

SUMMER 5_PODCAST

DG Hi, listeners, and welcome to reasonable and necessary, the only premier podcast series on everything you ever wanted to know, related to the National Disability Insurance Scheme.

I'm your host, Dr George Taripolous, and today, we're talking about the NDIS and transport.

If you want to know how the NDIS can fund your transport needs, please stay tuned.

We will also delve in to recent case law, so we can see what has happened when participants have challenged NDIS transport funding decisions.

With me today is Chris Thwaites, Legal Advocacy Lead at the Summer Foundation.

How are you, Chris?

CT I'm great, George, how are you?

GD I'm pretty well, thank you.

CT G'day, listeners.

DG So today, we're going to talk about NDIS and transport and I understand that's one of your favourite topics.

CT It is, it's complex, it's really started to make the agency think about how the act works, transport pretty well influences or has an impact on lots of people, lots of people have to travel to get to services, it's a pretty standard thing to require about people moving around in the community, so I think it affects a lot of people.

DG And also, I'll admit it's one of those issues that has for a long time been pervaded as something that people should have a right to and for a long time, their disability's had a hell of a lot of issues when it comes to transport, so they're all looking at the NDIS as a way of solving it.

CT Absolutely, and look, in modern society, participation nearly always goes with the ability to travel or move around because that's what participation's about in the community in a lot of cases.

DG Absolutely, okay, so let's start maybe with looking at some of the information that the NDIS provides about how they fund transport and there are a couple of fact sheets that are available, or there's one fact sheet that's available in various formats that people can check out, and it's a pretty straightforward piece of communication and it says that a participant will generally be able to access funding through the NDIS for change for assistance, if the participant cannot use public transport without substantial difficulty due to their disability, what does that mean in terms of substantial difficulty?

- CT Well, that's a case or a case by case basis, but that tends to be the gateway in relation to getting funding, it's about whether you can use transport without substantial difficulty in relation to public transport, so it's about whether you can get on to public transport and get on to trains, get on to buses.
- DG And do you think that idea is something that could be easily proven or could it be in some way a little bit borderline or debated?
- CT Well, there is a bit of a grey area, I suppose, around super stops and being able to get on to some forms of public transport in some areas in relation, more or less opposed to other areas, it's less accessible because of the nature of the environment that's built around the public transport, but a lot of issues around this could easily be supported by some of the speciality reports and you have support in any sort of application to the NDIS or the NDIA, I should say.
- DG And it's interesting because when the NDIS was introduced, it meant that once you receive a plan, your plan is activated, and you will lose the mobility allowance and the mobility allowance has the same requirement, so it says that you must have substantial difficulty to use public transport, so I guess it's partly trying to align the former funding subsidy that was the mobility allowance with what is now a funded support in someone's package.
- CT Yeah, and that links with the no disadvantage text as well, you should be able to move, in theory, seamlessly, through state based funding to the NDIA funding.
- DG Okay, all right, and the second part of the fact sheet said that funding takes in to account any relevant taxi subsidy scheme, it does not cover transport assistance and carers to transport their family member with a disability for everyday commitments, well, that's a bit controversial.
- CT Yeah, I think it is controversial, again, that last part around whether it will, it will not cover transport assistance for carers to transport their family members with a disability for everyday commitments, and that comes back to some of the things that we've talked about before in relation to reasonable and necessary and what everyday commitments are and how that works together, and reasonable and necessary as we talked before has to be directly linked to the disability and the goals in their, in people's plans and not everyday activities and maybe that's it.
- DG And maybe, yes, maybe an example could be that if you have a child, parents generally take their child to swimming lessons, they wouldn't expect the government to pay for that travel, so if you have a disability, parents should in some way have the same responsibilities.
- CT Yeah, and that's what the act and the rules are trying to get at, really, about what's reasonable to expect family supports and community supports to provide and they won't fund the those sort of things that's going to be over and above that, so specifically related to a person's disability.

