

## **7. Recovery from compensation payers and insurers**

When a [participant](#) (see section 9 of the NDIS Act), or [prospective participant](#), makes a claim for [compensation](#) against another person (the **potential compensation payer**) or, an [insurer](#) who may be liable under a contract of insurance, and the claim relates to the participant's, or prospective participant's, [impairment](#), the National Disability Insurance Agency (NDIA) may give a preliminary notice to the potential compensation payer or insurer.

A preliminary notice will be considered 'to have been given' to a potential compensation payer or insurer if it is given to the [authorised representative](#) of the potential compensation payer or insurer. For example, if the NDIA gives a copy of the preliminary notice to a lawyer or law firm that acts on behalf of a compensation payer or insurer, the notice will be considered to have been given to that compensation payer or insurer.

### **7.1 What is a preliminary notice?**

A preliminary notice is a written notice given by the NDIA advising a potential compensation payer or insurer that the NDIA may wish to recover an amount from the potential compensation payer or insurer.

The decision to give a preliminary notice is not a reviewable decision (section 99 of the [National Disability Insurance Scheme Act 2013](#) (NDIS Act)).

### **7.2 What is the effect of a Preliminary Notice?**

A preliminary notice suspends the liability or possible liability of the potential compensation payer or insurer to pay compensation to the participant, or prospective participant, while the written notice has effect (section 112 of the NDIS Act).

The preliminary notice will have effect until (section 114 of the NDIS Act):

- The preliminary notice has been revoked by the NDIA; or
- The NDIA has given the compensation payer or insurer written permission to pay the amount.

For more information, see [Consequences of failing to comply with a preliminary notice or a recovery notice](#).

### **7.3 When can the NDIA give a preliminary notice to a potential compensation payer?**

The NDIA may give written notice to the potential compensation payer, stating that the NDIA may wish to recover an amount from the potential compensation payer if:

1. a participant, or prospective participant, makes a claim against another person (the potential compensation payer) for compensation; and
2. the claim relates, to any extent, to the participant's, or prospective participant's, impairment (subsection 109(1) of the NDIS Act).

## 7.4 When can the NDIA give a preliminary notice to an insurer?

The NDIA may give written notice to the insurer, stating that the NDIA may wish to recover an amount from the insurer if:

1. a participant, or prospective participant, makes a claim against another person (the potential compensation payer) for compensation; and
2. the claim relates, to any extent, to the participant's, or prospective participant's, impairment; and
3. an insurer may be liable, under a contract of insurance, to indemnify the potential compensation payer against any liability arising from the claim for compensation (subsection 109(2) of the NDIS Act).

## 7.5 What information must a preliminary notice contain? (subsection 109(3) of the NDIS Act)

A preliminary notice given to a potential compensation payer or an insurer must contain the potential compensation payer or insurer's obligations (subsection 109(3) of the NDIS Act). More specifically, the requirement that the potential compensation payer or insurer notify the NDIA in writing:

- If the preliminary notice was received prior to becoming liable to pay compensation, within 7 days of becoming liable; or
- If the preliminary notice was received after becoming liable to pay compensation, within 7 days of the receipt of the notice (section 110 of the NDIS Act).

The potential compensation payer or insurer will commit an offence if they do not comply with this requirement. The offence is punishable by:

- 12 months imprisonment; or
- a fine of 60 penalty units; or
- both.

Increased fines may apply to bodies corporate (section 111 of the NDIS Act).

The written notice must also contain a statement of the effect of recovery (section 111 of the NDIS Act) insofar as it relates to the preliminary notice.

For more information regarding the effect of recovery see [Effect of a recovery notice](#) and [Consequences of failing to comply with a preliminary notice or a recovery notice](#).

## 7.6 What is a recovery notice?

A recovery notice is a written notice given by the NDIA requiring a compensation payer or insurer to pay the amount specified in the notice, directly to the NDIA.

The decision to give a recovery notice is a reviewable decision.

## 7.7 Effect of a Recovery Notice

A recovery notice suspends the liability of the compensation payer or insurer to pay compensation to the participant while the notice has effect (section 112 of the NDIS Act).

The recovery notice will have effect until:

- The amount specified in the recovery notice has been paid to the NDIA by the compensation payer or the insurer; or
- The NDIA has given the compensation payer or insurer written permission to pay the amount to the participant (section 114 of the NDIS Act).

For more information see [Consequences of failing to comply with a preliminary notice or a recovery notice](#).

## 7.8 When may the NDIA give a recovery notice to a compensation payer?

The NDIA may give written notice to the compensation payer that the NDIA proposes to recover from the compensation payer the amount specified in the notice if:

1. one or more NDIS amounts have been paid to a person in respect of a participant's impairment; and
2. a person (the compensation payer):
  1. is liable to pay compensation to the participant in relation to the impairment; or
  2. if the compensation payer is an authority of a State or Territory—has determined that a payment by way of compensation is to be made to the participant in relation to the impairment (subsection 111(1) of the NDIS Act).

The NDIA is not required to provide a preliminary notice before giving a recovery notice.

