

IN THE FAIR WORK COMMISSION

Matter No: 2018/26

Section 156 - Four Yearly Review of Modern Awards – *Social, Community, Home Care and Disability Services Industry Award 2010*

SUBMISSION OF UNITED VOICE

1. This submission is made pursuant to the Directions of the Fair Work Commission ('the Commission') made on 1 May 2017 requiring any '*interested party*' to provide their comments in respect of several matters in the 4 yearly review of the *Social, Community, Home Care and Disability Services Industry Award 2010* ('the Award').
2. United Voice makes this submission in respect of matter F. '*Part-time employment and casual employment Full Bench (AM2014/196 and AM2014/197)*'.
3. In the Directions, the Commission stated '*in the Part-time employment and casual employment decision the Full Bench described the operation of the NDIS at paragraphs [554] and [630] – [633]. Do the parties take issue with any of the observations made at those paragraphs? Is there any more up to date information?*'
4. The relevant paragraphs of the Part-time employment and casual employment decision¹ ('the Decision') are reproduced below:

[554] The NDIS, broadly speaking, funds persons with disability directly, rather than via disability services organisations, and thereby allows persons with disability and their carers to purchase the support services they need in accordance with individualised NDIS plans. This has meant that persons with disability are able to exercise a far greater level of choice and control over how, when, where and by whom their disability support services are delivered. ABI contends that the NDIS is radically changing the disability support services sector, in that employers have lost a large degree of control over when work is required to be performed, and accordingly require much greater flexibility in the allocation of working hours to part-time employees so that they can operate in a way which is responsive to client demand. Absent such flexibility, ABI contends that there is a substantial risk that the workforce in the sector, which will need to expand significantly in order to meet the demand for individualised services generated by the NDIS, will become casualised. The ABI claim was supported by Jobs Australia,

¹ [2017] FWCFB 3541.

which is a national peak body of non-profit organisations that assist disadvantaged people into work.

5.14 Consideration – the ABI/NSWBC claim

Findings re the operation of the NDIS

[630] We have earlier briefly described the concept of the NDIS. Participants in the scheme (and their carers) are required to prepare a NDIS plan in conjunction with the National Disability Insurance Agency (NDIA) which, in an itemised way, sets out their support needs and the way in which these support needs are to be met. Supports may be fixed – that is, regularly required at a fixed time each day or week – or be flexible, which means the participant has scope to rearrange the supports to suit themselves within the overall budget. In the early trial phase, these plans were prepared in a highly prescriptive format, but by the time of hearing they had become far less so. An example plan that was provided to us [466](#) set out the basic details of the participant and his/her immediate support persons and lifestyle, the participant’s goals for the plan, and the supports to be provided. The supports were identified under the headings of transport to access daily activities; assistance with daily life at home and in the community, education and at work; supported independent living; improved daily skills; assistive technology; improved living arrangements; and improved life funding. Specific supports were identified in the example plan under each heading, and an annual budget (for the period 15 June 2016 to 14 June 2017) set out for each support item. For some items, a maximum number of hours of a particular service per week or per year were specified. The example plan required each identified support to be purchased as described, and prohibited swaps from one item to another. The items in the plans are budgeted for in accordance with a “NDIS Price Guide” issued by the NDIA. In pricing items, the NDIA has been aggressive in trying to set the absolute minimal cost so as to control the cost to government of the NDIS as a whole. Labour costs are calculated by reference to the SCHCDSI Award.

[631] Once the plan is prepared, the majority of participants who are self-managed (as distinct from having their plans managed by a support agency) may then “buy” the services budgeted for in the plan from providers which are registered with the NDIA (although the actual payment is made by the NDIA to the provider in accordance with the plan and the NDIS Price Guide). There is no obligation to obtain all the services in a plan from a single provider, so a participant may have

multiple service providers. The participant, once he or she has chosen the provider of a specific service, will then enter into a service agreement with the provider. We were provided with an example of a service agreement [467](#), which included the following provisions of significance:

- the provider was required to “Work with you the Participant to provide supports that suit your needs and at the times preferred by you” (underline added) and to “Consult with you regarding decisions about how your supports are provided”;
- the participant was required to keep the provider “informed of any changes to my support need which may impact on the supports they provide”;
- in relation to payment for the services provided, “The NDIA sets the prices to be claimed for each support item and [the provider] may choose to accept or decline the provision of certain support items if the price set does not cover business operating costs”;
- in relation to variations to the participant’s plan, “The Participant and/or their Plan nominee is responsible for informing [the provider] when their NDIA Plan has been reviewed and/or modified in any way ... [the provider] requires this information so your Service Agreement can be reviewed and modified to ensure it reflects the most current supports you require [the provider]to provide”;
- the participant was requested to inform the provider at the time of developing or reviewing the Service Agreement if they intended using multiple service providers “to ensure that sufficient support hours and funds are available as per the Service Agreement” and “Failure to provide this information may result in over-use of certain supports and impact on [the provider’s] ability to claim for supports provided”;
- in relation to cancellations of supports by the participant, “We understand that situations may occur that mean participants need to change or cancel support. When this happens, it is appreciated if participants provide at least 24 hours notice to reduce any impact on business... Should the Participant not provide 48 hours notice of his or her inability to participate in the service, [the provider] will be entitled to claim from NDIA for payment of such Service... When cancellations or ‘no shows’ exceed 8 times per year, [the provider] must notify the NDIA so that consideration can be made to review the plan”; and
- in relation to termination of the service agreement by either party, a minimum of 4 weeks’ notice was required, and “If the participant chooses to cease services or engages the services of another provider without giving the agreed notice, an early exit payment will be charged of up to 4 weeks”

