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Dear Mr ~~Turner~~ *Steve*

**Re Home Care Service Transfer**

Thank you for your letter of 1 May 2015 regarding arrangements for transfer of Home Care Service employees to the non-government sector. I apologise for the delay in providing you with a response.

I am writing to inform you that, in the absence of agreement between the Government and the PSA on entitlements and arrangements for Home Care Service employees in the PSA area of coverage, these matters have now been determined by Government.

The Government has determined that the entitlements and arrangements to apply to transferring Home Care Service employees in the PSA area of coverage will be those agreed to by United Voice in December 2014. These entitlements and arrangements are outlined in **Attachment 1** to this letter.

In regard to the other matters you raise in your letter:

1. The Government has determined that Home Care Service employees will be transferred by Ministerial order. Consent will not be required;
2. The Government has determined that a legal mechanism such as a Deed will not be utilised in relation to the Home Care Service transfer. As has been the practice in previous transactions, relevant employee entitlements and arrangements for which the new operator would be responsible will be included in the sale contracts.

In addition, the contract with the new operator will include a requirement that each transferring employee must receive individual, written confirmation of the terms and conditions that will apply in their employment following transfer, including the relevant terms of the *NDIS (NSW Enabling) Act* and **Attachment 1: Transfer Arrangements for NSW Home Care Service** (the Employee Commitments).

When the contract is finalised, I will write to you again confirming its content as to the Employee Commitments and the requirements of the new operator.

A template form of the letter referred to above will be developed by the Government in consultation with the new provider. The Government will make arrangements with the

new provider regarding consultation with the PSA regarding the letter prior to it being issued to employees.

The letter will address the following employee entitlements and arrangements detailed in **Attachment 1** which are relevant to the new operator:

- Item 1: Employment Guarantee
- Item 3: Application of State Awards Post Transfer
- Item 5: Superannuation
- Item 8: Continuity of service
- Item 10: Accrued Leave (noting that some of the points such as cashing out leave in excess of 20 days are to be implemented by government at the point of transfer).

Other matters addressed in **Attachment 1: Transfer Arrangements for NSW Home Care Service** are for Government implementation prior to or at transfer. These include:

- Item 2: Transfer Payment
- Item 4: Conscientious Objection Principle: The identity of the new provider is integral.
- Item 6: Regularisation of Long Term Temporary Employees
- Item 7: Recognition of Prior Learning
- Item 9: Certification of Service History and Accrued Leave
- Item 13: Long Term Secondments and Higher Duties Allowance
- Item 14: Employment Termination Payment (ETP) Status of Transfer Payment
- Item 15: The Transfer Process

3. As per **Attachment 1**, a transfer payment of up to eight (8) weeks' base rate of pay, based on completed years of service, will be paid by the Government to all ongoing HCS employees who transfer to the new operator;
4. As you would be aware, the *NDIS (NSW Enabling) Act 2013* provides, at s14(4), that employment of a transferred employee with the new non-government employer is to be on the same terms and conditions as applied under an industrial instrument to the employee before transfer.

Further, s14(5)(a) requires that, if transferring employees are provided with an employment guarantee, the terms and conditions of employment under an industrial instrument cannot be varied within the employment guarantee period except by agreement entered into by or on behalf of the transferred employee in accordance with applicable industrial law. As per **Attachment 1**, ongoing employees who transfer to the new operator will have a two (2) year employment guarantee so current terms and conditions will continue to apply to them for that period and to apply to casual and temporary staff transferring for up to six (6) months.

Under Part 6.3A of the *Fair Work Act 2009*, the existing industrial instruments covering Home Care Service employees will also become Copied State Instruments and be preserved for up to five years.

The PSA made reference, in last year's negotiations, to some additional conditions which it claimed were enjoyed by Home Care Service employees under PSA coverage, but I note that your organisation has to date provided no evidence to support this claim.

The PSA may wish to participate in a Working Group to be established by FACS which will address implementation issues for HCS employees within PSA coverage arising from the entitlements and arrangements outlined in **Attachment 1**.

Please contact John Bailey, Director Employee Relations, FACS, on 8879 9082 or email [john.bailey@facs.nsw.gov.au](mailto:john.bailey@facs.nsw.gov.au) if the PSA wishes to participate in this Working Group.

Yours sincerely



Vicki Telfer  
Executive Director  
**NSW Industrial Relations**

20/7/15

# Attachment 1: Transfer Arrangements for NSW Home Care Service

## 1. Employment Guarantee

- An employment guarantee period from the date of transfer for ongoing employees of 2 years in duration and a maximum of six months for temporary and casual employees to apply in accordance with Section 14(5) of the *NDIS (NSW Enabling) Act*.

## 2. Transfer Payment

- A transfer payment of up to eight weeks will apply based on completed years of service for ongoing staff; the term ongoing is as defined in the *Government Sector Employment Act*.
- The following table sets out the scale of transfer payment for completed years of service as at the transfer date:

Continuous years of service	Transfer payment schedule (weeks of base rate of pay)
Less than one year service	0 weeks
One year or more but less than two years	2 weeks
Two years or more but less than three years	3.50 weeks
Three years or more but less than four years	5 weeks
Four years or more but less than five years	6 weeks
Five years or more but less than six years	7 weeks
Six years or more	8 weeks

- The transfer payment for part time employees will be calculated based upon the average weekly hours worked in the 12 month period prior to the transfer date or contracted hours, whichever is the higher excluding any overtime worked.
- Periods of approved leave without pay (including parental leave) will not break continuity of service.
- Periods of leave without pay for total contracted hours will be excluded for the purpose of calculating the years of completed service. Periods of part-time leave without pay will not affect the calculation of years of service.

