FEDERAL COURT OF AUSTRALIA

McGarrigle v National Disability Insurance Agency [2017] FCA 308

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| Appeal from: | *Liam McGarrigle v National Disability Insurance Agency* [2016] AATA 498 |
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| File number: |  |
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| Judge: | **MORTIMER J** |
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| Date of judgment: | 28 March 2017 |
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| Catchwords: | **HUMAN RIGHTS** – whether partial funding permissible under *National Disability Insurance Scheme Act 2013* (Cth) – meaning of “reasonable and necessary supports” – distinction between “funding” and “providing” of services under *National Disability Insurance Scheme Act* – partial funding not permissible |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth), s 43  *National Disability Insurance Scheme Act 2013* (Cth), ss 3, 4(5), 4(11), 4(17), 6 , 9, 13, 14, 17A, 31, 32, 32A, 33, 34, 35, 37, 39, 45, 46, 99, 103, 117, 118, 180B, 202, 209  *National Disability Insurance Scheme (Supports for Participants) Rules 2013 (Cth)*, rr 1.2, 1.3, 2.5, 3.4, 5 |
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| Cases cited: | *Commonwealth v Baume* [1905] HCA 11; 2 CLR 405  *Director of Liquor Licensing v Kordister Pty Ltd & Anor* [2011] VSC 207  *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409  *Drake v Minister for Immigration and Ethnic Affairs (No 2)* [1979] AATA 179; 2 ALD 634  *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325; 39 VR 92  *Plaintiff M47/2012 v Director-General of Security and Ors* [2012] HCA 46; 251 CLR 1  *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355  *R v Berchet* (1690) 1 Show KB 106  *Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286 |
|  |  |
| Date of hearing: | 1 December 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 122 |
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| Counsel for the Applicant: | Mr C Horan QC with Ms L Martin |
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| Solicitor for the Applicant: | Victoria Legal Aid |
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| Counsel for the First Respondent: | Ms J Davidson |
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| Solicitor for the First Respondent: | National Disability Insurance Agency |
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| Counsel for the Second Respondent: | The Second Respondent did not appear |

ORDERS

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|  | | VID 962 of 2016 |
|  | |  |
| BETWEEN: | LIAM MCGARRIGLE  Applicant | |
| AND: | NATIONAL DISABILITY INSURANCE AGENCY  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | MORTIMER J |
| DATE OF ORDER: | 28 March 2017 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Tribunal made on 15 July 2016 be set aside.
3. The matter be remitted to the Tribunal to be determined according to law.
4. The first respondent pay the applicant’s costs of, and incidental to, the appeal, on a lump sum basis.

THE COURT DIRECTS THAT:

1. On or before 4 pm on 11 April 2017, the applicant file and serve an affidavit constituting a Costs Summary in accordance with paragraphs 4.10 to 4.12 of the Court’s *Costs Practice Note* (GPN-COSTS) dated 25 October 2016.
2. On or before 4 pm on 26 April 2017, the first respondent file and serve any Costs Response in accordance with paragraphs 4.13 and 4.14 of the *Costs Practice Note* (GPN-COSTS).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MORTIMER J:

1. The applicant in this proceeding is Mr Liam McGarrigle, a 21-year old man who has autism spectrum disorder and an intellectual disability. He is a participant in the National Disability Insurance Scheme (NDIS), and receives funding provided by the National Disability Insurance Agency (the Agency) to cover his transport expenses for his travel to work and his travel to a group program. Under his NDIS plan, the Agency provides Mr McGarrigle with $11,850 for transport, which represents approximately 75 per cent of the annual cost of $15,850 required to pay for taxis and transport.
2. Mr McGarrigle appeals on eight questions of law he contends are raised by the decision of the Administrative Appeals Tribunal made on 15 July 2016. The Tribunal was reviewing a decision by the Agency to provide partial funding under the *National Disability Insurance Scheme Act 2013* (Cth) (the Act), for Mr McGarrigle’s transport costs. The Agency’s decision was affirmed by the Tribunal.
3. In general terms, Mr McGarrigle seeks to have the Tribunal’s decision overturned on the basis that on its proper construction, the Act requires “reasonable and necessary supports”, once identified, to be fully funded by the Agency. Accordingly, Mr McGarrigle seeks an order increasing the amount specified in Mr McGarrigle’s NDIS plan for transport to $15,850, or alternatively, an order remitting the matter to the Tribunal to be heard and decided again with a direction to that effect.
4. For the reasons that follow, I find that the Tribunal erred in law in the approach it took to s 34(1) of the Act, and therefore the first question of law should be answered favourably to the applicant. Its decision should be set aside and the matter remitted to the Tribunal for determination according to law. No direction should be given to the Tribunal. The amount of funding to which Mr McGarrigle is entitled is a matter for the Tribunal.

# Background

1. The factual background in the following sections is not controversial and is taken from the Tribunal’s decision.

## Mr McGarrigle’s background

1. In October 2013, Mr McGarrigle became a participant in the NDIS. Under the NDIS, he was provided with funding and support for a disability group program at Encompass Community Services for three days each week, and supported employment at a disability enterprise, Karingal Kommercial, for the other two weekdays.
2. Both Encompass and Karingal Kommercial are located in Geelong. Mr McGarrigle lives with his parents and younger sister in Moriac, which is approximately 25 km from Geelong. Accordingly, Mr McGarrigle’s NDIS plan includes funding for transport to and from Encompass and Karingal Kommercial. The funding includes return trips via taxi three days a week. On the other two days, he is picked up by a taxi in the morning, and a support worker funded by the NDIS picks him up in the afternoons, takes him to a gym, and then back home. Mr McGarrigle’s ability to use public transport, and the availability of public transport to and from Moriac, is limited. He holds a card which entitles him to a 50 per cent subsidy on taxi fares. To the extent possible, the taxi provider shares Mr McGarrigle’s trips with other people from the Moriac area, however this depends on the needs of others and is not predictable.
3. Mr McGarrigle’s father works full-time in Geelong, and his mother works 30 to 33 hours a week at a general store in Moriac. Mr McGarrigle’s mother is his primary carer. She describes herself as an “unofficial PA”, in that she coordinates his supports, looks after his finances, drives him to appointments, and is on-call to assist Mr McGarrigle.

## Participation in the NDIS – participant’s plan

1. As a participant in the NDIS, Mr McGarrigle has a “participant’s plan” prepared by the Agency, which includes a statement of his goals and aspirations, and a statement of participant supports. Part 2 of Chapter 3 the Act deals with these plans and I refer to those provisions below. It is sufficient here to note that by s 33(2) of the Act, a plan must include and specify the “general supports (if any)” that will be provided to a participant; and the “reasonable and necessary supports (if any)” that will be funded under the NDIS. It is the construction and operation of this latter phrase which plays a central role in the resolution of the questions of law raised on this appeal.
2. Since Mr McGarrigle became a participant in the NDIS in 2013, he has been subject to three NDIS participant plans.

### First plan

1. Under the first plan, which commenced on 2 December 2013 and was to be reviewed by 1 December 2014, Mr McGarrigle was provided with $14,317 in funding for assistance with travel. This amount comprised:
   1. $8,872, which was provided for taxi travel to and from Encompass and Karingal Kommercial; and
   2. $5,445, which was provided on a per kilometre basis for support staff to transport Mr McGarrigle to the gym and home two afternoons a week, as well as support staff for Mr McGarrigle to go out on a regular basis for respite, and for support staff to attend for in-home support.
2. The Agency advised the Tribunal that in respect of paragraph (b) above, the structure of the plans changed over time, and the additional funding for support staff travel was subsequently included in a different part of the plan.
3. Under the first plan, the full amount allocated for transport was not used. According to a letter from the Agency to Ms McGarrigle dated 6 January 2016, this was in part because Mr McGarrigle used the school bus, which was not funded from the NDIS plan.

### Second plan

1. Mr McGarrigle’s second plan commenced on 2 December 2014, and was to be reviewed by 1 December 2015. Mr McGarrigle was provided with $12,485.79 in funding for assistance with travel. This amount comprised:
   1. $10,521.75, which was provided for taxi travel to and from Encompass and Karingal Kommercial five mornings a week, and three evenings per week; and
   2. $1,964.04, which was provided on a per kilometre basis for support staff to transport Mr McGarrigle to the gym and home two afternoons a week.
2. According to the letter from the Agency to Mr McGarrigle’s mother in January 2016, the Agency acknowledged that 99% of the allocated funding was used under this second plan.
3. It is not in dispute that Mr McGarrigle’s first two plans included funding for the full cost of his transport to and from Encompass and Karingal Kommercial.

