



Response to Productivity Commission Draft Report - Review of the Workplace Relations Framework 2015

National Disability Services (NDS) is the peak organisation for non-government disability services. Our comments on the **Draft Report on the Workplace Relations Framework** are made in the context of a rapidly changing sector as a result of the NDIS which is currently in a trial phase and will be implemented nationally from July 2016.

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 choices and greater say for consumers and increased industry competition including by for-profit organisations. Many organisations are restructuring the services they offer to respond better to the preferences and needs of consumers and to align with the new NDIS pricing structure, which is often tighter than previous program funding.

Emerging trends in work organisation in the sites where the NDIS has been trialled so far include:

- the lengthening and increased variability of operating hours
- a shift from centre-based to home and community-based services
- fragmentation of demand in terms of the volume and type of services consumers are seeking, making planning more difficult.

For these reasons, disability services now need to operate in a more flexible and responsive fashion than in the past, adjusting to increased demand and new service patterns in an iterative manner.

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.

In the disability sector, workplace relations increasingly involves a three-way balance between the interests of employers, workers and consumers (people with disability).

2. General comments

As noted in our submission on the Issues Papers, there are many points of common interest between the parties in disability sector when it comes to wages, working conditions and fairness in employee relations.

However, NDS feels that Australian workplace relations does not have a sufficiently collaborative, solution-oriented culture at present. We are not convinced that the changes recommended currently by the Commission go far enough in creating this cultural change.

Our overall position as stated then was that the workplace relations framework needs to emphasise non-adversarial processes and help the parties develop and extend collaborative relationships where any divergent interests can be worked through. Below we note opportunities where additional measures of this type could be taken.

We also remind the Commission of the importance of recognising that affected parties in workplace relations matters are not just workers and employers, but include consumers. This is an aspect of workplace relations that has received increased attention in recent years but has yet to be reflected in institutional practices. In our sector under the NDIS, as in other areas of social care, the consumer is at the centre of decision-making and the workplace relations implications of this need to be understood and worked through.

3. Specific comments

Comments below relate to:

- the duration of workplace agreements
- the Better Off Overall Test
- greenfields agreements and s 189
- transfer of business arrangements
- productivity measures
- independent contractors and sham contracting
- junior wage rates

3.1 Duration of enterprise agreements

We note that the Commission has recommended the allowable length of agreements be increased from four to five years (15.3).

DRAFT RECOMMENDATION 15.3

The Australian Government should amend s. 186(5) of the *Fair Work Act 2009* (Cth) to allow an enterprise agreement to specify a nominal expiry date that:

- can be up to five years after the day on which the Fair Work Commission approves the agreement, or
- matches the life of a greenfields project. The resulting enterprise agreement could exceed five years, but where so, the business would have to satisfy the Fair Work Commission that the longer period was justified.

NDS in its submission to the Issues Papers argued for a shortening (not lengthening) of the duration of agreements to two years. This is because in a restructuring industry where the economic context is rapidly changing, conditions negotiated in one era can easily become a barrier to reform in another. We note the Commission's opinion that the Toyota decision has emptied the 'no extra claims' clause in agreements of effect, leaving employers freer to approach employees with variations during the life of an agreement. **However it can be difficult to convince all parties of the need to renegotiate agreements and the industry favours a shorter maximum duration.**

3.2 Replace the Better Off Overall Test (BOOT) with a no disadvantage test

We welcome the Commission's recommendation 15.4.

DRAFT RECOMMENDATION 15.4

The application of the better off overall test (BOOT) is creating uncertainty during the bargaining process and at the agreement approval stage.

The BOOT should be replaced by a no-disadvantage test, and the FWC should issue guidelines to its members on how to apply the test in order to reduce the gap between legislative intent and practice.

NDS supports this change as it is based on the objective of providing greater flexibility to organisations during bargaining.

NDS further notes that the proposed FWC guidelines on how to apply the test need 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 new test in a way that such flexibility could be traded off against remuneration.

Further, NDS suggested previously and now reiterates that as part of promoting a non-adversarial approach, the FWC should provide earlier advice about meeting the test prior to lodging. NDS asks the Commission to consider how the FWC could facilitate consideration of no disadvantage issues outside of the adversarial process.

We also note that the Commission has chosen not to recommend change to s 189 relating to exceptional circumstances when, on public interest grounds, the FWC may approve an agreement that does not pass the test; for example, for a business experiencing a short term crisis (s. 189).

NDS recommends that to encourage greater use of s 189, the wording of the clause should be changed, in particular making reference to the interest of consumers. NDS would also like to see added onus on the FWC to help the parties reach a constructive solution.

