

## 13. Special Circumstances

The National Disability Insurance Agency (NDIA) may consider special circumstances:

1. After an amount of compensation has been fixed by non-consent judgment, consent judgment or settlement under section 116 of the [National Disability Insurance Scheme Act 2013](#) (NDIS Act); :
  1. When recovering NDIS amounts and any costs incidental to a claim made or taken over by the NDIA under section 105B of the NDIS Act;
  2. When calculating a recoverable amount pursuant to section 106 or section 107 of the NDIS Act;
  3. When calculating the amount to be recovered from a compensation payer or insurer under section 111 of the NDIS Act.
2. After the Compensation Reduction Amount (CRA) has been calculated under rules 3.11 to 3.21 of the [National Disability Insurance Scheme \(Supports for Participants – Accounting for Compensation\) Rules 2013](#) (Compensation Rules) (see rule 3.10).

### 13.1 What are special circumstances?

Special circumstances are not defined in either the NDIS Act or the Compensation Rules.

The term 'special' is a qualifying term. The Administrative Appeals Tribunal has determined that in order for 'special circumstances' to exist, the circumstances must be 'unusual, uncommon or exceptional' (see [Beadle and Director-General of Social Security \(1984\) AATA 176](#) ).

The NDIA will generally consider a combination of factors, rather than just one factor in isolation, when considering the circumstances of the case.

It is not possible to provide a complete list of factors which the NDIA may take into account when considering if special circumstances exist (see [Secretary, Department of Social Security v Halls](#) (1991) FCA 58), however, some of the potentially relevant factors may include, but are not limited to, those outlined at 13.2.1 and 13.3.1 below.

### 13.2 Special circumstances and recovery (section 116 of the NDIS Act)

Section 116 of the NDIS Act states:

For the purposes of this Chapter, the NDIA may treat the whole or part of a [compensation](#) payment as not having been [fixed](#) by a [non-consent judgement](#), [consent judgement](#) or [settlement](#) agreement, if the NDIA thinks it is appropriate to do so in the special circumstances of the case.

If the NDIA considers that special circumstances exist, the NDIA may reduce the [recoverable amount](#) by treating the whole or part of a compensation payment as not having been fixed.

A decision under section 116 of the NDIS Act may only be made after an amount of compensation has been fixed and will be calculated:

- When the NDIA gives a recovery notice to the compensation payer or insurer that the NDIA proposes to recover an amount pursuant to section 111 of the NDIS Act; or
- When the NDIA seeks to recover the recoverable amount from the participant as a debt pursuant to section 108 of the NDIS Act.

A decision under section 116 of the NDIS Act will operate only for the purposes of Chapter 5 of the NDIS Act.

If the NDIA treats a participant's compensation as not having been fixed in whole or part under section 116, the calculation of the CRA will not be affected.

For example:

A participant settles their claim for \$100,000. The NDIA is entitled to recover \$30,000 under section 107 of the NDIS Act. Special circumstances apply and the whole of the participant's compensation is treated as though it were not fixed. As a result, the NDIA does not recover any money from the participant.

In the above scenario, a CRA is still required to be calculated on the total settlement amount (\$100,000). Further, a subtraction to the CRA will not be made at rule 3.13(g) because, following the application of special circumstances, there is no amount payable by the participant to the NDIA under section 107.

### **13.2.1 Potential factors which may be relevant when considering a participant's circumstances in the context of a recoverable amount**

The NDIA may consider a range of factors when determining whether to treat the whole or part of a compensation payment as not having been fixed. Factors may include, but are not limited to:

- Financial hardship;
- Fraud/theft;

- The circumstances of the compensable event;
- The participant's health;
- Administrative error by the NDIA;
- Incorrect or insufficient legal advice;

The existence of any of the above potentially relevant factors does not mean it will be appropriate for the NDIA to reduce the recoverable amount by treating the whole or part of a compensation payment as not having been fixed.

Each case will be assessed on its own merits, taking into account all of the circumstances of the case.

### 13.2.2 Potentially inapplicable considerations

Whilst the NDIA will consider the whole of a participant's circumstances when determining whether to exercise its discretion under section 116 of the NDIS Act, the following factors, may not be 'special circumstances':

#### The participant's disability

As the NDIS is a social insurance scheme, which provides funding for supports and services to participants with permanent and significant disability, the existence of a significant and permanent disability in the context of the NDIS may not, in itself, amount to a special circumstance.

