DECISION

Fair Work Act 2009
s.768BB - Application for an order about coverage for employee organisations under a state instrument

CPSU, the Community and Public Sector Union
(AG2017/4028)

COMMISSIONER JOHNS MELBOURNE, 8 MARCH 2018

S 768BB – Application for an order about coverage for employee organisations under a state instrument.

[1] This decision concerns an application made by the Community and Public Sector Union (**CPSU**) pursuant to s. 768BB of the Fair Work Act 2009 (**Act**).

[2] s. 768BB of the Act provides as follows:

> **FWC orders about coverage for employee organisations**
>
> (1) The FWC may make an order that:
>
> > (a) a copied State instrument for a transferring employee that would, or would be likely to, cover an employee organisation (the first employee organisation) in relation to the transferring employee because of subsection 768AN(2) does not, or will not, cover the organisation; and
> >
> > (b) another employee organisation (the second employee organisation) is, or will be, covered by the copied State instrument in relation to the employee.
>
> (2) When making an order under subsection (1), the FWC must consider whether the second employee organisation is a federal counterpart (within the meaning of section 9A of the Registered Organisations Act) of the first employee organisation.
>
> (3) The regulations may:
>
> > (a) prescribe circumstances in which the FWC may make an order for the purposes of subsection (1); and
> >
> > (b) otherwise make provision in relation to the making of the order.

(4) An order under subsection (1) must be made in accordance with any regulations that are made for the purposes of subsection (3).

[3] Regulation 6.03A of the Fair Work Regulations 2009 states as follows:

FWA orders about coverage for employee organisations

For paragraph 768BB(3)(a) of the Act, a circumstance in which FWA may make an order mentioned in subsection 768BB(1) of the Act is that the order is to be made:

(a) on FWA's own initiative; or

(b) on application to FWA by a transferring employee, or a person who is likely to be a transferring employee; or

(c) on application to FWA by the new employer, or a person who is likely to be the new employer; or

(d) on application to FWA by an employee organisation that is entitled to represent the industrial interests of an employee mentioned in paragraph (b).

Background to the application

[4] In 2013 the NSW Government passed the *National Disability Insurance Scheme (NSW Enabling) Act 2013* (NSW), allowing the Minister to transfer the employment of disability services employees to either employment of another public sector agency or a non-government sector employer.

[5] On and from 1 August 2017 almost 700 employees were transferred:

a) from that part of the Department of Family and Community Services (**FACS**) known as Aging Disability and Home Care (**ADHC**),

b) to Benevolent Australia Disability Services Limited (**BA-DS**) a company owned by The Benevolent Society (**TBS**) on 1 August 2017. The TBS is a non-government sector employer.

[6] Pursuant to Part 6-3A, Division 3 of the Act, upon this transfer, a number of state awards and agreements became copied state awards and copied state instruments.

[7] The relevant copied state instruments are as follows:

a) Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009

b) Crown Employees (Administrative and Clerical Officers - Salaries) Award 2007

c) Crown Employees (Public Sector - Salaries 2016) Award

d) Crown Employees (Psychologists) Award

(**Copied State Instruments**)

[8] The present application proposes that the Commission makes an Order that the CPSU is covered by the Copied State Instruments.

[9] Pursuant to Schedule 1A to the *Fair Work (Registered Organisations) Regulations 2009* the CPSU is the federal counterpart of the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (**PSA NSW**). The PSA NSW is the state registered employee organisation presently covered by the Copied State Instruments. However, it is not a registered organisation for the purposes of the *Fair Work (Registered Organisations) Act 2009*.

[10] On 13 September 2017, TBS indicated that it opposed the application.

[11] On 15 September 2017, the Health Services Union of Australia (**HSU**) made submissions to be an intervenor in the proceeding. However, on 30 November 2017, the HSU withdrew its objections to the application and played no further part in the proceedings.

[12] After a Mentions/Directions hearing on 10 October 2017, the matter was programmed and listed for hearing.

Hearing

[13] At the hearing on 15 December 2017:

a) Mr M Gibian of counsel appeared for the CPSU instructed by Ms A McRobert.

b) Mr T Dixon of counsel appeared for TBS instructed by Mr N Chadwick.

[14] Both parties were given permission to represented pursuant to section 596(2)(a) of the FW Act having regard to the complexity of the matter.

[15] The CPSU called the following witnesses:

a) Mr T Wright,[1] Assistant General Secretary of the PSA NSW and the Assistant Branch Secretary of the CPSU NSW; and

b) Ms K Cruden,[2] Industrial Manager of the FACS and Health Team as witnesses.

[16] In advance of the hearing the CPSU filed and served the following evidence:

a) Outline of Submissions for the CPSU dated 29 September 2017.[3]

b) Outline of Submissions for the CPSU in Reply dated 10 November 2017.[4]

c) Affidavit of Mr T Wright, dated 29 September 2017. [5]

d) Affidavit of Mr T Wright, dated 10 November 2017.[6]

e) Affidavit of Ms K Cruden, dated 10 November 2017.[7]

[17] During the Hearing, the CPSU tendered the following:

a) a proposed draft of the Order sought.[8]

b) copies of the Copied State Awards.[9]

c) an unsigned letter addressed to Ms J Toohey from Mr C Leech.[10]

[18] TBS called the following witnesses:

a) Ms J Toohey,[11] Chief Executive Officer of TBS; and

b) Ms W Pettifer,[12] Director of NDIS Transformation at TBS as witnesses.

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[1] PN41.
[2] PN243.
[3] Exhibit 3.
[4] Exhibit 4.
[5] Exhibit 5.
[6] Exhibit 6.
[7] Exhibit 7.
[8] Exhibit 1, PN31.
[9] Exhibit 8, PN306.
[10] Exhibit 9, PN411, PN527.
[11] PN313.

[19] In advance of the hearing TBS filed and served the following evidence:

a) Outline of Submissions for TBS, dated 27 October 2017.[13]

b) Affidavit and respective annexures of Ms J Toohey, dated 26 October 2017. [14]

c) Affidavit and respective annexures of Mr S Duvenhage, Director, Finance of TBS, dated 26 October 2017.[15]

d) Affidavit and respective annexures of Ms W Pettifer, dated 26 October 2017.[16]

[20] During the hearing, TBS tendered the following:

a) a letter from a Mr I Latham, Industrial officer for the ACOA enclosing the decision of M J Boland, Deputy Industrial Registrar,[17]

b) the decision of Williams SDP, 9 August 2001,[18]

c) decision of Lacy SDP, 24 January 2005,[19]

d) decision of Hamberger SDP, 22 April 2016,[20]

e) decision of Williams SDP, 10 August 2004,[21]

f) The *Implementation and Sale Agreement* between the State of NSW and TBS (on request from the Commissioner)[22] in respect of which a confidentiality Order was made restricting its use and production to the proceedings.[23]

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[12] PN920.

