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**COMPENSATION PROVISIONS IN THE *NATIONAL
DISABILITY INSURANCE SCHEME ACT 2013* (NDIS)**

About the Author:

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Disclaimer:

This advice was prepared at the request of DANA as an aid to understanding the compensation provisions of the NDIS Act 2013. The advice is general in nature and thus is not intended or suitable for application to any individual situation.

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Introductory comments:

1. The NDIS provisions define ‘compensation’ and they deal with various issues concerning the effect that a right to ‘compensation’ may have on a participant’s entitlements under the NDIS.
2. The NDIS provisions do not deal with the effect that any particular amount of ‘compensation’ will have on a participant’s entitlements (the quantum issue). This issue has been left to the Rules yet to be made under the NDIS.
3. The NDIS provisions that deal with ‘compensation’ are modelled closely on the corresponding provisions in the *Social Security Act 1991* (SSA). There has been extensive consideration of the relevant SSA provisions in the decisions of the courts and tribunals at all levels. A detailed annotation of these cases can be found in ‘*Social Security and Family Assistance Law*’ 3rd Ed (2013) Sutherland and Anforth. In what follows below I shall refer to the relevant provision in the SSA and summarise the relevance of the case law, without citing the cases or extracts from the cases.

PART 1- What is ‘compensation’:

4. The concept of ‘compensation’ is defined in section 11 NDIS:

(1) In this Act:

compensation means a payment (with or without admission of liability) in respect of:

- (a) compensation or damages in respect of personal injury; or
- (b) 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
- (c) 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.

(2) A payment referred to in subsection (1) may be:

- (a) in the form of a lump sum or in the form of a series of periodic payments;
and
- (b) made within or outside Australia.

5. This definition of 'compensation' is modelled on that found in section 17(2) SSA.
6. The definition of 'compensation' in NDIS is limited to 'personal injuries' and so does not extend to payments made for disabilities arising from causes not embraced by the term 'personal injuries'. By way of example only, paragraphs (a) and (c) of the definition would not catch payments made under a personal income protection or disability insurance policy, as these payments are made by the insurance company pursuant to a contractual obligation. The payments are not made by the tortfeasor or the tortfeasor's insurer as an award of compensation or damages for personal injuries. Paragraph (b) of the NDIS definition of 'compensation' would also not catch payments made under a private insurance policy, as paragraph (b) is limited to statutory insurance regimes only. Private insurance policies are not creatures of statute.
7. The fact that receipts from a private insurance policy would not be caught is consistent with section 17(2A) SSA which excludes receipts from these policies from the definition of 'compensation' for SSA purposes.
8. It should be noted that section 17(2B) SSA also excludes from 'compensation' monies paid under a statutory scheme for criminal injuries compensation, whereas the NDIS definition of 'compensation' would catch these payments. This amendment needs to be inserted into the NDIS.
9. The definition of compensation includes 'lump sum' and 'periodic' compensation. There are no definitions of these terms in the NDIS. The SSA contains various provisions defining when a payment is a lump sum and when it is periodic compensation (sections 17(1), 1163, 1164 and 1171 SAA).

10. The distinction between 'lump sum' and 'periodic' compensation is important in the SSA because it has a major affect on the quantum issue. Lump sums are treated differently from periodic compensation in the manner in which they reduce a pensioner's entitlement to disability support pensions and other entitlements under the SSA. At this point in time the NDIS does not deal with the quantum issue, which has been left to the NDIS Rules. It is therefore not apparent at the present time how significant the distinction between 'lump sum' and 'periodic' compensation will be under the NDIS.

11. The distinction between a lump sum and periodic compensation arises when:
 - (a) two or more payments are made relating to the same claim for personal injuries (section 1171 SSA):
 - (b) the arrears of periodic payments are paid in one lump sum. Sections 17(1), 1163 and 1164 SSA treats a lump sum of this kind as an equivalent set of periodic payment;

12. These issues arise under the SSA because the definition of compensation in section 17(2) SSA requires that there be an element of compensation for 'economic loss' in the payment received. If a payment has no element of economic loss then it is not characterised as 'compensation' and thus has no effect on a pension under the SSA. If however there is even a small part of the compensation payment for 'economic loss' then the whole of the payment is characterised as compensation; and then the whole of the payment is taken into account in reducing the pension in accordance with relevant statutory formulas.

