

Compensation Operational Guideline

Contents

Compensation Operational Guideline.....	1
1. What is the purpose of this operational guideline?	8
1.1. Overview	8
1.2. Information and Documents required for the NDIA to undertake its functions	9
2. What is the relevant legislation?	11
3. Principles relating to compensation and the NDIS.....	11
4. What is compensation	12
4.1 Compensation under the NDIS Act	12
4.2. When may a person be entitled to compensation?	12
4.3 Identifying if an amount is compensation under the NDIS Act	13
4.4 Payments that are wholly or partly for the cost of supports that may be provided to a participant.....	13
4.5 In what form may a compensation payment be made?	14
5. Requiring a participant, or prospective participant, to take action to claim or obtain compensation.....	14
5.1 When the NDIA may require a participant, or prospective participant, to take action to claim or obtain compensation	15
5.2 When will the NDIA consider that a participant, or prospective participant, is or may be entitled to compensation?	16
5.3 What if a participant, or prospective participant, has entered into an agreement to give up a right to compensation?	17
5.4 Giving written notice that action must be taken	17
5.5 How long does a participant, or prospective participant, have to comply with a notice requiring a participant, or prospective participant, to take action to claim or obtain compensation?	19
5.6 Can the period of time in a written notice be extended?	20

5.7 Evidencing action that has been taken.....	20
5.8 Consequences of failure to comply with the requirement to take action to claim or obtain compensation.....	20
5.9 The NDIA must notify a participant, or prospective participant, in writing that the action is being considered.....	23
5.10 Who is responsible for the legal costs of a claim if the NDIA takes action on behalf of a participant, or prospective participant, or takes over the conduct of a claim.....	24
5.11 Recovery of past NDIS amounts and costs incidental to the claim paid for by the NDIA from claims brought, or taken over by the NDIA on behalf of the participant, or prospective participant.....	25
6. Recovering past NDIS amounts from compensation	26
6.1 When may the NDIA calculate a recoverable amount?	26
6.2 When a recoverable amount will not be calculated	27
6.3 Recovering amounts from compensation fixed under a judgement (other than a consent judgement) under section 106 of the NDIS Act.....	27
6.4 What amount is payable to the NDIA?	29
6.5 Recovering from compensation fixed by consent judgement or settlement	33
6.6 What amount is payable to the NDIA?	34
6.7 The recoverable amount is a debt due to the NDIA	37
7. Recovery from compensation payers and insurers.....	37
7.1 What is a preliminary notice?	37
7.2 What is the effect of a Preliminary Notice?	37
7.3 When can the NDIA give a preliminary notice to a potential compensation payer?	38
7.4 When can the NDIA give a preliminary notice to an insurer?	38
7.5 What information must a preliminary notice contain? (subsection 109(3) of the NDIS Act)	38
7.6 What is a recovery notice?	39
7.7 Effect of a recovery notice.....	39
7.8 When may the NDIA give a recovery notice to a compensation payer?.....	40

7.9 When may the NDIA give a recovery notice to an insurer?	40
7.10 Calculating the amount to be specified in the notice	41
7.11 What information must a recovery notice contain?	41
7.12 The amount specified in a recovery notice is a debt due to the Agency by the recipient of the notice	41
7.13 Payment to the NDIA discharges the compensation payer or insurer's liability	41
7.14 Consequences of failing to comply with a preliminary notice or recovery notice	42
8. Compensation Reduction Amount (CRA)	43
8.1 What is a CRA?	43
8.2 In what circumstances is a CRA calculated?	43
8.3 Why is a CRA calculated?	44
8.4 How is a CRA calculated?	44
8.5 Applying the CRA to a statement of participant supports	46
8.6 For how long will a CRA be applied to statements of participant supports?	47
8.7 What happens if the CRA is reduced to nil?	47
9. Calculating the Compensation Reduction Amount (CRA) when compensation is fixed by a non-consent judgment, consent judgement, or settlement and the National Disability Insurance Scheme (NDIS) component is objectively identifiable	48
9.1 Steps for calculating the CRA where the NDIS component is fixed by a non-consent judgement, consent judgement or settlement, or is objectively identifiable	48
9.2 Example calculation	50
9.3 Compensation reduction amount reduced to nil	50
10. Calculating the compensation reduction amount (CRA) when compensation is fixed by a non-consent judgment, consent judgement, or settlement and the National Disability Insurance Scheme (NDIS) component is not objectively identifiable	50
10.1 Steps for calculating the CRA where the NDIS component is not objectively identifiable	51

10.2 Where the person has received more than one compensation payment for the same injury.....	54
10.3 CRA reduced to nil	54
11. Where participant is receiving compensation under a scheme of insurance or compensation under a Commonwealth, State or Territory law (rule 3.1(c) and rules 3.17-3.18)	54
11.1 Identifying the Compensation Reduction Amount (CRA) where the participant is receiving compensation under a scheme of insurance or scheme of compensation under a Commonwealth, State or Territory law (rules 3.17-3.18 of the Compensation Rules).....	55
12. Agreements to give up a right to compensation (rules 3.1(d) and 3.19 of the Compensation Rules)	55
12.1 When a participant may be considered to have entered into an agreement to give up a right to compensation	56
12.2 How does the NDIA determine whether it was reasonable to enter into the agreement?.....	56
12.3 Calculating the CRA – agreement to give up compensation (rules 3.19-3.21 of the Compensation Rules).....	57
12.4 Where there is an agreement to give up a right to compensation and another CRA has been identified in respect of the same injury.....	59
12.5 Compensation reduction amount reduced to nil	60
13. Special Circumstances	60
13.1 What are special circumstances?.....	60
13.2 Special circumstances and recovery (section 116 of the NDIS Act).....	61
13.3 Special circumstances and Compensation Reduction Amounts (CRA's)..	63
13.4 Information and documents required for a special circumstances determination	64
13.5 Special circumstances and reviewable decisions.....	65
14. Review of Decisions	65
14.1 Reviewable decisions relevant to compensation.....	65
14.2 The decision to approve a statement of participant supports in a participant's plan may include application of a Compensation Reduction Amount (CRA)	66

15. Compensation Operational Guideline – Definitions	67
A	67
Authorised representative	67
C	67
Commute	67
Compensable injury	67
Compensable event	67
Compensation	67
Compensation payer	68
Compensation Reduction Amount (CRA)	68
Compensation Rules	68
Consent Judgement	68
Cost of supports that may be provided to a participant	68
D	68
Damages	68
Disability requirements	68
Domestic Care and Assistance	68
E	69
Early intervention requirements	69
Economic Loss	69
F	69
Fixed	69
G	69
General Damages	69
General supports	69
Gratuitous care	69
I	69
Ineffective	69
Insurer	70

J.....	70
Judgement	70
L.....	70
Lump sum payment.....	70
M.....	70
Medical and like expenses	70
N	70
NDIA	70
NDIS Act	70
NDIS amount.....	70
NDIS component.....	71
Non-consent judgement	71
Notifiable amount	71
P	71
Participant's impairment.....	71
Personal injury	71
Periodic payment	71
Person.....	71
Potential compensation payer.....	71
Pre-existing impairment	72
Prospective participant.....	72
R	72
Reasonable and necessary supports	72
Recoverable amount.....	72
S	72
Settlement.....	72
Scheme of insurance	72
T	73
To any extent	73

Total of all NDIS amounts	73
U	73
Unenforceable.....	73
V	73
Void contract.....	73

1. What is the purpose of this operational guideline?

This Operational Guideline is intended to provide guidance in relation to the compensation provisions of the [National Disability Insurance Scheme Act 2013 \(External website\)](#) (NDIS Act) and the [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013 \(External website\)](#) (Compensation Rules).

1.1. Overview

The National Disability Insurance Scheme (NDIS) is designed to complement, not replace, existing [compensation](#) arrangements for [personal injury](#).

This means the NDIS is not meant to alter the way in which people seek compensation, or affect existing rights to compensation, in circumstances where they have sustained an injury which has caused, [to any extent](#), an [participant's impairment](#).

If a participant (see section 9 of the NDIS Act) or [prospective participant](#) does not seek compensation in circumstances where they have a right to do so, the National Disability Insurance Agency (NDIA) may direct them to seek compensation. If the participant, or prospective participant, does not comply with the direction of the NDIA to take steps to claim or obtain compensation the NDIA may:

- suspend their plan;
- not approve their plan;
- bring a claim for compensation in the name of the participant or prospective participant; or
- take over conduct of an existing claim for compensation.

The compensation provisions of the NDIS Act and the Compensation Rules are based on the need to ensure the financial sustainability of the NDIS. This is done by ensuring that:

- The NDIA may require a participant or prospective participant to take action to claim or obtain compensation if they have sustained an injury, which has caused, to any extent, an impairment [in compensable circumstances](#). Failure on the part of the participant, or prospective participant, to take the required action, may result in the NDIA claiming or obtaining compensation in the name of the participant, or prospective participant, or the NDIA taking over the conduct of an existing compensation claim. For more information, see [Requiring a participant or prospective participant to take action to claim or obtain compensation](#).
- The NDIA may recover from a participant, past [NDIS amounts](#) paid to a participant, where compensation has been paid, or becomes payable, for an

injury that has caused, to any extent, a participant's impairment. For more information see [Recovering past NDIS amounts from compensation](#).

- The NDIA may recover from the compensation payer or insurer past NDIS amounts paid to a participant, where compensation has been paid, or become payable, for an injury that has caused, to any extent, a participant's impairment. For more information see [Recovery from compensation payers and insurers](#); and
- The NDIA may reduce the funding for [reasonable and necessary supports](#) that would otherwise be approved in a statement of participant's supports (see section 33(2) of the NDIS Act) in a participant's plan to take into account compensation received, being received, or given up, by a participant. For more information see [Compensation Reduction Amount \(CRA\)](#).

1.2. Information and Documents required for the NDIA to undertake its functions

In order for the NDIA to undertake the functions as outlined throughout this Operational Guideline, it will be necessary for the NDIA to collect, use and disclose personal information and documents from participants and/or third parties.

The NDIA seeks to adopt best practice when handling personal information. Therefore, the NDIA may obtain consent from a participant or their [authorised representative](#) for the purposes of:

- Requiring a participant to claim or obtain compensation; or
- Calculating a compensation reduction amount; or
- [Providing information to a third party](#).

Third parties, that may be requested to lawfully provide information and/or documentation, include, but are not limited to:

- Authorised representatives (for example, lawyers).
- Trustees.
- Financial Managers (or similar).
- Insurers.
- Medicare.
- Centrelink,
- Commonwealth, State or Territory [schemes of insurance](#).
- Plan Managers.
- Service providers.

Circumstances in which the NDIA is likely to request information and/or documentation include, but are not limited to, when:

- A participant or prospective participant has sustained an injury, which has caused, to any extent, an impairment, but has not claimed compensation;

- A participant, or prospective participant, is currently claiming compensation;
- A participant or prospective participant received compensation either before or after they have been granted access to the NDIS;
- A participant is receiving compensation from a scheme of insurance or under a Commonwealth, State or Territory law; or
- A participant, or prospective participant, has given up a right to claim compensation.

Types of information and/or documents the NDIA is likely to request include but are not limited to:

- Court Judgement or Tribunal Decision.
- Statement of Claim.
- Particulars of Special Damage/Statement of Particulars.
- Terms of Settlement.
- Medical or other reports.
- Centrelink Charge Notice.
- Centrelink Preclusion Notice.
- Medicare Notice of Past Benefits or Notice of Charge.
- Letters from lawyers identifying the final settlement amount, including any breakdown (for example pain and suffering, medical and like expenses, economic loss).
- Letter from the scheme of insurance or insurer identifying the final settlement amount and any breakdown (for example general damages, medical and like expenses and economic loss).
- Details of any supports provided, or funded, by a scheme of insurance or insurer.
- Invoices or receipts for supports paid for by the participant from the date of the compensable event to the date of becoming a participant in the NDIS.
- Accounting or bank records showing support expenses paid by the participant from the date of the compensable event to the date of becoming a participant in the NDIS.
- Outgoing expense reports from trustees, financial managers or similar.

The information and documentation collected will assist the NDIA to efficiently and effectively enquire where compensation is a factor. For this reason, it is often beneficial for participants, prospective participants, authorised representatives, and third parties to assist the NDIA by providing the requested information and documentation in a timely manner.

The NDIA will not disclose collected information or documentation unless authorised by law. This includes situations where consent has been obtained by the participant, prospective participant, or an authorised representative, and the release of that information or documentation is necessary for the purposes of the NDIS Act and/or the Compensation Rules.

For information on the NDIA's power to collect information, and how information is handled, see [Our Guideline - Your privacy and information](#), [NDIA's privacy policy](#) and/or the [Privacy Act 1988 \(Cth\)](#) (External website).

2. What is the relevant legislation?

- Sections 3 – 5, 11, 17A, 31 – 36, 51 – 57, 99 – 116 of the [National Disability Insurance Scheme Act 2013 \(External website\)](#) (NDIS Act).
- [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013 \(External website\)](#) (Compensation Rules).

3. Principles relating to compensation and the NDIS

The [National Disability Insurance Scheme Act 2013 \(External website\)](#) (NDIS Act) sets out a number of principles (see section 4 of the NDIS Act) for the National Disability Insurance Scheme (NDIS).

The NDIS is designed to complement, not replace, existing [compensation](#) arrangements for [personal injury](#).

Chapter 5 of the NDIS Act and the [National Disability Insurance Scheme \(Supports for Participants - Accounting for Compensation\) Rules 2013 \(External website\)](#) (Compensation Rules) also ensure that where individuals receive compensation payments, the NDIS does not duplicate funding for supports that may be provided to a participant.

The National Disability Insurance Agency (NDIA) does this in the following key ways:

1. Ensuring participants (see section 9 of the NDIS Act) or [prospective participants](#), take reasonable action to claim or obtain compensation if they are, or may be, entitled to do so;
2. Taking action to claim or obtain compensation in the name of the participant, or prospective participant, or by taking over the conduct of any existing claim;
3. Recovering amounts from participants who have received reasonable and necessary supports from the NDIS and obtain compensation;
4. Reducing funding for [reasonable and necessary supports](#) through the application of [Compensation Reduction Amounts \(CRA\)](#).