- DG Yeah, and that is what people need to keep that in mind when they're looking at their own circumstances, so if you're an adult, versus a child, yeah, you would have I guess greater expectations around the transport supports that you could expect.
- CT Yeah, absolutely, and again, it's supposed to be a case by case basis, so we look at your current circumstances and your environment around that, but definitely moving in to adulthood and moving in to independent living has a different sort of aspect to those sorts of things.
- DG Okay, the other thing that people rely on combined with the fact sheet is that there's, the NDIS is effectively defying that three levels of transport support, and these levels range from 1606 double a year to 3456 dollars a year at level three, and the way they sort of differentiated it has been really around whether or not they're in employment.
- CT Yeah, it's an interesting, it's an interesting piece of work, this fact sheet, it does provide three levels or outlines three levels of funding and as you read it, it seems to at the lowest level of funding for people who are not working or studying and attending day programs, but is seeking to enhance their community access, so I assume it's the enhance the community access that attracts the lower level of funding rather than having to travel through your work or study as well.
- DG And I think in that sixteen hundred a year, that's not going to get you very far, is it?
- CT Well, depending on where you live as well, it's not going to get you many trips at all, is it?
- DG Well, if a taxi is fifty dollars to get there, really, but then an Uber's not terribly accessible, yeah, you're not ready to think a lot there.
- CT Yeah, so that's what I find that a number, that one of the things I find odd about this fact sheet is it's not really, it doesn't take in to the nuance of where people might be living and how far they might have to travel in relation to even get to the basics of seeking to enhance community participation and access.
- DG It does look like a very blunt instrument, doesn't it?
- CT It looks like a very blunt instrument.
- DG But the core funding issue, there's a nice little bit at the end that says that there are some participants who will receive higher funding, if either general funded supports in their plan are there enable them to participation in their requirements, so they're really shutting the door to anyone who's not currently in employment and they're saying that that's basically what we're going to get unless you have a job.
- CT Yeah, employment seems to be the big thin in this fact sheet, it seems to be what they attached the type of funding to and even for exceptional circumstances what they attach the type of funding to, it's interesting, some of the previous versions of this fact sheet had a unit on what the exceptional circumstances would go up to, a couple of

years ago, it said it would take a limit up to six thousand dollars, so they seemed to have dropped that for some reason.

DG Okay, well, now that we've sort of looked at what the NDIS has provided and the three levels, let's talk a bit about how these funding applications have been challenged in case law. Now I understand that there's one particular case that you're particularly fascinated by, Chris, and that's the McGarrigle case.

CT Yeah, that's right, George, so the McGarrigle case came down the last year as a single judge of the Federal court, so the background to this case was that Liam McGarrigle who lives around, as far as I remember, about twenty five or thirty kilometres outside Geelong, he was a participant in the NDIS and his first plan paid for the transport costs for him to get to his work and to group programs over the week, his second-

DG And how high was the funding for the first plan? I remember reading it was quite substantial-

CT Substantial, especially in light of that fact sheet that we-

DG Yeah, I think it was around the fourteen thousand.

CT Yeah, eventually, it was, so it started around the ten thousand mark, the second, the second plan was up because of the nature of just increasing transport costs was up around the twelve or thirteen thousand dollar mark and then the final one was up around the fifteen, just over fifteen thousand dollars, so he got full funding for the first two plans for all of his transport costs in relation to that, and then when we came to his third plan, the agency decided while these are the, while these are the costs for the transport that we paid for before, we're only going to pay 50.8% to the initial decision.

DG 50.8, I wonder how that came to the .8.

CT It seems to be a bit of a mystery, no one can quite work out how it got to 50.8, so what happened was, what happened was they asked for an internal review of that decision, and the internal review came back and said that it's not reasonable to ask for his family to pick up that extra amount, so they'll up the amount that they will cover and they ended up covering 75% of the full costs.

DG And that was through the appeals purchase?

CT That was, the appeals, that was an internal review, so their, the initial decision was for the 50.8% and when the internal review upped that to 75% of the total cost.

DG Okay, and they weren't happy with that, were they?

CT They were not happy with that, and you can understand why.

DG When I say, I mean the family.

- CT The family, yep, so you can understand why, in the previous plans, that being fully funded for this, these transport costs and suddenly, in the third plan, it started to get a percentage of it, even though the costs had been going up, so they took the matter to the administrative appeals tribunal, legal aid helped them with that and helped represent them with that, and the administrative appeals tribunal looked at that decision, so that they're now looking at the decision to say, we'll fund 75% of what is acknowledged as total cost, so the tribunal looked at that and they said, no, we think that's about right, 75%, take them in to account the circumstances of the family around Liam, so the tribunal decided that 75% was about right as well.
- DG Okay, so they probably would've felt a bit deflated by that, but they weren't going to be beaten, were they? They went one step further.
- CT They weren't going to be beaten, they took the matter to the Federal Court, again, legal aid was involved in that, in that matter, and that matter was heard in front of Justice Mortimer as the judge of the Federal Court, and in March 2017, she handed down her decision, so interesting decision, it's on the Federal court website, and she basically said-
- DG Can I just say something around that? I remember when that case was first announced, and there was so much excitement in the advocacy role because that was a really, not the word, if I could use it, it was pretty brave to take it all the way to the behind court, sorry, the Federal Court, it entered the outcome saying to the NDIS that they were wrong.
- CT Yep.
- DG Yeah, it was pretty exciting amongst the advocates.
- CT Absolutely, and it shows the efficacy of going through the appeals process, but you also got to recognise that that's hard work, you're pushing it all the way up, so good on the people who really pushed this as far as they could up there to get the right sort of decision, but that's how the appeals process worked and in this regard, the McGarrigles got the decision that they wanted which was great because it's set a precedent on how transport should be approached, the issue of transport should be approached.
- DG Yeah, and this sort of, and we'll talk a bit about the details of the decision by Mortimer, but this would have really freak out the NDIA, do you think, in terms of saying to them, hang on a minute?
- CT Yeah, I think around transport and the costs of transport, people always start to think about what the cover costs are going to build up and how it's going to be afforded and how the NDIA budget's going to be effected by a transport decision that's across the board for people because they're not an insubstantial start for sums, so I think there's always that sort of concern about how these costs are going to be covered or whether that's going to blow the budget out.

