



Administrative  
Appeals Tribunal

AAT  
Bulletin

# AAT Bulletin

**Issue No. 25/2021**

**13 December 2021**

The *AAT Bulletin* is a fortnightly publication containing information about recently published decisions and appeals against decisions in the AAT's General, Freedom of Information, National Disability Insurance Scheme, Security, Small Business Taxation, 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](mailto:aatweb@aat.gov.au).

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# Recent news

## Changes to how you can apply for a review and submit documents to the General and Other Divisions

From 31 January 2022, for the General and Other Divisions, you should use the AAT's [online services portal](#) to lodge applications and submit documents.

Emails will be monitored intermittently, so there may be delays in the processing of applications and documents received via email from this point.

Similar changes will be made to other types of cases in the future.

For more information, see the [AAT website](#).

## Updated AAT specifications for submission of digital section 37 documents

The AAT has made minor changes to the technical specifications for the submission of digital section 37 documents.

In accordance with the COVID-19 Special Measures Practice Directions that took effect on 29 April 2020, section 37 documents must be lodged using the AAT's [online services portal](#) wherever possible.

The technical specifications for digital section 37 documents will no longer be an interim measure, and the AAT expects that digital section 37 documents will be lodged in accordance with our [published specifications](#), wherever possible.

Respondents submitting section 37 documents should be aware of recent updates to the specifications:

- To assist with navigation, each PDF document must be either be bookmarked (preferred) or include hyperlinks from the index page
- Images and other content that cannot be converted to searchable text are permitted where necessary
- File size limits have increased from 50MB to 100MB.

Respondents are encouraged to view the [complete updated specifications](#) prior to submitting section 37 documents.

## Our end of year arrangements

We will be closed on the following days:

- Monday 27 December 2021
- Tuesday 28 December 2021
- Monday 3 January 2022

Our offices and registries will be operating on Wednesday 29, Thursday 30 and Friday 31 December 2021, except for in Canberra and Hobart where they will be closed.

If we or the agency that made the original decision have provided a date by which an application or documents must be submitted, you should consider using our [online lodgement facilities](#) so that you don't miss your deadline.

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

Contact us on 1800 228 333 or visit [www.aat.gov.au](http://www.aat.gov.au) for more information

### **Last edition for 2021 and first edition for 2022**

Please note that the last edition of the Bulletin will be issued on 24 December 2021.

The first edition of the Bulletin for 2022 will be on **10 January 2022**.

We wish you all a safe and happy Christmas season.

# 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, Small Business Taxation, 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

[RCBZ and Child Support Registrar](#) (Child support second review) [2021] AATA 4435 (26 November 2021); L M Gallagher, Member

CHILD SUPPORT – percentage of care – whether there was a change in care – actual care – date of effect – evidence – decision under review affirmed in part

[Capron and Fielden](#) (Child support) [2021] AATA 4496 (19 October 2021); M Douglas, Member

CHILD SUPPORT – departure determination – whether capacity of parent to provide financial support for child significantly reduced because of commitments to support other child parent has a duty to maintain – no legal duty to maintain step grandchildren – no ground for departure established – decision under review affirmed

[Carwardine and Copleston](#) (Child support) [2021] AATA 4492 (30 September 2021); M Martellotta, Member

CHILD SUPPORT – non-agency payment – prescribed payment for orthodontic treatment – payment correctly credited – decision under review affirmed

[Leftwich and Wrinch](#) (Child support) [2021] AATA 4224 (13 October 2021); S Letch, Member

CHILD SUPPORT – election to end assessment – no capacity for other party to alter date of election – decision under review affirmed

[Netter and Malghum](#) (Child support) [2021] AATA 4491 (19 October 2021); P Jensen, Member

CHILD SUPPORT – departure determination – special needs of the child – orthodontic expenses significantly affect the cost of maintaining the child – decision under review affirmed

[Scruton and Tichenor](#) (Child support) [2021] AATA 4490 (22 October 2021); S Cullimore, Member

CHILD SUPPORT – percentage of care – care change notification was actually application for administrative assessment – decision under review set aside and sent back with directions

## **Citizenship**

**[Abdi and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#)**  
(Citizenship) [2021] AATA 4562 (7 December 2021); Brigadier A G Warner, AM LVO (Retd), Member

CITIZENSHIP – application for citizenship by conferral – eligibility – refusal of citizenship – whether Tribunal satisfied of Applicant’s identity and good character – identification documents obtained through unofficial channels – counterfeit birth certificate – identity not linked from birth – Tribunal not satisfied of identity – character not assessed – reviewable decision affirmed

**[Al-Najadi and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#)**  
(Citizenship) [2021] AATA 4592 (10 December 2021); Mrs J C Kelly, Senior Member

CITIZENSHIP – application for Australian citizenship by conferral – citizenship test exemption – whether applicant suffers from a permanent or enduring mental incapacity – medical evidence considered – applicant diagnosed with Post Traumatic Stress Disorder – incapability to understand the nature of the application – incapability to demonstrate a basic knowledge of the English language – incapability to demonstrate an adequate knowledge of Australia and of the responsibilities and privileges of Australian – decision under review set aside

**[Chen and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#)**  
(Citizenship) [2021] AATA 4500 (3 November 2021); Emeritus Professor P A Fairall, Senior Member

CITIZENSHIP – refusal to grant Australian citizenship – delegate not satisfied that the applicant was likely to reside, or to continue to reside, in Australia to to maintain a close and continuing association with Australia if application were to be approved – applicant demonstrated attachment to Australia – more probably than not applicant is likely to continue to reside in Australia – decision under review set aside and remitted