[13] Exhibit F.

[14] Exhibit G.

[15] Exhibit K.

[16] Exhibit I.

[17] Exhibit A, PN141.

[18] Exhibit B, Williams SDP, 9 August 2001, PR907546, PN147.

[19] Exhibit C, Lacy SDP, 24 January 2005, PR955207, PN152.

[20] Exhibit D, Hamberger SDP, 22 April 2016, PR577056, PN169.

[21] Exhibit E, Williams SDP, 10 August 2004, PR950621, PN188.

[22] Exhibit H, PN384.

[23] PN376, PR601027.

g) bundle of Documents.[24]

h) Amended Submissions.[25]

[21] In coming to this decision the Commission, as presently constituted, has had regard to all of the evidence, exhibits and submissions made by the parties.

Agreed Statement of facts

[22] The parties jointly filed an agreed statement of facts (**ASOF**) dated 4 December 2017 in the following terms:[26]

"Introduction

1. This Agreed Statement of Facts is made jointly by the Applicant, the Community and Public Sector Union ("CPSU") and the Respondent, The Benevolent Society ("TBS").

2. This matter is an application by the Community and Public Sector Union ("the CPSU") for coverage as an employee organisation under copied state instruments pursuant to section 768BB of the *Fair Work Act 2009* (Cth) ("the FW Act").

3. TBS is a not for profit organisation which provides services to children and families in need, the aged, and people with a disability since 1813.[27]

4. The CPSU is an industrial organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) ("the RO Act").[28]

5. The PSA is an industrial organisation of employees registered under Chapter 5 of the *Industrial Relations Act* 1996 (NSW)[29] and identified as an "Associated Body" under Rule 5(c)(i) of the Rules of the CPSU.[30]

Privatisation of State Disability Services

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[24] Exhibit J, PN953.

[25] Exhibit L, PN1230.

[26] Exhibit 1, PN11.
[27] Statement of Joanne Toohey (Exhibit G), para 4.
[28] Affidavit of Troy Wright dated 29 September 2017 (Exhibit 5), para 4.
[29] Affidavit of Troy Wright dated 29 September 2017 (Exhibit 5), para 3.
[30] Affidavit of Troy Wright dated 29 September 2017 (Exhibit 5), para 7 and Annexure A (p99).

6. In or around December 2012, the New South Wales Government and the Commonwealth Government signed a Heads of Agreement to facilitate the establishment of the National Disability Insurance Scheme ("the NDIS"). It was a condition of the Heads of Agreement that the full scheme in NSW would be implemented by 1 July, 2018.

7. In 2013, the New South Wales Parliament enacted the *National Disability Insurance Scheme (NSW Enabling) Act* 2013 (NSW) ("the Enabling Act"). The Enabling Act permits, in s14, the Minister to transfer, by order in writing, the employment of a disability services employee to the employment of an employer in the non-government sector.[31]

8. At that time, the New South Wales Government provided disability services through Aging, Disability and Home Care ("ADHC") which is part of the Department of Family and Community Services ("FACS"). Employees engaged in the provision of disability services within ADHC are covered by awards made by the Industrial Relations Commission of New South Wales.

9. The New South Wales Government invited expressions of interest for the operation of various services undertaken by ADHC. The tendering process for the provision of ADHC's Clinical Services commenced in or around April 2016. The Benevolent Society was announced as the successful tenderer on 2 March 2017.[32]

10. The Benevolent Society is a registered provider of disability services by the National Disability Insurance Agency ("the NDIA"). An organisation must be approved as a registered provider with the NDIA to provide disability services under the NDIS scheme.[33]

11. On 28 July 2017, approximately 688 allied health staff who provided disability support services transferred from by way of Ministerial Order pursuant to s 14 of the Enabling Act ("the transferring employees").[34]

12. The terms of the transfer of employment of staff of ADHC to BA-DS included that the transferring employees would have an employment guarantee period of two years, receive a transfer payment of up to 8 weeks' pay and the same terms and conditions of employment would be guaranteed for a period of two years during

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[31] Affidavit of Troy Wright dated 29 September 2017 (Exhibit 5), para 15.

[32] Affidavit of Troy Wright dated 29 September 2017 (Exhibit 5), para 16.

[33] Statement of Wendy Pettifer (Exhibit I), para 8 and Annexure B.

[34] Affidavit of Troy Wright dated 29 September 2017 (Exhibit 5), para 17; Statement of Wendy Pettifer, para 5 and Annexure A.

which The Benevolent Society will not seek to make a new enterprise agreement applying to transferring employees.[35]

13. The transferring employees are employed in the following occupations: Psychologist Occupational Therapist, Speech Pathologist, Behaviour Support Specialists, Nurse Consultants, Dietician, Physiotherapist, Case Manager, Manager Access, Senior Manager Access, Clinical Nurse, Senior Clinical Consultant, Therapy Assistant, System Support Staff and Administrative Assistant.[36]

14. Immediately prior to transfer of their employment from the New South Wales public service, a number of awards made by the Industrial Relations Commission of New South Wales under the *Industrial Relations Act* 1996 (NSW) applied to the transferring employees being the following awards:

    a) Crown Employees (Public Service Conditions of Employment) Reviewed Award;
    b) Crown Employees (Administrative and Clerical Officers') Award;
    c) Crown Employees (Public Sector – Salaries 2017) Award;
    d) Crown Employees (Psychologists) Award ("the State Awards").[37]

15. Existing employees of The Benevolent Society engaged in certain classifications are covered by an enterprise agreement known as *The Benevolent Society Enterprise Agreement 2016-2019* negotiated with the Australian Services Union, United Voice and the Independent Education Union.[38] That enterprise agreement does not apply to employees of Benevolent Australia Disability Services or allied health staff of TBS.

National Disability Insurance Scheme

16. The NDIS is a national scheme under which funding for disability services will shift from each State providing services for people with a disability to a national insurance scheme where the funding is provided by the Commonwealth Government to eligible individuals. The NDIS is governed by the *National Disability Insurance Scheme Act* 2013 (Cth) ("the NDIS Act") and rules made under that Act.

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[35] Affidavit of Kristine Cruden dated 10 November 2017 (Exhibit 7), para 12 and Annexure B.

[36] Affidavit of Troy Wright dated 29 September 2017 (Exhibit 5), para 18; Statement of Joanne Toohey (Exhibit G) at paras 17 to 19; Statement of Wendy Pettifer (Exhibit I), para 5; Statement of Dirk Duvenhage (Exhibit K) at para 7.