### Third plan, and the first instance decision about it

1. Mr McGarrigle’s third plan was to commence on 21 December 2015 and was to be reviewed by 20 November 2016. Mr McGarrigle was provided with $8,000 in funding for assistance with travel. This third plan did not separately indicate the amount allocated for the taxis and the per kilometre allowance for support staff, but rather specified that this amount included funding for both of those purposes.
2. On 4 November 2015, Mr McGarrigle’s mother asked the Agency to conduct an internal review of the decision to fund $8,000 of her son’s transport costs. On 6 January 2016, Ms Neroli Raff, an authorised reviewer of the Agency, decided that the contribution should be increased to $11,850. Ms Raff acknowledged in her decision that the initial funding decision of $8,000 represented 50.8% of the estimate of the full cost of the Monday to Friday taxi costs, which, calculated by reference to the Geelong Taxi website, amounted to $15,850. The letter acknowledged that this would leave Mr McGarrigle and his informal support network with $7,580 worth of transport costs. The decision letter acknowledged that this would

be an onerous expectation, given that Liam is only on a part pension, you already provide significant informal and financial support for him and you have another teenager to support[.]

1. It appears that Ms Raff’s view about how onerous it was to expect Mr McGarrigle and his family to make up 50% of the transport costs was, at least in part, what led her to vary the decision and increase the funding to what she stated was a 75% contribution to the estimated costs of Mr McGarrigle’s “weekday transport”, leaving approximately $4,000 to be borne by Mr McGarrigle’s informal support network. It is unclear whether the reference to “weekday transport” here includes the amount for the support staff’s per kilometre allowance.
2. At the internal review meeting between Mr McGarrigle, Mr McGarrigle’s father and mother, and Ms Raff, there were discussions as to how to further reduce transport costs. The options canvassed included:

* seeking informal transport arrangements with family or trusted community members;
* seeking appropriate local activities that would also meet Mr McGarrigle’s goals; and
* seeking overnight accommodation close to Mr McGarrigle’s day or employment service, to reduce the number of trips required.

1. Following the internal review decision, Mr McGarrigle applied to the Tribunal for review of the decision. The Tribunal affirmed the Agency’s decision to contribute $11,850 of Mr McGarrigle’s transport costs.

# DISCUSSION OF Relevant ASPECTS OF THE LEGISLATIVE SCHEME

1. The objects of the Act are set out in s 3. Relevantly for present purposes, s 3 provides:

**3 Objects of Act**

(1) The objects of this Act are to:

(a) 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); and

…

(d) provide reasonable and necessary supports, including early intervention supports, for participants in the National Disability Insurance Scheme launch; and

…

(2) These objects are to be achieved by:

(a) providing the foundation for governments to work together to develop and implement the National Disability Insurance Scheme launch; and

(b) adopting an insurance-based approach, informed by actuarial analysis, to the provision and funding of supports for people with disability.

(3) In giving effect to the objects of the Act, regard is to be had to:

…

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

…

1. Section 4 of the Act sets out the general principles guiding actions under the Act. Relevantly, sub-ss (5), (11) and (17) provide:

**4 General principles guiding actions under this Act**

…

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

…

(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 and any other person or body is to perform functions and exercise powers under this Act in accordance with these principles, having regard to:

…

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

1. The NDIS scheme is not means tested – whether as to the person concerned, their family or community.
2. The National Disability Insurance Scheme Launch Transition Agency, now known as the National Disability Insurance Agency, is established by s 117 of the Act. The Agency is given a general assistance power in s 6 of the Act:

**6 Agency may provide support and assistance**

To support people with disability to exercise choice and control in the pursuit of their goals, the Agency may provide support and assistance (including financial assistance) to prospective participants and participants in relation to doing things or meeting obligations under, or for the purposes of, this Act.

Note: For example, the Agency might assist a participant to prepare the participant’s statement of goals and aspirations by assisting the participant to clarify his or her goals, objectives and aspirations.

1. Its functions are set out in s 118:

**118 Functions of the Agency**

(1) The Agency has the following functions:

(a) to deliver the National Disability Insurance Scheme so as to:

(i) support the independence, and social and economic participation, of people with disability; and

(ii) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports; and

(iii) ensure that the decisions and preferences of people with disability are respected and given appropriate priority; and

(iv) promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and inclusion in the community; and

(v) ensure that a reasonable balance is achieved between safety and the right of people with disability to choose to participate in activities involving risk;

(b) to manage, and to advise and report on, the financial sustainability of the National Disability Insurance Scheme including by:

(i) regularly making and assessing estimates of the current and future expenditure of the National Disability Insurance Scheme; and

(ii) identifying and managing risks and issues relevant to the financial sustainability of the National Disability Insurance Scheme; and

(iii) considering actuarial advice, including advice from the scheme actuary and the reviewing actuary;

(c) to develop and enhance the disability sector, including by facilitating innovation, research and contemporary best practice in the sector;

(d) to build community awareness of disabilities and the social contributors to disabilities;

(e) to collect, analyse and exchange data about disabilities and the supports (including early intervention supports) for people with disability;

(f) to undertake research relating to disabilities, the supports (including early intervention supports) for people with disability and the social contributors to disabilities;

(g) any other functions conferred on the Agency by or under this Act, the regulations or an instrument made under this Act;

(h) to do anything incidental or conducive to the performance of the above functions.

(2) In performing its functions, the Agency must use its best endeavours to:

(a) act in accordance with any relevant intergovernmental agreements; and

(b) act in a proper, efficient and effective manner.

1. The Agency’s function of managing, advising and reporting on the financial sustainability of the scheme should be noted. Sub-paragraphs (i) to (iii) of s 118(1)(b) contemplate detailed information will be available to the Agency.
2. Chapter 2 is entitled “Assistance for people with disability and others”. Broadly, it deals in more specificity with the functions of the Agency in s 118(1)(a) to assist people with disability. Sections 13 and 14, which refer to the Agency’s function and describe what the Agency may “provide”, as well as including a definition of “general support”. In my opinion ss 13 and 14 are helpful in ascertaining the meaning of the words “funded or provided” in s 34. They provide:

**13 Agency may provide coordination, strategic and referral services etc. to people with disability**

(1) The Agency may provide general supports to, or in relation to, people with disability who are not participants.

Note: Chapter 3 deals with the provision of general supports to, or in relation to, participants.

(2) In this Act:

***general support*** means:

(a) a service provided by the Agency to a person; or

(b) an activity engaged in by the Agency in relation to a person;

that is in the nature of a coordination, strategic or referral service or activity, including a locally provided coordination, strategic or referral service or activity.

**14 Agency may provide funding to persons or entities**

The Agency may provide assistance in the form of funding for persons or entities:

(a) for the purposes of enabling those persons or entities to assist people with disability to:

(i) realise their potential for physical, social, emotional and intellectual development; and

(ii) participate in social and economic life; and

(b) otherwise in the performance of the Agency’s functions.

1. Chapter 3 is entitled “Participant and their Plans”. Section 17A enshrines and gives prominence in the legislative scheme to principles of autonomy and self-determination for people with disability. The preconditions to, and consequences of, becoming a participant (see ss 18 to 30) can be put to one side as Mr McGarrigle’s status as a participant was common ground.
2. Part 2 of Chapter 3 deals with Participants’ Plans. Plans are the key implementation mechanism for NDIS funding. That is because s 39 of the Act provides:

**39 Agency must comply with the statement of participant supports**

The Agency must comply with the statement of participant supports in a participant’s plan.

1. 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). Payments made in accordance with a participant plan are called “NDIS amounts” in the scheme. There is a requirement that funds received by a participant (or a person on behalf of a participant) must be spent “in accordance with the participant’s plan”: s 46(1). The monies received are otherwise inalienable. There are detailed provisions for determining whether it is appropriate for a participant to manage funds herself or himself, or whether another person should manage (and therefore receive) the funds on her or his behalf: see ss 42 to 44.
2. Division 2 of Part 2 of Chapter 3 contains the core provisions relevant to the disposition of this application. Section 32 imposes a duty on the CEO to facilitate the preparation of a participant’s plan. Rules can be made (see s 32A) about how and when this is to occur.
3. Section 33 deals with the matters that must be included in a participant’s plan. It is also, as I have noted, the provision which identifies the approval function to be performed by the CEO. It provides:

**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

(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.

(3) The supports that will be funded or provided under the National Disability Insurance Scheme may be specifically identified in the plan or described generally, whether by reference to a specified purpose or otherwise.

(4)  The CEO must endeavour to decide whether or not to approve the statement of participant supports as soon as reasonably practicable, including what is reasonably practicable having regard to section 36 (information and reports).

(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.