13. One unfairness in the SSA is that a small award of compensation for economic loss taints the whole of the payment as compensation that then comes into play in reducing the pension. For this reason some legal practitioners have advised their clients to forego any claim for economic loss where that economic loss claim is likely to be small, because the loss in the rate of social security pension more than offsets the loss of a small compensation award for economic loss. When the economic loss part of the claim is withdrawn, all that remains is an award free of economic loss which then is not characterised as 'compensation' and so does not affect the pension rate.

14. The definition of ‘compensation’ under the NDIS has this same scheme except that it focuses on receipt of compensation for ‘the cost of support’ in contrast to the focus in the SSA on compensation for ‘economic loss’.
15. Depending on how the NDIS Rules deal with quantum issue, there is potential for the same unfairness under the NDIS. If the NDIS Rules adopt an approach to the quantum issue similar to that in the SSA, there should be some effort made to define the word “in part” to set minimum threshold below which any small amount of support needs in a compensation award will be ignored e.g. if the support needs component of an award are less than 10% of the total award.
16. To avoid the perceived unfairness under the SSA described at paragraphs 12-13 above various contrivances have been adopted by legal advisers including:
 - (a) settling claims in two or more parts in which all the economic loss was in one part of the settlement and the second part of the settlement was entirely devoid of compensation for economic loss. This was intended to have the effect that only the part of the settlement containing the economic loss was caught as compensation and the remaining payment was not. A reduced quantum of compensation meant a lesser reduction in the pension under the SSA;
 - (b) settling the compensation claim but leaving the legal costs and repayment of medical treatment costs previously incurred and paid, to be determined at a later date. This approach would not have the same level of benefit to the pensioner as (a) immediately above, but it would still reduce the quantum of the compensation taken into account.
17. In response to these contrivances the SSA was amended to deem multiple lump sum payments relating to the same claim as being a single payment (section 1171 SSA). However the strategy at (b) immediately above has been given support by the Administrative Appeal Tribunal at a Presidential level. The rationale involves the perceived unfairness in including legal costs and medical reimbursement costs as part of the sum received by the pensioner when those sums have to be paid out to the lawyers and doctors and were never the property of the pensioner for their own use. This principle should be embodied in the NDIS.

18. In their efforts to avoid the unfairnesses under the SSA referred to at paragraphs 12-13, some legal practitioners adopted the practice of entering consent awards that expressly denied any element of economic loss, whereas in reality the settlement was negotiated inclusive of economic loss. This is a different scenario to a genuine surrender of any right to compensation for economic loss. In response to this contrivance the SSA does not accept the terms of a consent award as definitive of its content (section 17(3) SSA). The Secretary retains the power to look behind any consent award and determine for himself/herself whether the award in truth contained an element of economic loss. In contrast where the award was given by a court after a hearing and the court judgment itself sets out the elements of the compensation awarded, then the court's order is taken to be definitive of its content. This is a reasonable position for the NDIS to adopt.
19. The definition of 'compensation' in section 11 NDIS and section 35(4)(b) NDIS each addresses the above issue by explicitly including any 'lump sum compensation payment that do not specifically include an amount for the cost of support'.
20. Unlike the SSA, the NDIS definition of compensation does not differentiate between payments made pursuant to out of court settlements and those made in accordance with an adjudication of a court or tribunal. However, section 106 does introduce this distinction indirectly when it comes to determining the amount to be recovered by the CEO for past NDIS payments from the awards of compensation.
21. The definitions of 'compensation' in the SSA and NDIS both treat payments of compensation made on a 'without prejudice basis' on the same basis as other compensation payment.

PART 2- How compensation is relevant to the NDIS:

22. The receipt of 'compensation' under the NDIS is relevant to the determination of the 'reasonable and necessary support' needs under section 34 NDIS. Section 34(h) permits the promulgation of Rules to determine how the 'reasonable and necessary supports' are determined:

34. Reasonable and necessary supports

For the purposes of specifying, in a statement of participant supports, the general supports that will be provided, and the reasonable and necessary supports that will be funded, the CEO must be satisfied of all of the following in relation to the funding or provision of each such support:

(h) the funding of the support complies with the methods or criteria (if any) prescribed by the National Disability Insurance Scheme rules for deciding the reasonable and necessary supports that will be funded under the National Disability Insurance Scheme.