[37] Affidavit of Troy Wright dated 29 September 2017 (Exhibit 5), para 21.

[38] Statement of Joanne Toohey (Exhibit G), para 14.

17. Under the NDIS model, funding for disability support services would shift from direct funding of the provider of services by State governments to funding the recipient of services, who would then determine how their funding package would be spent. A client will be assessed as qualifying for funding in accordance with an individual plan which outlines the funded services available to the client.

18. A client, (or participant as they are referred to under the NDIS scheme), applies to the NDIA and is assessed for certain services and supports. If approved the NDIA develops an individual plan with the client. The individual plan outlines how much money the client has to spend on a range of services, for example, daily care, occupational therapy and transport. The client then decides who will provide these services from an NDIA list of approved providers.

19. As an interim arrangement, the clients who transferred from ADHC to The Benevolent Society as of 28 July 2017 and who are not yet part of the NDIS scheme will be funded through FACS. The current funding of services through FACS is a temporary arrangement and is to cease from 1 July 2018.[39]

[23] The Commission, as presently constituted, notes that TBS did not agree to paragraphs 10 and 11 of the ASOF. During the hearing, Mr Dixon explained that the disagreement with paragraphs 10 and 11 was due to TBS wanting to insert additional information, namely that BA-DS were also a registered provider under the NDIS.[40] He stated that BA-DS is a separate legal entity from TBS and the 'true employer' of the transferring employees.[41]

Submissions

[24] The CPSU submitted:[42]

"Introduction

1. This matter is an application by the Community and Public Sector Union ("the CPSU") for coverage as an employee organisation under copied state instruments pursuant to section 768BB of the Fair Work Act 2009 (Cth) ("the FW Act").

2. The application is made on behalf of the CPSU. The CPSU is an industrial organisation registered under the Fair Work (Registered Organisations) Act 2009

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[39] Affidavit of Kristine Cruden dated 10 November 2017 (Exhibit 7), para 17; Statement of Dirk Duvenhage (Exhibit K) at paras 7-8.

[40] PN15

[41] PN17.

[42] Exhibit 3.

(Cth). The CPSU has coverage of the employees subject to this application in accordance with the Rules of the CPSU.

3. The Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales ("PSA") is the state registered employee organisation which is a party to the state Awards and instruments representing members affected by the transfer to The Benevolent Society, the subject of this application.

4. The CPSU is named as the federal counterpart of the PSA see item 126 of Schedule 1A of the Fair Work (Registered Organisations) Regulations 2009 (Cth).

5. The CPSU is the federal counterpart of the PSA within the meaning of section 9A of the Fair Work (Registered Organisations) Act 2009.

History of the CPSU/PSA

6. The CPSU came into existence on 1 July 1994 as a result of the amalgamation of other unions. Administratively the CPSU operates through two groups, the PSU Group and the State Public Service Federation ("SPSF") Group.

7. In 1994 the SPSF changed its Rules so that its capacity to enrol and represent members through its eligibility rules would reflect that of the State-registered Unions in their respective jurisdictions, described in Rule 5 (c) (i) of the CPSU rules as "Associated Bodies". The Associated Bodies of the CPSU currently include the PSA.

8. The Associated Bodies of the CPSU and the predecessor Victorian branch have long histories of industrial relations activity dating back most cases to the 19th century. The core area of coverage during that time has generally but not exclusively been public or civil service or statutory authorities of the State.

9. The SPSF was first registered under the Conciliation and Arbitration Act 1904 as a Federal organisation on 30 July 1976.

10. In New South Wales, members of the PSA are also members of the CPSU. Where their industrial rights are determined in the New South Wales industrial relations jurisdiction, they are represented in the name of the PSA.

11. Where their employer is a national system employer for the purposes of the Fair Work Act 2009 (Cth) and their rights and obligations are determined under that legislation and jurisdiction, they are usually represented in the name of the CPSU.

12. The employment rights of employees of Ageing, Disability and Home Care ("ADHC") within Family and Community Services ("FACS") in New South Wales have historically been determined in the New South Wales jurisdiction.

Transfer of employees from ADHC to the Benevolent Society

13. The application arises in the context of the privatisation of ADHC formerly part FACS by the NSW Government. In April 2013, the Secretary of FACS announced that operations then being undertaken by ADHC would be transferred to the private sector.

14. In or around December 2012 the NSW and Commonwealth Governments signed a Heads of Agreement establishing the National Disability Insurance Scheme (NDIS).

15. A condition of the Heads of Agreement was that the NSW Government would cease to be a provider of disability services by 1 July 2018.

16. Under the NDIS model, funding for disability support services would shift from direct funding of the provider of services to funding the recipient of services, who would then determine how their funding package would be spent. In New South Wales this would be coupled with the withdrawal of State services in the sector upon the full adoption of the NDIS.

17. In 2013 the NSW Government passed the National Disability Insurance Scheme (NSW Enabling) Act 2013 (NSW) ("the Enabling Act") that permitted the Minister for FACS to transfer the employment of ADHC employees to either another government sector agency or a non-government sector agency.

18. The privatisation tendering process commenced in April 2016 and The Benevolent Society was announced as the successful tenderer in an email to staff on 2 March 2017.

19. On 1 August 2017 approximately 700 employees of ADHC's Clinical Services were forcibly transferred to the employment of The Benevolent Society by way of Ministerial Order pursuant to the relevant provisions of the Enabling Act. The transfer of employees took place on 1 August 2017.

20. The transferred employees are employed in the following occupations: Psychologist (including psychologist, senior psychologist, special psychologist and senior specialist psychologist), Occupational Therapist, Speech Therapist, Physiotherapist, Case Manager, Behaviour Intervention Practitioner, Manager Access, Senior Manager Access, Clinical Nurse Consultant, Dietician, Therapy Assistant, System Support Staff and Administrative Assistant.

21. Following the transfer of their employment to The Benevolent Society the transferred employees are providing therapeutic services and case management to clients with a disability living in supported accommodation and elsewhere in the community funded by Commonwealth funding via the NDIS.

22. In accordance with the Heads of Agreement the State Government still has obligations to provide services to people with a disability who are not yet recipients of the NDIS until the anticipated full roll-out of the scheme in New South Wales in July 2018.

23. The terms of the transfer of employment of staff of ADHC included that transferring employees would have an employment guarantee period of two years, and in addition to the operative provisions of section 768 of the Fair Work Act 2009 (Cth) ("the FW Act"), an enforceable undertaking that the same terms and conditions of employment would apply to the employees for two years as The Benevolent Society would not seek to negotiate an enterprise agreement within that period of time.

