



**NDIS Quality
and Safeguards
Commission**

Civil Penalties Policy

V1.0 – January 2022



**NDIS Quality
and Safeguards
Commission**

NDIS Quality and Safeguards Commission PO Box 210, Penrith NSW 2750.

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Purpose of this policy

The NDIS Quality and Safeguards Commission (the NDIS Commission) is an independent government body that works to improve the quality and safety of NDIS supports and services, investigates and resolves problems, and strengthens the skills and knowledge of providers and participants.

The regulatory powers and functions of the NDIS Commission are set out in the *National Disability Insurance Scheme Act 2013* (the NDIS Act), and associated Rules. The NDIS Commission's regulatory powers are underpinned by the *Regulatory Powers (Standard Provisions) Act 2014* (RP Act).

The NDIS Commission's compliance and enforcement activities are an important part of its work as a regulator. Those activities enable the NDIS Commission to encourage best practice among NDIS providers and manage risk to NDIS participants.

The NDIS Commission is required to conduct compliance and enforcement activities in a risk responsive and proportionate manner. Actions to be taken are determined on a case by case basis taking into consideration factors such as the seriousness of the issue, the appropriateness of the provider's or other person's response, and the likelihood of further harm to persons with disability.

The NDIS Commission has a range of tools for responding to non-compliance that are provided for in Chapter 4, Part 3A of the NDIS Act (Part 3A). This policy is one of a suite of policies that expands on the general information provided in the [Compliance and Enforcement Policy](#), and provides guidance on the NDIS Commission's approach to the use of civil penalties.

This policy concerns a framework for general application in relation to civil penalty provisions. A civil penalty is a financial penalty imposed by a court and is payable to the Commonwealth.

The aim of a civil penalty is to deter a person from breaching the law, and may be a suitable and effective response to non-compliance in certain circumstances.

This policy provides background information and guidance on the NDIS Commission's general approach to the use of civil penalty provisions.

The NDIS Commissioner is not bound to exercise his or her discretion to seek a civil penalty only in accordance with this policy. Each case will be considered on its particular facts.

What is a civil penalty?

A civil penalty is a financial penalty imposed by a court for breaching a civil penalty provision. Civil penalty proceedings are not criminal proceedings, and therefore do not result in a person being convicted of an offence.

The standard of proof that applies in civil penalty proceedings is that of the 'balance of probabilities' – a lesser standard to that of 'beyond reasonable doubt', which applies in criminal matters.

The NDIS Commissioner may pursue a civil penalty in cases involving contraventions of civil penalty provisions within Part 3A. The quantum of a civil penalty can be significant and, when determined by a relevant court, will be designed to deter the relevant wrongdoer, and others the NDIS

Commission regulates from non-compliance with regulatory requirements in the future.

Annexure A to this policy lists the sections of the NDIS Act which carry a civil penalty for non-compliance. In summary, these include:

- failure of an NDIS provider to be registered to provide certain supports;
- providing false or misleading information when applying for registration as an NDIS provider;
- registered NDIS provider breaching a condition of its registration;
- former registered NDIS provider failing to keep records;
- NDIS providers or workers not complying with their obligations under the *NDIS Code of Conduct*;
- NDIS providers or workers breaching notices or orders issued by the NDIS Commissioner; and
- causing or threatening detriment to a person because of a protected disclosure.

This document provides further policy guidance as to the circumstances in which the NDIS Commissioner will pursue civil penalties, and the approach that the NDIS Commissioner will adopt when deciding to do so.

Legislative provisions

Section 73ZK of the NDIS Act and Part 4 of the RP Act provide the legislative basis for the NDIS Commissioner's use of civil penalties.

The NDIS Commissioner may apply to a relevant court for a civil penalty order in relation to an alleged contravention of a civil penalty provision within Part 3A. The NDIS Commissioner has six years from the date of the alleged contravention to make an application. The NDIS Commissioner may also delegate this power to a Commission officer, in writing.

If a court is satisfied, on the balance of probabilities, that a person has contravened a civil penalty provision, the court may issue a civil penalty in the form of a financial penalty payable by the person to the Commonwealth. The penalty may be of such value as considered appropriate by the court, up to the maximum penalty specified by the relevant provision that has been contravened.

