

IN THE FAIR WORK COMMISSION
4 Yearly Review of Modern Awards
National Disability Services
Final Submission in Reply – AM2018/26
Social, Community, Home Care and Disability Services Industry Award 2010

Substantive Issues Tranche 2
& Community Language Allowance

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Introduction

1. National Disability Services (NDS) makes the following submission in reply pursuant to the Directions made on 5 December 2019, and the subsequent directions issued on 18 December 2019 regarding the claim for a community language skills allowance.
2. This reply submission is in two parts.
3. The first part deals with the Tranche 2 substantive issues including
 - a) submissions made by parties in relation to the findings sought in earlier submissions listed at paragraph [4] of the *December 2019 Statement*, and
 - b) in relation to the questions posed by the Background Paper;
4. The second part responds to the submission of the ASU in relation to the claim for a Community Language Allowance.

Part 1 - Tranche 2 Substantive Issues

General Findings

Response to the Unions' submission

5. The Unions' submission in response to Q6 of the Background Paper¹ challenges the NDS proposed finding 11 regarding the general findings about the nature of the industry.
6. NDS accepts that the various parties' claims seek to address matters that have been features of the award since award modernisation.
7. However, the proposed finding simply points to the implementation, over the past several years, of individualised funding arrangements through NDIS in disability services and CDC in home care, as being developments that have brought those features of the award to prominence as practical workplace issues.
8. The proposed finding implies that if some aspects of the various parties' claims deal with matters that are not and never have been practical issues in some sectors, then consideration should be given to limiting the extent of application of a proposed variation to the relevant sector.
9. An example is the employer claims regarding client cancellation which are proposed to be limited to the disability and home care sectors. Client cancellation was dealt with in award modernisation and limited to the delivery of home care services. It has only been since the expansion of in home supports delivered through NDIS that client cancellation has become a practical issue in disability services.

Broken Shift

Response to the Unions' submission

10. The Unions challenge our contention at [92] of the Background Paper that the use of broken shift in disability services is driven by the needs of clients².
11. NDS points to the evidence of employer witnesses³ and notes that a common theme in their evidence relates to the peaks and troughs in demand from clients, and the commitment of service providers to accommodate client preferences. That evidence clearly points to client demand as being a key driver of the use of broken shift.
12. NDS does not rule out the possibility of other drivers and constraints. Our submissions have emphasised that there is always a balance to be struck between various factors when deciding how to use broken shifts.
13. The Unions also caution that the Commission should be hesitant about treating NDS as the voice of people with a disability⁴. NDS has not made any such claim.
14. The Unions refer to the Background Paper at [92] which reproduces part of our submission of 2 July 2019⁵. We state that "*NDS supports the NDIS objective that people with a disability*

¹ Unions' submission 10 February 2020 at [143]

² *Ibid* at [212]-[214]

³ Summarised at [88]-[89] of the Background Paper.

⁴ Unions' Submission at [214]

⁵ NDS Submission 2 July 2019 at [29]

should be able to exercise choice and control over how they live their lives and how supports are provided”.

15. That statement is not a claim to be a representative voice for people with disability. It reflects the fact that NDS has been part of a broad community-based coalition (the *Every Australian Counts* campaign), alongside organisations representing people with disability, and families and carers, that campaigned for and supported the creation of the NDIS, and that supports those goals. The providers that NDS represents are mission-based, and for them the interests of participants are a central factor in decision making.
16. The Unions criticise the additional information about the use of broken shifts that was provided by Mr Miller in response to questions from the Commission⁶. However, NDS does not accept that criticism. Mr Miller was asked a number of questions to which he was able to provide general responses, and was then asked further questions to which was not able to respond immediately. These related to the incidence of broken shifts⁷ and the number of breaks in broken shifts at his service⁸. As Mr Miller was unable to answer immediately, he was requested to provide that additional information later.
17. Mr Miller’s statement clearly answered those questions. The incidence of broken shifts during a sample roster period at his service was found to be 37% of shifts, with 33% being a single break and 4% having multiple breaks.
18. The unions object to the data being based on instances where there is a break of more than 1 hour. While that characterisation does not precisely reproduce the award definition it is clearly intended to refer to instances where there is a break that cannot be a meal break (which is limited to a maximum of 1 hour). Mr Miller’s evidence pointed to the peak periods of demand for his particular service being at the beginning and end of the day. The bulk of broken shifts that he reports had just one break, which is consistent with there being a significant break of more than 1 hour during the middle of the day, with no need for shorter breaks.
19. NDS rejects the characterisation of the information as being misleading and seeking to conceal shorter breaks as not counting as broken shifts.
20. The unions also submit that a 3 hour minimum engagement should apply for part-time workers, rather than 2 hours which NDS has proposed as an option to be considered⁹.
21. NDS has proposed a minimum engagement be set for part-time disability sector employees, aligned with the existing minimum of 2 hours for casuals, as an option to be considered in addressing concerns about short engagements during broken shift. It is intended to be considered in the context of inter-related issues around broken shift and travel time.
22. NDS relies on our earlier submission¹⁰ which oppose a longer minimum engagement.

