

## 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](#) ) (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 NDIA, 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 support 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 amounts](#) 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.

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