decision under review had power make a decision – Tribunal has no power to remit delegate's decision in order to exercise a power that the delegate is not entitled to exercise

[Singh and Minister for Immigration and Border Protection](#) (Citizenship) [2016] AATA 1020 (7 November 2016); Senior Member T Tavoularis

Character test – applicant convicted of perverting course of justice in Fiji – applicant struck off from roll of legal practitioners - applicant not of good character – decision under review affirmed

National Disability Insurance Scheme

[YPRM and National Disability Insurance Agency](#) [2016] AATA 1023 (14 December 2016); Deputy President G Humphries and Senior Member J Toohey

Access – child – type 1 diabetes – early intervention requirements – whether early intervention supports not most appropriately funded through NDIS – whether more appropriately funded through other general systems – decision under review affirmed

Practice and Procedure

[McCarthy and Building Practitioners Board](#) [2016] AATA 1029 (16 November 2016); Deputy President SA Forgie

Refund of application fee – whether proceeding in respect of the application has terminated in a manner favourable to the applicant – application for review of decision to postpone making of decision regarding registration as a builder – registration granted before review of postponement decision undertaken – although the applicant has been successful in obtaining registration, the decision postponing the making of that decision was not altered – therefore a proceeding in respect of the application in respect of which he paid an application fee was not terminated in a manner favourable to him.

Power to dismiss an application for review where the application is an abuse of process – application dismissed

[Pigram and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 982 (25 October 2016); Senior Member RW Dunne

Application for extension of time to lodge application for review – whether application for extension of time properly made – whether application for review of a decision properly made – whether reasonable in all the circumstances to grant extension – whether reasonable explanation for delay – whether reasonable prospects of success on the substantive application – application refused

[ZNQD and Child Support Registrar](#) (Child support second review) [2016] AATA 1011 (9 December 2016); Senior Member AC Cotter

Extension of time for lodgement of application for review – prescribed limit as a general rule – discretion to extend lodgement period – Hunter Valley factors considered – explanation for delay – awareness of appeal rights - prospects of success – prejudice to other parties – fairness to others in similar position to applicant - decision under review affirmed – no extension of time granted

Social Security

[Anderson and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1009 (9 December 2016); Senior Member P Nolan

Disability Support Pension – whether fully diagnosed, fully treated and fully stabilised – whether impairment severe – whether 20 points accumulated – whether continuing inability to work – program of support – relevant period - decision affirmed under review

[Davis and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1005 (8 December 2016); Mrs JC Kelly, Senior Member

Age pension – date of commencement – pension bonus scheme – whether “member of a couple” – whether single or married rate applies – financial aspects of the relationship – the nature of the household – the social aspects of the relationship – sexual relationship between members – nature of the people’s commitment to each other – decision under review affirmed with respect to payment of age pension at the couple rate – decision under review varied with respect to payment of pension bonus scheme at the member of a couple rate from 10 January 2014

[Gammaldi and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1028 (15 December 2016); Ms R Perton, Member

Family Tax Benefit – top up payment – late lodgement of tax return – whether special circumstances prevented applicant’s partner from lodging tax return within time – whether appropriate to grant an extension of time for lodgement of the tax return – decision affirmed

[Lazzaro and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1007 (9 December 2016); Senior Member P Nolan

Youth Allowance debt – School Kids Bonus debt – overpayment – where applicant ceased full-time study – where no administrative error – whether debt should be written-off or waived due to “special circumstances” – no special circumstances found – decision under review affirmed

[Mitchell and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1036 (16 December 2016); Deputy President JW Constance

Age pension – calculation of entitlement – means testing – assets to be taken into account when calculating pension entitlement – disposal of assets – encumbrances on assets – effect of bankruptcy on calculation of pension – decision set aside and remitted

[Ngai; Secretary, Department of Social Services and](#) (Social services second review) [2016] AATA 963 (30 November 2016); Senior Member RW Dunne