**[Cho Zah and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#)**  
(Citizenship) [2021] AATA 4431 (27 October 2021); A Nikolic AM CSC, Senior Member

CITIZENSHIP – application for conferral of Australian citizenship – whether the Tribunal is satisfied of the Applicant’s identity – lack of documents prior to arrival in Australia – insufficient efforts to obtain documents and statements – inconsistencies in life story – Tribunal not satisfied of Applicant’s identity – decision affirmed

**[Cho Zah and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#)**  
(Citizenship) [2021] AATA 4480 (27 October 2021); A Nikolic AM CSC, Senior Member

CITIZENSHIP – application for conferral of Australian citizenship – whether the Tribunal is satisfied of the Applicant’s identity – lack of documents prior to arrival in Australia – fraudulent driver’s licence – inconsistencies in life story – Tribunal not satisfied of Applicant’s identity – decision affirmed

**[Dargahi and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#)**  
(Citizenship) [2021] AATA 4561 (8 December 2021); A Poljak, Senior Member

CITIZENSHIP – application for Australian citizenship by conferral – whether the applicant is of good character – multiple driving offences – detain for advantage and cause injury to victim – assault occasioning actual bodily harm – limited insight into criminal conduct – limited positive contribution to Australian community – decision under review affirmed

**Druguet and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Citizenship) [2021] AATA 4556 (7 December 2021); A Poljak, Senior Member

CITIZENSHIP – application for Australian citizenship by conferral – general residence requirements not satisfied – where the applicant is currently residing in Romania – decision under review affirmed

**HRSP and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Citizenship) [2021] AATA 4563 (27 October 2021); A Nikolic AM CSC, Senior Member

CITIZENSHIP - application for conferral of Australian citizenship - s 24(2) Australian Citizenship Act 2007 (Cth) - United Nations Convention on the Rights of the Child - whether Applicant covered by policy guidelines – whether Applicant meets the eligibility criteria at s 21(5) of the Act - whether discretion to refuse should be exercised - decision affirmed

**JLNL and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Citizenship) [2021] AATA 4501 (3 December 2021); D J Morris, Senior Member

CITIZENSHIP – citizenship by conferral – applicant resided in Iran before travelling to Australia – no evidence of citizenship of any country – applicant granted protection visa – applicant applied for citizenship by conferral – certain requirements satisfied – delegate of minister not satisfied of applicant’s identity – other requirements not assessed – consideration of circumstances of applicant – satisfaction as to identity – decision set aside and new decision substituted with direction

**Khalaj Amir Hosseini and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Citizenship) [2021] AATA 4377 (26 November 2021); R Maguire, Member

CITIZENSHIP – application for citizenship by conferral – whether Applicant is of good character – where Applicant lied about date of birth – where Applicant made false declarations – where Applicant provided bogus documents – decision under review affirmed

**Rezaei and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Citizenship) [2021] AATA 4440 (26 November 2021); B J Illingworth, Senior Member

CITIZENSHIP – application for Australian citizenship by conferral – application for citizenship refused – whether Tribunal is satisfied as to good character – whether applicant undocumented stateless person – whether applicant engaged in material deception in his dealings with the department – decision under review affirmed

## **Compensation**

**DMQM and Comcare** (Compensation) [2021] AATA 4438 (26 November 2021); J Rau SC, Senior Member

COMPENSATION – whether the injury occurred in the course of employment – herpes simplex virus – whether Applicant included injury on the claim form – whether the Applicant suffers from a disease or a mental injury – whether an injury arises out of or in the course of employment – decision under review affirmed

[Lieschke and Telstra Corporation Ltd](#) (Compensation) [2021] AATA 4462 (1 December 2021); P Britten-Jones, Deputy President

COMPENSATION – normal weekly earnings – direction to remit determination of subsequent normal weekly earnings amounts – reviewable decision went beyond the direction to remit and included a calculation of a purported overpayment – application for review limited to the determination of normal weekly earnings – reviewable decision set aside and substituted

[Muirden and Australian National University](#) (Compensation) [2021] AATA 4560 (8 December 2021); L Kirk, Senior Member

WORKERS' COMPENSATION – condition resulting in deceased's death – whether condition properly classified as an injury or disease – whether compensation payable for injury resulting in employee's death – decision set aside

[Ocampo and Australian Postal Corporation](#) (Compensation) [2021] AATA 4464 (1 December 2021); A Poljak, Senior Member

COMPENSATION – applicant employed as parcel post officer at Australia Post – four claims – aggravation of cervical spondylosis – aggravation of neck and shoulder – aggravation of injury (neck and shoulder) plus nature and conditions of employment – secondary psychological condition – whether applicant suffered either injury in the primary sense to, or aggravation of, a pre-existing and underlying disease of both the cervical spine and the left shoulder – decisions under review affirmed

[Sprice and Comcare](#) (Compensation) [2021] AATA 4564 (6 December 2021); L Kirk, Senior Member

WORKERS COMPENSATION – permanent impairment - household expenses – pain management expenses – cease effects – psychological condition – what is an 'injury' – does the Applicant continue to suffer from the effects of the accepted conditions – are the accepted condition an 'injury (other than a disease)' – whether the Tribunal can make a decision contrary to the s 14 findings – decisions under review affirmed

[Thomas and Military Rehabilitation and Compensation Commission](#) (Compensation) [2021] AATA 4389 (26 November 2021); J Sosso, Deputy President

COMPENSATION – claim for dental disease – periodontitis – subgingival calculus – gingivitis – periodontal abscess – tooth wear – loss of teeth – whether condition could be diagnosed – whether defence service materially contributed to the claimed conditions – reviewable decisions affirmed

