



Administrative
Appeals Tribunal

AAT Bulletin

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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.

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

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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.

Compensation

[Bailey and Broadword Marine Contractors Pty Limited](#) (Compensation) [2016] AATA 1048 (20 December 2016); Dr P McDermott RFD, Deputy President

Seamen's compensation – whether disease or an aggravation of a disease suffered by applicant – whether applicant made a wilful and false representation that he or she did not suffer, or had not previously suffered, from that disease – decision under review affirmed

[Chalfont and Comcare](#) (Compensation) [2016] AATA 1081 (23 December 2016); Mr DK Grigg, Member

Commonwealth employees – claim for 'medical treatment' – accepted compensable injury – whether respondent liable for applicant's exercise shoes – whether exercise footwear is medical treatment – tear of lateral cartilage - meniscus of left knee – decision under review affirmed

[Chalfont and Comcare](#) (Compensation) [2016] AATA 1082 (23 December 2016); Mr DK Grigg, Member

Commonwealth employees – accepted colon injury – medical treatment not obtained in relation to accepted injury – decision affirmed

[Chalfont and Comcare](#) (Compensation) [2016] AATA 1083 (23 December 2016); Mr DK Grigg, Member

Commonwealth employees – whether applicant continues to suffer effects of accepted condition – decision under review affirmed

[LRJK and Telstra Corporation Limited](#) (Compensation) [2016] AATA 310 (13 May 2016); Senior Member JC Kelly and Dr W Isles, Member

Whether applicant suffers an impairment – whether impairment is permanent – degree of permanent impairment assessed – whether applicant satisfies 10% whole person impairment – workplace accident – psychological injury – decision set aside

[Lockwood and Telstra Corporation Limited](#) (Compensation) [2016] AATA 1053 (21 December 2016); Senior Member P Britten-Jones

Liability for medical expenses – definition of medical treatment – consideration of the purpose for which a medical report was provided – obtaining a medical report for medico-legal purposes is not "medical treatment" – decision under review affirmed

[Katterns and Military Rehabilitation and Compensation Commission](#) (Compensation) [2016] AATA 1075 (22 December 2016); Dr P McDermott RFD, Deputy President

Claim for compensation for an injury – osteoarthritis of the right hip – condition aggravated by the reserve military service of the applicant – decision under review set aside and substituted

[McDonald and Comcare](#) (Compensation) [2016] AATA 1049 (20 December 2016); Deputy President K Bean

Entitlement to compensation for household services – Preliminary issue raised – Effect of transitional provisions where compensable injury sustained prior to commencement of *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) – Whether applicant restricted to compensation of a type which would have been payable under 1971 Act – Entitlement to a particular type of compensation arising after 1 December 1988 in respect of a compensable injury is determined by direct reference to the applicable provision of the SRC Act

[Parton and Comcare](#) (Compensation) [2016] AATA 1076 (22 December 2016); Dr J Popple, Senior Member

Commonwealth employees – Applicant had pre-existing lumbar spine condition – Applicant travelled in the course of her employment – whether Applicant suffered injury when lifting bags at airport during travel – whether Applicant gave Comcare notice in writing of injury as soon as practicable after becoming aware of it – whether failure to give notice resulted from ignorance, mistake or from any other reasonable cause – decision under review set aside and substituted

[Tognini and Military Rehabilitation and Compensation Commission](#) (Compensation) [2016] AATA 1038 (16 December 2016); Dr C Kendall, Deputy President

Service in Australian Regular Army – whether service “significantly contributed” to condition of condition of lumbar spondylosis – relevance of date applicant first sought medical treatment for condition – meaning of “significant degree” as opposed to “material degree” – decision under review affirmed

Corporations

[Chapple and Australian Securities and Investments Commission](#) [2016] AATA 1032 (16 December 2016); Deputy President G Humphries

Permanent banning order prohibiting applicant from providing financial services – where conduct misleading or deceptive – nature of serious fraud – effect of recklessness -purpose of banning order – decision under review affirmed

Defence

[Powell and Secretary, Department of Defence](#) [2016] AATA 1056 (21 December 2016); Mr S Webb, Member

Defence home ownership assistance scheme – occupation of home – subsidy certificate – cessation of occupation of home prior to draw down of loan – date on which subsidy was payable – meaning of “first authorisation date” – determination that subsidy was payable not documented – alleged maladministration and errors causing disadvantage – subsidy paid even though payability criteria not

met – conditions in which subsidy stops being payable – meaning of “entitlement period” and “monthly authorisation period” - period of home occupancy – discretion to reduce period of home occupancy not exercised – date on which subsidy stops being payable – mandatory refusal to authorise continued payment of monthly subsidy – decision affirmed

