



Jobs Australia

Community Sector Industrial Relations

IN THE FAIR WORK COMMISSION

**4 YEARLY REVIEW OF MODERN AWARDS
CASUAL EMPLOYMENT AND PART-TIME EMPLOYMENT
(AM2014/196 & AM2014/197)**

Final Submission

regarding

**Social, Community, Home Care and Disability Services Industry Award 2010 and
NDIS-related matters**

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Introduction

1. Jobs Australia makes this submission in accordance with the Directions issued on 10 August 2016, and the extension of time granted by the Commission on 29 September 2016.
2. This submission is in support of the application by Australian Business Industrial (ABI) and NSW Business Chamber Ltd (NSWBC) to vary clause 10.3 of the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS). We support the submission filed by ABI and NSWBC on 30 September 2016.
3. Jobs Australia relies in part on our earlier submission in this matter made jointly with National Disability Services (NDS) dated 29 April 2016.
4. In summary, it is our submission that the variation to the award that is sought is necessary to meet the modern awards objective in light of the introduction of individualised funding arrangements such as the National Disability Insurance Scheme (NDIS).
5. These new arrangements under NDIS reduce the amount of control that disability sector employers have over the scheduling of work covered by the SCHADS Award.
6. The SCHADS award regulates the part-time contract of employment at clause 10.3. It is our submission that in the NDIS environment the requirements of that clause are impractical and lead to an unintended consequence that work that is reasonably predictable and secure is likely to be offered on a casual rather than permanent part-time basis.
7. This casualisation of work under NDIS is not the preference of employers, employees or clients¹, does not meet the modern award objectives, and can be remedied by the variation to clause 10.3 that is sought by ABI and NSWBC.

Context: How the National Disability Insurance Scheme (NDIS) affects the organisation of work in the disability services sector

8. NDIS commenced in a small number of trial sites in 2013, and from July 2016 is being extended across the rest of Australia².
9. The rollout of NDIS represents a significant expansion of the level of funding for support for people with disabilities and, importantly, is organised on individual insurance principles with the explicit objective of providing individual people with disability with more choice and control over how they are supported³.
10. Prior to NDIS, most disability services providers were funded under block grants that supported services that were delivered on a more standardised basis, with the provider determining the scheduling of supports.
11. Under NDIS, each client develops a Care Plan through negotiation with the National Disability Insurance Agency (NDIA). They can then choose a provider or providers to deliver the supports in the Plan, and enter into Service Agreement(s) with the provider(s) to operationalise the plan.

¹ See for example Rohr Statement at [17-19], Carey at [33], Paddick at [24-34], Fitzgerald PN962, Bowden PN5526. Denny at [26]

² Baker at [10-18], Carey at [11-13]

³ For example, Fitzgerald at [15-16]

12. Providers operate in a competitive market and if a client is dissatisfied with the supports offered by the provider, they can terminate the Service Agreement and move to a new provider⁴. As a consequence, clients have a greater degree of market power in negotiating the terms of the Service Agreement with the provider than was the case prior to NDIS.
13. The price that providers can charge is currently fixed by NDIA. The employer witnesses in this case gave evidence about the tight margins imposed by the NDIA pricing⁵.
14. By the time that NDIS is fully implemented it is anticipated that overall funding for disability support will have trebled and that the workforce will have doubled.
15. Prior to NDIS, government funding of disability support prioritised relatively high need clients, including an emphasis on institutionalised settings and group homes.
16. NDIS is funding the provision of support to greater numbers of people with disability, many of who have less severe disabilities. These new clients have less need for residential care and more need for short supports in the home and community in order to undertake work, education and social activities.
17. Employer witnesses gave evidence that about 70% of the growth under NDIS is in the area of individualised supports in the home and in the community⁶.
18. Employers in the trial sites have seen a marked shift away from regimented scheduling of supports towards individual arrangements for supports of short duration, spread across a wider range of hours, outside normal office hours⁷. The mere fact of a wider spread of hours does not raise any particular issues regarding award entitlements, but it does contribute to the increasing complexity of rostering of work.
19. Under NDIS, clients who require individualised supports in the home or community are able to negotiate with their provider around when those supports will be delivered.
20. The Care Plans negotiated with NDIA categorise supports as “fixed” or “flexible”. The evidence in these proceedings shows that clients have scope to rearrange flexible supports to suit themselves, within an overall budget. This means clients can, and do, approach the provider to request changes to the timetabling of supports to meet their individual circumstances as they change from time to time⁸.
21. The Service Agreements with providers typically have notice requirements regarding changes to timetabling, and clients do not have an unfettered right to impose arbitrary changes at short notice. But the employer witnesses emphasised that they make every attempt to accommodate such requests because it is their organisation’s mission to do so and also because they are under competitive pressure to provide the service the client asks for. If the provider does not accommodate changes from time to time, the client may go elsewhere to a provider who will meet their requests.⁹

⁴ Baker PN4750, Fitzgerald under cross examination PN819-822, Packard PN5653, Carey PN4944

⁵ For example, Baker at [20-25]

