National Disability Services Reasons for submission
Correspondence dated 12 January 2007

Brief Background

1. The Social and Community Services Employees (State) Award was an award made by the New South Wales Industrial Relations Commission (the SACS award). We understand you have a copy of the SACS award.

2. The SACS award was made by consent on 3 March 2006 with modified pay rates and reflected, within its terms, 3.5% increases in the rates of pay and allowances for the first full pay period on or after 1 July 2006; 1 July 2007 and 1 July 2008. Those pay increases reflected a conclusion by the New South Wales Industrial Relations Commission (the Commission) that a special case had been established, within the special case principle, in part because of work value changes, which it concluded had been made out: see [2006] NSW IR Comm 87 (the Commission decision) at paragraph 9 attached.

3. The SACS award also had an express clause (being clause 22.3) within it about future wage increases in the following terms:

   It is a term of this Award that the Union will not pursue any improvements in wages or conditions of employment, including any increases arising from the general increases given by the federal or state industrial tribunals, or the proposed Fair Pay Commission that arise during the term of this Award.

   Thus the clause expresses a clear intent to the effect that no further increases beyond those established by the SACS award should occur, although the clause
erroneously describes the applicable law. We will come back to the terms of this clause later in this letter.

4. The Work Choices legislation commenced on 27 March 2006 with the effect being that the SACS award became a notionally agreement preserving a state award, and its pay and classification provisions became the SACS preserved APCS. The increases referred to in paragraph 2 of this submission were part of the SACS preserved APCS pursuant to s208(4)(a) and (b) of the Workplace Relations Act 1996 (the Act).

5. It should be noted that the Act does not allow ongoing increases in an award to become part of a preserved APCS unless such increases are related to work value change or pay equity. Section 202(3) provides:

(3) Subject to subsection 208(4), rate provisions or casual loading provisions in an APCS must not include provisions under which a rate or casual loading provided for by the APCS will or may be increased by operation of the provisions and without anyone having to take any other action.

Section 208(4) provides that where pay increases were determined:

...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.

6. On 26 October 2006, the Australian Fair Pay Commission (the AFPC) made its first minimum wage decision which, amongst other things, provided an increase of $27.36 per week in all APCS’s up to and including $700.00 per week and an increase of $22.04 per week in all APCS’s above $700.00 per week (adjusted to an hourly rate of pay) (the AFPC decision).

7. It is clear that the AFPC did not receive any submission from interested parties about what should occur in respect of the SACS preserved APCS prior to making the AFPC decision.

8. The effect of the AFPC decision is that pay rates in the SACS preserved APCS, which were set, and had been the subject of an increase in March 2006, and a further increase in July 2006, were then cumulatively increased again on 1 December 2006. It appears that further adjustments in the SACS preserved APCS will also be increased beyond its terms by the APFC decision and any future APFC decision along the same lines.

The ACROD submission

Legislative purpose and objective

9. The purposes of the Act include those set out in section 3:
The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and

(b) establishing and maintaining a simplified national system of workplace relations; and

(c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act.

10. The AFPC’s wage-setting function is to:

(a) conduct wage reviews; and

(b) exercise its wage-setting powers as necessary depending on the outcomes of wage reviews.

11. The purposes of the Act with respect to the AFPC are set out in particular in s 23:

The objective of the AFPC in performing its wage-setting function is to promote the economic prosperity of the people of Australia having regard to the following:

(a) the capacity for the unemployed and low paid to obtain and remain in employment;

(b) employment and competitiveness across the economy.

12. For these purposes the AFPC is specifically tasked with its wage-setting function (s 22(1)), with the power to determine the frequency and scope of wage reviews (s 24(1)), and the ability to consult with others, and by monitoring and evaluating the impact of its wage-setting decisions (s 24(2)).

13. The AFPC may adjust a preserved APCS (s 216), in accordance with the purposes and objectives of the Act as applicable to that function.

Intention behind clause 22.3

14. The intention manifested in clause 22.3 is express and obvious. The intention of the parties and the Commission was that the increases set out in the SACS award were intended to be the only increases that should apply to the pay rates in question through to July 2008.

15. That intention is made even more obvious by the way in which clause 22.3 misconstrued the operation of the law insofar as the AFPC was concerned. Clause 22.3 assumes a system whereby wage increases determined by an industrial tribunal or the AFPC had to be the subject of application in respect of a specific instrument before those increases could apply to that instrument, whereas the Work Choices legislation empowers the AFPC to make wage setting decisions of general application across, for example, APCS’s as did the AFPC decision on 26 October 2006. In our submission it is clear that the employer
parties and the Commission would not have supported such work value increases over such a long period if they had known that the clause could effectively have no operation. (It is also clear that the Union would not be able to oppose our application as set out in these submissions.)

