Submission
to the
Australian Fair pay Commission.


Sally McManus
39 Renwick Street, Redfern 2016. NSW
02 9310 4000
sally@asu.org.au

The submission is NOT confidential.

Position held: Secretary of the Australian Services Union NSW and ACT (Services) Branch (Registered Organisation) and Australian Services Union of NSW (Provisionally Registered Organisation).
Background.

1. The Australian Services Union (the Union) welcomes the opportunity to make submissions to the Australian Fair pay Commission (the Commission) in relation to further adjustments to minimum wages.

2. The Social and Community Services Employees (State) Award 2006 is an award of the New South Wales Industrial Relations Commission (the SACS Award). We are advised that the Commission has a copy of this Award.

3. There is little or no bargaining undertaken in the Social and Community Services Industry (the Industry).

4. The overwhelming majority of employees employed in the Industry are paid the actual rates set out in the SACS Award.

5. Employees in the Industry can genuinely be described as low paid.

6. There is extensive evidence of a skill shortage in the Industry with employers and employer groups identifying the issue of attracting and retaining staff as the single biggest challenge in the industry.

7. The Social and Community Service Industry provides a variety of services which can broadly be described in the following terms:

   **Neighbourhood centres** – which are geographically based organisations that provide a broad range of social/welfare services targeting vulnerable people in the community. Services include information, referral, community development services, self help group support, local community development, children and family services.

   **Residential and community support for people with a disability** – which provide support primarily for people with intellectual or developmental disability. Residential services include group home accommodation and support. Non-residential services include day program support, respite care and business services (previously known as sheltered workshops). While business services provide employment for people with a disability, they also provide a place for people with a disability to learn living skills and enjoy dignity through work.

   **Services for migrants** – organisations providing services including: information, support, community development, referral, case work and advocacy for newly arrived migrants and refugees.

   **Community Legal Centres** – which provide legal assistance and support for disadvantaged people. Community legal centres are usually geographically based (eg assisting people within the Hunter region) or issue specific (separate legal centres for example, for consumer credit or welfare rights issues). Court support for women and children escaping domestic violence.

   **Community care for the aged** – Services include home-based care and support for elderly people, social support in the form of structured day activities, programs to reduce isolation, respite care, community transport, case management and development of community care packages.
**Aboriginal community programs** – which provide services such as aboriginal specific legal services, family support services, housing services, medical centres, job seeking services, and supported accommodations services.

**Family support services** - services that provide group and individual case support to families for behaviour management for children and young people with high and complex needs.

**Relationship services** – services include childrens contact centres (assistance with changeovers of children between separated parents), counselling services and mediation.

**Community housing** – organisations providing affordable rental housing to people on low to moderate incomes. There are 3 main types of community housing: housing associations, co-operatives and church owned housing. Housing is (primarily) owned by the state government with the non-government organisation collecting rent charged to tenants for management of properties and repairs of properties.

**Crisis & medium term supported accommodation** – services to assist homeless people or people at risk of homelessness, including women at risk of domestic violence, young people and families.

**Tenants advice services** – advice, case work, support, advocacy and representation for tenants on tenancy matters in both the public housing and private rental systems.

**Out of home care** – services which provide case management including counseling and family restoration, foster care, kinship care and community placement activities for young people in the care of the state.

**Youth services** – organisations that provide activities for young people in disadvantaged areas.

**Meals on wheels** – which provide in-home meals to frail, the aged and people with disabilities.

**Community transport** – provide services for aged and disabled people who need assistance with transport for attending medical appointments, undertaking daily activities and enhancing social support.

**Women’s health centres** – provide primary health care services including medical and clinical services and a range of counseling, health promotion, education, self-help and consumer advocacy services.

**Drug and alcohol services** – provide drug or alcohol treatment, education, prevention and information services in both residential and non-residential settings.

**Mental health services** – services which are involved in the rehabilitation of people living with a mental illness or psychiatric disability in both residential and non-residential settings.

**Regional organisations** – these organisations coordinate and disseminate information to and between the non-government community services sector and advocate on behalf of the sector and the communities in their geographic region.
Environmental organisations - primarily organise advocacy and campaigns in
defence of the environment.

Aid agencies – provide overseas aid and humanitarian services.

Peak groups – represent member organisations in the community services sector. Peaks also research and develop policies and advocate on issues affecting
marginalised and disadvantaged people by lobbying government and other
stakeholders and organise community support on their behalf.

8. The Disability Services Sector is but one small part of a much larger Industry.

9. The ASU has received an inquiry from the Commission as to the extent of “for profit”
service provision in the Industry. The ASU believes that there is limited “for profit”
service in the Social and Community Services industry. It comprises less than 1% of the
total industry.

