The participant in the national disability insurance scheme: A paradigm shift for administrative law

Thomas Liu*

The *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) established the National Disability Insurance Scheme (NDIS). One of the objectives of the NDIS Act is to give effect to Australia's international obligations with respect to persons with disabilities. In doing so, the NDIS Act enacts new concepts and principles around decision-making, planning and funding of supports for persons with disabilities. One of the key principles is that the NDIS Act puts the participant at the heart of the NDIS and centrally involves the participant in decision-making.

In this article, I look at the intersection of the NDIS Act (especially the role of the participant in decision-making) and the mechanism for merits review in Commonwealth administrative law. I analyse this intersection in the context of one type of decision under the NDIS Act: a decision to approve a statement of participant supports in a participant's plan under s 33(2). Decisions under s 33(2) are important because they are a critical step in operationalising the principles in the NDIS Act through the preparation and approval of a statement of participant supports. The statement of participant supports, which forms part of a participant's plan, specifies the reasonable and necessary supports that will be funded for the participant. Perhaps not surprisingly, then, the Commonwealth Ombudsman notes that '[w]hile there are many types of decisions that are subject to internal review, the bulk of the complaints to our Office involve decisions to approve a statement of participant supports (s 33(2))'.[1] Decisions under s 33(2) of the NDIS Act are also reviewed by the Administrative Appeals Tribunal (AAT).

The chief proposition advanced in this article is that decision-making under s 33(2) does not entirely harmonise with the existing mechanisms for merits review through the AAT. This creates incongruities in the administration of the NDIS Act and in AAT proceedings reviewing decisions under s 33(2) of that Act. However, observing these incongruities also provides opportunities for adopting more suitable procedures for the AAT and for participants.

This article addresses these issues in four sections. The first section provides an overview of the NDIS focusing on the centrality of the participant within the legislative scheme. The second section looks at the mechanism for merits review in the AAT and how it maps onto the NDIS. The third section identifies potential incongruities and challenges that emerge from the intersection of decision-making under the NDIS Act and the mechanism for merits review. The fourth section sets out possible solutions to the identified issues.

The National Disability Insurance Scheme — the participant and the legislative scheme

Background

The NDIS Act commenced in 2013. A useful and common starting point for understanding the background to the introduction of the NDIS and its core principles appears in the Explanatory Memorandum to the Bill which became the Act. The Explanatory Memorandum sets out the background to the NDIS Act as follows:[2]

* Thomas Liu is Barrister at 7th Wentworth Selborne Chambers, Sydney. This is an edited version of a paper presented to the Australian Institute of Administrative Law National Conference in Canberra on 19 July 2019.

1 Commonwealth Ombudsman, *Administration of Reviews under the National Disability Insurance Scheme Act 2013 — Report on the National Disability Insurance Agency's Handling of Reviews* (Report No 03, 2018).

2 Explanatory Memorandum, National Disability Insurance Scheme Bill 2013 (Cth) 1.

In August 2011, the Prime Minister released the Productivity Commission Inquiry Report, *Disability Care and Support*, which identified that disability care and support in Australia was 'underfunded, unfair, fragmented and inefficient', and that major reform was needed.

Since the release of this report, the Commonwealth and all state and territory governments have agreed on the need for major reform in the form of a National Disability Insurance Scheme, which:

- will take an insurance approach that shares the costs of disability services and supports across the community;
- will fund reasonable and necessary services and supports directly related to an eligible person's individual ongoing disability support needs; and
- will enable people with disability to exercise more choice and control in their lives, through a person-centred, self-directed approach, with individualised funding.

The Bill establishes a scheme that gives effect to these critical principles, and gives effect in part to Australia's obligations under the United Nations *Convention on the Rights of Persons with Disabilities*.

Objects and principles of the NDIS Act

Section 3 of the NDIS Act sets out the objects of the Act. Unique to social services legislation, s 3(1)(a) of the Act provides as its first objective to, 'in conjunction with other laws, give effect to Australia's obligations under the *Convention on the Rights of Persons with Disabilities* done at New York on 13 December 2006 ([2008] ATS 12)'. This is significant because it supports the view that the objects of the NDIS Act 'reflect the paradigm shift signalled in the *United Nations Convention on the Rights of People with Disabilities* (CPRD) to recognise people with disabilities as persons before the law and their right to make choices for themselves'.[3]

In *Mulligan v National Disability Insurance Agency*[4] (*Mulligan*) Mortimer J observed that '[t]he remainder of the objectives in s 3(1) have common themes: enhancing supports for people with a disability in a way which promotes their autonomy over their lives and full inclusion in the Australian community; and doing so in a nationally coordinated way'.

Section 4 of the Act sets out 17 '[g]eneral principles guiding actions under this Act'. The following general principles are particularly relevant for present purposes:

(1) People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.

(2) People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.

(3) People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.

(4) People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports.

(5) People with disability should be supported to receive reasonable and necessary supports, including early intervention supports.

3 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, 2014) 63 [3.3]. Although the report makes this comment in the context of the 'National Decision-Making Principles', the notion that the Convention signals a 'paradigm shift' is equally applicable to the NDIS Act.

4 [2015] FCA 544; 233 FCR 201 [14].

(6) People with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation.

(7) People with disability have the same right as other members of Australian society to pursue any grievance.

(8) People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.

(9) People with disability should be supported in all their dealings and communications with the Agency and the Commission so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs.

(10) People with disability should have their privacy and dignity respected.

(11) Reasonable and necessary supports for people with disability should:

(a) support people with disability to pursue their goals and maximise their independence; and

(b) support people with disability to live independently and to be included in the community as fully participating citizens; and

(c) develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.

...

(17) It is the intention of the Parliament that the Ministerial Council, the Minister, the Board, the CEO, the Commissioner and any other person or body is to perform functions and exercise powers under this Act in accordance with these principles, having regard to:

(a) the progressive implementation of the National Disability Insurance Scheme; and

(b) the need to ensure the financial sustainability of the National Disability Insurance Scheme.

These general principles in the NDIS Act mirror key recitals in the preamble to the *United Nations Convention on the Rights of People with Disabilities* (the Convention), which include:

> *Recognizing* the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,
>
> *Considering* that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them ...[5]

Article 4(3) of the Convention provides that one of the 'general obligations' of States Parties is that:

> In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

The general principles in the NDIS Act together with the relevant provisions of the Convention indicate the paradigm shift contemplated in decision-making processes

5 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 13 December 2006).

affecting persons with disabilities. As explained further below, these principles distil into the concept of the participant and the participant's plan as well as the decision-making framework concerning a participant's plan.

Participants and their plans

The objects and general principles of the NDIS Act set out above refer to 'people with disability' rather than 'participants'. This reflects the so-called 'tiered' approach which informed the establishment of the NDIS. Section 8 of the NDIS Act, which provides a 'simplified outline' of the Act, follows this tiered approach. Insofar as it is relevant, s 8 provides that the 'National Disability Insurance Scheme comprises':

(a) the provision of services or activities that are in the nature of coordination, strategic or referral services or activities (Chapters 2 and 3); and

(b) funding to persons or entities to enable them to assist people with disability to participate in economic and social life (Chapter 2); and

(c) individual plans under which reasonable and necessary supports will be funded for certain people, called participants (Chapter 3).

In *Re Mulligan and National Disability Insurance Agency*,[6] the AAT observed the following about the different 'tiers' under the NDIS, and the operation of the NDIS Act with respect to persons at each tier:

[9] These forms of support correspond with the three main functions of the NDIS recommended by the Productivity Commission in its report, *Disability Care and Support*, Report No 54, 31 July 2011 and the 'three different populations of 'customers' and costs' associated with them (at 158). The NDIS is modelled on the Commission's recommendations.