16. This intention is understood in the light of the drawn-out proceedings before the Commission, involving significant conciliation, major amended applications, and, at one stage, substantial disagreement (see paragraph 2 of the Commission’s decision). The Commission considered the matter to be a special case which was established, in part, because of the work value changes which it concluded had been made out (see paragraph 9 of the Commission’s decision). From ACROD’s perspective, it should also be noted that the industry did not and would not have agreed to any earlier or higher increases in wages because the industry is essentially reliant upon government funding. Government grants for the provision of disability services constitute the primary, sometimes the only, source of income for disability service organisations. In NSW, these grants are provided under three-year funding agreements in which grant amounts are fixed rather than negotiated. Indexation of grants is provided on an annual basis and advised, without negotiation, in yearly funding agreement renewals. There is no mechanism by which grants for the delivery of disability services can be adjusted to meet additional wage and wage-related costs accruing from the AFPC decision. The 1 July 2006 SACS Award wage increase was funded by the NSW Government in the form of 3.3 per cent indexation on grants. ACROD anticipates that the NSW Government will fund the further work value increases in 2007 and 2008 on a similar basis. In 2006-2007, the Australian Government indexed grants to states under the Commonwealth State and Territory Disability Agreement (CSTDA) by 1.8 per cent. Consequently, disability service organisations have no capacity to absorb such additional wage increases.

17. We also submit that what occurred with the SACS award both in terms of there being work value increases provided for over a three year period within the SACS award and the terms of clause 22.3 make this situation highly unusual. We doubt whether the AFPC will be faced with many, if any, APC’s that provide for a currently applicable series of work value increases within their terms, together with a clear proviso that no increases in pay rates other than those should be made. In that sense the AFPC has before it a confined set of circumstances.

Impact of the AFPC decision

18. In our submission the AFPC decision, in conjunction with the SACS preserved APC’s, will have a detrimental effect on the industry with respect to increased labour costs which were not contemplated in the light of government funding arrangements.

19. In NSW, approximately 750 not-for-profit, grant dependent, community-based organisations deliver over approximately 9,000 funded disability services across NSW per year. The NSW Department of Ageing Disability and Home Care will
provide grants of $1.07 billion in the 2006-2007 financial year to these organisations for the provision of these services.

20. The effect of the AFPC decision on the SACS preserved APCS will increase wage and wage-related costs by about 4 per cent across the disability services sector. This percentage figure is an approximate median based on the distribution of employees covered by the SACS preserved APCS effective after payment of the first work value wage increase in July 2006.

21. The NSW Government estimates that 80 per cent of grants to disability service organisations operating during regular business hours is dedicated to the payment of wages and wage-related costs for employees covered by the SACS preserved APCS. The NSW Government also estimates that 90 per cent of grants provided for services which operate on a 24-hour, seven day per week basis is dedicated to wage and wage-related costs.

22. On this basis, additional, and unfunded, recurrent wage-related costs in excess of $22 million per year will flow directly from effect of the AFPC decision to disability organisations in NSW. (See paragraph 16 of this submission.)

23. The combination of the work value wage increases in the SACS preserved APCS together with the AFPC decision will deliver compound wage increases across the disability services sector of 3.5 per cent from 1 July 2006, a further 4 per cent wage increase from 1 December 2006 and a further 3.5 per cent from 1 July 2007. An additional compounded 3.5 per cent increase is to be paid from 1 July 2008.

24. Additional costs will be incurred order to maintain wage differentials through subsequent adjustment of wages of salaried staff and management due to skills shortages and consequent labour market pressures experienced by disability service organisations. Further additional costs will be incurred through increased workers compensation insurance costs and adjustments to provisions for annual leave and long service leave.

25. ACROD members surveyed about the impact of the AFPC decision claim its implementation will reduce the scope and quality of services available to their clients. Frequently, increased wage and related costs will be met by decreased spending on capital works (for which no government funding support is available) infrastructure development and maintenance. Examples of the effect of the AFPC decision on four ACROD members are found below. Further detailed information is available from these organisations, if required:
Ms Jennifer Taylor  
Director of the Australian Fair Pay Commission

