THE NDIS TRANSFORMATION FROM DISCRETION TO RULES: LEGISLATIVE REBUTTAL AND ADMINISTRATIVE JUSTICE

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Australia's National Disability Insurance Scheme ('NDIS') offers a compelling case study of the tension between discretion and rules. This article argues that the 2024 NDIS reforms represent a 'legislative rebuttal': a systematic hardening of discretionary soft law into binding rules to blunt the application of principles established by judicial and merits review. This shift creates two competing consequences: programmatic invisibility, a legally mandated structural blindness to the holistic needs of participants; and a paradox of legibility, where the precision of the new rules creates targets for legal challenge. Reflecting on the long shadow of the Robodebt Royal Commission, the article concludes that the NDIS reforms reveal a subtle but potent pathology of executive power: not illegal defiance of administrative law, but its lawful circumvention by recasting accountability from substantive fairness to procedural compliance.

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I INTRODUCTION

In 2024, a comprehensive legislative overhaul fundamentally recast Australia's National Disability Insurance Scheme ('NDIS'), replacing the scheme's original discretionary, principles-based architecture with a prescriptive, rules-based framework. This article argues that these reforms exemplify what I term 'legislative rebuttal': the strategic conversion of flexible standards and soft-law guidance into binding legal instruments to reverse, and largely foreclose, the interpretive space courts and tribunals had used to protect individualised justice.[1] In plainer terms, the reforms moved decision-making from judgement within standards to classification under lists. The change is lawful, system-wide, and designed to endure. This transformation matters because it reveals how modern welfare states can lawfully circumvent accountability mechanisms when judicial oversight proves too effective at protecting citizen rights. Unlike the outright illegality of the Robodebt scheme,[2] which collapsed under judicial scrutiny, the NDIS reforms demonstrate a more sophisticated and potentially more enduring approach: achieving similar ends through legitimate legislative means. This makes the NDIS reforms a template for recalibrating the balance between executive efficiency and individual rights within the bounds of legality.[3]

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[1] On the operation of soft law in National Disability Insurance Scheme ('NDIS') administration prior to the reforms, see Terry Carney et al, 'National Disability Insurance Scheme Plan Decision-Making: Or When Tailor-Made Case Planning Met Taylorism & the Algorithms?' (2019) 42(3) *Melbourne University Law Review* 780, 786–7, documenting how National Disability Insurance Agency ('NDIA') Operational Guidelines directed assessments despite their non-binding status. On the separation of powers in the Australian administrative law context and legislative responses to judicial decisions, see, eg, John McMillan, 'Re-Thinking the Separation of Powers' (2010) 38(3) *Federal Law Review* 423.

[2] *Royal Commission into the Robodebt Scheme* (Final Report, July 2023) vol 1, xxix: 'Robodebt was a crude and cruel mechanism, neither fair nor legal, and it made many people feel like criminals. ... It was a costly failure of public administration, in both human and economic terms.'

[3] This article focuses on what is lost through the legislative rebuttal, but this should not diminish recognition of what might be gained. The reforms potentially benefit participants whose needs align with standardised categories, those lacking advocacy resources, and future participants who require a sustainable scheme. A complete evaluation would require longitudinal data not yet available. This article's critical perspective reflects concern that the mechanisms chosen to

The transformation of the NDIS sits in a longer Australian trajectory. Earlier disability programmes, including the Disability Support Pension and Carer Payment, experienced similar shifts toward prescriptive rules during the 1980s and 1990s, driven by concerns about expenditure growth.[4] This was not an isolated tuning of eligibility; it marked a structural re-imagination of disability benefits from open-textured judgement to quantified impairment scoring.[5] The NDIS reforms extend this pattern beyond income security payments to comprehensively case-managed disability services, representing a decisive policy choice to prioritise actuarial certainty over contextual judgement across the entire disability support landscape. Systemic design flaws compounded the fiscal imperative for reform: the original scheme's expansive discretionary language created what the 2023 Independent Review described as an 'unbalanced' system that had become the 'only lifeboat' as state-level foundational supports were allowed to deteriorate.[6] In this context, some form of intervention was politically and fiscally inevitable.[7] Furthermore, the similarities between these NDIS reforms and the progressive constraint of discretion in Australian migration law are striking.[8] As Stephen Gageler documented long before he became Australia's Chief Justice, migration law underwent decades of codification designed to limit judicial creativity, replacing discretionary decision-making with prescriptive rules.[9] More recent scholarship by Grant Hooper has examined how this 'codification on steroids' created new sites of contestation through the very precision it introduced.[10] The NDIS reforms follow a parallel trajectory, though in a different substantive domain, raising fundamental questions about the evolving

achieve legitimate goals may produce unintended consequences that ultimately undermine those very goals.

[4] See the comprehensive history provided in Terry Carney, 'Vulnerability: False Hope for Vulnerable Social Security Clients?' (2018) 41(3) *University of New South Wales Law Journal* 783, 793–800. I am grateful to the anonymous reviewer for making this insightful and important point.

[5] See discussion of the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 1997* (Cth) and subsequent iterations in Terry Carney, 'Disability Support Pension: Towards Workforce Opportunities or Social Control?' (1991) 14(2) *University of New South Wales Law Journal* 220; Carney, 'Vulnerability: False Hope for Vulnerable Social Security Clients?' (n 4).

[6] *Working Together to Deliver the NDIS: Independent Review into the National Disability Insurance Scheme* (Final Report, Commonwealth of Australia, Department of the Prime Minister and Cabinet, October 2023) 243–9 ('*Independent Review*').

[7] Ibid 295.

[8] I am grateful to the anonymous reviewer for drawing this critical connection.

[9] Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17(2) *Australian Journal of Administrative Law* 92, 96–8.

[10] Grant Robert Hooper, 'Three Decades of Tension: From the Codification of Migration Decision-Making to an Overarching Framework for Judicial Review' (2020) 48(3) *Federal Law Review* 401, 403.

relationship between legislative prescription, executive administration, and judicial oversight in the modern Australian administrative state. Put simply, the NDIS reforms follow a well-worn path in Australian welfare and migration law: codification constrains holistic discretion but creates new justiciable margins, shifting contest from contextual judgement to boundary-policing.

The pre-reform NDIS architecture embodied deep tensions.[11] Its broad 'reasonable and necessary' standard created vast discretionary space that generated both inconsistency and opportunity for judicial creativity.[12] When the National Disability Insurance Agency ('NDIA') failed to operationalise this discretion fairly and consistently,[13] courts and tribunals responded by developing what I term the 'NDIS review jurisprudence': a coherent body of principles emphasising individualised assessment, holistic support, and collaborative decision-making.[14] Yet this judicially-crafted framework, while protecting individual rights, exacerbated the very problems — rising costs, administrative complexity, and perceived inequity — that ultimately triggered legislative intervention. The 2024 amendments represent a systematic reversal of these judicial principles through three mechanisms: (1) transforming administrative guidelines into binding legislative instruments; (2) creating categorical exclusions that replace factual inquiry with classification; and (3) mandating fragmented assessment through an 'accepted impairment' gateway that fragments the person into discrete, governable categories.[15] These mechanisms share a common logic: eliminating the interpretive space where judicial creativity operated by hardening soft law into prescriptive rules.

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[11] Allan Ardill and Brett Jenkins, 'Navigating the Australian National Disability Insurance Scheme: A Scheme of Big Ideas and Big Challenges' (2020) 28(1) *Journal of Law and Medicine* 145, 147–8; Sue Olney and Helen Dickinson, 'Australia's New National Disability Insurance Scheme: Implications for Policy and Practice' (2019) 2(3) *Policy Design and Practice* 275, 277.