PART 3- Rules on compensation:

23. Section 35 NDIS formally authorises the making of the NDIS Rules to apply in determining the ‘reasonable and necessary supports’. The Rules are to deal with the treatment of compensation:

35(1) The National Disability Insurance Scheme rules may prescribe:

- (a) a method for assessing, or criteria for deciding, the reasonable and necessary supports or general supports that will be funded or provided under the National Disability Insurance Scheme; and
- (b) reasonable and necessary supports or general supports that will not be funded or provided under the National Disability Insurance Scheme; and
- (c) reasonable and necessary supports or general supports that will or will not be funded or provided under the National Disability Insurance Scheme for prescribed participants.

....

(4) The methods or criteria prescribed by the National Disability Insurance Scheme rules for assessing or deciding the reasonable and necessary supports that will be funded under the National Disability Insurance Scheme may include methods or criteria relating to how to take into account:

- (a) lump sum compensation payments that specifically include an amount for the cost of supports; and
- (b) lump sum compensation payments that do not specifically include an amount for the cost of supports; and
- (c) periodic compensation payments that the CEO is satisfied include an amount for the cost of supports.

(5) The methods or criteria prescribed by the National Disability Insurance Scheme rules for assessing or deciding the reasonable and necessary supports that will be funded under the National Disability Insurance Scheme may include methods or criteria relating to how to take into account amounts that a participant or prospective participant did not receive by way of a compensation payment because he or she entered into an agreement to give up his or her right to compensation.

24. Section 35(5) authorises Rules to deal with the situation where a participant or prospective participant did not receive a payment by way of a compensation payment because he or she entered into an agreement to give up his or her right to compensation. There is no explicit counterpart to this in the SSA. The compensation provisions in the SSA contain provisions that allow the Secretary to compel a pensioner to pursue their compensation rights in default of which no pension is paid. This is discussed at Part 4 below. But this is not the same thing as deeming compensation to have been paid where the rights to compensation have been irretrievably lost to the participant.

25. As it stands section 35(5) does not ask whether the participant received something of value in return for the surrender of their compensation rights. For example there is a fine line between surrendering compensation rights and redeeming them for a modest lump sum. It remains to be seen whether the Rules introduce any notion of the value of the rights surrendered compared to the value of that which was obtained in return for the surrender of those rights.

26. An injured person may choose to redeem their rights at a low rate for various reasons. It may be that their prospects of success in a claim are not good; it may be that they lack the financial resources to pursue the claim; it may be that they lack of emotional resilience to pursue the claim etc.

27. The right to compensation can be surrendered in other contexts, for example, where a claim is commenced on behalf of the participant but looks as though it is going to fail for some reason. A failed claim generally attracts costs against the unsuccessful claimant. In

such circumstances a claimant may negotiate release from the obligation to pay the defendant's costs in return for a surrender of all rights.

28. A surrender of rights to compensation sometime occurs where there is an agreement to pay compensation in one form and the terms of settlement required a release from any rights the claimant may have to compensation in another form. The most common example of this involves the overlapping rights under workers compensation claims and common law claims for unsafe working conditions. Another example would be where there is a settlement for some act of unlawful discrimination in the workplace that involves a release from workers compensation rights or the converse.
29. A participant may have surrendered their rights to compensation for some non-monetary advantage. For example, a person with a disability struggling to find employment may agree with an employer to hire them on the condition that they will not make a claim against the employer if they suffer an aggravation of their disability.
30. At this point in time there are no Rules dealing with the treatment of compensation.

PART 4- Compelling participants to take compensation action:

31. Section 104 NDIS allows the CEO to require a participant to pursue their rights to compensation. Section 104(3) contains a list of relevant factors that the CEO is to take into account in coming to this decision. These factors include the prospects of success and the financial and emotional capacity of the participant to undertake that litigation.
32. If the participant does not take the action required by the CEO within the specified time frame, two consequences follow:
 - (a) The participant's rights under the NDIS are suspended (section 105(2) and 105(3));
 - (b) If the right to compensation is one that arises other than under a statutory compensation scheme, the CEO may take the action in the name of the participant (section 105(4) NDIS) and bear the costs of that action (section 105A NDIS).

Thus the CEO could commence actions at common law or under a statutory cause of action that are not statutory insurance schemes (eg discrimination law).

