



Administrative  
Appeals Tribunal

# AAT Bulletin

**Issue No. 47/2017**

**20 November 2017**

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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# Recent developments

## Melbourne office relocation

From **Monday 27 November 2017**, AAT services in Melbourne will be provided from our office at Level 4, 15 William Street, Melbourne. The AAT's Melbourne office at Level 10, 120 Spencer Street will close at 5.00pm on Friday 24 November 2017. The offices at Level 11, 565 Bourke Street and Level 16 HWT Tower, 40 City Road, Southbank will close 8 December 2017.

Please check the [Contact us](#) page on our website, [www.aat.gov.au](http://www.aat.gov.au), for up-to-date information and contact details. Information about the co-location of our offices will be made available on our website and through [AAT Alerts](#).

# AAT Recent Decisions

The following decisions were recently delivered by the AAT in the General, FOI, NDIS, Security, Taxation & Commercial and Veterans' Appeals Divisions. 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. If the decision is to be summarised, this will be noted. Click on the links for direct access to the full text of the decision.

## Citizenship

[Douw and Minister for Immigration and Border Protection](#) (Citizenship) [2017] AATA 2181 (10 November 2017); DK Grigg, Member

CITIZENSHIP – whether unlawful non-citizen – whether discretion in section 22(4A) applies – decision under review affirmed

[Hamshari and Minister for Immigration and Border Protection](#) (Citizenship) [2017] AATA 2160 (9 November 2017); Mrs JC Kelly, Senior Member

CITIZENSHIP – citizenship by conferral – failure to meet residence requirement – whether the Applicant meets the residency requirement - whether the Applicant is likely to reside in Australia or maintain a close and continuing association with Australia if the application were approved – application of citizenship policy - decision set aside and substituted

[Rana and Minister for Immigration and Border Protection](#) (Citizenship) [2017] AATA 2167 (13 November 2017); Ms K Parker, Member

Citizenship – Application for conferral of citizenship under the Australian Citizenship Act 2007 – general eligibility criteria – general residency requirement – whether discretion enlivened under s 22(4A) of the Australian Citizenship Act 2007 – whether applicant present in Australia unlawfully because of an administrative error – consideration of Departmental procedures in place at the time - whether decision about validity of student visa application constituted an administrative error – whether decision about the manner of notification of an invalid visa application constituted an administrative error

## Compensation

[Barton and K & S Freighters Pty Ltd](#) (Compensation) [2017] AATA 2170 (14 November 2017); Senior Member E Fice

COMPENSATION – application for extension of time - spinal injuries arising out of or in course of employment – subsequent determination that liability to pay compensation ceased – applicant did not apply for reconsideration of determination within 30 day statutory time limit – applicant hospitalized and required to seek treatment for condition - applicant pursued permanent impairment and non-economic loss claims – reasonable explanation for delay – lack of prejudice to respondent – respondent's decision to deny extension of time set aside and substituted with decision to grant extension

[McKechnie and Military Rehabilitation and Compensation Commission](#) (Compensation) [2017] AATA 2159 (3 November 2017); Senior Member N Isenberg

COMPENSATION – melanoma – occupational disease specified by the Minister – presumption of material contribution rebutted – whether applicant’s service materially contributed to malignant melanoma – reviewable decision set aside

[Portors and Comcare](#) (Compensation) [2017] AATA 2166 (13 November 2017); Deputy President G Humphries

COMPENSATION – whether injury arose out of, or in the course of, employment – whether the Applicant had any entitlement to compensation – whether the Applicant has entitlement to compensation because of a new injury caused as a result of medical treatment – whether a fresh s 14 determination must be made over the new injury – the basis on which the Tribunal is to accept expert evidence – shifts in medical consensus over the years – reviewable decision affirmed.