[12] *National Disability Insurance Scheme Act 2013* (Cth) s 34. See also Alyssa Venning et al, 'Adjudicating Reasonable and Necessary Funded Supports in the National Disability Insurance Scheme: A Critical Review of the Values and Priorities Indicated in the Decisions of the Administrative Appeals Tribunal' (2021) 80(1) *Australian Journal of Public Administration* 97, 98.

[13] *Independent Review* (n 6) 32.

[14] The term 'NDIS review jurisprudence' is used in this article to refer to the coherent body of principles developed by the Administrative Appeals Tribunal and the Federal Court in interpreting the *National Disability Insurance Scheme Act 2013* (Cth) ('NDIS Act'), particularly the 'reasonable and necessary' criteria in s 34. It is 'jurisprudence' in the *functional* sense of being a series of published decisions that create a principled gloss on the statutory scheme.

[15] See overview of reforms provided at 'Summary of Legislation Changes', *NDIS* (Web Page, 18 September 2025) <https://ndis.gov.au/changes-ndis-legislation/summary-legislation-changes>. The principal amendments relevant to this paper are contained in the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No 1) Act 2024* (Cth) ('NDIS Amendment Act').

This transformation generates two profound consequences. First, it creates what I term 'programmatic invisibility': a legally mandated inability to perceive participants' holistic needs, forcing decision-makers to view complex human experiences through rigid categorical boundaries. Drawing on James C Scott's analysis of state 'legibility',[16] I argue that the reforms exemplify how administrative systems simplify complex realities for bureaucratic control, creating what Scott calls 'fiscal forests': administratively legible but humanly impoverished representations.[17] Second, and paradoxically, the attempt to insulate decision-making through precise rules creates a 'paradox of legibility'. By codifying every categorical boundary, the reforms inadvertently transform each new rule into a potential site for fresh legal contestation. While the durability and scope of this resistance remain uncertain, and past experience with rule-based disability programmes suggests caution, early Administrative Review Tribunal ('ART') decisions reveal adaptation to the new constraints through purposive statutory construction and vigorous merits review where rules permit.

This article develops these arguments through four parts. Part II examines the original discretionary model (2013–2023), showing how broad standards created space for both administrative failure and judicial creativity, and how the Administrative Appeals Tribunal ('AAT') developed coherent principles to give substantive content to the aspirations of the *National Disability Insurance Scheme Act 2013* (Cth) ('NDIS Act'). Part III analyses the 2024 reforms as a systematic legislative rebuttal, documenting how the transformation of soft law into hard rules reversed each principle of the NDIS review jurisprudence while simultaneously responding to legitimate concerns about sustainability and consistency. Part IV explores the consequences: how the reforms produce programmatic invisibility while simultaneously generating sites of resistance through the paradox of legibility. The conclusion considers broader implications for administrative justice, acknowledging the genuine design flaws that necessitated reform while questioning whether the chosen mechanisms adequately balance consistency with the contextual, individualised judgement essential to complex human needs.

[16] See James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1st ed, 1998) 2.
[17] Ibid 23.

II THE PROMISE AND PERIL OF DISCRETION: THE NDIS (2013–2023)

A *The Architecture of Discretion: Legislating for Flexibility*

From its inception, the NDIS was defined by a central, and ultimately unstable, tension; its reliance on broad discretionary standards created the very interpretive space that would later allow courts to challenge the agency's implementation. The 2024 NDIS reforms represent an inversion of this dynamic, using formal legal rules to diminish the policy space where decision-maker creativity thrived. The scheme's enabling legislation, the NDIS Act eschewed prescriptive detail in favour of broad principles.[18] The legislative cornerstone was the 'reasonable and necessary' standard, a phrase that created vast discretionary space while embedding deep value conflicts into the scheme's operation.[19] NDIA planners and Local Area Coordinators exemplified Lipsky's 'street-level bureaucrats':[20] frontline workers whose discretionary decisions effectively become policy.[21] The resulting inconsistencies were not administrative errors but predictable outcomes of delegating broad discretion to workers managing high demand with finite resources.[22] To manage demand and work pressures, street-level bureaucrats develop 'rules of thumb, local custom and practice, informal interpretations' and other coping mechanisms.[23] For the individuals subject to these practices, the result can be decisions that feel 'almost random and senseless'.[24] The gap between the scheme's legislative promise and its implementation fuelled conflicts that drove participants to AAT appeals.[25] The NDIS review jurisprudence can be understood not just as a judicial response to agency failure, but as a higher-level attempt to impose coherence and principle upon the unavoidable discretion exercised at the street level.[26]

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[18] See Mhairi Cowden and Claire McCullagh (eds), *The National Disability Insurance Scheme: An Australian Public Policy Experiment* (Springer Singapore, 2021) 5; Eloise Hummell et al, 'Agendas of Reform: Continuity and Change in Australia's National Disability Insurance Scheme (NDIS)' (2024) *Social Policy and Society* 1, 1–2.
[19] Venning et al (n 12).
[20] See generally Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (Russell Sage Foundation, 1980).
[21] Mike Rowe, 'Going Back to the Street: Revisiting Lipsky's Street-Level Bureaucracy' (2012) 30(1) *Teaching Public Administration* 10, 11, citing Lipsky (n 20) 3.
[22] Michele Foster et al, '"Reasonable and Necessary" Care: The Challenge of Operationalising the NDIS Policy Principle in Allocating Disability Care in Australia' (2016) 51(1) *Australian Journal of Social Issues* 27, 29–31; Venning et al (n 12); Lipsky (n 20) xii.
[23] Rowe (n 21) 12.
[24] Ibid 14.
[25] *Independent Review* (n 6) 32.
[26] Venning et al (n 12) 97.

To understand how this discretionary space was structured and contested, we must map the 'architecture of administration' comprising the scheme.[27] The scheme operated through a three-tiered hierarchy: the NDIS Act, limited binding *National Disability Insurance Scheme (Supports for Participants) Rules 2024* (Cth) ('NDIS Rules'), and extensive non-binding Operational Guidelines.[28] This architecture deliberately concentrated operational power in the 'soft law' guidelines. Cross's analysis confirms that decision-makers almost always followed these guidelines, giving them practical force despite their soft law status.[29] This created a 'structural incongruity'; the NDIS Act embodied a collaborative, participant-led philosophy, while merits review remained rooted in an adversarial judicial paradigm.[30] Early studies confirmed these tensions were designed into the policy.[31] The statute did not define key statutory terms, including the important 'reasonable and necessary supports' criterion. Most operational detail was in the sprawling body of internal Operational Guidelines, a form of 'soft law' that, while not legally binding, directed assessments and funded supports.[32] This architecture was inherently unstable, creating what Venning et al describe as a conflict between 'imagined rights versus fair and sustainable administration of entitlements'.[33] The result was not principled flexibility but widespread inconsistency, with reports of drastically increasing internal reviews and external AAT appeals, leading to a system that many participants found cumbersome and difficult to navigate without significant advocacy support.

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[27] Elizabeth Fisher, 'Why Doctrinal Administrative Lawyers Need to Think More About Policy' (2023) 29(4) *Australian Journal of Administrative Law* 254, 254.

[28] Prior to the 2024 reforms, these Guidelines were kept up to date and available on a dedicated 'microsite' (<https://ourguidelines.ndis.gov.au>). The microsite was taken down as of 4 September 2025, and current Guidelines are available at 'Our Guidelines', *NDIS* (Web Page, 24 October 2025) <https://www.ndis.gov.au/our-guidelines>. See generally Javier Cross, 'The Administrative Appeals Tribunal and the Drake Doctrine: How the AAT Treats Government Policy in NDIS Decisions as to Reasonable and Necessary Supports' (2022) 29(1) *Australian Journal of Administrative Law* 60; Thomas Liu, 'The Participant in the National Disability Insurance Scheme: A Paradigm Shift for Administrative Law' (2019) 97 *AIAL Forum* 81; Hummell et al (n 17) 2.