A key principle, to which consideration must be given, when undertaking these functions under Chapter 5 of the NDIS Act and the Compensation Rules, is the financial sustainability of the scheme.

4. What is compensation

4.1 Compensation under the NDIS Act

When the term compensation is used in the context of the National Disability Insurance Scheme (the NDIS), it is limited by the definition contained in section 11 of the [National Disability Insurance Scheme Act 2013 \(External website\)](#) (NDIS Act).

Section 11 of the NDIS Act defines compensation as:

1. In this Act:
2. Compensation means a payment (with or without admission of liability) in respect of:
 1. Compensation or damages in respect of personal injury;
 2. Personal injury, under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme; or
 3. Personal injury, in settlement of a claim for damages or a claim under such an insurance scheme;

that is wholly or partly in respect of the cost of supports that may be provided to a participant (whether or not specifically identified as such). It does not matter whether the payment is made directly to the person who sustained the personal injury or to another person in respect of that person.

3. A payment referred to in subsection (1) may be:
 1. In the form of a lump sum or in the form of a series of periodic payments; and
 2. Made within or outside Australia.

The definition provided in the NDIS Act limits compensation to a payment that is, wholly or partly, for the cost of supports that may be funded or provided by the National Disability Insurance Scheme (NDIS) for the injury which was the subject of the compensation claim.

If a person has sustained an injury, the person may lodge a claim for damages.

A claim for damages may include, but is not limited to, a claim for general damages (e.g. pain and suffering), economic loss (past and future), medical and like expenses (past and future), and domestic care and assistance (past and future).

4.2. When may a person be entitled to compensation?

A person may be injured in a number of ways that may result in compensation being paid or payable. This includes, but is not limited to events or injuries

- involving a motor vehicle;
- occurring at work;
- resulting from medical treatment, or lack of;
- occurring in a public place;
- occurring at private residence;
- occurring as a result of a criminal act;
- relating to equipment or product failure; or
- occurring during a sporting activity.

4.3 Identifying if an amount is compensation under the NDIS Act

In order for an amount received by a participant to meet the definition of compensation it must meet the following criteria:

1. Payment (limited to a lump sum payment or periodic payment);
2. The payment must be for a personal injury; and
3. The payment must include a component for supports that may be provided to the participant by the NDIS.

A description given to an amount may assist the NDIA to identify whether or not the amount is compensation, but the description will not be determinative.

For example, although the NDIS does not fund medical expenses, an amount identified as being for medical expenses may still meet the definition of compensation under the NDIS Act. This may occur if the amount included a component for the cost of supports that may be provided to a participant by the NDIS, such as assistive technology, home modifications, prosthesis or other disability support.

Amounts paid for domestic care and assistance are also in respect of the costs of supports that may be funded or provided to a participant. Whether those services are required and provided under a paid agreement, or gratuitously by a family member or friend, the purpose of the payment of compensation for those services will not change, which is to provide for a kind of support that may be funded or provided under the NDIS.

4.4 Payments that are wholly or partly for the cost of supports that may be provided to a participant

A payment will be *wholly* for the costs of supports that may be funded or provided to a participant or a person who later becomes a participant, if, that person receives an amount that is solely for medical and like expenses and/or domestic care and assistance (including [gratuitous care](#)).

A payment will be in part for the costs of supports that may be provided to a participant if a participant, or a person who later becomes a participant, receives an amount that is, in part, for medical and like expenses or domestic care and assistance (or a support type that may fall under one of these sub-categories).

For example: A person makes a compensation claim, and within the claim, the person seeks damages for pain and suffering, economic loss and medical and like expenses (and/or domestic care and assistance). The person's claim settles for a global sum. The global sum will be deemed compensation under the NDIS Act because the person's claim was, in part, for medical and like expenses and domestic care and assistance.

4.5 In what form may a compensation payment be made?

Compensation may be paid in a number of ways, such as, but not limited to:

- a lump sum payment;
- a structured settlement resulting in periodic payments; or
- other periodic payments.

5. Requiring a participant, or prospective participant, to take action to claim or obtain compensation

Instances may arise where a participant (see section 9 of the [National Disability Insurance Scheme Act 2013 \(External website\)](#) (NDIS Act)), or prospective participant, has sustained injury, which is or may be compensable; however, compensation has not been claimed or obtained. This may occur for a number of reasons, such as:

- The participant, or prospective participant, is unaware they may have an entitlement to seek compensation;
- The participant, or prospective participant, may not want to seek compensation, or may feel they do not need to seek compensation;
- The participant, or prospective participant, would prefer to seek their supports from mainstream services, informal supports and the National Disability Insurance Scheme (NDIS); or
- The participant, or someone on behalf of the participant, may have agreed to give up the right to compensation

A participant, or prospective participant, may have an entitlement to compensation, but has not taken action, or has not taken reasonable action, to claim or obtain compensation. In these circumstances, the National Disability Insurance Agency (NDIA) may require the participant, or prospective participant, to take action to claim or obtain that compensation.

Requiring a participant, or prospective participant, to take action to claim or obtain compensation supports the financial sustainability of the NDIS. Section 104 of the NDIS Act is important for ensuring the financial sustainability (see section 4(17)(b) of the NDIS Act) of the NDIS.

5.1 When the NDIA may require a participant, or prospective participant, to take action to claim or obtain compensation

By written notice under subsection 104(2) of the NDIS Act, the NDIA may require a participant, or prospective participant, to take action to claim or obtain compensation, if the following criteria is met:

- The participant, or prospective participant, is, or may be, entitled to compensation in respect of a personal injury (subsection 104(1)(a)); and
- The participant, or prospective participant:
 1. has taken no action to claim or obtain compensation; or
 2. has taken no reasonable action to claim or obtain compensation (subsection 104(1)(b))

The decision of the NDIA to give a written notice to require a participant, or prospective participant, to take reasonable action is a reviewable decision.

5.1.1 When may a participant or prospective participant be entitled to claim or obtain compensation in respect of personal injury?

Examples of the kinds of events, which may give rise to an entitlement to compensation include, but are not limited to, events or injuries:

- involving a motor vehicle;
- occurring at work;
- resulting from medical treatment, or lack of;
- occurring in a public place;
- occurring at a private residence;
- occurring as a result of a criminal act;
- relating to equipment or product failure; or
- occurring during a sporting activity.

5.1.2 What is reasonable action?

When determining what reasonable action is, the NDIA must have regard to the following:

1. the disability of the participant, or prospective participant, (subsection 104(3)(a) of the NDIS Act);

2. the circumstances which give rise to the entitlement or possible entitlement to compensation (subsection 104(3)(b) of the NDIS Act);
3. any impediments the participant, or prospective participant, may face in recovering compensation (subsection 104(3)(c) of the NDIS Act);
4. any reasons given by the participant, or prospective participant, as to why he or she has not claimed or obtained compensation (subsection 104(3)(d) of the NDIS Act);
5. the financial circumstances of the participant, or prospective participant, (subsection 104(3)(e) of the NDIS Act);
6. the impact of the requirement to take the action on the participant, or prospective participant, and his or her family (subsection 104(3)(f) of the NDIS Act).

When determining whether reasonable action has been taken, the NDIA may consider, but is not limited to, the following:

1. Whether legal advice has been sought;
2. Whether a lawyer has been engaged to commence legal proceedings; and/or
3. Whether a claim for compensation has been lodged with the appropriate body with relevant evidence.

What is reasonable must be determined having regard to the context and circumstances of each individual case.

5.2 When will the NDIA consider that a participant, or prospective participant, is or may be entitled to compensation?

The NDIA *must* be satisfied that the participant, or prospective participant, has reasonable prospects of success in claiming or obtaining compensation.

5.2.1 What are reasonable prospects of success?

A participant's, or prospective participant's, prospects of successfully claiming or obtaining compensation must be determined having regard to the circumstances of each case and based on the evidence available at the time the determination is made. Although what constitutes reasonable prospects of success will be determined on a case-by-case basis, case law has provided some guidance.

The NDIA may be satisfied reasonable prospects of success exist where:

1. The NDIA reasonably believes the facts demonstrate a right to claim or obtain compensation; and
2. There is evidence to support those facts.

The NDIA must be satisfied the evidence is sufficient to warrant the participant, or prospective participant, taking the specified action to obtain the compensation.

In *Degiorgio v Dunn* (No 2) [2005] NSWSC 3 (1 February 2005) at [17]: the Supreme Court of New South Wales held that reasonable prospects of success includes:

...reasonable prospects of damages being recovered in the action – not necessarily damages as claimed but some damages, however modest.

The [NDIA may request information and documents](#) from the participant, prospective participant, or a [third party](#) as evidence.

5.3 What if a participant, or prospective participant, has entered into an agreement to give up a right to compensation?

If a participant, or prospective participant, has entered into an agreement to give up a right to compensation, the NDIA may still form the opinion that the participant, or prospective participant, remains entitled to compensation if the agreement is [void](#), [ineffective](#) or [unenforceable](#) (section 104(6) of the NDIS Act).

If the NDIA determines that an agreement entered into by a participant, or prospective participant, is void, ineffective, or unenforceable, then the NDIA may require the participant, or prospective participant, to take action to claim or obtain compensation.

5.4 Giving written notice that action must be taken

If the NDIA is satisfied that the participant, or prospective participant, may be entitled to compensation, and the participant, or prospective participant, has not taken any reasonable action to claim or obtain compensation, then a written notice may be given requiring the participant, or prospective participant, to take reasonable action (subsection 104(2) of the NDIS Act).

Reasonable action may include, but is not limited to:

- Seeking legal advice;
- Attending a medical examination for the purposes of obtaining a report;
- Engaging a lawyer to commence legal proceedings; or
- Lodging a claim for compensation with the relevant body. For example, an insurer or a Commonwealth, State or Territory scheme of compensation.

The NDIA's decision to issue a written notice requiring the participant, or prospective participant, to take reasonable action is a reviewable decision and the NDIA must consider:

5.4.1 The disability of the participant, or prospective participant, (subsection 104(3)(a) of the NDIS Act)

The NDIA must have regard to the impact of a participant's, or prospective participant's, disability on their ability to claim or obtain compensation.

For example, a participant with a severe cognitive impairment may face barriers in making a claim for compensation.

5.4.2 The circumstances that gave rise to the entitlement or possible entitlement to compensation (section 104(3)(b) of the NDIS Act)

The NDIA must have regard to the circumstances, which give rise to the entitlement or possible entitlement to compensation.

For example, the NDIA may consider the geographical location of the incident. If the injury occurred overseas, it may be difficult to claim or obtain compensation.

5.4.3 Any impediments the participant, or prospective participant, may face in recovering compensation (section 104(3)(c) of the NDIS Act)

The NDIA must have regard to any impediments the participant, or prospective participant, may face in recovering compensation.

Impediments may include, but are not limited to:

- time limitation periods;
- jurisdiction;
- evidentiary barriers;
- complexities of establishing liability, including contributory negligence; or
- difficulties the participant, or prospective participant, has encountered when seeking legal or other assistance.

5.4.4 Any reasons given by the participant, or prospective participant, as to why he or she has not claimed or obtained compensation (subsection 104(3)(d) of the NDIS Act)

The NDIA must have regard to any reason given by the participant, or prospective participant, as to why he or she has not claimed or obtained compensation.

This presents an opportunity for a participant, or prospective participant, to explain their circumstances. The NDIA will determine the appropriate weight to be given to the reasons in light of the participant's, or prospective participant's, circumstances.

5.4.5 The financial circumstances of the participant, or prospective participant, (subsection 104(3)(e) of the NDIS Act)

The NDIA must have regard to the financial circumstances of the participant, or prospective participant.

This may include, but is not limited to, considerations associated with:

- the ability of the participant, or prospective participant, to pay legal costs; and/or
- the participant's, or prospective participant's, preference to fund or provide their own disability supports.

5.4.6 The impact of the requirement to take the action on the participant, or prospective participant, and their family (subsection 104(3)(f) of the NDIS Act)

The NDIA must have regard to the impact of the requirement to take the action on the participant, or prospective participant, and their family.

The impact on the participant or prospective participant, may include but is not limited to the emotional or psychological impact.

Impact on the participant's, or prospective participant's, family may include, but is not limited to:

- If the participant, or prospective participant, sustained injury due to the fault of a family member; or
- If the participant's, or prospective participant's, family had to pursue a claim on behalf of the participant, or prospective participant, including payment of legal costs.

5.5 How long does a participant, or prospective participant, have to comply with a notice requiring a participant, or prospective participant, to take action to claim or obtain compensation?

The written notice must give the participant, or prospective participant, a minimum of 28 days to take the required action (subsection 104(5) of the NDIS Act).

When specifying the period of time in the written notice, the NDIA will, for example, consider the complexity and/or burden of the required action. This may include any constraints (i.e. time, financial and geographical) and the participant's, or prospective participant's, disability.

5.6 Can the period of time in a written notice be extended?

A participant, or prospective participant, can apply to have the specified period in the written notice for compliance extended (subsection 104(5A) of the NDIS Act).

When requested to extend the specified period, the NDIA will consider any matters relevant to ensuring the participant, or prospective participant, is afforded an opportunity to comply with the written notice, including, but not limited to:

- The complexity and/or burden of taking the specified action on the participant or prospective participant; and/or
- Any attempts by the participant, or prospective participant, to undertake the specified action.

A decision of the NDIA to refuse to extend the period of time is a reviewable decision.

5.7 Evidencing action that has been taken

The NDIA may request the participant, or prospective participant, to provide evidence that the required action has been taken within the specified period of time. Any request will be in writing and included in the subsection 104(2) notice requiring a participant to take reasonable action.

5.8 Consequences of failure to comply with the requirement to take action to claim or obtain compensation

The consequences depend on whether a participant's plan is in effect and whether the required action is to enable the participant, or prospective participant, to claim or obtain compensation under a scheme of insurance under a Commonwealth, State or Territory law, or otherwise (section 105 of the NDIS Act).