3.3 Bargaining in greenfields sites

We welcome the Commission's recommendation 15.7 and the options it affords employers to overcome union opposition to bargaining when new entities.

DRAFT RECOMMENDATION 15.7

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may:

- continue negotiating with the union
- request that the Fair Work Commission undertake 'last offer' arbitration of an outcome by choosing between the last offers made by the employer and the union
- submit the employer's proposed greenfields arrangement for approval with a 12 month nominal expiry date.

Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the proposed no-disadvantage test.

3.4 Transfer of business and transfer between state and national systems

The transfer of business from state government institutions to the not-for-profit sector is a matter of current pressing concern for the disability sector. The transition to the NDIS is being accompanied in several states by the outsourcing of some or all government institutions and facilities to non-government services.

As the potential new employing bodies, our members are often keen to re-employ the original workers with as little disruption to consumers as possible. They note that one of the main worries for consumers is that the staff they have been happy with for many years will, following the change in ownership, no longer be available to provide support to them. However, they cannot match or replicate the wage levels or types of conditions that have historically been available to state government workers.

We welcome the Commission's treatment of these matters in the draft report, and its recognition that maintaining the wages and conditions of employees as they move from one sector to another undermines the very intent of the reforms.

We support the Commission's proposed solution to this issue as per Draft Recommendation 22.1.

DRAFT RECOMMENDATION 22.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that an employee's terms and conditions of employment would not transfer to their new employment when the change was at his or her own instigation.

However, we believe that possibly further clarity is needed in defining the meaning of the phrase 'at his or her own instigation'.

Additional guidance in the Act or in regulations to ensure clarity for all parties would be welcome.

3.5 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 previously, 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 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.

3.6 Independent contractors and sham contracting

NDS notes the Commission’s discussion of the workplace relations system as it applies to independent contractors, and in particular the problem of sham contracting.

As noted on p. 722, ‘sham contracting is the practice of misclassifying employees as independent contractors. It can occur with the worker’s consent or through misrepresentation or coercion’.

NDS submitted in its original submission that this could be a new and growing problem in our industry as the NDIS creates a more competitive market for disability services. Our concern is that greater choice and control for people with disability should not entail increased legal risk for them, and/or unfair wages and working conditions for their workers.

Risks associated with individual contracting in disability

We are aware already of a number of businesses whose business model is to undercut minimum employment standards. A number of web-based intermediaries have emerged in disability, with service offers that remove the principal obstacles to NDIS participant self-management but which come with additional risks for workers.

While some treat support workers who profile themselves on these platforms as employees, others treat them as independent contractors although the support worker will be working under the direct control of the person with disability.

Consumers and workers connect, establish compatibility, negotiate terms and establish agreements directly through a web platform.

The incentive for consumers is that the lower price paid per hour allows them to extend their NDIS budget to purchase a greater quantity and diversity of supports. The risk is the possibility of prosecution in the event of a successful claim against them by a worker for sham contracting.

NDS believes that for workers there is a risk of underpayment, superannuation avoidance and confusion about liability in cases of industrial accident or injury.

For the community the risk is avoidance of taxation.

Although the Commission has not presented a draft recommendation, its suggested reform on p. 728-9 and elsewhere would operate through increasing the risk of prosecution so as to encourage good practice.

The requirement that an employer must have been 'reckless' for them to be prosecuted for misrepresenting the nature of an employment contract appears to be a high hurdle for legal action.

Changing from a test of 'recklessness' to a test of 'reasonableness' would help discourage sham contracting, including through the regulators' out-of-court actions. Unless presented with contrary evidence, the Commission sees merit in replacing the 'recklessness' test with a 'reasonableness' test.'

While this is supported, NDS proposes that a further recommendation regarding active monitoring, information and education is necessary.

NDS's intelligence is that there is a range of understanding among both participants and directly employed workers about the rights and responsibilities of each party. 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. Periodic monitoring by the Fair Work Commission where there is evidence of possible sham contracting but no actual complaints would also be welcome.

3.7 Junior wage rates

A final matter we would like to comment on is junior rates of pay for young people up to 21 years. Currently the disability sector has workforce heavily weighted to the older age groups, and in particular people over 45 years of age. It is vital that the sector diversify its workforce in coming years by attracting more young people as well as more men and people from non-Anglophone cultural backgrounds.

For this reason, NDS supports the suggested direction in the Commission's report for a review that includes an assessment of the appropriate structure of junior and adult training wages, as well as government incentives.

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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 1,000 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.