24. The transfer of employees to a private sector employer is facilitated by the Enabling Act. The relevant provisions of the Enabling Act, in summary, are as follows:

> (a) Section 14 (1) permits the Minister to enter into a transfer agreement with an employer in the non-government sector for the transfer of employment of disability services employees to that employer.
>
> (b) Section 14 (2) and (3) permit the Minister, by order, to transfer the employment of a disability services employee to the employment of a new employer to give effect to a transfer agreement without the consent of the person transferred.
>
> (c) Section 14 (4) requires that a transfer agreement must give effect to a requirement that the employment of a transferred employee is to be on the same terms and conditions as applied under an industrial instrument immediately before the transfer of employment.
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> (d) Section 14 (5) permits a transfer agreement to specify an employment guarantee period and, if it does so, provides that the terms and conditions of employment of the transferred employee under an industrial instrument cannot be varied during the employment guarantee period except by agreement and that the employment of a transferred employee cannot be terminated during the employment guarantee period except for serious misconduct, on the application of reasonable disciplinary procedures or by agreement.

> (e) Section 15 (1) provides that on transfer of employment to the new employer an employee is entitled to continue as a contributor, member or employee for the purposes of any superannuation scheme, continuity of the employee's contract of employment is taken not to have been broken and that the employee retains any rights to annual leave, sick leave, extended or long service leave accrued before the transfer.

25. The consequence of transfer to an employer outside of the public sector in New South Wales will be that employees will fall under the provision of the FW Act. Part 6-3A of the FW Act makes provision for the transfer of business from a state public sector employer to a national system employer for the purposes of that Act. Part 6-3A provides for the creation of "copied State instruments" to apply to employees following their transfer to a national system employer covered by the FW Act.

26. Relevantly, s 768AI provides for the creation of a "copied State award" as follows (excluding notes to the section):

> "What is a copied State award:
> (1) If, immediately before the termination time of a transferring employee:
> (a) a State award (the original State award) was in operation under the State industrial law of the State; and
> (b) the original State award covered (however described in the original State award or a relevant law of the State) the old State employer and the transferring employee (whether or not the original State award also covered other persons);
> then a copied State award for the transferring employee is taken to come into operation immediately after the termination time.
> (2) the copied State award is taken to include the same terms as were in the original State award immediately before the termination time.
> (3) If the terms of the original State award were affect by an order, a decision or a determination of a State industrial body or a court of the State that was in operation immediately before the termination time, the terms of the copied State award are taken to be similarly affected by the terms of that order, decision or determination."

27. In short, upon transfer of employment to a national system employer, a copied State award is taken to come into operation including the same terms as were in the original state award.

28. The PSA is a party to the copied State awards listed below:

> (a) Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009.
> (b) Crown Employees (Administrative and Clerical Officer's) Award 2007.
> (c) Crown Employees (Public Sector-Salaries) Award 2017.

(d) Crown Employees (Psychologists) Award.

Statutory provisions

29. Section 768BB of the Fair Work Act provides:

> "FWC orders about coverage for employee organisations
> (1) The FWC may make an order that:
> (a) a copied State instrument for a transferring employee that would, or would be likely to, cover an employee organisation (the first employee organisation) in relation to the transferring employee because of subsection 768AN(2) does not, or will not, cover the organisation; and
> (b) another employee organisation (the second employee organisation) is, or will be, covered by the copied State instrument in relation to the employee.
> (2) When making an order under subsection (1), the FWC must consider whether the second employee organisation is a federal counterpart (within the meaning of section 9A of the Registered Organisations Act) of the first employee organisation.
> (3) The regulations may:
> (a) prescribe circumstances in which the FWC may make an order for the purposes of subsection (1); and
> (b) otherwise make provision in relation to the making of the order.
> (4) An order under subsection (1) must be made in accordance with any regulations that are made for the purposes of subsection (3)."

FWC Orders about coverage for employee organisations

30. The Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales ("PSA") is the state registered employee organisation covered by the State awards and instruments representing members affected by the employment transfer.

31. The Community and Public Sector Union ("CPSU") is named as the federal counterpart for the PSA of NSW (see item 126 of Schedule 1A, Fair Work (Registered Organisations) Regulations 2009 (Cth).

32. The PSA is named as an "Associated Body" or "Associated Body of the SPSF" in accordance with Rule 5 (c) (i) of the CPSU, the Community Public Sector Union, and Chapter A – General Rules ("CPSU Rules").

33. The PSA is not a registered organisation of employees for the purposes of the Fair Work (Registered Organisations) Act 2009 (Cth) or the FW Act. The PSA is also no longer a transitionally recognised organisation of employees for the purposes of the Fair Work (Registered Organisations) Act 2009 (Cth) or the FW Act.

34. The matters in relation to which the Commission must consider are set out in s 768BB (2). The Commission can be satisfied with these matters namely, that the CPSU is a federal counterpart (within the meaning of section 9A of the Registered Organisations Act) of the first employee organisation, the PSA.

35. The CPSU is eligible to represent the transferred employees employed by The Benevolent Society in accordance with the CPSU Rules in accordance with Rule 2, Part I, (A.1)(i)(f).

36. Rule 2 Part I (A.1)(i)(f) relevantly provides:

> "A.1 Without in any way limiting or being limited by subrules B, C, D, E, G , H, the following persons are eligible for membership of the Union –
> (i) any person employed, usually employed or qualified to be employed by:
> (f) any authority or body (whether corporate or not) being an authority or body that is financed in whole or in substantial part, either directly or indirectly by money provided by the Commonwealth…"

37. The Benevolent Society receives substantial funding from the Commonwealth either directly or indirectly for disability services it provides through the NDIS scheme. None of the exceptions list to the rule apply in these circumstances.

38. The Fair Work Commission should be satisfied that the CPSU is the federal counterpart of the CPSU pursuant to Schedule 9A of the Registered Organisations Act and is eligible to represent employees in The Benevolent Society in accordance with its Rules – see the recent decision of Deputy President Booth in CPSU, the Community and Public Sector Union (AG2017/2556) a decision issued on 29 August 2017.

Conclusion

39. For these reasons, the Fair Work Commission should make the order in the form sought by the CPSU.

(References Omitted)

[25] The Benevolent Society Submitted:[43]

"1. These submissions are filed in accordance with Further Amended Directions made by Johns C on 11 October 2017 and in response to the Applicant's Application made

[43] Exhibit F.

under s.768BB of the Fair Work Act 2009 (Cth) (FW Act) dated 6 August 2017, and its accompanying submissions dated 29 September 2017 supporting an order for coverage by the CPSU under certain copied State awards.