(6) To the extent that the funding for supports under a participant’s plan is managed by the Agency, the plan must provide that the supports are to be provided only by a registered provider of supports.

(7) A participant’s plan may include additional matters, including such additional matters as are prescribed by the National Disability Insurance Scheme rules.

Note: For example, a participant’s plan may include arrangements for ongoing contact with the Agency.

(8) A participant’s statement of goals and aspirations need not be prepared by the participant in writing, but if it is prepared other than in writing, the Agency must record it in writing.

Note:     Section 38 requires a copy of a participant’s plan to be provided to him or her.

1. There are several matters to note about s 33. The term “supports” is assigned an inclusive meaning by s 9 of the Act as including “general supports”. In turn, “general supports” is given a more specific meaning by s 13(2) of the Act which I have set out at [28] above. It can be seen that general supports are those provided by the Agency itself to the participant.
2. Although it does not use the term expressly, in my opinion it is clear that the assistance identified in s 14 (which the Agency funds, but does not provide) is the subject matter of s 33(2)(b): that is, the “reasonable and necessary supports (if any) that will be funded” under the NDIS.
3. It is the funding for “reasonable and necessary supports” which becomes, once approved and a participant plan is in effect, the “NDIS amount” for the purposes of s 45 and related provisions. The term “NDIS amount” is defined in s 9 to mean:

***NDIS amount*** means an amount paid under the National Disability Insurance Scheme in respect of reasonable and necessary supports funded under a participant’s plan.

1. Subsection 33(3), when it speaks of the supports “that will be funded or provided” is therefore referring to both general supports **provided** by the Agency (s 13), and “reasonable and necessary supports” **funded** by the Agency (s 14), but provided by others.
2. The matters set out in s 33(5) are mandatory aspects of the CEO’s approval function, and therefore on review, mandatory aspects of the Tribunal’s approval function. Section 33(5)(c) requires the CEO to be “satisfied as mentioned in s 34 in relation to the reasonable and necessary supports that will be funded and the general supports that will be provided”. This directs attention to six matters set out in s 34 of which the CEO must be satisfied.
3. Although s 34 is headed “reasonable and necessary supports”, it in fact expressly deals with both general supports (provided by the Agency under s 13) and reasonable and necessary supports (funded by the Agency under s 14). The six matters it sets out in paras (a) to (f) must, as the provision states, be considered by the CEO in relation to each support proposed in the plan. It provides:

**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;

(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.

(2) The National Disability Insurance Scheme rules may prescribe methods or criteria to be applied, or matters to which the CEO is to have regard, in deciding whether or not he or she is satisfied as mentioned in any of paragraphs (1)(a) to (f).

1. The key constructional choice in the present circumstances is whether, when s 34 uses the verb “funded” or the noun “the funding”, it means – for each reasonable and necessary support – full funding of each support, or whether those words should be construed as including, or extending to, partial funding of each support.
2. Although the phrase “reasonable and necessary supports” is used throughout the legislative scheme, including in the objects and principles provisions, it is not defined. Its meaning can be derived from the context in which it is used, especially in my opinion s 4(11), which sets out what reasonable and necessary supports should enable and empower people with a disability to do, read with s 14 which sets out the purposes for which funding for reasonable and necessary supports is provided.
3. Section 35 of the Act is headed “National Disability Insurance Scheme rules for statement of participant supports” and provides:

(1) The National Disability Insurance Scheme rules may make provision in connection with the funding or provision of reasonable and necessary supports or general supports, including but not limited to prescribing:

(a) methods or criteria to be applied, or matters to which the CEO is to have regard, in deciding, the reasonable and necessary supports or general supports that will be funded or provided under the National Disability Insurance Scheme; and

(b) reasonable and necessary supports or general supports that will not be funded or provided under the National Disability Insurance Scheme; and

(c) reasonable and necessary supports or general supports that will or will not be funded or provided under the National Disability Insurance Scheme for prescribed participants.

(2) The National Disability Insurance Scheme rules referred to in subsection (1) may relate to the manner in which supports are to be funded or provided and by whom supports are to be provided.

(4) The National Disability Insurance Scheme rules referred to in subsection (1) may relate to how to take into account:

(a) lump sum compensation payments that specifically include an amount for the cost of supports; and

(b) lump sum compensation payments that do not specifically include an amount for the cost of supports; and

(c) periodic compensation payments that the CEO is satisfied include an amount for the cost of supports.

(5) The National Disability Insurance Scheme rules referred to in subsection (1) may relate to how to take into account amounts that a participant or prospective participant did not receive by way of a compensation payment because he or she entered into an agreement to give up his or her right to compensation.

1. The rules are legislative instruments to be made by the Minister: see s 209. Section 209, sub-paras (4) to (7) constrain the rule-making power to preserve the federal characteristics of the NDIS. The *National Disability Insurance Scheme (Supports for Participants) Rules* *2013* (Cth) (the Rules) are an important element of the legislative scheme, introducing the ability to modify the operation of ss 33 and 34 by, for example, excluding certain kinds of supports from inclusion in participant plans. It is through the Rules that the executive is able to implement, within the federalism constraints imposed in s 209, some policy decision-making about the nature and extent of supports to be provided or funded under the NDIS.
2. Part 6A of Chapter 6 of the Act provides for annual reports by an actuary into the financial sustainability of the NDIS, risks, trends, and estimates of future expenditure. Section 180B, which is in Pt 6A, is in the following terms:

**180B Duties of scheme actuary**

*Duties relating to annual financial sustainability report*

(1) The scheme actuary must do all of the following each time an annual report is being prepared by the Board members under section 46 of the *Public Governance, Performance and Accountability Act 2013*:

(a) assess:

(i) the financial sustainability of the National Disability Insurance Scheme; and

(ii) risks to that sustainability; and

(iii) on the basis of information held by the Agency, any trends in provision of supports to people with disability;

(b) consider the causes of those risks and trends;

(c) make estimates of future expenditure of the National Disability Insurance Scheme;

(d) prepare a report of that assessment, consideration and estimation;

(e) prepare a summary of that report that includes the estimates described in paragraph (c).

*Duty to make quarterly estimates of future expenditure*

(2) At least once each quarter, the scheme actuary must make estimates of the future expenditure of the National Disability Insurance Scheme and advise the CEO of the estimates. For this purpose, ***quarter*** means a period of 3 months starting on 1 July, 1 October, 1 January or 1 April.

Note: The CEO must give the Board a copy of the advice under subsection 159(7).

*Duty to provide information and advice on request*

(3) The scheme actuary must, on request from the Board or the CEO, provide actuarial information or advice.

*Duty to report concerns to Board*

(4) If the scheme actuary has significant concerns about the financial sustainability of the National Disability Insurance Scheme, or the risk management processes of the Agency, he or she must report those concerns to the Board as soon as reasonably practicable.

# The Tribunal’s decision

1. The Tribunal noted (at [20]) that it was “not entirely clear” how the sum of $15,850 had been arrived at as the total amount of Mr McGarrigle’s transport costs. The Agency provided two different accounts to the Tribunal about whether the sum did or did not include a per kilometre allowance for the support worker. The Tribunal stated it would proceed on the basis that the sum “represents the full cost of transport by taxi and by the support worker”. Whether or not this is correct, that is the factual basis on which the Tribunal proceeded, and as the applicant correctly submitted, this Court must proceed on the basis of the facts as found by the Tribunal (subject to any challenges to its fact finding in the questions of law).
2. The key issue in the questions of law on this appeal was also put to the Tribunal – that is, a decision to partially fund the taxi costs is outside the jurisdiction or power of the Tribunal (and, therefore, the jurisdiction or power of the internal reviewer and the delegate of the CEO). At [4]-[5] the Tribunal set out these issues:

Mr McGarrigle seeks review of a decision by the National Disability Insurance Agency (NDIA) to fund $11,850 for ‘transport to access daily activities’. This amount represents approximately 75 per cent of the annual cost of $15,850 for taxis and transport by the support worker.

The NDIA submits that $11,850 is a reasonable contribution to Mr McGarrigle’s transport costs. For Mr McGarrigle it is submitted that funding for a contribution only, rather than the full cost of transport, is incompatible with the objects of the *National Disability Insurance Scheme Act 2013* (the Act).

