

## Modern Award Review: NDS update September 2016

### In brief

The Social, Community, Home Care and Disability Services Industry (SCHADS) award is being reviewed as part of the four yearly Review of Modern Awards by the Fair Work Commission.

The Fair Work Commission will consider all proposals from the perspective of whether they provide workplace relations rules that are fair to working Australians as well as being flexible for businesses and promoting productivity.

NDS and Jobs Australia have been working together to present evidence that informs the Fair Work Commission (FWC) of the reality of the NDIS operating environment.

This update provides members with information about issues and progress which may help inform their own decisions about workforce management and workplace bargaining, discussed at the end of the update.

### Detail

In 2014 the FWC began the process of reviewing Australia's 122 modern awards. To manage the large volume of work, it distinguished those issues that are common across industries ('common issues') from those specific to individual awards. In the former group of nine issues those of most interest to our industry are provisions for casual and part-time work, and in particular the ACTU's claim for a four-hour period of minimum engagement for part-time and casual workers.

Award specific issues are broader and cover some 50 issues such as rules on rostering, broken and sleepover shifts, classifications, loadings and rostering.

Each set of matters is discussed in more detail below.

### Common issues matters

In February 2016 NDS and Jobs Australia made a [combined submission](#) addressing how the NDIS affects part-time and casual work arrangements. It specifically addresses:

1. the ACTU claim for a 4 hour minimum engagement period for part-time and casual workers
2. employer proposals to vary clause 10.3(c) regarding part-time hours of work.

Workforce data provided by members was used to make the argument that providers need additional workforce flexibility to operate under the NDIS, but that this flexibility will also make it possible to balance workers' needs for job security and a living wage with providing greater choice and control for people with disability.

In April 2016, NDS and Jobs Australia made a [further submission](#) in which, while reiterating arguments relevant to the common issues of casual and part-time work, we provided additional detail on the NDIS. This evidence can be relied on in all aspects of the modern award review.

### Current situation – casual employment

Currently in the SCHADS award there is no minimum engagement period for part-time workers and a two-hour minimum engagement period for casual workers. Across other awards, a 2-3 hour minimum is the norm.

Jobs Australia and NDS have argued that increasing the minimum to 4 hours (for both part-time and casuals) is inconsistent with business efficiency, given that under the NDIS service requests are reducing in duration on average.

David Carey, CEO Connectability (Hunter) presenting evidence for NDS/Jobs Australia observed:

..... 28 per cent of our shifts are now four hours or less. Prior to NDIS, under state funding and agreements, 95 per cent of participants received 4-6 hours of support per day. Hours worked were typically 9am to 3pm. Only 5 per cent of participants received less than 4 hours support at any one time.

Dr Jennifer Fitzgerald, CEO Scope (Victoria) [similarly observed](#) that during the NDIS trial Scope experienced a significant increase in the proportion of requests from clients involving shifts of fewer than 4 hours. She stated: 'As plans get more individualised this trend will increase'.

In the Barwon region, Scope's shifts of less than 4 hours in duration grew from 31 per cent in FY14 to 57 per cent in FY16. Shifts of less than two hours increased from 20 per cent to 30 per cent of all in-home and in-community shifts in the same period.

Other submissions addressed similar issues, for example that of the [St Ives group](#), an aged services provider which noted that just 5 per cent of their home care workers worked shifts of 4 hours in length.

### Current situation – part time work (Clause 10.3(c))

While most of the common issues apply to many industries, Clause 10.3(c) is specific to our industry. Nevertheless it relates to part-time employment and will be subject to any principles established as part of the common issues process.

The current part-time work clause (inserted in 2012) states:

*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.*

NDS and Jobs Australia want to see the clause rewritten in such a way that:

- actual working hours are set out in rosters, not in the contract of employment
- the clause provides reasonable predictability, not necessarily completely unchanging hours of work arrangements
- it is read in conjunction with other provisions regarding changes by mutual agreement, requiring additional hours to be worked and roster changes
- it allows for flexibility in start and finish times where client choice and control requires changes to rostering
- it reflects common practice.

### What are the contested issues?

The unions' concern, aired recently in the media, is that changing this clause will allow employers to start using 'zero hours contracts' whereby employers engage part-time workers without specifying core hours and then 'flex up' as needed. The allegation here is that workers are in fact casuals, but are being engaged and paid as part-time workers.

They also reject arguments that the NDIS is generating major change in the way people schedule their care and consequently in the spread and patterns of working hours. They allege that stability is more common than employers accept and that only parts of the industry will see significant change resulting from the NDIS.

NDS and Jobs Australia have instead been arguing that currently this clause creates a perverse incentive to casualise because providers are unable to meet its unnecessarily rigid requirements.

Employer groups have explicitly ruled out zero-hours contracts and have proposed a [draft determination](#) where, as now, employers and workers must agree in writing the minimum hours to be worked each work. However, it is proposed, times and days **may** be regulated via the roster rather than the contract of employment.