#### The risks of litigation

Settlement of a compensation claim for a lower amount due to the risks of litigating the case, due to difficulties of proof or other weaknesses in the case, is not unusual or uncommon (see [Donald; Secretary, Department of Employment and Workplace Relations](#) [2006] AATA 920).

## 13.3 Special circumstances and Compensation Reduction Amounts (CRA's)

Rule 3.10 of the Compensation Rules states:

For the purposes of rule 3.5, the NDIA may ignore the whole or part of a [compensation reduction amount](#) that would otherwise arise under this Part if the NDIA thinks it appropriate to do so in the special circumstances of the case (which may include financial hardship suffered by the participant).

Rule 3.10 of the Compensation Rules allows the NDIA to ignore either all or part of the CRA. Any part of the CRA which is ignored will not be applied to a participant's statement of supports.

Rule 3.10 of the Compensation Rules may only be applied after the CRA has been calculated. The NDIA will decide whether to apply rule 3.10 of the Compensation Rules when determining whether or not to approve a statement of participant's supports (section 33(2) of the NDIS Act).

A special circumstances determination pursuant to rule 3.10 of the Rules is separate and distinct from a special circumstances determination under section 116 of the NDIS Act.

If the NDIA treats a participant's compensation as not having been fixed in whole or part under section 116, the calculation of the CRA will not be affected.

For example:

A participant settles their claim for \$100,000. The NDIA is entitled to recover \$30,000 under section 107 of the NDIS Act. Special circumstances apply and the whole of the participant's compensation is treated as though it were not fixed. As a result, the NDIA does not recover any money from the participant.

In the above scenario, a CRA is still required to be calculated on the total settlement amount (\$100,000). Further, a subtraction to the CRA will not be made at rule 3.13(g) because, following the application of special circumstances, there is no amount payable by the participant to the NDIA under section 107.

### **13.3.1 Potential factors to be considered when assessing special circumstances in the context of a compensation reduction amount**

The NDIA may consider a range of factors when determining whether to ignore whole or part of a CRA, including but not limited to:

- Financial hardship;
- Fraud/theft;
- The circumstances of the compensable event;
- The participant's health;
- Administrative error by the NDIA;
- Incorrect or insufficient legal advice;

The existence of any of the above potentially relevant factors does not mean it will be appropriate for the NDIA to ignore the CRA in whole or in part.

Each case will be assessed on its own merits, taking into account all of the circumstances of the case.

### 13.3.2 Potentially inapplicable considerations

Whilst the NDIA will consider the whole of a participant's circumstances when determining whether to exercise its discretion under rule 3.10 of the Compensation Rules, the following factors, may not be 'special circumstances':

#### The participant's disability

As the NDIS is a social insurance scheme, which provides funding for supports and services to participants with permanent and significant disability, the existence of a significant and permanent disability in the context of the NDIS may not, in itself, amount to a special circumstance.

#### The risks of litigation

Settlement of a compensation claim for a lower amount due to the risks of litigating the case, due to difficulties of proof or other weaknesses in the case, is not unusual or uncommon (see [Donald; Secretary, Department of Employment and Workplace Relations](#) [2006] AATA 920).

## 13.4 Information and documents required for a special circumstances determination

Documents and/or information may be required for the NDIA to make a decision under section 116 of the NDIS Act or to reduce the CRA in a statement of participant supports.

The kinds of documents and information a participant may be expected to provide include:

- Invoices and/or receipts;
- Official eviction notices;
- Notification of pending disconnection of essential services (i.e. water, gas, electricity);
- Bankruptcy notification;
- Notices of debt recovery;
- Financial advisor reports;
- Bank account statements;
- Police records;
- Court documents;
- Current reports from a registered health professional;
- Statutory declaration detailing how the circumstances arose.

This is not a complete list of the documents and/or information which may be provided. The NDIA may request further documents and/or information before making a decision.

## 13.5 Special circumstances and reviewable decisions

A decision under section 116 of the NDIS Act, to treat or not to treat the whole or part of a [compensation](#) payment as not having been [fixed](#) by a [non-consent judgement](#), [consent judgement](#) or [settlement](#), is a reviewable decision (subsection 99(1), Item 28 of the NDIS Act).

A decision not to reduce a CRA that would otherwise apply to a statement of participant supports, or to only reduce a CRA in part (applying rule 3.10 of the Compensation Rules), forms part of the decision to approve the statement of participant supports made under subsection 33(2) of the NDIS Act, which is a reviewable decision (subsection 99(1), Item 4 of the NDIS Act).

For more information on internal reviews, see the [Reviewing our decisions guideline](#).

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