



NDIS: the most significant social reform since Medicare

The NDIS imposes obligations on insurers and defendants, as well as criminal sanctions for non-compliance

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AT A GLANCE

- The National Disability Insurance Scheme (NDIS) is a no-fault insurance scheme providing funding to people with disability and the National Disability Insurance Agency (NDIA) is responsible for administering the NDIS.
- The NDIA can issue Preliminary Notices and Recovery Notices on insurers and defendants. It is a criminal offence to pay compensation towards a settlement while those notices are in effect.
- Insurers and defendants also need to be aware of their reporting obligations and the NDIA's broad powers, which include the power to litigate common law claims in a person's name.
- Insurers and defendants need to carefully consider the application of the NDIS in structuring settlement agreements with NDIS participants and prospective participants.

WHAT IS THE NDIS?

The NDIS is Australia's first national scheme to assist people living with a disability and is widely considered Australia's most significant social reform since Medicare. It is an opt-in scheme that is being progressively rolled out across all Australian States and Territories and is expected to become fully operational this year.

Under the scheme, funding for disability support is provided directly to eligible individuals (known as participants).

The scheme is open to individuals who satisfy certain age, residence and disability 'access criteria'. Generally speaking, the criteria dictate a person must:

- reside in Australia and hold either Australian citizenship, a permanent visa or a protected special category visa (residence requirement)
- be under the age of 65 at the time access is sought (age requirement), and
- have either a disability that is attributable to a permanent and significant impairment (disability requirement), or an impairment that is, or is likely, to be permanent and there is evidence they will benefit from early intervention (early intervention requirement).

THE LEGISLATIVE FRAMEWORK

The NDIS is governed by:

- The *National Disability Insurance Scheme Act 2013* (Cth) – the primary legislation establishing the NDIS and its administering body, the NDIA
- The *National Disability Insurance Scheme Rules* (NDIS Rules) – a legal instrument outlining the operation of the NDIS in detail, and
- The *Operational Guidelines* – located on the NDIS website and provide guidance to the NDIA on how to apply the law and interpret its functions.

WHAT DOES THE NDIS PROVIDE?

Once eligible for the NDIS, participants contribute to the creation of a personalised ‘plan of supports’ that outlines the assistance they require. Under this plan, the participant may be entitled to funding for ‘reasonable and necessary supports’, which may include:

- personal care supports (e.g. personal carer, or aids and equipment)
- transport supports (e.g. taxi allowance or training to use public transport)
- employment and higher/vocational education and training
- home and vehicle modifications
- recreation supports (e.g. specialised sporting equipment or personal assistance), and
- gratuitous care, only in very exceptional circumstances.

NDIA’S BROAD POWERS

Critically, the NDIS legislation does not remove a defendant’s or insurer’s liability to pay compensation to a claimant for ‘supports’. For example, if a participant receives supports by way of aids and equipment under

the NDIS, the defendant or insurer is still liable to pay for the aids and equipment.

The legislation allows the NDIA various avenues for recovering those payments and has afforded the NDIA broad powers to:

- compel a participant to claim compensation from a third party (such as a negligent defendant) if the NDIA believes the participant or prospective participant is entitled to compensation regarding a personal injury
- take its own legal action against a third party in the name of the participant or prospective participant
- seek recovery of past payments from a participant from certain judgments or settlements, and
- seek recovery from defendants and insurers for past payments it has made (by way of written notice).

PARTICIPANTS MAY HAVE TO ‘TAKE ACTION’ TO OBTAIN COMPENSATION

The NDIA can compel a participant to take action to claim compensation from a third party (such as a negligent third party), or it can otherwise subrogate the compensation rights of that person to claim the compensation directly. The process unfolds in this way:

- If a participant has not taken action to obtain compensation, the NDIA can require the participant to seek compensation if there are reasonable prospects of success. The NDIA can require the participant to seek legal advice, contact an insurer directly or issue legal proceedings.
- If the participant fails to comply with the directive by the NDIA and the action required of the participant does not relate to obtaining compensation under a Commonwealth, State or Territory compensation scheme (such as Comcare, Workcover or TAC), then the NDIA has power to take action, or take over conduct of an existing action, in the name of the participant. At this point, the NDIA Legal Services Branch steps in to act and becomes liable for the costs of the claim.
- If the NDIA is successful in obtaining compensation, the NDIA will recover from that third party an amount equal to what it has paid the participant. The NDIA will pay the legal costs and any remaining balance goes to the participant.

The NDIA can require a participant to take action to claim compensation under a Commonwealth, State or Territory compensation scheme. However, it cannot subrogate the participant's rights to claim that compensation if the participant fails to take the action directed by the NDIA. In this circumstance, the NDIA can either suspend the participant's 'plan of supports' or stop the plan from taking effect until the required action is taken.

