

# NDIS Update

Taylor Fry Newsletter / April 2013

In this month's newsletter we provide an update on the current status of the National Disability Insurance Scheme ("NDIS") following the introduction of the NDIS bill in November 2012.

Our [January newsletter](#) provided an overview of the draft NDIS legislation and potential impacts on insurers, reinsurers and accident compensation schemes.

In the intervening months a number of important developments have taken place:

- The NDIS legislation was passed by both houses.
- A draft set of the much-anticipated NDIS rules was released.
- South Australia and the ACT signed up to a full introduction of the NDIS and the Barker Region of the Northern Territory signed up to be a launch site.
- Despite a large political investment in the NDIS brand, the name of the scheme was changed to 'DisabilityCare Australia'.

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## Legislation passed by both houses

On 28 March 2013, the legislation establishing the NDIS launch sites received royal assent following a remarkably swift journey through both houses of parliament.

Despite a senate inquiry that raised serious concerns with the legislation wording, the amendments to the legislation were reasonably light. Nevertheless, there were some amendments that have the potential to significantly affect insurers, in particular:

- changes to compensation arrangements to allow the NDIS CEO to take over a potential claim; and
- loosening of the age eligibility criterion.

### How will the legislation amendments affect insurers?

#### Criticism of the draft legislation

The clauses in the draft legislation allowing the NDIS CEO to compel participants to seek common law recoveries came under concerted criticism and were subsequently amended. Unfortunately, the amendments are likely to add to the confusion facing insurers.

Under the draft legislation, participants could be compelled to seek common law recoveries with no funding for legal support provided by the NDIS Agency. The Senate Committee recommended the legislation be amended to allow a participant to elect to subrogate their rights to compensation to the Agency. The government response, which passed through to the final legislation, is somewhat more convoluted.

#### Compensation arrangements

Under the final legislation, if a potential participant is able to obtain compensation “under a scheme of compensation under a Commonwealth, State or Territory law”, the arrangements in the draft legislation stand and there is no allowance for the subrogation of compensation rights to the Agency. If the participant fails to seek compensation from the scheme within a specified period, their personal plan is suspended and they cease to receive NDIS benefits.

In all other circumstances, if the participant fails to take action within a specified period, the Agency may take over the claim in the name of the participant without giving the participant a choice in the matter. This falls short of full subrogation, which would pass all legal rights to compensation to the Agency, who could subsequently pursue compensation in its own name. By leaving the action in the participant’s name, the legislation sidesteps the need to modify many pieces of state-based compensation legislation. In order to pursue compensation under the participant’s name, the amendments give the NDIS CEO the right to apply to the Federal Court to force the participant to sign documents in relation to the claim.

The Agency’s actions in the participant’s name need not be limited to heads of damage that would be covered under the NDIS. The NDIS-related component of any amount paid under a claim made or taken over by the Agency is to be retained by the Agency; and the Agency is able to retain incidental costs. The balance of the settlement is to be returned to the participant.

The component of compensation the Agency is able to retain for itself is not necessarily all of the care-component of a settlement. Since the NDIS legislation

and rules only allow for “reasonable and necessary” costs, the Agency will presumably only be entitled to the reasonable and necessary costs embedded within the care head of damage. Since court awards are often provided as a single lump-sum, this causes considerable uncertainty as to the disbursement of the settlement between the Agency and the participant. The legislation does allow the Agency to seek out-of-court settlements and there is potential for the Agency to use this avenue to receive awards that are suitably specified.

The legislation appears likely to result in a complicated process for seeking common law recoveries which will vary between schemes, private insurers and self-insurers.

Further difficulties may occur where existing agreements are in place for cross border claims. Given the steep learning curve and related teething issues in establishing the trial sites, we suspect it will be some time before the practicalities of seeking recovery are adequately determined.

#### Age cut-off

In response to community lobbying, the government made two amendments relating to the age cut-off of 65 years:

1. Participants who pass the age of 65 and enter permanent residential aged care or community care prior to age 65 may elect to remain in the scheme. Participants who enter such care after 65 cease to be participants.
2. The early intervention requirements were amended to incorporate degenerative conditions. This allows entry into the scheme for individuals under the age of 65 who have a degenerative condition, but do not yet manifest the required

## More states and territories signed up

### Northern Territory

The Barker Region of the Northern Territory has been added as an NDIS launch site from July 2014. The site was selected because of its mix of remote, regional and urban communities.

### South Australia

The Commonwealth struck a deal with South Australia for a full rollout of the NDIS across the state from 2018. Under the deal, the Commonwealth will cover the full cost of people who turn 65 and choose to remain in the scheme. The agreement builds on the July 2013 launch of the NDIS in South Australia, which will cover children up to 14 years by 2015.

### ACT

The ACT government has signed on to a full introduction of the NDIS across the territory by 2016-17.

## Draft NDIS rules released

As outlined in our January newsletter, much of the detail of the NDIS has been relegated to subordinate legislation known as the "NDIS rules". The government has released draft versions of the rules that will have most bearing on the launch of the trial sites on 1 July 2013.

The rules currently released cover:

- Children
- Becoming a participant

- Rules for nominees
- Support for participants
- Plan management
- Protection and disclosure of information
- Registered providers of supports

While the rules do elaborate on some aspects of the legislation, they contain no major surprises.

## National Injury Insurance Scheme update

The NIIS advisory group has noted the difficulties associated with medical and criminal injuries, and in response two working groups have been established for medical accidents - the first to provide expert advice on technical matters and the second to determine an appropriate definition of 'medical accident'. A third working group has been established to look at alternatives for criminal injuries, which are anticipated to form a segment of the broader general accidents component of the scheme.

*Work continues on establishing a National Injury Insurance Scheme ("NIIS"), which will cover severe and profound disabilities arising from catastrophic injuries.*



## So, in short...

The introduction of the NDIS (or DisabilityCare Australia as it is now known) signals a step-change in the provision of disability care and support in Australia. Teething problems are to be expected, as many issues will only become apparent once the scheme is operational.

The compensation amendments to the legislation introduce considerable uncertainty, particularly in relation to the frequency and level at which the Agency will seek compensation.

To an extent, the uncertainty will be alleviated when the NDIS is operational but, until at least that point, there is a risk of increased common law action funded through the Agency.

### For more details

- [Final NDIS legislation](#)
- [NDIS draft rules](#)
- [Senate Committee report](#)
- [NDIS website](#)

## Questions or feedback? Contact us.



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