

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

**Re Draft Variation Determinations and
Provisional Views**

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Introduction

1. National Disability Services (NDS) makes this submission pursuant to the Decision regarding Tranche 2 of the substantive claims, published on 4 May 2021 ([2021] FWCFB 2383), and the Statements issued on 23 July 2021 and 3 August 2021.
2. As a peak sector body for disability services, our submissions are primarily focussed on the disability sector, unless otherwise stated.

Broken shift

Broken shift allowances

3. The Decision expresses a provisional view at [1266] that broken shift allowances should be paid with the rate set as a percentage of the standard weekly rate.
4. Setting this allowance as a percentage of the standard weekly rate results in the amount payable being a flat dollar amount regardless of the pay rate of the individual worker.
5. NDS submits that this is a desirable approach as it simplifies the task for payroll, and also potentially simplifies the way in which the cost of this allowance could be factored into the NDIS pricing mechanism for disability services.

Broken shift and work outside the span of hours

6. At point 4 in [1266] of the Decision the provisional view is put that a day worker who works a broken shift which extends outside the span of hours should be entitled to overtime for such work.
7. The Decision states that the broken shift allowance would replace the current entitlement in clause 25.6(b). The discussion at [547-558] makes it clear that one of the reasons for proposing a quantum of allowance that is at the upper end of the range of other modern awards, is that the allowance would replace shift penalty rates of up to 15% of the ordinary rate (as noted at [549]).
8. The decision at [491] provided an example of how the new broken shift entitlements would operate, including payment of an overtime penalty rate for time worked outside the span of hours.
9. The proposed variation to clause 28 regarding overtime for work outside the span of hours will apply to a day worker.
10. A question arises as to the entitlement of an employee who works a broken shift but is rostered to work hours that would currently attract a shift penalty rate under clause 29 and who might be assumed to be a shiftworker under clause 25.2(b).
 - a) The draft determination at clause 25.6(d) excludes the application of the shift penalty rates in clause 29.
 - b) A consequence is that it might appear that an employee who is rostered to work a broken shift that would currently attract a shift penalty rate under clause 29 will now receive neither a shift penalty rate, nor an overtime payment for time worked outside the span of hours under the proposed new clause 28.1 (a) or 28.1 (b) (iv).
11. NDS submits that the above concern would be misplaced, but that some clarification is desirable. Clause 29.4 prevents an employee who works broken shift being classified as a shiftworker, because shifts under clause 29 are to be worked in *"...one continuous block of hours that may include meal breaks and sleepover."*
12. The current clause 25.6(b) acts as an exception to the requirement that shifts be continuous. The draft determination removes that exception. Therefore, the definition at clause 29.4 would now prevent a broken shift worker being classified as a shiftworker. The overtime provision will therefore apply for all broken shift work performed outside the span of hours, as intended by the Decision.
13. NDS submits that in order to avoid confusion on this point, there is merit in considering an amendment to the draft determination at clause 25.6 by amending the first sentence to read *"This clause only applies to day workers, who are social and community services employees when undertaking disability services work and home care employees."*
14. A further amendment to the draft variation at clause 25.6 (d) would also assist to clarify this by an addition so that clause 25.6(d) reads *"Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates, including for time worked outside the span of hours, to be paid in accordance with clauses 26 and 28."*
15. It might be objected that in some cases, the replacement of a shift penalty rate that applies across a whole shift with overtime limited to the hours outside the span will result in a reduction in pay for some workers.

