Social security / NDIS in the AAT: some current issues

Matt Black, Barrister-at-Law

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What is merits review all about?

1. Under s 25(1) of the *Administrative Appeals Tribunal Act 1975* (the **AAT Act**), Commonwealth legislation may provide for applications to the Administrative Appeals Tribunal (the **AAT**) "for review of decisions" made under that legislation. It is generally understood that such a "review" is to be a "merits review"; that the AAT 'stands in the shoes' of the original decision-maker.[1]

2. Subject to any specific legislative limitation, in a review before the AAT the following principles will apply:

   (a) An applicant need not (and should not) attempt to demonstrate error in the reasoning or findings of the decision under review.

   (b) The AAT will decide the facts of the case for itself without being bound by the findings of fact made by the original decision-maker.

   (c) The AAT will decide the facts based on the evidence that is placed before the AAT without being limited to the material considered by the decision-maker.

   (d) The AAT will decide the case on the facts and circstumstances as they obtain at the time relevant to the decision, which may be some fixed point in time or may be as the current date.

   (e) Where the decision involves the exercise of a discretion, the AAT will exercise that discretion for itself without being bound by the way in which the original decision-maker exercised the discretion.[2]

3. What then of the reasons and findings made by the original decision-maker in the decision under review? Whilst those reasons and findings are generally not binding, they are not necessarily irrelevant:

4. The reasons and findings will often provide the applicant with insight into the decision-maker's position and the issues upon which the applicant might need to focuxs.

1 See, generally, *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.
2 Although the AAT will generally have regard to, and follow, relevant guides and policies.

5. The decision under review might include findings of fact that favour the applicant and which could form the basis for agreement or, perhaps, which might themselves be relied on as material to which the AAT can have regard—see the discussion in *Commonwealth of Australia v Snell* [2019] FCAFC 57 at [76].

6. In short, the reasons and findings made by the original decision-maker should be used (where possible) as resource to guide or support the case being advanced in the AAT.

Who goes first and does it matter?

7. Ordinary experience in the AAT is that, at a final hearing, the applicant will present his or her case first and then the respondent will present its case in response. That approach usually works well and is usually unquestioned. However, there is no fixed rule that hearings must be conducted in that way and the procedure to be adopted is generally within the discretion of the AAT: see AAT Act, s 33(1).

8. It is useful to bear in mind that generally there is no legal onus of proof in the AAT (and certainly not in the social security or NDIS jurisdictions). There is, however, what is sometimes called an evidentiary onus (although it is not truly an onus). The underlying principle was explained in *Mcdonald v Director-General of Social Security* (1984) 1 FCR 354:

> If the AAT finds itself in a state of uncertainty after considering all the available material, unable to decide a question of fact either way on the balance of probabilities, it will be necessary for it to analyse carefully the decision it is reviewing. If, for example, it is a decision whether or not to cancel a pension in the light of changed circumstances, then it has failed to achieve the statutory requirement of reaching a state of mind that the pension should be cancelled. If, on the other hand, it is a decision, to be made in the light of fresh evidence, whether or not the pension should ever have been granted in the first place, then it has failed to be satisfied that the person ever was permanently incapacitated for work.
> …

9. It is therefore important to carefully analyse the nature of the decision under review. One useful question is this: if there were absolutely no evidence at all, what would the decision have to be?

10. An example from another jurisdiction is the general practice in the Queensland Civil and Administrative Tribunal (**QCAT**) in disciplinary proceedings. In cases where a regulator has decided to discipline a person and that person applies for review of the decision, the general practice is that the ***respondent*** will be *dux litis* (the first to present its case first); not the applicant.

11. The AAT seems to have traditionally been less willing to require a respondent to present its case first,[3] but in the social security and NDIS jurisdictions there may be more flexibility. Consideration should be given, in appropriate cases, to seeking directions for the respondent to present its case first and for the applicant to respond.

