



National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013

National Disability Insurance Scheme Act 2013 (the Act)

The Act establishes the National Disability Insurance Scheme (the NDIS).

People who are participants in the NDIS will be assisted to develop a personal, goal-based plan about how they will be provided with general supports and reasonable and necessary supports.

The NDIS will enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.

National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013

These Rules are made for the purposes of section 35 of the Act.

These Rules are about assessment and determination of the reasonable and necessary supports that will be funded for participants under the NDIS, and specifically how compensation payments for personal injury are taken into account in such assessments and determinations.

These Rules commence on the day they are registered.

The Hon Jenny Macklin MP
Minister for Families, Community Services and Indigenous Affairs
Minister for Disability Reform

22 July 2013

Contents

National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013		1
Part 1	What these Rules are about	3
Part 2	Outline of these Rules	5
Part 3	Compensation	6
	Application	6
	Compensation, or forgone compensation, to be taken into account	7
	Special circumstances	8
	Compensation reduction amount—support component objectively identified	8
	Compensation reduction amount—other circumstances	8
	Compensation reduction amount—participant in a Commonwealth, State or Territory statutory insurance scheme	10
	Compensation reduction amount—agreement to give up compensation	10
Part 4	Other matters	12
	Citation	12
	Interpretation	12

Part 1 What these Rules are about

- 1.1 The NDIS is designed to complement, not replace, existing compensation arrangements for personal injury. These Rules are about ensuring that where individuals receive compensation payments, the NDIS does not duplicate the funding for supports already provided for by these payments.
- 1.2 These Rules specify how compensation payments in respect of a compensable injury suffered by a participant are taken into account by the CEO in determining the reasonable and necessary supports that will be funded or provided under the NDIS.
- 1.3 These Rules are related to the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*, and set out additional factors that the CEO is to take into consideration where the impairment of a participant was caused or aggravated by a personal injury and an amount of compensation was fixed, either by judgement or settlement, or where support is being provided under a Commonwealth, State or Territory statutory scheme. These Rules also apply where a person does not receive any compensation because they entered into an agreement to give up their right to compensation.
- 1.4 The Act sets out a number of objects for the NDIS. The objects that are most important for these Rules are the following:
 - (a) supporting the independence and social and economic participation of people with disability;
 - (b) providing reasonable and necessary supports, including early intervention supports, for participants in the NDIS launch.
- 1.5 The Act sets out a number of principles for the NDIS. The principles that are most important for these Rules are the following:
 - (a) people with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development;
 - (b) people with disability should be supported to participate in and contribute to social and economic life to the extent of their ability;
 - (c) people with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime;
 - (d) people with disability should be supported to receive reasonable and necessary supports, including early intervention supports;
 - (e) reasonable and necessary supports for people with disability should:
 - (i) support people with disability to pursue their goals and maximise their independence; and

- (ii) support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment;
- (f) the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected;
- (g) people with disability should be supported to receive supports outside the NDIS, and be assisted to coordinate these supports with the supports provided under the NDIS; and
- (h) the financial sustainability of the NDIS should be ensured.

Part 2 Outline of these Rules

- 2.1 Once a person becomes a participant in the NDIS, they develop a plan with the Agency. The plan comprises two parts:
- (a) the ***participant's statement of goals and aspirations***, which is prepared by the participant and specifies their goals, objectives, aspirations and circumstances; and
 - (b) the ***statement of participant supports***, which is prepared with the participant and approved by the CEO, and sets out, among other matters, the supports that will be provided or funded by the NDIS.
- 2.2 These Rules are about how compensation payments in respect of an injury suffered by a participant are taken into account by the CEO in determining the reasonable and necessary supports that will be funded under the NDIS.

Part 3 Compensation

Application

- 3.1 This Part applies in relation to a person who is a participant, or who later becomes a participant, if the impairment of the person was caused to any extent by a personal injury, and one of the following cases applies:
- (a) the person received compensation under a judgement or settlement in respect of the injury in which:
 - (i) it is possible to identify the NDIS component of the amount of compensation (**NDIS component** is defined in paragraph 4.4); and
 - (ii) the component is either fixed by a non-consent judgement or is objectively identifiable (eg commutation of benefits under a statutory scheme); or
 - (b) the person received compensation under a judgement or settlement in respect of the injury that:
 - (i) does not satisfy paragraph (a) and
 - (ii) fixes an amount of compensation in respect of the injury; or
 - (c) the person is receiving compensation 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
 - (d) the person:
 - (i) entered into an agreement to give up a right to compensation in respect of the injury; and
 - (ii) because of that agreement, there are amounts that the person did not receive by way of a compensation payment (even if the person received other amounts by way of compensation payment in respect of the injury); and
 - (iii) the CEO is not satisfied that it was reasonable, in the circumstances, for the person to have entered into the agreement.
- 3.2 For paragraph 3.1(d)(iii), in considering whether the person's entry into the agreement was reasonable, the CEO must have regard to the following matters:
- (a) the disability of the participant or prospective participant, including whether the disability affected his or her ability to reasonably assess the terms of the agreement;
 - (b) the circumstances which gave rise to the entitlement or possible entitlement to compensation;
 - (c) any reasons given by the participant or prospective participant as to why he or she entered into the agreement;

- (d) the impact (including any financial impact) on the participant or prospective participant and his or her family that would have occurred if the claim for compensation had been pursued or continued;
- (e) any other matter the CEO considers relevant, having regard to the objects and principles set out in Part 2 of Chapter 1 of the Act.

