

A Proposal for NDIS Administrative Reform: Adopting the ATO Model for Fairness, Certainty, and Transparency

1. Executive Summary

This submission is made by Dale Reardon. I am a 55-year-old NDIS participant from Cairns, Queensland, who is blind and uses my fifth guide dog, Cookie, and also live with a psycho-social disability.[1] My professional background includes years of experience as a Barrister and Solicitor, and as a legal and compliance officer at the Australian Taxation Office (ATO), giving me a unique insight into the robust administrative frameworks that underpin a fair public finance system.[1] My advocacy work is extensive; I was a founding member of the NDIS Independent Advisory Council (IAC) for seven years, gaining deep knowledge of the NDIA's internal processes and the scheme's many challenges.[1] I have also served as a board member for Royal Guide Dogs Tasmania and as the founding President of Blind Citizens Australia (Tasmanian Branch).[1]

My NDIS journey has been a battle. I have lived in both Tasmania and Cairns, experiencing the unique issues of regional and remote service delivery.[1] I have navigated the entire system, from internal reviews to the AAT and the independent external review process, fighting for vital supports that were eventually approved.[1] I have experienced the immense stress caused by inconsistent decisions and the absurd requirement to re-prove my blindness after decades of being legally blind.[1] It is this combination of lived experience and professional expertise that compels me to propose a better way forward. I am now an entrepreneur, currently running Tourism Success (<https://TourismSuccess.com>) and ThermoJo (<https://ThermoJo.com>), and have founded multiple award-winning social enterprises like My Disability Matters and Travel For All.[1] My LinkedIn profile is available at <https://www.linkedin.com/in/dalereardon/>. [1]

The National Disability Insurance Scheme (NDIS) is one of Australia's most significant

social reforms. However, its administration by the National Disability Insurance Agency (NDIA) currently lacks the mature legal and administrative frameworks necessary to ensure consistent, fair, and transparent decision-making. Participants face significant uncertainty on fundamental issues, including the interpretation of the *NDIS Act* and Rules, what constitutes a fundable "NDIS support," and how "reasonable and necessary" criteria are applied. This leads to inconsistent outcomes, a high volume of disputes, and an erosion of trust. In the 2022-23 financial year alone, **4,271 applications for review of NDIA decisions were lodged with the AAT.**^[2]

This paper proposes that the NDIA adopt a system of public guidance and private advice modelled on the robust, "battle-tested" framework used by the Australian Taxation Office (ATO). The ATO's system of public rulings, private binding rulings, and transparent processes for managing legal interpretation and litigation has been instrumental in providing certainty and fairness in a highly complex area of public administration.

Key Recommendations:

- **Create Certainty and Consistency** by establishing a two-tiered system of legally binding **NDIA Public Guidance Notes** (for broad, complex issues) and **NDIA Public Guidance Determinations** (for specific, narrow issues).
- **Empower Participants** by creating a system of **NDIA Participant Binding Advice**, allowing individuals to get a binding decision on a support *before* they spend their funds, with full appeal rights.
- **Embed Genuine Co-Design** by establishing a **Public Guidance and Co-Design Committee** with mandated representation from the disability community to approve all public guidance.
- **Build Institutional Trust and Transparency** by professionalising litigation management, creating a **Public Settlement Register** to end "secret settlements," and establishing an **NDIS Test Case Funding Program**.
- **Legislate Fairness** by amending the *NDIS Act* to include a **statutory minimum notice period** of 60 days before any adverse rule change can take effect.

