



## **National Disability Insurance Scheme Rules—Nominees**

*National Disability Insurance Scheme Act 2013 (the Act)*

The Act establishes the National Disability Insurance Scheme (the NDIS).

Participants in the NDIS can develop a personal, goal-based plan about how they will be provided with reasonable and necessary supports. People with disability who do not have a plan can also be assisted by the NDIS.

The NDIS will enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.

*National Disability Insurance Scheme Rules—Nominees*

These Rules are made for the purposes of sections 80, 88 and 93, of the Act.

These Rules are about nominees, and deal with whether a nominee should be appointed, who should be appointed as a nominee, duties of nominees, and cancellation and suspension of nominees.

These Rules commence on [...].

[signature block]

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## Part 1 What these Rules are about

- 1.1 These Rules are about nominees, and deal with whether a nominee should be appointed, who should be appointed as a nominee, duties of nominees, and cancellation and suspension of nominees.
- 1.2 The Act sets out a number of principles for the NDIS. The principles are particularly relevant to these Rules are that, where acts or things are done on behalf of persons with disability:
- (a) they are involved in decision-making that affects them, including making decisions for themselves, to the extent possible; and
  - (b) they are encouraged to engage in the life of the community; and
  - (c) the judgements and decisions they would have made for themselves are taken into account; and
  - (d) their cultural and linguistic circumstances are taken into account; and
  - (e) their supportive relationships, friendships and connections with others are recognised.

## **Part 2 Outline of these Rules**

- 2.1 **Part 3** deals with whether a nominee should be appointed.
- 2.2 **Part 4** deals with who should be appointed as a nominee.
- 2.3 **Part 5** deals with how nominees are expected to act, and prescribes additional duties of nominees.
- 2.4 **Part 6** deals with suspension and cancellation of appointments of nominees.
- 2.5 **Part 7** deals with other matters, including interpretation of these Rules.

## Part 3 Whether it is necessary to appoint nominee

- 3.1 People with disability are presumed to have capacity to make decisions that affect their own lives. However, the Act recognises that there may be circumstances where it is necessary for a person to be appointed as a nominee of a participant, and to act on behalf of, or make decisions on behalf of, a participant.
- 3.2 Appointments of nominees will be justified only when it is not possible for participants to be assisted to make decisions for themselves. It is expected that, wherever possible, participants will be supported to make decisions for themselves.
- 3.3 This Part deals with the issue of whether it is necessary for a nominee to be appointed.

### *Types of nominee*

- 3.4 Under the NDIS, there are 2 types of nominee: a **plan nominee** and a **correspondence nominee**. Either type of nominee can be appointed either indefinitely or for a limited term.

#### *Plan nominee*

- 3.5 Usually, a plan nominee is able to do any act that may be done by a participant under, or for the purposes of, the Act, that relates to:
- (a) the preparation, review or replacement of the participant's plan; or
  - (b) the management of funding for supports under the participant's plan.
- 3.6 In some circumstances, it may be appropriate to limit the matters that a plan nominee is appointed to deal with. The CEO is able to specify limitations in the instrument of appointment. For example, the appointment might be restricted so as to prevent the nominee from specifying the goals, objectives and aspirations of the participant.

#### *Correspondence nominee*

- 3.7 In contrast, the role of a correspondence nominee is significantly narrower. Although a correspondence nominee is able to do a range of acts on behalf of a participant under the NDIS, they are not able to do any of the acts referred to in paragraph 3.5 above. The acts that a correspondence nominee is able to do include making requests to the Agency (for example, requests for information), and receiving notices from the Agency, on behalf of the participant.

- 3.8 The matters the correspondence nominee is able to deal with cannot be limited further by the instrument of appointment.

*Paragraphs 3.1 to 3.8 summarise the operation of sections 78 and 79 of the Act. These sections contain further details relating to actions of nominees.*

### ***How appointment of nominee comes about***

- 3.9 A plan nominee or a correspondence nominee may be appointed:

- (a) at the request of the participant; or
- (b) on the initiative of the CEO.