2. The Respondent opposes the Application on the following grounds:

> (i) The Applicant has no standing to make an application under s.768BB by reason of Regulation 6.03A and section 768BB(4) of the FW Act. The CPSU is not entitled to cover the transferred employees under its rules.
>
> (ii) The named Respondent to the Application, The Benevolent Society, is not the legal employer of the transferred employees.
>
> (iii) There is no power to make an order under s.768BB in the circumstances of this Application, as that section only operates where a copied State instrument does not cover a State organisation such as in circumstances where an order has been made under s.768BA. This is not the CPSU's case.
>
> (iv) Alternatively, there is no reason proffered as to why, as a matter of merit, an order should be made under s.768BB consistent with the purpose of that section. In the absence of a proper ground, the Commission should not make the orders sought.

Background

3. The Benevolent Society (TBS) has been in existence for over 200 years. It is a not-for-profit charity and operates in a highly competitive commercial market with other disability service providers in the disability sector. TBS was approved as a registered provider of disability services under the NDIS in April 2016.

4. On 28 July 2017, approximately 688 allied health staff who provided disability support services (DS Staff) transferred from the New South Wales Department of Family and Community Services (FACS) to an entity styled as "Benevolent Australia Disability Services" (BA-DS).

5. As the DS Staff providing the services are employed by BA-DS, TBS entered into a brokerage agreement with BA-DS to provide disability services (Brokerage Agreement).

6. Under the Brokerage Agreement, DS Staff provide clinical services to clients with a disability, and TBS claims for those services. TBS does this by invoicing the clients for services rendered, and NDIS clients pay for the services by way of the NDIS.

(i) The CPSU has no Standing

7. The CPSU has applied under s.768BB of the FW Act for an order that certain copied State awards cover the CPSU to the exclusion of the PSA.

8. Section 768BB provides that the regulations may prescribe circumstances in which the Commission may make an order for the purposes of s.768BB(1): s.768BB(3). An order under s.768BB(1) must be made in accordance with any regulations that are made for the purposes of subsection (3): s.768BB(4).

9. Regulation 6.03A of the Fair Work Regulations 2009 relevantly provides that a circumstance in which Commission may make an order mentioned in subsection 768BB(1) of the FW Act is that the order is to be made on application to the Commission:

> "(d) by an employee organisation that is entitled to represent the industrial interests of an employee mentioned in paragraph (b)".

10. Paragraph (b) refers to a transferring employee, or a person who is likely to be a transferring employee. That is, in order to bring the Application, the CPSU must be entitled under its Rules to cover the transferred employees employed by BA-DS.

7. The CPSU has no standing to commence the proceedings as it is not entitled to represent the interests of the transferred employees.

8. The CPSU asserts in its Application that it is eligible to represent employee of TBS "in accordance with Rule 2, Part 1, (A.1)(i)(f)" of the CPSU Rules. The CPSU relies upon no other Rule.

9. For the reasons that follow:

> (a) TBS and BA-DS are not "bodies or authorities" that fall within the taxonomy of governance structures provided for in the CPSU Rules Part 1, A.1(i)(a)-(f);
>
> (b) neither TBS nor BA-DS are entities relevantly "financed" in whole or substantial part "by monies provided" (or otherwise) by the Commonwealth in respect of the transferred work for the purpose of CPSU Rule Part 1, A.1(i)(f); and
>
> (c) TBS and BA-DS receive monies from clients via the NDIS as part of a "commercial transaction" in any event for the purpose of CPSU Rule Part 1, A.1(i)(f) (A).

a) The CPSU Rules do not extend to TBS or BA-DS as they are not "bodies or authorities"

10. The sub-rule relied upon by the Applicant is located within CPSU Rule A.1 which recognises various governance structures utilised by Federal or Territory Governments:

> PART I
> A.1 Without in any way limiting or being limited by subrules B, C, D, E, G and H, the following persons are eligible for membership of the Union;
> (i) any person employed, usually employed or qualified to be employed by;
> (a) the Commonwealth;
> (b) the Northern Territory;
> (c) the Australian Capital Territory;
> (d) a body corporate established for a public purpose, whether in whole or in part, by or under a law of the Commonwealth, the Australian Capital Territory or the Northern Territory other than any local Government body established under the Local Government Act (Northern Territory) or other Local Government legislation in the Northern Territory;
> (e) by a company or other body corporate incorporated under a law of the Commonwealth or of a State or Territory, being a company or other body corporate in which the Commonwealth, the Northern Territory or the Australian Capital Territory has a controlling interest;
> (f) any other authority or body (whether corporate or not) being an authority or body that is financed in whole or in substantial part, either directly or indirectly by money provided by the Commonwealth except;
> (A) moneys paid as consideration in a commercial transaction, for the provision of goods or services to the Commonwealth,

11. It will be recognised from the above Rule that:

> (a) sub-rules A.1(i)(a)-(c) cover direct employment by the Government itself, namely traditional public sector employment
>
> (b) sub-rule A.1(i)(d) covers bodies corporate established and owned by the Government for public purposes, namely statutory authorities and statutory corporations;
>
> (c) sub-rule A.1(i)(e) covers a situation in which the Commonwealth has a controlling-interest shareholding in a company, notwithstanding that the company was not established by the government; and

> (d) sub-rule A.1(i)(f) covers entities which are "financed" in whole or substantial part "by monies provided" by the Commonwealth, except (relevantly) where monies are received as part of a "commercial transaction" with the Commonwealth: sub-rule A.1(i)(f)(A).

12. It is apparent from the above that the CPSU Rules seek to extend constitutional coverage from traditional public sector employment to situations where the Government maintains a significant control over the employing entity through either shareholding or by finance provided.

13. The expression "any other authority or body" in Part 1, A.1(i)(f) of the CPSU Rules does not extend to a private company in the nature of TBS. This is because the word "other" means other types of entities that are owned or controlled by the Commonwealth as described in the clauses immediately above rule (f).

14. On this construction, the expression in sub-rule (f) means a "body or authority" of a public nature, or under the control of the government through the provision of finance.

15. This construction is supported by the fact that where rule changes have been sought to extend to private entities, the CPSU has historically used the terminology of "company" or "corporation" to extend its coverage.

(b) TBS is not "financed ... by money provided" by the Commonwealth

16. Coverage under Part 1, A.1(i)(f) of the CPSU Rules turns on whether the entity is "financed … by money provided" by the Commonwealth.

17. The Oxford English Dictionary relevantly defines "finance" as:

> 1. [Noun] The management of large amounts of money, especially by governments or large companies.
> 1.1 Monetary support for an enterprise.
>
> 2. [Verb] Provide funding for (a person or enterprise).