5.8.1 Failure to take action to claim or obtain compensation under a Commonwealth, State or Territory compensation scheme (subsection 105(2) of the NDIS Act)

For participants:

- Where a plan is in effect, the plan is suspended from the end of the period specified in the notice until the participant takes the required action (subsection 105(2)(a)); or
- Where a plan is not yet in effect, the NDIA is still required to facilitate the preparation of the participant's plan, but the plan does not come into effect until the participant takes the required action (subsection 105(2)(b)).

The above is mandatory. If the required action is not taken in the specified period of time, the participant's existing plan must be suspended, and if no plan exists, the participant's first plan will not come into effect until the required action is taken.

For prospective participants:

- The NDIA is not prevented from deciding whether or not the prospective participant meets the access criteria and from commencing the preparation of their plan, however, the plan will not come into effect until the participant takes the required action (subsection 105(3)).

The above is mandatory. A participant's first plan will not take effect, if the required action is not taken in the specified period of time.

5.8.2 Failure to take action to claim or obtain compensation other than under a Commonwealth, State or Territory compensation scheme (subsection 105(4) of the NDIS Act)

If a participant or prospective participant fails to take action to claim or obtain compensation, other than under a Commonwealth, State or Territory compensation scheme, the NDIA may:

- Take action to claim or obtain compensation in the name of the participant, or prospective participant; or
- Take over the conduct of any existing compensation claim.

These are reviewable decisions.

This section gives the NDIA a statutory right of subrogation; this means the NDIA steps into the shoes of the participant, and is given the same rights to claim compensation as the participant, had the participant brought or continued the claim themselves.

Before the NDIA can take action to claim or obtain compensation in the name of the participant, or prospective participant, or take over the conduct of any existing compensation claim, the NDIA must have regard to the following criteria under subsection 105(5) of the NDIS Act:

5.8.2.1 The disability of the participant or prospective participant (subsection 105(5)(a) of the NDIS Act)

The NDIA will consider the impact of a participant's disability on their ability to claim or obtain the compensation.

For example, a participant with a severe cognitive impairment may face barriers in making a claim for compensation.

5.8.2.2 The circumstances that gave rise to the entitlement or possible entitlement to compensation (subsection 105(5)(b) of the NDIS Act)

The NDIA must have regard to the circumstances, which give rise to the entitlement or possible entitlement to compensation.

For example, the NDIA may consider the geographical location of the incident. If the injury occurred overseas, it may be difficult to claim or obtain compensation.

5.8.2.3 Any impediments the NDIA may face if the NDIA takes the action or takes over the conduct of the claim (subsection 105(5)(c) of the NDIS Act)

The NDIA must have regard to any impediments it may face in recovering compensation.

Impediments may include, but are not limited to:

- time limitation periods;
- jurisdiction;
- evidentiary barriers;
- complexities of establishing liability, including contributory negligence; and/or
- difficulties the participant, or prospective participant, has encountered when seeking legal or other assistance.

5.8.2.4 Any reasons given by the participant, or prospective participant, as to why they have not claimed or obtained compensation (subsection 105(5)(d) of the NDIS Act)

The NDIA must have regard to any reason given by the participant, or prospective participant, as to why he or she has not claimed or obtained compensation.

This presents an opportunity for a participant, or prospective participant, to explain their circumstances. The NDIA will determine the appropriate weight to be given to the reasons in light of the participant's, or prospective participant's, circumstances.

5.8.2.5 The impact of the NDIA taking the action or taking over the conduct of the claim, on the participant, or prospective participant, and their respective families (subsection 105(5)(e) of the NDIS Act)

The NDIA must have regard to the financial and other circumstances of the participant, or prospective participant, and their families.

This may include, but is not limited to, considerations associated with:

- the ability of the participant, or prospective participant, to pay legal costs;
- the participant's or prospective participant's ability to fund or provide their own disability supports; and/or
- the emotional or psychological impact on a participant, prospective participant, or their family.

5.8.2.6 Any matter the NDIA considers relevant, having regard to the objects and principles in the NDIS Act (subsection 105(5)(f) of the NDIS Act)

All objects (see section 3 of the NDIS Act) and principles (see section 4 of the NDIS Act) of the NDIS Act must be considered. However, the need to ensure the financial sustainability of the NDIS is a key consideration and highly relevant to these Operational Guidelines. The NDIA must balance the objects and principles of the NDIS Act with the operation of section 105 of the NDIS Act.

To protect the financial sustainability of the scheme, if a participant or prospective participant, has chosen not to claim or obtain compensation, the NDIA will generally take action in the name of the participant, or prospective participant, or take over the conduct of any existing claim, if it considers that reasonable prospects of success exist.

5.9 The NDIA must notify a participant, or prospective participant, in writing that the action is being considered

Prior to taking any action to:

- Claim or obtain compensation in the name of the participant, or prospective participant; or
- Take over the conduct of any existing compensation claim.

The NDIA must advise the participant, or prospective participant, in writing, that the NDIA is considering taking action (subsection 105(6) of the NDIS Act).

The NDIA may take the action specified in the notice 28 days after the notice was given. This time frame allows the participant, or prospective participant, to notify the NDIA of any additional information or considerations.

5.10 Who is responsible for the legal costs of a claim if the NDIA takes action on behalf of a participant, or prospective participant, or takes over the conduct of a claim

Where the NDIA takes action to claim or obtain compensation, or takes over conduct of a claim, the NDIA becomes liable for all costs of and incidental to the claim, except for costs unreasonably incurred by the participant (subsection 105A(1) of the NDIS Act).

Whether costs were reasonably or unreasonably incurred, will be determined having regard to the facts and circumstances of each individual case.

5.10.1 The NDIA may take appropriate steps to bring the claim to a conclusion

Steps that may be appropriate to bring a claim to a conclusion include, but are not limited to:

- entering into settlement discussions and/or agreements;
- making offers of settlement;
- mediating the claim;
- obtaining expert and/or medical evidence;
- proceeding to a hearing or trial and having the claim determined by a court, tribunal or judicial body;
- enforcing any settlement or judgement; or
- engaging legal representation and/or counsel.

5.10.2 Signing documents relevant to a claim made or taken over by the NDIA

The participant, prospective participant, or their authorised representative must sign any document relevant to a claim made or taken over by the NDIA being a document that the NDIA requires them to sign (subsection 105A(3) of the NDIS Act). These documents include but are not limited to:

- Affidavits;
- Witness statements and outlines;
- Answers to questions posed by other parties;
- Settlement agreements/deeds/releases.

Should the participant, prospective participant, or authorised representative not sign a relevant document:

- Where the claim is *not* before a court or tribunal: the NDIA may apply to the Federal Court to direct the document be signed by a person appointed by the

NDIA on behalf of the participant or prospective participant (subsection 105A(4)(a) of the NDIS Act; or

- Where the claim is before a court or tribunal: the NDIA may apply to that body to direct the document be signed by a person appointed by the CEO on behalf of the participant or prospective participant (subsection 105A(4)(b) of the NDIS Act).

Before such an application is made, the NDIA will:

- Notify the participant, prospective participant, or their authorised representative in writing of the intention to make an application to the court or tribunal to have the document signed on behalf of the participant, or prospective participant; and
- Inform the participant, or prospective participant, of their right of representation at the hearing of that application (subsection 105A(5) of the NDIS Act).

5.11 Recovery of past NDIS amounts and costs incidental to the claim paid for by the NDIA from claims brought, or taken over by the NDIA on behalf of the participant, or prospective participant

Any amount obtained as a result of a claim made or taken over by the NDIA must be paid to the Agency.

The NDIA must deduct from the amount obtained:

- an amount equal to the total of all NDIS amounts paid to, or for the benefit of, the participant before the amount is paid to the NDIA; and
- the amount of any costs incidental to the claim paid by the NDIA (this includes any costs incurred by the NDIA as a result of the decision to take action to claim or obtain compensation or take over the conduct of any existing claim).

When calculating an amount equal to the total of all NDIS amounts paid to, or for the benefit of the participant, the calculation is limited to amounts paid by the Agency for the impairment(s) caused, to any extent, by the injury, which is the subject of the compensation claim.

After deducting the total of all NDIS amounts and the amount of any costs incidental to the claim paid by the NDIA, the NDIA must pay the balance of the amount to the participant or prospective participant (subsection 105B of the NDIS Act).

Note: The balance will be paid to a person other than the participant, or prospective participant, at the direction of the relevant Court or Tribunal.

Furthermore, where the participant receives compensation as a result of a claim taken over by the NDIA, a [Compensation Reduction Amount \(CRA\)](#) will be calculated in accordance with the [Compensation Rules \(External website\)](#). For further information please see [Compensation Reduction Amount \(CRA\)](#).

6. Recovering past NDIS amounts from compensation

When compensation is [fixed](#) in respect of a [personal injury](#), which has caused, [to any extent](#), a [participant's impairment\(s\)](#), an amount from the [compensation](#), known as the [recoverable amount](#) may be repayable to the National Disability Insurance Agency (NDIA).

The recoverable amount is a debt due and payable by the participant (see section 9 of the [National Disability Insurance Scheme Act 2013 \(External website\)](#)) (NDIS Act) to the Agency (section 108 of the NDIS Act).

The NDIA may seek the recoverable amount directly from the participant, the [compensation payer](#) or [insurer](#). For more information on how the NDIA may recover the recoverable amount directly from a compensation payer or insurer please see [Recovery from compensation payers and insurers](#).

The recoverable amount can help the NDIA ensure a participant is not funded twice for past supports required as a result of an impairment which was caused, to any extent, by an injury.

This part of the Operational Guideline sets out when a recoverable amount is required to be paid to the NDIA and how the recoverable amount will be calculated.

6.1 When may the NDIA calculate a recoverable amount?

The recoverable amount may only be calculated after an amount of compensation has been fixed by a [non-consent judgement](#), [consent judgement](#) or [settlement](#) and after the participant is granted access.

For example, a participant's compensation claim settles in principle on 1 June 2017, subject to Court approval. On 1 September 2017, the Court approves the participant's settlement. The NDIA will calculate the recoverable amount between the date the participant met access and the day before their compensation was fixed (31 August 2017).

6.1.1 Providing a breakdown of past NDIS amounts for information purposes only

Prior to an amount of compensation being fixed by a non-consent judgement, consent judgement or settlement the NDIA can provide a breakdown of past NDIS

supports paid by the NDIA. A breakdown of past NDIS amounts can be requested at any time by a participant, or their [authorised representative](#).

The breakdown of past NDIS amounts is the sum of past NDIS amounts paid by the NDIS, current only as of the date identified in the accompanying letter.

The breakdown of past NDIS amounts may increase over time as a participant may use their NDIS funding while their compensation claim is in progress.

The breakdown of past NDIS amounts is not the recoverable amount. It is for information purposes only.

The NDIA will only calculate a recoverable amount after an amount of compensation has been fixed by judgement, consent judgement or settlement.

6.2 When a recoverable amount will not be calculated

If an amount of compensation is fixed before a person becomes a participant, there will be no recoverable amount in respect of that amount of compensation because the NDIS will not have paid for any reasonable and necessary supports before the amount of compensation is fixed.

If a participant has met access, but is yet to have a plan approved, the NDIS will not have paid for any supports and as such no recoverable amount will be payable to the NDIA.

If a participant, or prospective participant, has received compensation as defined under section 11 of the NDIS Act, there will also be the potential for the future application of a Compensation Reduction Amount (CRA) to their statement of participant supports in their plan. For more information, see [Compensation Reduction Amount \(CRA\)](#).

6.3 Recovering amounts from compensation fixed under a judgement (other than a consent judgement) under section 106 of the NDIS Act

A recoverable amount may be payable by the participant to the NDIA when:

1. an amount of compensation is fixed under a [judgement](#) (other than a consent judgement) given in respect of a personal injury which has caused, to any extent, a participant's impairment (whether or not the participant was a participant at the time of the injury); and
2. before the day of the judgement, [NDIS amounts](#) had been paid in respect of supports in relation to the participant's impairment which has been caused to any extent by the personal injury; and

3. the judgement specifies a portion of the amount of compensation to be a component for supports of a kind funded or provided under the NDIS.

Compensation is fixed under a judgement on the date the judgement is given.

6.3.1 The participant has a personal injury, which has caused, to any extent, the participant's impairment (subsection 106(1)(a) of the NDIS Act);

It does not matter if the participant sustained the personal injury prior to becoming a participant in the NDIS.

If a judgement for compensation is given in respect of an injury, which has aggravated, accelerated or exacerbated a pre-existing impairment, the injury will be taken to have caused, *to any extent*, the participant's impairment(s) and the NDIA will calculate a recoverable amount.

In the case of a participant with a pre-existing impairment(s), who sustains an injury, which causes a new impairment(s) and NDIS amounts are paid in respect of supports for the new impairment(s), a recoverable amount may be calculated. The calculation will only relate to past NDIS amounts paid for supports in relation to the new impairment(s).

6.3.2 NDIS amounts were paid in respect of supports in relation to the participant's impairment before the day of the judgement, (subsection 106(1)(b) of the NDIS Act);

If the participant's impairment(s) was caused, to any extent, by an injury and NDIS amounts have been paid for that impairment(s), those NDIS amounts are recoverable by the NDIA.

If the NDIS has paid for reasonable and necessary supports solely in respect of an impairment which was not caused, to any extent, by the injury for which they received compensation, those amounts will not form a part of the recoverable amount and will not be payable to the NDIA.

6.3.3 The judgement specifies a portion (the past NDIS support component) of the amount of compensation to be a component for supports of a kind funded or provided under the NDIS (subsection 106(1)(c) of the NDIS Act).

A non-consent judgement will generally identify the amount fixed in respect of each element of a participant's claim for compensation. For example, the non-consent judgement may specify the amount fixed for:

- general damages (including but not limited to pain and suffering);
- past and future economic loss;
- past and future medical and like expenses (including but not limited to, supports to assist functional capacity, therapy, assistive technology, home and vehicle modifications);
- past and future domestic care and assistance.