## **Customs**

[Winterhalter \(Australia\) Pty Ltd and Comptroller-General of Customs](#) [2021] AATA 4407 (29 November 2021); The Hon. D Cowdroy AO QC, Deputy President

CUSTOMS – tariff concession order – meaning of cycle – meaning of program – decision under review affirmed



## Education and Research

[Haque and Secretary, Department of Education, Skills and Employment](#) [2021] AATA 4406 (10 November 2021); M J McGrowdie, Senior Member

Applicant's Application to withdraw without penalty from a unit of study subsequent to the University's Census date – requirement for 'special circumstances' to exist such that the Tribunal could be satisfied that it was impracticable for the Applicant to complete the unit of study – whether the Applicant could withdraw from the unit of study without penalty – decision affirmed

## Migration

[Anand and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#) (Migration) [2021] AATA 4437 (30 November 2021); D J Morris, Senior Member

MIGRATION – applicant is citizen of the Republic of India – mandatory cancellation of Class BS Subclass 801 Partner visa – applicant concedes does not satisfy statutory character test – consideration of ministerial direction – Direction No. 90 – primary considerations – protection of Australian community – very serious offence – very low risk of re-offending – best interests of minor children in Australia – expectations of the Australian community – other considerations – extent of impediments if removed – impact on victims – links to Australian community – any other considerations – decision under review set aside with direction that visa cancellation be revoked

[Bourhas and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#) (Migration) [2021] AATA 4436 (30 November 2021); A Poljak, Senior Member

MIGRATION – non-revocation of mandatory cancellation of Special Category (Class TY) (Subclass 444) visa – citizen of New Zealand – where applicant has since returned to New Zealand – where visa mandatorily cancelled under s 501(3A) because applicant did not pass character test – substantial criminal record – aggravated robbery – whether there is another reason why the original decision should be revoked – Direction No. 90 – primary considerations – protection of the Australian community – expectations of the Australian community – other considerations – decision under review affirmed

[Devenport and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#) (Migration) [2021] AATA 4508 (2 December 2021); R Maguire, Member

MIGRATION – Non-revocation of mandatory cancellation of a Class TY Subclass 444 Special Category (Temporary) visa - where Applicant does not pass the character test – whether there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 90 – breaches of apprehended violence orders – decision under review affirmed

[Figota and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#) (Migration) [2021] AATA 4432 (30 November 2021); J C Kelly, Senior Member

MIGRATION – cancellation of Applicant's Class TY, Subclass 444 Special Category (Temporary) visa – Applicant is a citizen of New Zealand – failure to pass character test – whether there is another reason to revoke the visa cancellation – Direction No. 90 – protection of the Australian community – best interests of minor children in Australia – expectations of the Australian community – extend of impediments if removed – links to the Australian community – decision under review set aside

**Karehana and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4502 (3 December 2021); Dr L Bygrave, Member

MIGRATION – mandatory cancellation of visa – special category (subclass 444) visa – visa cancelled under s 501(3A) of the Migration Act 1958 (Cth) – applicant did not pass character test – substantial criminal record – Ministerial Direction No. 90 – primary considerations – protection of the Australian community – seriousness of offending and future risk – best interests of minor children – other considerations – extent of impediments if removed – links to the Australian community – strength, nature and duration of ties to Australia – decision under review affirmed

**King and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4391 (25 November 2021); S Burford, Member

MIGRATION – decision of delegate of Minister not to revoke mandatory cancellation of visa – character test – substantial criminal record – offences of unlawfully assaulting another and thereby doing bodily harm in circumstances of aggravation – Direction No 90 – primary and other considerations – protection of Australian community – nature and seriousness of criminal offending – risk to the Australian community should the Applicant commit further offences or engage in other serious conduct – best interests of minor children in Australia – expectations of the Australian community – strength, nature and duration of ties to Australia – Applicant is a 40-year-old man who arrived in Australia as a 27 year old – extent of impediments if returned to New Zealand – Non-Revocation Decision affirmed

**Knight and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4595 (8 December 2021); The Hon. D Cowdroy AO QC, Deputy President

MIGRATION – mandatory visa cancellation – failure to pass the character test – whether there is another reason why the visa cancellation should be revoked – Ministerial Direction No. 90 – nature and seriousness of offending conduct – risk of reoffending – protection of the Australian community – domestic violence committed by the Applicant – expectations of the Australian community – strength, nature and duration of ties to Australia – impediments to removal – decision affirmed

**LKSY and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4586 (9 December 2021); M Griffin QC, Senior Member

MIGRATION – mandatory cancellation of visa – Class TY Subclass 444 Special Category (Temporary) visa – where visa was cancelled under section 501(3A) because applicant did not pass character test – substantial criminal record- Ministerial Direction No. 90 – primary considerations – protection of the Australian community – seriousness of offending and future risk – best interests of minor children – expectations of the Australian community – other considerations – extent of impediments if removed – links to the Australian community – strength, nature and duration of ties to Australia – Impact on Australian business interests – decision under review affirmed

**Mihai and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4503 (4 November 2021); L Kirk, Senior Member

MIGRATION – mandatory cancellation – failure to pass the character test – Direction 90 – primary considerations – protection of Australian community – family violence – best interests of minor children – expectations of Australian community – other considerations – impediments if removed from Australia – impact on victims – links to Australian community – decision affirmed

**Omoregie and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4590 (10 December 2021); The Hon. J Pascoe AC CVO, Deputy President

MIGRATION – mandatory visa cancellation – failure to pass the character test – whether another reason why the visa cancellation should be revoked – Ministerial Direction No. 90 applied – nature and seriousness of offending conduct – risk of reoffending – protection of the Australian community – family violence committed by the non-citizen – best interests of minor children – expectations of the Australian community – ties to Australia – impediments to removal – international non-refoulement obligations considered – decision set aside and substituted