⁶ Baker under cross examination PN4787, Carey PN4897, Fitzgerald PN726

⁷ Fitzgerald at [34-47], Carey at [30-31], Baker at [26-31]

⁸ For example, Rohr PN4402-4425

⁹ see note 4 above

22. This aspect of NDIS is a deliberately designed feature of the scheme. It is intended to give people with disabilities more scope to be able to organise their lives in the same way as the rest of the community, with room for changes of plans and a degree of spontaneity. This is a deliberate move away from the regimented service provision of the past.¹⁰
23. The evidence from employers about how the timetabling of work has changed under NDIS, and the extent to which clients can vary the scheduling of their supports, shows that this aspect of the scheme is indeed functioning as intended and can be expected to continue to be a feature of service provision into the future.
24. Employers gave evidence about the range of reasons behind variations in the hours of service delivery required by individual clients. The cumulative effect of this range of reasons gives rise to a significant degree of uncertainty about rostering of work, even though the quantum of work available is increasing and some aspects (such as some personal care tasks) remain quite predictable.
25. Rostering of work is affected by a wide range of factors such as, but not limited to, clients:
- a) Falling ill, which is a common occurrence for some disabled people
 - b) Taking vacations
 - c) Engaging in social activity, such as having friends or family to visit and not needing a support worker at that time
 - d) Changing priorities, for example deciding to discontinue a particular recreational activity and devote more time to some other activity within their plan such as an educational activity, or changing recreational activities for seasonal reasons, for example a client choosing to reduce how much fishing they do in winter¹¹
 - e) Being affected by behavioural problems, Mr Rohr gave the example of a client learning to drive who cancelled an engagement due to anxiety¹²
 - f) Having specific requirements and preferences which can limit which individual employees are suitable to be assigned to the client¹³.
26. None of these individual reasons for changing schedules is necessarily, on their own, a significant problem. But the combination of the large number of possible circumstances leading to change – some at short notice and others with plenty of notice – makes it impossible for employers to precisely guarantee rostered hours in the medium term, even though there is some reasonable certainty about the overall quantum of work available.
27. Employers gave evidence of the level of change in rostered hours for in home and community support work. At Scope this was in the order of 35% of shifts being affected by change such as cancellation with or without notice¹⁴. At ConnectAbility, two employees are engaged to manage the short notice cancellations and staffing

¹⁰ Baker at [19,23,27]

¹¹ Carey PN4924-4926

¹² Rohr PN4492

¹³ For example, Carey PN 4928

¹⁴ Fitzgerald PN728

issues that arise each day¹⁵. These examples are consistent with trends observed by National Disability Services.

28. This uncertainty around rostering contrasts with the situation in a traditional, institution-based approach such as a day program, run at an institutional facility, where the group activities can continue with the same staffing even if some participants do not show up.
29. Despite this level of uncertainty, employers emphasised that there is a core of predictability about the quantum of work available¹⁶. However, it is also clear that in the provision of individualised supports the precise rostering of work is anticipated to vary for both planned and unplanned reasons from time to time, and that this is an important aspect of how choice and control for the client is intended to operate under NDIS.

Part-time employment under the SCHADS Award

30. Clause 10.3 (c) of the SCHADS award was inserted in August 2013, coinciding with the commencement of the first trial sites for NDIS.

31. It provides that

Before commencing employment, the employer and the 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 will work and the starting and finishing times each day. Any agreed variation to the regular pattern of work will be recorded in writing.

32. Prior to this variation, the only regulation of the arrangement of hours in the employment contract was provided by clause 10.3 (a) which says

A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work. (emphasis added)

33. The effect of clause 10.3 (c) is to require a much greater level of specificity in the contract of employment than is required by clause 10.3 (a) on its own. We submit that the requirements of clause 10.3 (c) go beyond “reasonable predictability” and require the employer to guarantee set hours for the life of the employment contract.
34. The requirements of clause 10.3 (c) are not a problem where the nature of the work is predictable, such as in some office environments.
35. Having entered into a contract of employment that sets hours as required by the award, the employer is not able to roster the employee to work different hours to meet the needs of clients.
36. A permanent part-time employee is prevented from being employed as a shift worker on a rotating roster in the way that fulltime employees may be, because of the requirement in clause 10.3 (c) that the start and finish time be specified in the contract.