[10] The Commission observed (at 158) that '[p]eople with a disability have different needs and aspirations and encounter different barriers' and it was not intended that the NDIS address the care and support needs of all individuals. Rather, the scheme should focus on those whose needs are greatest. To this end, the Commission recommended (Recommendation 3.1) it should:

- cost-effectively minimise the impacts of disability, maximise the social and economic participation of people with a disability, create community awareness of the issues that affect people with disabilities and facilitate community capacity building. These measures should be targeted at all Australians
- provide information and referral services, which should be targeted at people with, or affected by, a disability
- provide individually tailored, tax-payer funded support, which should be targeted at people with significant disabilities who are assessed as needing such support...

[11] These functions of the NDIS were described by the Commission (at 158-159) in terms of 'tiers':

- Tier 1: Everyone
- Tier 2: People with, or affected by, disability
- Tier 3: People with disability for whom NDIS-funded, individualised supports would be appropriate

6 [2015] AATA 974; 149 ALD 408 [9]–[13].

[12] Tiers 1 and 2 are reflected in the provisions of Chapter 2 as well as in Chapter 3 of the Act. In particular, s 13 provides for general supports for persons who are not participants in the NDIS, and funding to individuals and organisations to help people with disability participate in social and economic life. Tier 3 is reflected in the provisions of Chapter 3 which concerns Participants and their plans.

[13] A person who meets the access criteria in s 21 of the Act becomes a participant in the NDIS: s 28(1). The access criteria comprise age, residence, and disability or early intervention requirements: s 21(1). A person who becomes a participant is eligible for funding for 'reasonable and necessary supports' in accordance with s 34(1).

In *Mulligan* before the Federal Court, Mortimer J also observed the following about the concept of the participant within the statutory scheme:

[23] A key concept to the operation of relevant provisions of the Act in the current proceeding is the concept of a 'participant', which is defined in s 9 (read with ss 28, 29 and 30) to mean a person who is a participant in the NDIS launch. By s 28, a person becomes a participant on the day the CEO of the NDIA decides that the person meets the access criteria in ss 22 to 25.[7]

A person (or prospective participant under s 20) can become a participant by satisfying the access criteria in ss 22 to 23 and either s 24 (the disability requirements) or s 25 (the early intervention requirements).[8] In cases before the AAT concerning a decision about whether a person meets the access criteria, the most commonly litigated provisions are ss 24 and 25. In *Mulligan*, Mortimer J observed the following about the decision-making processes concerning participants:

[34] It is clear from the legislative scheme that the decision whether a person is or is not a participant is the threshold decision under the scheme, and the decision which enables access to the majority of benefits and funding available under the NDIS. However, what benefits and supports are provided, and how they are funded is subject to a separate decision-making process.[9]

The 'separate decision-making process' described in the above passage from *Mulligan* is the focus of this article. That decision-making process concerning 'what benefits and supports are provided' to a participant appears in Pt 2 of Ch 3 of the NDIS Act. An important but sometimes overlooked provision in the statutory scheme is s 31, which appears in Div 1, Pt 2, of Ch 3. Unlike s 4 (which refers to 'persons with disabilities'), s 31 contains principles specific to participants' plans in the following terms:

31 Principles relating to plans

The preparation, review and replacement of a participant's plan, and the management of the funding for supports under a participant's plan, should so far as reasonably practicable:

(a) be individualised; and

(b) be directed by the participant; and

(c) where relevant, consider and respect the role of family, carers and other persons who are significant in the life of the participant; and

(d) where possible, strengthen and build capacity of families and carers to support participants who are children; and

7 [2015] FCA 544; 233 FCR 201 [23].
8 See NDIS Act, s 21(1).
9 [2015] FCA 544; 233 FCR 201 [34].

(da) if the participant and the participant's carers agree—strengthen and build the capacity of families and carers to support the participant in adult life; and

(e) consider the availability to the participant of informal support and other support services generally available to any person in the community; and

(f) support communities to respond to the individual goals and needs of participants; and

(g) be underpinned by the right of the participant to exercise control over his or her own life; and

(h) advance the inclusion and participation in the community of the participant with the aim of achieving his or her individual aspirations; and

(i) maximise the choice and independence of the participant; and

(j) facilitate tailored and flexible responses to the individual goals and needs of the participant; and

(k) provide the context for the provision of disability services to the participant and, where appropriate, coordinate the delivery of disability services where there is more than one disability service provider.

There are clear overlaps between the principles set out in s 31 and those expressed in ss 3 and 4 of the NDIS Act. However, the principles in s 31 operationalise (through their direct application to actions relating to participants' plans) the 'paradigm shift' signalled by the Convention, including the principles of self-determination, equality before the law, choice and inclusion, and the participant's right to be at the centre of decision-making.

Division 2 in Pt 2, Ch 3, of the NDIS Act concerns the preparation of participants' plans. Once a person becomes a participant, the Chief Executive Officer (CEO)[10] of the National Disability Insurance Agency (the Agency) 'must facilitate the preparation of the participants' plan'.[11] Section 33 then gives operative content to a participant's plan and provides, insofar as it is relevant, that:

33 Matters that must be included in a participant's plan

(1) A participant's plan must include a statement (the *participant's statement of goals and aspirations*) prepared by the participant that specifies:

(a) the goals, objectives and aspirations of the participant; and

(b) the environmental and personal context of the participant's living, including the participant's:

(i) living arrangements; and

(ii) informal community supports and other community supports; and

(iii) social and economic participation.

(2) A participant's plan must include a statement (the *statement of participant supports*), prepared with the participant and approved by the CEO, that specifies:

(a) the general supports (if any) that will be provided to, or in relation to, the participant; and

(b) the reasonable and necessary supports (if any) that will be funded under the National Disability Insurance Scheme; and

10 The 'CEO may, in writing, delegate to an Agency officer any or all of his or her powers or functions' pursuant to s 202 of the NDIS Act.

11 NDIS Act, s 32(1).

(c) the date by which, or the circumstances in which, the Agency must review the plan under Division 4; and

(d) the management of the funding for supports under the plan (see also Division 3); and

(e) the management of other aspects of the plan.

...

(5) In deciding whether or not to approve a statement of participant supports under subsection (2), the CEO must:

(a) have regard to the participant's statement of goals and aspirations; and

(b) have regard to relevant assessments conducted in relation to the participant; and

(c) be satisfied as mentioned in section 34 in relation to the reasonable and necessary supports that will be funded and the general supports that will be provided; and

(d) apply the National Disability Insurance Scheme rules (if any) made for the purposes of section 35; and

(e) have regard to the principle that a participant should manage his or her plan to the extent that he or she wishes to do so; and

(f) have regard to the operation and effectiveness of any previous plans of the participant ...

The following observations concerning the operation of s 33 emerge for present purposes.

First, every participant's plan must have two components: a participant's statement of goals and aspirations; and a statement of participant supports. The two components together constitute a 'participant's plan' for the purposes of the NDIS Act. This distinction is not unimportant to the statutory scheme and the participant's role at different stages of decision-making.

Secondly, the NDIS Act does not require that 'a plan must be prepared *for*' a participant.[12] One half of the plan, being the participant's statement of goals and aspirations, is 'prepared *by* the participant'.[13] The CEO and the Agency have no determinative role in the preparation of a participant's statement of goals and aspirations.[14] This approach is consistent with the principles in s 4, s 17A and s 31 of the NDIS Act, which emphasise autonomy, the central role of the participant in decision-making, and that a participant's plan should maximise choice and independence.

