



## **Response to Productivity Commission Review of the Workplace Relations Framework 2015**

National Disability Services (NDS), as the peak organisation for non-government disability providers, would like to bring the major reshaping of disability work currently underway in Australia to the attention of the Productivity Commission.

### **1. Context – the NDIS is radically reshaping the disability sector**

The National Disability Insurance Scheme (NDIS) trial and (from July 2016) full roll-out involve replacing block and program funding with individual funding for people with significant and permanent disability. Its implications include more say for service users, greater industry competition and an increase in market share by for-profit organisations. Many organisations are restructuring the services they offer to respond better to the preferences and needs of service users and to align with the new NDIS pricing structure, which is often tighter than previous program funding.

Work organisation trends in the NDIS trial sites so far include:

- the lengthening and increased variability of operating hours
- a shift from centre-based to home and community-based services
- less predictability in the volume and type of services clients require, making planning more difficult.

The 2014 NDS Business Confidence Survey found that while most disability organisation are preparing to grow, almost all (93 percent) recognise that they need to improve productivity and many are relying on fundraising reserves and asset sales to remain financially viable. It also found that among organisations not already engaged in service alliances, mergers or acquisition processes, one quarter were planning to become involved in such processes in the coming six months.

### **2. How workplace regulation affects disability employers, workers and customers**

Workplace regulation and the workplace relations framework are important constraints on the way disability services are configured. It is important to recognise that workplace regulation affects not only employers and workers but also the *users* of disability services – people with disability and their families. As noted above, greater user choice and control is a key goal of the NDIS and is enshrined in individual client plans. But in reality, choice will be enabled or alternatively limited by the availability, quality and flexibility of services.

The NDIS trial sites have operated for nearly 20 months and as a result of this experience many service users and service providers believe the workplace relations framework should be modified to respond to the new operating context of the sector. In particular, they feel that greater flexibility is needed to meet the demands of individualised funding and an expanding, more diverse service user population.

However, both users and providers are aware that workplace regulation also has a role in helping to maintain a level playing field between services. Many believe that eroding the working conditions of front line workers in our sector would make it harder to attract and retain high quality staff.

The retention or loss of talented workers directly affects continuity in the support that services can provide for people with disability, and therefore client satisfaction and loyalty.

High turnover of staff because of poor pay, casualisation or unattractive working conditions can therefore be costly to employers and is often disliked by people with disability, with instances of clients shifting to another provider that pays its workers better. One NDS member who contributed to this submission noted:

We do not support the deregulation of workplace relations which would allow some employers to force their employees on lower rates of pay and unfairly compete in the market place. This would be of major concern to us in an NDIS environment and would also completely undermine the success of equal pay orders recently achieved in the industry.

NDS also recognises that reducing pay and conditions for workers who are already among the country's lowest paid may make it more difficult to fill unattractive shifts especially in regional and remote areas.

In the new context it is essential to create fair but flexible work options that meet the needs of employers, service users and workers alike. Our overall position is that to support the parties in achieving this delicate balance the workplace relations framework needs to emphasise collaborative, non-adversarial processes and help the parties develop and extend collaborative relationships where diverse interests can be worked through.

NDS feels that although the number of industrial disputes is low, Australian workplace relations does not have a sufficiently collaborative solution-oriented culture at present. Our submission is that to the extent possible, the Commission should recommend changes to achieve this goal.

### **3. NDS Issues for the review of the Workplace Relations Framework**

#### **Enterprise bargaining**

NDS supports enterprise bargaining as the basis for determining wages and conditions in a way that suits employers, workers and service users. Disability services make considerable use of both individual and multi-employer enterprise bargaining although the number of agreements varies considerably across Australia.

Our proposals are directed towards making the enterprise bargaining framework work better for all parties.

A major transition issue for many services is that while the NDIS pricing structure is based on minimum award rates under low-level award classifications, many services have in place enterprise agreements which either incorporate above-award wages or enshrine higher-level award classifications for the majority of workers.

This creates a barrier to renewed enterprise bargaining and, where the parties are not able to work collaboratively on a suitable transition plan, has the potential to create considerable conflict and in the worst case scenario lead to insolvency. This occurred in December 2014 when the Tasmanian service, Liviende Inc. entered voluntary administration after the Fair Work Commission rejected its appeal against an earlier decision pertaining to classification of its workers.

An NDS member described the dilemma in the following way:

We need to recognise that EBAs struck [in earlier periods] were designed to meet the needs of the sector as it existed and operated at that time. Disability Support work was arranged and remunerated against a traditional set of beliefs that saw work between 9am and 5pm as 'normal' and early starts, late finishes, overnight work, weekend work as 'abnormal' and therefore worthy of extra payment. Since then the disability sector has fundamentally changed, and those EBAs from [earlier years] are now significantly out of step with the norms that will prevail under the NDIS. The difficulty exists that Unions negotiating new EBAs will be loathe to relinquish the inflexible penalty rate and shift arrangements that they negotiated in the past. The likely result being that larger employers will remain saddled with the elements that are limiting future competition and competitiveness.

