

IN THE FAIR WORK COMMISSION

4 Yearly Review of Modern Awards

National Disability Services

Submission – AM2018/26

Social, Community, Home Care and Disability Services Industry Award 2010

Substantive Issues Tranche 2 – Evidence and Findings Sought

Introduction

1. National Disability Services (NDS) makes the following submission pursuant to the Directions made on 23 October 2019.
2. This submission addresses claims pursued by the various employer and union parties that were the subject of hearings before a Full Bench of the Fair Work Commission (FWC) during 15-18 October 2019.
3. In this submission, where a reference is given with the prefix PN it refers to the relevant paragraph of the transcripts of the hearings held 15-18 October 2019.

Summary of the claims in the tranche 2 proceedings that are being supported or opposed by NDS

4. NDS supports the following claims made by Australian Business Industrial, the NSW Business Chamber, Aged & Community Services Australia and Leading Age Services Australia (ABI claims) as amended and filed on 15 October 2019, and which are the subject of counter claims from some of the unions:
 - a) Roster change;
 - b) Client cancellation;
 - c) Remote response and consequential amendments to clauses dealing with on-call allowance and with recall to work overtime.
5. NDS opposes the following claims made by the unions, although in some instances NDS proposes alternative approaches to variations that might be made to address issues raised:
 - a) Travel time (United Workers Union and HSU);
 - b) Broken shift (ASU, HSU and UWU);
 - c) Minimum engagement (HSU);
 - d) Phone allowance (HSU and UWU);
 - e) Clothing and uniform allowance (HSU and UWU);
 - f) Sleepover (HSU);

- g) Overtime (HSU); Roster changes (HSU and UWU).
6. NDS will also make submissions about the nature of the industry and will specifically address the evidence adduced in relation to the operation of the NDIS and its impact on the disability services sector.

Nature of the industry, NDIS, and the context for the tranche 2 claims

7. Evidence relating to the nature of the industry and NDIS

Material	Court Book page	Paras
Submissions		
NDS submission 16 July 2019	4387	5-11
ABI Submission 5 April 2019	10	3.1-4.14
AIG submission 2 May 2019	624	1-21
Witness evidence and other reports		
FWC – Survey Analysis of the <i>Social, Community, Home Care and Disability Services Industry Award 2010</i> (June 2019)		Section 2.1
David Moody (NDS)	4399	11-50
Steven Miller (NDS)	4408	13-20 PN 2001-2015; 2048
Darren Mathewson (ABI)	211	61-69
Mark Farthing (15 February 2019)	2926	19-22
Mark Farthing (16 September 2019)	2981	6-22 PN 869-895
Endeavour Foundation Annual Report 2017-2018 (ASU3)		p 44
Fiona McDonald (HSU)	2902	Court Book p2914 para 2
Cortis et al (2017) (HSU)	3129	Sections 1.1-1.4
NDIA Efficient Cost Model for Disability Support Workers	489	

NDS - Australian Disability Workforce Report (February 2018)	1828	Court Book p1838
NDS State of the Disability Sector Report (2018)	3385	Court Book pp 3397-3398; 3404-3407
Report of Dr J Stanford (ASU)	1442	8; 15-25
Scott Harvey (ABI)	162	22-31

8. The Award covers employees across a range of sectors including social and community services, crisis assistance, disability services, home care and family day care¹.
9. All of the evidence listed in the above table attests that the disability sector has been undergoing significant change since the introduction of the National Disability Insurance Scheme which has been progressively rolled out across Australia between 2013 and 2020.
10. NDIS is a market based, individualised system² designed to give participants more choice and control over their daily lives³.
11. The implementation of NDIS has led to an increased fragmentation of how work is performed. While some disability supports continue to be provided in settings such as group homes, and increasing amount of work is performed by individual workers in the homes of individual clients, or on an individual or small group basis in community settings⁴.
12. Employers are under greater market pressure than before to accommodate the needs and preferences of clients and this has a flow on effect to how work needs to be organised⁵.
13. The disability sector is characterised by a high level of part-time and casual employment⁶.
14. The price that providers can charge participants for the delivery of services is currently capped by the National Disability Insurance Authority. The price has been developed using a “efficient cost model” which makes assumptions about labour costs⁷.
15. The evidence in these proceedings is that the cost model is deficient in many respects and underestimates labour costs. The NDIA costing model has been criticised in recent years for underestimating true labour costs. Recent price changes have ameliorated this to some extent but there are still deficiencies in the model⁸.
16. The result is that disability service providers are under increasing financial stress. For example, the NDS State of the Sector Report shows, that while the market is growing, a

¹ FWC – Survey Analysis of the *Social, Community, Home Care and Disability Services Industry Award 2010* (June 2019)

² Stanford [8]; McDonald (Court Book p2914 para 2); Cortis (section 1.1); NDS submission 16 July 2019 [8]

³ Moody [11-12]

⁴ Miller [16-18]

⁵ For example, Stanford PN 2249-2253

⁶ NDS – Aust Disability Workforce Report; Stanford [16-18]; Moody [23-40]

⁷ NDIA Efficient Cost Model for Disability Support Workers

⁸ Cortis et al; Farthing PN 869-895; Moody [46-48]

significant proportion of providers are making overall financial losses and experiencing deteriorating financial performance⁹.