Procedures and directions

12. Section 33(1) of the AAT Act is foundational. It says:

> (1) In a proceeding before the Tribunal:

3 Eg, *Brackenreg and Comcare* [2005] AATA 88, [6]-[9].

(a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;

(b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and

(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

13. The broad discretion as to procedure, and the mandate to avoid unnecessary formality and technicality, may enable creative approaches to overcoming difficulties that some applicants in the social security and NDIS jurisdictions face.

14. Consider an example from elsewhere.

15. In *Lacey v Attorney General for New South Wales* [2021] NSWCA 27, the applicant was a 15-year-old Aboriginal girl faced criminal charges in the NSW Children's Court. The prosecution case included footage of the the applicant being strip-searched at a police station which she intended to rely on to establish a defence that the search was unlawful. The applicant applied in the Children's Court for order aimed at preventing any male person from seeing the footage, including an order that the trial be heard by a female Magistrate and that no men be present at the trial for the playing of the footage. There was evidence of likely deep cultural shame if the video showing the applicant in a state of (at least partial) nudity was seen by men. The Court of Appeal found that the Children's Court did have the power in appropriate cases to (in effect) make the orders sought.

16. Is there scope under ss 33 and 35 of the AAT Act to seek directions aimed at improving the capacity for applicants in social security and NDIS matters to engage with the AAT process? Whilst I do not suggest automatic or wholesale departures from 'standard procedure', it may be worth considering whether creative approaches might be adopted in a appropriate cases. Some options might be, for example, views by the AAT (home visits), taking applicants' evidence away from formal hearing rooms, or conducting hearings in alternative locations.

Pleadings and issues

17. In the courts, of course, the purpose of pleadings is "to state with sufficient clarity the case that must be met ... [and] define the issues and make clear that which is in issue": *Ballesteros v Chidlow (No 2)* [2005] QSC 285, [35]. In tribunals without formal pleadings, there is nevertheless a "basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her": *Banque Commerciale S.A., En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279, 286.

18. It seems to follow that procedural fairness dictates that the parties in AAT proceedings are entitled to clearly know what issues are in contest. The need for such knowledge is patent: it guides the party in seeking out and obtaining evidence to put before the AAT, and in formulating the contentions that are to be relied on. Although tribunals such as the AAT are sometimes referred to as inquisitorial in nature, it is generally the parties who identify and define the issues. Indeed, in *Sullivan v Department of Transport* (1978) 20 ALR 323, Deane J said that ordinarily the AAT "will be best advised to be guided by the parties in identifying the issues" (at 342).

19. In the AAT, the issues will generally be defined by the parties' filing and exchanging statements of issues, facts, and contentions. Once those documents have been exchanged, there may be some tactical advantage to ensuring that the other party is confined to its case as set out in that document.

20. For example, in *Wiegand and Comcare* [2014] AATA 413, the respondent's closing submissions (after hearing) raised certain issues of which the applicant was not put on notice before the hearing. Noting the procedural fairness issues involved, the AAT refused to permit the respondent to raise those issues (at [69]-[71]).[4]

21. Similarly, in *Wuth and Comcare* [2020] AATA 3625, the respondent raised a submission that the applicant's claim for compensation was barred by a particular legislative provision (referred to as s 53). The Tribunal refused to consider the submission, saying (at [110]):

> … The issue of s 53 was not pleaded in Comcare's Statement of Facts, Issues and Contentions, nor adverted to explicitly during the hearing. As such, the opportunity to take evidence on matters relevant to this submission (for example, matters relevant to the considerations in s 53(3)(c)) was lost.

22. See, also, *TRGD and Comcare* [2021] AATA 2949, where both parties unsuccessfully attempted to recast their cases.

23. Another relevant consideration is s 25(4A) of the AAT Act, which states:

> The Tribunal may determine the scope of the review of a decision by limiting the questions of fact, the evidence and the issues that it considers.

24. In some recent NDIS matters, s 25(4A) has been used to limit the review to a consideration of specified supports (thereby formally precluding the applicant from raising other supports): eg, *GMVX and National Disability Insurance Agency* [2022] AATA 80. In appropriate cases, thought should be given to both ensuring that s 25(4A) does not unduly hinder the review and also to whether s 25(4A) can be used for 'protection' (eg, to formally prevent the respondent from contesting an issue previously accepted as favourable to the applicant).