[29] See Cross (n 28).

[30] Liu (n 28) 97.

[31] See Louise P Bygrave and Ron McCallum, 'The National Disability Insurance Scheme and Administrative Decision-Making: Unique Challenges and Opportunities' (2020) 26 *Australian Journal of Administrative Law* 191.

[32] *Independent Review* (n 6) 30.

[33] Ibid 32; Venning et al (n 12) 98.

B *Aspiration versus Reality: Inequity and Administrative Failure*

As the scheme matured, these ambiguities crystallised into intractable disputes, carrying the practice of the NDIA further from its collaborative, person-centred promises. Venning et al's analysis of AAT decisions shows disputes clustered around fundamental questions: the responsibilities between the NDIS and other government services, the scope of NDIS services, and the legitimacy of supports related to social participation and therapeutic goals.[34] Carney et al documented how the NDIA's adoption of 'Taylorist' administrative practices (the application of scientific management principles through algorithmic standardisation) had started to undermine individualised planning well before the 2024 legislative reforms.[35] Their analysis revealed that by 2016, the NDIA was using legacy data and questionnaires to generate typical 'reference packages' that served as presumptive starting points,[36] with planners under pressure to meet 'hugely ambitious' targets to produce 500 plans daily by 2018–19.[37] This fundamentally altered the planner-participant relationship, transforming collaborative planning into a process of algorithmic categorisation.[38]

These structural tensions were compounded by significant distributional inequities that undermined the scheme's egalitarian aspirations. The original model's reliance on subjective assessment and open-textured language inadvertently favoured participants with what sociologists term 'social capital': access to knowledgeable advocates, health professionals, and family support networks capable of navigating complex bureaucratic processes.[39] A 2018 evaluation by Mavromaras et al documented stark disparities, including one case where effective advocacy transformed a participant's package from $600 to $32,000.[40] Geographic location proved equally determinative; participants in rural and remote areas faced both service unavailability (with over one-third of mature participants in remote areas not accessing daily activity supports despite having budgets) and systematically smaller plan sizes, yet these market failures

[34] Venning et al (n 12) 99–100.
[35] Carney et al (n 1) 782–3.
[36] Ibid 794.
[37] Ibid 785.
[38] Ibid 787.
[39] Gemma Carey, Eleanor Malbon and James Blackwell, 'Administering Inequality? The National Disability Insurance Scheme and Administrative Burdens on Individuals' (2021) 80(4) *Australian Journal of Public Administration* 854, 868; Kostas Mavromaras et al, *Evaluation of the NDIS* (Final Report, National Institute of Labour Studies, Flinders University, February 2018) 198–200.
[40] Mavromaras et al (n 39) 248.

were persistently attributed to participant 'choice' rather than thin markets.[41] Cultural and linguistic diversity created additional barriers, exacerbating socio-economic or geographical disadvantage.[42] Thus this reliance on broad discretion did not lead to principled flexibility but instead produced deep systemic inequities, as outcomes began to depend less on need and more on a participant's social capital and capacity for advocacy. This 'postcode lottery' was a key criticism of the previous state-based disability services system that the federal NDIS was supposed to address.[43]

C *The Judicial Response: Forging the NDIS Review Jurisprudence*

External review became crucial as the NDIA struggled to fairly operationalise the scheme's rights-based mandate. As Venning et al note, judges stepped in to ensure that the scheme delivered on its promise to 'redress unfairness' and recognise 'the equal right of all persons with disabilities to live in the community'.[44] This intervention was achieved by the incremental development of 'NDIS review jurisprudence' through insistently and consistently aligning the interpretation and application of the NDIS Act with its purposes. The AAT and Federal Court did not routinely invoke the *Drake* exception (which allows for departure from lawful government policy where its application would produce unjust results),[45] so much as exercise their standard authority to reach different conclusions *within*

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[41] *Independent Review* (n 6) 287–291. See generally Sarah Veli-Gold et al, 'The Experiences of People with Disability and Their Families/Carers Navigating the NDIS Planning Process in Regional, Rural and Remote Regions of Australia: Scoping Review' (2023) 31(4) *Australian Journal of Rural Health* 631; Luke Wakely et al, 'The Lived Experience of Receiving Services as a National Disability Insurance Scheme Participant in a Rural Area: Challenges of Choice and Control' (2023) 31(4) *Australian Journal of Rural Health* 648; Alexandra Prowse et al, 'Lived Experience of Parents and Carers of People Receiving Services in Rural Areas under the National Disability Insurance Scheme' (2022) 30(2) *Australian Journal of Rural Health* 208; Stuart Wark, Lia Bryant and Tyson Morales-Boyce, '"Thin Markets": Recruitment and Retention of Disability Staff to Support Effective Post-parental Care Planning in Rural Australia' (2023) 20(4) *Journal of Policy and Practice in Intellectual Disabilities* 428.

[42] See generally, Angeline Ferdinand et al, 'Culturally Competent Communication in Indigenous Disability Assessment: A Qualitative Study' (2021) 20(1) *International Journal for Equity in Health* 68; Deborah Warr et al, *Choice, Control and the NDIS: Service Users' Perspectives on Having Choice and Control in the New National Disability Insurance Scheme* (Community Report, Melbourne Social Equity Institute, 2017); Corinne Cortese et al, 'Hard-to-Reach: The NDIS, Disability, and Socio-Economic Disadvantage' (2021) 36(6) *Disability & Society* 883.

[43] Mhairi Cowden and Claire McCullagh, 'The Philosophy of the NDIS' in Mhairi Cowden and Claire McCullagh (eds), *The National Disability Insurance Scheme: An Australian Public Policy Experiment* (Springer Singapore, 2021) 123, 131.

[44] Venning et al (n 12) 98. See also Joel Townsend, 'No Narrow or Pedantic Approach: The NDIS and AAT Jurisdiction' (2023) 34 *Public Law Review* 327, 336.

[45] Cross (n 28) 67–8.

the broad statutory guidance the NDIS Act provided.[46] Where the NDIA's Operational Guidelines remained within the statutory framework, decision-makers applied them as relevant considerations while maintaining independent judgement; where NDIA positions ventured beyond or contradicted the NDIS Act's beneficial purposes, tribunals simply applied the statute itself.[47] This represented conventional merits review rather than dramatic departures from policy. However, the systematic pattern of such decisions, which consistently privileged individualised assessment over bureaucratic standardisation, gave substantive content to the NDIS Act's principles and constrained the NDIA's tendency toward rigid, cost-focused administration. The NDIS review jurisprudence can therefore be understood as a judicial defence of *mētis*: the 'practical knowledge, informal processes, and improvisation' of participants and their support networks, against the state's abstract, schematic plans.[48] Where the NDIA sought to apply simplified categories, the judiciary insisted on the kind of particular, context-bound knowledge that, Scott argues, is essential for a functioning social order.[49]

This NDIS review jurisprudence crystallised around four foundational principles. First, the principle of indivisible funding, established in *McGarrigle v NDIA*,[50] holds that once a support is deemed reasonable and necessary, it must be fully funded.[51] The Federal Court rejected the NDIA's attempt to partially fund supports, finding it would introduce 'means testing by a backdoor route into the NDIS,' contrary to the scheme's social insurance model.[52] Second, the principle of intense factual assessment, articulated in *NDIA v WRMF*,[53] requires rigorous, evidence-based inquiry into the individual's circumstances.[54] The Full Federal Court rejected categorical exclusions for certain supports, insisting the 'reasonable and necessary' determination demands intense fact finding based on unique participant needs, not generic policy application.[55] Third, the principle of holistic and relational support, established in *NDIA v KKTB*,[56] requires viewing participant support needs as an integrated whole.[57] The Full Federal Court