Implementing this framework is a sound economic investment. It will address the root causes of the thousands of disputes that cost the scheme millions annually in legal and administrative fees, improve participant mental health by reducing system-induced stress, and ultimately restore the NDIS to its original promise of choice and control.^[3, 4]

2. The Core Problem: Pervasive Uncertainty and Inconsistency in the NDIS

The NDIS, in its current state, operates with a significant degree of administrative uncertainty. While the *NDIS Act 2013* and associated Rules provide the legislative foundation, the interpretation and application of key legal concepts are inconsistent and opaque. This uncertainty extends beyond the "reasonable and necessary" test to fundamental disputes over the interpretation of the NDIS Rules, Regulations, and the Act itself, including what constitutes a fundable "NDIS support".[5]

Participants are often reliant on the variable interpretations of individual NDIA staff or Local Area Coordinators. Internal NDIA operational guidelines, which heavily influence decisions, are not developed through public consultation and are not easily accessible or challengeable.[6, 7] The NDIA's own performance data shows it meets its 60-day timeframe for internal reviews in only **49% of cases**, leaving participants in prolonged states of uncertainty.

2.1. Inconsistency and the "NDIS Lottery"

The impact of this uncertainty extends beyond administrative inconvenience to life-altering consequences. Consider these real-world examples of inconsistencies that create a "lottery" system where a participant's outcome depends more on which staff member reviews their case than on their actual needs:

- **Guide Dog Support Inconsistency:** Some participants receive funding for guide dog veterinary care, grooming, and insurance, while others with identical circumstances are refused, forcing them to choose between their independence and financial security.
- **Therapy Funding Variations:** A participant in one state may receive funding for music or art therapy from a qualified therapist to achieve their goals, while a participant in another state with the same disability and goals is told it's "not evidence-based," despite both having identical therapeutic recommendations.[1]

- **Technology Support Disparities:** Smart home technology that enables independence for one participant may be deemed "not disability-related" for another, despite serving identical functional purposes and offering significant value for money by reducing the need for support workers.[1, 1]

These inconsistencies breach the fundamental principle of equality before the law and create a system that is unpredictable and profoundly unfair for participants.

3. The Solution: The ATO's Battle-Tested Framework for Public Administration

The ATO administers Australia's complex taxation system, another massive public finance scheme that relies on the public to "self-assess" their obligations. To make this system workable and fair, the ATO has developed a sophisticated, legally-grounded framework for providing public guidance and binding advice. This framework, developed over decades and tested in the courts, offers a powerful model for the NDIA.

3.1. Public Rulings and Determinations: A Two-Tiered System for Public Certainty

The ATO provides clarity and consistency by issuing different types of legally binding public advice. This two-tiered system allows it to address both broad, complex issues and narrow, specific questions.

- **Taxation Rulings (TRs):** These are comprehensive documents that provide the ATO's interpretation on **broad and often complex areas of the law**. A Ruling will typically look at multiple interacting provisions and provide a detailed, principle-based explanation. Think of it as a detailed chapter in an instruction manual.
 - **ATO Example:** A Taxation Ruling might cover the entire topic of "deductibility of self-education expenses," explaining all the different criteria and how it interacts with other parts of the tax act.
- **Taxation Determinations (TDs):** These are much shorter, more focused rulings that clarify the ATO's view on a **single, specific point of law**. They are often

issued to provide a quick, clear answer to a common question or to clarify the ATO's position following a specific court case. Think of a Determination as a specific, high-priority FAQ with legal weight.

- **ATO Example:** A Taxation Determination might answer a very specific question like, "What is the value of goods taken from stock for private use by a business owner?".[8]

Crucially, both are developed through a formal, public consultation process, including the release of draft versions for comment, ensuring the final interpretation is robust and practical.

3.2. Private Binding Rulings (PBRs): Certainty for Individuals

For situations not covered by public guidance, an individual can apply for a **Private Binding Ruling (PBR)**.

- **Purpose:** A PBR provides a legally binding answer on how the law applies to a specific, personal situation.
- **Binding Nature & Protection:** The ruling is legally binding on the ATO for that applicant and their situation. This gives the individual complete certainty before they act.
- **Fairness and Review Rights:** If a taxpayer disagrees with a PBR, they have the right to object and appeal the decision to the ART and the courts.
- **Transparency:** Edited, de-identified versions of PBRs are published in a public register, enhancing transparency and providing guidance to others.