### **3. Application of State Awards Post Transfer**

- Awards applicable at the date immediately prior to the transfer continue to apply post transfer as copied state instruments under the provisions of the *Fair Work Act*.
- Current awards will be continued as Copied State Instruments for up to 5 years.
- Where a current award refers to or incorporates the terms of an external instrument or document, that term will be similarly protected as part of the copied state instrument.
- The parties agreed that unions would provide a list of conditions not specified in the applicable award, for further discussion with employer representatives. It was noted that some of these conditions may be covered in other entitlements such as the National Employment Standards.

### **4. Conscientious Objection Principle**

- The *NDIS (NSW Enabling) Act* provides for the transfer of staff from the government to the non-government sector under a Ministerial Order.
- NSW government contracts with reputable organisations with proper human resource practices and policy frameworks in force that comply with all relevant laws including laws against discrimination in the workplace.
- However if there are circumstances where an employee objects to transfer to a particular new employer because of genuine religious, cultural, or other head of discrimination or by reason of a sensitive personal or family history in relation to an organisation where there has been public recognition of institutional failing, FACS agrees to implement a process to review these circumstances.

### **5. Superannuation**

- The provisions in the *NDIS (NSW Enabling) Act* establish the broad government commitment to provide for superannuation arrangements of transferred employees to continue post transfer. Sections 15(1)(a) and (b) of the *NDIS Enabling Act* address superannuation entitlements where a transfer order has been made.
- Part 3 of the *NDIS (NSW Enabling) Act* permits continuing participation in defined benefit superannuation schemes for existing members.
- To give effect to the *NDIS (NSW Enabling) Act*, the government will make the necessary administrative arrangements, including naming the employer in the schedule, to allow employees to continue to contribute to their

defined benefit superannuation scheme.

- Employees moving to the non-government sector will become subject to federal law, any arrangements regarding superannuation will be subject to federal choice of superannuation laws.
- Employees who contribute to First State Super or a state government defined benefit superannuation scheme, may receive financial advice from the relevant fund. With a view to facilitating advice to employees, FACS will liaise with the relevant schemes to ensure that they are aware of the major changes impacting upon staff.

## **6. Regularisation of Long Term Temporary Employees**

- FACS commits to the regularisation of long term temporary employees in accordance with the Rules issued by the Public Service Commissioner.

## **7. Recognition of Prior Learning**

- FACS will implement a process for formalisation of employee qualifications through Home Care Branches utilising the Home Care Professional Development Framework.
- Recognition of prior learning beyond the above will be facilitated by FACS on a case by case basis.
- A process will be developed that will enable employees to raise issues in relation to the recognition of prior learning prior to the transfer. FACS undertakes to review any such issues.

## **8. Continuity of Service**

- The *NDIS (NSW Enabling) Act* provides for the non-government provider to recognise continuity of service for the purposes of calculating benefits that may not have accrued at the date of transfer.
- Recognised service with the old employer will count for service with the new employer.

## **9. Certification of Service History and Accrued Leave**

- An audit process will be applied to service records to ensure that leave balances are correct as at last day of service with FACS.
- The audit process will provide employees with the opportunity to review the service history prior to the transfer order taking effect. A process for employees to raise concerns about the service history will apply.

- The certificate to be provided to transferring employees will set out the service history and accrued annual, sick, family and community service leave or personal carers leave, long service leave and/or extended leave that are retained by the employee and transferred to the non-government provider, in line with s15(3) of the *NDIS (NSW Enabling) Act 2013*.

## **10. Accrued Leave**

- The *NDIS (NSW Enabling) Act* provides that an employee transferring to the non-government provider will retain any rights to annual leave, sick leave, long service leave or extended leave accrued prior to a transfer.
- Ongoing employees who are subject to a transfer order, may elect to cash out, where the law provides, annual leave in excess of 20 days and long service leave or extended leave balances accrued as at last day of service with FACS.
- All accrued annual leave and extended leave that is not cashed out, will be transferred to the new employer.
- Unless otherwise specified, the receiving employer is responsible for the management of all accrued leave entitlements that are transferred to them.
- Employees who choose to cash out their accrued annual leave, will be granted payment of a proportionate amount of annual leave loading for the current leave year. Where the accrued annual leave is not cashed out, annual leave loading will carry across to the new employer to the extent permitted under the *Fair Work Act*.
- Provisions of the *Long Service Leave Act 1955* continue to apply.

## **11. Review of Contracted Hours [Applicable only to United Voice ]**

- *FACS will undertake a review of contracted hours for each Care Worker in accordance with the Award provisions.*
- *The review will commence as soon as practicable and be completed no later than 8 weeks prior to the transfer date to allow Care Workers the opportunity to review and resolve any queries concerning contracted hours.*

## **12. Additional Hours and Work [Applicable only to United Voice ]**

- *Parties note clause 13 of the Care Worker Employees – Department of Family and Community Award contains provisions regarding distribution of hours. The parties agree to discuss how this provision is currently being put into effect.*

### **13. Long term secondments and HDA**

- The Employer representatives undertake to review long term secondments and HDA to assess whether or not there can be any arrangements made in regards to ongoing employment.

### **14. Employment Termination Payment (ETP) Status of Transfer Payment**

- The Government will seek a ruling from the Australian Taxation Office that the Transfer Payment will qualify as an ETP.

### **15. The Transfer Process**

- It has been agreed that a document will be provided to unions and communicated to employees about the next steps and timetable for the transfer/divestment process.