18. The verb "financed" in Part 1, A.1(i)(f) of the CPSU Rule is therefore understood to mean the provision of funding. The term "funding" is in turn defined in the Oxford English Dictionary as:

> "Money provided, especially by an organization or government, for a particular purpose."

19. This definition of "financed" being synonymous with "funding" and "money provided" therefore conforms with the language employed in the CPSU Rule where the verb "financed" conditions the expression "by money provided".

20. The language of "provision" of finance in CPSU Rule Part 1, A.1(i)(f) therefore concerns the funding of an entity by the Commonwealth, and is to be contrasted with "payments" made to an entity for services rendered.

21. The High Court in CFMEU v Mammoet Australia Pty Ltd [2013] HCA 36; 248 CLR 619 drew this distinction between the concepts of "payment" of money for wages, and the "provision" of other benefits which were not part of the quid pro quo for work performed.

22. The Commonwealth does not "provide" funding or "finance" to TBS or BA-DS. Any monies received from the Commonwealth under the NDIS are payments made to TBS' clients for services rendered by BA-DS in a "commercial transaction".

23. The NDIS allocates allowances to eligible individuals to be used for disability supports. Those individuals then choose how they use the funds, and who provides those supports.

24. Section 45 of the National Disability Insurance Scheme Act 2013 (Cth) (NDIS Act 2013) contemplates "An NDIS amount that is payable to a participant ….". Whilst the service provider may claim the payment on behalf of the participants, this is a mere expedient.

25. The Participant Service Agreement provided under the NDIS confirms that the Commonwealth payments are intended to be made to the participant, which TBS then claims via invoices rendered to the participant or their nominee/manager, or otherwise TBS "claims the payment" from the NDIS on behalf of the participant: clause 7.

26. As the DS Staff providing the services to participants are employed by BA-DS, TBS entered into a brokerage agreement with BA-DS to provide disability services (Brokerage Agreement). Under the Brokerage Agreement, DS Staff provide clinical services to clients with a disability on behalf of TBS, and TBS claims for those services.

27. The invoices which TBS renders to its clients (being the participants under the NDIS) also confirm that any Commonwealth Government monies received are for services rendered.

28. The arrangements described above do not fall within the CPSU eligibility rules. TBS is not "financed in whole or in substantial part, either directly or indirectly by

money provided by the Commonwealth". To the contrary, is not "financed" at all by "money provided" by the Commonwealth.

(c) Payments made under the NDIS are part of a commercial transaction in any event

29. Moreover, for the above reasons, the NDIS allowances which are ultimately paid to TBS are payments made for disability support services rendered in commercial transactions.

30. There is no receipt of monies from the Commonwealth via the NDIS unrelated to services rendered. This much is accepted by the CPSU in this Application: Applicant's Submissions at [16].

31. The Terms of Business make it clear that a client is not required to engage the services of a registered provider such as TBS. Thus TBS operates in a competitive environment with other NDIS service providers.

32. This scenario falls within the exception in CPSU Rule Part 1, A.1(i)(f)(A).

(ii) The Benevolent Society is not the proper Respondent

33. The Transfer of DS Staff from FACS to BA-DS was effected by a Transfer Order on 31 July 2017. Pursuant to that Transfer Order, BA-DS employed approximately 688 DS Staff who transferred from FACS. BA-DS is a separate legal entity to TBS.

(iii) No power exists where the CPSU asserts the PSA is covered by copied State awards

34. The CPSU seeks an order under s.768BB of the FW Act that it, as opposed to the PSA, is to be covered by the copied State awards.

35. Section 768BB empowers the Commission to make an order that:

> (a) a copied State instrument for a transferring employee that would, or would be likely to, cover an employee organisation (the first employee organisation) in relation to the transferring employee because of subsection 768AN(2) does not, or will not, cover the organisation; and
>
> (b) another employee organisation (the second employee organisation) is, or will be, covered by the copied State instrument in relation to the employee.

36. Section 768BB is expressed in contingent language. The power to make an order exists where there is a copied State instrument "that would, or would be likely to,

cover an employee organisation". That power does not exist where a copied State award does cover an organisation.

37. The CPSU makes no submission on this point as to whether the awards it identifies "would, or would be likely to, cover" the PSA. Its Application assumes the copied State awards already do cover the State organisation. Accordingly, the power in s.768BB is not engaged.

38. The provisions in Division 6 of Part 6-3A of the FW Act are intended to give the Commission power to displace the default coverage rule that a copied State instrument for a transferring employee covers the employee and the new employer. If the copied State instrument provides for terms and conditions of employment which are markedly inconsistent or inferior to an existing enterprise agreement that covers the new employer, the Commission can displace the default coverage rule.

39. Thus, for example, an employer that is already covered by an existing enterprise agreement may seek an order that a transferring employee also be covered by that enterprise agreement, instead of the copied State instrument. If such an order were to be made, then s.768BB allows consequential orders to be made where there is a copied State instrument "that would" cover an organisation but for the effect of an order made under s.768BA.

40. The Explanatory Memorandum confirms that s.768BB is intended to apply "where the corresponding State registered organisation(s) no longer has coverage". That would occur where an order has been made under s.768BA.

41. This is not the Applicant's case. The CPSU' case proceeds on the basis that the PSA already has 'coverage' in respect of the copied State instruments. This is not a scenario where it can be said the copied State instruments "would, or would be likely to" cover the PSA such as to provide a basis for the exercise of power under s.768BB.

42. Accordingly, as the Application is premised on the fact that the copied State awards cover the State organisation, the Commission has no power to make an order under s.768BB.

(iv) Alternatively, there are no merit grounds upon which an Order should be made

43. The discretion under s.768BB is not perfunctory. The CPSU's materials and submissions identify no basis upon which the Commission should exercise its discretion. Thus, it is not immediately apparent what the purpose of a s.768BB order would be.

44. The Commission "must have regard to the federal counterpart(s) when making this type of order". It is submitted that, as the CPSU does not have constitutional coverage

of the transferred employees under its Rules for the reasons submitted above, this fact militates against the exercise of any discretion under s.768BB.

45. Moreover, assuming s.768AN applies, then the effect of an order under s.768BB on the PSA and the transferred employees is not dealt with in the Application. The CPSU assumes that references in the copied State awards to the PSA and various State organs and legislation will automatically apply to the CPSU. No submission is made as to why this result would follow in the event an order under s.768BB was made.

Conclusion

46. For the reasons set out above, the CPSU does not have constitutional coverage under its Rules to represent employees of BA-DS. TBS is an entity whose survival as a going concern is dependent on its ability to successfully compete in the market for disability services, and not on the provision of finance by the government. The Application should therefore be dismissed as the CPSU has no standing to bring it by reasons of Regulation 6.03A, and it is brought against TBS who does not employ the transferred employees.