**PYCS and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4405 (25 November 2021); J Rau SC, Senior Member

MIGRATION – mandatory cancellation of Class BB Subclass 155 Five Year Resident Return visa under section 501CA(4) - where Applicant does not pass the character test – Applicant has substantial criminal record – whether the discretion to refuse to grant the visa should be exercised – consideration of Ministerial Direction No. 90 – domestic violence – international non-refoulement obligations – decision under review affirmed

**Shao and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4572 (8 December 2021); A Poljak, Senior Member and Mr S Evans, Member

MIGRATION – business visa cancellation – discretion to cancel business visas pursuant to subsection 134(1) of the Migration Act 1958 (Cth) – whether any prohibitions on the cancellation of the visa apply pursuant to subsection 134(2) of the Migration Act 1958 (Cth) – whether the cancellation of the second and third applicants' visas would cause extreme hardship – facts and circumstances considered – relevant law and policy considered – evidence and submissions considered – decisions under review affirmed.

**Snowden and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4405 4504 (2 December 2021); C Puplick AM, Senior Member

MIGRATION – mandatory visa cancellation – failure to pass the character test – whether there is another reason why the visa cancellation should be revoked – Ministerial Direction 90 – consideration of cases involving significant mental health issues – acquired brain injury – protection of the Australian community – nature and seriousness of offending conduct – risk of reoffending – expectations of the Australian community – impediments to removal – impact on victims – strength, nature and duration of ties to Australia – decision set aside and substituted

**SRKB and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4390 (26 November 2021); The Hon. D Cowdroy AO QC, Deputy President

MIGRATION – mandatory visa cancellation – failure to pass the character test – whether there is another reason why the visa cancellation should be revoked – Ministerial Direction No. 90 – nature and seriousness of offending conduct – risk of reoffending – protection of the Australian community – family violence – best interests of minor children – expectations of the Australian community – non-refoulement obligations – strength, nature and duration of ties to Australia – impediments to removal – decision under review set aside and substituted

**SXNC and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4510 (25 November 2021); R Bellamy, Member

MIGRATION – Non-revocation of mandatory cancellation of a Class XB Subclass 202 Global Special Humanitarian visa - where Applicant does not pass the character test – whether there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 90 – consideration of Australia’s international non-refoulement obligations where receiving country is Iraq – decision under review affirmed

**THYM and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4364 (19 November 2021); B W Rayment OAM QC, Deputy President

Migration – application for protection visa – protection visa denied – applicant deemed a danger to the community – danger to community whilst in detention – Issue for determination: whether the applicant is a danger to the community – considerations – the applicant’s prospects of being released in the future – applicant’s medical conditions and criminal background considered – decision set aside

**YHHT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Migration) [2021] AATA 4505 (12 October 2021); Dr N A Manetta, Senior Member

MIGRATION – mandatory cancellation of applicant’s visa – substantial criminal record – primary considerations including interests of minor children – family violence – observations on wording in Direction 90 – decision under review set aside in all the circumstances of the case

**1930514** (Migration) [2021] AATA 4359 (28 October 2021); A Murphy, Member

MIGRATION – cancellation – Return (Residence) (Class BB) visa – Subclass (155) (Five Year Resident Return) – Federal Circuit Court remittal – incorrect answers in the visa application – family composition – death of the applicant’s father – race – Hazara – credibility issues – long period of separation from family – potentially prolonged detention – non-refoulement obligations – decision under review set aside

**2102175** (Migration) [2021] AATA 4461 (25 October 2021); M Sripathy, Member

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine, continuing and exclusive relationship – members of the family unit – stepchildren of the sponsor – divorce of the sponsor’s first wife – de facto relationship – polygamous relationship – regular money transfers – divorce procedure in Afghanistan – compelling and compassionate circumstances – lengthy family separation – decision under review remitted

**Rugsat** (Migration) [2021] AATA 4429 (1 November 2021); M Sripathy, Member

MIGRATION – Child (Residence) (Class BT) visa – Subclass 802 (Child) – becoming a dependent child of an Australian permanent resident – no substantive visa at the time of application – parents’ relationship ceased – mutual agreement with the mother – financial hardship – dependent child of the sponsor since birth – compassionate circumstances – referral for Ministerial Intervention – decision under review affirmed

[Singh Auto Care Pty Ltd](#) (Migration) [2021] AATA 4459 (1 November 2021); C Burnett-Wake, Member

MIGRATION – sponsorship cancellation or bar – record keeping obligations – ensuring equivalent terms and conditions of employment – nominee did not receive his Guaranteed Annual Earnings – extended Leave Without Pay period for personal financial reasons – undocumented and unverified leave process – cash payments – extended LWOP not considered compatible with filling specific skill shortages – formal leave arrangements now in place – testimony of leave mutually agreed between staff – substantial compliance – decision under review set aside

[Wei](#) (Migration) [2021] AATA 4457 (2 November 2021); K Raif, Senior Member

MIGRATION – cancellation – Skilled Nominated (Permanent) (Class SN) visa – Subclass 190 Skilled – Nominated – incorrect information in the visa application – de facto – relationship ceased soon after visa grant – partner conceived a child with another person – applicant did not rely on Partner points – impact on the applicant’s employer – financial hardship – partner’s two Australian citizen children – decision under review affirmed

## **National Disability Insurance Scheme**

[Vecchio and National Disability Insurance Agency](#) [2021] AATA 4565 (8 December 2021); Emeritus Professor P A Fairall, Senior Member