Response to the submission of Ai Group in relation to minimum engagement and broken shift

⁶ Statement of Steven Miller 19 November 2019

⁷ PN2054

⁸ PN2057

⁹ Unions’ Submission 10 February 2020 at [224]-[226]

¹⁰ NDS Submission in reply 16 July 2019 at [12]-[27]

23. Ai Group have responded¹¹ to the NDS proposition that a 2 hour minimum engagement be considered for part-time employees.
24. Ai Group correctly note that we have placed some caveats on this proposition.
25. The NDS proposition regarding a minimum engagement for part-time employees is intended to assist in setting an appropriate balance between operational requirements, and ensuring a fair safety net for employees in relation to their hours of work and adequate remuneration for the time and cost associate with attending for a period of work.
26. We agree with the Ai Group that consideration of this proposition should take account of the interaction with other restrictions on hours of work for part-time employees in the award.
27. Whether or not the introduction of a minimum engagement for part-time disability workers during broken shift is appropriate would also depend on how the related issue of travel time is resolved. For example, if the award were varied to provide specific compensation for travel time between clients there would be less need to consider introducing a minimum engagement for broken shift.

Response to the submission of AFEI in relation to minimum engagement and broken shift

28. The submission of AFEI raises a number of concerns in response to the NDS proposition regarding minimum engagements.
29. NDS accepts that there is evidence that some clients require less than a 2 hour attendance, and in circumstances where a minimum engagement applies there may be costs and inefficiency if other work is not available for that time.
30. The NDS proposition, as noted above, has caveats and is proposed as an option in the event that a variation to the broken shift provisions is found to be required.
31. NDS has proposed the option of a minimum engagement only in the context of disability services, in light of evidence of how working hours arrangements have changed in response to the implementation of NDIS. We do not propose consideration of such a provision tin other sectors.
32. The concerns raised by AFEI are factors that need to be taken into account in determining an appropriate balance in this matter.

Travel time

Response to the Unions' submission

33. The unions contest the findings proposed by NDS relating to the evidence of Mr Steiner which deals with travel time¹².
34. The first issue¹³ put by the unions is that Mr Steiner's evidence cannot be taken to support a general finding that employees perform work for short periods.
35. NDS does not seek a general finding of that nature based on Mr Steiner's evidence. We simply submit that he has provided evidence that at least some work is performed for short periods.

¹¹ Ai Group Submission 10 February 2020 at [138]-[139]

¹² Unions' Submission 10 February 2020 at [102]-[103]

¹³ *Ibid* at [102]

36. The second concern raised is the evidence regarding the importance of continuity of support for some clients¹⁴.
37. NDS submits that continuity of care is a relevant factor that in at least some cases would encourage an employer to roster a single individual to work a broken shift rather than two workers for single short shifts.
38. NDS does not seek to place great weight on this issue. However, we submit that the evidence is not surprising and that this evidence could also support arguments that might be made about the business case for seeking to reduce casualisation and improve job security in this industry.

Client Cancellation

Response to the Unions' submission

39. The unions challenge our submission to the effect that the changes to pricing for client cancellations have resulted in the financial impact of cancellations being "*slightly reduced*", whereas they regard the change as "*significantly in favour of service providers*"¹⁵.
40. NDS does not take particular issue with the unions' comment on this point. We simply acknowledge that there is a material reduction in the financial impact on providers of client cancellation as a result of changes to the pricing. However, the changes are recent and it is unclear to what extent providers will be able to utilise them given the need for an agreement with the participant that allows the payment to be claimed, as well as other commercial and welfare-based factors.

Response to the submission of Ai Group

41. NDS does not disagree with the point made by Ai Group about the precise definition of a short notice cancellation¹⁶. Our submission¹⁷ provides the same definition. Where our submission refers elsewhere to cancellations with less than 2 days' notice¹⁸, that expression is only intended as a shorthand simplification of the definition.

Response to the Submission of AFEI

42. NDS agrees with the observation of AFEI that it is unclear to what extent service providers actually claim payment in the event of client cancellations that meet the definition of a short notice cancellation¹⁹.

Mobile phone allowance

Response to submission made by AFEI

43. NDS does not disagree with the observations made by AFEI in relation to the use of mobile phones²⁰.

¹⁴ *Ibid* at [103]

¹⁵ Unions' Submission at [259]-[260]

¹⁶ Ai Group Submission 10 February 2020 at [158]-[159]

¹⁷ NDS Submission 2 July 2019 at [30]

¹⁸ *Ibid* at [31]

¹⁹ AFEI Submission 11 February 2020 at [2-79]

²⁰ Submission of AFEI 11 February 2020 at [2-91]-[2-92]

Part 2 – Community Language Allowance

44. NDS primarily relies on our previous submissions opposing this claim²¹.
45. NDS submits that the revised claim from ASU partially addresses some of the drafting concerns raised by various parties.
46. The removal of the distinction between “*regular*” and “*occasional use*” helps to reduce the likelihood of dispute over ill-defined terms. However, the concept of using language skills “*in the course of their normal duties*” still suffers from a lack of precision regarding what extent of use counts as part of normal duties.
47. The quantum of the allowance remains too high. Our earlier submission compared rates of pay for interpreters set by other modern awards and demonstrated that the SCHADS award already pay rates that are approximately equivalent²², and went on to analyse how the existing classification structure already comprehends this level of skill and responsibility²³.
48. In the disability sector there is the added difficulty of how to charge clients for this allowance when the language skills may only be required for a minority of clients who are supported by the worker.
49. The amendment to apply the allowance on a pro rata basis to part-time and casual employees is appropriate.
50. The deletion of the requirement around accreditation removes an unclear administrative burden but does not resolve the question of how to determine whether an employee has language skills that they are required to use that would justify the imposition of an allowance.

Michael Pegg

On behalf of National Disability Services

26 February 2020

²¹ NDS Submission in Reply 5 April 2019 at [8]-[17]; and NDS Submission 17 May 2019 at [2]-[8] responding to a Background Document from FWC, and at [19]-[31].

²² NDS Submission 17 May 2019 at [3]-[7]

²³ *Ibid* at [19]-[31]