47. Additionally, the Commission does not have the power to exercise its discretion under s.768BB in circumstances where the CPSU claims that the copied State instruments apply to the PSA.

48. Alternatively, if the Commission finds it has the power to make an order in the circumstances, it should not be satisfied that an order under s.768BB to exclude the PSA from coverage is necessary or desirable in the absence of any merit case identified in the Application.

(References Omitted)

[26] In response, the CPSU submitted:[44]

"Introduction

1. These are submissions filed on behalf of the Community and Public Sector Union ("the CPSU") in reply to the submissions of The Benevolent Society and the Health Services Union ("the HSU"). Both The Benevolent Society and the HSU oppose the application made under s 768BB of the Fair Work Act 2009 (Cth) ("the FW Act").

2. The opposition to the application by The Benevolent Society and the HSU is on substantially the same grounds and appear to be as follows:

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[44] Exhibit 4.

(a) Firstly, it is submitted that the CPSU does not have standing to make the application pursuant to Regulation 6.03A and s 768BB(4) of the FW Act because, it is asserted, the CPSU is not entitled to represent the industrial interests of the transferring employees.

(b) Secondly, it is submitted that the Commission has no power to make the order under s 768BB because the order sought is not one contemplated by s 768BB, it appears on the basis that the section only operates where a copied State instrument does not cover a State organisation.

(c) Thirdly, it is submitted for The Benevolent Society that no "merit case" has been advanced to support the order sought and, by the HSU, that as a matter of discretion the order should not be made as a result of demarcation issues between the HSU and the CPSU.

3. The CPSU submits that the objections could not be accepted. The CPSU is entitled to represent the industrial interests of the transferred employees and the order sought is precisely that contemplated by s 768BB of the FW Act. The demarcation issues raised by the HSU are not appropriate for consideration in the context of these proceedings. If the HSU, or The Benevolent Society, believe there is a basis for obtaining such an order, the proper procedure for raising demarcation questions is by appropriate application under the Fair Work (Registered Organisations) Act 2009 (Cth) ("the RO Act").

4. The Benevolent Society also raises a question as to the proper respondent to the proceedings. The question is raised because the employer of the transferred employees is a subsidiary of The Benevolent Society known as Benevolent Australia Disability Services. The point is not one of substance. The only requirement for an entity to be made party to an application under s 768BB would be to ensure procedural fairness. The Benevolent Society is clearly the appropriate entity to make submissions and has made submissions. If Benevolent Australia Disability Services wishes to make separate submissions, it is clearly on notice of the application and could do so.

Coverage of the CPSU

5. The Benevolent Society and the HSU submit that the CPSU is not entitled to represent the industrial interests of the transferring employees and the CPSU is, accordingly, not able to bring the present application. The submissions must be rejected.

6. Section 768BB(3)(a) of the FW Act permits regulations to be made prescribing the circumstances in which the Commission may make an order under subsection (1). Regulation 6.03A of the Regulation provides that:

For paragraph 768BB(3)(a) of the Act, a circumstance in which FWA may make an order mentioned in subsection 768BB(1) of the Act is that the order is to be made:

> (a) on FWA's own initiative; or
> (b) on application to FWA by a transferring employee, or a person who is likely to be a transferring employee; or
> (c) on application to FWA by the new employer, or a person who is likely to be the new employer; or
> (d) on application to FWA by an employee organisation that is entitled to represent the industrial interests of an employee mentioned in paragraph (b).

7. Regulation 6.03A refers to an organisation that is "entitled to represent the industrial interest of an employee in paragraph (b), namely, a transferring employee. Whether an organisation is "entitled to represent the industrial interests" of a person depends upon coverage of a person under its eligibility rules.

8. The first step is to construe the eligibility rules of the CPSU. In construing the rules, the essential task is to give the words used their ordinary meaning. For example, the Full Bench of the then Australian Industrial Relations Commission said in NTEU v Technisearch Ltd (1996) 66 IR 38 at 42:

> The High Court cases cited do not discard an examination of the substantial character of the industrial enterprise in which the relevant employee will be engaged as a test to be applied in establishing whether an activity is in connection with a relevant industry for purpose of a union eligibility rule. Aickin J in the Uranium Mining Case expressly applied the test quoted. But the Court has also made it clear that tests of that kind, including the related test of "the primary and predominant purpose of the activity" for which the employee is engaged, should not divert the Commission from the path of construction of the relevant eligibility rule. See R v Isaac at 344 per Wilson J. Similarly in the Worsley Case; R v Coldham; Ex parte Australian Workers Union (1983) 153 CLR 415 at 431-434 per Deane and Dawson JJ who identify the prime issue as establishing the proper connotations of the relevant industry based on a construction of the union's rule. In our view, it is essential to focus on construction of the rule and to then apply it to the circumstances of the case.

9. The words in the eligibility rules of a union must be construed broadly and not narrowly. In R v Cohen ex parte Motor Accidents Insurance Board (1979) 141 CLR 577, the High Court set out the broad approach to the construction of union rules. Mason J said (at 587):

> … it should be recognized at the outset that we are concerned with the use of that expression in the eligibility clause of a trade union's registered rules. The

> expression is, in such a context, no doubt intended to have a wide meaning and it should be interpreted and applied in accordance with its ordinary and popular denotation rather than with some narrow or formal construction.

10. This broad approach to construction of union rules has been consistently adopted by the courts. The broad approach is reinforced by the objects of the RO Act which include "enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented." Freedom of association is also a basic human right enshrined in Article 20(1) of the Universal Declaration of Human Rights and Article 22(1) of the International Covenant on Civil and Political Rights which provides that: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

11. The CPSU is entitled to represent the industrial interests of the transferring employees under Rule 2, Part I (A.1)(i)(f). The relevant part of the Rules provides:

> A.1 Without in any way limiting or being limited by subrules B, C, D, E, G and H, the following persons are eligible for membership of the Union;
> (i) any person employed, usually employed or qualified to be employed by;
> (a) the Commonwealth;
> (b) the Northern Territory;
> (c) the Australian Capital Territory;
> (d) a body corporate established for a public purpose, whether in whole or in part, by or under a law of the Commonwealth, the Australian Capital Territory or the Northern Territory other than any local Government body established under the Local Government Act (Northern Territory) or other Local Government legislation in the Northern Territory;
> (e) by a company or other body corporate incorporated under a law of the Commonwealth or of a State or Territory, being a company or other body corporate in which the Commonwealth, the Northern Territory or the Australian Capital Territory has a controlling interest;
> (f) any other authority or body (whether corporate or not) being an authority or body that is financed in whole or in substantial part, either directly or indirectly by money provided by the Commonwealth except;
> (A) moneys paid as consideration in a commercial transaction, for the provision of goods or services to the Commonwealth,
> …

Body or Authority

13. The Benevolent Society submit that it is not an "other authority or body" for the purposes of Rule 2, Part I (A.1)(i)(f). It is submitted by The Benevolent Society that the expression "other authority or body" extends only to a "body or authority" that is

of a public nature or under the control of government. The submission cannot be reconciled with the language of the CPSU Rules.