1. At [64] of reasons the Tribunal expresses its conclusion:

I am satisfied that the transport is a reasonable and necessary support for Mr McGarrigle within the meaning of subsection 34(1). I do not accept that funding for less than the full cost of his transport is inconsistent with the Act. I am satisfied that the decision to fund 75 per cent of his weekday transport costs strikes an appropriate balance between what is reasonable and necessary for him and the overall financial sustainability of the NDIS

1. At [60]-[63], the Tribunal expanded on how, in Mr McGarrigle’s situation, it reached the conclusion that supports for transport to the extent of 75% of the actual costs struck the appropriate balance:

There may be supports which, by their nature, are rendered of little or no benefit if only partly funded. There may be supports which, by their nature, cannot be provided or supplemented by families or other informal supports. However, I am not persuaded that transport is a support of that kind. Nor am I persuaded that a policy by which a substantial part of the cost of transport is met, rather than the full cost, is inconsistent with the objects of the Act.

In every case an individual participant’s needs for support have to be considered in light of his or her circumstances and the relevant legislation and relevant policy.

I accept that it would impose an additional burden on Mr McGarrigle’s parents if they have to transport him to and from Encompass and Kommercial 25 per cent of the time, or meet the shortfall in funding. The shortfall amounts to the equivalent of two and a half – realistically three – trips each week in addition to the transport they already provide him at other times during the week and on weekends.

I accept that it may add to the demands already placed on Mr McGarrigle’s parents if one of them has to drive him on those extra trips each week, or they have to make some other arrangement that does not rely on funded transport. I accept that any additional burden has the potential to affect their wellbeing. However, in my view, the decision to provide funding for 75 per cent of the cost of Mr McGarrigle’s weekday transport takes into account what it is reasonable for families generally, and his family in particular, to provide. In setting an amount above the amounts usually payable according to NDIA policy, I am satisfied that it recognises the burden on his family and potential risk to their wellbeing in a way that takes into account what it is reasonable to expect families and others to provide by way of transport or by alternative arrangements.

1. The Tribunal then divided its reasoning into five parts. It looked first at the scheme of the Act, and at [25], particularly by relying on the mandatory consideration in s 34(1)(e), found that the scheme

contemplates that funding or provision of a support may be reduced, or may not be funded or provided at all.

1. The second part of the Tribunal’s reasons examined the various indications within the legislative scheme that ensuring the financial viability of the NDIS was an important matter. The Tribunal referred to ss 3(3)(b) and 4(17)(b) of the Act in this regard, and to the Rules. Noting the submissions made on behalf of Mr McGarrigle (not all of which were pursued in this Court), the Tribunal concluded (at [36]-[37]):

I do not agree that it follows, because the CEO (and so the Tribunal) is satisfied of all of the matters in subsection 34(1), that a support must, or should, be fully funded. Subsection 34(1)(e) specifically requires consideration of what it is reasonable for families and others to provide. Moreover, rule 2.5 requires regard to be had to the financial sustainability of the NDIS in respect of individual plans. It provides:

*In administering the NDIS and in* ***approving each plan*** *the CEO must have regard to objects and principles of the Act including the need to ensure the financial sustainability of the NDIS and the principles relating to plans (emphasis added).*

Nor is it necessarily incompatible with the objects of the Act to fund less than the full cost of a support. The need to ensure the financial sustainability of the NDIS is relevant to the performance of any function and the exercise of any power under the Act, and its objects are given effect by, among other things, having regard to financial sustainability of the scheme.

1. Third, the Tribunal examined the Rules and, in particular, rr 1.2, 1.3, 3.4 and 5. Rule 3.4 purports to expand on the mandatory consideration in s 34(1)(e) concerning what it is reasonable to expect families, carers, informal networks and the community to provide by way of support to a NDIS participant. Rule 5 deals with the exclusion of “day-to-day living costs” from NDIS funding, and with what is comprehended by “day-to-day living costs”. The Tribunal saw nothing in r 5 (which it correctly identified as involving a discretionary decision) which compelled full funding of Mr McGarrigle’ s transport costs. As for r 3.4, the Tribunal considered the submissions put by Mr McGarrigle on the criteria in r 3.4, but did not express any conclusion in this part of its reasons.
2. Fourth, the Tribunal looked at Agency policy, referring to the approach set out in *Drake v Minister for Immigration and Ethnic Affairs (No 2)* [1979] AATA 179; 2 ALD 634 (*Drake (No 2)*). The Tribunal did not refer to the less expansive view of the role of government policy in the Tribunal’s decision-making which was expressed by the Full Court on appeal: see *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 420-421 (Bowen CJ and Deane J) (*Drake*). The Tribunal took into account what it described as “Fact sheets” published by the Agency. These facts sheets purported to place funding level caps on support for transport costs. The Agency referred the Tribunal to another document entitled “Work Practice – Guide to Funded Supports, Operations Branch version 2.1”, which the Tribunal acknowledged appeared only to be in draft form but which it nevertheless took into account on the basis that it formed part of the Agency’s policy framework. That document also purported to place caps around the amounts of funding available for transport costs. There was a further internal document in the form of a checklist for staff, entitled “‘NDIA – Plan Review – Conversation Tool”, which contained the following statement:

Funding should never equate to the total funding required for transport – it is only ever a contribution.

1. Correctly in my opinion (and consistently with the observations of Bowen CJ and Deane J in *Drake*), at [57] of its reasons, the Tribunal explained why it considered this statement was not consistent with the legislative scheme and, correctly, did not follow the “instruction”.
2. The Tribunal then examined another policy document which, correctly again in my opinion, it found was only of tangential relevance – an “Operational Guideline” which principally related to the criteria in s 34(1)(f).
3. Having considered these matters, the Tribunal reached the conclusions I have set out at [47] above. It can be seen that the Tribunal’s conclusion that the legislative scheme permitted and authorised approval by the CEO under s 33(2)(b) of the Act to extend to partial funding of a “reasonable and necessary support” for a participant was central to its reasoning, and to the outcome of Mr McGarrigle’s review.
4. In a variety of ways, it is that reasoning the applicant challenges in this appeal.

# THE PARTIES’ CONTENTIONS

1. In setting out the parties’ competing contentions, it is useful to adopt the structure set out in the applicant’s submissions. The applicant structured his submissions around four broad propositions, said to arise from the eight questions of law:
   1. that the Tribunal misconstrued or misapplied s 34(1) of the Act by finding that it could fund a proportion of the cost of a support which had been found to be “reasonable and necessary”;
   2. that the Tribunal wrongly elevated the need to ensure the financial sustainability of the NDIS over the criteria in s 34(1);
   3. that the Tribunal took into account an irrelevant consideration by relying on policies that are inconsistent with s 34(1); and
   4. alternatively to the above three contentions, that the Tribunal failed to respond to detailed claims from the applicant that his weekday transport met the criteria in s 34(1) and therefore should have been fully funded.
2. The applicant’s submissions concentrated on the first two propositions, as did the respondent’s.

## Whether the Tribunal misconstrued or misapplied s 34(1) (Questions of Law 1–3, Grounds 1-3)

### Applicant’s contentions

1. The applicant contends that on its plain and natural reading, s 34(1) does not permit the CEO or the Tribunal to find that a support is a “reasonable and necessary support”, but then go on to find that only a proportion of the cost of that support should be funded under the participant’s plan. While the requirements in s 34(1) have inbuilt protections to ensure that the support represents value for money and does not duplicate supports which are available from other sources, those requirements are directed to whether or not the support is a “reasonable and necessary support” that will be funded under the NDIS. Once a support has been found to meet the legislative requirements and to be a “reasonable and necessary support”, the applicant contends that there is no room for any suggestion that the funding of that support may be partial or limited.
2. The applicant contends that the Tribunal erroneously read into s 34(1) the ability to fund a proportion of the cost of a support, despite the subsection providing that “reasonable and necessary supports… **will be** funded” (emphasis added) if the CEO is satisfied of all of the s 34(1) requirements in relation to the funding of each support.
3. Linked to his contention that the Tribunal misunderstood s 34(1) as available to approve partial funding of a reasonable and necessary support, the applicant contends that the Tribunal erroneously applied, or misconstrued, s 34(1)(e) (whether it is reasonable to expect the individual’s families, carers, informal networks and the community to contribute). The applicant submits para (e) does not concern whether an individual’s families, carers, informal networks and the community could be reasonably expected to provide funding. Rather it asks the decision-maker to look at the capacity of families, carers, networks and the community to provide a support, and if that is the case, that support would not be a “reasonable and necessary” support for the NDIS to fund.
4. Otherwise, if the approach the Tribunal adopted is taken, the applicant submits this introduces means testing by a backdoor route into the NDIS, because those families or carers with capacity to make up a shortfall in funding would be expected to do so. In the present case, the Tribunal’s finding that the NDIS should fund 75% of Mr McGarrigle’s transport costs thus implies that it was reasonable to expect Mr McGarrigle’s family and informal support networks to contribute 25% of the costs.
5. This approach, the applicant submits, tends to undermine the objects of the Act. Where support has been found to be “reasonable and necessary”, it would be inconsistent with the purpose of the scheme for the provision of that support to be conditional on funding by another person. The “obvious consequence”, the applicant submits, would be that if the other person were unable or unwilling to make that contribution, the participant could be deprived of the support in its entirety.