10. The SACS Award, which is a common rule award of the Industrial Relations Commission
of NSW and applies to services of the above types, was made on 3 March 2006. This
Award contains increases in all rates of pay operative from the 1st of July in 2007, 2008
and 2009. These increases were granted in part as a result of changes in work value.

11. At the time at which the Award changes were made, the Workplace Relations Act 2006
(the Act), had already passed through the Parliament and subsequently became
operative on 27th of March 2006.

12. Effective 27th of March 2006, the SACS Award became, for those employers who are
constitutional corporations, a Notional Agreement Preserving a State Award (NAPSA),
and the rates of pay became a preserved Australian Pay and Classification Standard
(APCS).

13. By virtue of s208 (4) of the Act, the increases referred to in paragraph 10 above, became
part of the preserved APCS. As the increases were granted “….wholly or partly on the
ground of work value change or pay equity; then (despite subsection 202(3)), the
preserved APCS is taken to include provisions under which those increases will take
effect for those employees at that time or those times.” (s 208 (4))

14. The increases in the SACS Award were agreed to by the parties in full knowledge of the
provisions of the Workplace Relations Act 1996. There were explicit discussions as to the
effect of the then s 90 ZD 3 A, now s 208 (4).

15. The parties had the benefit of examining the Act before agreeing to the variations to the
SACS award in the State Jurisdiction.

16. The Act sets out powers of the Commission to make and adjust an APCS.

17. It was clearly understood and known that the APCS which would come in to operation on
the date of operation of the Act would contain the increases that had been agreed to and
which were part of the Award.

18. It was clearly understood that this was the APCS which would be varied by the
Commission in any subsequent exercise of its powers as set out in the Act.
Nature of the APCS.

19. National Disability Services is not an industrial organisation. It is a peak body representing member organisations who provide services in the disability services sector.

20. Some National Disability Services members are represented by a number of employer industrial organisations.

21. A significant number of the members of National Disability Services are represented by Employers First.

22. It is the submission of Employers First that the APCS arising from the SACS Award does not contain the increases referred to in paragraph 10 above. In their submission the rates of pay contained in the NAPSA are those rates of pay that applied on March 3rd 2006.

23. The reasons for the submission of Employers First are set out in paragraph 10 of their submission to the Commission in current proceedings.

24. The ASU submits that the views of Employers First are without foundation at law and rejects its submission.

Jurisdiction.

25. The APCS derived from the SACS Award applies only to those employers who are constitutional corporations. There is no evidence to suggest that any of the employers represented by National Disability Services are in fact constitutional corporations.

26. The Union has sought and obtained extensive legal advice on the issue of whether or not employers in the industry are likely to be constitutional corporations. On the basis of that advice the ASU submits that it is highly unlikely that any more than a small minority of those employers represented by National Disability Services are in fact constitutional corporations.

27. The Union advances the submission set out in paragraph 25 on the basis of the following:

- the organisations do no undertake trading of a significant type.

- to the extent that an organisation does undertake trading, the trading is only peripheral to the primary purpose of the organisation.

- the overwhelming majority of funding provided to the organisations is provided by Government.

- the funding provided by Government is for the delivery of service which might otherwise be delivered by Government itself.

- it is either an implicit or explicit requirement of funding provided by Government that a fee be charged for service.
2007 State Wage Case – NSW.

28. The Industrial Relations Commission of NSW is currently hearing evidence and taking submissions in the 2007 State Wage Case.

29. As part of those proceedings the Industrial Relations Commission of NSW is being asked to consider adjustments to the current Wage Fixing Principles (the Principles).

30. In submissions to the Industrial Relations Commission of NSW, Unions NSW has argued that the principles should be varied so that the benefits of any State Wage Case will flow onto those Awards where there have been pay increases granted as a result of changes in work value or on the basis of pay equity. Under the current principles such increases would not be available.

31. The Union is advised that this submission is broadly supported in principle by the State Government.

32. The Union has further submitted that should the principles be amended in the manner sought by Unions NSW then the union should be permitted to seek retrospective application of the 2006 State Wage Case decision to the SACS Award, as well as the 2007 decision and any increases awarded in future years.

Response to Submissions of National Disability Services (NDS) to the AFPC.