<table>
<thead>
<tr>
<th>Current affected payroll</th>
<th>$8 million (approximately)</th>
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<tbody>
<tr>
<td><strong>Estimated AFPC pay scale impact</strong></td>
<td>$332,000 plus $23,000 one-off adjustment to provisions for annual leave and long service leave plus flow on affect to other staff involved in disability services where there is no direct linkage to the SACS Award to maintain wage parity. The annual cost of a flow on is $87,000. The once off cost for leave provisions is a further $6,000.</td>
</tr>
<tr>
<td><strong>Funding source:</strong></td>
<td>New Horizons will meet its contractual obligations to the Commonwealth and State Governments. New Horizons will seek cost reductions on all contracts that will be in deficit because of this increase in the SACS directly related salary costs. This does not necessarily mean a reduction in consumer outcomes because New Horizons has not yet examined each contract in detail. New Horizons other non disability activities are not directly affected by this AFPC decision. Any SACS cost increase that cannot be offset by cost reductions within each contract will have to be funded by New Horizons non disability services resources. This may impact on growth plans of these non disability activities.</td>
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**DISABILITY SERVICES AUSTRALIA (Sydney NSW)**

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<thead>
<tr>
<th>Current affected payroll</th>
<th>$11 million (approximately)</th>
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<tbody>
<tr>
<td><strong>Estimated AFPC pay scale impact</strong></td>
<td>$449,000 recurrent (including increased temporary staff agency costs) plus proportionate one-off adjustment to provisions for annual leave and long service leave.</td>
</tr>
<tr>
<td><strong>Funding source:</strong></td>
<td>Cancellation of capital works; reduction of infrastructure spending.</td>
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**WHEEL CHAIR AND DISABLED ASSOCIATION OF NSW (The House with No Steps) (Sydney NSW)**

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<thead>
<tr>
<th>Current affected payroll</th>
<th>$18,770 million (approximately)</th>
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<tbody>
<tr>
<td><strong>Estimated AFPC pay scale impact</strong></td>
<td>$695,000 recurrent including adjustments to leave provisions.</td>
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Ms Jennifer Taylor
Director of the Australian Fair Pay Commission

<table>
<thead>
<tr>
<th>Funding source:</th>
<th>Potential service cut-backs and redundancies.</th>
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<tr>
<td>WESTHAVEN ASSOCIATION Ltd (Dubbo, NSW)</td>
<td></td>
</tr>
<tr>
<td>Current affected payroll</td>
<td>$2.6 million (approximately)</td>
</tr>
<tr>
<td>Estimated AFPC pay scale impact</td>
<td>$105,000 recurrent plus $9600 one-off adjustment to provisions for annual leave and long service leave.</td>
</tr>
<tr>
<td>Funding source:</td>
<td>Unknown. The organisation is the sole provider of non-government disability accommodation services in the far-western regional centre of Dubbo. Before implementation of the AFPC minimum wage decision, it anticipated an operating deficit of $130,000 in the current financial year.</td>
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26. Thus the effect of the AFPC decision on the SACS preserved APCS is likely to lead to reduced employment in the sector, and a reduction in social and/or welfare programs in the community. It will also lead to a distinction between employers who are constitutional corporations and those who are not, which would be unfortunate.

27. Accordingly, the AFPC decision, as it impacts on the SACS preserved APCS, does not further the purposes of the Work Choices legislation as set out above.

28. We are instructed that affidavits confirming the matters raised in paragraphs 16 and 18-25 can be provided, if required.

**Proposed action**

29. We request, pursuant to ss 22 and 216 of the Act, that the AFPC adjust the SACS preserved APCS back to rates contained within it as at 30 November 2006.

30. That could be manifested by the AFPC, further to its AFPC decision, adjusting the SACS preserved APCS back to those pay rates set out in Table 4 of the SACS preserved APCS. The adjustment would thus replace the effect of the AFPC decision.

31. Further, we request that, in the course of the AFPC's review in June 2007 and any review in 2008, the SACS preserved APCS not be adjusted until after July 2008.

**Relevant considerations**

32. We submit that the AFPC should adjust the SACS preserved APCS so that the AFPC decision does not apply in a way which goes beyond the contemplation of the parties and the Commission with respect to the SACS award. There are a
number of relevant considerations relevant to our submission which arise out of the legislative framework and background to the SACS award, as summarised above. These considerations include:

32.1 The purposes of the Act and the AFPC's functions as outlined above.

32.2 The extensive history behind the SACS award and the fact that the parties not only consented to it, but the Union consented to seeking no increases beyond its terms.

32.3 The manifest intention of the Commission in making the SACS award, as based on the views of the relevant parties who consented to the SACS award.

32.4 The highly unusual nature of the SACS award with respect to the work value increases provided for over a three year period within the SACS award, and the terms of clause 22.3. (There is no relevant floodgates argument in our submission.)

32.5 The impact of the AFPC decision on employees covered by the SACS preserved APES, if the AFPC decision continues to apply without adjustment of the SACS preserved APES.

32.6 The likely impact on those employed in the sector of wage increases which cannot be supported by employers.