

## **12. Agreements to give up a right to compensation (rules 3.1(d) and 3.19 of the Compensation Rules)**

Where a [person](#) who has an [impairment](#) caused [to any extent](#) by a [personal injury](#):

- enters into an agreement to give up a right to [compensation](#) in respect of that personal injury; and
- because of that agreement, there are compensation amounts the person did not receive (even if the person received other compensation amounts in respect of the injury); and
- the NDIA is not satisfied it was reasonable for the person to have entered into the agreement.

The National Disability Insurance Agency (NDIA) is to reduce the funding for [reasonable and necessary supports](#) by a Compensation Reduction Amount (CRA) in accordance with rules 3.19-3.21 of the [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013](#) (Compensation Rules).

It does not matter whether the person was a participant at the time of entering into the agreement.

### **12.1 When a participant may be considered to have entered into an agreement to give up a right to compensation**

A participant may have entered into an agreement to give up a right to compensation including, but not limited to, the following circumstances:

- The participant requires NDIS type supports as a result of an injury and the participant, prospective participant or their authorised representative unreasonably enters into an agreement which does not compensate the participant for NDIS type supports;
- Prior to entering the settlement agreement the participant had their needs assessed by a qualified medical practitioner which determined the participant required NDIS type supports as a result of the subject injury but, the participant, prospective participant or their authorised representative unreasonably enters into an agreement in which NDIS type supports have not formed a part of their payment.

### **12.2 How does the NDIA determine whether it was reasonable to enter into the agreement?**

The NDIA will consider the following:

#### **Rule 3.2(a) of the Compensation Rules - Disability**

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The NDIA will consider whether a participant's, or prospective participant's, disability affected their ability to understand and assess the terms of the agreement they have entered into.

For example, a participant with severe cognitive impairment may not have understood the consequences of giving up their right to compensation. The NDIA will take this into consideration.

### **Rule 3.2(b) of the Compensation Rules - Circumstances**

The NDIA will consider the circumstances of the [compensable event](#).

The circumstances may include but are not limited to, the geographical location of the compensable event. For example, if it occurred overseas, it may have been difficult or complex to claim compensation.

### **Rule 3.2(c) of the Compensation Rules - Reasons**

The NDIA will consider any reason given by the participant, or prospective participant, as to why they entered into the agreement.

### **Rule 3.2(d) of the Compensation Rules - Impact (including financial impact)**

The NDIA will consider the impact on the participant, or prospective participant, had a claim for compensation been pursued. This may include, but is not limited to:

- Ability to pay legal costs;
- Ability of participant to fund or provide their own supports; and/or
- Emotional or psychological impact.

The NDIA will consider the impact on the participant's, or prospective participant's, family had a claim for compensation been pursued. This may include but is not limited to:

- If the participant, or prospective participant, sustained injury due to the fault of a family member; and
- Pursuing compensation would affect familial relationships or cause a family member financial hardship.

### **Rule 3.2(e) of the Compensation Rules - Other matters**

The NDIA will consider any other relevant matter, having regard to the objects and principles of the [National Disability Insurance Scheme Act](#) (NDIS Act) (in particular sections 3 – 5 of the NDIS Act).

All objects and principles of the NDIS Act will 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

## **12.3 Calculating the CRA - agreement to give up compensation (rules 3.19-3.21 of the Compensation Rules)**

To calculate the CRA in accordance with rules 3.19-3.21 of the Compensation Rules, the NDIA will:

### **Step 1 - Rule 3.19(a)**

Assess the likely amount of the [NDIS component](#) of [compensation](#) that the participant would have received under a [non-consent judgement](#) had the participant not entered into an agreement to give up their right to compensation in respect of the [personal injury](#) (even if other compensation amounts were received in respect of the injury).

The NDIA may require the participant, or prospective participant, to undergo an assessment (medical, psychiatric, psychological or other examination, by an appropriately qualified medical practitioner) and provide the NDIA with a report, in the approved form, of the person who conducts the assessment (section 36(2) of the NDIS Act).