The past NDIS component in a non-consent judgement may consist of, for example, past medical and like expenses and past domestic care and assistance, including past gratuitous care.

A non-consent judgement may identify specific supports, or may refer to terms such as medical and like expenses and/or domestic care and assistance. Where specific supports are not identified, the amount fixed under the terms such as medical and like expenses and/or domestic care and assistance will be relied upon for the purposes of calculating the recoverable amount.

6.4 What amount is payable to the NDIA?

6.4.1 Calculating the recoverable amount

The starting point of the calculation is that the recoverable amount is equal to the sum of the NDIS amount paid before the date of non-consent judgement (subsection 106(2)(a) of the NDIS Act).

If the participant has only received NDIS funding for supports in respect of impairment(s) caused, to any extent, by an injury which is the subject of the compensation claim, the sum of the past NDIS amounts paid by the NDIA will be recoverable between the following dates:

- the date the participant was granted access to the NDIS; and
- the day before the amount of compensation was fixed by non-consent judgement.

Subject to the potential reductions set out in 6.4.2, 6.4.3 and 6.4.4.

For example:

- The amount of compensation fixed under the non-consent judgement is \$200,000.
- The sum of past NDIS amounts is \$100,000.
- Noting the **recoverable amount** is equal to the recoverable amount, the recoverable amount is \$100,000 (subject to the potential reductions at 6.4.2, 6.4.3 and 6.4.4).

If the participant receives NDIS funding for supports for a pre-existing impairment(s) and funding for supports for an impairment caused to any extent by an injury, the sum of the past NDIS amounts paid by the NDIA for the impairment sustained as a result of the injury, will be recoverable between the following dates:

- The date the participant was granted access to the NDIS or, the date they sustained their injury (whichever is the later); and
- The day before the amount of compensation was fixed by non-consent judgement.

Subject to the potential reductions set out in 6.4.2, 6.4.3 and 6.4.4.

For example:

- The amount of compensation fixed under the non-consent judgement is \$200,000.
- The sum of past NDIS amounts for the pre-existing impairment and the impairment caused by the injury is \$100,000.
- The sum of past NDIS amounts for the impairment caused by the injury is \$20,000.
- The **recoverable amount** is \$20,000 (subject to the potential reductions set out in 6.4.2, 6.4.3 and 6.4.4)

6.4.2 Reducing the recoverable amount by the proportion of liability apportioned to the participant in the non-consent judgement (subsection 106(3) of the NDIS Act)

The recoverable amount is to be reduced if:

1. the judgement fixes the amount of compensation on the basis that liability for the injury should be apportioned between the participant and another person; and
2. as a result, the amount of compensation is less than it would have been if liability had not been so apportioned.

If the non-consent judgement specifies the participant contributed to their personal injury, their compensation award will be reduced by the percentage they were found to have contributed to the injury occurring.

In these circumstances, the NDIA will reduce the sum of the NDIS amounts included in the recoverable amount, by the proportion of liability that is apportioned to the participant by the judgement.

For example, if a participant was found to be in part responsible for their injuries by a particular percentage, the sum of the NDIS amounts will be reduced by the same percentage.

Put another way:

The sum of NDIS amounts

Minus (-)

Participant's contributory negligence (calculated as a percentage of the sum of NDIS amounts)

=

The recoverable amount (subject to 6.4.3 and 6.4.4).

For example:

- The amount of compensation fixed under the non-consent judgement is \$200,000.
- The non-consent judgment states the participant was 25% responsible for their injury.
- The sum of past NDIS amounts is \$100,000.
- The NDIA must deduct 25% of \$100,000.
- The recoverable amount is calculated as follows:
 - \$100,000 (the sum of past NDIS amounts)
 - minus
 - \$25,000 (25% of the sum of past NDIS amounts)
 - The recoverable amount is \$75,000 (subject to 6.4.3 and 6.4.4)

6.4.3 The recoverable amount will not exceed the component of the non-consent judgement relevant to NDIS supports

If the sum of NDIS amounts is greater than the NDIS support component, the recoverable amount will be reduced to the amount of the NDIS support component (subsection 106(4) of the NDIS Act).

For example:

- The amount of compensation fixed under the non-consent judgement is \$200,000.
- The sum of past NDIS amounts is \$100,000.
- The recoverable amount after applying 6.4.2 was \$75,000.
- The NDIS support component in the judgment is \$60,000.
- The recoverable amount (\$75,000) will therefore exceed the past NDIS support component (\$60,000).
- Accordingly, the **recoverable amount** is \$60,000 (subject to 6.4.4)

6.4.4 Reducing the recoverable amount as a result of statutory repayments (subsection 106(5) of the NDIS Act)

If the recoverable amount would exceed the difference (if any) between:

1. the amount of compensation fixed by the judgement; and
2. the sum of the amounts (if any) payable in respect of the amount of compensation under the following:
 1. the Health and Other Services (Compensation) Act 1995;
 2. the Health and Other Services (Compensation) Care Charges Act 1995;
 3. Part 3.14 of the Social Security Act 1991;
 4. a law of the Commonwealth, a State or a Territory, prescribed by the National Disability Insurance Scheme rules;

then the recoverable amount is taken to be the amount of the difference.

Put another way:

The amount of compensation fixed by the non-consent judgment

Minus (-)

The sum of statutory repayments

=

The recoverable amount (if the amount identified is lower than the figure identified following steps 6.4.1, 6.4.2 and 6.4.3).

For example, if:

- The amount of compensation fixed under the non-consent judgement is \$200,000.
- The participant is required to repay Medicare \$75,000.
- The participant is required to repay Centrelink \$75,000.
- There is no other statutory repayment prescribed by the NDIS Rules.
- The difference between the amount of compensation fixed under the judgement (\$200,000) and the statutory repayments (\$150,000) is \$50,000.
- The recoverable amount after applying 6.4.1, 6.4.2 and 6.4.3 is \$60,000.
- The recoverable amount (\$60,000) will therefore exceed the difference between the amount of compensation fixed under the judgement and the statutory repayments (\$50,000).
- Accordingly, the recoverable amount is \$50,000.

6.5 Recovering from compensation fixed by consent judgement or settlement

A recoverable amount will be payable by the participant to the NDIA under section 107 of the NDIS Act when:

1. an amount of compensation is fixed under a consent judgement or settlement in respect of a personal injury that has caused, to any extent, a participant's impairment (whether or not the participant was a participant at the time of the injury); and
2. before the day of the consent judgement or settlement, NDIS amounts (the past NDIS amounts) had been paid in respect of supports in relation to the participant's impairment.

Compensation is fixed under a consent judgement or settlement on the date the consent judgement is given. For settlements, compensation is fixed when all parties have signed a document setting out the terms agreed upon to compromise or resolve their dispute.

The term settlement is broad and captures agreements to pay compensation without proceeding to litigation.

6.5.1 The participant sustained a personal injury which caused, to any extent, the participant's impairment (subsection 107(1)(a) of the NDIS Act)

It does not matter whether the participant sustained the personal injury prior to becoming a participant in the NDIS.

If a consent judgement or settlement for compensation is given in respect of an injury, which has aggravated, accelerated or exacerbated a pre-existing impairment(s), the injury will be taken to have caused, to any extent, the participant's impairment(s) and the NDIA may calculate a recoverable amount.

In the case of a participant with a pre-existing impairment(s), who sustains an injury, which causes a new impairment(s) and NDIS amounts have been paid in respect of supports for the new impairment(s), a recoverable amount may be calculated. The calculation will only relate to past NDIS amounts paid for supports in relation to the new impairment(s).

It is irrelevant if the terms of settlement or consent judgement state the compensation payer or insurer does not accept liability for the personal injury.

6.5.2 NDIS amounts were paid in respect of supports in relation to the participant's impairment before the day of the consent judgement or settlement (subsection 107(1)(b) of the NDIS Act)

If the participant's impairment(s) was caused, to any extent, by an injury and NDIS amounts have been paid for that impairment(s), those NDIS amounts are recoverable by the NDIA.

If a participant received funding for supports from the NDIS solely in respect of an impairment which was not caused, to any extent, by the injury for which they received compensation, those amounts will not form a part of the recoverable amount and will not be payable to the NDIA.

6.6 What amount is payable to the NDIA?

6.6.1 Calculating the recoverable amount

The starting point of the calculation is that the recoverable amount is equal to the sum of the NDIS amounts paid before the date of consent judgement or settlement (subsection 107(2)(a) of the NDIS Act).

If the participant has only received funding for supports in respect of impairment(s) caused to any extent by an injury which is the subject of the compensation claim, the sum of the NDIS amounts paid by the NDIA will be recoverable between the following dates:

- the date the participant was granted access to the NDIS; and
- the day before the amount of compensation was fixed by consent judgement or settlement.

Subject to the potential reductions set out in 6.6.2 and 6.6.3.

If the participant receives funding for supports for a pre-existing impairment(s) and funding for supports for an impairment caused, to any extent by an injury, the sum of the past NDIS amounts paid by the NDIA for the impairment sustained as a result of the injury, will be recoverable between the following dates:

- The date the participant was granted access to the NDIS or, the date they sustained their injury (whichever is the later); and
- The day before the amount of compensation was fixed by consent judgement or settlement.

Subject to the potential reductions set out in 6.6.2 and 6.6.3.

For example:

- The amount of compensation fixed under the consent judgement or settlement is \$200,000.
- The sum of past NDIS amounts is \$100,000.
- Noting the recoverable amount is equal to the **recoverable amount**, the recoverable amount is \$100,000 (subject to the potential reductions at 6.6.2 and 6.6.3)

6.6.2 Reducing the recoverable amount by the proportion of liability apportioned to the participant in the consent judgement or settlement (subsection 107(3) of the NDIS Act)

The recoverable amount is to be reduced if:

1. the consent judgement or settlement fixes the amount of compensation on the basis that liability for the injury should be apportioned between the participant and another person; and
2. as a result, the amount of compensation is less than it would have been if liability had not been so apportioned.

If the consent judgement or settlement specifies the participant contributed to their personal injury, their compensation award will be reduced by the percentage apportioned to the participant by the consent judgement or settlement.

In these circumstances, the NDIA will reduce the sum of the NDIS amounts included in the recoverable amount, by the proportion of liability that is apportioned to the participant by the consent judgement or settlement.

For example, if a participant was found to be in part responsible for their injuries by a particular percentage, the sum of the NDIS amounts will be reduced by the same percentage.

Put another way:

The sum of NDIS amounts

Minus (-)

Participant's contributory negligence (calculated as a percentage of the sum of NDIS amounts)

=

The recoverable amount (subject to 6.6.3)

For example:

- The amount of compensation fixed under the consent judgement or settlement is \$200,000.
- The consent judgment or settlement agreement states the participant was 25% responsible for their injury.
- The sum of past NDIS amounts is \$100,000.
- The NDIA must deduct 25% of \$100,000.
- The recoverable amount is calculated as follows:
 - \$100,000 (the sum of past NDIS amounts)
 - minus
 - \$25,000 (25% of the sum of past NDIS amounts)
 - The recoverable amount is \$75,000 (subject to 6.6.3)

6.6.3 Reducing the recoverable amount as a result of statutory repayments (subsection 107(4) of the NDIS Act)

If the recoverable amount would exceed the difference (if any) between:

1. the amount of compensation fixed by the consent judgement or settlement; and
2. the sum of the amounts (if any) payable in respect of the amount of compensation under the following:
 1. the Health and Other Services (Compensation) Act 1995
 2. the Health and Other Services (Compensation) Care Charges Act 1995;
 3. Part 3.14 of the Social Security Act 1991;
 4. a law of the Commonwealth, a State or a Territory, prescribed by the National Disability Insurance Scheme rules;

the recoverable amount is taken to be the amount of the difference.

Put another way:

Total settlement sum / total amount fixed by consent judgment

Minus (-)

The sum of statutory repayments

=

The recoverable amount (if the amount identified is lower than the figure identified following steps 6.6.1 and 6.6.2).

For example, if:

- The amount of compensation fixed under the consent judgement is \$200,000.

- The participant is required to repay Medicare \$75,000.
- The participant is required to repay Centrelink \$75,000.
- There is no other statutory repayment prescribed by the NDIS Rules.
- The difference between the amount of compensation fixed under the judgement (\$200,000) and the statutory repayments (\$150,000) is \$50,000.
- The recoverable amount after applying 6.6.1 and 6.6.2 is \$75,000.
- The recoverable amount (\$75,000) therefore exceeds the difference between the amount of compensation fixed under the judgement and the statutory repayments (\$50,000).
- Accordingly, the recoverable amount is \$50,000.

6.7 The recoverable amount is a debt due to the NDIA

A recoverable amount calculated under section 106 or section 107 of the NDIS Act is a debt due to the NDIA by that person (section 108 of the NDIS Act).

If the recoverable amount is not paid by the person who owes the debt, the debt recovery provisions under Part 1 of Chapter 7 of the NDIS Act may apply including, the potential to bring legal proceedings for repayment of the debt.

7. Recovery from compensation payers and insurers

When a participant (see section 9 of the NDIS Act), or prospective participant, makes a claim for compensation against another person (the potential compensation payer) or, an insurer who may be liable under a contract of insurance, and the claim relates to the participant's, or prospective participant's, impairment, the National Disability Insurance Agency (NDIA) may give a preliminary notice to the potential compensation payer or insurer.

A preliminary notice will be considered to have been given to a potential compensation payer or insurer if it is given to the authorised representative of the potential compensation payer or insurer. For example, if the NDIA gives a copy of the preliminary notice to a lawyer or law firm that acts on behalf of a compensation payer or insurer, the notice will be considered to have been given to that compensation payer or insurer.

7.1 What is a preliminary notice?

A preliminary notice is a written notice given by the NDIA advising a potential compensation payer or insurer that the NDIA may wish to recover an amount from the potential compensation payer or insurer.

The decision to give a preliminary notice is not a reviewable decision (section 99 of the National Disability Insurance Scheme Act 2013 (External website) (NDIS Act)).