16. However, under the draft determination, when taking the broken shift allowances into account, this can generally only happen in relatively restricted circumstances where the value of the 50% overtime penalty rate adds up to less than the value of a 12.5% or 15% penalty across all hours worked. This would usually only be where less than 30 minutes is worked outside the span of hours.
17. Under the current award provisions, it makes little sense for employers to roster employees to work small amounts of time outside the span of hours, because the cost of the resulting shift penalty being imposed on all hours worked is disproportionate to the operational need. In other words, we doubt that it is common for an employee to be rostered to work less than 30 minutes outside the span of hours as part of a broken shift because it results in a 12.5% or 15% impost on all hours worked that day.
18. Furthermore, most broken shift appear to be worked during the day and within the span of hours, reflecting client need. As an example, the evidence of Mr Miller indicated that for a sample roster period, only 15% of individual in home client supports were delivered outside the span of hours¹.
19. NDS submits that the provisional view that time worked outside the span of hours as part of a broken shift be treated as overtime has some desirable benefits.
20. The proposed variation means that it is easier to identify which rostered hours will attract the higher rate of pay, and will make it easier for providers to assign that cost to individual clients who require supports outside the span of hours.
21. Under the current provisions of the award, the shift penalty applies across the whole broken shift. The result is that where a worker provides support to a number of different clients during the broken shift, the cost of the shift penalty incurred for support of one client outside the span of hours, also affects the cost for other clients who only need support within the span of hours.
22. However, the proposed changes will result in significantly higher costs overall for providers because of the broken shift allowance applying to all broken shifts. Most work is carried out within the span of hours and does not currently attract any allowance or penalty rate.
23. A further issue that arises from the draft determination at clause 25.6(d) is that there is no reference to the rate to apply to a broken shift worked on a public holiday. It may be appropriate to consider adding a reference to public holiday rates in this clause.

Roster changes

24. NDS is supportive of the proposed variation to allow employees to swap shifts by agreement, but proposes one amendment to the proposed clause 25.5(d)(ii) to clarify that an agreed shift swap between employees also requires the agreement of the employer.
25. In some circumstances, an employer may have reasonable grounds to not agree to a proposed shift swap. In a disability service this might relate to considerations such as matching employees with the appropriate skills and attributes to the needs of a client, or fatigue management where a shift swap might result in excessive hours being worked by an employee in a short period of time.

¹ [NDS submission and witness statement](#) 2 July 2019 at page 5 of the statement, page 4412 of the Court Book.

26. We propose that the provisional clause 25.5(d)(ii)(A) at [1271] of the Decision be amended to read *“if the change is proposed by an employee to accommodate an agreed shift swap with another employee, subject to the agreement of the employer;...”*.

Client cancellation

27. NDS has no objection to the provisional view set out in the Decision at [1276] regarding the draft clause 25.5(f)(v) requiring 12 hours’ notice as a threshold for the use of make up time.
28. At [1277] the decision notes that the use of the word “shift” in this context at clause 25.5(f)(v) may require further consideration.
29. NDS submits that the client cancellation provision is really dealing with the cancellation of an appointment with a client, which may be for just part of the shift to be worked by the employee that day.
30. Elsewhere in the clause, the term “service” is used to refer to the period of work that relates to the appointment that the client is cancelling.
31. The word “shift” could be replaced by “service” throughout clause 25.5, except at 25.5(vii)(D) where the phrase “make up shift” could be replaced with “make up time” to be consistent with other references to make up time in the clause.

Overtime for part-time workers

32. NDS has no objection to the proposed new clause 10.3 (f) which clarifies that additional hours worked by part-time employees are subject to agreement.
33. The Decision also puts a provisional view that there should be a mechanism whereby a part-time employee may request a review of their hours where they have been regularly working additional hours.
34. In the draft determination, clause 10.3(g)(iii) provides that an employer may refuse the request only on reasonable business grounds, and provides an example including where there is uncertainty about funding and client numbers and preferences for home care employees.
35. NDS submits that the term “reasonable business grounds” is well understood and does not require the use of examples which might serve to unnecessarily restrict the scope of such grounds.
36. However, if it is decided that examples would be beneficial in order to provide guidance to employers and employees, NDS submits that the current draft needs some reworking to avoid any unnecessary restriction on what can constitute reasonable business grounds.
37. The specific change to the draft that we propose involves the home care employee example in the draft determination. This example could also reasonably apply to disability support work, and conceivably to work performed in other parts of the SACS sector. We suggest that this should be amended by removing the words *“For home care employees”*.

