IN THE FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

National Disability Services Ltd

Submission in Reply

AM2018/26

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

Substantive Issues

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Introduction

1. In accordance with the Directions issued on 4 February 2019, National Disability Services (NDS) makes this submission in reply regarding substantive issues for the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS).
2. National Disability Services (NDS) is the peak organisation for non-government disability providers with nearly 1,000 members across Australia.
3. NDS members operate several thousand services for Australians with all types of disability. Members range in size from small support groups to large multi-service organisations. They provide person-centred support for people with a disability – through personal one-to-one care in homes and in group settings, professional therapy, education, training and life-skills development, employment, accommodation support, respite and recreation.
4. This submission is restricted to the matters identified at the mention before Justice Ross, on 3 April 2019, as not being affected by the change in status of the draft consent determination. These matters consist of claims made by the relevant unions – the Australian Service Union (ASU), Health Services Union (HSU) and United Voice (UV).
5. The matters this submission will address are set out in the following table, referring to the relevant item number in the *Revised Summary of Proposed Substantive Variations* produced by FWC on 22 November 2017 and summarising the subject matter and the relevant union party:

Item	Subject matter	Union
S6	Community Language Allowance	ASU
S19	First aid certificate renewal	HSU
S43 S44A S40	Deletion of 24 hour clause Deletion of 24 hour clause Consequential variation to sleepover clause	HSU UV UV
S47	Variation to Excursions clause	UV
S48 S51	Casual rates for overtime Casual rates on weekends and public holidays	HSU UV
S57	Variation to public holidays clause	UV

6. Our submissions will address each of these claims in turn.

7. NDS, jointly with Jobs Australia, have previously made submissions regarding the operation of the NDIS in the casual and part-time employment common issue proceedings in the 4 yearly review (AM2014/196 & AM2014/197 – submission in reply and witness statement of Dr Ken Baker, 29 April 2016). We do not disagree with the general characteristics of the NDIS environment for disability services as described in the various union submissions. NDS intends to make a further submission about developments in the NDIS since 2016, which will be relevant to the consideration of the remaining substantive issues to be addressed following the present matters.

S6 – Community Language Allowance

8. The claim by ASU for a community language allowance would have application across the community sector, beyond disability services.

9. Our submission is primarily in regard to the effect of this claim on the disability sector, but we anticipate that the cost would also have a significant effect on a wide range of community based social service organisations with diverse types of funding from government and philanthropy.

10. In relation to disability services, many providers focus on people with disability who have culturally and linguistically diverse (CALD) backgrounds.

11. NDS accepts that providers with CALD clients sometime seek workers who are bilingual. We agree with the submission of the ASU of the benefits of such workers in being able to provide culturally and professionally appropriate communication where needed.

12. The employment of bilingual workers to work with CALD communities and clients is a long standing feature of the sector. There have been no material changes to warrant the introduction into the award of an allowance for this work.

13. This is a matter that ought to be dealt with in enterprise bargaining. NDS acknowledges the ASU submission regarding the constraints on bargaining in this sector. The reality is that in the absence of funding, employers are very constrained in their ability to bargain on this type of matter. However, the modern award objective does not provide for the substitution of bargaining by modern awards.

14. The draft determination proposes an all purpose weekly allowance with two different rates based on whether the required work is occasional or a regular feature of the employee's duties.

15. The ASU has not provided any evidence or reasoning to support the level of payment that is proposed in the draft determination.

16. The cost of the proposed allowance is in the order of about 4-6% of the wage rate for a disability support worker. In the context of NDIS which currently sets a capped fixed price for supports, the effect would be to place services that

specialise in support for CALD clients at a financial and competitive disadvantage as they will need to absorb between 4-6% on-costs for the relevant employees without the ability to adjust prices.

17. The NDIS environment under which most disability services operate entails payment to the provider by each individual client for the specific supports that are provided. A weekly allowance payable even if no language skills are required for most clients would be an additional labour cost that is not covered by the price paid for the service.

S19 – First aid certificate renewal

18. The HSU submits that it is commonplace that workers in home care and disability services may be required to possess a first aid certificate as a requirement of the job. NDS accepts that this is the case for a large part of the workforce.

19. However, HSU have not provided sufficient evidence of widespread refusal by employers to pay the cost of renewal of first aid certificates. The witness evidence provides mixed anecdotal evidence of some employers paying, and references to the potential cost if not paid for by the employer.

20. In the absence of any evidence beyond simple assertions, this claim should be dismissed.

S43, S44A, S40 – regarding 24 hour care and consequential amendment

21. HSU and United Voice seek to delete the award provision for 24 hour care.

22. This clause applies only to home care workers. It is used in situations where a client needs a worker to be present for a 24 hour period but is not expected to have to provide active support for the whole period. It is used to provide respite for families, or to provide care when a client returns home after hospitalisation. For some clients, it is important to use a single worker rather than a team, in order to provide continuity of care and to minimise the disruption associated with changing shifts of workers in a private residential setting.