Thirdly, the other half of the plan, being the statement of participant supports, and the CEO's function to 'approve' the statement of participant supports under s 33(2), is qualified in an important respect. The CEO's function to approve a statement of participant supports is part of a broader function to 'facilitate the preparation the participant's plan'.[15] Section 33(2) also requires the CEO to prepare the statement of participant supports 'with the participant'. Another way of reading s 33(2) is that it requires the decision-maker to approve a statement of participant supports that is prepared with the participant.

12 Compare [2015] FCA 544; 233 FCR 201 [32].
13 NDIS Act, s 33(1).
14 Section 32(1) of the NDIS Act provides that 'the CEO must facilitate the preparation of the participant's plan'.
15 NDIS Act, s 32(1).

Fourthly, there are no decisions of the Federal Court or the AAT which analyse what 'prepared with the participant' means in this context. The decided cases in this area focus on whether the material before the AAT allows it to be satisfied that a particular support meets the criteria in s 34(1). However, s 33(2) contemplates a form of decision-making 'with the participant' combined with approval of the statement of participant supports by the CEO. The meaning of 'prepared with the participant' in this context must require the decision-maker to take into account the participant's circumstances in line with the principles in s 4 (general principles), s 17A (principles relating to the participation of people with disability), and s 31 (principles relating to plans) of the NDIS Act.

In practice, the Agency performs both parts of the s 33(2) function through 'planning meetings' which, according to the NDIS website, are 'either in person, or over the phone, [and are] the best way for [the Agency] to gather all [the participant's] information so together, [the Agency] can develop the best plan for [the participant]'.[16] The NDIS website also invites participants at the planning meeting to 'discuss the goals/activities/tasks [the participant] want[s] to achieve with [the participant's] ECEI Coordinator, LAC or NDIA planner'.

In theory, this form of 'planning' should satisfy:

a. the principles in, for example, s 31(i) (to maximise the choice and independence of the participant) and (j) (to facilitate tailored and flexible responses to the individual goals and needs of the participant);

b. the requirement in s 32 that the CEO 'must facilitate' the preparation of a participant's plan;

c. the requirement in s 33(2) that the CEO prepare a statement of participant supports 'with the participant', which the CEO then approves.

In 'deciding whether or not to approve a statement of participant supports under subsection (2)', s 33(5)(c) requires a decision-maker to 'be satisfied as mentioned in section 34 in relation to the reasonable and necessary supports that will be funded'. Section 34, therefore, provides a number of mandatory relevant considerations in the following terms:

> **34 Reasonable and necessary supports**
>
> (1) For the purposes of specifying, in a statement of participant supports, the general supports that will be provided, and the reasonable and necessary supports that will be funded, the CEO must be satisfied of all of the following in relation to the funding or provision of each such support:
>
> (a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;
>
> (b) the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation;
>
> (c) the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;
>
> (d) the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice;

16 NDIS, *How the Planning Process Works* (11 June 2019) <https://www.ndis.gov.au/participants/how-planning-process-works>.

(e) the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide;

(f) the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:

(i) as part of a universal service obligation; or

(ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability ...

Section 34 is important because it is the central provision upon which decisions about funding of specifics supports ultimately hinge. Section 33(2)(b) makes this so. It provides that a statement of participant supports must specify 'the reasonable and necessary supports (if any) that will be funded'. Section 34 also gives practical content to the principles of the NDIS Act as relevant to preparing and approving a statement of participant supports. For example, s 34(1)(a) provides that, in determining what are reasonable and necessary supports that will be funded, the decision-maker must be satisfied that the funding or provision of the 'support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations'. This is significant because, as s 33(1) makes clear, the participant's statement of goals and aspirations is entirely a matter for the participant and is not subject to any approval by the CEO.

A plan comes into effect once the CEO has received the participant's statement of goals and aspirations and approved the statement of participant's supports.[17] In *McGarrigle v National Disability Insurance Agency*[18] (*McGarrigle*), Mortimer J explained that:

> [31] Approval of a plan by the CEO (or a delegate of the CEO — see s 202 of the Act) is, by reason of s 37(1)(b) one of the two steps which brings a plan into effect. A plan cannot be varied but can be replaced: see s 37(2) and (3).[19]

Once a plan is in effect for a participant, the Agency must comply with the statement of supports in the plan.[20]

A participant can seek internal review of a decision under s 33(2) to approve a statement of participant supports by a 'reviewer' who must confirm, vary or set aside the reviewable decision.[21] Section 99 sets out in a table all the 'reviewable decisions' under the NDIS Act. Section 103 allows a participant to apply to the AAT for review of a decision made by a reviewer under s 100(6).

Administrative law and merits review of decisions under s 33(2)

Once a participant goes through the merits review gateway provided by s 103 of the NDIS Act, the participant also becomes an 'Applicant for Review'[22] in a proceeding before the AAT. This has a number of implications. Before I consider those implications, I outline in this part of the article key features of the AAT's structure, process and procedure. This

17 NDIS Act, s 37.
18 [2017] FCA 308; 252 FCR 121.
19 Ibid [31].
20 NDIS Act, s 39.
21 NDIS Act, s 99 and s 100.
22 Term used in Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis, 4th ed, 2015) Ch 5.

outline contextualises the later discussion concerning the suitability of merits review in the AAT of decisions under s 33(2) of the NDIS Act.

The *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) established the AAT,[23] which commenced operation on 1 July 1976. The AAT was the product of a number of reports and recommendations made in the 1970s which resulted in fundamental reforms of Australian administrative law.[24] Pearce notes that the 'basis for these recommendations was a concern that review of government decisions through the parliament and the courts was inadequate as to its content and inaccessible to most persons affected'.[25] Pearce also notes that '[w]hat was needed … was an accessible, informal and relatively cheap means of obtaining a review of the merits of a decision, not just its legality'.[26]

Since the amalgamation of a number of Commonwealth tribunals with the AAT in 2015, the objective of the AAT Act in s 2A is as follows:[27]

> **2A Tribunal's objective**
>
> In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:
>
> (a) is accessible; and
>
> (b) is fair, just, economical, informal and quick; and
>
> (c) is proportionate to the importance and complexity of the matter; and
>
> (d) promotes public trust and confidence in the decision-making of the Tribunal.

Division 1 of Pt II of the AAT Act contains s 5, which establishes the AAT; and s 5A, which provides that the AAT consists of four categories of members. Division 2 of Pt II concerns the appointment, qualifications, terms and remuneration of members.

Section 17A in Subdiv A within Div 1 of Pt III of the AAT Act sets out the divisions of the AAT. Section 17A(c) refers to the 'National Disability Insurance Scheme Division'. Section 17E concerns assignment of a member to the NDIS Division of the AAT.

The President of the AAT (who must be a Federal Court judge)[28] may give 'written directions in relation to … (b) the procedure of the Tribunal; [and] (c) the conduct of reviews by the Tribunal' under s 18B of the AAT Act.[29] There is a current practice direction in place for the NDIS Division.[30] However, the AAT website notes that the 'practice direction is currently under review'.[31]

Section 25 of the AAT Act does not confer jurisdiction on the AAT but facilitates provisions such as s 103 of the NDIS Act to operate in conferring jurisdiction on the AAT. Section 25(3) states, for example, what an enactment allowing an application to be made to the AAT must provide.