33. If the CEO takes the action in the name of the participant, the monies recovered are paid to the participant minus any monies already paid to the participant under the NDIS and the costs incurred by the CEO in taking that action (section 105B NDIS).
34. The suspension of entitlements provisions of sections 104 and 105 NDIS are modelled on sections 1166 and 1167 SSA which allows the Secretary to require a pensioner to pursue their compensation rights. The SSA has no equivalent of sections 105(4), section 105A or section 105B to allow the Secretary to bring an action in the name of the pensioner.
35. Sections 105(4), 105A and 105B are modelled to section 50 *Safety Rehabilitation and Compensation Act 1988* which confers the right on Comcare to commence actions in the name of people to whom it has made workers compensation payments.
36. The kind of action that could be required of a participant would include the active negotiation of the settlement of their rights to compensation outside court or tribunal proceedings or the commencement of proceedings in a court or tribunal of competent jurisdiction. Merely filing a claim in a court or tribunal would not of itself constitute taking reasonable action to enforce rights. The CEO could require the progression of a claim filed in a court or tribunal.
37. There are difficulties in forcing a person to commence an action for compensation under section 105, 105A and 105B for the very reason set out in the list of relevant factors in section 104(3). It is a value judgment to be made. One relevant factor that should not be underrated is the emotional effect on the participant. It is a common phenomenon that the pursuit of compensation claims put the claimants in the position of reliving their injuries and traumas and of convincing doctors, solicitors, families and tribunal members that they are severely impaired. In the end these claimants often succeed in convincing themselves of the serious level of their impairments. This mind set is contrary to the well being and prospects of social integration of the participants.

38. There are difficulties in government agencies commencing claims in the name of private citizens to whom money has been paid by government agencies. The fact that the claim is brought in the name of the citizen does not relieve the citizen from the obligation to cooperate with the government agency, to attend the medical assessments and to appear at any hearing and give evidence. It raises the same problem as per paragraph 36 above.
39. Another problem with government agencies commencing claims in the name of citizens is the tendency to settle the claim cheaply once the government agency has negotiating a sufficient award to cover the money owing to it and for its costs of the action. This settlement brings the citizen's rights to a permanent end.
40. If a choice has to be made between the two options, the better option is for the government agencies to bring the action and bear the costs (the Comcare model) rather than force the participant under the NDIS to undertake the litigation themselves.

PART 5 – Recovery from compensation awards of amounts previously paid for support needs:

41. Sections 106 and 107 NDIS contain provisions allowing the recovery of amounts paid under the NDIS from a participant where the participant receives a compensation award. These NDIS provisions are modelled on sections 1178-1181 SSA and to a lesser extent on section 48(3) *Safety Rehabilitation and Compensation Act 1988*. These provisions apply to the participant personally and create an obligation in the nature of a debt in the participant (section 108 NDIS).
42. These provisions relate to payments of support needs made in the past and should not be confused with the effect of compensation payments on future entitlements to support needs assessed under sections 34-35 NDIS.
43. Section 106 NDIS provides that where a court or tribunal actually determines the amount of compensation for support needs then this is the maximum figure which is recoverable by the CEO from the award to the participant. If the amount actually paid by the NDIS is less than this compensation component for support needs then only the amount actually paid by the NDIS is recoverable from the compensation award.

44. The recoverable amount is further reduced by any obligations that the participant has to repay Medicare, Centrelink or any other government insurance (including NDIS). Note that this provisions only allows a set off for Medicare repayments and not for amounts paid to medical practitioners outside or beyond Medicare.
45. Sections 109-115 of the NDIS and section 51 *Safety Rehabilitation and Compensation Act 1988*) each contain provisions for intercepting the repayable amount of compensation from the insurer or other person liable to pay the compensation to the participant, pensioner or injured employee respectively.
46. These provisions are not of immediate relevance to the fair operation of the NDIS to participants because their operation is dependent on the prior determinations concerning the amount of compensation that is recoverable. They are machinery provisions only.

PART 6- Special circumstances:

47. Section 1184K SSA is a provision that allows the Secretary to disregard the receipt of some or all of the compensation actually received if there are ‘special circumstances’ for so doing. If all or part of the compensation is disregarded then the amount of the pay back for past SSA payments may be reduced and the extent of the future preclusion from SSA pensions may be reduced.
48. Section 116 NDIS is similar except that it allows the CEO to treat the whole or part of a compensation payment as ‘not having been fixed by a judgment (including a consent order) or settlement if the CEO thinks it is appropriate to do so in the special circumstances of the case’. Presumably the intention of section 116 is that the amount determined not to have been fixed by the judgement etc is not taken into account for the purposes of section 34, section 35 and the NDIS Rules pertaining to compensation payments. In this sense it operates similar to section 1184K SSA.
49. There are many cases on section 1184K exploring the range of special circumstances. The decisions are not always consistent and often involve substantial value judgments by the Secretary and the Tribunals (Social Security Appeals Tribunal and the Administrative Appeals Tribunal). The annotation of section 1184K in *Social Security and Family*