### Respondent’s contentions

1. The respondent took a different approach to the Tribunal’s reasons. It contends that the Tribunal did not first find that the full cost of the transport was a reasonable and necessary support, and then approve only 75% of funding for that support, and nor did it qualify s 34(1) by reference to the financial viability of the NDIS scheme. The respondent instead submits that the Tribunal, guided by s 34(1)(e), considered it appropriate to assess the partial funding as part of determining whether the transport costs (fixed at 50%) were a reasonable and necessary support. It decided they were not, but decided that the transport costs (fixed at a 75%) were a reasonable and necessary support.
2. The respondent submits there is no “bifurcation” in s 34(1) between the type of support on the one hand, and the level of support on the other. Rather, in contrast to the applicant’s reading of s 34(1), whether a support is “reasonable and necessary” takes into account both the **type** and **quantum** of the support.
3. In relation to s 34(1)(e), the respondent submits that, in contrast to the applicant’s contentions, the phrase “what it is reasonable to expect families, carers, informal networks and the community to provide” is not limited to the provision of “support” that is reasonable to expect the individual’s families, carers, informal networks and the community to provide. The provision includes consideration for any other contribution that families, carers, informal networks and the community could reasonably be expected to provide, such that in light of that contribution, the amount of funding from the Agency is reduced. In any case, the respondent submits that what the Tribunal was envisaging was support to be provided to Mr McGarrigle by his family members, rather than costs to be borne by them. To that extent, the respondent relies on [43] of the Tribunal’s reasons, where the Tribunal said:

There is nothing to suggest that there is any risk to Mr McGarrigle’s wellbeing arising from his reliance on family members and others to transport him to and from Encompass and Kommercial or anywhere else. Nor is there any reason to question their suitability to provide him with transport.

1. The respondent contends that full funding of his transportation costs might not be reasonable and necessary. The respondent submits, in respect of the Tribunal’s decision:

It is not the case that his costs have, in their entirety, been determined a reasonable and necessary support, and *subsequently* a decision has been taken to part-fund this support. Rather, in view of his circumstances, part-funding of his total transport costs has been judged a reasonable and necessary support.

Viewed in this light, the decision to award transport costs to the Applicant constituting 75 per cent of the estimated total costs of the Applicant being transported to work, group and gym activities by taxi (having regard to his subsidised taxi card, but ignoring the possibility of sharing a taxi) is entirely consistent with the Act. It is a decision which takes account, as it must, what it is reasonable to expect the Applicant’s family and other informal support networks to provide. Appropriately, it is also informed by the Supports for Participants Rules, and the context in which the decision-maker is operating—namely, exercising a power under the NDIS (the question of financial sustainability as a consideration in the Act and Rules is considered below at [41].

(Emphasis in original.)

1. The respondent submits that the language of the Act permits “degrees”, rather than being satisfiable in a “complete and conclusive sense”. For instance, the respondent submits that the phrases “funded or provided” in s 33(3) and “funding or provision” in s 34(1)(e) mean partially or fully funded or provided, and not just fully. The phrases “assist the participant to pursue”, and “facilitate [the participant’s] participation” in s 34(1) are examples of phrases which admit of “degrees”. Further, under s 33(5), the CEO is required to “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”. This requirement, the respondent contends, emphasises the requirement for maximising the participant’s choice and control. This enhanced a flexible approach to the management by people with disabilities of their day to day activities, and preserved choice for people with disabilities, which is an important component of the NDIS. If the applicant’s view were adopted, the decision-maker would be obliged to consider the types of support for inclusion in a participant’s plan “in their entirety, or potentially not at all”. Such an approach would be an “all or nothing approach which would not only frustrate the objectives of the Scheme, it would jeopardise its viability.”
2. The respondent also addresses the applicant’s contentions that where a participant’s family or informal network is unable or unwilling to contribute to the reasonable and necessary support, the participant could be deprived of that support in its entirety. The respondent submits that, under r 3.4 of the Rules, the CEO is required to consider the risks to the wellbeing of the participant arising from the participant’s reliance on the support of family members and informal networks.

## Whether the Tribunal erred by treating the need to ensure the financial sustainability of the NDIS as a qualification on the statutory criteria in s 34(1) (Questions of Law 6-8, Grounds 6-8)

1. The applicant submits that the Tribunal placed great weight on the importance of ensuring the financial sustainability of the NDIS, and that it thereby treated that consideration as qualifying the extent to which a support was “reasonable and necessary”. The applicant contends that such an approach was an “illegitimate and impermissible use of the consideration of financial sustainability to cut down the specific statutory criteria in s 34 of the NDIS Act”.
2. The applicant accepts that it is permissible to have regard to the “need to ensure the financial sustainability of the NDIS” in giving effect to the objects of the Act, pursuant to s 3(3)(b), and that s 4(17) applies to the Tribunal, in performing functions and exercising powers under the Act. These subsections, however, are general principles guiding actions under the Act, according to the applicant, and do not allow the Tribunal to ignore the requirements set out in s 34(1). This is because an objects clause cannot be used to restrict the application of the tests set out in the legislation.
3. Some of the criteria in s 34(1) expressly incorporate the objective of ensuring financial sustainability – particularly ss 34(1)(c), (d), (e) and (f). However, the applicant submits that, rather than taking “the need to ensure the financial sustainability of the NDIS” into account when determining whether or not a support is a “reasonable and necessary support”, the Tribunal instead first determined that Mr McGarrigle’s weekday transport costs were a reasonable and necessary support, and *then* used the financial sustainability of the NDIS as a balancing factor, to justify a reduction in the amount of funding for those transport costs. The applicant contends that this was not permissible.
4. Moreover, the applicant submits that there was no evidence before the Tribunal about the “overall financial sustainability of the NDIS”, nor about how the NDIS would be affected by a decision to fund the full cost of the applicant’s weekday transport. The applicant submits that it could not be said that the extra $4,000 involved in the full funding of the taxis for Mr McGarrigle would imperil the overall financial sustainability of the NDIS. To the extent the issue is that there are broader impacts of funding all participants’ “reasonable and necessary” supports on the overall financial sustainability of the NDIS, the applicant submits that evidence is required to make such a finding: *Director of Liquor Licensing v Kordister Pty Ltd & Anor* [2011] VSC 207 at [261]-[263] (Bell J); *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325; 39 VR 92 at [71], [76]-[79] (Warren CJ, Osborn JA), [215] (Tate JA). The applicant submits that under the Act, the Tribunal could have referred to annual financial sustainability reports given by the scheme actuary or the reviewing actuary (ss 180B and 180E), annual reports (s 172(4)), or corporate plans prepared by the Agency’s Board (s 177(2)), if it was necessary to consider financial sustainability as a concrete limiting factor. The applicant submits that there is an absence of a mechanism for determining the correct proportion of funding if financial sustainability of the scheme is considered – he submits the Tribunal’s figure of 75% is an imprecise subjective assessment, without basis on any concrete criteria.
5. The applicant also submits in the alternative that the Tribunal failed to address the applicant’s submissions with respect to the financial sustainability of the NDIS.

### Respondent’s contentions

1. The respondent contends that, the Act and Rules do not require data on the financial position of the NDIS. The respondent submits that the Tribunal’s conclusion as to the relevance of the financial sustainability is grounded in the language of the Act and the Rules. To this end, the decision-maker is giving effect to the objects of the Act, which require the consideration of financial sustainability. The respondent contends that this does not mean that the criteria in s 34(1) are being “overborne or distorted” by the objects of the Act.

## Whether the NDIA polices were inconsistent with s 34(1) (Question of Law 4, Ground 4)

1. The applicant contends that various Agency policy documents were inconsistent with the Act – in particular the “Participant Transport Fact Sheet” and the “Work Practice – Guide to Funded Supports”. The former document identified three capped levels of support for transport assistance, together with a category of exceptional circumstances, which still involved a cap of up to $6,000. The latter document contemplated funding of up to $6,000, or above $6,000 with “Site Manager approval”.
2. The applicant submits that, in so far as the funding caps in the two policy documents above contemplate funding only a proportion of the costs of a reasonable and necessary support, these policy documents are inconsistent with the Act. This is because, in accordance with question of law 1, the applicant contends the policies are inconsistent with the scheme which (on the applicant’s submission) contemplates full funding of a “reasonable and necessary support”.
3. In oral submissions, the applicant did not develop this question of law, relying primarily on his outline of submissions.

