

## **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](#) (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))

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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)**

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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?**

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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)).

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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.



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### **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

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- 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:

1. 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
2. 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](#) . For further information please see [Compensation Reduction Amounts \(CRA\)](#).

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