- 3.3 For this Part, if the NDIS component of compensation under a judgement or settlement includes an element that consists of periodic payments, the amount attributable to that element is taken to be:
- (a) if the amount is specified in a judgement—that amount; or
 - (b) if the amount is not specified in a judgement, but the CEO is satisfied that a specified amount was paid by the defendant to ensure the provision of the periodic payments—that amount; or
 - (c) otherwise—the value of the periodic payments as assessed in accordance with accepted actuarial standards, in consultation with the scheme actuary.

Compensation, or forgone compensation, to be taken into account

- 3.4 If the person is already a participant and has a participant's plan, the CEO is to revise the plan.
- 3.5 In considering whether or not to approve a statement of participant supports in a plan for the participant (whether the first plan or a revised plan), the CEO is to take account of the compensation by reducing the funding for reasonable and necessary supports that would otherwise be approved by the appropriate ***compensation reduction amount*** under paragraphs 3.11 to 3.21.
- 3.6 To avoid doubt, a compensation reduction amount may arise in relation to each amount of compensation fixed or foregone in respect of injury, including amounts to which different paragraphs of paragraphs 3.1(a) to (d) apply (for example, where a person receives a compensation amount awarded by a court and another amount as part of a settlement). In this case, more than 1 compensation reduction amount applies for paragraph 3.5. Paragraphs 3.15 and 3.20 set out special rules that apply when there are multiple compensation reduction amounts to which different paragraphs of paragraphs 3.1(a) to (d) apply.
- 3.7 The reduction in respect of:
- (a) an amount of compensation under a judgement, settlement or agreement mentioned in paragraph 3.1(a) (b) or (d); or
 - (b) a lump sum received as compensation under a scheme mentioned in paragraph 3.1 (c);

may be amortised over a period no longer than the remainder of the participant's expected lifetime in accordance with accepted actuarial standards, in consultation with the scheme actuary.

- 3.8 If requested to do so by a person who has suffered an injury and is considering a settlement or other agreement that might result in the application of this part, the CEO may advise the person in relation to the likely compensation reduction amount, or elements of the likely compensation reduction amount, that would apply in relation to the settlement or agreement.
- 3.9 No action lies against the CEO or any other person in relation to advice given under paragraph 3.8.

Special circumstances

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

Compensation reduction amount—support component objectively identified

- 3.11 In the case of a judgement or settlement mentioned in paragraph 3.1(a), the CEO is to identify the ***compensation reduction amount*** as follows:
- (a) identify the NDIS component of the amount of compensation;
 - (b) subtract an amount that the CEO considers equivalent to the total of the amounts that were paid by the participant for supports of that kind after the date of the judgement or settlement and before becoming a participant;
 - (c) subtract the amount of any reduction in funding under paragraph 3.5 that occurred in relation to a previous plan of the participant.
- 3.12 If, by subtracting a particular amount under paragraph 3.11, the compensation reduction amount would be reduced to nil or less than nil, the CEO must:
- (a) only subtract so much of the amount that would reduce the compensation reduction amount to nil; and
 - (b) not subtract any further amounts under paragraph 3.11.

Compensation reduction amount—other circumstances

- 3.13 In the case of a judgement or settlement mentioned in paragraph 3.1(b), the CEO is to identify the ***compensation reduction amount*** as follows:
- (a) calculate the amount of compensation fixed under the judgement or settlement;

- (b) subtract the sum of the amounts (if any) payable in respect of the amount of compensation under the following:
 - (i) the *Health and Other Services (Compensation) Act 1995*;
 - (ii) the *Health and Other Services (Compensation) Care Charges Act 1995*;
 - (iii) Part 3.14 of the *Social Security Act 1991*;
 - (iv) a law of the Commonwealth, a State or a Territory, prescribed by the National Disability Insurance Scheme rules;
- (c) subtract an amount that the CEO considers reflects the value of any period of preclusion:
 - (i) that arises from a Commonwealth, State or Territory statutory scheme of entitlements (for example, the *Social Security Act 1991*); and
 - (ii) is in respect of the injury;
- (d) if no preclusion period has arisen for the purposes of paragraph (c) and the CEO is satisfied that:
 - (i) the participant claimed damages in relation to lost earnings or lost capacity to earn; and
 - (ii) the amount of compensation fixed under the judgement or settlement included an amount in respect of those damages;
 - subtract 50% of the amount of compensation;
- (e) if the amount after applying paragraphs (a) to (d) is greater than the value of the reasonable and necessary supports that the CEO considers would have been provided to the participant and funded under the Act over the participant's expected lifetime, had the participant been a participant from the time of the compensable event—replace the amount by that value;
- (f) subtract an amount that the CEO considers equivalent to the total of the amounts that were paid by the participant for supports, being supports of a kind funded under the Act, after the compensable event and before becoming a participant;
- (g) subtract any recoverable amount payable by the participant in respect of the compensation amount pursuant to section 106 or section 107 of the Act;
- (h) subtract any amounts deducted by the Agency under section 105B of the Act;
- (i) subtract the amount of any reduction in funding under paragraph 3.5 that occurred in relation to a previous plan of the participant.