PRACTICE AND PROCEDURE – jurisdiction – Defence home ownership assistance scheme – decision not the exercise discretion to shorten period of home occupancy – alleged maladministration and errors causing disadvantage - overpayment and recovery of subsidy – Tribunal jurisdiction confined to external review’ of ‘internal review’ decision – no jurisdiction to review discretion in respect of home occupancy period, overpayment or recovery decisions

Employment

[Kersten and Secretary, Department of Employment](#) (Social services second review) [2016] AATA 1052 (21 December 2016); Deputy President SE Frost

Employment – Fair Entitlements Guarantee – claim for advance under *Fair Entitlements Guarantee Act 2012* – employee or independent contractor – particular employer – decision affirmed

Freedom of Information

[Price and Attorney General’s Department](#) (Freedom of information) [2016] AATA 1044 (20 December 2016); Deputy President IR Molloy

Request for access to documents – conditional exemptions claimed – whether documents exempt – whether, on balance, access would be contrary to public interest – decision under review affirmed

Immigration and Citizenship

[Cao and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1050 (20 December 2016); Senior Member E Fice

Application for Bridging E (Class WE) visa refused – failure to satisfy character test – applicant pleaded guilty to a sexually based offence – Indecent act with child under 16 – where serious risk to Australian community if applicant re-offended – where Australian community would expect application to be refused – decision affirmed

[FTYC and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1039 (19 December 2016); Dr L Bygrave, Member

Visa refusal – character test – substantial criminal record – whether visa refusal was the preferable decision – protection of the Australian community – expectations of the Australian community – international non-refoulement obligations – decision affirmed

[Oh and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1079 (23 December 2016); Dr L Bygrave, Member

Visa refusal – application for partner visa – failure to pass character test – discretion to refuse visa on character grounds – undisclosed criminal record upon re-entry into Australia – protection of the Australian community – evidence of rehabilitation – low risk of reoffending – expectations of Australian community – best interests of minor children – impact on applicant’s family – expert evidence of negative impact of family separation – decision set aside and substituted

[Reddy and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1043 (19 December 2016); Mr W Evans, Member

Decision by Minister to refuse applicant's skilled residence (Class VB) visa pursuant to s 501 (1) of the Migration Act 1958 – Applicant does not pass “character test” as a result of “substantial criminal record” – whether Tribunal should exercise discretion to refuse visa applying Direction 65 – protection of the Australian community from criminal or other serious conduct considered – best interests of minor children in Australia considered – expectation of the Australian community considered – business interests considered – impact on family members considered – decision under review affirmed

[Singh and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1040 (19 December 2016); Mr DJ Morris, Member

Refusal to grant a non-citizen's visa on character grounds – applicant does not pass character test – whether discretion should have been exercised – the protection of the Australian community from criminal or other serious conduct – expectations of Australian community – decision to refuse visa affirmed

[Steve and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1054 (21 December 2016); Dr L Bygrave, Member

Visa cancellation – Absorbed Person visa – character test – substantial criminal record – Direction No. 65 – protection of community – seriousness of conduct – drug offences – moderate risk of reoffending – expectations of the Australian community – strength of ties to Australia – extent of impediments to removal – Applicant New Zealand citizen – minimal employment history – decision affirmed

[Taillez and Minister for Immigration and Border Protection](#) (Migration) [2016] AATA 1045 (20 December 2016); Senior Member T Tavoularis

Decision not to revoke mandatory cancellation of visa – Applicant did not pass section 501 character test – visa cancelled – discretion should not be exercised to revoke cancellation – decision under review affirmed

[Huynh and Minister for Immigration and Border Protection](#) (Citizenship) [2016] AATA 1084 (23 December 2016); Dr G Hughes, Member

Application for citizenship by descent – child born in Vietnam – alleged father an Australian citizen by naturalisation – whether parent of child - lack of evidence of a relationship between alleged father and the mother – Applicant submitted to DNA testing in Vietnam but declined to submit to DNA testing in Australia – adverse inference drawn

[Surapaneni and Minister for Immigration and Border Protection](#) (Citizenship) [2016] AATA 1073 (22 December 2016); Professor R McCallum AO, Member

Citizenship by conferral – cancellation of citizenship approval – eligibility criteria – likely to maintain a close and continuing association with Australia – likely to reside or continue to reside in Australia – failed to make pledge of commitment – reason for failure not prescribed by the regulations – decision affirmed

Practice and Procedure

[The Sharemarket College Pty Ltd and Australian Securities and Investments Commission](#) [2016] AATA 1057 (24 November 2016); The Hon. D Cowdroy OAM QC, Deputy President