Where the NDIS provider is a body corporate, the maximum penalty payable is five times the prescribed penalty units. (A body corporate will be responsible for the actions of an employee, agent or officer of a body corporate, acting in the legitimate scope of their employment, or within their actual or apparent authority.) Otherwise, where the person who has breached a civil provision is an individual, the maximum penalty payable is the number of penalty units as prescribed.

Annexure A to this policy lists the sections of the NDIS Act which carry a civil penalty for non-compliance. **Annexure A** also lists the maximum penalty that a court could impose for each breach of the relevant provision.

A civil penalty is a debt owed to the Commonwealth, enforceable through civil debt proceedings, and can be a judgment debt. Where a person fails to pay the amount specified in the civil penalty

order, the NDIS Commissioner may commence legal proceedings against the person named in the order to recover the amount owed.

Ancillary contraventions

Any conduct that is ancillary to the contravention of a civil penalty provision is taken to be a contravention of the provision. Ancillary conduct includes:

- any attempt to contravene a civil penalty provision;
- aiding, abetting, counselling or procuring a contravention of a civil penalty provision;
- inducing (by threats, promises or otherwise) a contravention of a civil penalty provision;
- being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or
- conspiring with others to effect a contravention of a civil penalty provision.

Continuing contraventions

In some cases, a contravention of the NDIS Act will manifest itself in the failure to complete a required obligation by a certain deadline. In those cases, the contravention will ‘continue’ until the required obligation has been met.

The effect of this is that a separate contravention of the relevant civil penalty provision will occur on every day the relevant obligation is not met (including the day the relevant civil penalty order is made or any later day). This is designed to ensure that a person still meets the obligation, and is not excused from doing so after the relevant deadline has passed.

Conduct contravening two or more civil penalty provisions

A person’s conduct may contravene more than one civil penalty provision. The NDIS Commissioner may institute proceedings relating to any or all provisions allegedly contravened by a person’s conduct.

However, a person may only be ordered to pay one penalty for the same conduct—that is, they cannot be ordered to pay a penalty for breaching provision A and a penalty for breaching provision B, if both breaches resulted from the same conduct.

Multiple contraventions of one civil penalty provision

A relevant court may make a single civil penalty order for multiple contraventions of a civil penalty provision if proceedings for the contraventions are founded on the same facts, or if the contraventions form, or are part of, a series of contraventions for the same or similar conduct. This may assist in minimising court administration and enable consolidation of legal proceedings.

However, any penalty ordered must not exceed the sum of the maximum penalties that could be ordered if there were separate proceedings for each contravention.

Civil proceedings and criminal proceedings

A court cannot make a civil penalty order against a person who has been convicted of a criminal offence for the same, or substantially the same, conduct.

Civil proceedings are suspended if criminal proceedings commence or have commenced and relate to the same, or substantially the same, conduct.

If the criminal proceedings result in a conviction, civil proceedings related to the same, or substantially the same, conduct will be dismissed and costs for the civil proceedings will not be awarded. Civil proceedings may resume if the person is not convicted of the offence.

Criminal proceedings may commence after civil proceedings, even in the event the civil proceedings result in a civil penalty order. However, evidence given by an individual during proceedings for a civil penalty order cannot be used in any subsequent criminal proceedings, where those proceedings have been commenced against the same individual and relate to the same, or substantially the same, conduct.

The NDIS Commission's approach to the use of civil penalties

The NDIS Commission's [*Compliance and Enforcement Policy*](#) states that the NDIS Commission considers a range of factors in determining its response to non-compliance with the NDIS Act and Rules.

When a civil penalty is an appropriate enforcement tool

Examples of circumstances where seeking civil penalties may be appropriate include where:

- the person has a history of non-compliance;
- the NDIS Commission has previously taken other action against the person for similar contraventions of the NDIS Act;
- the NDIS Commission considers the contravention(s) warrant consideration by a court;
- there is no immediate or ongoing detriment or risk to the health, safety or wellbeing of a person with disability;
- the alleged wrongdoing resulted in significant injury or death to a person with disability;
- the person has, as a consequence of the alleged non-compliance, directly obtained a financial benefit (for example, profits gained or losses avoided) or other advantage, to the detriment of others;
- the lack of response by the person to other mechanisms used by the NDIS Commission to address non-compliance.