CG Yeah, that's right, so let's talk a bit about the decision, we'll get a bit legalistic now and give us the ups of what the decision made says for people with respect to their funding.

CT My favourite thing is getting legalistic, George.

DG I know it is, you're very excited.

CT I get very excited about these sorts of things, but basically, the decision looks at how you read the apps, specifically, one of my favourite sections of the app which we talked about before which is Section 34 and how that, how that's approached, especially when you're looking at transport, so it talks about how you approach decision making around what is reasonable and necessary, and whether you look and it's a good decision because there are good arguments on both sides about whether you one, look at what is reasonable and necessary and how that should be funded, or whether you look at something being reasonable and necessary without taking in to account the funding capacity of that, those people and whether that should be a percentage in relation to the funding that's provided for reasonable and necessary support, so that sounds a bit complicated, but basically, it's about how the section is drafted and it talks about funded supports, so Justice Mortimer looked at the wording section and said, well, you have to have a look at all those things that we've talked about before in relation to Section 34 about what is a reasonable and necessary support, but once you come to the conclusion that it's a reasonable and necessary support, then that's your job done, that's what's done and that's what need to be funded because the top of the section's funded, just get on with it.

DG Yeah.

CT The department in its arguments said, no, because part of the consideration of reasonable and necessary is what parents and the community can provide, so you've got to take that in to consideration and that's how you can say, it's a reasonable and necessary support, but the community or the family can provide some of that, so you won't be fully funded.

DG So you've got two opposing arguments, and in this case, it may be in favour of the McGarrigle family, can you just maybe help us understand how you think that went in their direction as opposed to the reasonable and necessary argument deployed by, because there are, and in some way, I can see that both arguments do have merit in terms of saying that the family can be seen as having some capacity, but how old is he? I think he's, yeah, I do see it, so I don't know, but I think that for an ordinary family, would he be not necessarily accepted that Mum and Dad would drive around their twenty something adult son and then it would be entirely appropriate for them to say, hang on, that's not our responsibility any more.

CT Yeah, that's true and some of the arguments that were run extrapolated that, saying, well, if you can say a support is a reasonable and necessary support, but qualify that

by saying, but somebody else has to pay for part of that support, then in a way, you're introducing a means test by the back door, we all know that the NDIS or the NDIA is means tested, but if you're saying, well, you can get these supports from somebody has to be able to afford to pay for some of them, then it is a way of introducing their sort of means tested.

DG Yes, and I read that in the case, that it said that we need to not think about what the family can afford because the whole idea is that it's not about putting the cost on them, but for the family.

CT And that really, if you extrapolate that and this is what the judge thought about it, if you extrapolate going down that way of making these decisions, you expose a participant to vagaries of what their family might decide they want to do for them, so they might miss out on the support all together if the family just decides, well, we're not going to participate, we're not going to put in funding for this or we're not going to drive you anywhere, so they might miss out on the support entirely, depending on what the family's approach to it is, and I think that was also one of the things that helped drive the other argument, that it shouldn't be at the capacity or the whimsy of other types of support in order to get these supports that are already being deemed to be reasonable and necessary.

DG Okay, so if I'm decided that the family has a disability, can they then think about what the, what are the consequences of the **effic**? What does this say for other people who aren't with me who might think that they didn't get all the funding that they were entitled to? Does, I'm sure there are some implications here.

CT Yeah, well, just to follow up, the department appeal and that appeal went to the full court of the Federal court which is three judges and they heard that in August this year, and dismissed the appeal and sent it back to the AAT, so they have indicated that they think the decision was correct as to law, so the McGarrigle matter is now back at the AAT and the appeals court has suggested that it should be heard by a three member panel of the AAT including the president, so that decision is still at the AAT.