[46] Ibid 60–1.
[47] Cross (n 28); Venning et al (n 12).
[48] Scott (n 16) 6, 350.
[49] Ibid 311.
[50] *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 121 ('*McGarrigle*').
[51] Ibid [94], affd *National Disability Insurance Agency v McGarrigle* [2017] FCAFC 132.
[52] *McGarrigle* (n 50) [62] (Mortimer J).
[53] *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415 ('*WRMF*').
[54] Ibid [152].
[55] Ibid.
[56] *National Disability Insurance Agency v KKTB* (2022) 295 FCR 379 ('*KKTB*').
[57] Ibid [136]

endorsed the AAT's right to assess an 'overall requested level' of support as a single package, directly rebutting administrative fragmentation.[58] This principle was taken further in AAT decisions like *RXFR and NDIA*,[59] where the ART's analysis focused not just on the child applicant but on the profound disabilities affecting the entire family unit.[60] Considering the applicant's needs in this context, the ART found that the care required exceeded reasonable family expectations under s 34(1)(e) of the NDIS Act.[61] Finally, the principle of collaborative process, articulated in *QDKH v NDIA*,[62] requires review processes to be collaborative and inquisitorial.[63] The Full Federal Court confirmed that the AAT was not confined to supports formally requested at internal review, accepting the parties' reasoning that participants 'may lack the capacity to identify the particular supports they wish to have approved', and that this broad construction 'better serves the beneficial purpose of the NDIS Act' by protecting vulnerable participants from bureaucratic limitations.[64]

These four principles represented more than individual judicial decisions. They constituted a coherent philosophy of administrative justice that privileged substance over form, individual needs over bureaucratic categories, and collaborative problem-solving over adversarial contest. The judiciary had created a common law overlay, consistently applied and further developed in the AAT and ART, that gave meaning to the NDIA Act's abstract principles while constraining the NDIA's tendency toward rigid, cost-focused administration. Yet this judicially managed balance proved unsustainable. The success of the NDIS review jurisprudence in expanding access and ensuring individualised justice created the conditions for its demise. This outcome reflects the fundamental tension in public law between systematic rules and contextual judgement, a tension particularly acute in social welfare schemes needing consistency and responsiveness to individual need.[65] However, where previous studies have

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[58] Ibid.
[59] *RXFR and National Disability Insurance Agency* [2024] ARTA 188 ('*RXFR*').
[60] Ibid [86], [111]–[122].
[61] Ibid [112].
[62] *QDKH, by his litigation representative BGJF v National Disability Insurance Agency* [2021] FCAFC 189 ('*QDKH*'). In *QDKH* both parties agreed that the AAT had made an error of law; the Full Federal Court made consent orders and confirmed the parties' shared understanding of the legal position was correct.
[63] See ibid [7].
[64] Ibid.
[65] Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) *The Modern Law Review* 425, 455.

focused on administrative non-compliance or policy workarounds,[66] the NDIS reforms demonstrate a more sophisticated response: the strategic use of legislative precision to eliminate the interpretive space where judicial creativity operates. This 'legislative rebuttal' represents not merely a technical change but a profound institutional choice to resolve the rules-discretion dialectic through comprehensive statutory prescription rather than administrative judgement.[67] The reforms exemplify the 'institutional turn' in administrative law: a recalibration of decision-making authority between courts, tribunals, and agencies through structural legal change.[68]

D *The Breaking Point: An Unsustainable System*

The pressure for reform came from multiple sources. Rising costs, inconsistent outcomes, and the administrative burden of complex, multi-day hearings generated political demands for standardisation.[69] Reports from the Australian National Audit Office documented persistent non-compliance and poor quality assurance within the NDIA.[70] This dysfunction was compounded by the agency's failure to learn from external review. A 2024 Commonwealth Ombudsman report observed the NDIA's practice of settling cases immediately before AAT hearings, creating a perception that 'the only way the NDIA will fund certain supports ... is if the participant appeals to the Tribunal'.[71] The strategic implications of these settlement patterns merit particular attention. The NDIA's practice of settling cases immediately before hearings was not merely an efficiency measure but a deliberate strategy to minimise the normative force of AAT jurisprudence. As Queensland Advocacy for Inclusion documented, less than 1% of appeals between 2019 and 2021 resulted in published decisions (130 published decisions from 7,532 appeals).[72] The Parliamentary Joint Standing Committee on the NDIS specifically recommended publication of settlement outcomes to address this

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[66] See, eg, Terry Carney, 'Robo-Debt Illegality: The Seven Veils of Failed Guarantees of the Rule of Law?' (2019) 44(1) *Alternative Law Journal* 4; Valerie Braithwaite, 'Beyond the Bubble That Is Robodebt: How Governments That Lose Integrity Threaten Democracy' (2020) 55(3) *Australian Journal of Social Issues* 242; *Royal Commission Into the Robodebt Scheme* (n 2).

[67] Carl E Schneider, 'Discretion and Rules: A Lawyer's View' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1992) 47, 72.

[68] See Yee-Fui Ng, 'Institutional Adaptation and the Administrative State' (2021) 44 *Melbourne University Law Review* 889, 898.

[69] *Independent Review* (n 6) 28–31.

[70] See Mona Nikidehaghani, 'Accounting and Neoliberal Responsibilisation: A Case Study on the Australian National Disability Insurance Scheme' (2024) 37(9) *Accounting, Auditing & Accountability Journal* 128, 132; Hummell et al (n 18) 2.

[71] Commonwealth Ombudsman, *Learning from Merits Review: Best Practice Principles for Agency Engagement with Merits Review* (Report, December 2024) 35.

[72] Queensland Advocacy for Inclusion, *Analysis of NDIS Appeals* (Report, 30 June 2022) 12.

accountability gap, a recommendation the government rejected.[73] These high settlement rates limited the AAT's opportunities to provide guidance to the NDIA on interpretation of legislation. This guidance was sorely needed in a system which, as Brookes and Ballantyne observed, 'there seem[ed] to be significant confusion over the correct interpretation of the legislation and associated instruments across the Agency'.[74] Thus the penetration of AAT principles into NDIS administrative practice remained minimal despite the tribunal's development of coherent jurisprudential guidance.

NDIA dysfunction and implementation tensions were amplified by a fundamental design flaw in the federal architecture: the absence of clarity about boundaries between the NDIS and other service systems. The Applied Principles and Tables of Support ('APTOS'), intended to delineate responsibilities, proved inadequate as state and territory governments allowed mainstream disability supports to deteriorate, leaving the NDIS as what the Independent Review called the 'only lifeboat'.[75] Important programs that had previously supported all people with disability were effectively rolled into the scheme, leaving many Australians with a disability who were not NDIS-eligible without adequate support, and significant uncertainty about which governments or programmes were responsible for services.[76] From this perspective, the government's case for reform rested not only on fiscal sustainability but on legitimate concerns that discretionary decision-making had, in practice, systematically disadvantaged the most vulnerable participants. The 2024 reforms sought to address this through the National Cabinet's commitment to re-establish 'foundational supports' (universal services available to all people with disability regardless of NDIS eligibility) with $2 billion committed over five years as a first phase.[77] This structural recalibration, emphasising that the NDIS should not be the sole source of disability support, formed a crucial part of the reform rationale, attempting to restore the balance between targeted, individualised NDIS supports and broader systemic supports that had been lost during implementation. By 2023, the discretionary model had become politically and administratively unsustainable.

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[73] Ibid 4.
[74] Libby Brookes and Tom Ballantyne, 'Review and Appeal Rights in the NDIS' (2019) 154 *Precedent* 8, 10.
[75] *Independent Review* (n 6) 243–9.
[76] Productivity Commission, *Review of the National Disability Agreement* (Study Report, February 2019) ch 10.
[77] Australian Government, Department of Health, Disability and Ageing, *Foundational Supports for People with Disability* (Policy Framework, 1 October 2025) <https://www.health.gov.au/our-work/foundational-supports-for-people-with-disability>.