## **Proposals**

NDS argues for some additional flexibilities during the bargaining process to address these issues. Comments below relate to the Better Off Overall Test (BOOT) and to the duration of agreements.

- **We support the proposal to make it clear that non-monetary items** (such as more flexibility for the employee about when or where they work, or additional leave) can be considered as part of the BOOT in a way that such flexibility could be traded off against remuneration. It should be noted that in the disability industry employers have very little capacity to offer additional remuneration given the financial constraints referred to above.
- **We would like to see greater use of S 189** which allows the FWC to approve an enterprise agreement that does not pass the BOOT where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement.
- **To encourage greater use of S 189, the wording of the clause** may need to be changed, in particular making reference to the interest of the service user. NDS would also like to see added onus on the FWC to help the parties reach agreement on a constructive solution.

- **Duration of agreements should be limited to two years** after which time, unless constructive bargaining occurs within a specified time, conditions revert to the award.
- **Rules about EBA applicability to greenfields sites should** provide employers more flexibility in applying EBAs to post-merger organisations. Currently, employers contemplating mergers and acquisitions are discouraged from doing so based on the encumbrances and high costs that may be associated with the automatic application of existing EBAs to merged/acquired entities. Genuine transmission of business between unrelated entities could perhaps trigger re-bargaining or default to the Modern Award (as alluded to in the above point).
- **More flexibility around greenfields agreements which currently require union agreement, which can limit new service/market development.** This means that employers establishing new enterprises are discouraged from doing so based on the uncertainty around labour costs/conditions. Under the prevailing conditions, providers find it more favourable to acquire smaller players with more flexible EBAs (with the perverse outcome that providers seeking to innovate need to acquire their competition rather than being able to promote competition by adding a new and innovate player to the sector).
- **Is there a way to get earlier advice about meeting the BOOT prior to lodging with the FWC?** NDS asks the Commission to consider how the FWC could facilitate consideration of any BOOT issues outside of the adversarial process.

In response to other issues canvassed in Issues Paper 3, NDS notes as follows:

### **Requirement to consider productivity measures**

We support any additional features that can encourage consideration of productivity-related measures and in particular encourage the parties to give genuine, non-adversarial consideration to innovations that could be of mutual benefit to service providers, workers and people with disability.

As noted earlier we feel that there could be more done by the FWC to promote good faith bargaining conducted in a collaborative solution-focused manner. In this respect, we note the function of the FWC under S 576 (2) (aa) in:

‘promoting cooperative and productive workplace relations and preventing disputes.’

This clause has been used very effectively to promote discussions between the NDS and other parties prior to the modern award review and we believe it could be used more frequently by the FWC.

### **Independent Contractors**

NDS would like to address the Commission’s questions in Paper 5 regarding the WR system as it applies to independent contractors. Our position in summary is that

greater choice and control for people with disability and their direct employees should not be at the expense of minimum employment standards.

Our position is that both people with disability, and existing and potential contractors need active advice about their rights and entitlements under different forms of engagement.

Consultation with people with disability in the NDIS trial sites conducted by NDS last year identified the scope for developing more innovative solutions that provide them with a greater say over workforce.

This is one reason people with disability (known as 'participants') are opting for direct employment of support workers, an approach strongly encouraged by the NDIA. However the consultation also revealed mixed understandings among both participants and directly employed workers about the rights and responsibilities of each party. NDS believes there is a risk of underpayment and confusion about liability in cases of industrial accident or injury.

Given this context NDS would like to see greater provision of advice and support as this form of employment becomes more prevalent. This should go beyond the passive provision of web-based information, and referrals to private lawyers.

NDS would like to see active forms of information, education and support being provided as this segment of the market grows, so as avoid major legal difficulties occurring in the future. NDS's National Disability Practitioners association and disability advocacy groups both offer opportunities to offer active information and support around the rights and responsibilities associated with independent contracting.

### **Skill-based classification structures**

NDS will be arguing through the award review process for classifications that are based on competencies in recognition that, especially under the NDIS, it is important for services to accurately match the skills of the worker with the needs of the person with disability, so as to offer the most efficient and effective service possible.

The general point for the Commission lies in the FWC's role in guiding award review processes and the principles guiding them. NDS feels that the Commission needs to take a more proactive role in guiding the parties in relation to Part 2-3 Subdivision B Section 39 'skill-based classifications'.

NDS is of the view that awards should be clear and transparent documents for both workers and employers alike. In the case of the modern award classifications, NDS believes there is scope for better specification of the types of work and the skills required to do them in the award in order to assist all parties to agree on the applicable classifications for the job in question.

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**National Disability Services** is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes more 1000 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.