(The Act contains further provisions relating to the appointment of a nominee, which have not been reproduced in these Rules.)

*Paragraph 3.9 summarises subsections 86(2) and 87(2) of the Act.*

#### *Appointment at request of participant*

- 3.10 If the participant has requested that a nominee be appointed, the CEO is to have regard to the principle that a nominee should ordinarily be appointed if the participant requests one.
- 3.11 If the participant has requested that a particular person be appointed as nominee, the CEO is to have regard to the following:
- (a) the principle that the person the participant has requested should ordinarily be appointed;
  - (b) whether there is any evidence to indicate that the person has unduly or improperly induced or influenced the participant to request the appointment.

#### *Appointment without a request from the participant*

- 3.12 If the participant has not requested that a nominee be appointed, when deciding whether to appoint a nominee, the CEO is to have regard to the following:
- (a) whether the participant would be able to participate effectively in the NDIS without having a nominee appointed;
  - (b) the principle that a nominee should be appointed only when necessary, as a last resort, and subject to appropriate safeguards;
  - (c) any formal guardianship arrangements that might be in place;
  - (d) whether the participant has supportive relationships, friendships or connections with others that could be:

- (i) relied on or strengthened to assist the participant to make their own decisions; or
- (ii) improved by appointment of an appropriate person as a nominee.

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## Part 4 Who should be appointed as nominee?

- 4.1 This Part deals with the issue of who should be appointed as a nominee.
- 4.2 Under the NDIS, the CEO is responsible for deciding who should be appointed as a nominee.

### ***Persons that cannot be appointed as nominee***

- 4.3 Under the NDIS, a nominee is able to make certain decisions for and on behalf of a participant. Accordingly, the Act envisages that there are some persons who it would be inappropriate to appoint as a nominee.

*Paragraphs 4.1 to 4.3 summarise the operation of the Act.*

- 4.4 The following must not be appointed as a nominee:
- (a) a person under 18 years of age;
  - (b) the Agency;
  - (c) any individual associated with the Agency, other than in their personal capacity.

### ***Matters to take into account when deciding who to appoint as nominee***

- 4.5 There are several matters the CEO is required to take into account when deciding whether to appoint a particular person as a nominee. These are set out below.
- 4.6 The CEO is to:
- (a) take into consideration the wishes (if any) of the participant regarding the making of the appointment; and
  - (b) have regard to those wishes, however they are expressed (for example, a participant might express a wish in a non-verbal manner, or might express a wish to a third party, such as a disability support worker); and
  - (c) have regard to whether a person has guardianship of the participant.

*Paragraph 4.6(a) summarises the requirement of paragraph 88(2)(b) of the Act. Paragraph 4.6(b) prescribes a matter to which the CEO is to have regard when appointing a nominee. Paragraph 4.6(c) summarises the requirement of subsection 88(4) of the Act.*



4.7 The CEO is also to:

- (a) have regard to whether the person is willing; and
- (b) consider whether the person is able;

to comply with the duties of a nominee to a participant (these are set out in section 80 of the Act and also Part 5 of these Rules).

*Paragraph 4.7, so far as it relates to paragraph (b), summarises the requirement of subsection 88(3) of the Act.*

4.8 The CEO is also to have regard to the following:

- (a) the presumption that, if the participant has a guardian whose powers and responsibilities are comparable with those of a nominee, the guardian should ordinarily be appointed as nominee;
- (b) the degree to which the person:
  - (i) knows, and is in a relationship of trust with, the participant; and
  - (ii) is willing and able to:
    - (A) act in conjunction with other representatives and supporters of the participant to maximise the participant's wellbeing; and
    - (B) undertake the kinds of activities that a nominee is required to undertake in performing their functions under the Act (for example, a plan nominee must be able to enter into contracts on behalf of the participant); and
    - (C) involve the participant in decision-making processes; and
    - (D) assist the participant to make decisions for him or herself; and
    - (E) ascertain what judgements and decisions the participant would have made for him or herself; and
  - (iii) understands and is committed to performing the duties of a nominee; and
  - (iv) is sensitive to the cultural and linguistic circumstances of the participant; and
  - (v) is familiar with, and able to work with, the participant's communication system or other technological supports (if any);
- (c) the desirability of preserving family relationships and informal support networks of the participant;
- (d) any existing arrangements that are in place between the person and the participant;
- (e) where the CEO has asked the person to answer any questions or provide any information in relation to the possible appointment of that person as a

nominee, including requesting the person to consent to the release of information concerning their criminal history:

- (i) any answers or information that have been provided by the person; and
- (ii) any refusal by the person to provide answers or information;
- (f) any relevant views of carers and other persons who provide support to the participant;
- (g) any relevant conviction for an offence under Commonwealth, State or Territory law.

### ***Term of appointment of nominee***

4.9 Under the Act, the CEO is able to appoint a plan nominee or a correspondence nominee indefinitely, or for a limited term. An appointment that is for a limited term can expire either on a specified date, or on the occurrence of a specified event.

*Paragraph 4.9 summarises the operation of the Act.*

4.10 The following are examples of when the CEO might decide that an appointment for a limited term is appropriate:

- (a) the CEO considers that it would be desirable to review the appointment of a nominee after a period to see whether the participant still needs a nominee;
- (b) the CEO has cause to believe that a guardian could be appointed under State or Territory law, and appoints a nominee in the interim;
- (c) the person that the participant would like as a nominee is presently not in a position to act (for example, they might be overseas or hospitalised), and the CEO appoints a nominee until that person is available.

### ***Requirements with which the CEO is to comply when appointing nominee***

4.11 The CEO is to consult, in writing, with any guardian in relation to any appointment.

4.12 If the CEO is deciding whether to appoint as a nominee a person that is a body corporate:

- (a) the CEO is required to request the person to identify an officer or employee who will be closely involved in performance of the nominee functions under the NDIS; and
- (b) the rules set out in this Part (other than this rule) apply as if references to the person include references to the officer or employee.

## Part 5 How nominees are expected to act

- 5.1 The Act provides guidance as to how nominees are to act under the NDIS.
- 5.2 Nominees have duties to participants under the Act. These duties are relevant under the NDIS in 3 principal ways:
- (a) these duties provide general guidance as to how nominees are expected to perform in the role of nominee; and
  - (b) when appointing a person as a nominee, the CEO is required to consider whether the person is willing and able to comply with these duties; and
  - (c) any breach of these duties is a matter to which the CEO is to have regard in cancelling or suspending the appointment of a nominee.

*Paragraphs 5.1 and 5.2 set out background information.*

### ***Duty to ascertain wishes, and promote personal and social wellbeing, of participant***

- 5.3 A nominee has a duty to:
- (a) ascertain the wishes of the participant; and
  - (b) act in a manner that promotes the personal and social wellbeing of the participant.
- 5.4 This duty is not breached if the nominee does an act, or refrains from doing an act, so long as:
- (a) the nominee reasonably believes that they have ascertained the wishes of the participant; and
  - (b) the nominee reasonably believes that doing the act, or not doing the act, will promote the personal and social wellbeing of the participant.

*The duty set out in paragraph 5.3 and the qualification set out in paragraph 5.4 summarise subsections 80(1), (2) and (3) of the Act.*

### ***Nominees not to do certain things unless participant not capable***

- 5.5 A plan nominee appointed on the initiative of the CEO is only able to do an act on behalf of the participant if the nominee considers that the participant is not capable of doing the act.

*Paragraph 5.5 summarises subsection 78(5) of the Act. This is not described as a duty under the Act.*

- 5.6 A plan nominee appointed at the request of the participant has a duty not to do an act unless satisfied that:
- (a) it is not possible for the participant to do, or to be supported to do, the act himself or herself; or
  - (b) it is possible for the participant to do the act himself or herself, but the participant does not want to do the act himself or herself.

