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*ACPNS Legal Case Notes Series: 2019-103 NNXF And National Disability Insurance Agency.*

[Working Paper]

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<http://www.austlii.edu.au/au/cases/cth/AATA/2019/5552.html>

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## NNXF AND NATIONAL DISABILITY INSURANCE AGENCY [2019] AATA 5552

**Administrative Appeals Tribunal of Australia, Justice D G Thomas, S A Forgie, Britten-Jones 23 December 2019**

A Plan Review Request Form was filed with the NDIA from a person receiving support and was not dealt with nearly six months later.

**Key words: NDIS, Federal Court, Delay, As Soon As Reasonably Practicable, Prescribed Period**

1. The question to be decided in this case was in circumstances where the National Disability Insurance Agency (NDIA) has failed to make a reviewable decision within a reasonably practicable period of time, a reviewable decision may be deemed to have been made so that the Tribunal's jurisdiction is enlivened.

2. Section 100(6) NDIS Act provides that:

*The reviewer must, as soon as reasonably practicable, make a decision:*

- (a) *confirming the reviewable decision; or*
- (b) *varying the reviewable decision; or*
- (c) *setting aside the reviewable decision and substituting a new decision.*

3. Section 103 provides that applications may be made to this Tribunal for review of a decision made by a reviewer under s 100(6).

4. Section 25(5) of the *Administrative Appeal Tribunal Act 1975* (Cth) provides:

*Failure of decision maker to meet deadline*

- (5) *For the purposes of an enactment that makes provision in accordance with this section for the making of applications to the Tribunal for review of decisions, a failure by a person to do an act or thing within the period prescribed by that enactment, or by another enactment having effect under that enactment, as the period within which that person is required or permitted to do that act or thing shall be deemed to constitute the making of a decision by that person at the expiration of that period not to do that act or thing.*

5. The NDIA argued that that there was no jurisdiction under s 25(5) because:

- (a) there is no “period prescribed” by the NDIS Act and in particular the words “as soon as reasonably practicable” in s 100(6) do not prescribe a period;
- (b) the wording of s 100(6) obliges a decision-maker to do one of three things, namely to confirm, vary or set aside the reviewable decision and substitute a new decision, whereas s 25(5) assumes a binary decision choice and is therefore not capable of applying to s 100(6); and
- (c) the NDIS Act excludes or impliedly repeals s 25(5).

6. The judge set out a number of principles of statutory interpretation being:

- Where a number of Acts form a scheme of legislation, it is proper to look at all of the Acts comprising that scheme for the purpose of construing the expressions in any one of those Acts.
- The NDIS Act and the AAT Act are beneficial legislation, and the policy behind these statutes is to promote opportunities for persons aggrieved by a decision to have that decision reviewed and to ensure that the correct and preferable decision is made.
- The sections of each Act should be construed harmoniously and justly so as to achieve the purposes outlined in each Act

7. Applying these the tribunal decided that:

- (a) s 100(6) of the NDIS Act expresses a readily ascertainable temporal limitation and prescribes a period for the purposes of s 25(5) of the AAT Act;
- (b) the reviewer failed to make a decision “*as soon as reasonably practicable*” as required by s 100(6) of the NDIS Act;
- (c) as a result of the conclusions reached in (a) and (b) above, a decision pursuant to s 100(6) was deemed by operation of s 25(5) of the AAT Act;
- (d) the terms of the deemed decision are in the letter from the respondent to the applicant dated 28 June 2018; and
- (e) the applicant was entitled pursuant to s 103 of the NDIS Act to bring her application to the Tribunal.

## IMPLICATIONS



There were conflicting authorities from the Tribunal with respect to this issue. Deputy President Bean in Re FJKH and National Disability Insurance Agency [2018] AATA 1294 and Deputy President Humphries in Re Simpson and National Disability Insurance Agency [2018] AATA 1326 found that there was jurisdiction. Deputy President Forgie took an opposing view in Re KRBG and National Disability Insurance Agency.

The matter has now been clarified.

## VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/cth/AATA/2019/5552.html>

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