



## AAT Bulletin

ISSUE NO. 35/2014

8 SEPTEMBER 2014

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

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

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).

### Contents

<b>AAT Recent Decisions</b> .....	<b>2</b>
Child Support .....	2
Compensation.....	2
Customs.....	3
Defence Force Retirement and Death Benefits.....	3
Education .....	3
Freedom of Information .....	3
Immigration and Citizenship .....	3
Practice and Procedure .....	4
Social Security .....	4
Tax Agents.....	6
Taxation .....	6
Trade and Commerce.....	7
Veterans' Affairs.....	7
<b>Appeals</b> .....	<b>8</b>
Appeals lodged .....	8
Appeals finalised.....	8

---

## AAT Recent Decisions

---

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

### Child Support

[Ezekiel-Hart and Child Support Registrar](#) [2014] AATA 612; 28/8/2014; Senior Member RM Creyke

Departure prohibition order – whether applicant satisfies criteria for revocation of departure prohibition order – whether discretion to revoke departure prohibition order should be exercised

### Compensation

[Alamos and Comcare](#) [2014] AATA 629; 14/8/2014; Deputy President JW Constance

Medical treatment – ongoing physiotherapy – whether treatment was reasonable for the employee to obtain – decision affirmed

[Bozic and Comcare](#) [2014] AATA 615; 29/8/2014; Senior Member RM Creyke

Commonwealth employee – application for reinstatement – application settled by consent – whether the Tribunal considers it appropriate to reinstate – whether applicant had knowledge of consent agreement

[Kucharski and Comcare](#) [2014] AATA 626; 2/9/2014; Senior Member RG Kenny

Liability accepted for major depressive disorder, single episode – claim for permanent impairment – condition not permanent – decision under review affirmed

[Saad and Comcare](#) [2014] AATA 636; 3/9/2014; Senior Member RM Creyke

Commonwealth employee – accepted conditions – extent of household services reasonably required as a result of accepted conditions

[Turkington and Comcare](#) [2014] AATA 616; 1/9/2014; Senior Member RG Kenny

Claim for psychiatric injury – diagnosis of adjustment disorder with depressive reaction – significant contribution by aspects of employment – contribution resulted from reasonable administrative action taken in a reasonable manner – no liability of respondent for compensation for incapacity or impairment – decision under review affirmed

## Customs

[Becker Vale Pty Ltd and Chief Executive Officer of Customs](#) [2014] AATA 625; 2/9/2014; Deputy President JW Constance

Tariffs – description of goods – competing classifications – whether goods should be classified under tariff classification 8504.34.00 or 8537.20.90 – principal function of the goods is transformation of electricity – decision affirmed

## Defence Force Retirement and Death Benefits

[Renehan and Commonwealth Superannuation Corporation](#) [2014] AATA 619; 2/9/2014; Senior Member N Isenberg

Defence Force Retirement and Death Benefits – multiple conditions – reclassification from Class B to Class A pension – whether reclassification should take effect from earlier date – whether special circumstances – decision set aside

## Education

[BHLT and Secretary, Department of Education](#) [2014] AATA 643; 4/9/2014; Dr P McDermott RFD, Senior Member

Higher Education Contribution Scheme – education provider – removal of financial liability after census date – special circumstances not satisfied – HECS-HELP cannot be remitted – decision affirmed

## Freedom of Information

[Lester and Commonwealth Scientific and Industrial Research Organisation](#) [2014] AATA 646; 5/9/2014; Senior Member AF Cunningham

Documents publicly available some at cost – application of FOI Act – application of exemptions – commercial arrangements with publishers – adverse effect on operations of agency – public interest test – decision under review affirmed

## Immigration and Citizenship

[Lu and Minister for Immigration and Border Protection](#) [2014] AATA 642; 3/9/2014; Senior Member BJ McCabe

SECTION 501 VISA REFUSAL – application for second Working Holiday visa – conviction for fraud in Taiwan – declared conviction upon arrival in Australia – failed to disclose conviction on visa application forms – honesty and integrity of applicant in question – limited information about conviction – application of Ministerial Direction – protection of Australian community – proportionality – decision set aside and substituted – visa application should not be refused on character grounds

[XQMD and Minister for Immigration and Border Protection](#) [2014] AATA 633; 2/9/2014; Senior Member N Isenberg

