



Administrative
Appeals Tribunal

AAT
Bulletin

AAT Bulletin

Issue No. 40/2019

8 October 2019

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, 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.

The Review

The **AAT Review** is AAT's monthly e-newsletter which will allow you to keep up to date with recent news and help you get to know more about the Tribunal. It also includes short, plain English summaries of a range of the Tribunal's recent decisions.

Subscribe to be sent The Review every month.

Contents

AAT Recent Decisions	3
Child Support	3
Citizenship	3
Compensation.....	3
Conflict of Laws.....	4
Freedom of Information	4
Industrial Law.....	4
Migration.....	5
National Disability Insurance Scheme.....	6
Practice and Procedure.....	7
Social Services	7
Taxation.....	8
Appeals.....	9
Appeals lodged	9
Appeals finalised.....	9

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

[WCFT and Child Support Registrar](#) (Child support second review) [2019] AATA 4085 (4 October 2019); D Mitchell, Member (Presiding) and P Ranson, Member

CHILD SUPPORT – care determination – reasonable action for compliance – interim determination – where no special circumstances – decision under review affirmed

Citizenship

[Fofana and Minister for Home Affairs](#) (Citizenship) [2019] AATA 4082 (4 October 2019); Senior Member Emeritus Professor P A Fairall and Mr S Evans, Member

CITIZENSHIP – cancellation of approval of citizenship application – good character – provision of bogus document in support of citizenship application – whether the submission of a bogus document by the applicant demonstrates that she is not a person of good character for the purposes of becoming an Australian citizen – where applicant not of good character – decision affirmed

[Odesho and Minister for Home Affairs](#) (Citizenship) [2019] AATA 3946 (27 September 2019); Senior Member C Puplick AM

CITIZENSHIP – refusal – whether applicant of good character – common assault – apprehended domestic violence order issued – traffic offences – consideration of applicant's character – decision set aside and remitted

Compensation

[Carlisle and Comcare](#) (Compensation) [2019] AATA 4058 (3 October 2019); R West, Member

COMPENSATION – fibromyalgia – compensation for permanent impairment and non-economic loss – Comcare Guide does not apply to fibromyalgia – AMA5 – fibromyalgia is a chronic pain condition for the purpose of Principle 12 – exclusion of fibromyalgia from assessment under AMA5 – assessment of degree of impairment under ss 24(5) not possible – decision affirmed

[Doorbar and Comcare](#) (Compensation) [2019] AATA 4003 (2 October 2019); Senior Member D Cremean

WORKERS' COMPENSATION - lateral epicondylitis – chronic regional pain syndrome – Department of Defence - repetitive keyboard and mouse activity – tennis elbow – compensation for injury – compensation for medical expenses – compensation for injuries resulting in incapacity – decision set aside

[Kropp and Comcare](#) (Compensation) [2019] AATA 4078 (4 October 2019); Senior Member L Kirk

WORKERS' COMPENSATION – stenosing tenosynovitis – trigger finger – whether the Applicant suffers an ailment or an aggravation of an ailment as defined in s 4 of the Safety, Rehabilitation and Compensation Act – whether the respondent is liable to pay compensation under s 14 of the Safety, Rehabilitation and Compensation Act – whether the ailment or aggravation of an ailment was contributed to, to a significant degree, by the Applicant's employment – decision under review set aside and substituted

[Lolic and Comcare](#) (Compensation) [2019] AATA 3944 (26 September 2019); Ms A Burke AO, Member

WORKER'S COMPENSATION – public servant – denial of liability – whether injury is work related – conflicting medical evidence – decision set aside

Conflict of Laws

[Wesson and Victorian Building Authority](#) [2019] AATA 4088 (4 October 2019); Deputy President S A Forgie

MUTUAL RECOGNITION – application for registration in Victoria for equivalent occupation as registered in Western Australia – whether registration for occupation of Registered Building Practitioner (WA) equivalent to registration as Building Inspector (unlimited), Commercial Builder (limited to the construction of medium rise building work), Domestic Builder (unlimited) and Project Manager (domestic) (Vic) – where activities authorised to be carried out under each registration are not substantially the same – decision affirmed

Freedom of Information

[Dezfouli and Australian Federal Police](#) (Freedom of information) [2019] AATA 4079 (4 October 2019); Deputy President, The Hon. J Pascoe AC CVO

FREEDOM OF INFORMATION – access – where documents were produced to Applicant either in full or with exemptions – whether the Respondent took all reasonable steps to find documents within the scope of the access request – whether information contained in identified documents fall under exemptions in FOI Act – public interest considerations – decision affirmed

Industrial Law

[Kable and Secretary, Attorney General's Department](#) [2019] AATA 3963 (1 October 2019); Senior Member D O'Donovan

FAIR WORK ENTITLEMENTS – Fair Work Entitlements Guarantee Act - applicant not entitled to advance in respect of redundancy payments – Fair Work Act the governing instrument - entitlement to redundancy pay under section 119 – meaning of small business employer under section 23 - whether company has the requisite number of employees at a particular time – decision affirmed