[Spence and Comcare](#) (Compensation) [2017] AATA 2161 (9 November 2017); Dr J Popple, Senior Member

COMPENSATION — Commonwealth employees — Applicant injured back unhitching police boat from police vehicle — Comcare given notice in writing more than 11 years later — notice not given as soon as practicable after Applicant become aware of injury — no liability — Applicant claimed back condition aggravated by carrying heavy weights in load bearing vest and accoutrement belt — wearing vest and belt did not contribute, to significant degree, to aggravation of condition — aggravation did not arise out of or in the course of employment — no liability — decisions under review affirmed.

## Corporations

[SWEENEY and Australian Securities and Investments Commission](#) [2017] AATA 2182 (8 November 2017); Mr PW Taylor SC, Senior Member

CORPORATIONS – ASIC – banning order – conduct as a director – irregularities in financial reporting and disclosures – residential property development – misleading or deceptive conduct – failure to comply with benchmarks 5 and 7 in Regulatory Guide 69 – number and value of loans in arrears – valuation basis of development and construction loans – applicant aware of deficiencies and non-disclosures in documents – auditors’ reports not relevant to objective materiality of loan and applicant’s knowledge and understanding of that materiality – no breach of Corporations Act s 728 – applicant knowingly involved in contraventions of Corporations Act s 1041H – applicant not involved in contraventions relating to policy and disclosure compliance – discretion to exercise banning power – applicant’s personal circumstances – decision under review affirmed

## Migration

[KDSP and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 2169 (8 November 2017); Senior Member MJ McGrowdie

MIGRATION – visa refusal – character test – substantial criminal record – protection of the Australian community – nature and seriousness of the conduct – risk of reoffending – best interests of minor children – expectations of the Australian community – other considerations – decision set aside and substituted

[Maea and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 2158 (9 November 2017); Deputy President BW Rayment

MIGRATION – non-revocation of mandatory cancellation of visa – character test – substantial criminal record – primary and other considerations under Ministerial Direction No. 65 – protection of the Australian community – expectations of the Australian community – extent of impediments if removed – decision affirmed

[PKJT and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 2178 (14 November 2017); Senior Member B Stefaniak AM RFD

MIGRATION – mandatory cancellation of visa – request for revocation of cancellation – character test – substantial criminal record – primary and other considerations – prospect of rehabilitation – unacceptable risk of harm – decision set aside and substituted

[QFFD and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 2179 (8 November 2017); Senior Member B Stefaniak AM RFD

MIGRATION – mandatory cancellation of visa – request for revocation of cancellation – character test – substantial criminal record – primary and other considerations – prospect of rehabilitation – unacceptable risk of harm – decision under review affirmed.

[Wikotu and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 2172 (15 November 2017); Senior Member T Tavoularis

MIGRATION – non-revocation of mandatory cancellation of visa – visa was cancelled under s 501(3A) because the Applicant did not pass character test and was serving a full-time term of imprisonment – whether discretion in s 501CA to revoke mandatory visa cancellation should be exercised – Considerations in Direction No. 65 – Applicant has minor children in Australia – considerations outweighed by nature and risk of re-offending and community expectation – decision under review affirmed.

## **National Disability Insurance Scheme**

[Hudson and National Disability Insurance Agency](#) [2017] AATA 2176 (13 November 2017); Professor R McCallum AO, Member, Dr L Bygrave, Member

NATIONAL DISABILITY INSURANCE SCHEME – reasonable and necessary supports – spinal cord injury – attendance at weekly exercise therapy targeting the Applicant's spinal cord injury at a specific service provider – whether NDIA should fund the Applicant's weekly exercise therapy sessions – whether the weekly exercise therapy is a reasonable and necessary support within the context of s 34(1) of the National Disability Insurance Scheme Act – decision set aside and substituted

[SSBV and National Disability Insurance Agency](#) [2017] AATA 2174 (17 October 2017); Deputy President K Bean