23 AAT Act, s 5.
24 See Commonwealth, *Administrative Review Committee report 1971* (Kerr Committee Report), Parliamentary Paper No 14 (1971); Commonwealth, *Final report of the Committee on Administrative Discretions* (Bland Committee Final Report), Parliamentary Paper No 316 (1973).
25 Pearce, above n 22, 1.
26 Ibid.
27 See *Tribunals Amalgamation Act 2015* (Cth) Sch 1.
28 AAT Act, s 7(1).
29 AAT Act, s 18B.
30 Administrative Appeals Tribunal, *Practice Direction for Review of National Disability Insurance Scheme Decisions*, 30 June 2015.
31 Administrative Appeals Tribunal, *Practice Directions, Guides and Guidelines* (1 March 2019) <https://www.aat.gov.au/resources/practice-directions-guides-and-guidelines>.

The key procedural provisions relevant for present purposes are ss 33 and 39 of the AAT Act. Section 33 sets out the basic procedure for reviews by the AAT and includes the following features:

(d) The procedure of the Tribunal is, subject to the AAT Act and Regulations, and any other enactment, within the discretion of the Tribunal (s 33(1)(a));

(e) The proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of the AAT Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit (s 33(1)(b));

(f) The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate (s 33(1)(c));

(g) The person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding (s 33(1AA));

(h) A party to a proceeding before the Tribunal, and any person representing such a party, must use his or her best endeavours to assist the Tribunal to fulfil the objective in s 2A of the AAT Act (s 33(1AB)).

Section 39(1) relevantly provides that:

> the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.

In *Sullivan v Department of Transport*[32] (*Sullivan*), Deane J made the following observations about the operation of ss 33 and 39, as they stood at the time, which remain apposite today:

> Section 39 of the Administrative Appeals Tribunal Act provides, for present purposes, that 'the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his case'. In dealing with an application for review, the Tribunal is plainly under a duty to act judicially, that is to say, with judicial fairness and detachment. In these circumstances, the requirement contained in s 39 that the Tribunal shall ensure that a party to the proceedings before it be given a reasonable opportunity to present his case constitutes statutory recognition of an obligation which the law would, in any event, imply. Where a Tribunal is under a duty to act judicially, the principle that a party must be given a reasonable opportunity to present his case is at the heart of the requirements of natural justice which it is obliged to observe (see *R v Moodie* (1977) 17 ALR 219 at 225) ...
>
> Section 33(1)(b) of the Act requires that the proceedings of the Tribunal shall be conducted with as little formality and technicality, and with as much expedition as the requirements of the Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit. It is apparent that the objectives of expedition and of lack of formality or technicality and the requirements of fairness will ordinarily be best achieved by a ready identification of the issues which are, in truth, in dispute between the parties in a particular application for review. In the ordinary case, a tribunal which is under a duty to act judicially and which has the relevant parties before it will be best advised to be guided by the parties in identifying the issues and to permit the parties to present their respective cases in the manner which they think appropriate. Circumstances may, of course, arise in which such a statutory tribunal, in the proper performance of its functions, will be obliged to raise issues which the parties do not wish to dispute and to interfere, either by giving guidance or by adverse ruling, with the manner in which a particular party wishes to present his case. Ordinarily, however, in the absence of a request for assistance or guidance by a party who is appearing in person, a tribunal under a duty to act judicially should be conscious of the fact that undue interference in the manner in which a party conducts his case may, no matter how well intentioned, be

32 (1978) 20 ALR 323.

> counter-productive and, indeed, even overawe and distract a party appearing in person to the extent that it leads to a failure to extend to him an adequate opportunity of presenting his case.[33]

Justice Smithers in *Sullivan* expressed a somewhat different view of the operation of ss 33 and 39. His Honour said:

> [The proper performance of the AAT's function] depends upon the Tribunal having the wide powers and flexible procedures with which it is provided: see in particular s 33 of the [AAT Act]. For the performance of its function it would seem appropriate, according to the circumstances, for the Tribunal to take certain initiatives, and to regard itself as unfettered by the strict rules of the adversary system. And s 39 is to be seen as imposing a duty upon the Tribunal consistent with this conception of its function.[34]

Despite the injunction in s 33 that the AAT should conduct proceedings with as little formality and technicality as the case permits, several commentators describe the effect and judicial interpretation of s 39 of the AAT Act (together with other provisions) as importing a 'judicial model',[35] 'judicial paradigm',[36] 'creeping legalism',[37] and 'adversarial bias'.[38] Hall summarises a number of these views through the following observations:

> Although characterised as an administrative Tribunal, the business of the Tribunal in its practical operation involves the resolution of disputes between a citizen and the administration. To enable it to discharge that function effectively, the Administrative Appeals Tribunal Act confers upon the Tribunal many trappings of judicial power. The requirements for public hearings (section 35); the right to representation of a party in a proceeding before the Tribunal (section 32); the right to an opportunity to present one's case and make submissions (section 39); the power to take evidence on oath or affirmation, to proceed in the absence of a party who had had reasonable notice of the proceeding and to adjourn the proceeding from time to time (section 40) all point inescapably to the judicial model.[39]

Allars makes similar observations about the same provisions of the AAT Act, with the addition of s 43(2) and (2B) (duty to give reasons for decision which include finding on material questions of fact). She describes these provisions as being '[o]f an adversarial nature' and containing 'features of formal procedure'.[40]

Many proceedings in the AAT, including the NDIS Division, substantiate these observations once they reach the hearing stage. Counsel not uncommonly appear for both the applicant and the respondent in NDIS proceedings before the AAT and legal aid funding is available to applicants in certain cases — for example, those that raise a 'complex or novel legal issue'.[41]

Moreover, in appropriate circumstances, the AAT, in observing the requirements of procedural fairness, may allow cross-examination but is not required to do so in all cases.[42]

33 Ibid 342–3. See also Deane J's comments on the 'duty to act judicially' in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, where his Honour noted that the formulation created 'a potential for confusion' and that the duty is no more than a requirement to accord procedural fairness.

34 (1978) 20 ALR 323, 326 (citations omitted).

35 AN Hall, 'Administrative Review Before the Administrative Appeals Tribunal — A Fresh Approach to Dispute Resolution? Part I' (1981) 12 *Federal Law Review* 71, 78, 88.

36 M Allars, 'Neutrality, the Judicial Paradigm and Tribunal Procedure' (1991) 13(3) *Sydney Law Review* 377, 410. Although Allars notes (at 405) that the AAT cannot be classified as formal/adversarial and of the judicial paradigm, she notes (at 410) that the judicial paradigm dominates in key decisions such as *Sullivan* which interpret the application of the procedural provisions in the AAT Act.

37 R Creyke, 'Tribunal Amalgamation 2015: An Opportunity Lost?' (2016) 84 *AIAL Forum* 54, 67.

38 J Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures' (1991) 20(2) *Federal Law Review* 252.

39 Hall, above n 35, 78 (citations omitted).

40 Allars, above n 36, 410.

41 See, for example, Legal Aid NSW, *Legal Aid NSW Guidelines on Civil Law Matters* [3.18].

42 See *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93; 322 ALR 581 [175], citing *O'Rourke v Miller* (1985) 156 CLR 342, 353 (Gibbs CJ); and *Rawson Finances Pty Ltd v Commissioner of Taxation* [2013] FCAFC 26 at [73], (2013) 296 ALR 307 (Jessup J).

In practice, proceedings before the AAT concerning decisions under s 33(2) of the NDIS Act which involve the question of what are reasonable and necessary supports (pursuant to s 34(1)) often involve cross-examination of experts as well as the participants (or close family members of the participants).