7.2 What is the effect of a Preliminary Notice?

A preliminary notice suspends the liability or possible liability of the potential compensation payer or insurer to pay compensation to the participant, or prospective participant, while the written notice has effect (section 112 of the NDIS Act).

The preliminary notice will have effect until (section 114 of the NDIS Act):

- The preliminary notice has been revoked by the NDIA; or
- The NDIA has given the compensation payer or insurer written permission to pay the amount.

For more information, see [Consequences of failing to comply with a preliminary notice or a recovery notice](#).

7.3 When can the NDIA give a preliminary notice to a potential compensation payer?

The NDIA may give written notice to the potential compensation payer, stating that the NDIA may wish to recover an amount from the potential compensation payer if:

1. a participant, or prospective participant, makes a claim against another person (the potential compensation payer) for compensation; and
2. the claim relates, [to any extent](#), to the participant's, or prospective participant's, impairment (subsection 109(1) of the NDIS Act).

7.4 When can the NDIA give a preliminary notice to an insurer?

The NDIA may give written notice to the insurer, stating that the NDIA may wish to recover an amount from the insurer if:

1. a participant, or prospective participant, makes a claim against another person (the potential compensation payer) for compensation; and
2. the claim relates, to any extent, to the participant's, or prospective participant's, impairment; and
3. an insurer may be liable, under a contract of insurance, to indemnify the potential compensation payer against any liability arising from the claim for compensation (subsection 109(2) of the NDIS Act).

7.5 What information must a preliminary notice contain? (subsection 109(3) of the NDIS Act)

A preliminary notice given to a potential compensation payer or an insurer must contain the potential compensation payer or insurer's obligations (subsection 109(3) of the NDIS Act). More specifically, the requirement that the potential compensation payer or insurer notify the NDIA in writing:

- If the preliminary notice was received prior to becoming liable to pay compensation, within 7 days of becoming liable; or
- If the preliminary notice was received after becoming liable to pay compensation, within 7 days of the receipt of the notice (section 110 of the NDIS Act).

The potential compensation payer or insurer will commit an offence if they do not comply with this requirement. The offence is punishable by:

- 12 months imprisonment; or
- a fine of 60 penalty units; or
- both.

Increased fines may apply to bodies corporate (section 111 of the NDIS Act).

The written notice must also contain a statement of the effect of recovery (section 111 of the NDIS Act) insofar as it relates to the preliminary notice.

For more information regarding the effect of recovery see [Effect of a recovery notice](#) and [Consequences of failing to comply with a preliminary notice or a recovery notice](#).

7.6 What is a recovery notice?

A recovery notice is a written notice given by the NDIA requiring a compensation payer or insurer to pay the amount specified in the notice, directly to the NDIA.

The decision to give a recovery notice is a reviewable decision.

7.7 Effect of a recovery notice

A recovery notice suspends the liability of the compensation payer or insurer to pay compensation to the participant while the notice has effect (section 112 of the NDIS Act).

The recovery notice will have effect until:

- The amount specified in the recovery notice has been paid to the NDIA by the compensation payer or the insurer; or
- The NDIA has given the compensation payer or insurer written permission to pay the amount to the participant (section 114 of the NDIS Act).

For more information see [Consequences of failing to comply with a preliminary notice or a recovery notice](#).

7.8 When may the NDIA give a recovery notice to a compensation payer?

The NDIA may give written notice to the compensation payer that the NDIA proposes to recover from the compensation payer the amount specified in the notice if:

1. one or more NDIS amounts have been paid to a person in respect of a participant's impairment; and
2. a person (the compensation payer):
 1. is liable to pay compensation to the participant in relation to the impairment; or
 2. if the compensation payer is an authority of a State or Territory—has determined that a payment by way of compensation is to be made to the participant in relation to the impairment (subsection 111(1) of the NDIS Act).

The NDIA is not required to provide a preliminary notice before giving a recovery notice.

In circumstances where the terms of a consent judgement or a settlement specifically deny any liability on the part of the potential compensation payer or insurer, the compensation payer will still be liable to pay the NDIA the amount specified in the recovery notice.

The decision to give a recovery notice to a compensation payer is a reviewable decision.

7.9 When may the NDIA give a recovery notice to an insurer?

The NDIA may give written notice to the insurer that the NDIA proposes to recover from the insurer the amount specified in the notice if:

1. one or more NDIS amounts have been paid to a person in respect of a participant's impairment; and
2. an insurer is liable, under a contract of insurance, to indemnify the compensation payer against any liability arising from a claim of the participant for compensation (subsection 111(2) of the NDIS Act).

The NDIA is not required to provide a preliminary notice before giving a recovery notice.

In circumstances where the terms of a consent judgement or a settlement specifically deny any liability on the part of the potential compensation payer or

insurer, the insurer will still be liable to pay the NDIA the amount specified in the recovery notice.

The decision to give a recovery notice to an insurer is a reviewable decision.

7.10 Calculating the amount to be specified in the notice

The amount specified in the written notice is to be the lesser of:

- The sum of the NDIS amounts paid in respect of a participant's impairment by the NDIS; or
- The [recoverable amount](#) calculated pursuant to section 106 or section 107 of the NDIS Act (subsection 111(4) of the NDIS Act).

7.11 What information must a recovery notice contain?

The notice must contain:

- The amount the compensation payer or insurer is to pay directly to the NDIA (subsections 111(1) and (2) of the NDIS Act); and
- A statement of the effect of offences (section 114 of the NDIS Act) insofar as it relates to the recovery notice (subsection 111(5) of the NDIS Act).

For more information please see [Consequences of failing to comply with a preliminary notice or a recovery notice](#).

7.12 The amount specified in a recovery notice is a debt due to the Agency by the recipient of the notice

If a compensation payer or an insurer is given a recovery notice, the amount specified in the notice becomes a debt due to the NDIA (subsection 111(7) of the NDIS Act).

If the recoverable amount is not paid by the compensation payer or the insurer who owes the debt, the debt recovery provisions under Part 1 of Chapter 7 of the NDIS Act may be operationalised including, the potential to bring legal proceedings for repayment of the debt.

7.13 Payment to the NDIA discharges the compensation payer or insurer's liability

When a compensation payer pays the NDIA after receiving a recovery notice, the payment discharges, to the extent of the payment:

- the compensation payer's liability to the participant; and

- the participant's liability to the NDIA (subsection 113(1) of the NDIS Act).

When an insurer pays the NDIA after receiving a recovery notice, the payment discharges, to the extent of the payment:

- the insurer's liability to the compensation payer to the extent of the payment;
- the compensation payer's liability to pay compensation to the participant to the extent of the payment; and
- the participant's liability to the NDIA (subsection 113(2) of the NDIS Act).

The liability discharged by payment of the recoverable amount to the NDIA is limited to liability to pay the amount specified in the recovery notice. The compensation payer or insurer remains liable to pay to the participant the amount of compensation fixed by the non-consent judgement, consent judgement or settlement, less the recoverable amount.

For example, if a participant settles a claim with a compensation payer or insurer in the sum of \$1,000,000 and the NDIA issues a recovery notice on the compensation payer or insurer for the sum of \$250,000, the compensation payer or insurer remains liable to pay the participant \$750,000.

7.14 Consequences of failing to comply with a preliminary notice or recovery notice

The potential compensation payer or insurer commits an offence if they pay any amount of compensation to the participant or prospective participant in discharge of their liability after receiving a preliminary notice or recovery notice, unless:

- the NDIA has revoked the preliminary notice in writing; or
- the compensation payer or insurer has paid the NDIA the amount specified in a recovery notice; or
- the NDIA has given the potential compensation payer or insurer written permission to pay the amount (subsections 114(2)-(4) of the NDIS Act).

If a potential compensation payer or insurer does not comply with the preliminary notice or recovery notice, the offence is punishable by:

- 12 months imprisonment; or
- a fine of 60 penalty units; or
- both.

Increased fines may apply to bodies corporate (subsection 114(1) of the NDIS Act).

In addition to any penalty, a potential compensation payer or insurer who pays an amount to the participant or prospective participant while the preliminary notice or recovery notice remain in effect, will be required to pay to the NDIA:

- If a preliminary notice remained in effect – an amount determined by the NDIA that does not exceed the amount that would have been specified in a recovery notice if one had been issued (subsections 115(1) - (2) of the NDIS Act); or
- If a recovery notice remained in effect – the amount specified in the recovery notice (subsection 115(1) of the NDIS Act).

The amount that is to be paid to the NDIA if the potential compensation payer or insurer paid an amount to the participant when a preliminary notice or recovery notice remained in effect, is a debt due by the potential compensation payer or the insurer to the NDIA (subsection 115(4) of the NDIS Act).

If the amount is not paid by the potential compensation payer or the insurer who owe the debt, the debt recovery provisions under Part 1 of Chapter 7 of the NDIS Act may be operationalised, including the potential to bring legal proceedings for repayment of the debt.

8. Compensation Reduction Amount (CRA)

8.1 What is a CRA?

A CRA is an amount the National Disability Insurance Agency (NDIA) may reduce a participant's funding for reasonable and necessary supports to account for compensation being received or given up. A CRA is not a debt owed to the NDIA.

The CRA does not require a participant to make a payment to the NDIA out of their compensation. A CRA operates on future funding for reasonable and necessary supports. As a result, a CRA will reduce the participant's entitlement to funding for reasonable and necessary supports.

8.2 In what circumstances is a CRA calculated?

A CRA will be calculated if a participant sustains a personal injury (even if that personal injury was sustained prior to becoming a participant), which caused, to any extent, their impairment, and the participant:

- received compensation from a non-consent judgement, consent judgement or settlement;
- commutated their entitlement to medical and like expenses under a scheme of insurance, or compensation under a Commonwealth, State or Territory law; or
- entered into an agreement to give up compensation and the NDIA is not satisfied it was reasonable, in the circumstances, to have entered into the agreement.

It does not matter whether the participant was a participant at the time they sustained the personal injury, or whether the compensation amount from a non-

consent judgement, consent judgement or settlement was received prior to becoming a participant.

8.3 Why is a CRA calculated?

The NDIS is designed to complement, not replace, existing compensation arrangements for personal injury (rule 1.1 of the [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013](#) (External website) (Compensation Rules)).

The Compensation Rules make it mandatory for the NDIA to calculate a CRA which may reduce the funding for reasonable and necessary supports in a participant's plan that would otherwise be approved (rule 3.5 of the Compensation Rules).

If a participant has received more than one compensation payment, the NDIA will calculate a CRA for each compensation payment received.

Any reduction in funding is subject to operation of the special circumstances provisions (rule 3.10 of the Compensation Rules). For more information on special circumstances, see [Special Circumstances](#).

8.4 How is a CRA calculated?

The Compensation Rules determine how a CRA is calculated in relation to a participant, if the impairment of that participant was caused, to any extent, by a personal injury.

How a CRA is calculated depends on whether rules 3.1(a), (b), (c) or (d) of the Compensation Rules applies.

8.4.1 Compensation received under a non-consent judgement, consent judgement or settlement where the NDIS component is objectively identifiable (Rule 3.1(a) of the Compensation Rules)

This Rule applies where the participant received compensation under a non-consent judgement, consent judgement or settlement in respect of the injury, which caused to any extent that participant's impairment, in which:

- It is possible to identify the [NDIS component](#) of the amount of compensation; and
- The component is either [fixed](#) by a non-consent judgement or is objectively identifiable (e.g. commutation of benefits under a statutory scheme).

If the participant received compensation under a non-consent judgement and that non-consent judgement specifies an amount that relates to the provision of supports

of a kind that may be funded or provided under the NDIS after the date of non-consent judgement (i.e. future NDIS supports), rule 3.1(a) of the Compensation Rules will apply.

If the participant received compensation under a consent judgement or settlement and the compensation includes an element that consists of periodic payments, and these periodic payments were received in full or in part, rule 3.1(a) of the Compensation Rules will apply (see rule 3.3 of the Compensation Rules).

Where rule 3.1(a) of the Compensation Rules applies, a CRA will be calculated in accordance with rules 3.11-3.12 of the Compensation Rules.

It does not matter whether the participant was a participant at the time they sustained the personal injury, or whether the compensation amount from a non-consent judgement, consent judgement or settlement was received prior to becoming a participant.

For information on calculating the CRA under rules 3.11-3.12 of the Compensation Rules, Calculating the CRA when compensation is fixed by a non-consent judgment, consent judgment or settlement and the NDIS component is objectively identifiable.

8.4.2 Compensation received where the NDIS component is not objectively identifiable (rule 3.1(b) of the Compensation Rules)

This Rule applies where the person received compensation under a non-consent judgement, consent judgement or settlement in respect of the injury, which:

- Does not satisfy rule 3.1(a); and
- Fixes an amount of compensation in respect of that injury.

If the compensation amount is fixed, and it is not possible to objectively identify the NDIS component of the compensation figure, rule 3.1(b) of the Compensation Rules applies.

Where the criteria of rule 3.1(b) is met, a CRA will be calculated in accordance with rules 3.13-3.16 of the Compensation Rules.

It does not matter whether the participant was a participant at the time they sustained the personal injury, or whether the compensation amount from a non-consent judgement, consent judgement or settlement was received prior to becoming a participant.

For information on calculating the CRA under rules 3.13-3.16 of the Compensation Rules, see Calculating the CRA when compensation is fixed by a non-consent judgment, consent judgment or settlement and the NDIS component is not objectively identifiable.

8.4.3 Compensation is being received under a scheme of insurance or Commonwealth, State or Territory law (rule 3.1(c) of the Compensation Rules)

If the participant is receiving compensation under a scheme of insurance, or under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme, rule 3.1(c) of the Compensation Rules applies.

It does not matter whether the participant was a participant at the time they sustained the personal injury.

For information on calculating the CRA under rules 3.17-3.18 of the Compensation Rules, see [Where participant is receiving compensation under a scheme of insurance or compensation under a Commonwealth, State or Territory law.](#)

8.4.4 A right of compensation given up under an agreement (rule 3.1(d) of the Compensation Rules)

Where a participant has entered into an agreement to give up a right to compensation, a CRA will be calculated in accordance with rules 3.19-3.21 of the Compensation Rules.