The stage was set for a comprehensive legislative rebuttal of the NDIS review jurisprudence.

III THE LEGISLATIVE REBUTTAL: ENGINEERING CERTAINTY

Having mapped the discretionary architecture and the jurisprudence it invited, this Part demonstrates how Parliament dismantled it through what I term 'legislative rebuttal'. Building on Fisher's analysis of how administrative law structures the relationship between policy and legal accountability,[78] this concept distinguishes ordinary legislative amendment from something more fundamental. While amending a statute to correct judicial interpretation is a normal democratic process,[79] legislative rebuttal describes the comprehensive restructuring of an administrative scheme, specifically designed to foreclose entire modes of judicial reasoning. The 2024 NDIS reforms are a textbook example, [80] converting the very texture of decision-making from flexible standards to prescriptive rules, and from contextual principles to rigid categories. This was not a minor policy adjustment; it was an act of administrative re-engineering designed to achieve through legislative instruments what discretionary administration could not. The 2024 amendments represent a systematic narrowing of the NDIS review jurisprudence principles, replacing broad standards with prescriptive rules.[81] These reforms were based on recommendations of the 2023 Independent Review of the NDIS,[82] and respond to the very real problems plaguing the scheme. While the Independent Review identified multiple drivers for reform, including financial sustainability, administrative burden, and participant frustration with inconsistent outcomes,[83] the specific mechanisms chosen reveal an underlying logic of legislative rebuttal. The government could have addressed these concerns through enhanced training, better guidelines, or improved quality assurance. Instead, it chose to

[78] Fisher (n 27).
[79] John Basten, 'Separation of Powers: Dialogue and Deference' (2018) 25 *Australian Journal of Administrative Law* 91, 91.
[80] NDIS Amendment Act (n 15).
[81] See Georgia Van Toorn and Terry Carney, 'Decoding the Algorithmic Operations of Australia's National Disability Insurance Scheme' (2025) 60(1) *Australian Journal of Social Issues* 21 for evidence of how soft law standardisation operated in practice, though their focus on algorithmic systems represents only one mechanism through which standardisation occurs.
[82] *Independent Review* (n 6) i.
[83] Ibid; *Learning from Merits Review* (n 71); Rachael Thompson, 'The National Disability Insurance Scheme Review Process: Weaknesses and Opportunities to Enhance the CRPD' (2022) 28(2–3) *Australian Journal of Human Rights* 266, 272.

eliminate discretion itself, suggesting a deeper objective: constraining the judicial creativity that had expanded access and individualised support.

A *The Strategy: Hardening Soft Law to Dismantle Jurisprudence*

The reform strategy adopted was to transform the NDIA's non-binding Operational Guidelines into legally binding instruments.[84] This strategy represents a classic managerial solution to the 'continuing dilemma' posed by street-level bureaucracy: the impulse 'to manage street-level bureaucrats, to control their independence'.[85] Where the original discretionary model created inconsistency by empowering frontline staff, the 2024 reforms sought to constrain that discretion through formalisation. This can be seen as an attempt to resolve the perennial tension between professional autonomy and bureaucratic control by decisively favouring the latter. The 'hardening' of soft law aimed for consistency, ensuring predictable and uniform outcomes. Consistency is a recognised ideal of good government according to law,[86] and inconsistency was a major motivator for reforming the NDIS. However, the new NDIS Rules, by creating prescriptive lists and mandating specific assessment tools, impose a level of consistency that is at odds with other principles of good administration like 'flexibility', as embodied in the existing 'no fettering' ground of judicial review which requires attention to individual circumstances.[87] The legislative rebuttal represents a choice to prioritise executive-defined consistency over individualised, merits-based justice in the NDIS review jurisprudence.

The transformation involved several key changes. First, the government introduced the NDIS Rules, which created detailed lists of funded and non-funded supports. Second, it amended s 34 of the NDIS Act to include a new 'accepted impairment' gateway, limiting funding to supports addressing needs from the specific impairment for scheme access.[88] The mandatory use of standardised assessment tools replaces individualised professional judgement with algorithmic calculation, creating 'algorithmic grey holes': spaces of automated calculation shielded from legal scrutiny because they were classified as inputs

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[84] NDIS Amendment Act (n 15); *National Disability Insurance Scheme (Supports for Participants) Rules 2024* (Cth).
[85] Rowe (n 21) 16.
[86] Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 156.
[87] See discussion in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 7th ed, 2022) 303–6.
[88] Section 34(1)(aa) provides that the CEO must be satisfied that 'the support is necessary to address needs of the participant arising from an impairment in relation to which the participant meets the disability requirements … or the early intervention requirements'.

rather than reviewable decisions.[89] This provides a technological solution to the administrative problem of street-level bureaucracy. The algorithm becomes the new manager, a tool designed to eliminate frontline discretion. This recourse to automation represents a contemporary expression of the historical tension between 'bureaucratisation and professionalisation'.[90] By embedding rules in code, the reforms privilege a highly regulated, formalised mode of policy delivery over the professional, discretionary judgement inherent in the street-level bureaucrat role.

Beyond the frontline, this legislative strategy also closed the interpretive space used to develop the NDIS review jurisprudence. Where the AAT applied the *Drake* doctrine to avoid unjust results produced by rigid application of the guidelines, the new framework eliminated this possibility by making the guidelines legally binding. Where courts insisted on individualised assessment, the new rules mandated categorical determinations. Where tribunals took a holistic view of participant needs, the reforms required a fragmented assessment, impairment by impairment.

B *A Doctrinal Reversal: From Factual Inquiry to Classification*

The 2024 reforms radically recalibrated the ART's task. While independent merits review remains a feature, the legislative rebuttal limits its scope and impact by hardening policy into binding law, constraining the ART's capacity to depart from government policy on substantive grounds. The shift from the collaborative problem-solving seen in *QDKH* to mechanical rule application represents a significant reversal of the NDIS review jurisprudence's participant-centred philosophy, a shift plain to see in the 2025 ART decision of *FSWN and NDIA*.[91] In dismissing an application for naturopathy and yoga supports, the Tribunal Member explicitly acknowledged that the 2024 reforms had fundamentally changed the nature of the review process.[92] Previously, the question of whether naturopathy was 'effective and beneficial' under s 34(1)(d) of the NDIS Act would have been a factual inquiry, likely involving competing expert evidence. However, the ART noted that this was no longer the case.[93] With the introduction of binding rules, which expressly exclude alternative therapies

[89] Van Toorn and Carney (n 81) 31.
[90] Peter Hupe, Michael Hill and Aurélien Buffat, 'Introduction: Defining and Understanding Street-Level Bureaucracy' in Peter Hupe, Michael Hill and Aurélien Buffat (eds), *Understanding Street-Level Bureaucracy* (Bristol University Press, 1st ed, 2015) 3, 6.
[91] *FSWN and National Disability Insurance Agency* [2025] ARTA 114 ('*FSWN*').
[92] Ibid [4].
[93] Ibid [3], [43]–[46].

and yoga therapy,[94] the question of efficacy was no longer 'a fact to be found by the [ART]' but was instead determined by 'statutory instruction'.[95] The Tribunal concluded that the new rules operated to 'deprive the Applicant's case of any substance' from the outset.[96] It also directly addressed the impact on participant autonomy, observing that the principle of 'choice and control' must now be exercised *within* the prescribed categories of approved supports, 'and not outside them'.[97] The ART further noted that the 'decisional freedom' afforded to it by the Full Federal Court in *WRMF* was now 'similarly constrained' by the new legislative framework.[98]

Thus, following the reforms, the question has shifted from evidentiary to classificatory. Furthermore, the new s 34(1)(aa) 'accepted impairment' gateway limits funding to supports addressing needs from the specific impairment granting scheme access. This severs connections between co-existing conditions, forcing decision-makers to see discrete impairments rather than whole persons, and preventing the holistic and contextual evaluation seen in cases like *KKTB* and *RXFR*. This systematic reversal repurposes a core principle of the administrative continuum. Tribunals must 'stand in the shoes' of the primary decision-maker, so hardening policy into prescriptive rules constrains the tribunal's adjudicative space. Once law dictates categorical exclusions, tribunals must apply them regardless of individual merit. The capacity for objective, evidence-based assessment is curtailed by rewriting the rules at their source. The reforms do not eliminate merits review but seek to alter its character: from substantive review of 'reasonableness' and 'necessity' to a more constrained, classificatory review of whether a support fits a prescribed category. Evaluative judgement sensitive to individual circumstances — or indeed any consideration of the individual themself — begins only if a support is first determined to be on the correct list.[99] The effect is not to abolish the umpire, but to shrink the playing field.