3.14 For paragraph 3.13(e), the calculation must be in accordance with any applicable actuarial model published by the Agency on its website at the time the calculation is undertaken.

3.15 If a compensation reduction amount has also been identified in respect of the injury under paragraph 3.11, paragraph 3.13 is to be applied with the following modifications:

- (a) reduce from the amount to be subtracted under paragraph 3.13(f) any amount subtracted in respect of the injury under paragraph 3.11(b);
- (b) reduce from the amount to be subtracted under paragraph 3.13(i) any amount subtracted in respect of the injury under paragraph 3.11(c).

3.16 If, by subtracting a particular amount under paragraph 3.13, the compensation reduction amount would be reduced to nil or less than nil, the CEO must:

- (a) only subtract so much of the amount that would reduce the compensation reduction amount to nil; and
- (b) not subtract any further amounts under paragraph 3.13.

Compensation reduction amount—participant in a Commonwealth, State or Territory statutory insurance scheme

3.17 In the case of compensation mentioned in paragraph 3.1(c), the CEO is to identify the ***compensation reduction amount*** by identifying the total value of the care and support expected to be provided to the participant under that scheme until the plan is required to be reviewed in accordance with paragraph 33(2)(c) of the Act.

3.18 For paragraph 3.17, the identification must be:

- (a) in accordance with any applicable actuarial model published by the Agency on its website at the time the calculation is undertaken; and
- (b) done in consultation with the person or entity that administers the scheme.

Compensation reduction amount—agreement to give up compensation

3.19 In the case of an agreement mentioned in paragraph 3.1(d), the CEO is to identify the ***compensation reduction amount*** as follows:

- (a) assess the likely amount of the NDIS component of compensation that participant would have received under a judgement (other than a consent judgement) had the participant made a claim for compensation in respect of the personal injury (***NDIS component*** is defined in paragraph 4.4);
- (b) subtract the amount of any reduction in funding under paragraph 3.5 that occurred in relation to a previous plan of the participant;
- (c) subtract an amount that the CEO considers equivalent to the total of the amounts that were paid by the participant for supports, being supports of a kind funded under the Act, after incurring the injury and before becoming a participant.

- 3.20 If a compensation reduction amount has also been identified in respect of the injury under paragraph 3.11 or 3.13, paragraph 3.19 is to be applied with the following modifications:
- (a) between the steps in paragraphs 3.19(a) and (b), subtract the compensation reduction amounts identified under paragraphs 3.11 or 3.13;
 - (b) reduce from the amount to be subtracted under paragraph 3.19(b) any amount subtracted in respect of the injury under paragraph 3.11(c) or 3.13(i);
 - (c) reduce from the amount to be subtracted under paragraph 3.19(c) any amount subtracted in respect of the injury under paragraph 3.11(b) or 3.13(f).
- 3.21 If, by subtracting a particular amount under paragraph 3.19, the compensation reduction amount would be reduced to nil or less than nil, the CEO must only subtract so much of the amount that would reduce the compensation reduction amount to nil.

Part 4 Other matters

Citation

- 4.1 These rules may be cited as the *National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013*.

Interpretation

- 4.2 These Rules contain text that summarises provisions of the Act or describes expectations as to what will normally occur in practice under the NDIS, as well as operative rules. The boxed notes identify such text, which does not form an operative part of these Rules.
- 4.3 Terms and expressions that are used in the Act have the same meaning in these Rules unless these Rules display a contrary intention—see the *Acts Interpretation Act 1901*, which also contains definitions and rules of interpretation that apply to all Commonwealth legislation. (See also the *Legislative Instruments Act 2003*, which, among other things, applies the *Acts Interpretation Act 1901* to legislative instruments such as these Rules.) For convenience, the more important definitions from the Act are identified or reproduced in paragraph 4.4.
- 4.4 In these rules:

Act means the *National Disability Insurance Scheme Act 2013*.

CEO—see section 9 of the Act.

compensable event means the event in which a person's injury occurred that gave rise to the 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 Act.

compensation reduction amount—see paragraph 3.5.

NDIS means the National Disability Insurance Scheme (see section 9 of the Act).

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.

NDIS rules means the National Disability Insurance Scheme rules (see section 9 of the Act).

participant—see section 9 of the Act.