Application for Australian Citizenship – general residence requirements not satisfied – whether s 22(9) discretion should be exercised – whether Applicant had a close and continuing relationship with Australia – whether in periods of absence Applicant can be treated as present in Australia if Applicant was absent due to reasons not related to Applicant's spouse

## **Practice and Procedure**

[Le and Comcare](#) [2014] AATA 634; 29/8/2014; Deputy President J W Constance

Summons – objection to inspection of material produced under summons – relevance – leave to inspect granted

[Tosun and Secretary, Department of Social Services](#) [2014] AATA 641; 4/9/2014; Mr M Hyman, Member

Request for a confidentiality order under s 35 – where request made subsequent to hearing – request to abandon line of argument put at hearing – requests denied

## **Social Security**

[Alarcon and Secretary, Department of Social Services](#) [2014] AATA 617; 1/9/2014; Professor R McCallum AO, Member

Disability support pension – permanent conditions – whether the Applicant has an impairment rating of 20 points or more under the impairment tables – whether depression fully treated and stabilised - decision under review affirmed

[Coelho and Secretary, Department of Social Services](#) [2014] AATA 640; 4/9/2014; Miss EA Shanahan, Member

Pensions and allowances – Disability Support Pension – medical condition of paroxysmal atrial fibrillation – permanency – frequency and severity of symptoms – treatment response – incapacity for work – impairment rating – remittance for further medical opinion and reconsideration – decision affirmed

[Gergis and Secretary, Department of Social Services](#) [2014] AATA 645; 5/9/2014; Dr I Alexander, Member

Pensions – Disability Support Pension – whether applicant's conditions were fully diagnosed, treated and stabilised – whether applicant's impairment is rated 20 points or more under the Impairment Tables – decision under review affirmed

[Haakman and Secretary, Department of Social Services](#) [2014] AATA 624; 2/9/2014; Senior Member P McDermott RFD

SOCIAL SECURITY – pensions, benefits and allowances – Disability Support Pension – whether 20 impairment points – whether continuing inability to work – Applicant did not participate in program of support – decision under review affirmed

[Lee and Secretary, Department of Social Services](#) [2014] AATA 630; 1/9/2014; Senior Member CR Walsh

Entitlement to Austudy in relevant period – overpayment – debt due to the Commonwealth – whether all or part of debt should be waived – whether debt solely attributable to administrative error made by the Commonwealth – whether “special circumstances” exist – whether debt should be written off – entitlement to Newstart Allowance in relevant period – notional entitlement – decision under review set aside and remitted to the Secretary for reconsideration in accordance with the Tribunal’s recommendation

[Mr R and Secretary, Department of Social Services and Anor](#) [2014] AATA 628; 3/9/2014; Senior Member N Isenberg

Family Tax Benefit – percentage of care – shared care – care periods – decision under review set aside

[Niemczyk and Secretary, Department of Social Services](#) [2014] AATA 618; 1/9/2014; Senior Member P McDermott RFD

SOCIAL SECURITY – Disability Support Pension – whether maximum portability period of six weeks reached – Applicant not eligible to receive Disability Support Pension -decision affirmed

[Prins and Secretary, Department of Social Services](#) [2014] AATA 639; 4/9/2014; Dr P McDermott RFD, Senior Member

Overpayment – New Zealand Superannuation – request for overpayment to be advanced and paid back in instalments – Application of Agreement on Social Security between the Government of Australia and the Government of New Zealand contained in Schedule 3 of the *Social Security (International Agreements) Act 1999* – decision affirmed

[Southern Cross Care \(Tas\) Inc and Secretary, Department of Health and Ageing](#) [2014] AATA 623; 2/9/2014; Senior Member AF Cunningham and Dr R Walters, Member

Aged Care, classification level of care recipients for Commonwealth subsidy – palliative care program involving end of life care – medical directive – complex health care criteria not satisfied – decision under review affirmed

[Vass and Secretary, Department of Social Services](#) [2014] AATA 621; 2/9/2014; Senior Member PMcDermott RFD

SOCIAL SECURITY – pensions, benefits and allowances – Disability Support Pension – whether 20 impairment points – whether continuing inability to work – Applicant did not complete the program of support – decision affirmed

[Woods and Secretary, Department of Social Services](#) [2014] AATA 627; 3/9/2014; Mr P Wulf, Member