C *The Official Rationale: Pursuit of Sustainability and Consistency*

The legislative transformation of the NDIS was not an arbitrary exercise of power, nor can it be described solely (or even primarily) as an attempt to avoid accountability. To understand the legislative rebuttal, one must engage seriously

[94] *National Disability Insurance Scheme (Getting the NDIS Back on Track) Transitional Rules 2024* (Cth) sch 2 ('Transitional Rules').
[95] *FSWN* (n 91) [28].
[96] Ibid [4].
[97] Ibid [56].
[98] Ibid [57].
[99] Ibid [43].

with its official rationale, framed as a response to two intertwined crises: long-term financial sustainability and a lack of fairness caused by systemic inconsistency.

The first imperative was fiscal. The NDIS Review Panel was tasked with making recommendations to secure the scheme's future, reinforced by National Cabinet's decision to implement a Financial Sustainability Framework. The government's position, articulated through the *Independent Review*, was that a well-managed scheme required predictable and manageable budget setting, a core principle of responsible public administration. The proposed new governance structure, with National Cabinet and the Disability Reform Ministerial Council ('DRMC') accountable for the sustainability of the entire disability ecosystem, reflects this imperative.

The second imperative was fairness. The original discretionary model created a "postcode lottery". Participants with similar needs received vastly different outcomes based on their location, planner, or ability to navigate a complex and adversarial appeals process. The NDIS Review voiced the frustration of the disability community, quoting one participant who captured the corrosive effect of this perceived unfairness:

> Arbitrary rules — what is reasonable and necessary to me is not the same as it is to my planner … Being told a service is not reasonable and necessary by your planner but knowing someone (whom is in the exact same situation) else's planner has approved it.[100]

Lived experiences of inequity justified reform. From this perspective, the government's primary solution, elevating key policy parameters from non-binding Operational Guidelines into the NDIS Rules, was presented as the logical cure for both crises. Legally binding rules would deliver consistency, ensuring similar outcomes for similar circumstances and remedying the unfairness of the "postcode lottery". This standardisation would create predictability to control costs and ensure financial sustainability.

Framed this way, the shift from discretion to rules is not a repudiation of justice, but a redefinition prioritising horizontal equity and systemic integrity over bespoke outcomes. It reflects an attempt to rein in what had become an unsustainably expensive and administratively unwieldy system while maintaining an acceptable level of support for participants. It sees centralised managerial control as the solution to the problems of street-level bureaucracy.

[100] *Independent Review* (n 6) 26.

Yet, as the next Part contends, this choice to solve administrative problems through prescriptive rule-making has profound, and paradoxical, consequences. The very mechanisms designed to create a legible and consistent system produce new forms of programmatic invisibility, and simultaneously open up new battlegrounds for legal contestation.

IV AFTERMATH: INVISIBILITY AND NEW BATTLEGROUNDS

Having identified the instruments and design choices that constrain discretion, this Part examines what those choices do in practice and traces their system-level effects in two directions. First, this legislative rebuttal entrenches 'programmatic invisibility': a state where the system cannot see or respond to participants' holistic needs. Second, it creates the potential for a 'paradox of legibility': where codification enables new forms of systemic challenge. Whether this paradox will prove durable or merely represent transitional friction remains uncertain.[101] The experience of income security programmes since the 1990s, which underwent similar transformations from discretionary to rule-based frameworks with minimal subsequent judicial contestation, suggests caution about predicting ongoing robust resistance through purposive statutory construction.[102] Nonetheless, early ART decisions reveal judicial creativity adapting to new constraints, raising the possibility that the precision introduced to foreclose discretion may generate unforeseen sites of legal challenge.

A *Programmatic Invisibility: The State's Simplifying Gaze*

At its core, programmatic invisibility is the direct outcome of the state's drive for what Scott calls 'legibility'. He argues that no administrative system can engage with a complex reality without first subjecting it to a 'heroic and greatly schematized process of abstraction and simplification'.[103] The state's gaze is necessarily a simplifying one; it is not interested in the whole person but only in 'that slice of it that interest[s] the official observer',[104] in this case, a fiscally containable impairment. The NDIS reforms, particularly the 'accepted impairment' gateway and lists of excluded supports, are a textbook example of

[101] The observations here are necessarily preliminary, based on the first year of decisions under the new framework. Longitudinal analysis will be required to assess whether these patterns of resistance persist.
[102] See Carney, 'Vulnerability: False Hope for Vulnerable Social Security Clients?' (n 4), documenting minimal judicial success in challenging the rule-based Disability Support Pension framework post-reform.
[103] Scott (n 16) 22.
[104] Ibid 3.

this process. They force decision-makers to see the participant not as a whole person, but as a collection of governable categories. Scott's Prussian forestry metaphor illuminates this process; complex forests were reduced to timber yields, creating 'fiscal forests' that were perfectly legible but ecologically doomed.[105] Similarly, the NDIS reforms create 'fiscal participants': administratively legible but humanly impoverished representations of complex lives.[106] Thus the new architecture forces decision-makers to view a person as a collection of discrete, siloed impairments, consistent with a model that locates disability as a deficit within the individual. This fragmentation represents the legislative entrenchment of a medical model of disability.[107] This contrasts with the social model of disability, which understands 'disability' as the interaction between an individual's impairment and an inaccessible society.[108] The NDIS review jurisprudence had, through its emphasis on holistic assessment and contextual need, moved the scheme closer to the social model the NDIS claimed to embrace.[109] The reforms, by compelling a narrow focus on the 'accepted impairment', reverse this trajectory.

Tsao and NDIA illustrates the operation of programmatic invisibility.[110] Mr Tsao, who has severe vision impairment, was denied funding for physiotherapy for debilitating back pain and psychiatric support. The ART's reasoning was straightforward; these needs did not arise from his 'accepted disability', the vision impairment that granted him access to the scheme.[111] The new s 34(1)(aa) legally required the ART to ignore that Mr Tsao is a whole person whose back pain affects his mobility just as profoundly as his vision loss. The system could see only the single impairment through which he entered, rendering his other needs programmatically invisible. To have the decision-maker consider support needs relating to his additional disabilities — the existence of which was unchallenged — Mr Tsao would have to repeat the onerous application and assessment process he had already navigated for his 'accepted disability'.[112] *Sparkes and NDIA* replicates this fragmentation, where physiotherapy for physical conditions was

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[105] Ibid 12.
[106] A tendency observed even pre-reform in Carney et al (n 1).
[107] See Fleur Beaupert, Linda Steele and Piers Gooding, 'Introduction to Disability, Rights and Law Reform in Australia: Pushing beyond Legal Futures' (2018) 35(2) *Law in Context* 1.
[108] Mike Oliver, 'The Social Model of Disability: Thirty Years On' (2013) 28(7) *Disability & Society* 1024, 1024.
[109] Samantha Cooms, 'Decolonising Disability: Weaving a Quandamooka Conceptualisation of Disability and Care' (2025) 40(2) *Disability & Society* 235, 238.
[110] *Tsao and CEO, National Disability Insurance Agency* [2025] ARTA 235.
[111] Ibid [67].
[112] Ibid [66].

denied because the applicant's scheme access was based on Autism Spectrum Disorder.[113] Thus the reformed NDIS compels decision-makers to 'see' the participant as a collection of unrelated impairments rather than an integrated human navigating complex, interconnected challenges. The human cost of this administrative neatness is clear: a person's undisputed needs are rendered legally irrelevant, forcing them to endure multiple, onerous application processes to have their whole self recognised by the scheme.