In addition to the procedural features of a review conducted by the AAT, the general principles concerning merits review are also relevant. The AAT's function in conducting a merits review is to make the correct or preferable decision on the material before it.[43] In doing so, the AAT generally conducts a *de novo* hearing but stands in the shoes of the original decision-maker.[44] However, as Hall notes, 'like many aphorisms, this is only partially true'.[45] For reasons I will come to, this may be particularly so in the context of a decision under s 33(2) of the NDIS Act.

Finally, the role of the respondent Agency in proceedings before the AAT is another important and relevant feature for present purposes. Section 33(1AA) requires the decision-maker to use his or her best endeavours to assist the AAT in relation to the proceeding. Earlier decisions of the Tribunal relied on s 37 as providing the foundation for the principle that the respondent should assist the AAT and not place it in a position of disadvantage whereby it is not 'properly and fully informed when it reviews the decision'.[46] Moreover, the AAT expects assistance by respondents and has suggested that without such appropriate assistance '[t]he review procedure will not function fairly'.[47] In *Re Wertheim and Department of Health*, the AAT observed that:

> The Administrative Appeals Tribunal Act 1975 provides that in every case the decision-maker is to be a party to the review: see s 30. This provision is not aimed solely at permitting a decision-maker to defend his or her decision. Part of its aim is to ensure that the Tribunal is fully informed.[48]

These observations assume a heightened significance in reviews before the AAT concerning a decision under s 33(2). This is because the approval decision under s 33(2) requires the existence of a statement of participant supports 'prepared with the participant' by the decision-maker. This poses difficult questions about which party should prepare the statement of participant supports and how that should take place in the context of a contested AAT proceeding. Justice Downes, a former President of the AAT, said in an extra-curial address that '[o]nce the Tribunal notionally becomes the decision-maker, it follows that the decision-maker's interest is for the correct or preferable decision to be made'.[49] While that conception of the respondent's role helps to harmonise the roles of AAT and decision-maker in a merits review proceeding, it does not answer the question of how to prepare a substituted or new statement of participant supports 'with the participant', and who is to help to prepare it, in the context of reviewing a decision under s 33(2). I consider the implications of this issue in greater detail below.

The upshot of the preceding analysis is, as Allars puts it, that '[t]he undisputed emphasis in practice, and in judicial interpretation of the [AAT Act], is upon formal and adversarial

43 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68; see also *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424–5.

44 *Bramwell v Repatriation Commission* (1998) 51 ALD 56, 60; *Repatriation Commission v Maloney* (1993) 45 FCR 563, 568; *Budworth v Repatriation Commission* (2001) 63 ALD 422 [44]. See also AAT Act, s 43(1).

45 Hall, above n 35, 78.

46 *Re Hungerford and Repatriation Commission* (1990) 21 ALD 568, 577.

47 *Re Wertheim and Department of Health* (1984) 7 ALD 121, 154. See also Dwyer, above n 38, 255–6, citing *Re Cimino and Director-General of Social Services* (1982) 4 ALN N 106; *Re Lockley and Commonwealth* (1986) 11 ALN N 139; *Re Ermolaeff and Commonwealth* (1989) 17 ALD 686; *Cinkovic and Repatriation Commission* (1990) 20 ALD 131, 137–8.

48 (1984) 7 ALD 121, 154.

49 Justice Garry Downes AM, 'Future Directions' (Paper presented at the Australian Institute of Administrative Law Forum, Canberra, 1 July 2005).

procedure'.[50] Moreover, as Creyke observes, 'tribunals are sited in an adjudicative system the final tiers of which traditionally operate in an adversarial fashion'.[51] Although these views about AAT procedure are well established, the following part of this article identifies distinct and acute issues that arise in the application of AAT procedure in merits review of decisions to approve a participant's plan under s 33(2) of the NDIS Act.

Incongruities and issues from the intersection of the NDIS and administrative law

The first and second sections of this article set out key features of the statutory scheme created by the NDIS Act and analyse the existing Commonwealth administrative law framework for merits review in the context of decisions to approve a statement of participant supports under s 33(2).

In this part of the article I focus on two specific incongruities that appear from the intersection of the decision-making principles in the NDIS Act and the process of merits review in the AAT. First, I consider the centrality of the participant within the NDIS and how the principles concerning decision-making with the participant sit with the procedural requirements of the AAT. Secondly, I consider the suitability of the existing merits review mechanism for reviewing decisions under s 33(2) of the NDIS Act.

The centrality of the participant

The NDIS Act puts the participant at the centre of decision-making through the process of preparing a participant's plan. This reflects the 'paradigm shift' which the NDIS Act gives effect to in enacting certain principles under the Convention. This method of decision-making, planning and funding of participant supports also reflects and operationalises the 'transformational approach to the provision of disability services in this country'.[52] That transformational approach, however, results in an incongruity when mapped onto the existing administrative law framework, which has not undergone a similar transformation. The incongruity is first evident at the point where a participant seeks merits review by the AAT of a decision to approve a statement of participant supports under s 33(2). Once a participant commences a merits review proceeding in the AAT, the participant also becomes an applicant for review who is subject to the AAT's procedures as well as the decision-making principles in the NDIS Act.

Notwithstanding this incongruity, there is a basis for the view that a participant who also becomes an applicant for review in an AAT proceeding should be subject to the AAT's procedure even where that involves some level of formality not contemplated by the substantive legal framework that empowered the original decision. This is because, once an applicant invokes the AAT's jurisdiction to conduct a review, such an act also potentially brings into play the AAT's whole range of powers. This includes the power to take evidence on oath or affirmation,[53] the power to compel the attendance of a witness or production of a document,[54] and the power to grant a stay of the original decision pending the review.[55] These powers support the AAT's function of having a de novo hearing and arriving at the correct or preferable decision on the material before it. On one view, adherence to the AAT's procedures is a necessary price for a party invoking its powers and having an opportunity to persuade the AAT to make the correct or preferable decision. However, recognising this as so should not detract from the objective of bringing two incongruous decision-making

50 Allars, above n 36, 404.
51 Robin Creyke, 'Administrative Tribunals' in Matthew Groves and HP Lee (eds), *Australian Administrative Law* (Cambridge University Press, 2007) 93.
52 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2012, 13878 (Julia Gillard).
53 AAT Act, s 40(1)(a).
54 AAT Act, s 40A.
55 AAT Act, s 41.

frameworks into greater harmony where appropriate and achievable.

Merits review of decisions under s 33(2) of the NDIS Act

The key point in this article is that the process of merits review in the AAT does not operate harmoniously in the context of decisions concerning participant supports under s 33(2) of the NDIS Act. This is because s 33(2) requires the CEO or delegate to approve a statement of participant supports prepared with the participant. As outlined above, the AAT's procedures do not easily allow it to give effect to a mode of decision-making 'with the participant' — and certainly not in the way that the Agency, through planning meetings, would exercise the power under s 33(2).

Section 103 of the NDIS Act provides the AAT with jurisdiction to 'review a decision made by a reviewer under subsection 100(6)'. Section 100(6) provides that a reviewer (who cannot be the original decision-maker) must confirm, vary or set aside and substitute a 'reviewable decision' if a person affected by the original decision requests a review. Item 4 of the table at s 99(1) specifies that the 'reviewable decision' under s 33(2) is 'a decision to approve the statement of participant supports in a participant's plan' and identifies the CEO as the relevant decision-maker.