Assistance Law 3rd Ed (2013) Sutherland and Anforth is lengthy and divides the cases into classes of circumstances that regularly arise eg:

- Failures by legal advisers to advise on the recovery and preclusion provisions
- Failures by the Department to give timely or correct advice
- Financial hardship
- Existing assets, in particular spending the compensation lump sum to buy a house
- Conduct in the expenditure of the lump sum
- Ill health
- Social and cultural factors
- Other unusual factors

50. It remains to be seen how the NDIS Rules address these factors and in what degree of specificity.

PART 7- Review of compensation related decisions:

51. Part 6 of the NDIS contains the provisions relating to the right of a participant to seek administrative review of decision.

52. In relation to compensation issues, section 99(o) and 99(q) respectively provide for a right of review of decisions to require a participant to undertake action to recover compensation from a third party; and a special circumstances decision of the CEO under section 116.

53. There is no right to administrative review of a decision by the CEO determining that certain payments are, or are not, compensation, although a right of judicial review would exist where the CEO misinterpreted the terms of the NDIS.

54. Perhaps the most important thing to note is there is no right of administrative review of a decision by the CEO under sections 34 and 35 in determining what are a participant's reasonable and necessary support needs. The range of decisions under the NDIS that are made reviewable by section 99 NDIS relate to procedural decisions only. The core substantive decision of the CEO is not made reviewable. This contrasts with the SSA where the core substantive decisions concerning eligibility for pensions and benefits etc are administratively reviewable.

55. This deficiency in the review rights should be remedied.

Some guidance for advocates for participants:

56. Generally the advocate will become involved after the personal injuries compensation litigation is over. The litigation will have been conducted by solicitors whose involvement usually finished at the end of that litigation. Solicitors rarely continue involvement during disputes with Centrelink and are unlikely to be involved in disputes with the CEO over NDIS follow on effects.

57. The advocate will need to obtain the following documents from the court and former solicitor for the participant:

- (a) A copy of the court or tribunal award and its reasons for decision (if they were given)
- (b) The whole of the former solicitors file which the solicitor is required to give to the participant once the solicitor's fees have been paid. These fees will usually have been paid from the compensation settlement when the monies were received into the solicitors trust account and so there should be no impediment to obtaining the file.
- (c) The Centrelink notice setting out the amount that was paid from the participant's compensation to Centrelink.
- (d) The Medicare notice setting out the amount that was paid from the participant's compensation to Medicare.
- (e) A list of the medical practitioner's costs, not covered by Medicare, that were paid from the participants compensation award.
- (f) The legal costs paid to the solicitors.
- (g)

58. From the participant the advocate should ascertain:

- (a) What the solicitors told the participant about the effect of the compensation award on the participants NDIS entitlements;
- (b) The total amount of compensation that the participants received in the hand after all deductions;

- (c) Whether the participant suffered a Centrelink preclusion because of the compensation award thus requiring the participant to use the compensation money for living costs in lieu of Centrelink;
- (d) How the compensation money was spent. Generally this will require a detailed list of verified expenditures.
- (e) Was the compensation money used to purchase things relevant to the NDIS e.g. modifying a house or car;
- (f) Was the compensation money wasted, if so why. Was the participant capable of managing their compensation money; did family members or friends take advantage of the participants; are there psychological or cultural issues bearing on the wastage etc. If there are issues of intellectual or psychological capacity to manage then a report from a psychologist to this effect may be required.

59. The advocate may lodge a 'special circumstances' application relying on what is discovered from the above enquiries.

60. At the very least the advocate should argue for the excision from amount of compensation taken into account under the Rules in assessing the participants reasonable support needs, of all Medicare paybacks, Centrelink paybacks and future preclusion periods, payments to medical practitioners outside Medicare, legal costs and any compensation money spent on things that would otherwise have been funded by the NDIS.

61. The advocate should consider the ratio of the amount for support needs in the compensation award relative to size total of the compensation award. If the ratio is small then the advocate should argue that it be ignored under the special circumstances power.

62. If it seems that the participants compensation action was sacrificed in a cheap settlement by the former solicitors or the client was poorly advised by the former solicitors, the advocate may themselves need to enlist legal advice on behalf of the participant.