***Duty to consult***

- 5.7 A nominee has a duty to consult with the following in relation to doing acts under, or for the purposes of, the Act:
- (a) the participant's guardian (if any);
  - (b) any other person who assists the participant to manage their day-to-day activities and make decisions.
- 5.8 If 2 plan nominees have been jointly appointed, a further duty of each nominee is to consult with the other nominee before doing any act under, or for the purposes of, the Act.

***Duty to develop capacity of participant***

- 5.9 A nominee has a duty to apply their best endeavours to developing the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary.

***Duty to avoid or manage conflicts of interest***

- 5.10 A nominee has a duty to avoid or manage any conflict between their interests and the interests of the participant.
- 5.11 Without limiting paragraph 5.10, a conflict arises if the nominee is, in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the provision of any services for fee or reward to the participant.

## Part 6 Suspension and cancellation of appointment of nominee

- 6.1 Under the Act, there are several situations in which the CEO is able, or is required, to suspend or cancel the appointment of a nominee.
- 6.2 The CEO is required to cancel an appointment if:
- (a) the nominee was appointed at the request of the participant, and the participant requests the CEO to cancel the appointment; or
  - (b) the nominee informs the CEO that they no longer wish to be a nominee.
- 6.3 The CEO is able, but not required, to cancel an appointment if the nominee was appointed on the initiative of the CEO, and the participant requests the CEO to cancel the appointment.
- 6.4 The CEO is able, but not required, to cancel or suspend the appointment of a nominee if:
- (a) the ability of the person to act as nominee becomes compromised; or
  - (b) the CEO has reasonable grounds to believe that the nominee has caused, or is likely to cause, severe physical, mental or financial harm to the participant.

*Paragraphs 6.1 to 6.4 summarise sections 89, 90 and 91 of the Act. The provisions in the Act contain further details of the grounds of suspension and cancellation, and should be consulted where appropriate. The Act specifies a number of detailed procedural and other requirements that must be followed for these grounds of cancellation or suspension to be relied on.*

- 6.5 When cancelling or suspending the appointment of a nominee in the situations described in paragraph 6.3 or paragraph 6.4, the CEO is to have regard to the following:
- (a) any breach of a duty of the nominee to the participant under the Act or these Rules;
  - (b) the previous conduct of the nominee in relation to the participant;
  - (c) the results of any review of the participant's plan;
  - (d) the impact on the participant of any cancellation or suspension of appointment;
  - (e) whether the nominee has been convicted of a criminal offence that is reasonably likely to compromise the ability of the person to act as nominee;

- (f) whether the participant still needs a nominee, having regard to the criteria mentioned in paragraph 3.12.

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## Part 7 Other matters

### **Commencement**

7.1 These Rules commence on ...

### **Citation**

7.2 These Rules may be cited as the *National Disability Insurance Scheme Rules—Nominees*.

### **Interpretation**

7.3 These Rules include text that summarises provisions of the Act. The boxed notes identify such text, which does not form an operative part of these Rules.

7.4 Terms and expressions that are used in the Act have the same meaning in these Rules unless these Rules display a contrary intention—see the *Acts Interpretation Act 1901* and the *Legislative Instruments Act 2003*, which contain definitions and rules of interpretation that apply to all Commonwealth legislation. For convenience, the more important definitions from the Act are identified or reproduced in paragraph 7.5.

7.5 In these Rules:

**Act** means the *National Disability Insurance Scheme Act 2013*.

**Agency**—see section 9 of the Act.

**CEO**—see section 9 of the Act.

**correspondence nominee**—see section 9 of the Act.

**general supports**—see section 9 of the Act.

**guardian** means a guardian appointed under a law of the Commonwealth, a State or a Territory, and **guardianship** has a corresponding meaning.

**NDIS** means the National Disability Insurance Scheme (see section 9 of the Act).

**NDIS rules** means the National Disability Insurance Scheme rules (see section 9 of the Act).

**nominee**—see section 9 of the Act.

**participant**—see section 9 of the Act.

***participant's statement of goals and aspirations***—see section 9 of the Act.

***plan nominee***—see section 9 of the Act.

***statement of the participant's supports***—see section 9 of the Act.

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