It does not matter whether the participant was a participant at the time they sustained the personal injury, or whether, the agreement entered into to give up a right of compensation was made prior to a person becoming a participant.

For information on calculating the CRA under rules 3.19-3.21 of the Compensation Rules, see [Agreements to give up a right to compensation.](#)

8.5 Applying the CRA to a statement of participant supports

The CRA may be applied to one or more statements of participant supports.

8.5.1 Applying a CRA to a statement of participant supports in only one plan

In order to apply the total CRA to a statement of participant supports, the funding in a participant's statement of supports must exceed the total CRA (i.e. a CRA that has not been divided (amortised) over a period not exceeding the participant's expected lifetime under rule 3.7 of the Compensation Rules).

For example, if the amount that will be funded in a statement of participant supports prior to the application of a CRA is \$100,000, and the CRA is \$60,000, it is possible to apply the total CRA to only one plan.

The above is subject to, for example:

- The plan containing the statement of participant supports, with the final CRA applied, remains unchanged prior to its scheduled review date; and
- The participant remaining a participant in the NDIS; and
- The participant obtaining further compensation.

A decision to apply the total CRA to only one plan is not automatic. Such a decision will be made having regard to the circumstances of the case.

8.5.2 Applying a CRA to more than one statement of participant supports

The CRA may be divided over a period of time, not exceeding the remainder of the participant's expected lifetime (rule 3.7 of the Compensation Rules).

The CRA, if divided over a period of time, will continue to be applied to a statement of participant supports in future plans until the CRA is reduced to nil.

The period over which the CRA is divided is not fixed. For each new statement of participant supports the NDIA may re-calculate and re-divide the CRA over a new period of time, up to the remainder of the participant's expected lifetime.

The NDIA will generally not apply a CRA to reduce the funding in a statement of participant supports by less than 10% of the total funding in that statement of participant supports (subject to the CRA being equal to or more than 10% of the total funding in that statement of participant supports).

For example, if the amount that will be funded in a statement of participant's supports prior to the application of the CRA is \$100,000, generally the minimum amount that will be deducted from this plan is \$10,000.

A key consideration when applying a minimum reduction of 10% of the total funding in a statement of participant's supports is the financial sustainability of the NDIS.

8.6 For how long will a CRA be applied to statements of participant supports?

The CRA will be applied to a statement of participant supports until the CRA is reduced to nil.

8.7 What happens if the CRA is reduced to nil?

8.7.1 During the calculation of the CRA

If the calculation of the CRA, pursuant to rules 3.1(a), (b) or (d) of the Compensation Rules, is reduced to nil, the NDIA is to record the CRA as nil and there will be no reduction to the statement of participant supports (see rule 3.12, rule 3.16 and rule 3.21 of the Compensation Rules) in relation to that compensation.

8.7.2 After application of the CRA to a participant's statement of supports

If the CRA is reduced to nil following its application to the statement of participant supports, the participant will not have a CRA applied to future statements of participant supports in relation to that compensation.

The above is subject to, for example:

- If the plan containing the statement of participant supports, with the final CRA applied, remains unchanged prior to its scheduled review date; and
- The participant remaining a participant in the NDIS; and
- The participant obtaining further compensation.

9. Calculating the Compensation Reduction Amount (CRA) when compensation is fixed by a non-consent judgement, consent judgement, or settlement and the National Disability Insurance Scheme (NDIS) component is objectively identifiable

Where compensation is received under a non-consent judgement, consent judgement or settlement and the NDIS component is fixed, or is objectively identifiable, the approved CRA will be calculated in accordance with rules 3.11-3.12 of the National Disability Insurance Scheme (Supports for Participants – Accounting for Compensation) Rules 2013 (External website) (Compensation Rules) (also see rules 3.5 and 3.6).

9.1 Steps for calculating the CRA where the NDIS component is fixed by a non-consent judgement, consent judgement or settlement, or is objectively identifiable

To calculate the compensation reduction amount in accordance with rules 3.11-3.12 of the Compensation Rules, the NDIA will:

Step 1 – Rule 3.11(a) of the Compensation Rules

Identify the NDIS component of the compensation.

The NDIS component will be identified as follows:

- if the component is specified in a non-consent judgement – that amount;
- if the component is not specified in a non-consent judgement but the NDIA is satisfied a specified amount was paid to ensure the provisions of periodic payments – for example because benefits under a Commonwealth, State or Territory scheme of insurance are commutated, that amount (rule 3.3);
- otherwise – the value of the periodic payments as assessed in accordance with accepted actuarial standards, in consultation with the scheme actuary (rule 3.3).

Step 2 – Rule 3.11(b) of the Compensation Rules

Subtract an amount equivalent to the total of the amounts paid by the participant for supports of a kind funded under the NDIS, between the date of the non-consent judgement, consent judgement or settlement and the date before the person became a participant.

This step recognises a person may have used their compensation to pay for the kind of supports the NDIS may fund, prior to becoming a participant. By reducing the CRA to account for those amounts paid, the NDIA ensures participants are not disadvantaged by having used their compensation in this way. For more information on the kinds of supports funded under the NDIS see [NDIS Pricing Arrangements and Price Limits](#).

This amount will be identified in consultation with the participant. To identify this amount, the NDIA will require information and evidence of past amounts paid. For more information see [Information and documentation required for NDIA to accurately and appropriately undertake its functions](#), the [Our Guideline – Your privacy and information](#), and/or the [NDIA Privacy Policy](#).

Step 3 – Rule 3.11(c) of the Compensation Rules

Subtract the amount of any reduction in the participant's funding that has occurred previously in respect of the non-consent judgement, consent judgement or settlement.

A participant may have had previous reductions in funding applied to their statement of participant supports (see section 33(2) of the [National Disability Insurance Scheme Act 2013 \(External website\)](#) (NDIS Act) in respect of compensation paid under the non-consent judgement, consent judgement or settlement.

Each time the participant's plan is reviewed, the new plan will take into account earlier CRAs calculated to prevent double reductions.

The amount remaining after steps 1 – 3, is the compensation reduction amount.

9.2 Example calculation

If:

- On 1 December 2017, a person receives \$1,000,000 under a non-consent judgement.
- The non-consent judgement identifies the NDIS component as \$300,000.
- On 1 December 2018 the person becomes a participant in the NDIS.
- Between 1 December 2017 and 30 November 2018, the participant paid \$25,000 for supports of a kind funded under the NDIS.

The compensation reduction amount is calculated as follows:

- Identify the NDIS component of the amount of compensation: \$300,000
- Subtract the amount paid to the participant for supports of a kind funded under the NDIS, between the date of the non-consent judgement (or settlement) and the date before the person became a participant: \$25,000
- There has been no previous reduction of funding to their statement of participant supports in relation to the CRA calculated from the non-consent judgement. This means no subtraction is made under Rule 3.11(c) of the Compensation Rules.

The compensation reduction amount is \$275,000.

9.3 Compensation reduction amount reduced to nil

If a compensation reduction amount is reduced to nil, there will be no reduction to the statement of participant supports (see rule 3.12).

For more information see [What happens if compensation reduction amount is reduced to nil](#).

10. Calculating the compensation reduction amount (CRA) when compensation is fixed by a non-consent judgment, consent judgement, or settlement and the National Disability Insurance Scheme (NDIS) component is not objectively identifiable

Where compensation is received under a non-consent judgement, consent judgement or settlement and the NDIS component is not objectively identifiable, a CRA will be calculated in accordance with rules 3.13-3.16 of the [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013](#) (External website) (Compensation Rules) (as set out below).

The NDIS component of a compensation payment will not be objectively identifiable if a non-consent judgement, consent judgement or settlement attributes an amount to the supports of a kind that may be funded or provided under the NDIS without objective evidence that substantiates the amount attributed (see paragraph 3.1, Explanatory Statement of Compensation Rules).

10.1 Steps for calculating the CRA where the NDIS component is not objectively identifiable

To calculate the CRA in accordance with rules 3.13-3.16 of the Compensation Rules, the National Disability Insurance Agency (NDIA) will:

Step 1 – Rule 3.13(a) of the Compensation Rules

Identify the amount of compensation fixed under the non-consent judgement, consent judgement or settlement.

The NDIA will do this by reviewing the non-consent judgement, consent judgement

Step 2 – Rule 3.13(b) of the Compensation Rules

The NDIA will subtract the sum of the amounts (if any) payable in respect of the amount of compensation under:

1. The [Health and Other Services \(Compensation\) Act 1995 \(External website\)](#);
2. The [Health and Other Services \(Compensation\) Care Charges Act 1995 \(External website\)](#);
3. Part 3.14 of the [Social Security Act 1991 \(External website\)](#); or
4. A law of the Commonwealth, a State or a Territory, prescribed by the National Disability Insurance Scheme Rules.

The NDIA will take into account amounts the person is required to pay, if any, from their compensation because of other legislation. For example, amounts payable from the compensation to Centrelink and Medicare are subtracted from the amount of compensation fixed (see step 1) at this step.

Currently there are no laws prescribed by the National Disability Insurance Scheme Rules for the purposes of rule 3.13(b)(iv).

Step 3 – Rule 3.13(c) of the Compensation Rules

The NDIA will subtract an amount that reflects the value of any period of preclusion:

- that arises from a Commonwealth, State or Territory statutory scheme of entitlements (for example, the *Social Security Act 1991*); and
- is in respect of the injury.

Step 3 reduces the amount calculated after undertaking steps 1 and 2 above (where applicable), by taking into account the economic loss component of the compensation.

Step 4 – Rule 3.13(d) of the Compensation Rules

Where the NDIA is satisfied that the participant is not subject to a preclusion period for the purposes of step 3 above, and the NDIA is satisfied that:

- the participant claimed damages in relation to lost earnings or lost capacity to earn; and
- the amount of compensation fixed under the non-consent judgement, consent judgement or settlement included an amount in respect of that compensation.

Step 4 reduces the amount calculated after undertaking steps 1 to 3 above (where applicable), by subtracting 50% of the total amount of the compensation identified at step 1.

Step 4 ensures the participant's CRA will be reduced to take account of the economic loss component of the compensation. A deduction will only be applied at step 4 when there was no deduction at step 3.

Step 5 – Rule 3.13(e) of the Compensation Rules

The NDIA will calculate the value of the reasonable and necessary supports that would have otherwise been provided to the participant and funded under the [National Disability Insurance Scheme Act 2013 \(External website\)](#) (NDIS Act) over the participant's expected lifetime, had the participant been a participant from the time of the compensable event.

The amount is to be calculated in accordance with any applicable actuarial model published by the NDIA on its website at the time the calculation is undertaken (see rule 3.14).

If the amount calculated in accordance with the actuarial model is less than the amount calculated under steps 1 – 4, then this amount replaces the amount calculated under steps 1 – 4. The calculation then continues using the amount identified at this step.

If the amount calculated in accordance with the actuarial model is greater than the amount calculated under steps 1 – 4, then the calculation continues using the amount identified after undertaking steps 1 – 4.

Step 6 – Rule 3.13(f) of the Compensation Rules

The NDIA will subtract an amount equivalent to the total of the amounts that were paid by the participant for supports of a kind that may be funded under the NDIS, in

the period between the [compensable event](#) and the day before the person became a participant.

The NDIA subtracts these amounts to reduce the CRA by the amount of NDIS type supports the participant self-funded after they sustained their injury and before they became a participant. For more information on the kinds of supports funded under the NDIS, see [NDIS Pricing Arrangements and Price Limits](#).

To identify this amount, the NDIA will require information and evidence of past amounts paid by the participant for supports of a kind funded under the NDIS. For more information see [Information and documents required for the NDIA to undertake its function](#), the [Our Guideline – Your privacy and information](#), and/or the [NDIA Privacy Policy](#).

Step 7 – Rule 3.13(g) of the Compensation Rules

The NDIA will subtract any [recoverable amount](#) payable by the participant pursuant to section 106 and section 107 of the NDIS Act in respect of the compensation amount that is the subject of the current calculation (see steps 1-6 above).

For more information on the recoverable amount, see [Recovering past NDIS amounts from compensation](#) and/or [Recovery from compensation payers and insurers](#).

Step 8 – Rule 3.13(h) of the Compensation Rules

This step only applies when compensation has been obtained as a result of a claim made or taken over by the NDIA.

The NDIA will subtract any amounts deducted by the NDIA under section 105B of the NDIS Act.

For more information see [Recovering past NDIS amounts from compensation](#).

Step 9 – Rule 3.13(i) of the Compensation Rules

Subtract the amount of any reduction in the participant's funding that has occurred previously in respect of the non-consent judgement, consent judgement or settlement.

A participant may have had previous reductions in funding applied to their statement of participant supports in respect of compensation paid under the non-consent judgement, consent judgement or settlement.

Each time the participant's plan is reviewed, the new plan will take into account earlier CRAs calculated to prevent double reductions.

The amount remaining after steps 1 – 9, is the compensation reduction amount.

10.2 Where the person has received more than one compensation payment for the same injury

When an amount of compensation is received from a non-consent judgement, and another amount of compensation is received under a settlement or consent judgement for the same injury, the amounts will be treated separately. This means a CRA will be calculated for each amount and more than one CRA will be applied to the statement of participant supports.

If a CRA has been identified in respect of the injury under rules 3.11-3.12 (non-consent judgement, consent judgement or settlement where NDIS component of compensation is objectively identifiable), the calculation under rule 3.13 is modified as follows:

- reduce from the amount to be subtracted at step 6 above, any amount subtracted under rule 3.11(b); and
- reduce from the amount to be subtracted under step 9 above, any amount subtracted under rule 3.11(c).

This step ensures that if a person:

- Receives an amount of compensation where the NDIS component is objectively identifiable;
- Receives an amount of compensation where it is not possible to identify the NDIS component; and
- Both amounts are received in respect of the same injury;

The NDIA does not duplicate reductions made to the CRA calculated second in time, in respect of amounts paid by the participant for supports of a kind funded under the NDIS Act.

10.3 CRA reduced to nil

If the compensation reduction amount would be reduced to nil, there will be no reduction to the statement of participant supports (see rule 3.16).