33. The Union rejects the submission of National Disability Services in respect to the meaning that can be given to clause 22.3 of the SACS Award. In the submission of the Union the insertion of this clause into the SACS Award represents nothing more than compliance with the Wage Fixing Principles as they existed at the time. In the current proceedings before the Industrial Relations Commission of NSW in regard to amending the principles, the ASU has given evidence that should the principles be amended then it intends to make application to vary the SACS Award to give effect to both the 2006 and the 2007 State Wage Case Decision.

34. In our submission the AFPC does not have before it a “confined set of circumstances” as submitted by NDS. At least one other State Award contains increases of the type contained in the SACS Award and which were determined in accordance with s.208(4) of the Act:

-Miscellaneous Workers-Kindergarten and Child Care Centres (State) Award

35. In addition the following awards provide for prospective increases during the life of the Award:

-Teachers Non Government (English Colleges) (State) Award;
-Teachers (non-Government Early Childhood Services Centres Other Than Pre-schools) (State) Award;
-Teachers (Non-Government Pre Schools) (State) Award
-Cleaning and Building Services Contractors (State) Award, and;
-Electrical, Electronic and Communications Contracting Industry (State) Award.

36. The ASU absolutely rejects the submission of NDS as set out in paragraphs 18-24. Specifically:

-There is no evidence whatsoever to suggest that the granting of the 2006 and 2007 increases in the minimum wage to those involved in the industry will or have had a detrimental effect on the industry. (Paragraph 18)
- The suggestions and submissions contained in paragraphs 19, 20, 21 and 22 are fanciful. There is no evidence that all or any of the employers represented by NDS is as a matter of law a constitutional corporation.
- There is no evidence that would support the assertion that the flow on effect of the AFPC decision is $22 million per year. (Paragraph 22.)
- There is no evidence to support the suggestion in paragraph 25 that the employers so listed are as a matter of law constitutional corporations. Further, there is no evidence that these employers have in fact paid the increases awarded by the Commission in October 2006. Indeed the Union believes that the employers have in fact NOT paid these increases.

37. There is no evidence whatsoever to support the assertions made at paragraph 26 of the submission of NDS. There is no evidence that would support the assertion that an increase granted by the Commission is likely to or has lead “to reduced employment in the sector, and a reduction in social and or welfare programs in the community.”

38. There is no evidence to support an assertion and nor has any assertion been made that the employers represented by NDS have an incapacity to pay the awarded increases. The ASU submits that such an assertion could not be sustained.

Submissions.

39. The overwhelming majority of employees in the Industry are not employed by constitutional corporations. The overwhelming majority of employers represented by NDS are not constitutional corporations. Accordingly the APCS arising out of the Award has little or no application.

40. However to the extent that the APCS applies to employees then such employees should not be denied the increases granted by the Commission in 2006 or any increase granted in 2007. The provisions of the Act are in our submissions clear and beyond doubt. There can be no doubt what the parliament intended. If the parliament intended to deny employees of employers represented by NDS or similar employers the benefits of the decisions of the AFPC then it would not have enacted s. 208 (4) of the Act.

41. The intent of s. 208 (4) is clear and unequivocal. In such circumstances employees are entitled to the benefits that are contained in a NAPSA that arise out of circumstances envisaged by s 208 (4) of the Act, and, to the benefits of the decisions of the Commission.

42. For any submission to the contrary to succeed then such a submission will in effect have to make out the case that s. 208(4) has not clear meaning and that the parliament did not understand what it enacted into law.

43. Employees in the Industry are low paid, to not grant the increases from 2006 and to deny such workers further increases in 2007 would be fundamentally contrary to the purposes of the ACT and the objects of the Commission.

44. The Disability Services Sector is a small part of a larger Industry. To grant the application made by NDS would be to severely disadvantage those employees and employers who operate in the rest of the industry which is the majority of the Industry.

45. Some of the employers who are party to the application made by NDS are also members of Employers First. In such circumstances then these unnamed employers are arguing that on the one hand employees are NOT entitled to increases contained in the APCS by virtue of s. 208 (4) of the Act on the grounds that they say that the decision of the
Industrial Relations Commission of NSW does not constitute a “determination” as envisaged by s.208 (4) of the Act. On the other hand they also say that employees should not be entitled to the increases granted in 2006 and possibly 2007 by the Commission.

46. In these circumstances the Commission is in effect being asked to deny the employees of such employers any increases in 2006 and 2007. Such an outcome is not consistent with the ACT.

47. There is no evidence before the Commission to support submissions that the granting of the increases discussed would lead “to reduced employment in the sector, and a reduction in social and or welfare programs in the community.”

48. There is no evidence to support an assertion and nor has any assertion been made that the employers represented by NDS have an incapacity to pay the awarded increases. The ASU submits that such an assertion could not be sustained.