NATIONAL DISABILITY INSURANCE SCHEME – Reasonable and necessary supports – Foetal alcohol spectrum disorder – Whether appropriate for Tribunal to extend applicant’s plan – Whether material time for the Tribunal’s decision was the date of the internal review or the date of the Tribunal’s decision – Whether the Tribunal could take into account any unexpended funds remaining in a participant’s plans – Decision under review affirmed but the Tribunal notes the respondent’s undertakings

## **Practice and Procedure**

[Banigo and Secretary, Department of Education and Training](#) [2017] AATA 2195 (17 November 2017); Deputy President SA Forgie

PROCEDURE – FAMILY ASSISTANCE LAW – application – whether prescribed fee payable – no prescribed fee payable

[Horizons \(Asia\) Pty Ltd and Registrar of Trade Marks](#) [2017] AATA 2175 (9 November 2017); Senior Member A Poljak

PRACTICE AND PROCEDURE – jurisdiction – whether tribunal has jurisdiction to review – opposition to registration of trade mark – late application for extension of time – intention to refuse extension of time application – procedural fairness letter not final determination – no jurisdiction

[Maukau and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 2194 (20 October 2017); Deputy President BJ McCabe

PRACTICE AND PROCEDURE – Application for extension of time to lodge application for review of decision of the respondent dated – Consideration of the reasons for delay, prejudice to the parties and prospects of success – Lack of prospect of success in the substantive case – Application refused

[Mendonca and Tax Practitioners Board](#) [2017] AATA 2177 (10 November 2017); Senior Member A Poljak

PRACTICE AND PROCEDURE – jurisdiction – whether tribunal has jurisdiction to review – applicant sought review of decision about power to investigate complaint – no enactment permitting an application to be lodged for review of that decision – no jurisdiction to review decision

[O’Gorman and Comcare](#) (Compensation) [2017] AATA 2192 (16 November 2017); Dr L Bygrave, Member

PRACTICE AND PROCEDURE – application for extension of time to make application for review – whether it is reasonable in all the circumstances to grant the extension – acceptable explanation for delay – whether applicant ‘rested on her rights’ – prejudice to the respondent and general public – merits of substantive matter – application for extension of time granted

[Pervez and Minister for Immigration and Border Protection](#) (Migration) [2017] AATA 2171 (14 November 2017); Dr L Bygrave, Member

PRACTICE & PROCEDURE – extension of time application – whether it is reasonable in all the circumstances to grant the extension of time – not reasonable in all the circumstances – extension of time application refused

[Senanayake and Migration Agents Registration Authority](#) (Migration) [2017] AATA 2157 (3 November 2017); Dr L Bygrave, Member

PRACTICE & PROCEDURE – Applicant’s registration as a migration agent cancelled under s 303(1) – Applicant requested a stay of the decision – whether the Tribunal can grant a stay – Tribunal cannot stay the decision – application for stay refused

## **Primary Industry**

[Rust-Oleum Australia Pty Ltd and Australian Pesticides and Veterinary Medicines Authority](#) [2017] AATA 2180 (10 November 2017); Deputy President SA Forgie

AGRICULTURAL AND VETERINARY CHEMICALS – notice to recall product – agricultural chemical product - whether mould inhibitor - whether mould killer – whether disinfectant – residential use not domestic use - decision affirmed

PRACTICE AND PROCEDURE – whether decision could be reviewed on the basis that the product had a label different from that which it currently has and with which it is distributed

## **Social Security**

[Al Zamal and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 2193 (16 November 2017); Professor R McCallum AO, Member

SOCIAL SECURITY – disability support pension – cancellation of disability support pension – whether applicant was an Australian resident – nature of accommodation – nature and extent of family relationships – nature and extent of employment, business or financial ties – nature and extent of assets – frequency and duration of travel outside Australia – any other relevant matter – decision affirmed

[Asaad and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 2173 (15 November 2017); Professor R McCallum AO, Member