For more information see [What happens if compensation reduction amount is reduced to nil?](#)

11. Where participant is receiving compensation under a scheme of insurance or compensation under a Commonwealth, State or Territory law (rule 3.1(c) and rules 3.17-3.18)

When a participant is receiving compensation in respect of a personal injury under a scheme of insurance under a Commonwealth, State or Territory law (including a payment under a contract entered into under such a scheme), the participant's funding for reasonable and necessary supports is to be reduced in accordance with rule 3.17-3.18 of the National Disability Insurance Scheme (Supports for Participants – Accounting for Compensation) Rules 2013 (External website) (Compensation Rules) (as set out below).

11.1 Identifying the Compensation Reduction Amount (CRA) where the participant is receiving compensation under a scheme of insurance or scheme of compensation under a Commonwealth, State or Territory law (rules 3.17-3.18 of the Compensation Rules)

Where a participant is receiving compensation from a scheme of insurance or scheme of compensation under a Commonwealth, State or Territory law, the funding for reasonable and necessary supports is to be reduced by an amount equivalent to the value of the compensation for care and support expected to be provided to the participant under that scheme, for the period of the participant's plan.

The value of the compensation for care and support expected to be provided to the participant must be identified:

- in accordance with any applicable actuarial model published by the National Disability Insurance Agency (NDIA) on its website at the time the calculation was undertaken; and
- done in consultation with the person or entity that administers the scheme (rules 3.17-3.18 of the Compensation Rules).

In order to identify the compensation reduction amount, rule 3.18 of the Compensation Rules makes it mandatory for the NDIA to consult the scheme of insurance or the scheme of compensation from which the participant is receiving compensation.

12. Agreements to give up a right to compensation (rules 3.1(d) and 3.19 of the Compensation Rules)

Where a person who has an impairment caused to any extent by a personal injury:

- enters into an agreement to give up a right to compensation in respect of that personal injury; and
- because of that agreement, there are compensation amounts the person did not receive (even if the person received other compensation amounts in respect of the injury); and

- the NDIA is not satisfied it was reasonable for the person to have entered into the agreement.

The National Disability Insurance Agency (NDIA) is to reduce the funding for [reasonable and necessary supports](#) by a Compensation Reduction Amount (CRA) in accordance with rules 3.19-3.21 of the [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013](#) (External website) (Compensation Rules).

It does not matter whether the person was a participant at the time of entering into the agreement.

12.1 When a participant may be considered to have entered into an agreement to give up a right to compensation

A participant may have entered into an agreement to give up a right to compensation including, but not limited to, the following circumstances:

- The participant requires NDIS type supports as a result of an injury and the participant, prospective participant or their authorised representative unreasonably enters into an agreement which does not compensate the participant for NDIS type supports;
- Prior to entering the settlement agreement the participant had their needs assessed by a qualified medical practitioner which determined the participant required NDIS type supports as a result of the subject injury but, the participant, prospective participant or their authorised representative unreasonably enters into an agreement in which NDIS type supports have not formed a part of their payment.

12.2 How does the NDIA determine whether it was reasonable to enter into the agreement?

The NDIA will consider the following:

Rule 3.2(a) of the Compensation Rules - Disability

The NDIA will consider whether a participant's, or prospective participant's, disability affected their ability to understand and assess the terms of the agreement they have entered into.

For example, a participant with severe cognitive impairment may not have understood the consequences of giving up their right to compensation. The NDIA will take this into consideration.

Rule 3.2(b) of the Compensation Rules – Circumstances

The NDIA will consider the circumstances of the [compensable event](#).

The circumstances may include but are not limited to, the geographical location of the compensable event. For example, if it occurred overseas, it may have been difficult or complex to claim compensation.

Rule 3.2(c) of the Compensation Rules – Reasons

The NDIA will consider any reason given by the participant, or prospective participant, as to why they entered into the agreement.

Rule 3.2(d) of the Compensation Rules – Impact (including financial impact)

The NDIA will consider the impact on the participant, or prospective participant, had a claim for compensation been pursued. This may include, but is not limited to:

- Ability to pay legal costs;
- Ability of participant to fund or provide their own supports; and/or
- Emotional or psychological impact.

The NDIA will consider the impact on the participant's, or prospective participant's, family had a claim for compensation been pursued. This may include but is not limited to:

- If the participant, or prospective participant, sustained injury due to the fault of a family member; and
- Pursuing compensation would affect familial relationships or cause a family member financial hardship.

Rule 3.2(e) of the Compensation Rules – Other matters

The NDIA will consider any other relevant matter, having regard to the objects and principles of the [National Disability Insurance Scheme Act 2013 \(External website\)](#) (NDIS Act) (in particular sections 3 – 5 of the NDIS Act).

All objects and principles of the NDIS Act will be considered. However, the need to ensure the financial sustainability of the NDIS is a key consideration and highly relevant to these Operational Guidelines. The NDIA must balance the objects and principles of the NDIS Act with the operation of rules 3.19-3.21 of the Compensation Rules.

12.3 Calculating the CRA – agreement to give up compensation (rules 3.19-3.21 of the Compensation Rules)

To calculate the CRA in accordance with rules 3.19-3.21 of the Compensation Rules, the NDIA will:

Step 1 – Rule 3.19(a)

Assess the likely amount of the [NDIS component](#) of [compensation](#) that the participant would have received under a [non-consent judgement](#) had the participant not entered into an agreement to give up their right to compensation in respect of the [personal injury](#) (even if other compensation amounts were received in respect of the injury).

The NDIA may require the participant, or prospective participant, to undergo an assessment (medical, psychiatric, psychological or other examination, by an appropriately qualified medical practitioner) and provide the NDIA with a report, in the approved form, of the person who conducts the assessment (section 36(2) of the NDIS Act).

Step 2 – Rule 3.19(b) of the Compensation Rules

Subtract the amount of any reduction in the participant's funding that has occurred previously in respect of the agreement to give up a right to compensation.

A participant may have had previous reductions in funding applied to their statement of participant supports (section 33(2) of the NDIS Act) in respect of the agreement to give up a right to compensation. Each time the participant's statement of supports is reviewed, the new plan will take into account earlier CRAs, which have been applied to the participant's previous statement of participant's supports by undertaking this step, to prevent double reductions.

Step 3 – Rule 3.19(c) of the Compensation Rules

The NDIA will subtract an amount equivalent to the total of the amounts that were paid by the participant for supports of a kind that may be funded under the NDIS, in the period between the [compensable event](#) and the day before the person became a participant.

The NDIA subtracts these amounts to reduce the CRA by the amount of NDIS type supports the participant self-funded after they sustained their injury and before they became a participant. For more information on the kinds of supports funded under the NDIS, see [NDIS Pricing Arrangements and Price Limits](#).

To identify this amount, the NDIA will require information and evidence of past amounts paid. For more information see [Information and documents required for the NDIA to undertake its functions](#), the [Our Guidelines – Your privacy and information](#), and/or the [NDIA Privacy Policy](#).

12.4 Where there is an agreement to give up a right to compensation and another CRA has been identified in respect of the same injury

In some circumstances a participant may make more than one compensation claim in respect of the same injury.

For example, if the compensable event was a motor vehicle accident where two other drivers are at fault, a participant may have received compensation from one driver and waived their right to compensation in respect of the other driver.

If a person has entered into an agreement to give up a right to compensation and a CRA has also been identified for another amount of compensation under rule 3.11 (see [Calculating the CRA when compensation is fixed by non-consent judgment, consent judgment or settlement and the NDIS component is objectively identifiable](#)) or rule 3.13 (see [Calculating the CRA when compensation is fixed by non-consent judgment, consent judgment or settlement and the NDIS component is not objectively identifiable](#)), the calculation for the amount of compensation given up under an agreement (under rule 3.19 of the Compensation Rules) is modified as set out below:

Rule 3.20(a) of the Compensation Rules

Between step 1 and step 2 above, subtract the CRA identified for any other amount of compensation received in respect of the injury under a [non-consent judgement, consent judgement or settlement](#) agreement.

A CRA calculated under rule 3.19 is calculated on the basis the participant would be compensated in full for the NDIS component had the claim proceeded to a non-consent judgement.

If the participant has received compensation for the same injury and a CRA has been calculated in respect of previously received compensation, the previously calculated CRA needs to be subtracted from the CRA calculated under rule 3.19 to avoid duplicate reductions in funding in a participant's statement of supports.

Rule 3.20(b) of the Compensation Rules

Reduce the amount to be subtracted at step 2 above, by any amount previously subtracted under rule 3.11(c) or rule 3.13(i) of the Compensation Rules (i.e. the amount of any reduction in the participant's funding that has occurred previously for any previous CRA calculated in respect of the injury).

This step ensures that if a participant has previously received compensation for the injury and a CRA has been applied to the statement of participant supports in respect of that injury, duplicate reductions are not made.

Rule 3.20(c) of the Compensation Rules

Reduce the amount to be subtracted at step 3 above, by any amount previously subtracted under rule 3.11(b) or rule 3.13(f) of the Compensation Rules (i.e. an amount equivalent to the total of the amounts that were paid by the participant for supports of a kind that may be funded under the NDIS in respect of the injury).

This step ensures that if a participant has paid for supports of a kind that may be funded under the NDIS, these amounts are not accounted for twice and double reductions are not made.

12.5 Compensation reduction amount reduced to nil

If the compensation reduction amount is reduced to nil, there will be no reduction to the participant's statement of supports (rule 3.21).

For more information see [What happens if CRA is reduced to nil?](#)

13. Special Circumstances

The National Disability Insurance Agency (NDIA) may consider special circumstances:

1. After an amount of compensation has been fixed by non-consent judgment, consent judgment or settlement under section 116 of the [National Disability Insurance Scheme Act 2013 \(External website\)](#) (NDIS Act):
 1. When recovering NDIS amounts and any costs incidental to a claim made or taken over by the NDIA under section 105B of the NDIS Act;
 2. When calculating a recoverable amount pursuant to section 106 or section 107 of the NDIS Act;
 3. When calculating the amount to be recovered from a compensation payer or insurer under section 111 of the NDIS Act.
2. After the Compensation Reduction Amount (CRA) has been calculated under rules 3.11 to 3.21 of the [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013 \(External website\)](#) (Compensation Rules) (see rule 3.10).

13.1 What are special circumstances?

Special circumstances are not defined in either the NDIS Act or the Compensation Rules.

The term special is a qualifying term. The Administrative Appeals Tribunal has determined that in order for special circumstances to exist, the circumstances must be 'unusual, uncommon or exceptional' (see [Beadle and Director-General of Social Security \(1984\) AATA 176 \(External website\)](#)).

The NDIA will generally consider a combination of factors, rather than just one factor in isolation, when considering the circumstances of the case.

It is not possible to provide a complete list of factors which the NDIA may take into account when considering if special circumstances exist (see [Secretary, Department of Social Security v Hulls \(External website\)](#) (1991) FCA 58), however, some of the potentially relevant factors may include, but are not limited to, those outlined at 13.2.1 and 13.3.1 below.

13.2 Special circumstances and recovery (section 116 of the NDIS Act)

Section 116 of the NDIS Act states:

For the purposes of this Chapter, the NDIA may treat the whole or part of a compensation payment as not having been fixed by a non-consent judgement, consent judgement or settlement agreement, if the NDIA thinks it is appropriate to do so in the special circumstances of the case.

If the NDIA considers that special circumstances exist, the NDIA may reduce the recoverable amount by treating the whole or part of a compensation payment as not having been fixed.

A decision under section 116 of the NDIS Act may only be made after an amount of compensation has been fixed and will be calculated:

- When the NDIA gives a recovery notice to the compensation payer or insurer that the NDIA proposes to recover an amount pursuant to section 111 of the NDIS Act; or
- When the NDIA seeks to recover the recoverable amount from the participant as a debt pursuant to section 108 of the NDIS Act.

A decision under section 116 of the NDIS Act will operate only for the purposes of Chapter 5 of the NDIS Act.

If the NDIA treats a participant's compensation as not having been fixed in whole or part under section 116, the calculation of the CRA will not be affected.

For example:

A participant settles their claim for \$100,000. The NDIA is entitled to recover \$30,000 under section 107 of the NDIS Act. Special circumstances apply and the whole of the participant's compensation is treated as though it were not fixed. As a result, the NDIA does not recover any money from the participant.

In the above scenario, a CRA is still required to be calculated on the total settlement amount (\$100,000). Further, a subtraction to the CRA will not be made at rule 3.13(g) because, following the application of special circumstances, there is no amount payable by the participant to the NDIA under section 107.

13.2.1 Potential factors which may be relevant when considering a participant's circumstances in the context of a recoverable amount

The NDIA may consider a range of factors when determining whether to treat the whole or part of a compensation payment as not having been fixed. Factors may include, but are not limited to:

- Financial hardship;
- Fraud/theft;
- The circumstances of the compensable event;
- The participant's health;
- Administrative error by the NDIA;
- Incorrect or insufficient legal advice;

The existence of any of the above potentially relevant factors does not mean it will be appropriate for the NDIA to reduce the recoverable amount by treating the whole or part of a compensation payment as not having been fixed.

Each case will be assessed on its own merits, taking into account all of the circumstances of the case.

13.2.2 Potentially inapplicable considerations

Whilst the NDIA will consider the whole of a participant's circumstances when determining whether to exercise its discretion under section 116 of the NDIS Act, the following factors, may not be special circumstances:

The participant's disability

As the NDIS is a social insurance scheme, which provides funding for supports and services to participants with permanent and significant disability, the existence of a significant and permanent disability in the context of the NDIS may not, in itself, amount to a special circumstance.

The risks of litigation

Settlement of a compensation claim for a lower amount due to the risks of litigating the case, due to difficulties of proof or other weaknesses in the case, is not unusual or uncommon (see [Donald; Secretary, Department of Employment and Workplace Relations \(External website\)](#) [2006] AATA 920).