When a civil penalty would not be considered an appropriate enforcement tool

Examples of circumstances where seeking civil penalties may not be appropriate include where:

- the person has no previous record of non-compliance;
- the NDIS Commission does not consider the contravention(s) warrant consideration by the court (because, for instance, the alleged non-compliance does not involve a serious contravention of a civil penalty provision);
- there is a lower risk to the health, safety and wellbeing of a person with disability;
- the person has already responded to other tools used by the NDIS Commission to address relevant non-compliance;
- the person has accepted their conduct was non-compliant and discontinued it, unless the non-compliance constituted a serious contravention of the NDIS Act (for example, as a result of a serious breach of the *NDIS Code of Conduct*); or
- the person has agreed to co-operate and engage with the NDIS Commission and there are more appropriate enforcement options available.

The relationship between an infringement notice and a civil penalty

There is a relationship between an infringement notice and a civil penalty order.

The NDIS Commissioner may issue an infringement notice for an alleged contravention of a civil penalty provision, as an alternative to pursuing court action. If the recipient of an infringement notice pays the amount stated in the notice, then court proceedings cannot be brought against that person in relation to the alleged contravention of the NDIS Act.

The option for the NDIS Commissioner to issue an infringement notice instead of seeking a civil penalty order from the court recognises that a lengthy civil proceeding may not be the optimal way of addressing every alleged contravention of the NDIS Act. Infringement notices may be used as a low cost and efficient enforcement option to address minor or 'technical' contraventions, without requiring court proceedings.

However, if the recipient of an infringement notice chooses not to pay the infringement notice, then the option exists for the NDIS Commissioner to initiate proceedings to obtain a civil penalty order. The court may impose a greater financial penalty amount on the person than the amount stated in the infringement notice.

Separately, if an infringement notice is withdrawn, then the NDIS Commissioner may also consider whether commencing action for a civil penalty order in respect of the alleged contravention is appropriate.

For more information on how and when the NDIS Commissioner may consider the use of infringement notices, see the [Infringement Notice Policy](#).

Record keeping and publication

The NDIS Commission will keep records of civil penalty orders sought and obtained, and the payment or non-payment of the penalties ordered by the court. The NDIS Commissioner may include information about civil penalties imposed on the NDIS Provider Register, which is published on the NDIS Commission's website. Where permitted by law, the NDIS Commission may provide information about civil penalty proceedings it conducts to other regulators, to assist those regulators in carrying out their responsibilities.

Annexure A – Provisions of the NDIS Act with Civil Penalty Provisions and Penalty Amounts

Provision of NDIS Act	Description of Provision	Maximum penalty units that a court might impose for breaching the provision*
S 73B	Providing supports under a participant's plan where the NDIS rules require the person to be registered but the person is not so registered.	250 penalty units (individual) 1250 penalty units (corporation)
S 73D	Providing false or misleading information or a document in, or in connection with, an application for registration.	60 penalty units (individual) 300 penalty units (corporation)
S 73J	Registered NDIS provider breaches a condition of registration.	250 penalty units (individual) 1250 penalty units (corporation)
S 73R	Former registered NDIS provider fails to comply with requirement to retain records.	60 penalty units (individual) 300 penalty units (corporation)
S 73V	Failure of person to comply with a requirement under the NDIS Code of Conduct.	250 penalty units (individual) 1250 penalty units (corporation)
S 73ZC	Engaging in conduct that causes detriment to another person because that person or another person has made a protected disclosure.	500 penalty units (individual) 2500 penalty units (corporation)
S 73ZC	Threatening to cause detriment to another person because that person or another person has or may make a protected disclosure.	500 penalty units (individual) 2500 penalty units (corporation)
S 73ZM	NDIS provider fails to comply with a compliance notice.	60 penalty units (individual) 300 penalty units (corporation)
S 73ZN	Person engages in conduct that breaches a banning order.	1000 penalty units (individual) 5000 penalty units (corporation)

*As at the date of this document, a penalty unit means the amount of \$222. Prices are typically indexed on an annual basis and are subject to change.