### Progress to date

The Part-time and Casual Full Bench of the FWC held hearings in mid-July and mid-August. Employer representatives were Jobs Australia, Australian Business Industrial (ABI) and the NSW Business Chamber, the so-named Aged Care Employers (ACSA and LASA), the St Ives Group and the Australian Federation of Employers and Industries.

Dr Ken Baker, CE of NDS gave evidence in mid-July 2016 along with several NDS members. Dr Baker's transcript of cross-examination is available [here](#).

### **SCHADS Award specific matters**

[Over fifty individual variations](#) have been listed by the FWC in relation to this award<sup>1</sup>. NDS member objectives include:

- Classifications that give indicative responsibilities and include more examples from disability work and which are written in disability-relevant language, including distinguishing 'complex service delivery'
- Less reliance on qualifications and more on job functions in the classifications
- Some alignment between the Workforce Capability Framework and the award classifications.
- A mixed functions provision which allows for different rates of pay reflecting different duties at different times, and/or a modification of the higher duties clause to allow for higher duties before the current prescribed five days
- Explicit recognition that mutually agreed forms of flexible working arrangements are possible in addition to the three patterns currently listed in the Award, including flexitime and make-up time, arrangements such as six shifts in a seven day week and etc.
- A longer time-frame for the averaging of hours beyond the current four-week period. This would assist in managing around client cancellations.
- Mutual agreement to roster changes with less than 7 days notice
- 12 hour shifts by mutual agreement
- Reduction of the 8 hour break between shifts tied to a sleepover to enable longer adjacent shifts and full time work to be offered to people with sleepover shifts; alternatively, treating sleepovers as breaks between shifts
- More flexibility in managing broken shifts
- A client cancellation provision similar to that pertaining to Home Care workers to be extended to disability support work with relevant timing for the notice period and the make-up period.
- The extension of 24 hour care provisions to cover disability as more disability work is becoming analogous to home care work.
- Recall to the workplace clause to be varied to distinguish recall in order to respond to a phone call (whether to provide service delivery or deal with administrative matters), with a reduced minimum overtime payment where there is no need to travel to and from a workplace
- Clarity that progression between pay points is based on FTE service (1,976 hours).

### Progress to date

Conciliation conferences commenced on 3 June 2016 and will continue until early 2017. Jobs Australia attends with the other employer parties (not NDS). The various claims have been clustered into a smaller number of groups (eg 'hours of work', 'classifications') to facilitate ease of discussion. Some priorities have been established.

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<sup>1</sup> Scroll down the linked document to see variations pertaining to the SCHADS award.

Some matters will be conciliated; those that are not will be dealt with at Full Bench hearings starting in February 2017. At this time NDS may invite members to provide further evidence on some award issues.

The FWC has agreed that evidence about the operation of the NDIS and its implications for employers which has been presented at the July/August 2016 common issues hearings can be subsequently drawn on for the SCHADS award-specific aspects of the award review.

Many of the clauses flagged by employer representatives have also been flagged by unions. The unions are seeking additional leave and rates for excursions, removal of the 24 hour care clause for home care workers among other things.

## **Other workplace relations matters**

### **‘Cooperative Workplace Relations’ discussions**

During late 2015 and early 2016 NDS held a series of meetings with unions, attended also by Jobs Australia. These were convened by the Fair Work Commission under its power relating to ‘Promoting cooperative and productive workplace relations and preventing disputes.’

The aim was an exchange of views and mutual understanding regarding the changes required to operate successfully under the NDIS. These were ‘blue skies’ discussion intended to canvass potential new work arrangements, not limited to those that relate to award review matters.

Deputy-President Anna Booth convened these discussions and is also presiding over the award-specific conferences and hearings of the modern award review (see above).

### **National wage indexation – applying from July 1 2016**

In accordance with the decision of the Annual Wage Review 2015–16, determinations adjusting wages in all modern awards come into operation from 1 July 2016. They provide for a 2.4 per cent increase for most employees.

New rates for the SCHADS award can be found at the FWC’s [annual wage review page](#) or from your industrial service.

### **Annual leave amendments – applying from July 29 2016**

Changes to annual leave in Modern Awards came into effect on 29 July 2016 as a result of the common matters review. Provisions were inserted into the SCHADS award concerning:

- annual leave in advance
- managing and directing employees to take excessive annual leave
- cashing out of annual leave
- payment for annual leave.

New rates for the SCHADS award can be found at the FWC's [annual wage review page](#) or from your industrial service.

### **Enterprise bargaining or not?**

The length of time involved in the Modern Award Review means that many providers are considering undertaking workplace bargaining themselves rather than wait for its conclusions. In Victoria a group of employers has formally commenced workplace bargaining, resourced in part by NDS, in order to address conditions in recent agreements that are difficult to uphold under the NDIS.

Workplace bargaining may be an option in situations where agreements that are expiring or have expired contain conditions the provider considers to be positive, as these may otherwise be lost. However, they can also take some time to work through.

Workplace agreement conditions not consistent with the award as it changes (for example, once the award review has completed) can still be retained, unlike wage rates which must be updated in line with national wage cases.