Pensions, benefits and allowances – Disability Support Pension – impairment tables – conditions not fully treated and stabilised – conditions not permanent – no impairment rating – decision under review affirmed

## Tax Agents

[Su and Tax Practitioners Board](#) [2014] AATA 644; 4/9/2014; Deputy President SE Frost and Mr N Gaudion, Member

Registration as tax agent – termination of registration – rejection of application for renewal of registration – prohibition on applying for registration for three years – whether length of non-application period excessive – whether fit and proper person – breaches of Code of Professional Conduct – unsatisfactory understanding of role as tax agent – shortcomings in integrity – concerns over competence as a tax agent – lack of insight into the seriousness of shortcomings – decision under review affirmed

## Taxation

[Bentivoglio and Commissioner of Taxation](#) [2014] AATA 620; 2/9/2014; Deputy President SE Frost

Taxation and Revenue – income tax – non-commercial losses - private ruling – Commissioner’s discretion – whether special circumstances affected taxpayer’s business activity – whether unreasonable to apply non-commercial loss provisions

[Coshott and Commissioner of Taxation](#) [2014] AATA 622; 2/9/2014; Deputy President R Deutsch

TAXATION – income tax – whether capital gains tax event occurred from a deed of settlement – what are the capital proceeds of CGT event – cost base of CGT asset – taxpayer bears burden of proof – record keeping – penalty assessments – appropriate penalty – meaning of recklessness – objection decision affirmed

[GHP 104 160 689 Pty Ltd and Commissioner of Taxation](#) [2014] AATA 515; 29/7/2014; President D Kerr

Income taxation – deductions for research and development expenditure – applicant conducted plant trials in copper and lead concentrator and copper smelter – whether expenditure deductible at a premium rate – whether expenditure “research and development expenditure” – whether expenditure “feedstock expenditure”

STATUTES – interpretation – centrality of statutory text – defined words – statutory purpose to be found in statutory text rather than in any a priori assumptions based on policy

PRACTICE AND PROCEDURE – extrinsic materials – whether Tribunal may have regard to materials capable of assisting in the ascertainment of the meaning of a statutory provision that would be inadmissible in a court – Tribunal not bound by rules of evidence – importance of consistent statutory interpretation by courts and tribunals – regard had to rules of evidence in determining the admissibility of extrinsic aids to statutory interpretation

[Moore and Commissioner of Taxation](#) [2014] AATA 631; 2/9/2014; Senior Member G Lanzas

Penalty – recklessness – taxpayer complained that Commissioner of Taxation responsible – objection decision affirmed – decision not to remit penalty affirmed

## **Trade and Commerce**

[Minas and Australian Trade Commission](#) [2014] AATA 647; 5/9/2014; Senior Member E Fice

Export Market Development Grant – Ineligible expenditure – Success fee – Commission payments – Was the claimed expenditure incurred – Exclusionary provisions – decision under review affirmed

## **Veterans' Affairs**

[Hoang and Repatriation Commission](#) [2014] AATA 635; 3/9/2014; Senior Member RM Creyke

Whether applicant has qualifying service – whether applicant served with defence force of allied country during relevant time period – whether applicant incurred danger from hostile forces of the enemy

---

## Appeals

---

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

### Appeals lodged

---

CASE NAME	AAT REFERENCE
-----------	---------------

---

None lodged

---

### Appeals finalised

---

CASE NAME	AAT REFERENCE	COURT REFERENCE
-----------	---------------	-----------------

---

<b>Contreras v Minister for Immigration and Border Protection &amp; AAT</b>	<a href="#">[2013] AATA 914</a>	<a href="#">[2014] FCA 912</a>
---	---------------------------------	--------------------------------

---

<b>Soames v Secretary, Department of Social Services</b>	<a href="#">[2014] AATA 258</a>	<a href="#">[2014] FCA 952</a>
--	---------------------------------	--------------------------------

---

<b>Taniela v Minister for Immigration and Border Protection</b>	<a href="#">[2013] AATA 632</a>	<a href="#">[2014] FCAFC 104</a> <a href="#">[2014] FCA 375</a>
---	---------------------------------	--

---



© Commonwealth of Australia 2014



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](mailto: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](#). Those terms provide that section 182A of the *Copyright Act 1968* applies.