4. A Proposed NDIA Public Guidance and Certainty Framework

The NDIA can and should adopt a parallel framework to bring much-needed fairness, consistency, and transparency to the scheme.

Proposed NDIA Framework

ATO Model Component	Proposed NDIA Equivalent	Purpose and Function in the NDIS Context
Taxation Rulings (TRs)	NDIA Public Guidance Notes (PGNs)	Legally binding public statements on the NDIA's interpretation of significant or complex areas of the <i>NDIS</i> Act and Rules. Examples: "The application of 'reasonable and necessary' criteria to self-employment supports"; "The interface between NDIS and Health for psychosocial disability".
Taxation Determinations (TDs)	NDIA Public Guidance Determinations (PGDs)	Legally binding, shorter public statements clarifying the NDIA's position on a single, specific point of law or rule. Examples: "Is vet insurance for an accredited guide dog a fundable support?"; "Are the labour costs for essential pool maintenance fundable under 'yard maintenance'?"
Private Binding Rulings (PBRs)	NDIA Participant Binding Advice (PBAs)	A formal process where a participant can apply for a legally binding decision on whether a specific support (or package of supports) is fundable for them. The NDIA's decision would be binding, providing certainty before funds are spent. Unfavourable decisions would carry full appeal rights to the ART.
Public Register of PBRs	Public Register of NDIA Decisions	A public, de-identified register of all PBA decisions, including all decisions made in

		relation to Replacement Supports . This would build a body of precedent, increase transparency, and help other participants understand the application of the rules.
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5. Embedding Genuine Co-Design in Rule-Making

A key failing of the NDIA and DSS has been the lack of genuine co-design.[9, 10, 11] To build trust and create workable rules, the disability community must be embedded in the decision-making process, not just consulted as an afterthought.

5.1. The Tiers of "Consultation"

It is crucial to distinguish between tokenistic engagement and genuine co-design. Arnstein's Ladder of Participation provides a useful model for this:

- **Non-Participation (Manipulation/Therapy):** Where the goal is to "educate" participants into accepting a pre-determined decision. This is often seen in "information sessions" disguised as consultation.
- **Tokenism (Informing/Consultation/Placation):** Where participants are heard, but their views have no real power. This includes discussion papers where the key decisions have already been made, or advisory panels with no decision-making authority.
- **Citizen Power (Partnership/Delegated Power/Citizen Control):** Where power is genuinely shared, and participants are involved in negotiating and making final decisions.

The NDIS has too often operated on the lower rungs of this ladder. A truly co-designed system must operate at the level of **Partnership** and **Delegated Power**.

5.2. A Co-Design Model for the NDIA

The ATO's model provides a template. The ATO's **Public Advice and Guidance Panel** includes external members from the legal and accounting professions and industry bodies to test and challenge the ATO's proposed interpretations.

Proposal: The NDIA must establish a **Public Guidance and Co-Design Committee** to approve all PGNs and PGDs.

5.2.1. Mandatory Disability Community Representation Requirements

The Co-Design Committee must include:

- A minimum of **40% representation** from Disabled People's Organisations (DPOs) and NDIS participants.
- Mandatory inclusion of representatives from:
 - People with intellectual disability (with appropriate support).
 - Culturally and Linguistically Diverse (CALD) communities.
 - Aboriginal and Torres Strait Islander peoples with disability.
 - Rural and remote participants.
 - Young people with disability (18-25 years).
 - Parents and carers of children with disability.

5.2.2. Decision-Making Authority

The Committee must have genuine decision-making power, not merely advisory functions. No Public Guidance Note or Determination can be published without majority approval from the Committee, including majority support from participant/DPO representatives.

