

NDIS - A Short Guide for Insurers

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Introduction

Australia's National Disability Insurance Scheme (**NDIS**) is here and moving into a crucial implementation phase over the next 12 months.

Rosan Santangelo, HBA Legal Partner, reviews some documents from the NDIS website and examines the legislation with a view to understanding what these changes will mean for compensation payers.

As anyone who practices in casualty litigation will know, at the end of a personal injury case the parties fill in a Medicare form, notify Centrelink of the judgment or settlement and seek the required clearances. So what I initially wanted to know was does the NDIS change any of that? The answer is yes, it does. The NDIS regime also has the potential to influence peoples' decision as to whether they will commence litigation or not.

What is NDIS?

The overriding principle of the NDIS is to give the individual choice and control. Participants are able to make choices about what care and support they wish to receive and to control the employment and payment of service providers. Funding is provided to participants in an NDIS approved personal plan and participants select the services and service providers. The NDIS legislation is broad in respect of the types of supports and assistance to be covered. The basic requirement is that the National Disability Insurance Agency (**NDIA**) determines that services are "reasonable and necessary".

The sorts of services covered include those which would be the subject of an award for damages for care or out of pocket expenses in a personal injury claim such as:

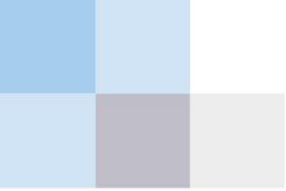
- personal care;
- domestic assistance; and
- home modifications.

Will claims costs reduce as individuals are not paying for care? **No**

The NDIS does not remove liability for care and supports from the underlying compensation payer or insurer.

Can the NDIA commence recovery proceedings? **Yes**

The legislation enables the NDIA to conduct common law actions in a participant's name and to seek recoveries from insurers, accident compensation schemes and other compensation payers.



If a participant fails to seek compensation from the scheme within a certain period, their personal care and support plan can be suspended and the injured personal will cease to receive NDIS benefits. In other circumstances, if the participant fails to take action within a specified period, the NDIA has broad powers to take over a claim/litigation in the name of the participant.

Are recovery actions limited to NDIS payments? No

In NDIA recovery actions a scheme participant's claim will not be limited to heads of damage that would be covered by the NDIS. Payments made by the NDIS prior to the award of damages will be recovered as a lump sum by the NDIA. The balance of the damages resulting from the litigation will be passed on to the participant once damages for future care or supports (of a type that would typically be provided by the NDIS) are accounted for. Those amounts for 'care' will reduce future NDIS payments on an ongoing basis.

It will be interesting to see if the NDIA will be incentivised to maximise the care related damages component of litigated claims and how scheme participants fare in the process, particularly if they have no say as to how settlements are constructed.

Do insurers need to provide a Notice and Details of Settlement? Yes

The NDIA can seek recoveries from insurers post settlement or judgment. There are strict notification requirements for insurers akin to those currently in place for Medicare and Centrelink. It is an offence for an insurer to make a payment to an individual prior to paying the recovery amount to the NDIA. Insurers must:

- provide written notice to the NDIA within seven days of becoming liable for or receiving notice that they may be liable for support costs relating to a participant; and
- not make any compensation payments subsequent to receiving a recovery notice from the NDIA and while that notice is in effect.

Comment

The NDIS is a major project and its infrastructure will, no doubt, develop over time. Insurers ought to be mindful of:

- personal injury liabilities that will arise in the near future where claimant's qualify for benefits under the NDIS; and
- reporting and compliance obligations.

Contact

Rosan Santangelo | Partner
D: +61 (0) 2 9367 1144
rosan.santangelo@hbalegal.com
www.hbalegal.com