NATIONAL DISABILITY INSURANCE SCHEME – whether claimed supports are reasonable and necessary - whether supports are in accordance with NDIS rules and guidelines - decision under review set aside and remitted with directions

## **Practice and Procedure**

[Azimullah and National Disability Insurance Agency](#) [2021] AATA 4363 (26 November 2021); The Hon. J Pascoe AC CVO, Deputy President

PRACTICE AND PROCEDURE – extension of time application – application to Tribunal not within time – whether reasonable in all the circumstances – explanation for delay – whether substantive application has merit – extension of time refused

[Bradley and Secretary, Department of Education, Skills and Employment](#) [2021] AATA 4507 (6 December 2021); A Poljak, Senior Member

PRACTICE AND PROCEDURE – application for extension of time – substantive matter seeks review of decision refusing remission of course fees – whether it is reasonable in all the circumstances to do so – delay – merits of substantive matter – prejudice to the respondent – extension of time application refused

[Carpenter and Australian Capital Territory](#) (Compensation) [2021] AATA 4378 (26 November 2021); S Webb, Member

PRACTICE AND PROCEDURE – compensation for psychological injury – determination of no present liability in respect of medical treatment expenses and incapacity for work – permanent impairment – applications for review – summons – production of medical records – objections to access – legal professional privilege – relevant principles – objection refused

**El Ali and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

(Citizenship) [2021] AATA 4594 (8 December 2021); Emeritus Professor P A Fairall, Senior Member

EXTENSION OF TIME APPLICATION – citizenship by conferral – where the application is 84 days out of time – where applicant has used wrong form to apply – whether use of wrong form is fatal to the merits of the application – whether there was a reasonable explanation for the delay – little if any prospect of success - application refused

**Evans and Secretary, Department of Social Services** (Social services second review) [2021]

AATA 4477 (1 December 2021); Emeritus Professor P A Fairall, Senior Member

EXTENSION OF TIME APPLICATION – application for review eight years out of time – claim for refusal of Centrelink crisis payment – decision affirmed by Social Security Appeals Tribunal – no satisfactory explanation for failure to comply with the 28 day requirement – extension of time refused

**Lagrange and Comcare** (Compensation) [2021] AATA 4369 (25 November 2021); S Boyle, Deputy

President

PRACTICE AND PROCEDURE – application for dismissal (AAT Act s 42B(1)) – whether application is vexatious – costs: applicability of SRC Act sub-ss 67(1), (2), (8) – Tribunal's powers statutory – circumstances of the case do not meet the requirements of SRC Act sub-ss 67(2) or (8) – under current program Applicant receives what she sought – no practical purpose would be served by a successful review of the decision the subject of the applications – proceedings have become frivolous – applications dismissed

**M&A Corporate Accountants Pty Ltd and Tax Practitioners Board** [2021] AATA 4523 (17

November 2021); B J McCabe, Deputy President

PRACTICE AND PROCEDURE – application for a stay and confidentiality orders under ss 41 and 35 of the Administrative Appeals Tribunal Act 1975 (Cth) – whether a conditional stay may be granted – whether the applicants should be compelled to inform clients of the these proceedings – whether confidentiality orders amounting to a private hearing, the substitution of the applicants' names with pseudonyms and the non-publication of orders are appropriate – conditional stay granted – application for confidentiality orders refused

**Mulipola and National Disability Insurance Agency** [2021] AATA 4442 (30 November 2021); Dr L

Bygrave, Member

PRACTICE AND PROCEDURE – application for dismissal under section 42B of the Administrative Appeals Act (Cth) – application for review of decision that Supported Independent Living (SIL) is not a reasonable and necessary support pursuant to subsection 34(1) of the National Disability Insurance Scheme Act 2013 (Cth) – whether Tribunal satisfied the application has no reasonable prospects of success – application for dismissal refused

**Ta and Linfox Australia Pty Ltd** (Compensation) [2021] AATA 4476 (26 October 2021); D

O'Donovan, Senior Member (Presiding) and P Q Wood, Senior Member

WORKERS' COMPENSATION – whether the Tribunal has jurisdiction to consider a different injury to the injury identified on the claim form – whether the Tribunal has jurisdiction to consider whether the applicant suffered an injury as defined in section 5A of the SRC Act, by reason of the nature and conditions of his employment – jurisdiction established in relation to a frank injury on a particular day – no jurisdiction established in relation to an injury suffered by reason of the nature and conditions of employment.

## Primary Industry

[Emanuel Exports Pty Ltd; EMS Rural Exports Pty Ltd and Secretary, Department of Agriculture, Water and the Environment](#) [2021] AATA 4393 (26 November 2021); P Britten-Jones, Deputy President and Dr M Evans-Bonner, Senior Member

AGRICULTURE, WATER AND THE ENVIRONMENT – application 2018/5307 – live export of sheep – cancellation of live-stock export licence – export permits – carriage of sheep by sea – show cause notices issued – integrity and competence – whether Emanuel ceased to be a body corporate of integrity – Emanuel through its managing director, provided incorrect pen air turnover (PAT) data for the vessel MV Awassi Express – whether Emanuel knew PAT values incorrect or should have known they were incorrect – whether Emanuel knew PAT values would affect the acceptable loading capacity of vessel – attribution of the actions of a person to a corporation – vessel data file for heat stress assessment software program (HotStuff) based on incorrect PAT values – whether any person who participates in management or control of the live-stock export business of Emanuel has ceased to be a person of integrity – whether Emanuel contravened a condition of its licence – whether Emanuel committed multiple alleged breaches of Australian Standards for the Export of Livestock (ASEL) – alleged breaches of ASEL after licence cancellation at Peel Feedlot – whether sufficient changes to management and control of Emanuel to demonstrate it is a body corporate of integrity – First Reviewable Decision set aside and substituted with a new decision that the licence should be suspended for the period 22 June 2018 to 3 December 2021