Stay application – applicants prohibited from providing any financial services – utility of granting stay where applicant business has no business to conduct - prospects of success where legal and factual issues to be considered at hearing – public interest – consequences on application for review – application for stay dismissed

[Thomas and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1047 (20 December 2016); Brigadier AG Warner, Member

Application for extension of time for review of decision of the Social Security Appeals Tribunal dated 28 June 2006 – significant length of delay – applicant's explanation for delay not satisfactory – limited prospects of success for applicant's application for review – Tribunal not satisfied that reasonable in all the circumstances to grant extension of time – application of time refused

[Mackenzie and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1051 (20 December 2016); Brigadier AG Warner, Member

Application for extension of time to lodge application for review of decision of the Social Services and Child Support Division of Administrative Appeals Tribunal dated 19 November 2015 – length of delay significant – applicant advised of appeal rights – explanation for delay not compelling or satisfactory – limited prospects of success of applicant's substantive application – Tribunal not satisfied that reasonable in all the circumstances to grant extension of time – application for extension of time refused

[Thumma and Telstra Corporation Limited](#) (Compensation) [2016] AATA 1085 (23 December 2016); Senior Member E Fice

Application for reinstatement – application dismissed under s. 42A(5) for failure to comply with a direction – whether application dismissed in error – notes to direction refer to holding directions hearing prior to dismissal – notes not followed – nature of error contemplated by s.42A(10) – direction itself warned of dismissal for failure to comply - reinstatement refused

Social Security

[Atzil and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1055 (21 December 2016); Mr A Cameron, Member

Disability support pension – qualification – whether resident at time of first having continuing inability to work – residency acquired after that time – decision affirmed

[Carroll; Secretary, Department of Social Services and](#) (Social services second review) [2016] AATA 1070 (22 December 2016); Miss EA Shanahan, Member

Disability support pension – claim for lumbar spinal injury sustained in a motor vehicle accident – spinal function incapacity table rating of 10 points – condition of depression not fully diagnosed, treated and stabilised – s 94(1)(b) of the Act not satisfied – decision set aside

[Ebady and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1058 (21 December 2016); Mr C Ermert, Member

Disability Support Pension – relevant date – whether physical, intellectual or psychiatric impairment – whether conditions fully diagnosed, fully treated and fully stabilised – whether impairment rates 20 points or more under Impairment Tables – decision affirmed

[El Azzi and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1042 (19 December 2016); Dr L Bygrave, Member

Pensioner Education Supplement – start date of payments – qualification date – date on which a claim is deemed to have been made – whether payment can be backdated further than date of first contact – decision under review affirmed

[Govedarica and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1068 (22 December 2016); Mr A Cameron, Member

Disability support pension – qualification – continuing inability to work – program of support – decision affirmed

[May and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1061 (21 December 2016); Mr S Webb, Member

Claim for disability support pension – generalised osteoarthritis accepted as ‘permanent’ – diagnosis of depression – meaning of ‘clinical psychologist’ – rating of impairments resulting from ‘permanent’ conditions – no severe impairment – assessment of continuing inability to work – job capacity assessment not consistent with medical evidence – work capacity within two years below minimum threshold of ‘work’ definition – active participation in a ‘program of support’ – program of support provided by insurer under a State workers’ compensation scheme – meaning of ‘designated provider’ – temporal component not satisfied – assessment of ability to work independently of a program of support within two years – lack of evidence – evidentiary basis for inference – assessment of ability to undertake training activities – training activities unlikely to enable claimant to work independently of a program of support – active participation requirement not satisfied – decision affirmed

[Lamont and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1046 (20 December 2016); Senior Member J Sosso

Disability support pension – Impairment Tables – where Applicant has several conditions – whether conditions are fully diagnosed, treated and stabilised – whether conditions meet requirements for 20 points under the Impairment Tables – decision under review affirmed

[Raye and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1059 (21 December 2016); Dr G Hughes, Member

Claim for disability support pension – multiple conditions – allocation of impairment rating – whether conditions fully diagnosed, treated and stabilised – lack of supporting medical evidence supporting diagnosis, treatment and stabilisation of conditions – claimed mental health condition not diagnosed by appropriate professional – less than twenty points allocated under impairment tables – decision affirmed

[Rybarczyk; Secretary, Department of Social Services and](#) [2016] AATA 1066 (1 December 2016); Dr P McDermott RFD, Deputy President

Disability support pension – physical and psychiatric impairments – whether claimant’s conditions are permanent – whether claimant has undertaken reasonable treatment – whether claimant’s impairment is of 20 points or more under the Impairment Tables – whether claimant has a continuing inability to work – decision under review set aside and substituted