Pensions, benefits and allowances – claim for paid parental leave (PPL) – PPL period – when PPL is payable – whether there has been overpayment of PPL – recovery of PPL debt – waiver requirements – whether solely administrative error – whether special circumstances – decision under review set aside

[Robson and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1012 (1 December 2016); Senior Member AC Cotter

Family tax benefit – late lodgement of claim – late lodgement of tax return – whether an extension of time can be granted – whether “special circumstances” prevented lodgement within time – where applicant did not know of legislative change – where applicant relied on incorrect professional advice – no special circumstances exist – no special circumstances prevented timely lodgement – decision under review affirmed

[TH and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1024 (14 December 2016); Professor R McCallum AO, Member

Disability support pension – residency requirements – onset of impairment – onset of continuing inability to work – whether the continuing inability to work arose before applicant became an Australian resident – decision set aside and remitted

Taxation

[HWZG and Commissioner of Taxation](#) (Taxation) [2016] AATA 1017 (6 December 2016); Senior Member CR Walsh

Deductibility of home office expenses – what constitutes “fair and reasonable” apportionment on a “floor area” basis on the facts in the applicant’s particular case – decision under review affirmed

[TVKS and Commissioner of Taxation](#) (Taxation) [2016] AATA 1010 (9 December 2016); Deputy President SA Forgie

Applicant beneficiary of trusts during relevant income years – applicant seeking to disclaim entitlement to interest in income, capital or gifts from trusts – whether applicant can rely on disclaimer of entitlements under trust resolutions – whether trust resolution purporting to distribute trust income for 2006 year ineffective in accordance with terms of trust deed – whether trust resolutions effective in preventing applicant from being presently entitled to share of trusts in relevant income years – whether Commissioner out of time to issue amended assessments to applicant in relevant income years – whether carried forward losses available to company in capacity as trustee in 2006 income year – whether shortfall interest charge should be remitted – decision affirmed

Transport

[Arthur and Minister for Infrastructure and Regional Development](#) [2016] AATA 1026 (15 December 2016); Senior Member JF Toohey

Application to import nonstandard vehicle – whether discretion to allow importation should be exercised in applicant’s favour – factors to be considered in exercising discretion – 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
-----------	---------------

None lodged

Appeals finalised

CASE NAME	AAT REFERENCE	COURT REFERENCE
Charan v Secretary, Department of Social Services	[2015] AATA 760	[2016] FCAFC 175 [2016] FCA 486
Howes v Comcare	[2016] AATA 448	[2016] FCA 1521
Commissioner of Taxation v Townsing & Ors	[2015] AATA 976	[2016] FCAFC 180

AAT 2016 End of Year Arrangements

The Administrative Appeals Tribunal will be operating at limited capacity over the Christmas and New Year period.

Some of our offices, including all corporate areas, will close from 5.00pm, Friday 23 December 2016 and will reopen at 8.30am on Tuesday 3 January 2017.

The following offices will be open from 8.30am to 5.00pm from Wednesday 28 December 2016 to Friday 30 December 2016:

- Level 8, 14 Moore Street, **Canberra**, ACT
- Level 6, 83 Clarence Street, **Sydney**, NSW
- Level 4, Harry Gibbs Building, Commonwealth Law Courts, 119 North Quay, **Brisbane**, QLD
- Level 2, 1 King William Street, **Adelaide**, SA
- Edward Braddon Building, Commonwealth Law Courts, 39 – 41 Davey Street, **Hobart**, TAS
- Level 10, 120 Spencer Street, **Melbourne**, VIC
- Level 5, 111 St Georges Terrace, **Perth**, WA

We will respond to telephone enquiries and accept applications, fee payments and submissions over the counter on the days that we are open.

We recommend that you consider lodging applications or documents using our [online lodgement facilities](#) or [by email](#) to ensure that you lodge within statutory timeframes.

If you intend to send any documents by post, please be aware there may be delays in postal delivery during this period.

Please [contact us](#) on 1800 228 333 if you have any questions.

© 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](#). 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](#).