AGRICULTURE, WATER AND THE ENVIRONMENT – application 2018/5541 – EMS’s live-stock export licence cancelled due to association with Emanuel – no adverse findings by Secretary against EMS – whether the degree of association with Emanuel warrants cancellation of EMS’s licence – Second Reviewable Decision set aside and substituted with a new decision that the licence should be suspended from 11 July 2018 to 3 December 2021

JURISDICTION – nature and scope of the Tribunal’s review – whether Tribunal’s review should be restricted to the content of the show cause notices – formulation of the statutory questions

APPLICABLE LAW – legislative regime changed before proceedings finalised – whether Tribunal should apply law as at date of Tribunal’s decision or as at the time the reviewable decisions were made – transitional provisions – accrued rights – review concerned with rights and liabilities at anterior date – held that applicable legislation is the version in force at the time of the export licence cancellations

EVIDENCE AND PROCEDURE – applicability of rules of evidence in the Tribunal – former Applicants’ managing director not called as a witness – whether adverse inference should be drawn – rule in *Jones v Dunkel* – self-incrimination privilege

STATUTORY INTERPRETATION – meaning of “integrity” – meaning of “competence” – use of the present tense – temporal element – “person who participates” held to describe the person participating in the management or control of the business at any time

## Refugee

[1702744](#) (Refugee) [2021] AATA 4443 (15 October 2021); A Murphy, Member

REFUGEE – Protection Visa – Ethiopia – race – Amhara ethnicity – religion – Orthodox Christian – married an Australian citizen – particular social group – ‘women’ and ‘single women in Ethiopia’ – imputed political opinion – parents’ anti-government political opinions – relocation not reasonable – effective state protection not available – decision under review remitted

[1711221](#) (Refugee) [2021] AATA 4367 (1 September 2021); J Marquard, Member

REFUGEE – protection visa – Samoa – religion – Pentecostal Christianity – evangelical Christianity predominant in home village – no family support – officially Christian country – right to choose, practise and change religion and many different churches – communal pressure to belong to predominant village church, but no reports of threats or harm – possibility of relocation and help from new church community – decision under review affirmed

[1712009](#) (Refugee) [2021] AATA 4524 (4 November 2021); D Dragovic, Senior Member

REFUGEE – protection visa – Pakistan – race – Hazara – religion – Shia – particular social group – divorced women – unmarried mothers – mixed religious relationship – unregistered children – physical assault – honour killing – abusive first marriage – internal relocation – access health and education – decision under review remitted

[1712252](#) (Refugee) [2021] AATA 4374 (18 August 2021); B Darcy, Member

REFUGEE – protection visa – Republic of Korea – complementary protection – socio-economic hardship – close to retirement age with personal debts and no assets or savings and limited family or community support – visa, employment and small business history – application made after applications for business visas refused – second applicant's mental health and adult children's physical health – one child an Australian citizen – country information – societal discrimination against mature-aged workers – request for referral for ministerial consideration not granted – decision under review affirmed

[1715247](#) (Refugee) [2021] AATA 4408 (9 September 2021); L Mojsin, Member

REFUGEE – protection visa – Egypt – religion – Quranist – fear of the Muslim Brotherhood – physical assault – family arranged divorce – applicant estranged from his family – return visits to Egypt – delay in applying for protection – decision under review affirmed

[1811003](#) (Refugee) [2021] AATA 4411 (17 September 2021); R Shanahan, Member

REFUGEE – protection visa – Egypt – religion – Muslim – non-Sunni or infidel – acceptance of the Qur'an – does not accept any part of the Sunnah or ahadith – credibility concerns – lack of knowledge of the Qur'an's views on praying – inconsistent evidence – migration history – delay in seeking protection – Female Genital Mutilation (FGM) – decision under review affirmed

[2002491](#) (Refugee) [2021] AATA 4415 (22 October 2021); K Millar, Senior Member

REFUGEE – cancellation – protection visa – Afghanistan – incorrect information in visa application – family composition and citizenship – father deceased and applicant an Afghani citizen – allegation that father alive and he and applicant Pakistani citizens – statement by wife that she visits applicant's parents – money transfers to person in Pakistan with same name as father, who is required to hold national ID to open bank account – department's notice lengthy and not always clear – much information about issues not relied on by delegate, including other relationships – gravity of decision to cancel – requirement for positive satisfaction that ground exists – decision under review set aside

[2007677](#) (Refugee) [2021] AATA 4467 (12 September 2021); J Pennell, Senior Member

REFUGEE – Protection Visa – Ethiopia – Federal Court remittal – race – ethnic Amhara – actual and imputed political opinion – supporter of Ginbot 7 or the EPPF – second applicant – race – ethnic Tigray – member of the family unit of the second applicant – decision under review remitted



[2010265](#) (Refugee) [2021] AATA 4555 (20 September 2021); B Darcy, Member

REFUGEE – protection visa – Papua New Guinea – Federal Circuit Court remittal – failure to take into account a relevant consideration – complementary protection criterion – gender-based violence from a former intimate partner – cruel or inhuman treatment or extreme humiliation – forced marriage and bride price – single woman of limited education – real risk of serious domestic violence – personal status laws and women in Papua New Guinea – state protection – Wantok system and Wantokism – decision under review remitted

## **Social Services**

[Alobeidy and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4479 (1 December 2021); Dr N A Manetta, Senior Member

SOCIAL SECURITY – disability support pension – carer payment – whether applicants were overpaid social security payments - whether respondent's calculations of debt were incorrect – assessment of disputed income-producing transactions made by Tribunal – whether or not overpayment should be waived- waiver not found to be appropriate- jurisdiction of Tribunal to review transactions and fix amount of overpayment considered- parties agree quantum of debt given interim conclusions of Tribunal – AAT 1 decision under review varied.