17. The home care sector is experiencing changes similar to NDIS as a result of consumer directed care¹⁰.
18. Most of the employer and union claims in tranche 2 of these proceedings, such as client cancellation, broken shift and minimum engagements, travel time, and phone allowances, deal with issues arising from the implementation of NDIS in disability services, and consumer directed care in home care.

ABI claim - Roster Change

19. This claim is a merit based claim to permit roster change at short notice where there is mutual agreement between the employee and the employer.
20. Material relied on in the Court Book
 - a) ABI Submission at page 74 paras 4.11 - 4.14
 - b) NDS submission of 2 July 2019 at page 4381, paras 12-16.

ABI claim – Client Cancellation

21. Client cancellation affects the delivery of individualised supports for clients in home care and disability services. The ABI claim is to extend a modified version of the current award provision for home care workers, to apply to disability support workers.
22. Material relied on in the Court Book

Material	Court Book page	Paras
Submissions		
ABI (2 July 2019)	64	5.1-5.20
NDS (2 July 2019)	4380	17-40
NDS Witnesses		
David Moody	4399	64-66 (in conjunction with Exhibit NDS3)
Steven Miller	4408	40-50
ABI Witnesses – all to be read in conjunction with Exhibit ABI4		
Graham Shanahan	155	20-28

⁹ NDS State of the Sector Report (Court Book pp 3404-5); Endeavour Foundation Annual Report 2017-2018 (ASU3) at p44 shows falling surpluses between 2014-2018

¹⁰ Mathewson [61-69]

Scott Harvey	162	32-48
Deb Ryan	190	46-53
Joyce Wang	200	35-42
Jeffrey Wright	470	25-31
Wendy Mason	477	40-48

23. The employer witnesses gave consistent evidence about the reasons for client cancellation and the difficulties experienced in managing both the rostering consequences and the financial impact¹¹.
24. The NDIS pricing arrangements for client cancellation were significantly changed from July 2019. The effect has been to reduce the financial impact of cancellations for providers. However, it is still the case that participants only pay in the event of cancellation in certain circumstances depending on the amount of notice provided. As a consequence, client cancellations still have a financial impact¹².
25. NDS submits that it can be found that the NDIS has driven an increase in the extent of client cancellation in the disability sector, and that it continues to be a feature of the home care sector.

Remote response

26. NDS supports the revised ABI claim in relation to remote response, and the consequential amendments to the on call provisions and the recall to work overtime provisions.
27. We rely on our submission of 2 July 2019 (page 4380 in the Court Book) at paras 41-57, and support the ABI submission of 2 July 2019, and the amended draft determination filed on 15 October 2019. We also support the submission of AFEI of 3 July 2019 at (page 585 in the Court Book) at paras 13 and 14.
28. The amended draft determination sets different amounts of payment that apply to remote work performed, depending on whether or not the employee is on-call.
29. An employee who is on-call has been given notice of the possibility of interruption while away from the workplace, and is paid an allowance in compensation of that disutility.
30. In the case of an employee who is not on-call, but who is required to perform remote work, we submit there is merit in imposing a higher level of compensation for that work. The employee has not been on notice and has not been in receipt of an allowance.

¹¹ For example, Shanahan [20-28]; Harvey [32-48], Miller [40-50]

¹² see for example Harvey at PN 1339; Miller [47-49]

Broken shift and minimum engagement

31. The union claims around broken shift and minimum engagement are interconnected with the claims around travel time.

32. Evidence that we refer to in relation to this claim include:

Material	Court Book page	Paras
Submissions		
NDS (16 July 2019)	4387	28-49
NDS (16 September 2019)	4394	14-17; 29-42
Witnesses		
Steven Miller (NDS)	4408	40-50 PN 2033-2039; PN 2049-2053
Graham Shanahan (ABI)	155	33-40
Scott Harvey (ABI)	162	53-60
Jeffrey Wright (ABI)	470	44-46
Wendy Mason (ABI)	477	55-72 PN 3314-3315
Joyce Wang (ABI)	200	65-67
Rob Steiner (ASU)	1222	15-16 and PN 1552-1569
Deon Fleming (UWU)	4480	19-21
Trish Stewart	4602	12
Heather Waddell (HSU)	2956	21-25

33. Employer witnesses provided evidence about the need for broken shift arrangements in certain types of services in the disability and home care sectors because the demand for services has peaks and troughs, especially around meal times¹³.