As a matter of statutory interpretation, it is plausible to construe s 99(1), item 4, as limiting the reviewer's and thereby the AAT's function to reviewing only the approval component in s 33(2) and not extending to the 'prepared with the participant' requirement. However, there are two main reasons why the AAT's function in conducting a review of a decision under s 33(2) should not be read as limited in this way.

Section 43(1) of the AAT Act provides that, in conducting a review, 'the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision'. In the context of reviewing a decision made under s 33(2), this must include the power to prepare the statement of participant supports with the participant as well as the express provision in s 99(1), item 4, which refers to 'a decision to approve'. The Agency's publicly available material given to participants indicates that a reviewer conducting an internal review 'may want to talk to you [the participant] as part of this process'.[56]

Inclusion of the participant in decision-making is an essential feature of the statutory scheme, particularly with respect to participants' plans.[57] Therefore, not limiting the AAT's review function to merely approving a statement of participant supports under s 33(2) but requiring it, as the relevant decision-maker, centrally to involve the participant in the decision-making process is consonant with the principles of the NDIS Act. Moreover, s 4(17) provides, in essence, that any person or body 'is to perform functions and exercise powers under this Act in accordance with these principles [in s 4]'. This would include the principle in s 4(8) that '[p]eople with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity'.

The better view seems to be that s 99(1), item 4, does not limit the AAT's functions in reviewing a decision under s 33(2) and that the AAT has power to approve a statement of participant supports that is prepared with the participant. Moreover, in exercising that power, the AAT must give effect to the general principles in s 4 as well as the specific principles concerning participants' plans under s 31 of the NDIS Act.

56 National Disability Insurance Agency, 'Booklet 2 — Planning', 14 <https://www.ndis.gov.au/about-us/publications/booklets-and-factsheets>.

57 See NDIS Act, s 31.

Assuming the correctness of this view, the simplest way of illustrating the incongruity between the requirements of decision-making under s 33(2) of the NDIS Act and the procedure for merits review in the AAT is to point to the incompatibility between the requirement to prepare a statement of participant supports 'with the participant' under s 33(2) of the NDIS Act and the requirement in s 39 of the AAT Act that the 'Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case'. Two recent decisions of the Tribunal illustrate the incompatibility of decision-making 'with the participant' and the conduct of merits review through an adversarial and adjudicative process.

Re FRCT National Disability Insurance Agency[58] (*FRCT*) involved twin brothers under four years of age, both diagnosed with autism spectrum disorder. The boys' mother on their behalf sought approval in their statements of participant supports for 20 hours a week of Applied Behaviour Analysis (ABA) therapy. The plan approved by the original decision-maker contained funding for ABA therapy at about one-third of what the participants had sought.

At the hearing before the AAT, the applicants maintained their request for funding for 20 hours a week of ABA therapy. The respondent put forward a very different alternative position which focused on 'capacity building supports for early childhood intervention through keyworker model' and a 'six month transition from ABA therapy'.[59] The AAT noted that '[i]t is these two proposed support plans that I consider in relation to the evidence and the requirements of the NDIS Act'.[60]

In urging the AAT to adopt one of the two alternative positions, both parties put on extensive expert evidence. The applicants relied on expert evidence from the ABA therapy provider for the twins as well as the boys' speech pathologist. The respondent 'commissioned a report from Association Professor "D" who has clinically specialised in the area of developmental and behavioural paediatrics'.[61] The respondent also relied on reports prepared by an occupational therapist and a speech pathologist which supported the 'keyworker model' put forward as the centrepiece of its alternative position. The AAT heard oral evidence in chief from the mother of the twins and five expert witnesses. There was cross-examination of each witness who gave oral evidence.

Ultimately, the AAT found that ABA therapy at 18 hours a week was a reasonable and necessary support for the two boys. In doing so, the AAT gave particular weight to the fact that the parents of the participants wished 'to continue with ABA therapy' and found that:

> the proposal by the Agency to transition FRCT from ABA therapy is completely inconsistent with the objects and principles of the NDIS Act, which reinforce the exercise of choice in the planning and delivery of supports, and acknowledge the role of families in this process. This approach is also inconsistent with section 31 of the NDIS Act that outlines principles relating to participants' plans including respecting and strengthening the capacity of families to support participants who are children, and enabling participants to exercise control and maximise choice and independence.[62]

This case illustrates the practical difficulties of simultaneously giving effect to both the procedural obligations in s 39 of the AAT Act and the requirement in s 33(2) while adhering to the objects and principles of the NDIS Act. Under s 39 of the AAT Act, the respondent Agency was entitled to put its alternative case to try to satisfy the AAT that its proposed supports were reasonable and necessary within the meaning of s 34(1) of the NDIS Act. However, being satisfied that a particular support is reasonable and necessary having

58 [2019] AATA 1478. See also the accompanying decision in *WKZQ and National Disability Insurance Agency* [2019] AATA 1480.
59 [2019] AATA 1478 [21].
60 Ibid [22].
61 Ibid [55].
62 Ibid [172].

regard to the criteria set out in s 34(1) is not the end of the matter. The AAT (standing in the shoes of the CEO) must ultimately exercise the power in s 33(2) to approve a statement of participant supports prepared with the participant (specifying, amongst other things, the reasonable and necessary supports that will be funded).[63] The AAT must perform that function in a way that is consonant with the NDIS Act as a whole and the principles that underpin it. Having alternative cases put to it may allow the AAT to make findings that enable it to specify a reasonable and necessary support that satisfies s 34(1), but it does not necessarily give effect to the requirement that decision-making about plans must involve the participant in a central and collaborative way. By making this observation I intend no criticism whatsoever of the AAT or the respondent Agency, either in a specific case or generally. The AAT and the respondent each engaged in the process in a way that was consistent with the AAT's procedure. The real issue is one of structural incongruity between that procedure and the 'paradigm shift' in the mode of decision-making under s 33(2) of the NDIS Act.

The second case that illustrates this incongruity is the decision in *Re Burchell and National Disability Insurance Agency*[64] (*Burchell*). In *Burchell*, the participant asked for nutritional support products and thickened fluids to be specified as reasonable and necessary supports in his statement of participant supports and funded by the NDIS. He asked for these supports to be included as reasonable and necessary because, on his case, they addressed his functional impairment in being unable safely to swallow unmodified food and drink as a result of his dysphagia, which was caused by his cerebral palsy. Before the AAT, 'the agency contended as a principal submission that the support requested is health-related, and that health-related supports will not be funded under the [NDIS Act], even if the health system does not make it available'.[65]

The main issue in *Burchell* was whether the requested supports met the criterion in s 34(1)(f) in that they were most appropriately funded or provided by the NDIS and were not more appropriately funded or provided through another general system, particularly the health system. Prior to the decision in *Burchell*, a line of decisions developed in the AAT which considered the parameters of the NDIS by reference to s 34(1)(f) of the NDIS Act.[66]

In *Re Fear by his mother Vanda Fear and National Disability Insurance Agency*[67] (*Fear*) the AAT found that:

> [73] ... the bedside and portable oral suctioning equipment are supports more closely related to the clinical treatment of Mr Fear's health needs than to his independence and social or economic participation. Their principal purpose relates to managing his health and preventing illness rather than to supporting him to undertake activities that enable him to participate in the community. Put very bluntly again, they help to keep him alive. The fact that they enable him to remain living at home and to go out with his family and others does not change that, in our view, their principal purpose is to manage his health.[68]

The AAT in *Burchell*, constituted by Deputy President Rayment QC, set aside the reviewable decision and declined to follow the reasoning in *Fear* to the extent it upheld the proposition that, pursuant to s 34(1)(f), 'health related expenditure not funded elsewhere will not be funded under the NDIS'.[69] The Deputy President also found that the proposed supports did