[Bennett and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4441 (26 November 2021); B J Illingworth, Senior Member

SOCIAL SECURITY – Claim for Disability Support Pension – Physical, intellectual or psychiatric impairment – Whether a combined impairment rating of 20 points or more exists under the Impairment Tables – Whether fully diagnosed, fully treated and stabilised – Decision under review affirmed

[Doulaveras; Secretary, Department of Social Services and](#) (Social services second review) [2021] AATA 4506 (3 December 2021); Dr I Alexander, Senior Member

SOCIAL SECURITY – termination redundancy payment – jobseeker payment – income maintenance period – applicant was not in severe financial hardship – decision set aside and substituted

[Dring and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4376 (26 November 2021); S Evans, Member

SOCIAL SECURITY – age pension – rate – whether the applicant is a member of a couple for the purposes of calculating his rate of age pension – whether the applicant is a member of an illness separated couple – whether there is a special reason for the applicant not to be treated as a member of a couple – provisions of the Social Security Act 1991 (Cth) considered – relevant policy and cases considered – decision under review affirmed

[Hamdache and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4585 (9 December 2021); Mr S Evans, Member

SOCIAL SECURITY – disability support pension – whether the applicant's impairments can be assigned 20 points or more in accordance with the Impairment Tables – relevant legislation and secondary materials considered – medical reports and other evidence considered – decision under review affirmed

[JDKD and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4434 (30 November 2021); R West, Member

FAMILY TAX BENEFIT – shared care of child – change of care percentage – date of change – determination of new percentage of care – application for review – decision affirmed

[Larson; Secretary, Department of Social Services and](#) (Social services second review) [2021] AATA 4433 (2 November 2021); Dr L Bygrave, Member

SOCIAL SECURITY – residing outside of Australia – rate of age pension – nature of accommodation used in Australia considered – nature and extent of family relationships in Australia considered – nature and extent of employment, business or financial ties with Australia considered – nature and extent of assets located in Australia considered – frequency and duration of travel outside of Australia considered – other factors considered – decision under review set aside

[MacLeod and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4475 (2 December 2021); A Poljak, Senior Member

SOCIAL SECURITY – age pension – overpaid amount of \$49,896.19 – whether all or part of the debt may be written-off or waived – where Secretary conceded that debt from 4 September 2017 to 3 September 2018 was due to sole administrative error – whether remaining debt is attributable solely to administrative error – whether special circumstances exist that make it desirable to waive the debt – decision under review set aside and substituted

[Nematzadeh and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4463 (1 December 2021); L Rieper, Member

SOCIAL SECURITY – Special Benefit Payment – whether the applicant was qualified for special benefit payment – compensation payment – applicant had considerable funds available to her – not suffering financial hardship – ongoing income support – decision under review affirmed

[Noureddin and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4599 (9 December 2021); J Rau SC, Senior Member

SOCIAL SECURITY – Austudy – Overpayment of Austudy – Debt due to Commonwealth – Whether Applicant was a full-time student – Recovery of debt – Whether there should be a write-off of the debt – Deferral of payment appropriate – Decision under review of Applicant not being a full-time student and owing a debt affirmed – Decision under review of Respondent recovering the debt set aside and varied

[RTYG and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4557 (7 December 2021); S Barton, Member

SOCIAL SECURITY – disability support pension – whether the Applicant met the eligibility requirements for a disability support pension – fully treated and stabilised – Qualification Period – assigning impairment ratings – Impairment Table 12 – Visual Function – Impairment Table 1 – Functions requiring Physical Exertion and Stamina – eye damage from LASIK surgery – fibromyalgia/ chronic fatigue syndrome – Applicant found not to meet eligibility requirements – Reviewable Decision affirmed

[Ryan and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4403 (29 November 2021); B Pola, Senior Member

SOCIAL SECURITY – overpaid parenting payments – debt incurred – misreported fortnightly income as nil or negligible – partial or full recovery of debt – debt write-off – sole administrative error – no special circumstances – decision affirmed

[VGPM and Secretary, Department of Social Services](#) (Social services second review) [2021] AATA 4591 (9 December 2021); C Puplick AM, Senior Member

FAMILY TAX BENEFIT – whether there was a change in the pattern and percentage of care – factors relevant to the determination of actual care – no sufficiently solid or probative evidence to determine a pattern of care – no firm evidence which might result in significant amendment of decision – decision affirmed

## **Taxation**

[KXCS and Commissioner of Taxation](#) (Taxation) [2021] AATA 4465 4498 (3 December 2021); Dr M Evans-Bonner, Senior Member

TAXATION – income tax – superannuation contributions – Division 293 tax assessment – Applicant received lump sum redundancy and leave payout shortly before end of 2017-2018 financial year – whether discretion can be exercised under Division 293 - whether special circumstances apply to Division 293 - Reviewable Decision affirmed

[Kwan and Commissioner of Taxation](#) (Taxation) [2021] AATA 4465 (1 December 2021); D Mitchell, Member

TAXATION – income tax – was the Applicant carrying on a business – deductibility of expenses – Applicant's burden to prove amended assessment excessive or otherwise incorrect – decision under review affirmed

[M3K Services Pty Ltd and Commissioner of Taxation](#) (Taxation) [2021] AATA 4416 (26 November 2021); R Olding, Senior Member