WHAT IF A PARTICIPANT HAS ALREADY RECEIVED COMPENSATION FROM A DEFENDANT OR INSURER?

The legislation also allows the NDIA to recover past support payments directly from participants in certain judgments and settlements for those same supports.

Where a participant receives compensation under any judgment or settlement, the NDIA also has power to reduce the participant's future supports under the NDIS. The amount of the reduction is known as the Compensation Reduction Amount and is calculated using a complex formula prescribed by the NDIS Compensation Rules.

RECOVERY FROM DEFENDANTS AND INSURERS

Finally, if a participant or prospective participant makes a claim against a defendant or insurer, the NDIA can issue that defendant or insurer with either a Preliminary Notice or a Recovery Notice. The NDIA can issue a notice on an insurer, if the insurer is liable to indemnify the defendant (or potential compensation payer) under a contract of insurance.

A Preliminary Notice outlines the recipient's obligations to notify NDIA of any liability to pay compensation to the participant or prospective participant, such as through a settlement agreement in a common law action.

On the other hand, a Recovery Notice will specify a debt presently owed to NDIA and is only issued when a participant has received funding under the NDIS for the same impairment that is the subject of the claim. If the NDIA issues a Recovery Notice, the defendant or insurer is liable to pay to NDIA any amount reflected in the Recovery Notice. The amount specified in the Recovery Notice is the lesser of either the amount paid to the participant under the NDIS for reasonable and necessary supports, or in circumstances where a participant has obtained judgment or a settlement before the notice is issued, an amount known as the recoverable amount. Notably, if a judgment or settlement applies a reduction for contributory negligence, then the recoverable amount can be reduced.

WHAT SHOULD INSURERS AND DEFENDANTS DO IF THEY ARE ISSUED WITH A PRELIMINARY NOTICE OR RECOVERY NOTICE?

Insurers and defendants must not release settlement money or pay damages to a claimant while a Preliminary Notice or Recovery Notice is underway.

Insurers and defendants must only release settlement money to a claimant if the NDIA has revoked the notice in writing, the insurer or defendant has paid the amount in the Recovery Notice, or the NDIA has given written permission to the insurer or defendant to pay compensation directly to the participant.

Insurers and defendants also need to be aware of their reporting obligations regarding a Preliminary Notice, including notifying the NDIA in writing of their liability to pay compensation (such as under a settlement agreement or judgment) within seven days of:

- receiving the Preliminary Notice, if the defendant or insurer was liable to pay compensation when they received the notice, or
- becoming liable to pay compensation, if that liability arises after receiving the Preliminary Notice.

It is a serious criminal offence to breach a Recovery Notice or Preliminary Notice. The offence carries a penalty of 12 months imprisonment or 60 penalty units (currently \$9,671.40), or both. Further, if convicted for paying compensation while a Preliminary Notice or Recovery Notice is in effect, insurers and defendants remain liable to pay the NDIA.

WHAT DO I DO IF A CLAIM OR PROCEEDING IS UNDERWAY?

There is no obligation on insurers and defendants to notify the NDIA of a personal injury claim. However, if the NDIA issues a Recovery Notice or Preliminary Notice, defendants and insurers must comply with their reporting obligations and make any necessary payments as directed by the NDIA.

To protect themselves, when proceedings settle, insurers and defendants should:

- make it clear in any settlement agreement that the settlement sum includes any repayments to the NDIA, and
- require a claimant to indemnify them for any liability they might have to the NDIA, by express terms in the settlement agreement.

This means defendants and insurers should ensure that settlement agreements are diligently drafted, particularly if a claimant waives their rights to compensation (for example, in a walk away/bear own cost settlement agreement). If the NDIA determines the agreement is void, it can require the participant to act to recover compensation, or it can subrogate that participant's compensation rights and pursue the insurers and defendants directly.

If there was contributory negligence resulting in reduced compensation, it is worth noting this in the settlement agreement because it can reduce the liability to the NDIA, which is akin to the current practice when making repayments to Medicare.

If you suspect a claimant is seeking to, or intends to, seek supports under the NDIS, insurers should understand where they stand regarding liability for repayments under the NDIS before they release settlement money. This could be done with a letter to the claimant's solicitors asking if the claimant has made a claim for support under the NDIS, or intends to make a claim, as well as with a carefully drafted settlement agreement.

Given the serious ramifications for failing to comply with Preliminary Notices and Recovery Notices, insurers and defendants should ensure their claims management systems are configured to withhold compensation payments and schedule relevant reporting dates after receiving a Notice.

NEED TO KNOW MORE?

For more information please contact us.



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