63 NDIS Act, s 33(2)(b).
64 [2019] AATA 1256.
65 Ibid [5].
66 See *Fear by his mother Vanda Fear and National Disability Insurance Agency* [2015] AATA 706; and *Gordon Young and National Disability Insurance Agency* [2014] AATA 401; 140 ALD 694.
67 Ibid.
68 Ibid [73].
69 [2019] AATA 1256 [43].

not fall within the definition of clinical treatment, as 'the support is not an activity or service, and is neither a pharmaceutical nor any other universal entitlement'.[70]

The point from *Burchell* that is presently relevant is not about the difference in opinion within the AAT regarding the application of s 34(1)(f) of the NDIS Act. What the decision in *Burchell* illustrates is that the AAT, in carrying out its review function, particularly during these relatively early days of the NDIS, often needs to resolve fundamental contests over what the NDIS will be responsible for and what the NDIS will not be responsible for and how those responsibilities interact with other support systems.[71] Resolving these issues invariably involves, as Deputy President Rayment observed, 'questions of law about the statute, which have not hitherto been examined in the courts, in regard to the Act'.[72] Although undeniably important, statutory construction forms only part of the panoply of the decision-maker's functions under Div 2, Pt 2, of Ch 3 of the NDIS Act. In particular, s 33(2), which was the relevant decision-making power in each of the cases analysed above, contemplates more from the decision-maker before arriving at a decision. In other words, s 33(2) requires more than an adjudication. The need for adjudication in these cases further highlights the practical difficulty of decision-making 'with the participant' in circumstances where the decision-maker and the participant approach the exercise under s 33(2) with fundamentally different conceptions about the nature and effect of the participant's disability and different characterisations of a particular support as 'health' or 'disability' related.

Adjudicating in these cases and producing written decisions resolving these issues are part of the 'normative effect on administration' of AAT decisions.[73] This is an important principle underpinning the merits review system. The Agency often incorporates significant AAT decisions into its Operational Guidelines for primary decision-makers. However, the adjudicative and adversarial process undertaken to arrive at these decisions remains in tension with the different mode of decision-making contemplated by s 33(2) of the NDIS Act.

Possible solutions

The final part of this article sets out possible solutions to the issues identified above. In particular, I consider in this section possible solutions to the disjunction between the requirement for the decision-maker to prepare a statement of participant supports with the participant and the approval function ultimately exercised by the AAT. I also consider the role of a participant's statement of goals and aspirations and how a participant might use the power of goal setting.

Solutions under the AAT Act

The starting point in the search for solutions must be the AAT Act. However, as Allars points out, '[t]he AAT Act gives little guidance on how a clash of formal/informal or adversarial/inquisitorial in the application of these provisions is to be resolved'.[74] Although that comment addresses the issue in a more conceptual way about how the AAT operates generally, it highlights the point that the AAT Act does not have much to say about how the AAT will deploy the most appropriate procedure in each case. Moreover, Creyke observes that post-amalgamation:

> the different procedures of the chief divisions are enshrined in legislation and will be difficult to change. This is inimical to the development of a more user-friendly, accessible tribunal which avoids confusion and

70 Ibid [49].
71 See, for example, *National Disability Insurance Scheme (Supports for Participants) Rules 2013*, Sch 1, cll 7.4 and 7.5.
72 [2019] AATA 1256 [5].
73 Gerard Brennan, 'Twentieth Anniversary of the AAT' in J McMillan (ed), *The AAT — Twenty Years Forward* (AIAL, 1998) 11–12.
74 Allars, above n 36, 410.

> enhances accessibility. More careful attention to this issue was needed and will be needed to avoid these consequences of the status quo.[75]

This observation arguably applies with even greater force to cases in the NDIS Division.

Short of amending the AAT Act and the statutory procedures applicable to the NDIS Division, Creyke suggests that the power under s 18B of the AAT Act to issue presidential directions may be one way to 'provide review which is proportionate to the importance and complexity of the matter'.[76] Creyke's suggestion originates in the context of limiting the levels of representation in proceedings before the AAT; however, it alludes to the possibility of using a s 18B direction in other ways to make decision-making under the NDIS Act more appropriate to its context. The current *Practice Direction for Review of National Disability Insurance Scheme Decisions* made under s 18B essentially summarises in plain English the parties' procedural obligations under the AAT Act. For example, the practice direction tells applicants that '[t]he hearing is an opportunity for you and the Agency to tell your sides of the case to an AAT Member who will make a decision'.[77]

The AAT's website notes that the practice direction is currently under review but does not indicate the status of that review or when it might finish and result in a new practice direction. Whatever the outcome of the review, a new practice direction is unlikely to be a panacea for all of the potential incongruities. However, it is an opportunity for the AAT to recognise the unique requirements of decisions made under s 33(2) of the NDIS Act, which comprehends the approval of a statement of participant supports prepared with the participant and the consequence of that particular power in combination with the principles applicable to participant plans on the conduct of a review by the AAT. Although the NDIS Division reviews many different types of decisions made under the NDIS Act, it may be appropriate to have a practice direction, or a part of a practice direction, that specifically addresses the conduct of reviews of decisions made under s 33(2) which alludes to the need for involving the participant in decision-making in a way that extends beyond merely being a litigant with a right to be heard.

There are also other procedural mechanisms available to the Tribunal under the AAT Act to address this incongruity. The most obvious is s 33(1)(b) of the AAT Act. The AAT may be able to rely on this provision to adopt a procedure which would allow it to make a decision 'with the participant' in an appropriate case. Another option under the AAT Act relates to the appointment power under ss 6 and 7 in conjunction with the division assignment power under s 17E (concerning assignment to the NDIS Division). None of those provisions require the appointment of lawyers and there is at least a credible argument that the government should consider appointing some non-lawyers with specialist expertise relevant to the NDIS and its administration.[78] One difficulty with this approach may be the requirement, under s 28 of the AAT Act, to give written reasons for decisions which, by virtue of s 44, may be scrutinised by the Federal Court on a question of law. The AAT may ameliorate such a difficulty by constituting itself with two or three members with different but complementary expertise under s 19B of the AAT Act.[79]

Where the AAT cannot through its procedure give effect to the requirements of s 33(2) by approving a statement of participant supports made with the participant, the Tribunal may need carefully to evaluate in an appropriate case how it exercises its powers under s 43(1)

75 Creyke, above n 37, 66.
76 Ibid 68.
77 Administrative Appeals Tribunal, *Practice Direction for Review of National Disability Insurance Scheme Decisions*, 30 June 2015, [7.1].
78 Compare the recommendation in IDF Callinan AC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (2019) [10.34].
79 However, again, compare the recommendation in Callinan, ibid, [10.36].

of the AAT Act. This may arise where the AAT determines that the statement of participant supports should include further funding for certain reasonable and necessary supports that it finds satisfy the criteria in s 34(1) of the NDIS Act but can only arrive at such a decision following a hotly contested hearing. In such a case, it may be appropriate for the AAT to 'remit the matter for reconsideration with any direction or recommendation' under s 43(1)(c)(ii) of the AAT Act rather than 'make a decision in substitution' under s 43(1)(c)(i). In this way, the AAT can make appropriate findings about what are reasonable and necessary supports for the purposes of s 33(5) and s 34(1) but ultimately leave the CEO or the CEO's delegate to approve the statement of participant supports prepared with the participant in the form of, for example, planning conversations, with the benefit of the AAT's direction. This course would also allow the approval of the statement of participant supports and the preparation of a participant's plan to better fulfil the principles in s 31 of the NDIS Act.