SOCIAL SECURITY – Age Pension – residence requirements – whether the applicant meets the residency requirements – applicant does not meet the residency requirements – decision under review affirmed

[Dubois and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 2164 (10 November 2017); Deputy President BW Rayment

SOCIAL SECURITY – debt repayment – age pension debt – designated private trust – trust asset attribution rules – whether applicant is an attributable stakeholder – decision set aside and remitted

[Mitting and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 2162 (9 November 2017); LM Gallagher, Member

SOCIAL SECURITY – disability support pension – whether applicant had conditions that were fully diagnosed treated and stabilised – whether applicant had 20 impairment points – seronegative arthritis – spinal condition – photosensitivity – depression – decision under review affirmed

[Russo and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 2190 (15 November 2017); Senior Member MJ McGrowdie

SOCIAL SECURITY – disability support pension – spinal condition – upper limb condition – mental health condition – whether applicant has physical and psychiatric impairments – impairments are not fully treated and stabilised – rating cannot be given under impairment tables for mental health condition – decision affirmed

[Singh and Secretary, Department of Social Services](#) (Social services second review) [2017] AATA 2163 (10 November 2017); Deputy President J Sosso

SOCIAL SECURITY – Sickness allowance – asset calculation – decision set aside and remitted

## **Taxation**

[VPRX and Commissioner of Taxation](#) (Taxation) [2017] AATA 2156 (31 October 2017); The Hon. D Cowdroy OAM QC, Deputy President

TAXATION – default assessments issued against taxpayer – onus on Applicant to establish the assessment is excessive or incorrect – whether payments the Applicant received are capital gains or income – payments received were income - failure to discharge onus – Applicant is liable for administrative penalty – no grounds for remittal – decision under review affirmed

## **Veterans' Affairs**

[Crawford and Repatriation Commission](#) (Veterans' entitlements) [2017] AATA 2191 (15 November 2017); Brigadier AG Warner, Member

VETERANS' AFFAIRS – veterans' entitlements – eligible defence service – claim for special rate – alone test – whether ameliorating provisions apply - not entitled to pension at the special rate – decision under review affirmed

[Lipke and Repatriation Commission](#) (Veterans' entitlements) [2017] AATA 2168 (13 November 2017); Deputy President J Sosso

VETERAN'S AFFAIRS – Veteran's Entitlements – whether the veteran's condition was defence-caused – rhabdomyosarcoma – inability to obtain appropriate clinical management – where the condition was treated quickly and appropriately – the decision under review affirmed

[Morris and Repatriation Commission](#) (Veterans' entitlements) [2017] AATA 2165 (14 November 2017); Senior Member AC Cotter

VETERANS' AFFAIRS – Veterans' Entitlements – disability pension – application for increase in pension – whether Applicant is entitled to payment of disability pension at the Special or Intermediate Rate – PTSD – whether satisfies the “alone test” – other factors – alcohol dependence – back condition – shoulder condition – domestic circumstances – whether contributed to preventative effect- “alone test” satisfied – Applicant entitled to payment at the Special Rate - decision under review set aside and substituted

# 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
<b>Bailey and Repatriation Commission</b>	<a href="#">[2017] AATA 1909</a>
<b>MVLW and Minister for Immigration and Border Protection</b>	<a href="#">[2017] AATA 1557</a>
<b>Sandhu and Minister for Immigration and Border Protection</b>	<a href="#">[2017] AATA 1387</a>
<b>SSBV and National Disability Insurance Agency</b>	<a href="#">[2017] AATA 2174</a>
<b>TYGJ and Information Commissioner</b>	<a href="#">[2017] AATA 1560</a>

## Appeals finalised

CASE NAME	AAT REFERENCE	COURT REFERENCE
<b>NRJT v Australian Offshore Solutions Pty Ltd</b>	<a href="#">[2015] AATA 588</a>	<a href="#">[2017] FCA 1322</a> <a href="#">[2017] FCA 268</a>

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