

**IN THE FAIR WORK COMMISSION**

**AM2018/26**

**S 156 - Four Yearly Review of Modern Awards - Group 4 Awards**

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

**SUBMISSION OF THE HEALTH SERVICES UNION**

1. The Health Services Union (**HSU**) make these submissions in response to the Directions of the Full Bench dated 1 May 2019 (**the Directions**), in relation to the four yearly review of the Social, Community, Home Care and Disability Services Industry Award (**SCHCDS Award**).
2. These submissions are made in response to the questions raised by the Full Bench in paragraph F of the Directions, which are as follows:

*In the Part-time employment and casual employment decision the Full Bench described the operation of the NDIS at paragraphs [554] and [630] – [633]. Do the parties take issue with any of the observations made at those paragraphs? Is there any more up to date information?*

3. The HSU does take issue with some of the observations made at paragraphs [554] and [630]-[633] for the reasons outlined below. We also provide some up-to-date information on the operation of the NDIS.

**Paragraph [554]**

4. We take issue with the following contention of Australian Business Industrial and the NSW Business Chamber (**ABI**) which was summarised in paragraph [554] of the Part-time and Casual decision<sup>1</sup>:

*ABI contends that the NDIS is radically changing the disability support services sector, in that employers have lost a large degree of control over when work is required to be performed, and accordingly require much greater flexibility in the allocation of working hours to part-time employees so that they can operate in a way which is responsive to client demand.*

5. Whilst it is true that the nature of the funding system has changed, the needs of people with disabilities have not changed because of the NDIS. For example, NDIS participants requiring personal care during the morning and evening will still predominantly need that support during the morning and evening. Claims from

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<sup>1</sup> [2017] FWCFB 3541



ABI that the NDIS has and will lead to radical changes on a daily basis are incorrect.

6. We also note that paragraph [554] by no means represents the concluded view of the Full Bench on the operation of the NDIS. The paragraphs fall under the heading '5.1 ABI and NSWBC claim' and represents a summary of ABI's claim and characterisation of how the NDIS operates.
7. In fact, the Full Bench rejected ABI's characterisation of the NDIS later in the decision, particularly in paragraphs [636] - [640].
8. Relevantly, the Full Bench found at [636] that:

*The evidence makes it clear that there remains considerable uncertainty as to how the NDIS will operate and what will be the pattern of service demand from participants once the NDIS is fully implemented. We consider it to be likely that this uncertainty is a major reason for the current degree of preferment for casual employment, and that once the NDIS has been fully implemented and its operation becomes more certain and stable, part-time employment will be maintained as a substantial feature of the sector.<sup>2</sup>*

9. It found at [639]:

*The basic elements of the NDIS lend themselves to reasonably predictable workforce planning. Many of the forms of support that are funded in individualised NDIS plans are (as Mr Bowden said) regular and predictable. The service agreement between the participant and the provider of a support service allows for providers to deal with participants in a structured and consistent way, with requirements for cooperation and communication as to when services are provided, notice periods for cancellations, payment where insufficient notice of a cancellation is provided, and notification to the NDIA for a review of the plan if cancellations become excessive. Ultimately an agreement may be terminated by the provider if it becomes impracticable and financially unviable.*

10. It found at [640]:

*Fourth, we consider it unlikely that the market for disability support services which the NDIS is establishing will give participants the degree of market power that some of the employer witnesses implicitly suggested it would. It is clear that for many types of supports, participants value support workers who provide a high quality and amenable service, and they also value having continuity in the personnel who provide the service. In that context, we cannot envisage that participants will be in a position to demand from providers as a matter of course the disability service worker they prefer at whatever time they may choose to nominate from week to week. The massive expansion in the number of participants which will occur as the NDIS is rolled out, and the*

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<sup>2</sup> [2017] FWCFB, [636]



*concomitant expansion in the workforce which will be required in order to service these participants, tend to indicate that providers will need to, and will be in a position to, limit the extent to which participants can demand the provision of services on a discretionary and unplanned basis.*

### **Paragraph [630]**

11. For accuracy, the second sentence in paragraph [630] should read '*Participants in the scheme (and/or their carers) are required to prepare an NDIS plan...*' [amended text underlined].

12. We say that the 3<sup>rd</sup> and 9<sup>th</sup> sentences in paragraph [630] are inaccurate. These state:

*Supports may be fixed – that is, regularly required at a fixed time each day or week – or be flexible, which means the participant has scope to rearrange the supports to suit themselves within the overall budget.*

...

*The example plan required each identified support to be purchased as described, and prohibited swaps from one item to another.*

13. An NDIS plan has 3 overall categories of supports: (i) core supports; (ii) capital supports, and; (iii) capacity building supports. The significant majority of funded NDIS supports are core supports. Core supports are generally fully flexible within the category, and not as prescriptive as the discussion of the example plan suggests. Only capacity-building and capital supports would identify prohibits on swaps.

14. We do not agree with the second from last sentence of paragraph [630]:

*In pricing items, the NDIA has been aggressive in trying to set the absolute minimal cost so as to control the cost to government of the NDIS as a whole.*

15. Recently, there have been significant pricing increases announced. The NDIA has not publicly released the reference formulas for the new prices that have been announced but not yet come into effect (they will on 1 July 2019).