### **Step 2 - Rule 3.19(b) of the Compensation Rules**

Subtract the amount of any reduction in the participant's funding that has occurred previously in respect of the agreement to give up a right to compensation.

A participant may have had previous reductions in funding applied to their statement of participant supports (section 33(2) of the NDIS Act) in respect of the agreement to give up a right to compensation. Each time the participant's statement of supports is reviewed, the new plan will take into account earlier CRAs, which have been applied to the participant's previous statement of participant's supports by undertaking this step, to prevent double reductions.

### **Step 3 - Rule 3.19(c) of the Compensation Rules**

The NDIA will subtract an amount equivalent to the total of the amounts that were paid by the participant for supports of a kind that may be funded under the NDIS, in the period between the [compensable event](#) and the day before the person became a participant.

The NDIA subtracts these amounts to reduce the CRA by the amount of [NDIS type supports](#) the participant self-funded after they sustained their injury and before they became a participant. For more information on the kinds of supports funded under the NDIS, see [NDIS Pricing Arrangements](#)

To identify this amount, the NDIA will require information and evidence of past amounts paid. For more information see [Information and documents required for the NDIA to undertake its function](#), the [Information Handling Operational Guidelines](#) and/or the [NDIA Privacy Policy](#).

## **12.4 Where there is an agreement to give up a right to compensation and another CRA has been identified in respect of the same injury**

In some circumstances a participant may make more than one compensation claim in respect of the same injury.

For example, if the compensable event was a motor vehicle accident where two other drivers are at fault, a participant may have received compensation from one driver and waived their right to compensation in respect of the other driver.

If a person has entered into an agreement to give up a right to compensation and a CRA has also been identified for another amount of compensation under rule 3.11 (see [Calculating the CRA when compensation is fixed by non-consent judgment, consent judgment or settlement and the NDIS component is objectively identifiable](#)) or rule 3.13 (see [Calculating the CRA when compensation is fixed by non-consent judgment, consent judgment or settlement and the NDIS component is not objectively identifiable](#)), the calculation for the amount of compensation given up under an agreement (under rule 3.19 of the Compensation Rules) is modified as set out below:

### **Rule 3.20(a) of the Compensation Rules**

Between step 1 and step 2 above, subtract the CRA identified for any other amount of compensation received in respect of the injury under a [non-consent judgement](#), [consent judgement](#) or [settlement](#) agreement.

A CRA calculated under rule 3.19 is calculated on the basis the participant would be compensated in full for the NDIS component had the claim proceeded to a non-consent judgement.

If the participant has received compensation for the same injury and a CRA has been calculated in respect of previously received compensation, the previously calculated CRA needs to be subtracted from the CRA calculated under rule 3.19 to avoid duplicate reductions in funding in a participant's statement of supports.

### **Rule 3.20(b) of the Compensation Rules**

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Reduce the amount to be subtracted at step 2 above, by any amount previously subtracted under rule 3.11(c) or rule 3.13(i) of the Compensation Rules (i.e. the amount of any reduction in the participant's funding that has occurred previously for any previous CRA calculated in respect of the injury).

This step ensures that if a participant has previously received compensation for the injury and a CRA has been applied to the statement of participant supports in respect of that injury, duplicate reductions are not made.

### **Rule 3.20(c) of the Compensation Rules**

Reduce the amount to be subtracted at step 3 above, by any amount previously subtracted under rule 3.11(b) or rule 3.13(f) of the Compensation Rules (i.e. an amount equivalent to the total of the amounts that were paid by the participant for supports of a kind that may be funded under the NDIS in respect of the injury).

This step ensures that if a participant has paid for supports of a kind that may be funded under the NDIS, these amounts are not accounted for twice and double reductions are not made.

## **12.5 Compensation reduction amount reduced to nil**

If the compensation reduction amount is reduced to nil, there will be no reduction to the participant's statement of supports (rule 3.21).

For more information see [What happens if CRA is reduced to nil?](#)

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