

NOTICE OF FILING

Details of Filing

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File Title:	COMMISSIONER OF THE NDIS QUALITY AND SAFEGUARDS COMMISSION v LIVEBETTER SERVICES LIMITED
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Concise Statement

Federal Court of Australia
 District Registry: New South Wales
 Division: General

No. of 2023

COMMISSIONER OF THE NDIS QUALITY AND SAFEGUARDS COMMISSION

Applicant

LIVEBETTER SERVICES LIMITED (ACN 160 259 512)

Respondent

A. THE IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. Until her death on 7 February 2022, Ms Kyah Lucas resided in her family home with her mother, Ms Wicks, at 94 Nile Street, Orange NSW. Ms Lucas had multiple disabilities and health conditions, including Cornelia De Lange Syndrome. Those conditions included that Ms Lucas had thin skin, which was particularly sensitive to temperature, and that she was non-verbal and could not communicate that she was suffering physical pain or harm.
2. From 2009, Ms Lucas was a client of LiveBetter Services Ltd (**LiveBetter**) (formerly known as CareWest). At all relevant times, LiveBetter was aware that Ms Lucas had Cornelia De Lange Syndrome and its related symptoms.
3. On or about 1 July 2018, LiveBetter became a registered NDIS provider, and has since that date remained a registered NDIS provider.
4. Between 5 April 2021 and 2 February 2022 (the **Relevant Period**), LiveBetter provided Ms Lucas with in-home supports, including personal care and bathing. During the Relevant Period, 81 in-home bathing supports were provided by LiveBetter to Ms Lucas (the **Bathing Supports**).
5. Prior to providing the Bathing Supports:

Filed on behalf of	Commissioner of the NDIS Quality and Safeguards Commission, Applicant		
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- (a) LiveBetter had not provided to those of its employees or agents performing the Bathing Supports, any formal training on the risks associated with bathing a vulnerable person or on the appropriate temperature for bathing a vulnerable person, or vulnerable persons with the disabilities and vulnerabilities suffered by Ms Lucas.
 - (b) LiveBetter had not conducted any formal or specific risk assessments in relation to the bathing of Ms Lucas. Nor did LiveBetter have any formal or specific staff competency assessments or training regarding the bathing of Ms Lucas.
 - (c) LiveBetter trained staff in Ms Lucas' in-home bathing supports "on the job". That training was provided by Ms Sandra Kennedy, who was an employee of LiveBetter. Ms Kennedy received her "on the job" training from Ms Lucas' mother, Ms Wicks, and not by anyone employed at LiveBetter.
6. On 2 February 2022, Ms Lucas suffered burns when receiving bathing support services provided by Ms Kennedy and Ms Jasmin Morris, who were both employed by LiveBetter. The burns were caused because Ms Lucas was placed by Ms Kennedy and Ms Morris in a bath in which the water in the bath was at an excessive temperature, likely in excess of fifty degrees centigrade. Ms Kennedy and Ms Morris, consistently with LiveBetter's practice in bathing Ms Lucas, had checked the bath water temperature using only feel and not in a reliable manner or by reference to Ms Lucas' specific needs and vulnerabilities. While in the bath Ms Lucas could not communicate that the water was burning her because she was non-verbal, and the LiveBetter staff only became aware Ms Lucas was burnt by the water (and likely in severe discomfort) after she had been in the bath for no more than one to two minutes because Ms Lucas was (unusually) wriggling in the bath.
7. Ms Lucas was taken to hospital and treated for the burns she suffered due to being bathed in water which was at an excessive temperature. On 7 February 2022, Ms Lucas died in hospital as a consequence of the burns she received while being bathed by LiveBetter staff.
8. Following the death of Ms Lucas, LiveBetter has implemented formal training, policies and procedures regarding safe bathing.

B. THE RELIEF SOUGHT FROM THE COURT

9. The Commissioner of the NDIS Quality and Safeguards Commission (the **Commissioner**) seeks declarations that LiveBetter contravened ss 73J and 73V of the *National Disability Insurance Scheme Act 2013* (Cth) (the **Act**).
10. The Commissioner also seeks pecuniary penalties and ancillary orders as set out in the Originating Application.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF

Section 73J

11. Section 73J of the Act is a civil penalty provision. It provides that a person contravenes s 73J if the person is a registered NDIS provider and breaches a condition to which the registration of the person is subject.
12. The NDIS Practice Standards specify the standards concerning the quality of supports and services to be provided by registered NDIS providers: *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (Cth) (the **Practice Standards Rules**), s 19(2). Non-compliance with the NDIS Practice Standards by a registered NDIS provider constitutes a breach of a condition of registration: Act, s 73F(2)(c).
13. To remain registered to provide assistance with daily personal activities (including bathing), a registered NDIS provider must comply with the standards specified in Schedule 1 of the Practice Standards Rules: Practice Standards Rules, s 20(2), (3); including:
 - (a) Part 3 of Schedule 1 specifies the NDIS Practice Standards relating to the governance and operational management arrangements for registered NDIS providers: Practice Standards Rules, Sch 1, cl 8. Clause 10 of Part 3 states, “Risks to participants, workers and the provider are identified and managed”.
 - (b) Part 4 of Schedule 1 specifies the NDIS Practice Standards relating to the provision of supports to participants: Practice Standards Rules, Sch 1, cl. 17. Clause 21 of Part 4 states, “Each participant can access responsive, timely, competent and appropriate supports to meet their needs, desired outcomes and goals”.
14. At all relevant times, LiveBetter was a registered NDIS provider and was registered to provide assistance with daily personal activities. By reason of the facts described in paragraphs 1 to 8 above, LiveBetter failed to comply with:
 - (a) clause 10 of Part 3 of the NDIS Practice Standards, in that LiveBetter did not identify and manage the risks to Ms Lucas; and
 - (b) clause 21 of Part 4 of the NDIS Practice Standards, in that LiveBetter did not provide Ms Lucas with access to competent and appropriate supports to meet her needs.
15. By reason of the matters described in paragraph 14 above, LiveBetter failed to comply with the NDIS Practice Standards on each occasion that it provided the Bathing Supports or, in the alternative, on 2 February 2022, when it provided bathing supports to Ms Lucas.

16. By reason of its failures to comply with the NDIS Practice Standards as stated in paragraph 15 above, LiveBetter contravened s 73J of the Act.

Section 73V

17. Section 73V of the Act is a civil penalty provision. It provides that a person contravenes s 73V if the person is subject to a requirement under the NDIS Code of Conduct and fails to comply with the requirement.

18. NDIS providers are a “Code-covered person” for the purpose of the *National Disability Insurance Scheme (Code of Conduct) Rules 2018* (Cth) (**Code of Conduct Rules**): Code of Conduct Rules, s 5(2). Code-covered persons must comply with the NDIS Code of Conduct set out in s 6 of the Code of Conduct Rules: Code of Conduct Rules, s 5(3).

19. Section 6(c) of the Code of Conduct Rules provides that in providing supports or services to people with disability, a Code-covered person must provide supports and services in a safe and competent manner, with care and skill.

20. At all relevant times, LiveBetter was an NDIS provider and a “Code-covered person”. By reason of the facts described in paragraphs 1 to 8 above, LiveBetter did not provide supports and services in a safe and competent manner, with care and skill.

21. By reason of the matters described in paragraph 20 above, LiveBetter failed to comply with the NDIS Code of Conduct on each occasion that it provided the Bathing Supports or, in the alternative, on 2 February 2022, when it provided bathing supports to Ms Lucas.

22. By reason of its failures to comply with the NDIS Code of Conduct as stated in paragraph 21 above, LiveBetter contravened s 73V of the Act.

D. HARM SUFFERED

23. As a result of the matters set out in paragraphs 1 to 22 above, Ms Lucas died.

24. The harm suffered is twofold. In the specific, the harm to Ms Lucas was fatal, and consequently of the utmost seriousness. Specific harm was also suffered by members of Ms Lucas’ family, particularly her mother, Ms Wicks who had day to day care of Ms Lucas and has now suffered the loss of her daughter. In the general, NDIS providers are responsible for providing a necessary public service to and caring for disabled and vulnerable members of society, including the most vulnerable. NDIS providers are consequently subject to quality standards, and compliance with those standards is a matter of high public policy. Dereliction of the high obligations assumed by NDIS providers tends to expose not only vulnerable individuals to physical and mental harm (and corresponding distress and harm to family, friends or other carers), but also to derogate from the Commonwealth funded provision of

support and care to vulnerable members of society. It is a matter of high public policy that the obligations of NDIS providers, which are voluntarily assumed, are met and, if not, strictly enforced.

25. As the regulator responsible for monitoring compliance with the Act, the Practice Standards Rules and the Code of Conduct Rules, the Commissioner is acting to protect the public interest.

The Concise Statement was prepared by Jeremy Giles SC and Amy Munro.

Certificate of lawyer

I Rebecca Jaffe certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Dated: 28 March 2023



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Signed by Rebecca Jaffe
Lawyer for the Applicant