The entrenchment of programmatic invisibility extends beyond individual planning decisions to the review architecture. Previously, the AAT undertook an 'intense factual assessment' of individual circumstances,[114] but the new framework replaces factual inquiry with categorical classification. This shift is exemplified by comparing pre and post-reform decisions. In *MPPZ and NDIA*,[115] Deputy President Mischin conducted a thorough analysis of whether funding for a sex worker was reasonable and necessary, examining evidence about the participant's specific circumstances, therapeutic goals, and support needs. The question was entirely factual: did this participant, in their specific situation, require this support to achieve their goals?[116] Post-reform, nuanced analysis is foreclosed. In *Habib and NDIA*,[117] a health retreat request is dismissed not through factual inquiry but through classification: retreats are on the excluded list.[118] In *Chamberlin and NDIA*,[119] an archery kit is refused because it falls within 'standard recreational equipment'.[120] The ART cannot ask whether this equipment is therapeutically necessary for this person. The decision-maker's role is thus transformed: from an evaluator of human need to a mere taxonomist, tasked only with assigning a requested support to its correct regulatory box.

B *The Paradox of Legibility: How Rules Create Resistance*

The mechanisms designed to entrench programmatic invisibility generate an unexpected consequence: the paradox of legibility. While Scott's work details how subordinate groups resist state power through 'infrapolitics', the subtle, undeclared acts of non-compliance that operate in the gaps of state

[113] *Sparkes and CEO, National Disability Insurance Agency* [2025] ARTA 561.
[114] *WRMF* (n 53) [152].
[115] *MPPZ and National Disability Insurance Agency* [2024] AATA 3563.
[116] Ibid [23].
[117] *Habib and National Disability Insurance Agency* [2025] ARTA 483 ('*Habib*').
[118] Ibid [78], [80]–[82], [160]–[164].
[119] *Chamberlin and National Disability Insurance Agency* [2025] ARTA 582 ('*Chamberlin*').
[120] Ibid [36]–[39].

surveillance,[121] the NDIS reforms reveal a different form of resistance, one uniquely adapted to the modern administrative state. By transforming discretionary soft law into prescriptive hard law, the state makes its power perfectly legible. In doing so, it inadvertently creates clear, hard targets for legal contestation. The lines of the state's own grid become the front lines of legal resistance. What was meant to be a shield becomes a map for strategic litigation.

Rock and Weeks, distinguishing between applicants seeking individual redress and those pursuing systemic reform, articulate a framework for understanding the operation of this paradox in the Australian context.[122] The old NDIS, with its vast body of soft law and case-by-case discretion, was primarily amenable to individual challenges. Each adverse decision was sui generis, based on particular facts. The aggregation of hundreds of AAT decisions created a discernible body of precedent and principle, but each case remained an isolated dispute about individual circumstances. The new system, by codifying exclusionary policies into hard legal rules, transforms them from administrative preferences into legislative instruments susceptible to judicial review on grounds of validity, interpretation, and application. The reforms create new procedural vulnerabilities. Binding NDIS Rules are legislative instruments that must comply with the *Legislative Instruments Act 2003* (Cth), subjecting them to disallowance and enhanced judicial scrutiny. Each prescriptive rule creates a 'jurisdictional fact': a determination that, if wrongly made, can invalidate the entire decision.[123] The paradox of legibility reveals a truth about administrative law; precision and accountability exist in tension. The more precisely executive power is exercised through formal legal instruments, the more it can be seen, challenged, and potentially invalidated by courts maintaining the rule of law.

1 *Resistance in Action: Policing Boundaries and Unbundling Supports*

Early ART decisions reveal a strategy of using purposive statutory construction to resist a purely classificatory logic, ensuring exclusionary rules do not defeat the disability-specific purpose of the NDIS Act. In *QGRY and NDIA*,[124] the ART confronted whether kitchen modifications for a vision-impaired participant constituted excluded 'standard home repairs'.[125] The NDIA advocated for literal

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[121] James C Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press, 1990) 198.
[122] Ellen Rock and Greg Weeks, 'Getting What You Want from Administrative Law' (2023) 108 *AIAL Forum* 88, 90–1.
[123] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, 64 [38].
[124] *QGRY and National Disability Insurance Agency* [2025] ARTA 598.
[125] Ibid [223].

interpretation; modifications to a kitchen are home repairs, which the NDIS Rules exclude. The ART rejected this approach, reasoning that modifications required *because of* disability-related functional deficits cannot be 'standard'.[126] This interpretive move re-establishes the nexus to disability as determinative, pushing back against classification by label alone. This resistance through interpretation extends across multiple categories. In *Eastham and NDIA*, the ART refused to accept that a mobility scooter designed for a person with disability could be classed as a 'standard scooter' under recreational exclusions.[127] Again, the ART focused on purpose and function rather than nomenclature. These decisions demonstrate judicial insistence that exclusionary rules cannot be applied in ways that would defeat the NDIS Act's beneficial purpose — a technique of resistance through statutory construction.

The most sophisticated interpretive resistance involves 'unbundling' requested supports to identify fundable components within excluded categories. *WWWX and NDIA* exemplifies this approach.[128] The ART accepted that swimming lessons generally fall within the excluded category of 'recreational activities'.[129] However, it distinguished between the standard cost of group lessons and the additional expense of one-on-one instruction needed by WWWX. This differential, incurred solely due to disability, was deemed a distinct, fundable support.[130] The ART funded the essential support without directly contravening the exclusionary rule, demonstrating its capacity to work within the statutory constraints while achieving individualised justice.

2 *The Persistence of Merits Review: Where Discretion Survives*

The legislative rebuttal did not eliminate merits review entirely; it corralled it. Where the new rules are silent, particularly regarding the quantum and configuration of non-excluded supports, the ART's robust, evidence-based analysis continues unabated. The contrast with simple classification cases is stark. In *Habib* and *Chamberlin*, the inquiry ends at categorisation; health retreats and archery equipment are excluded, full stop. But for supports not captured by bright-line rules, the ART continues the AAT's tradition of intense factual analysis. Specialist disability accommodation disputes exemplify this. In *Flack and NDIA*[131]

[126] Ibid [224]–[226].
[127] *Eastham and National Disability Insurance Agency* [2025] ARTA 198.
[128] *WWWX and National Disability Insurance Agency* [2024] ARTA 285.
[129] Ibid [324]–[331].
[130] Ibid.
[131] *Flack and CEO, National Disability Insurance Agency* [2025] ARTA 456.

and *CBYW and NDIA*,[132] the ART conducted multi-day hearings examining expert evidence about housing models. The statutory criterion of 'value for money' became the vehicle for traditional merits review: weighing evidence, assessing credibility, and determining the best supports for the participant's needs. Similarly, *XMTW and NDIA* saw the Deputy President undertaking analysis of competing occupational therapy reports about bathroom modifications, with the 'value for money' criterion enabling consideration of design options, safety, and utility.[133]

These cases prove that the legal model of administrative justice endures where rules permit. The ART uses the same methodologies as the pre-reform NDIS review jurisprudence: careful fact-finding, expert evidence evaluation, and reasoned justification for preferring one outcome. This approach's persistence for non-excluded supports creates a two-track system: mechanical classification for rule-based exclusions, detailed merits review for everything else.