### Respondent’s contentions

1. The respondent contends that, contrary to the applicant’s submissions, the Tribunal did not rely on the two policies provided to it in order to supplant or distort the meaning of the Act. The respondent submits that the Tribunal member was circumspect in the use made and reliance placed on the policy documents. In particular, the respondent submits that the decision to fund $11,850 of travel expenses was a significantly higher amount than the amount set out in the policy.

## Whether the Tribunal failed to respond to the applicant’s detailed claims that his weekday transport was a reasonable and necessary support to be funded in full (Question of Law 5, Ground 5)

1. The applicant submits that if, contrary to what he submits in relation to his first three propositions, the Tribunal was permitted to decide to fund only a proportion of Mr McGarrigle’s weekly transport costs, then it was nevertheless required to address each of the statutory criteria in determining what proportion should be funded. The applicant’s outline of submissions to the Tribunal set out arguments responding to each of the s 34(1) criteria, and, the applicant contends, the Tribunal should have addressed each of these criteria.
2. The applicant claims that in its decision, the Tribunal addressed only s 34(1)(a), (b) and (c) briefly and gave some consideration to s 34(1)(e), but did not address s 34(1)(d) and (f). In doing so, the applicant contends that this amounted to a constructive failure to exercise its jurisdiction under s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth).
3. As with question of law 4, the applicant did not develop this ground during the course of oral submissions.

### Respondent’s contentions

1. The respondent contends that the Tribunal’s decision shows that it had regard to all of the criteria in s 34(1), and that it had considered that all of the criteria were met by the funding of 75% of the estimated full costs of Mr McGarrigle’s travel expenses. To the extent that the applicant contends that the Tribunal was required to specifically address s 34(1)(d) and (f), the respondent submits that there was no such requirement.

# Resolution

## The Tribunal’s function

1. At the outset, the function the Tribunal was performing should be identified. Like other aspects of its merits review function, the Tribunal was required to make the correct or preferable decision on the material before it, and at the time it made its decision: *Drake* at 419 (Bowen CJ and Deane J) (*Drake*); *Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286 at [37]-[38], [45]-[46] (Kirby J), [99] (Hayne and Heydon JJ), [143] (Kiefel J). In *Shi*, Hayne and Heydon JJ (at [99]) considered that the Tribunal is not confined to the material before the primary decision-maker, unless there is some statutory basis for such a limitation. Kirby J (at [46]) considered that such a limitation would arise only “exceptionally”.
2. Section 99 of the Act identifies the decisions under the Act which are reviewable by the Tribunal. Included in this list are decisions made under s 33(2). Section 33(2) must be read with s 32 – the obligation to “facilitate” the preparation of a participant’s plan. In that context s 33(2), stating as it does in mandatory language what a plan must specify, confers an additional function on the CEO (and her or his delegate) of “approving” the necessary or reasonable supports required by the participant. This is confirmed by several other provisions. First, s 33(2)(b) which speaks of supports “that will be funded” – meaning, in my opinion, those supports the CEO approves to be funded. Second, s 37, which provides that a plan only comes into effect when approved by the CEO, and third, s 39 which imposes a duty on the Agency to comply with a statement of participant supports. Therefore, what is entered in a plan as a support becomes a determinative factor in the administration of the scheme. As the respondent submitted, by s 33(3), supports may be generally described or may be specifically identified. Either way, the function being performed on review by the Tribunal is to approve, vary or modify the supports as set out in a participant plan. In performing that function, the Tribunal must have regard to the matters set out in s 33(5), and form its satisfaction in accordance with s 34.

## What is the “support”?

1. At [23] and [24] of its reasons, the Tribunal defines the “support” as transport. That is a correct characterisation, and the Tribunal was correct to reject the Agency’s submission that a “contribution to funding” could be the “support” for the purposes of the scheme.
2. Section 33 sets out two components which are necessary for a participant’s plan, bearing in mind the plan is the foundational document for a person’s access to services under the NDIS. The first aspect is the person’s goals and aspirations. The second, not divorced from the first, are the “participant supports” to be funded or provided. The language of “funded or provided” harks back, as I have noted, to the distinctions in ss 13 and 14 between supports **provided** by the Agency and supports **funded** by the Agency but provided by others. The scheme intends that the supports provided or funded will assist the participant to achieve her or his goals and aspirations: the two mandatory aspects of the plan set out in s 33 are intended to work together. So much is clear from the principles set out in s 31, and from provisions such as s 4(11). As s 31 expressly states, the “management of the funding for supports under a participant’s plan” is intended to advance, and be consistent with, the principles set out in s 31.
3. Section 13 expressly indicates that a “support” might be a service, or it might be an activity. In my opinion, although s 14 (which deals with funding by the Agency of others to assist the participant rather than the Agency assisting the participant directly) is expressed purposively, its subject matter is also “support” – whether by way of services or activities or any other matter that assists a person with disability in a way that is consistent with the general principles set out in s 4. The word “support” must be given a broad construction in this context, and there is no need for the purposes of this proceeding to seek to give it any comprehensive meaning. Rather, the point to be made is that it is a practical description of the means by which a person with disability is assisted. It is not intended, in my opinion, to encompass funding, especially because what s 14 contemplates is that the Agency will “fund” a support. The Agency cannot “fund” funding.

## What does “reasonable and necessary” support mean?

1. A general principle of construction is that each word in a statute should be assumed to have, and be given, work to do: *Commonwealth v Baume* [1905] HCA 11; 2 CLR 405 at 414 (Griffith CJ); 419 (O’Connor J). See also *Plaintiff M47/2012 v Director-General of Security and Ors* [2012] HCA 46; 251 CLR 1, where French CJ said (at [41]):

It is a long-established rule of interpretation that “such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent”.

1. His Honour noted this proposition originated in *R v Berchet* (1690) 1 Show KB 106 and was subsequently adopted by the High Court in *Baume* and again in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355.
2. Whether a support is “reasonable” requires a different assessment to whether a support is “necessary”. Again, it is not necessary in the context of this proceeding to be definitive about the nature and extent of the meaning of the phrase, or its components. It is enough to observe that using the concept of necessity would appear to tie one aspect of the CEO’s assessment to an evaluation of the kinds of factors set out in s 34(1)(a) and (b) and (d). The word “reasonable” would appear to be directed at factors such as those set out in s 34(1)(c) and (f). That is not to say the meaning of each word is exhausted by the factors set out in s 34(1): rather, it is to illustrate the different work that each concept does as an adjective in the phrase “reasonable and necessary supports”.
3. Relevantly to this proceeding, the factor set out in s 34(1)(e) (“funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide”) goes to both whether a support is “reasonable” (in the sense of it being subject to provision or funding by the Agency) as well as whether it is “necessary” (in the sense of whether it is a support that cannot be provided by others).
4. In my opinion, the text and context of s 33(5)(c), read with s 34(1) indicates that the CEO (or the delegate or Tribunal) must either be satisfied that a support has the character of being a reasonable and necessary support, or that it does not. Once a support is identified and described (to take an example away from this case, speech therapy lessons three times a week), then the question for the CEO (or the delegate or Tribunal) is whether she or he is satisfied that support, as identified, is reasonable and necessary for that particular participant. It may be open to the CEO to be satisfied that a differently identified support is reasonable and necessary: in this example, speech therapy lessons once a week. That determination can only be made on the basis of probative evidence.

## The scheme contemplates full funding of reasonable and necessary supports

1. Once a decision is made that the support, as identified and described, is reasonable and necessary, then subject to the other requirements in s 33(5) and s 34, the scheme requires and contemplates that support “will” be funded. In my opinion, that can only mean wholly or fully funded.
2. The subject matter of the CEO’s approval in s 33(2)(b) is the reasonable and necessary supports that “will” be funded. The language is imperative, and in my opinion this is consistent with the applicant’s contention that the relevant gateway established by the legislative scheme is whether the support is “reasonable and necessary”, and once through that gateway, the scheme intends the support will be fully funded. There are no references in these provisions to “contributions” from the participant, the participants’ family or carers. I have explained, in my opinion, how s 34(1)(e) is intended to operate: that is, it is intended to operate at the stage of the CEO (or the delegate or Tribunal) forming a state of satisfaction about what are “reasonable and necessary supports”. It is not intended to ask the decision-maker to assess whether any of the persons in para (e) are capable, or willing, to make a financial contribution towards the proposed support. That is made especially clear by the inclusion in the list in para (e) of the “the community”. Parliament did not intend the decision-maker to ask, in forming a state of satisfaction, whether *the community* could or should make a financial contribution to the funding of a support found by the decision-maker to be reasonable and necessary in order for the participant to work towards the goals, objectives and aspirations set out in the participant’s plan.
3. The Agency’s submissions seek to place a gloss on the provisions by reference to the concept of contributions. The consequence of such a construction was set out in the applicant’s submissions (at [29]), which I accept:

The alternative construction has the potential to undermine the objects of the NDIS Act. In circumstances where a support has been found to be both ‘reasonable and necessary’, it would be inconsistent with the purpose of the scheme for such a support to be made effectively conditional on either the provision or the funding by another person of a portion of the relevant support. The obvious consequence would be that, if the other person were unable or unwilling to make that contribution, the participant could be deprived of the support in its entirety. Contrary to the Tribunal’s reasoning, this problem is not confined to ‘supports which, by their nature, are rendered of little or no benefit if only partly funded’ or ‘supports which, by their nature, cannot be provided or supplemented by families or other informal supports’.