Documents

25. It is a common experience that AAT proceedings in the social security and NDIS jurisdictions can produce voluminous amounts of documentary evidence. Avoiding unnecessary documentation is the gold standard, but an important procedural imperative is that the documentation must be well managed. Generally, that means dealing with electronic documents. Some points to consider:

    (a) When using PDF bundles, make use of appropriate features—bookmarks, links, etc.

    (b) Use an index in conjunction with those features.

    (c) Ensure the PDF is text searchable.

    (d) Consider page numbering—eg, do the PDF file page numbers match the 'printed' pagination?

4 See also *Heffernan v Comcare* [2014] FCAFC 2.

(e) Consider how documentation will be provided for access by witnesses during evidence —eg, if a witness is giving evidence remotely, how will the relevant documents be accessed?

26. Ultimately, the format and management of the documentation must facilitate—not hinder—the hearing. The Tribunal, parties, and witnesses should have an easy and consistent way to reference documentation during the hearing and in written submissions (including with appropriate pin-point references). The presentation of the documentation should also facilitate a clear record of the evidence in the event the matter is taken on appeal. Whatever approach to the documentation is taken, these objectives should be borne in mind.

27. One particular type of document worth giving particular thought is the 'witness statement'. It will commonly be the case that all witnesses, including the applicant, are required to provide a statement of evidence. That statement generally becomes the witness's evidence-in-chief at the hearing and, for applicants, that is sometimes the only 'direct' way in which the Tribunal hears from them. It is therefore a document of considerable importance.

28. When the time comes to prepare a witness statement, the first question might be: is a written statement the best way of presenting the witness's evidence-in-chief? If so, consider:

(a) Should the evidence merely provided by way of a signed statement?

(b) Should a statutory declaration be used?

(c) Who should be involved in preparing the document—solicitor? Counsel?

29. But maybe a written statement is not the best way, or the exclusive way, of presenting a witness's evidence-in-chief. For example:

(a) Should a direction be sought for the witness to give evidence-in-chief orally?

(b) Could the witness's evidence-in-chief be presented by way of an audio or video recording of the evidence?

(c) Could a written statement be supplemented by a video recording of relevant demonstrations?

30. The social security and NDIS jurisdictions can involve applicants from a diverse range of backgrounds and circumstances and (particularly in the latter jurisdiction) with a broad array of disabilities and impairments. It would be worth considering, in an appropriate case, whether there might be benefits in presenting evidence in a manner more 'creative' than a stock-standard written statement.

Referring questions of law to FCA

31. In both the social security and NDIS jurisdictions, difficult or contentious questions of statutory interpretation tend to arise from time-to-time. The social security legislation is particularly voluminous; some aspects of the NDIS legislation are particularly opaque. Is there greater scope to have some of those issues resolved by the Federal Court?

32. Section 45 of the AAT Act allows the Tribunal, with the President's consent, to refer a question of law to the Federal Court. Some considerations:

(a) There are some circumstances where there are existing AAT decisions which have come to conflicting views on questions of statutory interpretation. Instead of arguing in the AAT over which approach is correct, could the question be referred to the Federal Court for authoritative resolution?

(b) When dealing with legislation which gives rise to genuine ambiguity or a truly uncertain point of construction which has broad consequences for the scheme, could that be referred to the Federal Court for resolution?

33. One concern, of course, is costs. In the Federal Court, costs usually follow the event. However, if there are legal questions of the nature outlined above, it might be worthwhile for an applicant to approach the respondent with a view to agreeing that each party bear its own costs of a referral (or appeal) to the Federal Court. In some circumstances, it might even be appropriate to ask the Commonwealth to pay the applicant's costs of such a referral regardless of the outcome.[5]

Matt Black

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5 Either by way of the respondent funding the matter directly or through an approach to the Commonwealth Attorney-General: <https://www.ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance/commonwealth-public-interest-and-test-cases>.