Another solution to address the prospect of a participant's merits review proceedings becoming an adjudicative vehicle for resolving important but technical issues concerning the application of the NDIS Act, but which have little bearing on the participant's choice and self-determination, is s 45 of the AAT Act. Section 45(1) provides that the AAT may refer a question of law to the Federal Court for decision. The AAT may do so on its own initiative or at the request of a party. Resolving discrete threshold issues of statutory construction separately from the decision-making framework under s 33(2) of the NDIS Act may be a solution which allows the AAT better to adhere to the principles under the NDIS Act.

Considering the role of the respondent Agency

Another possible solution that may address the incongruity between merits review procedure and the requirements of decision-making under s 33(2) of the NDIS Act is to reconsider the role of the respondent Agency and those who represent them in AAT proceedings. The most obvious starting point is to embrace the proposition that '[i]t is complementary to the function of the Tribunal itself, that the role of the decision-maker in proceedings before the Tribunal may be different from that of an adversary in litigation'.[80] Allars further notes that '[i]n some social security and compensation cases AAT members have suggested non-adversarial roles for departmental advocates and have criticised counsel who adopt unnecessarily adversarial attitudes to hearings'.[81]

In making a similar point, Dwyer refers to the decision in *Re Cimino and Director-General of Social Services*,[82] where the AAT said, 'I think it is very important that representatives of the department should approach their task in this way, as it were as counsel for the Crown, ensuring only that all the facts are before the Tribunal and not placing emphasis on defeat of the application'.[83] I doubt whether this proposition can be laid down as a rule that lawyers representing respondent agencies in AAT proceedings must act in this way in all cases, particularly where s 33(1AA) of the AAT Act only requires the decision-maker to 'use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding'. The Commonwealth's model litigant obligation says substantively the same thing.[84]

There are limits to how much the Agency's lawyers can do in this context. Nonetheless, a less adversarial approach to NDIS proceedings is likely to help the AAT better to meet the requirements of the NDIS Act with respect to the preparation of participants' plans when conducting a review of a decision under s 33(2).

80 Hall, above n 35, 90.
81 Allars, n 36 above, 411.
82 (1982) 4 ALN 106.
83 Quoted in Dwyer, above n 38, 256.
84 See *Legal Services Directions 2017* (Cth), Appendix B, cl 4.

The participant's statement of goals and aspirations

The ability for participants to set their own goals through the participant's statement of goals and aspirations under s 33(1) of the NDIS Act has important implications for the administration of the NDIS Act. This is particularly so in the context of s 33(2)(b), which is the 'gateway established by the legislative scheme'[85] and directs the decision-maker to the requirements in s 33(5)(c) requiring satisfaction 'as mentioned in section 34 in relation to the reasonable and necessary supports that will be funded'. Section 34(1) then provides six mandatory considerations, the first of which is 'the participant's statement of goals and aspirations'.

In *McGarrigle*, Mortimer J made the following observations about the significance of a participant's goals and aspirations:

> [103] The question whether five return trips were a reasonable and necessary support for Mr McGarrigle (as opposed to a lesser number) would have required a detailed assessment of Mr McGarrigle's needs, and the benefits he received, from the activities for which he required the transport. This would have included (for example) whether he could be transported by others (family, carers, etc). But the Tribunal would have had to find, on the evidence and as a matter of fact, that this could reasonably be done. Then there may have been a probative basis to be satisfied that only three days a week transport costs were reasonable and necessary. For example, as senior counsel for Mr McGarrigle submitted, *the goals, objective and aspirations of a person with disability are a core aspect of the participant plan* and, I have found, the supports which are approved are intended by the scheme to 'support' pursuit of those goals, objectives and aspirations. That would appear to be one of the reasons Parliament has used the word 'support'. On the evidence, *independence is important for Mr McGarrigle, so having others transport him may not pursue that goal*. To find five days transport was not reasonable and necessary, *the Tribunal would have had to confront this issue on the merits*.[86]

The effect of s 33(1) and s 34(1)(a) is that a participant can create mandatory relevant considerations for the decision-maker by setting goals, without approval by the decision-maker, and which are entirely unique to that participant. This is a unique power in administrative law. Goal setting in the statement of participant's goals and aspirations is different from, for example, an asylum applicant making a 'claim'. In asylum cases, an applicant's claim is a factual matter put forward as satisfying a criterion for a protection visa, which the decision-maker must consider in exercising the jurisdiction to grant or refuse to grant a visa.[87] The statement of participant's goals and aspirations is much more than that. It actually creates and gives content to a unique criterion in every participant's case which, although not dispositive, is 'a core aspect of the participant plan'[88] and must be taken into account generally pursuant to s 31(j),[89] specifically in the context of determining what are reasonable and necessary supports under s 34(1)(a).

How the AAT 'confront[s] this issue on the merits' on a case-by-case basis has important implications for the administration of the NDIS and for participants. There is no reason why a participant could not specify a goal with particularity and detail and use a specifically identified goal as the basis for seeking approval of a specific support directed toward that goal.

85 [2017] FCA 308; 252 FCR 121 [95].
86 Ibid [103] (emphasis added).
87 See *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1 [55], [58]. See also *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 214 CLR 496 [24].
88 [2017] FCA 308; 252 FCR 121 [103].
89 Section 31(j) of the NDIS Act relevantly provides that the 'preparation, review and replacement of a participant's plan … should so far as reasonably practicable: … (j) facilitate tailored and flexible responses to the individual goals and needs of the participant'.

Indeed, a major quantitative study of the implementation of NDIS by Mavromaras et al found that '[t]here was evidence that NDIS participants had become more knowledgeable about using the language and philosophy of the NDIA in order to include previously unsupported services and supports in their plans'.[90] Published decisions of the AAT in s 33(2) cases indicate that most participants still identify their goals and aspirations at a fairly generally level. A more targeted approach to a participant's statement of goals and aspirations would appear to be one area where growing knowledge of the NDIS could be deployed with great effect. It may also minimise the incongruities between the NDIS Act and AAT procedure by ensuring that the participant's wishes remain central to the AAT's decision.

Conclusion

The NDIS Act, in giving effect to Australia's obligations under the Convention, introduced new concepts and principles relevant to persons with disability but also to administrative law. The most important concept introduced by the NDIS Act is that of the participant. The concept of the participant and the principles underpinning the NDIS have (not without difficulty) mapped onto a pre-existing administrative law framework for merits review. This article has analysed some of the challenges that emerge from the intersection of the NDIS and merits review in the AAT in the context of decisions to approve a statement of participant supports under s 33(2) of the NDIS Act. The main point is that there are real difficulties in simultaneously conducting a review in accordance with the AAT's procedures while adhering to the requirements of decision-making under the NDIS Act, and the principles of the NDIS Act, which contemplate the central and not necessarily adversarial involvement of the participant in decision-making.

The solutions are not straightforward. They require adapting an established mechanism for merits review to new modes of decision-making. In a related context, the Australian Law Reform Commission said that 'hard cases should not, however, be treated as a barrier to building law and legal frameworks that signal the paradigm shift of the [Convention]'.[91] Going forward, decision-makers, practitioners, participants and participants' advocates will need to consider how best to navigate these challenges, mindful that the paradigm has shifted.

90 Mavromaras et al, *Evaluation of the NDIS — Final Report* (National Institute of Labour Studies, Flinders University, 2018) 144.
91 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, 2014) 63 [2.116].