(Footnote omitted.)

1. I do not consider there is anything inconsistent in the Rules with this approach. I accept as the respondent submitted, that the Tribunal was correct to look at r 3.4 (see [41] of the Tribunal’s reasons) in the context of considering s 34(1)(e). While the arguments put to the Tribunal on behalf of the applicant about the application of this rule (see [43]-[44] of the reasons) might have been creative, the salient point is that the content of r 3.4 is directed at the activity or assistance which family or carers might provide, or which might be otherwise available – so that the participant does not need the support proposed, nor does not need it to the same extent or level. I do not consider that r 3.4 is concerned with the funding of the support: rather, it is concerned with how the participant can access the practical assistance required, thus requiring the decision-maker to consider whether that access is available through other sources rather than funding it by the Agency pursuant to the participant plan. As I have noted elsewhere in these reasons, this is an important distinction because it makes the task of the decision quite different. The decision-maker must examine the realistic and reasonable capacity of others to provide the support – feasibility, continuity, suitability – and must decide, in a rational and reasonable way, based on probative material, whether or not there is, in fact, capacity for others to provide the support to the participant that is needed.
2. I do not accept the respondent’s submission (at [34] of its written submissions) that the applicant’s construction involves an “all or nothing” approach, which is too inflexible to be the correct constructional choice for a scheme such as the NDIS. Rather, the applicant’s approach, with which I agree, focuses on the point of time at which, and the way in which, a decision-maker assesses when a support will be both reasonable and necessary. It does not require a decision-maker to either accept “all” of the support proposed or “nothing” of the support proposed. However, the scheme does contemplate that whatever support the decision-maker determines is reasonable and necessary is the support which will be fully funded. In this case, the Tribunal accepted that five days’ transport for Mr McGarrigle was a reasonable and necessary support: having done that, it could not determine that support should only be funded to 75% of its cost. Its function under ss 33 and 34 is not to determine funding proportions. Its function, relevantly, was to determine what supports were necessary and reasonable, in the way I have set out at [93] above. The difference is material, in terms of the way it must perform that task, and the probative material it would need to consider in order to be satisfied a proposed support was not “reasonable and necessary”.
3. Contrary to the respondent’s submission, I do not consider this diminishes the choice available to people with disability who participate in the NDIS. Persons with disability, and their carers and families, are able to propose what they consider necessary and reasonable in the participant plan. Ultimately, the legislative scheme reposes the approval function in the CEO but through the two-tiered review process there will be opportunities to persuade the decision-maker why the supports suggested should be approved. Rather, in my opinion, the respondent’s construction – of a partial funding approval being open to the CEO (or the delegate or Tribunal) is likely to be an approach which restricts choice for persons with disability, if this be a permissible consideration.

## Whether the Tribunal misconstrued or misapplied s 34(1) (Question of Law 1-3, Grounds 1-3)

1. It follows from my construction of the phrase “reasonable and necessary supports” that the Tribunal’s task of forming its satisfaction as required by s 33(2), read with s 33(5)(c) in particular, miscarried. The Tribunal incorrectly construed both what its task was in forming a state of satisfaction about whether the supports proposed were “reasonable and necessary supports”, and more particularly relied on s 34(1)(e) in a way which gave that provision an effect inconsistent with its proper function in the legislative scheme. Section 34(1)(e) does not authorise the CEO (or the delegate or Tribunal) to be satisfied that a support which has otherwise been concluded to be “reasonable and necessary” should be only partially funded because others can make up the funding difference. Rather, the function of s 34(1)(e), as with the remainder of s 34(1) is to assist the CEO (or the delegate or Tribunal) in forming a state of satisfaction about whether a support is reasonable and necessary. Once that satisfaction is formed, one way or the other, on the basis of probative evidence and material, the support must be fully funded. That is what the words “will be funded” in s 33(2)(b) should be taken to require.
2. The Tribunal’s approach could mean that a support found on the material to be reasonable and necessary would not in fact be provided if only partially funded, if the person could not make up the funding shortfall. The correct construction needs to be capable of applying across many situations. A partial funding construction could be applied to the provision of a single service, which could then end up not being delivered at all (e.g. one on one support at an activity one day a week). That is not the kind of outcome which in my opinion is intended by the legislative scheme. Approval of a participant plan, including approval of reasonable and necessary supports is intended by the scheme to be translated into actual delivery of those supports – not possible delivery, depending on the financial circumstances of others.
3. I do not accept the respondent’s submissions that the Tribunal found only 75% of Mr McGarrigle’s taxi costs were a reasonable and necessary support. As I have noted, the Tribunal did not engage in the kind of analysis of the evidence and material which would have been required to reach this conclusion. Further, it is clear from the way its reasons are expressed (see [47] and [48] above) that the Tribunal took the costs of five days’ of transport for Mr McGarrigle as reasonable and necessary, and then (wrongly) concentrated on who should pay for them.
4. 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.
5. That was not the approach taken. Instead, the Tribunal asked itself whether Mr McGarrigle’s family could be expected to make up the funding shortfall. That was the wrong question, and an irrelevant question, under the legislative scheme.
6. These conclusions mean that the first question of law should be answered “yes”, and the appeal should succeed. Questions of law 2 and 3 do not arise because of this conclusion.
7. Having found material error in the Tribunal’s decision, it is strictly unnecessary to determine the remaining grounds of appeal. However since they were fully argued, and concern matters of some significance to the operation of the NDIS legislative scheme I propose to consider them although in my opinion, none need be substantively determined.

## Whether the Tribunal erred by treating the need to ensure the financial sustainability of the NDIS as a qualification on the statutory criteria in s 34(1) (Questions of Law 6-8, Grounds 6-8)

1. There is no doubt that consideration of the financial sustainability of the NDIS is given an express place in the operation of the legislative scheme. The applicant accepts that s 4(17) of the Act applies to the Tribunal and this concession was correctly made. The Tribunal performs a review function “under” the Act: see s 103. Section 3(3)(b) is to similar effect, and understanding how the two provisions operate together may be a matter of hierarchy. Although it may not matter to the outcome of these grounds of appeal, it seems to me that s 3(3) is the lead provision, in the sense that by its language and context it is intended to be applied in all circumstances where it is necessary to “give effect to the objects” of the Act. Nevertheless s 4(17)(b) relevantly involves a mandatory consideration which must be taken into account by the Tribunal (and by the CEO and delegate) in approving a participant plan for the purposes of s 33(2) of the Act. If there was any doubt about this, r 2.5 of the Rules provides:

In administering the NDIS and in *approving each plan* the CEO must have regard to objects and principles of the Act including the need to ensure the financial sustainability of the NDIS and the principles relating to plans.

(Emphasis added.)