5.2.3. Ending Secret Consultations

A deeply problematic practice has been the use of confidentiality clauses or NDAs to silence disability organisations during consultation. This prevents representatives from consulting their own communities and is an abuse of power. The enabling legislation for the Co-Design Committee must explicitly prohibit the use of such clauses, ensuring all consultation is open and transparent.

6. A New Approach to Dispute and Litigation Management

A transparent administrative system requires a professional and accountable approach to managing disputes. The NDIA's current approach often appears ad-hoc and adversarial, whereas the ATO has developed mature systems to ensure fairness and public accountability.

6.1. Professionalising Litigation Management

From my personal experience and that of many others, it appears that NDIA decisions at the ART are often managed by a single case officer, which can lead to decisions being influenced by individual interpretation or potential bias. In contrast, the ATO manages litigation through a team-based approach involving legal, technical, and policy experts who assess cases against the agency's established public positions.

Proposal: The NDIA should establish a formal, team-based litigation management model for all ART matters. This would ensure that decisions to defend, concede, or settle cases are made by a panel of experts, based on the facts and the NDIA's own public guidance, thereby reducing the impact of individual bias and promoting consistency.

6.2. Ending "Secret Settlements": A Public Settlement Register

A significant issue that erodes trust is the NDIA's practice of settling strong cases at the ART with confidential terms. This prevents the creation of precedent and forces other participants to re-litigate the exact same issues, which is an inefficient use of public funds and deeply unfair.

The ATO, in contrast, operates under a public **Code of Settlement** and has processes for ensuring the integrity of settlements, including an Independent Assurance program for large cases.

Proposal: The NDIA should be required to establish and maintain a **Public Settlement Register**. All settlement agreements reached in ART matters must be published in a de-identified format, outlining the issue in dispute and the terms of the resolution. This transparency would ensure the NDIA is accountable for its decisions, acts consistently, and cannot settle cases merely to avoid creating a useful precedent for other participants.

6.3. Clarifying the Law for Everyone: A Test Case Funding Program

Uncertainty in the law creates disputes. The ATO acknowledges that it is in the public interest to clarify uncertain areas of law and runs a **Test Case Litigation Program** to provide financial assistance to taxpayers to run important court cases that will establish a clear precedent for the benefit of the community.

Proposal: The NDIA should establish an **NDIS Test Case Funding Program**, modelled on the ATO's program. This would provide funding for participants to pursue appeals on significant or uncertain points of law in the Federal Court.

7. Legislating Fairness: A Minimum Notice Period for Changes

Sudden changes to rules and interpretations can have a devastating impact on the lives of participants and their families, leaving them without essential supports and no time to make alternative arrangements.

Proposal: The *NDIS Act* should be amended to include a **statutory minimum notice period**, for example 60 days, before any change to the NDIS Rules or a Public Guidance Note/Determination can take effect if that change would negatively impact a participant's existing supports or eligibility. This is a standard principle of fairness in other areas of Australian law, such as employment and tenancy law, where notice periods are mandated to allow people time to adjust to significant changes.

8. The Long-Term Benefits: Why Transparency is Value for Money

The NDIA may argue that implementing such a comprehensive framework would be too costly. However, this view is short-sighted. Decades of research into public administration and tax systems show that transparency and certainty are not expenses, but investments that yield significant long-term returns.

- **Increased Public Trust and Voluntary Compliance:** When participants and providers understand the rules and see them applied fairly and consistently, trust in the administrator grows. Research shows a direct link between trust in an authority and the willingness of individuals to comply voluntarily. In the NDIS context, this means more accurate claiming and less administrative churn.
- **Reduced Disputes and Litigation Costs:** The primary driver of appeals to the ART is uncertainty. In 2022-23, there were **4,271 NDIS matters lodged with the AAT**.^[2] The NDIA's own Independent Expert Review program found the average cost of an AAT hearing was nearly **\$30,000**.^[12] By providing clear, binding public guidance and a mechanism for private binding advice, the number of disputes would drastically decrease, saving millions of dollars annually.
- **Greater Administrative Efficiency:** A clear framework makes decision-making simpler and faster for NDIA staff. It reduces the need for repeated internal consultations and escalations, freeing up resources and improving the timeliness of decisions for participants. The NDIA's performance against its own service guarantee for internal reviews is poor, meeting the 60-day timeframe in only **49% of cases** in the March 2025 quarter.^[13] A clearer framework would improve this performance significantly.