13.3 Special circumstances and Compensation Reduction Amounts (CRA's)

Rule 3.10 of the Compensation Rules states:

For the purposes of rule 3.5, the NDIA may ignore the whole or part of a compensation reduction amount that would otherwise arise under this Part if the NDIA thinks it appropriate to do so in the special circumstances of the case (which may include financial hardship suffered by the participant).

Rule 3.10 of the Compensation Rules allows the NDIA to ignore either all or part of the CRA. Any part of the CRA which is ignored will not be applied to a participant's statement of supports.

Rule 3.10 of the Compensation Rules may only be applied after the CRA has been calculated. The NDIA will decide whether to apply rule 3.10 of the Compensation Rules when determining whether or not to approve a statement of participant's supports (section 33(2) of the NDIS Act).

A special circumstances determination pursuant to rule 3.10 of the Rules is separate and distinct from a special circumstances determination under section 116 of the NDIS Act.

If the NDIA treats a participant's compensation as not having been fixed in whole or part under section 116, the calculation of the CRA will not be affected.

For example:

A participant settles their claim for \$100,000. The NDIA is entitled to recover \$30,000 under section 107 of the NDIS Act. Special circumstances apply and the whole of the participant's compensation is treated as though it were not fixed. As a result, the NDIA does not recover any money from the participant.

In the above scenario, a CRA is still required to be calculated on the total settlement amount (\$100,000). Further, a subtraction to the CRA will not be made at rule 3.13(g) because, following the application of special circumstances, there is no amount payable by the participant to the NDIA under section 107.

13.3.1 Potential factors to be considered when assessing special circumstances in the context of a compensation reduction amount

The NDIA may consider a range of factors when determining whether to ignore whole or part of a CRA, including but not limited to:

- Financial hardship;
- Fraud/theft;

- The circumstances of the compensable event;
- The participant's health;
- Administrative error by the NDIA;
- Incorrect or insufficient legal advice;

The existence of any of the above potentially relevant factors does not mean it will be appropriate for the NDIA to ignore the CRA in whole or in part.

Each case will be assessed on its own merits, taking into account all of the circumstances of the case.

13.3.2 Potentially inapplicable considerations

Whilst the NDIA will consider the whole of a participant's circumstances when determining whether to exercise its discretion under rule 3.10 of the Compensation Rules, the following factors, may not be special circumstances:

The participant's disability

As the NDIS is a social insurance scheme, which provides funding for supports and services to participants with permanent and significant disability, the existence of a significant and permanent disability in the context of the NDIS may not, in itself, amount to a special circumstance.

The risks of litigation

Settlement of a compensation claim for a lower amount due to the risks of litigating the case, due to difficulties of proof or other weaknesses in the case, is not unusual or uncommon (see [Donald; Secretary, Department of Employment and Workplace Relations](#) (External website) [2006] AATA 920).

13.4 Information and documents required for a special circumstances determination

Documents and/or information may be required for the NDIA to make a decision under section 116 of the NDIS Act or to reduce the CRA in a statement of participant supports.

The kinds of documents and information a participant may be expected to provide include:

- Invoices and/or receipts;
- Official eviction notices;
- Notification of pending disconnection of essential services (i.e. water, gas, electricity);
- Bankruptcy notification;
- Notices of debt recovery;

- Financial advisor reports;
- Bank account statements;
- Police records;
- Court documents;
- Current reports from a registered health professional;
- Statutory declaration detailing how the circumstances arose.

This is not a complete list of the documents and/or information which may be provided. The NDIA may request further documents and/or information before making a decision.

13.5 Special circumstances and reviewable decisions

A decision under section 116 of the NDIS Act, to treat or not to treat the whole or part of a compensation payment as not having been fixed by a non-consent judgement, consent judgement or settlement, is a reviewable decision (subsection 99(1), Item 28 of the NDIS Act).

A decision not to reduce a CRA that would otherwise apply to a statement of participant supports, or to only reduce a CRA in part (applying rule 3.10 of the Compensation Rules), forms part of the decision to approve the statement of participant supports made under subsection 33(2) of the NDIS Act, which is a reviewable decision (subsection 99(1), Item 4 of the NDIS Act).

For more information on internal reviews, see the [Our Guidelines – Reviewing our decisions](#).

14. Review of Decisions

A reviewable decision is a decision made by the National Disability Insurance Agency (NDIA) which carries formal rights of review under the [National Disability Insurance Scheme Act 2013 \(External website\)](#) (NDIS Act).

14.1 Reviewable decisions relevant to compensation

These are reviewable decisions under the NDIS Act related to the Compensation Recoveries Operational Guidelines:

- A decision to give a notice to require a person to take reasonable action to claim or obtain compensation under section 104 of the NDIS Act (subsection 99(1), item 23);
- A decision to refuse to extend a period under subsection 104(5A) of the NDIS Act (subsection 99(1), item 24);
- A decision to take action to claim or obtain compensation under subsection 105(4)(a) of the NDIS Act (subsection 99(1), item 25);

- A decision to take over the conduct of a claim under subsection 105(4)(b) of the NDIS Act (subsection 99(1), item 26);
- A decision to give a notice that the CEO proposes to recover an amount under section 111 of the NDIS Act (subsection 99(1), item 27);
- A decision not to treat the whole or part of a compensation payment as not having been fixed by a judgment or settlement under section 116 of the NDIS Act (subsection 99(1), item 28).
- A decision to approve a statement of participant supports under subsection 33(2) of the NDIS Act (subsection 99(1), item 4).
- Any decision specified by the [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013](#) (External website) (Compensation Rules)(subsection 99(2)).

14.2 The decision to approve a statement of participant supports in a participant’s plan may include application of a Compensation Reduction Amount (CRA)

A decision to approve a statement of participant’s supports in a participant’s plan under subsection 33(2) of the NDIS Act is a reviewable decision (section 99, Item 4 of the NDIS Act).

Before the statement of participant’s supports is approved the Compensation Rules must be applied if applicable (subsection 33(5)(d) of the NDIS Act).

In circumstances where the Compensation Rules have been applied to the statement of participant supports before it is approved, the Compensation Rules will form a part of any reviewable decision under section 99, Item 4 of the NDIS Act, including:

- A CRA where the support component is objectively identifiable (rules 3.11-3.12 of the Compensation Rules);
- A CRA where the support component is not objectively identifiable (rules 3.13-3.16 of the Compensation Rules);
- A CRA where the participant is receiving compensation under a Commonwealth, State, or Territory statutory insurance scheme (rules 3.17-3.18 of the Compensation Rules);
- A CRA where the participant has been identified as having entered into an agreement to give up compensation (rules 3.19-3.21 of the Compensation Rules);
- A decision not to ignore the whole or part of a CRA that would otherwise arise under Rule 3.10 of the Compensation Rules; and
- The period over which a CRA is divided (amortised) under rule 3.7 of the Compensation Rules.

For further information on requesting an internal review please see the [Our Guidelines – Reviewing our decisions](#).

15. Compensation Operational Guideline – Definitions

Definitions below relate only to the Compensation Operational Guideline. The following definitions should not be relied upon in respect of other Operational Guidelines, unless the word is expressly defined within the [National Disability Insurance Scheme Act 2013 \(NDIS Act\) \(External website\)](#) or the [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013 \(Compensation Rules\) \(External website\)](#).

A

Authorised representative

is a person who has the authority to make decisions on behalf of the participant, or prospective participant, and may include a person with parental responsibility of a child (child's representative) (see section 75 of [the NDIS Act \(External website\)](#)), an appointed plan nominee (see section 9 of the NDIA Act), a legal guardian, power of attorney, financial manager or administrator.

C

Commutate

an agreement reached between an insurer and an insured person where the insurer agrees to pay out the insured person's entitlement in either one lump sum payment, or periodic payments.

Compensable injury

an injury, which may give rise to a right to claim or obtain compensation.

Compensable event

means the event in which a person's injury occurred that gave rise to the compensation payment or potential compensation payment. If the event is a course of events or conduct, the compensable event is the beginning of that course of events or conduct.

Compensation

see section 11 of [the NDIS Act \(External website\)](#) or [What is compensation?](#)

Compensation payer

a person who is liable to pay compensation to the participant in relation to the participant's impairment (see section 111 of [the NDIS Act \(External website\)](#)). Includes reference to an authority of a State or Territory.

Compensation Reduction Amount (CRA)

see [Compensation Reduction Amount](#).

Compensation Rules

the [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013 \(External website\)](#).

Consent Judgement

a decision handed down by the Court, Tribunal or judicial body, which is based on agreed terms by the parties. This will occur in the circumstances of a Court approved settlement.

Cost of supports that may be provided to a participant

includes supports that may be funded or provided by the NDIS to a participant. The kinds of supports which may be funded or provided under the NDIS include general supports and reasonable and necessary supports.

D

Damages

an award of compensation intended to place a person, insofar as money can do so, in the position they would have been in had they not sustained an injury.

Disability requirements

see section 24 of [the NDIS Act \(External website\)](#).

Domestic Care and Assistance

describes paid and gratuitous attendant care required as the result of an injury. It includes, but is not limited to, tasks such as cleaning, gardening, transfers, toileting, showering, shopping, and preparing meals.

E

Early intervention requirements

see section 25 of [the NDIS Act \(External website\)](#).

Economic Loss

amounts paid for economic loss compensate for loss of earnings and loss of earning capacity sustained as a result of an injury.

F

Fixed

final, unchangeable, set, unalterable.

G

General Damages

amounts that are incapable of being directly measured in money, for example, pain and suffering, discomfort, loss of pleasure derived from work, hobbies, sport and families, loss of independence, and/or loss of taste and/or smell.

General supports

see section 13 of [the NDIS Act \(External website\)](#)

Gratuitous care

care provided by a person's family member or loved one without cost to the injured person. Compensation received for domestic care and assistance, provided on a gratuitous basis, is calculated at the current commercial rate for the provision of care services. This calculation accounts for the proper and reasonable cost of the injured person's need for domestic care and assistance created by the injury - see *Donnelly v Joyce (1974) QB 461-462* and *Griffiths v Kerkemeyer (1977) 139 CLR 161* at 168).

I

Ineffective

a contract may be declared ineffective if, for example, a contracting party lacked capacity to understand the consequences of the agreement.

Insurer

an entity liable, under a contract of insurance, to indemnify a potential compensation payer against any liability arising from a claim of the participant, or prospective participant, for compensation, which relates to the participant, or prospective participant's, impairment (see subsection 109(2) and subsection 111(2) of [the NDIS Act \(External website\)](#)). Reference to an insurer may also include reference to an authority of a State or Territory (see subsection 11(3) of the NDIS Act).

J

Judgement

a decision handed down by a Court, Tribunal or judicial body.

L

Lump sum payment

a global payment covering multiple items for different purposes.

M

Medical and like expenses

is an umbrella term used to describe, for example only, the reasonable cost of medical treatment, medication, prosthetics, therapy and/or aides and appliances, home and vehicle modifications which a participant, or prospective participant, requires as a result of their injury.

N

NDIA

the National Disability Insurance Agency.

NDIS Act

the [National Disability Insurance Scheme Act 2013 \(External website\)](#)

NDIS amount

an amount paid under the NDIS in respect of reasonable and necessary supports funded under a participant's plan (see section 9 of [the NDIS Act \(External website\)](#)).

NDIS component

of an amount of compensation under a judgement or settlement, means the component that relates to the provision of supports of a kind that may be funded or provided under the NDIS after the date of the judgement or settlement, and may include a component that consists of periodic payments (see rule 4.4 of [the Compensation Rules \(External website\)](#)).

Non-consent judgement

as opposed to a consent judgement which is made by the agreement of the parties, a non-consent judgement is a decision handed down by a Court, Tribunal or judicial body. Non-consent judgement has the same meaning as judgement.

Notifiable amount

the amount specified in a recovery notice (see section 111 of [the NDIS Act \(External website\)](#)).

P

Participant's impairment

means an impairment in relation to which the participant meets the disability requirements, or the early intervention requirements, to any extent (see section 9 of [the NDIS Act \(External website\)](#)).

Personal injury

an injury sustained by a person who is a participant or who later becomes a participant.

Periodic payment

payments made at intervals following a claim for compensation (this includes structured settlements).

Person

includes a body politic or corporate as well as an individual (see section 2C of the, Acts Interpretation Act 1901).

Potential compensation payer

the person against whom the participant, or prospective participant, makes a claim for compensation, which relates to the participant, or prospective participant's, impairment (see subsection 109(2) of [the NDIS Act \(External website\)](#)).

Pre-existing impairment

the impairment(s) a participant had prior to sustaining the compensable injury that caused, or aggravated, the participant's impairment(s).

Prospective participant

means a person in relation to whom an access request has been made but not yet decided.

R

Reasonable and necessary supports

see [Our Guidelines - Reasonable and necessary supports](#)

Recoverable amount

is the amount calculated in accordance with subsection 106(2) and subsection d 107(2) of [the NDIS Act \(External website\)](#).

S

Settlement

where two or more parties agree to compromise or resolve a claim for compensation.

Scheme of insurance

examples of Commonwealth, State and Territory schemes of insurance include, but are not limited to:

ACT: Lifetime Care and Support Scheme

NSW: iCare

NT: Motor Accidents Compensation Commission and Territory Insurance Office

QLD: Motor Accident Insurance Commission and NIIS Queensland

SA: Lifetime Support Authority and ReturnToWorkSA

TAS: Motor Accident Insurance Board and WorkSafe

VIC: Transport Accident Commission and Victorian WorkCover Authority

WA: Insurance Commission of Western Australia and WorkCover WA

CTH: Comcare

T

To any extent

means any contribution whatsoever, however minimal.

Total of all NDIS amounts

amounts paid by the NDIS in respect of reasonable and necessary supports funded under a participant's plan limited to the impairment or impairments which are the subject of the claim brought or taken over by the NDIA.

U

Unenforceable

a contract may be unenforceable due to, for example, non-compliance with a statutory requirement, the terms of the contract are not fair for one party, duress, influence, misrepresentation, fraud or on public policy grounds, for example, if the parties who entered into the contract did not have the power to make decisions on behalf of the person upon whom the contract operates.

V

Void contract

a contract may be void for reasons not limited to illegality and uncertainty.