[632] Until mid-2016, the NDIS was implemented in various trial areas throughout the country. The full implementation rollout began in July 2016, but it is not expected to be completed until 2019. It is expected that the total number of participants in the NDIS will increase to about 460,000 by 2019, about 20 times the number of participants in 2016. Many of the new participants will not be living in institutionalised care or group homes with regimented support demands, but will require supports that are shorter in duration and more flexible in order to undertake work, education and social activities. The number of registered providers is also expected to increase significantly. In 2016 there were over 2,000 registered providers, the large majority of which had not been disability support providers prior to the advent of the NDIS.

[633] At the time of hearing, according to data collected and benchmarked by NDS, there were about 26,000 disability support workers in Australia, of which 23% were full-time, 35% were part-time, 37% were casual, and 6% were on fixed-term contracts. This workforce is predominantly female. It was estimated in 2011 that the workforce would have to double by the time of full implementation of the NDIS. There was some evidence that some employers had increased the usage of casuals in order to meet the work demands of the NDIS, against their preference to employ mainly permanent part-time employees, mainly because of the variability associated with the one-on-one attendances which are a new industry feature introduced as part of the NDIS.

5. United Voice takes issue with some of the observations made in paragraphs [554], [631] and [633] of the Decision.
6. In respect of paragraph [554] we make the following submissions.
7. The introduction of the NDIS has created a change in the sector with a greater focus on consumer directed care. We generally agree with the statement in [554] that *‘the NDIS, broadly speaking, funds persons with disability directly, rather than via disability services organisations, and thereby allows persons with disability and their carers to purchase the support services they need in accordance with individualised NDIS plans. This has meant that persons with disability are able to exercise a far greater level of choice and control over how, when, where and by whom their disability support services are delivered.’*

8. However, we disagree with the next statement, insofar as it is taken as a general observation (as opposed to a statement of ABI's position): *'ABI contends that the NDIS is radically changing the disability support services sector, in that employers have lost a large degree of control over when work is required to be performed, and accordingly require much greater flexibility in the allocation of working hours to part-time employees so that they can operate in a way which is responsive to client demand. Absent such flexibility, ABI contends that there is a substantial risk that the workforce in the sector, which will need to expand significantly in order to meet the demand for individualised services generated by the NDIS, will become casualised.'*
9. In the part-time and casual proceedings, ABI sought to vary the Award to create an exception to the requirement that on commencement, an employer and a part-time employee will agree in writing on a regular pattern of work including the number of hours to be worked each week, the days of the week the employee would work, and the starting and finishing times each day (clause 10.3(c)). The exception sought by ABI was that *'if the employee is engaged to provide supports to clients in circumstances where the client has discretion to vary when the support is provided'* the employer and employee would agree in writing only on the number of hours to be worked each week (or the average number of hours) and the days and/or times of the week that the employee was not available to work.²
10. Such a variation would have increased unpredictability and instability for employees covered by the Award. The variation that was sought by ABI, and the argument made in favour of it, was based on the premise of shifting the risk onto the employee rather than the employer. We say this is an inappropriate and unfair way to manage risk.
11. The NDIS has changed the disability support services sector; however employers still control when work is required to be performed. A service provider determines which type of services it will provide and when those services will be provided. People with a disability who are participants in the NDIS will determine which service provider best suits their needs.
12. The NDIS represents a move from a block-funded welfare model of support to a fee-for-service market-based approach.³ This necessitates that services will compete in the market place for consumers. There is an inherent level of risk when competing in such a market.

² See paragraph [558] of the Decision.