3 *The Rule of Law in Transition*

The transition to the new framework has generated contests over rule of law principles. *Deayton v NDIA* represents the Federal Court's defence of legal finality against retrospective rule changes.[134] Mr Deayton had won his AAT case before the reforms, with the AAT remitting the matter to the NDIA with directions to fund supports. The NDIA delayed implementation until after the new NDIS Rules took effect, then argued that the Transitional Rules prevented funding supports now excluded.[135] Justice Hill's rejection was emphatic. Her Honour found the savings provisions deliberately preserved pre-commencement decisions' legal effect.[136] To hold otherwise would produce 'arbitrary or anomalous' outcomes where participants' vested rights depended on administrative processing speed.[137] The decision establishes a clear boundary; final judicial and quasi-judicial determinations create rights that subsequent legislative changes cannot retroactively defeat.

Yet *LFKZ and NDIA*[138] demonstrates this protection's limits. There, a plan approved under old law included certain supports, but a new plan under new rules validly removed them. The ART distinguished *Deayton* on the basis that

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[132] *CBYW and National Disability Insurance Agency* [2025] ARTA 548.
[133] *XMTW and CEO, National Disability Insurance Agency* [2025] ARTA 107.
[134] *National Disability Insurance Agency v Deayton* [2025] FCA 562 ('*Deayton*').
[135] Ibid [131].
[136] Ibid [136].
[137] Ibid [128].
[138] *LFKZ and National Disabilty Insurance Agency* [2025] ARTA 558.

administrative plan approvals, unlike tribunal decisions, create no vested rights. Plans are subject to review and variation; once superseded, they cease having legal effect. These cases delineate the rule of law's boundaries in transitional space: final adjudicative decisions receive protection; administrative decisions remain vulnerable.

The ART has also vigorously defended judicial hierarchy against attempts to relitigate settled principles. In *Klewer and NDIA*, following Federal Court remittal, both parties argued that the Federal Court was wrong and invited the ART to ignore its findings.[139] Deputy President O'Donovan's refusal was emphatic. Accepting that invitation 'would show a distinct lack of respect for the respective tasks that the Parliament has assigned to the tribunal and to the Federal Court'.[140] This assertion of institutional boundaries demonstrates the judiciary's determination to maintain coherent legal order despite legislative upheaval.

C *Surveying the New Landscape*

These forms of resistance (interpretive creativity, persistent merits review, and defence of procedural foundations) reveal an administrative law system adapting to new constraints while preserving core commitments. They demonstrate the paradox of legibility in action. Each interpretive dispute about categorical boundaries, each contest over quantum where categories do not apply, and each procedural challenge to transitional arrangements is enabled by the precision the reforms introduced. The government's attempt to create certainty may instead have multiplied the sites of legal contestation, creating new doctrinal flashpoints that could prove harder to manage than the principled discretion they replaced. This resistance preserves space for individualised, contextual decision-making that programmatic invisibility seeks to foreclose. It maintains administrative law's commitment to substantive justice within a system designed for mechanical application. Ultimately, it reveals that the foundational tension between rules and

[139] *Klewer and National Disability Insurance Agency* [2025] ARTA 155 ('*Klewer*'); *Klewer v National Disability Insurance Agency* [2023] FCA 630. The Federal Court decision in 2023 set aside an AAT decision with respect to Mr Klewer's Statement of Supports, and remitted it for rehearing. On rehearing, the parties raised an issue regarding the time from which any alteration to Mr Klewer's plan would take effect. The ART found that, even where subsequent decisions had cast some doubt on the correctness of the Federal Court's decision on that issue, 'in circumstances where a question of law which arises in these proceedings has been considered and resolved by the Federal Court, [the ART] should treat the question as settled for the purposes of these proceedings and apply the facts to the law as determined by the Court' (at [38]).

[140] *Klewer* (n 139) [37].

discretion cannot be resolved by an act of Parliament. It can only be displaced, destined to re-emerge on new doctrinal terrain.

V CONCLUSION

The transformation of the NDIS marks a decisive retreat from discretion towards prescription, revealing the inherent instability of principle-based systems when confronted with "wicked problems". While this analysis has critiqued the consequences of this shift, it acknowledges a foundational premise of the reforms; the pre-2024 scheme was, by many measures, unsustainable. The central issue this paper has explored, then, is not the need for change, but the nature of the choice made: whether the government's legislative rebuttal, in hardening soft law to achieve consistency, has sacrificed the individualised judgement essential for justice.

The original NDIS architecture, built on the 'reasonable and necessary' standard, created vast discretionary space that generated conflict. When the NDIA failed to operationalise this discretion fairly or consistently, the Federal Court and AAT forged a body of principles emphasising individualised assessment, holistic support, and collaborative process. This intervention was necessary, fulfilling the administrative continuum's promise that merits review would address defects in primary decision-making. By transforming soft law guidelines into binding legislative instruments, creating categorical exclusions, and mandating fragmented assessment through the 'accepted impairment' gateway, the reforms fracture the administrative continuum. By design, these mechanisms sever the feedback loop whereby merits review of individual cases could inform and shape administrative practice. This is not merely technical law reform but a fundamental reconceptualisation of disability support administration that prioritises actuarial certainty over individual justice.

This transformation generates two profound consequences in productive tension. First, it creates 'programmatic invisibility', a state where the system cannot see or respond to participants' holistic needs. The reformed architecture legally mandates a fragmented view of the person, forcing decision-makers to parse integrated human experiences into discrete, fundable categories, and to assess a participant's interconnected disabilities only as isolated, separate impairments. This is not an unintended consequence but the logical endpoint of a system designed to transform human complexity into governable administrative categories. Yet this attempt to achieve administrative control generates the second consequence: the 'paradox of legibility'. The transformation of discretionary policies into precise legal rules, intended to insulate

decision-making from judicial scrutiny, creates new and potentially more powerful avenues for legal challenge. Every categorical exclusion requires definition; every definition creates boundaries; every boundary becomes a site of contestation. The shift from soft to hard law triggers enhanced judicial scrutiny and opens possibilities for systemic challenges that transcend individual cases. What was meant as a shield becomes a target.

The post-reform resistance cases demonstrate this paradox in operation. Judicial creativity has not disappeared but relocated: from articulating broad principles to policing categorical boundaries, from defining 'reasonable and necessary' to interpreting 'standard recreational equipment'. The proliferation of interpretive disputes, procedural challenges, and creative 'unbundling' strategies reveals a fundamental truth of administrative law. The tension between rules and discretion cannot be resolved through legislation; it can only be displaced. The NDIS presents a different pathology of executive power than the unlawful automation of Robodebt. Where Robodebt represented illegal defiance of administrative law principles, the NDIS reforms represent their lawful circumvention. This may prove the more dangerous precedent. It offers a playbook for future governments, demonstrating how to achieve ends similar to Robodebt not through unlawful administrative action, but through the powerful, and entirely lawful, tool of legislative reform.

This is not to argue that the reforms are universally negative or that external review is extinct. Indeed, the persistence of robust merits review where rules permit shows that oversight continues in the new system's cracks. While the scheme may benefit participants whose needs align with its new categories, my core contention is that the structural logic of the administrative architecture has fundamentally transformed. The question is whether Australian public law can develop adequate doctrinal tools for this new challenge. A focus on individual errors and procedural fairness seems ill-equipped to address legislatively mandated systemic blindness. The early post-reform cases suggest judicial ingenuity persists, but within narrowing channels. The interplay between programmatic invisibility and the paradox of legibility will define the evolving character of Australian administrative justice, testing the judiciary's ability to protect the individual when the state's simplifying gaze is enshrined in law.