Migration

[Dharma and Minister for Home Affairs](#) (Migration) [2019] AATA 4065 (3 October 2019); Senior Member A Nikolic AM CSC

MIGRATION – mandatory visa cancellation – citizen of Indonesia – Transitional (Permanent) (Class BF) visa – criminal offending since 1994 – failure to pass character test – whether another reason why the mandatory visa cancellation should be revoked – Ministerial Direction No. 79 applied – decision affirmed

[Edwards and Minister for Home Affairs](#) (Migration) [2019] AATA 4084 (4 October 2019); Brigadier A G Warner, Member

MIGRATION – decision of delegate of Minister not to revoke mandatory cancellation of Applicant's visa – Applicant does not pass character test – whether discretion to revoke mandatory cancellation should be exercised – primary considerations – protection of Australian community from criminal or other serious conduct – expectations of the Australian community – other considerations – minor children not resident in Australia – strength, nature and duration of ties – extent of impediments if removed – relevance of cancellation of the revocation of the visa of the Applicant's brother – decision under review affirmed

[Kungu and Minister for Home Affairs](#) (Migration) [2019] AATA 4056 (2 October 2019); T Eteuati, Member

MIGRATION – refusal of application for Partner visa under section 501(1) – Applicant failed to pass the character test under section 501(6)(a) - whether the discretion to refuse to grant the Partner visa should be exercised – application of Direction No. 79 – decision under review affirmed

[Lu and Minister for Home Affairs](#) (Migration) [2019] AATA 4053 (2 October 2019); Senior Member B J Illingworth

MIGRATION – mandatory cancellation of applicant's visa – applicant has substantial criminal record – whether discretion to revoke mandatory cancellation should be exercised – primary considerations – other considerations – decision under review affirmed

[MBJY and Minister for Home Affairs](#) (Migration) [2019] AATA 4055 (7 June 2019); S Burford, Member

MIGRATION – decision of delegate of Minister not to revoke mandatory cancellation of visa – character test – substantial criminal record – Direction no. 79 – primary and other considerations – protection of the Australian community – best interests of minor children – expectations of the Australian community – international non-refoulement obligations – strength, nature and duration of ties to Australia – extent of impediments if returned to India – reviewable decision affirmed

[Paddock and Migration Agents Registration Authority](#) (Migration) [2019] AATA 3941 (27 September 2019); Senior Member C Puplick AM

MIGRATION AGENTS – registration – barring of registration – whether applicant complied with Code of Conduct – immigration assistance – lodgement of application without consent of client – failure to act diligently – charging excessive fees – decision under review affirmed

[Puni and Minister for Home Affairs](#) (Migration) [2019] AATA 3943 (26 September 2019); Senior Member A Nikolic AM CSC

MIGRATION – Mandatory visa cancellation – citizen of New Zealand – Class TY Subclass 444 Special Category (Temporary) visa – failure to pass good character test – criminal history between 2003 and 2015 – convictions for multiple violent offences – whether another reason why the mandatory visa cancellation should be revoked – Ministerial Direction No. 79 applied – decision affirmed

[SRYY and Minister for Home Affairs](#) (Migration) [2019] AATA 4054 (27 September 2019); Senior Member L Kirk

MIGRATION – mandatory cancellation of applicant’s visa under s 501(3A) – where Applicant does not pass character test – whether there is another reason why the cancellation decision should be revoked – primary considerations and other considerations in accordance with Direction No. 79 – decision affirmed

[TGDR and Minister for Home Affairs](#) (Migration) [2019] AATA 4086 (1 October 2019); Senior Member The Hon. Matthew Groom

MIGRATION – mandatory cancellation – applicant convicted of historic sexual offences – applicant fails character test – whether another reason why mandatory cancellation should be revoked – Direction 79 – protection of Australian community – best interests of minor children in Australia – strong ties to Australia – extensive impediments if returned – overall balance weighs in favour of applicant – decision set aside

[Trang and Minister for Home Affairs](#) (Migration) [2019] AATA 4087 (1 October 2019); Deputy President Boyle

MIGRATION – Migration Act 1958 (Cth) – mandatory visa cancellation – s 501CA(4) – substantial criminal record – is there another reason why the cancellation decision should be revoked? – Direction 79 – protection of the Australian community – nature and seriousness of the conduct – the risk to the Australian community – nature of harm – expectations of the Australian community – non-refoulement obligations – necessity to consider protection obligations – strength, nature and duration of ties – extent of impediments if removed – decision affirmed

National Disability Insurance Scheme

[Stephenson and National Disability Insurance Agency](#) [2019] AATA 4059 (1 October 2019); Mrs J C Kelly, Senior Member