³ Productivity Commission Study Report, *National Disability Insurance Scheme (NDIS) Costs*, October 2017, page 8, available at <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/13f-am201826-productivitycommission-ndis-costs-hsu-150219.pdf>

13. Providers have a choice when faced with increased demand for flexibility in service provision; absorb the risks and potential costs as organisational costs, or pass them on to the workforce in the form of reduced security and consistency in shifts and hours worked, with flow on effects including reduced pay. It is not inevitable that increased flexibility for NDIS participants must be borne as a cost by individual workers. The allocation of risk occasioned by the funding model is properly a choice which resides with employers. As the choice is one of employers, the attendant risk should be managed and if necessary absorbed by employers.
14. The industrial arrangements for the sector should not assist or facilitate employers passing on these risks to employees by a reduction in their terms and conditions.
15. The Award covers a service based sector⁴ with clearly identified issues associated with skills shortages and retention.⁵The sector is also predominately funded by the Commonwealth Government applying uniform criteria albeit with greater autonomy given to the recipient of services about the provider accessed. Community and personal care workers comprise more award reliant employees than most other industries.⁶ These workers are not in a position to absorb risks irrespective of the question of the appropriateness of attributing risk to them.
16. Reasonable core minimum employment standards provide a critical mechanism that informs providers' decision making. Employment standards are one of the mechanisms available to governments to demonstrate 'stewardship' to mitigate risk and regulate the sector.⁷ The marketization of employment terms and conditions which is implicit in the flexibility sought by the ABL is not inevitable and will in the long term be destructive of high quality and sustainable service provision.
17. David and West⁸ note:

Given the established relationship between quality support workers and quality services, it is important that mechanisms which promote and protect quality are not simply left to the private interaction between service user and support worker in a market context.

⁴ See the definition of 'social and community services sector' at clause 3.1 of the Award.

⁵ National Disability Insurance Agency, *Integrated Market, Sector and Workforce Strategy*, (2015), Canberra, NDIA, at page 9.

⁶ Research Report 1/2017, Jimenez and Rosenbes, *Award-reliant workers in the household income distribution*, February 2017, FWC, at page 16, the authors note 'the most common occupation for award-reliant employees are Community and personal service workers, labours and Sales workers.'

⁷ David and West, *NDIS Self-Management Approaches: Opportunities for choice and control or an Uber-style wild west?* Australian Journal of Social Issues, 2017, **52**, 331 at 342.

⁸ As above.

The maintenance of a fair and relevant minimum safety net of terms and conditions for the employees engaged in the sector is a critical mechanism available to promote and protect quality.

18. Further, providers have more capacity to absorb the risks and costs of higher flexibility than low-paid workers. Providers are better positioned to mitigate those risks and costs, given that they have control of rostering and work organisation. The allocation of these risks as the principal responsibility of providers also places the risk where it is likely to provide the greatest overall utilitarian benefit.
19. Given that many NDIS workers already undertake unpaid work due to unpaid travel time and a desire to provide quality care, further shifting the burden of absorbing client flexibility onto workers will likely serve to increase workforce turnover and intention to leave.⁹
20. Further, there is already significant flexibility in respect of the rostering of part time employees under the Award. Part time employees have no minimum engagement period, and can work up to 10 hours a day or 38 hours a week or 76 hours per fortnight without payment of an overtime rates (clause 28.1(b) (iii)). Further, there are already mechanisms in the Award providing flexibility for employers in the circumstances of client cancellation (clause 25.5(f)).
21. In the part time and casual employment decision, the Commission found that the variation sought by ABI was not necessary, and the reasoning behind this decision, found in paragraphs [636] to [640], remains accurate today.
22. In respect of paragraph [631], it is important to note that the majority of participants in the NDIS are not self-managed. In June 2018, only 24% of participants were either partly or fully self-managed.¹⁰
23. In respect of paragraph [633], there has been some change in rates of permanent and casual employment in the sector. According to the National Disability Services (NDS) Australian Disability Workforce Report of July 2018, 48% of disability support workers were permanent (full-time or part-time) and 46% were casual.¹¹
24. The NDS Workforce Report also stated that the trend towards casualisation was not universal across the sector, was more prevalent in small and medium organisations, and

⁹ See Macdonald, F., Bentham, E. & Malone, J. (2018), *Wage Theft, Underpayment and Unpaid Work in Marketised Social Care*, *The Economic and Labour Relations Review*, 29:1, 80-96.

¹⁰ NDIS, *Annual report 2017-2018*, page 66, downloaded at:
<https://www.ndis.gov.au/media/431/download>

¹¹ National Disability Services (NDS), *Australian Disability Workforce Report of July 2018*, downloaded at
<https://www.nds.org.au/pdf-file/cd6e735a-0e8f-e811-80c8-005056ac7853>

- was absent in large organisations.¹² This suggests that large organisations may better be able to manage the risks associated with increased market competition under the NDIS.
25. Most employers welcomed the marketisation of disability support services, which entails more competition between providers who need to offer high quality services. If providers are unable to compete in this market without eroding workers' pay and conditions through unreasonable demands for flexibility, they may need to reevaluate their business models.
26. A secure and stable workforce is a precondition for the delivery of sustainable quality services and also the long term viability of providers. A fair and relevant minimum safety net of terms and conditions should not encourage providers to shift on to employees risks associated with increased demand for flexibility in service provision.

United Voice
17 May 2019

¹² NDS, *Australian Disability Workforce Report*, page 6.