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The Impact of the National Disability Insurance Scheme on
Catastrophic Injury Cases

Presentation to the NSW Claims Discussion Group by

Lucinda Lyons, Partner
Joseph Callaghan, Senior Associate

Lee & Lyons Lawyers
1/131 Macquarie Street
SYDNEY NSW AUSTRALIA 2000

Tel: (02) 8273 8000

www.leeandlyons.com.au

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Outline

- What is the NDIS?
- How are people catastrophically injured impacted by the NDIS?
- Is recovery under common law affected by the NDIS?
- How will NDIS recover expenses from insurers?
- What are the broader impacts on the insurance sector?
- Structural challenges in implementing the NDIS
- What is the NIIS and its relationship to catastrophic injury cases?
- What is the role of common law damages in a no-fault scheme?
- How may these changes affect the legal sector?
- What are the proposed funding models for the NIIS?
- How will these changes impact the insurance sector?
- When will the NIIS be implemented?
- Concluding remarks

The National Disability Insurance Scheme Act 2013 (Cth) (Act)

Section 24 of the Act sets out when a person meets the disability requirements. The requirements are met if:

- the person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or to one or more impairments attributable to a psychiatric condition;
- the person's impairment are, or are likely to be, permanent;
- the impairment results in substantially reduced functional capacity to undertake, one or more of the following activities: communication, social interaction, learning, mobility, self-care, self-management;
- the impairment affects the person's capacity for social and economic participation; and
- the person's support needs are likely to continue for the person's lifetime.

What is the NDIS?

The **NDIS Rules** (draft) cover issues such as:

- **Becoming a Participant:** The requirements a person needs to meet to access a plan under the Scheme including the residence and age requirements.
- **Support for Participants:** The criteria for establishing whether support is reasonable and necessary.
- **Plan Management:** Timing and manner of payments by DisabilityCare Australia.

How Will It Work?

- The Scheme is administered by a National Disability Insurance Agency (NDIA) which will hold and distribute all funds.
- Estimated cost to be \$19.3 billion until 2020.
- Jointly funded by Commonwealth and State governments, as well as an increase in the Medicare levy.

How are people catastrophically injured impacted by NDIS?

- A catastrophic injury entails significant medical treatment and usually has some permanent impairment on the injured person's life.
- Around half of all catastrophic injuries are the result of motor vehicle accidents.
- 8% are work related.
- 11% arise from medical accidents.
- 32% are classed as general injuries e.g. sport and recreational activities, criminal assaults and catastrophic falls.

How the Scheme Will Operate in Practice For Those Who Are Catastrophically Injured

New South Wales No Fault Schemes

- The Life Time Care and Support Scheme (LTCS) - motor vehicle accidents.
- WorkCover Scheme – work related injury or disease.
- New South Wales Treasury Managed Fund self-insurance scheme - for all New South Wales public hospitals.
- The Northern Territory does not have a work place accidents insurance cover for those who sustain a work related injury.

Recovery Under Common Law and NDIS

- The NDIA can recover payments made under the scheme to a participant if they receive further compensation from either a judgment or a settlement.
- Under Section 104 of the Act, the CEO of NDIA may require a person to take action to obtain compensation.
- Under Section 105 of the Act, the CEO may take action to claim or obtain compensation in the name of the participant or prospective participant where the person has refused to do so or take over an existing claim.
- Under Sections 106 and 107 of the Act, the Agency may recover any past NDIS support payments made in respect of personal injury claims if compensation is later fixed under a judgment, consent judgment or settlement.

Recovery from Insurers

Under s112 of the NDIS Act, the CEO may give written notice to a potential compensation payer to the effect that the CEO wishes to recover an amount from the potential compensation payer. Where an insurer may be liable by virtue of a contract of insurance, to indemnify the compensation payer, the CEO may give notice to the insurer direct.

An insurer commits an offence if it makes a payment of compensation to a participant or prospective participant after having received a s112 notice of recovery: s113 of the NDIS Act.

Structural Challenges Implementing the NDIS

The implementation of the Program in remote areas will need to tackle the significant disadvantage presented by those living in remote communities, often indigenous communities. The question is already being asked in the media how the necessary infrastructure will be improved to properly service those communities.

National Injury Insurance Scheme

A no-fault National Injury Insurance Scheme (NIIS) to assist those severely injured through accident.

“The only factor which should determine the level of care someone receives is the level of support they require, not the cause of their injury”

National Injury Insurance Scheme

The Productivity Commission identified four main causes of catastrophic injury which require a NIIS:

- Motor vehicle accidents;
- Medical accidents;
- Workplace accidents; and
- General accidents occurring at home or in the community.

Case Study

Fault-based Scheme -v- No-fault Scheme

According to the Federal Government's press release, with the benefit of an NIIS,

"...rehabilitation is more likely to be goal oriented and planned...(leading to) earlier discharge from an acute setting and accelerated and supported participation."

National Injury Insurance Scheme

Administered by the National Disability Insurance Agency.

A federation of separate State-based injury insurance schemes overseen by a national agency. Individual jurisdictions would control the implementation and development of their own schemes, including:

- Funding options;
- Pricing of premiums;
- Investment of scheme assets;
- Set up of legislative infrastructure;
- The level of support provided above the minimum benchmark; and
- Oversight of service delivery, assessment and dispute management.

Interaction with the 'common law'

The Commission proposed that lifetime care and support fall for cover under the NIS. As such, the NIS would meet all reasonable and necessary clinical health services, medical and social rehabilitation, early intervention therapies, care and home modifications.

Common law damages for economic loss, pain and suffering would continue to be available to those injured. Exemplary damages also, where appropriate, are likely to still be available.

Impact on Legal Sector

Removal of future care claims will result in fewer common law claims for personal injury damages.

The Australian Bureau of Statistics estimated legal fees charged in Australia during 2007-8 were approximately \$1.2 billion, comprising:

- \$410 million for motor vehicle accidents;
- \$350 million for worker's compensation; and
- \$450 million for other injury claims.

Funding

Primarily a fully-funded Scheme.

The Productivity Commission recommended the maintenance of existing as well as additional financing options for each category of catastrophic injury proposed:

- Transport accidents;
- Medical treatment accidents;
- Workplace accidents; and
- General injuries.

Conclusion

Far greater potential impact on the insurance sector than that associated with the NDIS.

Some preliminary studies suggest a reduction in the frequency and size of claims and more underwriting certainty, which may potentially reduce premiums and the cost of reinsurance arrangements.

The ultimate net effect on the insurance sector is difficult to predict at this early stage of the NIIS.

Concluding Remarks