¹⁵ Carey PN4899

¹⁶ For example, Carey PN4931

37. In the context of the provision of individualised supports under NDIS, the evidence is clear that the employer knows that the precise arrangement of the hours of work is very likely to change from time to time.
38. If a worker engaged to provide individualised supports is employed on a contract that complies with clause 10.3 (c), that worker has a contractual right to insist on those hours of work and is under no obligation to mutually agree to any variation of hours.
39. In a context where the employer knows that the hours are very likely to change to some extent, then in the face of the constraints set by clause 10.3 (c) the only alternative is to offer employment on a casual basis.
40. Casual employment is clearly a sensible option where the hours of work are completely or largely unpredictable.
41. However, the evidence in this case is that much of the work that is available is likely to be long term and does have a “reasonable” degree of predictability. Employers, employees and clients all have a preference for the core workforce to have access to permanent employment because of the more attractive conditions, such as paid leave entitlements, relatively stable employment, and because of the continuity and consistency of care for clients and to minimise the risk of poor quality service and abuse or neglect of clients¹⁷.
42. The employer witnesses gave evidence of their ability to offer guaranteed minimum weekly hours for their core workforce, subject to being able to vary the rostering from time to time in accordance with the rostering provisions of the award.
43. The evidence showed that while not all part-time employees are available to work additional hours, many are and this enables the provider to deal with short term requirements for extra shifts and to cover employee absences.
44. Clause 10.3 (c) operates as a barrier to the employment of workers on a permanent part-time basis, in services which are subject to individual client choice and control.
45. The requirement to specify start and finish times on commencement as a contractual right also reduces the ability of employers to guarantee minimum weekly hours because of the likelihood of some variation over time.¹⁸

Union evidence

46. The Union evidence relevant to the current application was mostly in the form of lay witness evidence, together with evidence from two union officials regarding a survey, and evidence from Mr Paddick regarding the NDIA planning process.
47. The evidence from Mr Paddick was mostly based on a Care Plan developed early in the history of the Barwon trial site for NDIS. Mr Paddick acknowledged under cross-examination that the plan provided allowed for a degree of flexibility in how supports could be scheduled¹⁹. In any event, the more recent types of plans such as provided through Mr Rohr and Mr Packard²⁰ provide a more accurate picture of the degree of flexibility allowed currently under NDIS.

¹⁷ Fitzgerald PN962

¹⁸ For example, Fitzgerald at PN1027, Bowden at PN5514

¹⁹ Paddick PN5115-5118

²⁰ Rohr PN4402-4425, Packard PN5671-5686

48. The lay union witnesses were residential support workers not currently employed in NDIS sites. The evidence of Mr Packard in response to the evidence of Mr Denny provided a clear illustration of how some workers will continue to be employed on quite predictable hours of work, depending on the particular nature of the service²¹. However, the big growth under NDIS is in quite different work to that performed by the union witnesses – specifically in one on one, individualised support in the home and community.
49. The survey evidence was from a very small sample of workers whose characteristics were not clearly defined. The results were shown in cross examination to be unreliable and should be disregarded.²²

The proposed variation

50. The variation filed by ABI and NSWBC on 5 July 2016 addresses the barrier to the employment of workers on a permanent part-time basis where the work is ongoing and reasonably predictable. It adds a new clause 10.3 (d) which provides an alternative form of part-time employment and makes a consequential amendment to clause 10.3 (c).
51. The variation is not intended to completely replace the existing form of permanent part-time employment provided by clause 10.3 (c) and which is able to operate effectively in workplaces where the hours of work do not vary.
52. The variation is limited to workers whose hours of work are determined in part by the individual client, and where the employer therefore has less control over rostering.
53. The proposed clause 10.3(d) provides that agreement must be reached on the employee's availability within which work may be rostered. It is recognised that some part-time employees may have limited availability.
54. In effect, the clause allows the hours of work to be set by a roster, in accordance with the award provisions around rostering, and within the parameters set by the contract regarding the number (or average number) of hours per week and the employee's availability.

Modern awards objective

55. Jobs Australia supports the detailed submission of ABI and NSWBC in relation to how the proposed variation is necessary in order to meet the modern awards objective. Accordingly we make just some brief additional comments in relation to the modern awards objective.
56. An objection to the proposed variation might be that it appears to reduce the safety net for part-time employees and might not be compatible with s.134 (a) in relation to relative living standards and the needs of the low paid.
57. However, the proposed variation is better characterised as removing an obstacle to the provision of the benefits of permanent part-time employment, including access to paid leave and job security.
58. Put another way, it facilitates the employment of workers on a permanent basis rather than as casuals. In doing so employers are better able to offer a higher

²¹ Packard PN5740-5748

²² Futardo cross examination PN5262-5372, and Wiegard cross examination PN5910-5994

minimum number of hours per week, in exchange for flexibility within agreed parameters around rostering of work, together with improved conditions of employment such as paid leave and notice of termination.

59. The proposed variation also meets the need to promote flexible modern work practices and the efficient and productive performance of work (s.143 (d)). It removes a barrier to the reasonable and flexible deployment of a stable, permanent workforce.
60. Finally, in relation to s.134 (g), the variation removes ambiguity in relation to the operation of the award. For example, notwithstanding the current clause 10.3(c) the SCHADS award has extensive provisions regarding rostering which are arguably inapplicable for part-time employees. The variation clarifies how the rostering provisions can apply, in the circumstances where the hours of work are subject to a degree of client-directed control.

Conclusion

61. The proposed amended variation filed by ABI and NSWBC, if granted, would ensure that the SCHADS award meets the modern award objectives in relation to the employment of casual and part-time workers.
62. Jobs Australia notes that ABI and NSWBC have raised the prospect of alternate formulations, and we do not oppose that aspect of their submissions.