16. The NDIA is not simply concerned with keeping costs at a minimum; it also aims to set prices at what it deems to be high enough to encourage supply. This is apparent in the recent NDIA Quarterly Report, dated 31 March 2019,<sup>3</sup> which states the following in relation to NDIS pricing:

*The NDIA is acutely aware of its role as market steward and the need to set prices that encourage market development, particularly in thin markets.*

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<sup>3</sup> National Disability Insurance Agency (NDIA), *COAG Disability Reform Council Quarterly Report* (31 March 2019).



*Supplementing the work of the Independent Pricing Review, which is currently being implemented, and the Western Australia Market Review, the NDIA has undertaken extensive consultation on therapy prices and pricing for attendant care. That work, initiated and promoted by the NDIA, has been rigorous and fact-based, using extensive data not previously available to the Independent Pricing Review.*

*As a consequence, it was announced towards the end of the quarter that from 1 July 2019 significant price increases will be made for both therapy and attendant care.*

...

*In relation to attendant care, increases of between 5.6% and 15.4% to the base price for attendant care, depending on location, times and days of shifts, and skill level will be available from 1 July 2019. In addition, a Temporary Transformation Payment of 7.5% will also be made to providers, reducing by 1.5% each year over 5 years. This conditional loading will assist providers continue to transform their businesses as the market evolves.*

*Overall, the increases will help ensure the availability of supply in the attendant care and therapy markets, thereby assisting participants to achieve their goals.<sup>4</sup>*

17. Additionally, the NDIA indexes prices on an annual basis to take into account wage inflation (the minimum wage order and the equal remuneration order) and non-wage inflation (CPI).
18. Furthermore, a significant area of NDIS supports, known as ‘Supported Independent Living (SIL)’ is not subject to price caps of any kind.

### **Paragraph [631]**

19. Paragraph [631] is inaccurate in its characterisation of self-managed compared with agency managed NDIS plans.
20. We outline the categories of plans below. The statistics are taken from the NDIA Quarterly Report.<sup>5</sup>
21. At the plan approval stage, participants can opt to manage their funding in three different ways (or a combination of each)

### **Agency-Managed Funding**

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<sup>4</sup> Ibid, 45.

<sup>5</sup> Ibid, 85.



22. The first option is to have an agency-managed plan. This means that the National Disability Insurance Agency (NDIA) pays disability service providers on behalf of participants. NDIS participants who select this option can only purchase NDIS-funded services from service providers who are registered with the NDIA. As at 31 March 2019, 47% of NDIS participants had agency-managed funding.

### *Plan-Managed Funding*

23. The second option is plan management, where the NDIA will fund a financial intermediary (a Plan Manager) who will pay providers for purchased supports and manage financial reporting. NDIS participants who use plan-managed funding can use both registered and unregistered providers. As at 31 March 2019, 27% of Victorian NDIS participants had plan-managed funding.

### *Self-Management*

24. The third option is self-managed funding, where the NDIA provides funds directly to the NDIS participant who is responsible for managing their own plan. Self-managing NDIS participants can use registered or unregistered providers and directly employ their own staff (or engage them as independent contractors). As at 31 March 2019, 15% of NDIS participants were fully self-managing their funding, with another 11% partly self-managing. Self-managing participants are not subject to the price caps contained in the NDIA Price Guide.

25. Paragraph [631] refers to an example of a 'service agreement'. Service Agreements are contracts between an NDIS service provider and an NDIS participant. Certain rules are imposed, which are articulated by the NDIA's Terms of Business and Price Guide.<sup>6</sup> It's important to state that providers will generally set the terms of a service agreement. The provisions in the example of a service agreement listed in dot points under paragraph [631], particularly around the participant informing the provider about certain changes, are not standard across the sector.

### **Paragraph [632]**

26. The second sentence of paragraph [632] states:

*The full implementation rollout began in July 2016, but it is not expected to be completed until 2019.*

27. This statement is out of date. The rollout targets have not been met and it can be expected that rollout will continue well into 2020.

28. The data in paragraph [632] is generally out of date. According to the NDIA Quarterly Report, as at 31 March 2019:

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<sup>6</sup> 'Terms of Business for Registered Providers'

[https://providertoolkit.ndis.gov.au/sites/g/files/net3066/f/ndis\\_terms\\_of\\_business.pdf](https://providertoolkit.ndis.gov.au/sites/g/files/net3066/f/ndis_terms_of_business.pdf)



- (i) There were 277,155 NDIS participants. Of these 85,489 were receiving support for the first time.<sup>7</sup>
- (ii) The total number of registered providers was 20,208. Of this 57% (11,418) were “active” on 31 March 2019. “Active” means that they had claimed a payment from the NDIA for delivering a service. Of the total number of providers, 45% are individual/sole traders.<sup>8</sup>

29. The ‘*data collected and benchmarked by NDS*’ referred to in paragraph [633] will have changed since 2017. Moreover, the data appears to refer to the NDS ‘Workforce Wizard’ data. This data is collected through self-reporting of NDS members. It is therefore not rigorous or accurate in the same way as ABS data, for example, would be.

**Health Services Union**  
**17 May 2019**

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<sup>7</sup> National Disability Insurance Agency (NDIA), *COAG Disability Reform Council Quarterly Report* (31 March 2019), 18.

<sup>8</sup> *Ibid*,43.