23. The clause does two things. Firstly it facilitates a single worker providing care without the constraint of the break between shifts provisions of the award. The expectation is that the employee will have significant down time, as well as 8 hours sleep, other than if contingencies arise.

24. The second aspect of the clause is that it restricts the amount of work to that prescribed by a care plan, and limits that work to 8 hours. The employee is required to be available in case of contingencies and is paid a 55% loading to cover that as well as the inconvenience of being present for the 24 hour period.

25. The unions submit that there is insufficient precision about whether the payment adequately covers all the work performed.

26. If there were to be a variation to this clause, the unions' concerns about ensuring full payment for work performed can addressed differently. The clause could be

amended to provide that the 55% loading is payment for any additional work required of up to 2 hours, with overtime payable for all work performed beyond that amount. This would be preferable to deleting a clause that facilitates the provision of a type of support that is of value to aged and disabled people in certain limited circumstances. However, the unions have not sought this.

S47 - Variation to Excursions clause

27. United Voice seek a variation to the Excursions clause, on the basis that the entitlement to compensation for overtime is ambiguous.
28. NDS submits that there is no ambiguity.
29. This clause facilitates the presence of workers on excursions with clients for continuous period over multiple days without breaching the break between shift provisions set out in clause 25.4 of the award which would otherwise apply.
30. The clause limits the ordinary hours to be worked to 10 hours per day, consistent with the hours of work provisions of the award at clause 25.1.
31. The relevant sub clause, 25.9 (ii) states "*The employer and employee may agree to accrual of time instead of overtime payment for all other hours*"
32. If an employee is required to perform more than 10 hours in a day, it follows that the additional hours would be overtime. Clause 25.9 (ii) recognises this by specifying an alternative to overtime payment.
33. The alternative specified is accrual of time instead of overtime payment, by agreement.
34. The award provides for time off instead of payment of overtime at clause 28.2, and that clause would therefore apply. In the SCHADS Award, time off instead of payment for overtime is accrued and taken on a time for time basis rather than penalty rates.
35. United Voice are seeking that in the case of excursions, time off should accrue and be taken on a penalty rates basis rather than time for time as applies for all other overtime worked under the SCHADS award.
36. No evidence has been provided of any need to change the level of entitlement.
37. If it were determined that there is an ambiguity, this could be addressed by a simple amendment to clause 25.9 (ii) which references the overtime clause of the award.

S48 & S51 – Overtime, weekend and public holiday payments for casuals

38. The HSU and United Voice seek to make the casual loading payable in addition to overtime, weekend and public holiday penalties.
39. The award currently provides for such payments to be in substitution for the casual loading.

40. This issue was considered at length for this award during the 2012 review of modern awards and was subject to decisions by SDP Watson in [2013] FWC 4141 and on appeal by a Full Bench in [2014] FWCFB 379.

41. Those decisions resulted in an increase in payment for casuals, by providing for penalty rates (which are greater than 25%) to apply instead of the 25% casual loading, where previously only the casual loading applied.

42. The decisions took account of the award history and also the material circumstances of the industry.

43. The unions do not claim that the variation is necessary due to any change in the material circumstances of the industry but seek to rely on principles they say are established by the Penalty Rates decision ([2017] FWCFB 1001).

44. The Penalty Rates decision, at [45-46] identifies a range of matters to be taken into account in assessing a claim to increase remuneration as follows:

> *[45] An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified requires a consideration of a range of matters, including:*
>
> *(i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);*
>
> *(ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and*
>
> *(iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.*
>
> *[46] Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact on such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times.*

45. The Penalty Rates decision took account of extensive evidence in relation to the specific awards and industries in question. In contrast in the current review, the unions have failed to provide evidence addressing the range of factors identified in the Penalty Rates decision' let alone in relation to the modern awards objective.

46. The effect of the unions' claims would be to significantly increase the wage cost for the provision of a wide range social services, including disability support, for employers who are largely dependent on government funding or, in the case of the NDIS, a fixed price over which they have no control. The result is likely to be a reduction in services to vulnerable members of the community.

47. We submit that there is no compelling reason to alter the outcome of the 2014 decision of the Full Bench on this issue.

S57 – Variation to Public Holiday clause

48. United Voice asserts that employers are altering the rosters of part-time employees for the purpose of avoiding the payment of public holiday rates.

49. No evidence is provided for this assertion and therefore there is no evidence of any need for the award to be varied.

50. NDS submits that, consistent with the requirement of clause 10.3 (c) of the award, part-time employees by definition have a regular pattern of work that is reasonably predictable. The entitlement to a public holiday under ss 114 and 116 of the Act is readily enforceable by reference to the regular pattern of work.

51. NDS does not consider that the variation is necessary to meet the modern awards objective.