1. The question raised by these grounds of appeal is how “the need to ensure the financial sustainability of the NDIS” is to be taken into account.
2. As the applicant submits, some of the criteria in s 34(1) expressly incorporate this consideration – especially s 34(1)(c) and (f). The Rules also impose constraints which can be seen as, at least in part, intended to ensure that the financial sustainability of the scheme as a whole is not imperilled by the performance of functions under the Act. Rule 5.1(d), to which the Tribunal referred, is a good example. The exclusion from funding by the Agency under s 14 of the Act of supports that constitute “day-to-day living costs” (examples given are rent, groceries, utilities fees) imposes some general restrictions on what might be funded under s 14, subject to (as the Tribunal noted) the discretion conferred by r 5.2. If r 5 is engaged in a particular review, then the Tribunal will be acting conformably with its obligations under s 4(17)(b) and r 2.5.
3. The respondent approached the role of considering financial sustainability of the NDIS in quite a different way, rather than accepting it would be considered through the operation and application of various provisions of the Act. The respondent submitted it was a free standing mandatory consideration, and the Tribunal was required to consider it as a separate matter. This reflects the submissions the Agency put to the Tribunal on review. The transcript of the Tribunal hearing reveals that the Agency put to the Tribunal that transport was a common form of support, and more and more people were joining the NDIS, which should lead the Tribunal to approve funding of only a portion of Mr McGarrigle’s transport costs.
4. Whether because of the way the Agency put this matter or not, the Tribunal did, as the applicant submits, appear to make up its mind about its satisfaction under s 34(1) (including s 34(1)(e)) and then put this conclusion through the “prism” of financial sustainability. The applicant relied on [64] of the Tribunal’s reasons where it first expressed its satisfaction that “transport is a reasonable and necessary support for Mr McGarrigle within the meaning of subsection 34(1)”, and then found that funding only 75% of the transport costs is consistent with the Act and “strikes an appropriate balance”.
5. However, by the remark “strikes an appropriate balance”, read in the context of what it said in [62]-[63] about Mr McGarrigle’s family taking an additional “burden” (the Tribunal’s word) of providing transport for him for some of the trips, the Tribunal was referring to matters other than the financial sustainability of the NDIS scheme. The Tribunal’s approach in [64] stemmed from what I have found to be its erroneous understanding of the task of forming a state of satisfaction about what are reasonable and necessary supports. In proceeding on the basis that it could decide that a reasonable and necessary support should only be partially funded, the Tribunal engaged in a “balancing exercise” about what proportion should be funded. In doing so, it rejected the 50% figure of the delegate and adopted the 75% figure.
6. Contrary to the applicant’s submissions, I do not consider the Tribunal was striking the figure of 75% by reference to the financial sustainability of the NDIS. It is important to set out the context of the Tribunal’s references (at [35]-[37] of its reasons) to financial sustainability:

For Mr McGarrigle, it is submitted that references to the need to ensure the financial sustainability of the NDIS go to the broad objects of the Act, such as the object in subsection 3(1)(a), to give effect to Australia’s obligations under the *Convention on the Rights of Persons with Disabilities*. It is submitted that considerations of financial sustainability cannot be relied upon to refuse funding for the full cost of a support that meets subsection 34(1). It is submitted that subsection 34(1) has inbuilt checks to ensure the financial sustainability of the scheme such as the requirement that a support represents value for money, and that it in effect covers the field concerning funding in a particular case. Further, that funding the full cost of Mr McGarrigle’s transport is consistent with the insurance-based principles on which the NDIS is founded (see subsection 3(2)(b)).

I do not agree that it follows, because the CEO (and so the Tribunal) is satisfied of all of the matters in subsection 34(1), that a support must, or should, be fully funded. Subsection 34(1)(e) specifically requires consideration of what it is reasonable for families and others to provide. Moreover, rule 2.5 requires regard to be had to the financial sustainability of the NDIS in respect of individual plans. It provides:

*In administering the NDIS and in* ***approving each plan*** *the CEO must have regard to objects and principles of the Act including the need to ensure the financial sustainability of the NDIS and the principles relating to plans (emphasis added).*

Nor is it necessarily incompatible with the objects of the Act to fund less than the full cost of a support. The need to ensure the financial sustainability of the NDIS is relevant to the performance of any function and the exercise of any power under the Act, and its objects are given effect by, among other things, having regard to financial sustainability of the scheme.

1. These passages reveal that the Tribunal was relying on r 2.5, and (although it did not refer to them by their section numbers) ss 3(3)(b) and 4(17)(b) of the Act to support the conclusion it had reached that it was authorised by the Act to approve only partial funding for a support it had found to be a reasonable and necessary support. This goes again to the error identified in question of law 1, above.
2. I do not consider that on a fair reading of its reasons, the Tribunal relied on ss 3(3)(b) and 4(17)(b) of the Act, and r 2.5, as a separate and independent consideration weighing in favour of funding only a proportion of Mr McGarrigle’s costs. That is, contrary to the applicant’s submissions, the Tribunal did not reason to the effect that in order to pursue the objective of ensuring the financial sustainability of the NDIS, it would only approve funding of 75% of Mr McGarrigle’s transport costs (even if the Agency’s submissions may have encouraged it to take this approach).
3. Accordingly the contention raised by the applicant on these grounds of appeal does not arise. I need not determine the question decided by Bell J in the Victorian Supreme Court in *Director of Liquor Licensing v Kordister Pty Ltd & Anor* [2011] VSC 207, especially at [254] and then at [261]-[263], and upheld, on that point, on appeal by the Victorian Court of Appeal: *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325; 39 VR 92 at [71], [76]-[79] (Warren CJ, Osborn JA), [215] (Tate JA). At [215] Tate JA said:

Following the dismissal of the accountancy evidence, the Tribunal sought to arrive at the conclusions it did on the basis of its own expertise. In my view, the Director is correct to submit that findings about the viability of a business, or, more particularly, findings about the general impact of a decision upon an industry are not to be made by an administrative tribunal in the absence of any evidence or material before it. The authorisation under statute for a tribunal to inform itself as it thinks fit is not an invitation for a tribunal to speculate in the absence of any proper factual material before it.

1. While there is, with respect, much to commend the approach taken by Tate JA (and Bell J below), it is not necessary for the Court to determine whether this is the correct approach to the considerations expressed in the NDIS Act because, in this case, the applicant’s argument proceeded on a premise different to the approach in fact taken by the Tribunal. The role of considerations of financial sustainability of the NDIS scheme is an important issue which should await determination in an appropriate case.

## Whether the NDIA polices were inconsistent with s 34(1) (Question of Law 4, Ground 4)

1. Whether the policies to which the Tribunal referred in its reasons have a degree of inconsistency with the Act, and to that extent are unlawful because of my acceptance of the applicant’s contention in question of law 1 also need not be determined. By way of example, at [52] of its reasons, the Tribunal set out an excerpt of one of the policies, entitled “Participant Transport Fact Sheet”:

Under the heading ‘Expected levels of transport support’, the fact sheet states there are ‘three levels of supports for transport assistance’ which are ‘used to provide a transport budget for participants’. They are:

* *Level 1 - The NDIS will provide up to $1,539 per year for participants who are not working, studying or attending day programs but are seeking to enhance their community access.*
* *Level 2 - The NDIS will provide up to $2,377 per year for participants who are currently working or studying part-time (up to 15 hours a week), participating in day programs and for other social, recreational or leisure activities.*
* *Level 3 - The NDIS will provide up to $3,326 per year for participants who are currently working, looking for work, or studying, at least 15 hours a week, and are unable to use public transport because of their disability.*

*Exceptional circumstances – participants can receive higher funding, up to $6,000 per year, if the participant has supports (mainstream, informal or funded) in their plan that enables their participation in employment.*

(Emphasis in original.)

1. Senior counsel for the applicant accepted the Tribunal did not apply this policy, because it fixed a level of funding well in excess of even the “exceptional circumstances” mentioned in the policy. Accordingly any question concerning whether the Tribunal impermissibly applied a policy to fetter or constrain the formation of its state of satisfaction does not arise. Whether or not the policy is lawful should await a decision where the policy materially affects or contributes to the Tribunal’s conclusion on the decision under review. The view I take is not dislodged by the Tribunal’s findings in [63] of its reasons, which in my opinion demonstrates the Tribunal chose not to be apply the caps suggested in the policy in the individual circumstances of Mr McGarrigle’s case, which is the approach *Drake* requires.

## Whether the Tribunal failed to respond to the applicant’s claims that his weekday transport was a reasonable and necessary support to be funded in full (Question of Law 5, Ground 5)

1. This ground of appeal does not arise because, as the applicant’s written submissions recognise (at [42]), it is premised on the Court rejecting the propositions underlying questions of law 1 to 3 in the notice of appeal. Since I have determined question of law 1 should succeed, question of law 5 does not arise.

## Conclusion

1. The applicant has succeeded on the first question of law, as amplified by ground 1 in the notice of appeal. This was the principal source of debate between the parties and occupied most of the time on the appeal. In those circumstances it is appropriate that the usual orders as to costs apply. Consistently with the Court’s *Costs Practice Note* (GPN-COSTS), a lump sum award should be made. The parties will be directed to file the necessary documents contemplated by the Practice Note.
2. Although the notice of appeal sought, optimistically, to have the Court determine for itself the question of the approval of Mr McGarrigle’s participant plan with his transport cost as stipulated being a reasonable and necessary support, senior counsel for the applicant accepted during oral argument that this course would not be appropriate. The appropriate order is that the matter be remitted to the Tribunal for determination according to law. The Tribunal has the Court’s reasons and it is not appropriate for the Court to issue any “direction” to the Tribunal about the performance of its merits review function.

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| I certify that the preceding one hundred and twenty-two (122) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 28 March 2017