In circumstances where the terms of a consent judgement or a settlement specifically deny any liability on the part of the potential compensation payer or insurer, the compensation payer will still be liable to pay the NDIA the amount specified in the recovery notice.

The decision to give a recovery notice to a compensation payer is a reviewable decision.

## 7.9 When may the NDIA give a recovery notice to an insurer?

The NDIA may give written notice to the insurer that the NDIA proposes to recover from the insurer the amount specified in the notice if:

1. one or more NDIS amounts have been paid to a person in respect of a participant's impairment; and
2. an insurer is liable, under a contract of insurance, to indemnify the compensation payer against any liability arising from a claim of the participant for compensation (subsection 111(2) of the NDIS Act).

The NDIA is not required to provide a preliminary notice before giving a recovery notice.

In circumstances where the terms of a consent judgement or a settlement specifically deny any liability on the part of the potential compensation payer or insurer, the insurer will still be liable to pay the NDIA the amount specified in the recovery notice.

The decision to give a recovery notice to an insurer is a reviewable decision.

## 7.10 Calculating the amount to be specified in the notice

The amount specified in the written notice is to be the lesser of:

- The sum of the NDIS amounts paid in respect of a participant's impairment by the NDIS; or
- The [recoverable amount](#) calculated pursuant to section 106 or section 107 of the NDIS Act (subsection 111(4) of the NDIS Act).

## 7.11 What information must a recovery notice contain?

The notice must contain:

- The amount the compensation payer or insurer is to pay directly to the NDIA (subsections 111(1) and (2) of the NDIS Act); and

- A statement of the effect of offences (section 114 of the NDIS Act) insofar as it relates to the recovery notice (subsection 111(5) of the NDIS Act).

For more information please see [Consequences of failing to comply with a preliminary notice or a recovery notice](#).

## **7.12 The amount specified in a recovery notice is a debt due to the Agency by the recipient of the notice**

If a compensation payer or an insurer is given a recovery notice, the amount specified in the notice becomes a debt due to the NDIA (subsection 111(7) of the NDIS Act).

If the recoverable amount is not paid by the compensation payer or the insurer who owes the debt, the debt recovery provisions under Part 1 of Chapter 7 of the NDIS Act may be operationalised including, the potential to bring legal proceedings for repayment of the debt.

## **7.13 Payment to the NDIA discharges the compensation payer or insurer's liability**

When a compensation payer pays the NDIA after receiving a recovery notice, the payment discharges, to the extent of the payment:

- the compensation payer's liability to the participant; and
- the participant's liability to the NDIA (subsection 113(1) of the NDIS Act).

When an insurer pays the NDIA after receiving a recovery notice, the payment discharges, to the extent of the payment:

- the insurer's liability to the compensation payer to the extent of the payment;
- the compensation payer's liability to pay compensation to the participant to the extent of the payment; and
- the participant's liability to the NDIA (subsection 113(2) of the NDIS Act).

The liability discharged by payment of the recoverable amount to the NDIA is limited to liability to pay the amount specified in the recovery notice. The compensation payer or insurer remains liable to pay to the participant the amount of compensation fixed by the [non-consent judgement](#), [consent judgement](#) or [settlement](#), less the recoverable amount.

For example, if a participant settles a claim with a compensation payer or insurer in the sum of \$1,000,000 and the NDIA issues a recovery notice on the compensation payer or insurer for the sum of \$250,000, the compensation payer or insurer remains liable to pay the participant \$750,000.

## **7.14 Consequences of failing to comply with a preliminary notice or recovery notice**

The potential compensation payer or insurer commits an offence if they pay any amount of compensation to the participant or prospective participant in discharge of their liability after receiving a preliminary notice or recovery notice, unless:

- the NDIA has revoked the preliminary notice in writing; or
- the compensation payer or insurer has paid the NDIA the amount specified in a recovery notice; or
- the NDIA has given the potential compensation payer or insurer written permission to pay the amount (subsections 114(2)-(4) of the NDIS Act).

If a potential compensation payer or insurer does not comply with the preliminary notice or recovery notice, the offence is punishable by:

- 12 months imprisonment; or
- a fine of 60 penalty units; or
- both.

Increased fines may apply to bodies corporate (subsection 114(1) of the NDIS Act).

In addition to any penalty, a potential compensation payer or insurer who pays an amount to the participant or prospective participant while the preliminary notice or recovery notice remain in effect, will be required to pay to the NDIA:

- If a preliminary notice remained in effect – an amount determined by the NDIA that does not exceed the amount that would have been specified in a recovery notice if one had been issued (subsections 115(1) - (2) of the NDIS Act); or
- If a recovery notice remained in effect – the amount specified in the recovery notice (subsection 115(1) of the NDIS Act).

The amount that is to be paid to the NDIA if the potential compensation payer or insurer paid an amount to the participant when a preliminary notice or recovery notice remained in effect, is a debt due by the potential compensation payer or the insurer to the NDIA (subsection 115(4) of the NDIS Act).

If the amount is not paid by the potential compensation payer or the insurer who owe the debt, the debt recovery provisions under Part 1 of Chapter 7 of the NDIS Act may be operationalised, including the potential to bring legal proceedings for repayment of the debt.

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