[Vesic and Secretary, Department of Social Services](#) (Social services second review) [2016] AATA 1074 (22 December 2016); Deputy President SE Frost and Mr N Gaudion, Member

Disability support pension – overpayment of pension – recovery of debt – whether debts were properly raised – assets test – whether value of loans advanced by the Applicant includes the balance of funds in an account in Applicant’s name – whether a valid trust exists – designated private trust – whether the Applicant is an attributable stakeholder – deprived assets – decision set aside and remitted

Taxation

[Nguyen and Commissioner of Taxation](#) (Taxation) [2016] AATA 1041 (19 December 2016); Senior Member FD O’Loughlin

Income tax – whether amended assessments excessive – burden of proof on applicant taxpayer – balance of probabilities – fraud or evasion – whether requisite opinion formed – onus on applicant to show fraud or evasion opinion should not have been formed – decision under review affirmed

[Tan and Commissioner of Taxation](#) (Taxation) [2016] AATA 1062 (21 December 2016); Senior Member CR Walsh

International tax – applicant was an Australian resident for Australian income tax purposes in the 2015 income year – applicant was a Malaysian resident for Malaysian income tax purposes in the 2015 income year – application of the residence “tiebreaker” test in the Australia/Malaysia double taxation agreement – whether applicant had a “permanent home available to him” in Australia and/or Malaysia – whether the applicant’s “habitual abode” was in Australia and/or Malaysia – whether the applicant’s “personal and economic relations” were closer to Australia or Malaysia – applicant’s Malaysian source “personal services” income and “business income or profits” taxable in Australia – objection decision affirmed

Veterans' Affairs

[Lahiff and Repatriation Commission](#) (Veterans’ entitlements) [2016] AATA 1037 (16 December 2016); Dr P McDermott RFD, Deputy President

Pensions and benefits – claim for pension at the special rate of pension – whether veteran prevented by incapacity from defence-caused conditions alone from continuing to undertake remunerative work – decision set-aside and substituted

[McAnally and Repatriation Commission](#) (Veterans’ entitlements) [2016] AATA 1071 (22 December 2016); Deputy President JW Constance

Eligibility for disability pension – whether Applicant suffers from post-traumatic stress disorder – whether disease is war-caused – where Applicant suffers alcohol use disorder – decision 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
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None lodged

Appeals finalised

CASE NAME	AAT REFERENCE	COURT REFERENCE
Singh v Minister for Immigration and Border Protection & Administrative Appeals Tribunal	[2016] AATA 628	[2016] FCA 1529
Jonshagen v Commissioner of Taxation	[2015] AATA 380	[2016] FCA 1545
Smith v Military Rehabilitation and Compensation Commission	[2015] AATA 343	[2016] FCA 1558

Jurisdiction and legislative changes

This section of the *Bulletin* provides a summary of significant legislative changes that affect the AAT, including changes and potential changes to the AAT's jurisdiction to review decisions. Information about the AAT's jurisdiction can also be found on the [AAT website](#).

Amendments to the *Military Rehabilitation and Compensation Act 2004*

Recent amendments to the *Military Rehabilitation and Compensation Act 2004* (the MRC Act) have established a single appeal pathway for claimants under the MRC Act. The amendments also affect the way in which cases are managed in the AAT and when the AAT can make a costs order. The amendments apply in relation to original determinations made on or after **1 January 2017**.

Single appeal pathway

Prior to the enactment of the *Budget Savings (Omnibus) Act 2016* (Budget Savings Act), there were two possible appeal paths in the reconsideration and review of an original determination made by the Commission or the Chief of the Defence Force:

1. The claimant may request a reconsideration of the original determination; OR
2. The claimant may make an application to the Veterans' Review Board (the Board) under Part 4 for review of the original determination.

The effect of the amendments is to remove the first of the two appeal pathways. The claimant may no longer request to the Commission or the Chief of the Defence Force to reconsider an original determination. The only appeal path available to claimants under the MRC Act is to apply to the Board for review of an original determination.

Review by the AAT

Mandatory remittal to the Commission in certain circumstances

The Budget Savings Act also introduced amendments that affect the way a case is managed in the AAT and how a case is remitted to the Commission where:

- document(s) have been provided to the AAT during the course of the AAT's review that could have reasonably been provided to the Board, and
- the AAT is satisfied the Board would have made a determination more favourable to the applicant if the document(s) had been provided to the Board.

Costs of proceedings before the AAT

The amendments also affect how the AAT orders costs in favour of a claimant in circumstances outlined immediately above.

Commencement of amendments

These amendments apply in relation to original determinations made on or after **1 January 2017**.

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