34. Jeffrey Wright and Wendy Mason also provided evidence of the significant need for the use of broken shift at their organisations, with the use of broken shifts being driven by the needs of clients¹⁴.

¹³ Miller [40-50] and PN 2042-2056; Shanahan [33-40]; Harvey [53-60]; Wright [44-46]; Mason [66-72]

35. The employer witnesses also indicated that they seek to avoid short engagements within a broken shift, and aim to schedule consecutive appointments (or “runs”)¹⁵.
36. There was evidence of short engagements for individual clients, often as part of a broken shift, as well as short engagements for employees as portions of a broken shift¹⁶. However, caution needs to be exercised with the witness evidence as the term “shift” was sometimes used interchangeably to refer to the employee’s total working hours, and the individual client appointment which might form part of a longer employee shift¹⁷.
37. The oral evidence of Rob Steiner¹⁸ also pointed to the need for supports being provided intermittently through the day at meal times. He also gave evidence that for some clients it is important that the same worker attend where possible for continuity of care. For his clients, using different workers at different times of the day would be potentially disruptive for the client. The result can be a need for a worker to attend the same client on at least three separate occasions during the working day, with two breaks between the attendances.

Travel time

38. Evidence that we refer to in relation to the union claims around travel includes:

Material	Court Book page	Paras
NDS Submissions		
NDS (16 July 2019)	4387	28-49
NDS (16 September 2019)	4394	14-17; 29-42
ABI (13 September) 2019	137	4.1-10.6
Witnesses & other reports		
Fiona McDonald (HSU)	2902	Court Book pp 2917-2920
Heather Waddell (HSU)	2956	10-14 PN 1386-1414
Thelma Thames (HSU)	2961	13-16
Scott Quinn (HSU) (supplementary statement)	3051	14-29

¹⁴ Wright [44-46]; Mason [66-72] & PN 3314-3315

¹⁵ Miller PN 2035-2039; Harvey [57-58]; Mason [60-61]

¹⁶ For example, Fleming [19-21]; Stewart [12]; Waddell [21-25]

¹⁷ See for example, Miller PN 2033-2039; PN 2049-2053

¹⁸ Steiner PN 1552-1569

Trish Stewart (UWU)	4661	3-8
Rob Steiner (ASU)	1222	15-16 and PN 1552-1569

39. A range of union witnesses gave evidence regarding travel necessarily undertaken in the course of their duties and as part of broken shift arrangements¹⁹.
40. Practices appear to vary but there is evidence that some of the time needed for travel between clients is not paid time²⁰
41. Travel in the disability sector is often associated with the use of broken shift because in home supports are usually only needed for short periods at certain times of the day, such as meal times. For example, Robert Steiner gave evidence²¹ about the extent of travel in his job. Part of his evidence pointed to the importance of ensuring continuity of support for clients with psychosocial disability. The consequence was that where a client only needed intermittent supports during the day, it was often necessary for the same employee to travel back to provide that support in order to avoid the disruptive effect of different workers attending the client.

Telephone Allowance

42. Evidence that we refer to in relation to this claim includes:

Material	Court Book page	Paras
Witnesses		
Robert Sheehy (HSU)	2941	11-13
Pamela Wilcock (HSU)	2952	19-20
Heather Waddell (HSU)	2956	31-32 PN 1386-1414
Thelma Thames (HSU)	2961	22
Deon Fleming (UWU)	4480	25-30 PN 533-540
Trish Stewart	4602	20-22 PN 445-456

¹⁹ For example, Waddell [10-14] & PN 1386-1414; Thames [13-16]; Quinn [14-29]; Stewart [3-8]; Steiner [15-16]

²⁰ McDonald Court Book pp 2917-2920; Also, for example, Waddell [13]; Thames [16]; Quinn [10]; Thames [16]

²¹ Steiner [15-16] & PN 1552-1569

43. Disability support workers who are required to work in client homes and in the community are commonly required to own a mobile phone²².
44. This phone is used for a combination of work and personal purposes, and may be on plans with unlimited data included²³.



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on behalf of National Disability Services
19 November 2019

²² Sheehy [11-13]; Wilcock [19-20]; Waddell [31-32] & PN 1386-1414; Thames [22]; Fleming [25-30] & PN 533-540; Stewart [20-22] & PN 445-456

²³ For example, Stewart PN 445-456; Fleming PN 533-540