24-hour-care clause

38. NDS proposes one amendment to the draft determination for the clause dealing with 24-hour care.

39. The draft clause 25.8(c) provides “...an opportunity to sleep for a continuous period of 8 hours...” and we submit this creates a concern about what happens if there is an unplanned interruption such that the opportunity for a continuous period of sleep is denied.
40. It may assist with clarity to use wording that aligns with the wording of clause 25.7 which deals with sleepovers.
41. The first sentence of the draft clause 25.8 (c) could be replaced with “*The employee may be required to sleep overnight at the premises where the client for who the employee is responsible is located (sleepover). This period of sleepover will be scheduled to be a continuous period of 8 hours. In the event of the employee on sleepover being required to perform work during the sleepover period, the employee will be paid for the time worked in accordance with clause 25.8(e).*”

Equal Remuneration Order

42. NDS has no further submission regarding the Equal Remuneration Order issue.

Operative date

43. NDS notes that the variations that will be made as a result of this Decision will have a major impact on the operations of some disability services, as well as imposing significant costs which are currently unfunded.
44. NDS proposes that an operative date of 12 months after the finalisation of determinations to vary the award should apply. Alternatively, if that timeframe is not possible, then a date of no earlier than 1 July 2022 should apply.
45. For disability services that make extensive use of broken shift, the cost of the new broken shift allowance, together with the changes to minimum engagement, is significant and currently unfunded.
46. An example of the cost impact can be drawn from evidence referred to in the decision. Evidence from Mr Miller in response to questions from the Bench referred to a sample roster cycle where of 2000 shifts were worked, of which 37% were broken shifts². Using pay rates incorporating the annual wage increase effective from July 2021, we can estimate the additional cost of the broken shift allowance as follows:
 - a) 668 broken shifts had a single break; the cost of the allowance (at \$17.53 per shift) would be \$11,710.
 - b) 78 broken shifts had two breaks; the cost of the allowance (at \$25.78 per shift) would be \$2,010.
 - c) The total additional cost for that roster cycle would be \$13,720.
47. Another way to express the cost is that the new allowance amounts to a 7.1% increase for a broken shift of 8 hours with a single break, and 10.4% if there are two breaks. The additional percentage increase in cost is higher for shorter shift lengths due to the flat dollar rate of the allowance.

² [NDS submission and witness statement](#) 20 November 2019 and referred to at [464] – [466] of the Decision.

48. Employers and funders will require time to manage the increased costs associated with this variation, in addition to the other changes proposed.
49. Employers have budgeted for the financial year and have limited capacity to adjust within the provisional operative date of October 2021.
50. The main funding source for disability services is the NDIS, with prices set by the NDIA. NDIA have announced an annual review of pricing will commence in August 2021 and conclude in December 2021 with a view to implementing any changes from 1 July 2022³. At best it seems unlikely that there is scope for significant changes to pricing before the end of financial year 2021-2022.
51. NDS accepts that funding arrangements are not determinative of how modern awards should operate, however we submit they are relevant and are a factor that should be given some significant weight in this matter, particularly in the context of major change.
52. Payroll systems will need significant changes in order to accommodate different calculations of allowances and penalty rates. This is because, for example, there is a move away from shift penalty rates calculated as a percentage of the ordinary rate, to a flat dollar allowance in relation to broken shift.
53. The Decision at [587] and [1268] contemplates that the changes to minimum engagement and broken shift are likely to drive changes in rostering practices.
54. We agree that the Decision will drive changes to rostering, however, those changes cannot, and should not, be made overnight.
55. The required changes are likely to have significant effects on hours of work for employees with pre-existing patterns of work. The implementation of new rostering arrangements will require a change management process that allows for genuine consultation and development of measures to mitigate any adverse effects on employees.
56. Pending the renegotiation of service agreements with clients, where there is non-working time between appointments that is currently not paid, the new minimum engagement provisions will result in payment for that time, until the employer is able to change rosters to provide for better “bundling” of supports and travel time within the minimum engagement.
57. The changes to rostering may also require renegotiation of service agreements with clients with respect to the timetabling of support delivery. The time required for this is potentially quite significant.
58. Since each service agreement is different, negotiating changes involves the provider meeting individually with each participant, together with carers, family and advocates as relevant; getting agreement; and then finalising the drafting of the amendment to the service agreement. For some providers this will involve a large number of clients who will all require an individualised approach.

Michael Pegg

On behalf of National Disability Services

3 August 2021

³ NDIS 2 July 2021; [Pricing updates | NDIS](#)