NATIONAL DISABILITY INSURANCE SCHEME – reasonable and necessary supports – Applicant seeks funding for driveway modifications – whether supports relate to the Applicant’s disability – Applicant able to walk and drive up and down driveway prior to stroke - lost mobility and independence as result of stroke - dependent on carers and family to access community – limited type of vehicles can access driveway because of grounding at the top and/or bottom of the driveway - driveway modifications relate to Applicant’s disability - whether proposed drive way modifications represent value for money – no survey available – Tribunal not able to be satisfied as to feasibility or cost of proposed modifications – proposed modification did not include all necessary modifications to the driveway - decision set aside and remitted with recommendations made

Practice and Procedure

[Gower and Australian Capital Territory](#) (Compensation) [2019] AATA 3947 (6 September 2019); W Frost, Member

PRACTICE AND PROCEDURE – application for release from implied undertaking in relation to medical reports – whether release from implied undertaking applies – reports to be used for purpose of claims management of accepted condition – whether release from implied undertaking should be granted – release from implied undertaking granted

[Vance and National Disability Insurance Agency](#) [2019] AATA 3948 (17 September 2019); Senior Member B J Illingworth

NATIONAL DISABILITY INSURANCE AGENCY - JURISDICTION – dependent upon application being made for a reviewable decision – identifying reviewable decision – whether decision made under s 48 or s 100 – Tribunal has jurisdiction

Social Services

[Dickman and Secretary, Department of Social Services](#) (Social services second review) [2019] AATA 4052 (3 October 2019); A Wood, Member

SOCIAL SECURITY – disability support pension – impairment rating during qualification period – continuing inability to work – decision under review set aside

[Hartigan and Secretary, Department of Social Services](#) (Social services second review) [2019] AATA 4083 (7 October 2019); R West, Member

Disability Support Pension - maximum portability period – meaning of absence from Australia – decision set aside and substituted

[Hayles and Secretary, Department of Social Services](#) (Social services second review) [2019] AATA 4002 (5 September 2019); D Mitchell, Member

SOCIAL SECURITY – disability support pension – DSP – whether medical conditions fully diagnosed, fully treated and fully stabilised – whether 20 points or more under the impairment tables during the relevant period – decision under review affirmed

[Hussein and Secretary, Department of Social Services](#) (Social services second review) [2019] AATA 4051 (2 October 2019); K Parker, Member

SOCIAL SECURITY – claim for carer payments – care receiver diagnosed with attention deficit hyperactivity disorder - whether care receiver required constant care – whether provision of care severely restricted Applicant's ability to undertake paid employment – Applicant and her husband owned and operated a Red Rooster store – Applicant's mother provided after school care to the care receiver – care receiver attended school during usual school hours – medical evidence did not support conclusion that care receiver required constant care – qualification requirements not met – decision affirmed

[Metcalf and Secretary, Department of Social Services](#) (Social services second review) [2019] AATA 3945 (30 September 2019); Senior Member B Pola

SOCIAL SECURITY – disability support pension – DSP – whether condition is fully diagnosed, fully treated and fully stabilised – decision under review affirmed

[Shore and Secretary, Department of Social Services](#) (Social services second review) [2019] AATA 4004 (1 October 2019); K Parker, Member

SOCIAL SECURITY BENEFITS – claim for newstart allowance – determination of “start date” – deemed claim – no jurisdiction to review previous cancellation decision – cancellation decision was the subject of an earlier application for review which was dismissed due to non-attendance by the Applicant – no application made by the Applicant for reinstatement of the earlier application – decision under review in relation to “start date” of new claim for newstart allowance affirmed

[XSYY and Secretary, Department of Social Services](#) (Social services second review) [2019] AATA 3942 (17 September 2019); Mr S Evans, Member

SOCIAL SECURITY – Newstart payments – whether the applicant was overpaid Newstart – income incorrectly declared – whether the debt is recoverable – whether the debt should be waived or written off in part or full – no sole administrative error – applicant informed of income reporting obligations numerous times – whether special circumstances exist – decision affirmed

Taxation

[Ke and Commissioner of Taxation](#) (Taxation) [2019] AATA 4057 (3 October 2019); D K Grigg, Member

TAX – where income tax assessments issues by the Australian Tax Office following an audit – whether assessment excessive – whether administrative penalty correctly imposed under section 284-75(3) of Schedule 1 of the Tax Administration Act 1953 – whether discretion should be exercised to remit the 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
Frugtniet and Secretary, Department of Social Services	[2019] AATA 547
XJLR and Minister for Home Affairs	[2019] AATA 3406

Appeals finalised

CASE NAME	AAT REFERENCE	COURT REFERENCE
Frugtniet v Secretary, Department of Social Services	[2019] AATA 547	[2019] FCA 1617
LKQD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	[2018] AATA 2710	[2019] FCA 1591
Maksoud v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	[2019] AATA 825	[2019] FCA 1635
NDDG v Minister for Home Affairs	[2019] AATA 250	[2019] FCA 1527
Ward v Minister for Home Affairs	[2019] AATA 581	[2019] FCA 1623



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

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

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

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

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