DG That's really interesting, so does that mean that the, that they've won again in terms of the family?

CT Yeah, generally speaking, so the appeal grounds that were put to the full Federal court were dismissed, so the full Federal court said, no, you don't have the, we don't think that these appeal grounds are going to be successful, so we're not going to hear the appeal, and the matter goes back to the AAT to decide as to law because the current decision made by a member, there were two decisions made by the agency, one was funded by another 50.8% amount and then they did the 75% on internal review. Now that decision is again in front of the AAT with the Federal court's decision, just a normal decision, Justice Mortimer's decision saying, no, this is the way you have to do it, so you can need to have another look at that and do it that way.

- DG But why didn't the full bench of the Federal court just uphold the end and the matters? It feels like we're in a circle of heaven, but just an agency hell, really, it feels like it's not really working if it's now going back to the head of the AAT.
- CT Well, it might sound like it's not really working, but that's the nature of the appeals process, that's how they do it, so the Federal Court will say, this is what the law is and this is how it should be applied, they will rarely then say, this is what the decision is, they will say, the decision maker underneath us either got the law wrong or they applied it wrong, you've got to go back and do it properly.
- DG Wow, and then what?
- CT So then there'll be a decision at the AAT, so I haven't been able to find out when that will be, but this matter is now back at the AAT and there'll be a decision made of the AAT and whether the McGarrigles get the decision they want or they don't, then they get an option to pursue that through that.
- DG And when does it go to the High Court?
- CT Well, that's, the High Court's at the top of that tree, so there's the, let's start from the agency, there's the original decision and the agency, and then there's the review, the internal review of the agency, and then there's the AAT, and then there's the Federal Court, usually, a single judge of the Federal Court, then there's the full Federal Court which is a number of judges sitting on it and then there's the High Court, so there's a whole raft of levels.
- DG And why didn't it go from the, from the Federal Court to the High Court?
- CT Well, because the party that appealed which was the agency was the appeal grounds, we're not going to entertain your appeal grounds back, so they're now back at the AAT, so I know that sounds like lawyer Heaven, it doesn't get us very far in relation to people on the ground in getting decisions made, but you, the agency will be taking notice of Justice Mortimer's decision, the agency will be looking at the decision for reasons in saying, okay, well, this is the way we have to apply.
- DG Can we just step back then because that's a pretty long process that the family has gone through, do you think that there'd be a lot of people who simply will think, wow, that's just, that's too much for me? So it feels like the NDIA has won because there's still all this work that's gone in to it and yet there's still no outcome for the person and the family.
- CT Yeah, look, there, there's no getting away from how exhausting the appeals processes can be, but these headline cases, so this is a relatively new act or a new agency and how they're supposed to apply the law, so these headline cases, these new cases that are really setting down what the courts are saying and what the law is and how it should be applied are the ones that are going to take some time to figure out through, but once they've set, once the appeal process is settled and the law is settled, then how

that is applied goes back to the agency and they will start applying the law as it's been set out by the way the court said it should be set out, so while the McGarrigle family is going through this and all power to them, really, it will help everybody else who's coming behind them in relation to the decisions that they get.

DG So I guess the message is it's a lot of work, that we're in the early, very early stages of the scheme, in general, continue a couple of hundred years or it's robots who do all this rather than vehicles and all that sort of stuff, so it's important and if you think something's not fair or something's not in accordance with the NDIS act, you need to speak out and appeal it.

CT Yeah, absolutely, so if people look at that fact sheet that we were talking about at the start which has three different levels of it and that works for you and if that's the decision you get, great, but if it's not, and if you think there's something that you should be receiving more, then you've got, you've got options to ask for that decision to be previewed.

DG And it might be a long fight, but it's worth having because it will set the foundations for the people who will follow.

CT Absolutely.

DG Thanks, Chris, that's been really helpful.

CT Thanks, George, I know it was a long way around, but here are some really interesting things happening in this area, so keep an eye on it.

DG Okay.

CT Thanks, mate.

DG And that's all we have time for on today's podcast of reasonable and necessary, brought to you by the Summer Foundation.

Follow us on Facebook at building better lives.

You'll be able to access a transcript there, and also keep up to date with our latest info on the NDIS.

Well, sadly, this is our final podcast in this series.

However, keep your eyes on our Facebook page for series two coming to you shortly.

I'm Dr. George, until next time, stay well and reasonable.

END OF TRANSCRIPT