TAXATION – GOODS AND SERVICES TAX – whether refund of excess GST paid is denied by s 142-10 of the A New Tax System (Goods and Services Tax Act) 1999 – whether excess GST passed on – where supplier priced to the market, rather than on a cost-plus margin basis – held GST passed on – whether s 142-15 of the Act applied to treat s 142-10 as never having applied – held s 142-15 not applicable – reviewable decisions affirmed

[Rogers and Commissioner of Taxation](#) (Taxation) [2021] AATA 4478 (1 December 2021); The Hon Justice D G Thomas, President and B J McCabe, Deputy President

TAXATION – Superannuation – where applicant was imposed tax for excess superannuation contributions for the 2018 income year pursuant to Division 293 of the Income Tax Assessment Act 1997 (Cth) – whether applicant exempt from Division 293 tax by operation of Subdivision 293-E – consideration of whether applicant is a constitutional state higher level office holder – decision under review set aside and substituted

[Stealth Enterprises Australia Pty Ltd and Commissioner of Taxation](#) (Taxation) [2021] AATA 4600 (10 December 2021); Mr P W Taylor SC, Senior Member and N Gaudion, Member

TAXATION – income tax and GST amended assessments – where applicant failed to declare assessable income and under-stated taxable supplies – where inconsistent evidence – whether the Commissioner’s amended assessments were excessive – onus to prove assessment was excessive and what taxable income should have been – administrative penalty – 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, Small Business Taxation, 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
<b>NXPQ and Comcare</b>	<a href="#">[2021] AATA 4094</a>
<b>Secretary, Department of Social Services and Ali</b>	<a href="#">[2021] AATA 4095</a>
<b>XQDX and Commissioner of Taxation</b>	<a href="#">[2021] AATA 4070</a>

## Appeals finalised

CASE NAME	AAT REFERENCE	COURT REFERENCE
<b>Daly v Australian Securities and Investments Commission</b>	<a href="#">[2020] AATA 4589</a>	<a href="#">[2021] FCA 1521</a>
<b>LGLH v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs</b>	<a href="#">[2021] AATA 179</a>	<a href="#">[2021] FCA 1529</a>
<b>Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs</b>	<a href="#">[2021] AATA 1488</a>	<a href="#">[2021] FCA 1503</a>

# Statements of Principles

This section of the *Bulletin* provides information on recent developments including the notification or completion of investigations in relation to Statements of Principles made by the Repatriation Medical Authority (RMA) for the purposes of section 120A(2) of the [Veterans' Entitlements Act 1986](#) (VEA) and section 338(2) of the [Military Rehabilitation and Compensation Act 2004](#) (MRCA). These Acts require reference to be had to Statements of Principles made about particular conditions concerning injury, disease or death.

If the RMA gives notice that it intends to carry out an investigation in respect of a particular kind of condition, the Repatriation Commission cannot determine a claim made under the VEA about the incapacity or death of a person relating to that condition, until the RMA has determined a Statement of Principles or declares that it does not propose to determine a Statement of Principles about the condition. Also during this period, claims under the MRCA cannot be determined, reconsidered or reviewed by either the Repatriation Commission, the Veterans' Review Board or the AAT, until the RMA has determined a Statement of Principles about the condition concerned or declared it does not propose to do so.

Certain claims cannot succeed if the RMA has declared it does not propose to make a Statement of Principles in relation to the particular condition.

Existing Statements of Principles are also reviewed, amended or revoked from time to time.

## New Statements of Principles

The AAT has been advised that the RMA has made the following new Statements of Principles. These take effect from **20 December 2021**:

**chronic solvent-induced neurocognitive disorder (Balance of Probabilities) - No. 110 of 2021**  
<https://www.legislation.gov.au/Details/F2021L01627>

**chronic solvent-induced neurocognitive disorder (Reasonable Hypothesis) - No. 109 of 2021**  
<https://www.legislation.gov.au/Details/F2021L01626>

**gender dysphoria (Balance of Probabilities) - No. 114 of 2021**  
<https://www.legislation.gov.au/Details/F2021L01632>

**gender dysphoria (Reasonable Hypothesis) - No. 113 of 2021**  
<https://www.legislation.gov.au/Details/F2021L01631>

**motor neurone disease (Balance of Probabilities) - No. 112 of 2021**  
<https://www.legislation.gov.au/Details/F2021L01630>

**motor neurone disease (Reasonable Hypothesis) - No. 111 of 2021**  
<https://www.legislation.gov.au/Details/F2021L01628>

## Amended Statements of Principles

The AAT has been advised that the RMA has made the following instruments amending the Statements of Principles for the specified conditions. These take effect from **20 December 2021**:

**pilonidal sinus (Reasonable Hypothesis) - No. 115 of 2021**

<https://www.legislation.gov.au/Details/F2021L01633>

**pilonidal sinus (Reasonable Hypothesis) - No. 115 of 2021**

<https://www.legislation.gov.au/Details/F2021L01633>

## **Statements of Principles to be revoked**

The AAT has been advised that the following Statements of Principles determined by the RMA **will be revoked** on **20 December 2021**:

**chronic solvent encephalopathy - No. 72 of 2013**

<https://www.legislation.gov.au/Details/F2013L01888>

**chronic solvent encephalopathy - No. 71 of 2013**

<https://www.legislation.gov.au/Details/F2013L01886>

**motor neurone disease - No. 68 of 2013**

<https://www.legislation.gov.au/Details/F2013L01656>

**motor neurone disease - No. 67 of 2013**

<https://www.legislation.gov.au/Details/F2013L01655>



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