9. Implementation Roadmap: A Practical Pathway to Reform

This reform can be implemented in a structured, phased approach:

- **Phase 1 (Months 1-6): Legislative Framework**
 - Draft amendments to the *NDIS Act* requiring the binding guidance system, the Co-Design Committee, the Public Settlement Register, the Test Case Funding Program, and the statutory notice period.
 - Establish the Co-Design Committee with mandated representation.
 - Develop and publish consultation protocols prohibiting confidentiality clauses.
- **Phase 2 (Months 7-12): System Design**
 - The Co-Design Committee develops the first tranche of Public Guidance Notes on highest-priority issues (e.g., meal preparation, assistance animal costs).
 - Establish the Participant Binding Advice application process and IT infrastructure.
 - Train NDIA staff in the new framework and the principles of co-design.
- **Phase 3 (Months 13-18): Pilot and Refinement**
 - Launch a pilot program for Participant Binding Advice with volunteer participants.
 - Publish the first Public Guidance Notes and Determinations after public consultation.
 - Establish and begin populating the Public Settlement Register.
- **Phase 4 (Months 19-24): Full Implementation**
 - Complete rollout of all framework components across NDIS operations.
 - Conduct a formal evaluation of outcomes and refine processes based on feedback.
 - Develop a forward work program for the next tranche of guidance materials.

10. Addressing Implementation Concerns

- **Concern: "This will slow down decision-making."**
 - **Response:** While initial setup requires investment, the long-term outcome is

faster and more efficient decision-making. The ATO processes millions of returns annually under this model. Current NDIS delays are caused by uncertainty, inconsistent decisions, and the resulting high volume of reviews and appeals. The proposed model eliminates these bottlenecks at their source.

- **Concern: "Participants won't understand complex legal documents."**
 - **Response:** The ATO successfully provides guidance in multiple formats: technical rulings for professionals and simplified guides for individuals.[14] The NDIA can and should adopt the same tiered approach, producing PGNs and PGDs in plain English, Easy Read, and other accessible formats, co-designed with the community to ensure they are clear and useful.
- **Concern: "This limits NDIA flexibility."**
 - **Response:** This framework provides certainty within a flexible system, not rigid constraints. The NDIA retains the ability to adapt guidance as the law and circumstances change. The key difference is that any changes must be made transparently and in genuine consultation with the disability community, rather than through opaque internal policy shifts.

11. Conclusion: Building a Fairer, More Transparent NDIS

The current administrative approach of the NDIA, characterized by opaque internal guidelines and inconsistent decision-making, is failing participants and undermining the integrity of the NDIS. It creates an adversarial environment where participants must fight for supports that should be readily available under the law.

Adopting a framework modelled on the ATO's system of public guidance and binding advice is not a radical proposal; it is a common-sense application of best-practice public administration. Such a system has been proven to work for over a century in an equally complex and high-stakes environment.

By implementing **NDIA Public Guidance Notes and Determinations, Participant Binding Advice**, a **Public Settlement Register**, a **Test Case Funding Program**, and embedding **genuine co-design** at the heart of decision-making, the government can:

- **Empower participants** with the certainty they need to exercise genuine choice and control.

- **Drastically reduce disputes** and the associated costs to both participants and the taxpayer.
- **Embed genuine co-design** and consultation into the fabric of the scheme's administration.
- **Build trust and confidence** in the NDIA as a fair and transparent administrator.

This is a tangible, achievable reform that would address the root cause of many of the scheme's current failings and help restore the promise of the NDIS for all Australians with a disability.

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