14. A body corporate established for a public purpose or in which the Commonwealth, Northern Territory or ACT have a controlling interest are already covered by paragraphs (d) and (e) of Rule A.1. On the interpretation advanced by the Benevolent Society, paragraph (f) does not add anything to the coverage of the CPSU Rules and is otiose. Clearly, the Rules would not be interpreted so as to render parts of the eligibility rule of no practical effect.

15. Furthermore, there is no foundation for a requirement that an "authority or body" be established for a public purpose or under the control of government in paragraph (f) itself. The ordinary language of the paragraph requires only that a person be employed or usually employed by "any other authority or body (whether corporate or not)" and that the authority or body is financed in whole or in substantial part by money provided by the Commonwealth.

16. Paragraph (f) extends the operation of the rules to "any other authority or body (whether corporate or not)". By its express terms, the rule applies to a body corporate which must include a company. There is no reason to read down paragraph (f) of Rule A.1 in the manner proposed by the Benevolent Society. To do so would be contrary to the proper approaches to the interpretation of union rules set out above.

Financed Directly or Indirectly by Money provided by the Commonwealth

17. The Benevolent Society, this time supported by the HSU, submit that it is not financed by money provided by the Commonwealth. The submission read Rule 2, Part I (A.1)(i)(f) too narrowly and, in any event, mischaracterise the operation of the NDIS scheme.

18. Paragraph (f) requires no more than that the Benevolent Society be financed, directly or indirectly, by money provided by the Commonwealth. The ordinary meaning of the term "finance" extends to "monetary support for an enterprise" or to "provide funding for (a person or enterprise)". The question presented is what is the source of the monetary support or funding of the relevant operations of the Benevolent Society. If it is, directly or indirectly, money provided by the Commonwealth then the employees are eligible to be members of the CPSU.

19. There is no doubt that the funding for services provided as part of the NDIS is provided by the Commonwealth through the National Disability Insurance Agency. Paragraph (f) does not require funding directly be provided to the relevant body. It is sufficient that the body is financed by money provided by the Commonwealth. There is no doubt on the evidence that the payments for supports provided as part of the NDIS are money provided by the Commonwealth.

20. The Benevolent Society relies upon an assertion that funding is nominally provided to the individual participant in the NDIS. In particular, reliance is placed on s 45 of the National Disability Insurance Scheme Act 2013 (Cth) which provides as follows:

> Payment of NDIS amounts
> (1) An NDIS amount that is payable to a participant, or to a person who is managing the funding for supports under a participant's plan, is to be paid:
> (a) at the time or times determined by the CEO in accordance with the National Disability Insurance Scheme rules; and
> (b) in the manner (if any) prescribed by the National Disability Insurance Scheme rules.
> (2) Without limiting paragraph (1)(b), the National Disability Insurance Scheme rules may provide that:
> (a) an NDIS amount is to be paid to the credit of a bank account nominated and maintained by the person to whom it is to be paid; and
> (b) an NDIS amount is not payable to the person until the person nominates an account.

21. That provision does not determine the question raised. Even if the NDIS payment is made to the individual participant, the participant is only able to spend the money on support in accordance with the person's management plan. That is, once a person's plan include a service provided by the Benevolent Society, the funding provided by the Commonwealth must be provided to the Benevolent Society. It is immaterial whether that occurs directly or indirectly.

22. The evidence is that the payments are frequently made directly by the Commonwealth to the Benevolent Society with respect to services provided to participants in the NDIS. However, even if the funding is provided to the individual participant who, in turn, makes a payment to the Benevolent Society, the scenario is plainly within the concept of the Benevolent Society being financed "indirectly" by money provided by the Commonwealth.

23. The evidence of the Benevolent Society is that Benevolent Australian Disability Services has no other source of income other than via clients who are paid under the NDIS or, as an interim arrangement, through FACS. The requirement that a body be financed wholly or in substantial part by money provided by the Commonwealth is clearly satisfied in relation to Benevolent Australian Disability Services.

Commercial Transaction

24. Finally, the Benevolent Society submits that it falls within the exception found in Rule 2, Part I (A.1)(i)(f)(A). The exception is as follows:

> (A) moneys paid as consideration in a commercial transaction, for the provision of goods or services to the Commonwealth,

25. The Benevolent Society asserts that the monies it receives are related to services rendered. Whilst that may be accepted, the Benevolent Society ignores the wording of paragraph (f)(A). The exception only applies where monies are paid in a commercial transaction for the provision of goods or services "to the Commonwealth". On the evidence put forward by the Benevolent Society itself, it does not provide services "to the Commonwealth". The exception can have no application.

Order under s 768BB

26. The Benevolent Society and the HSU submit that the order sought is not within the scope of or permitted by s 768BB. The submissions, however, are different and inconsistent. It is, accordingly, necessary to address the two submissions in turn.

27. The Benevolent Society submits that s 768BB(1)(a) only permits an order to be made if the copied State instrument "would, or would be likely to, cover" the PSA and that condition has not be engaged. Confusingly, The Benevolent Society also submits that s 768BB is not able available because the PSA already has coverage in respect of the copied State instruments. The HSU's submissions appear more confined. The HSU submit that the PSA is not an "employee organisation" within the meaning of s 768BB(1)(a) and, for that reason, the order sought could not be made.

28. Both submissions misunderstand the relevant provisions of the FW Act. The obvious intent of s 768BB is to permit the Commission to substitute coverage by a State-registered union which was party to the relevant State award or agreement by ordering that the copied State instrument instead cover a federal counterpart union or other appropriate union following the transfer of employees to the federal system. So much is made clear by the Explanatory Memorandum to the Fair Work Amendment (Transfer of Business) Bill 2012 which indicated:

> 58. FWA can also make an order that a copied State instrument for a transferring employee does or does not cover an employee organisation but instead covers, or will cover, another employee organisation. For example, FWA could order that one or more federal counterparts were covered by a copied State instrument where the corresponding State registered organisation(s) no longer has coverage. FWA must have regard to the federal counterpart(s) when making this type of order.

29. The operation of the provisions can be understood as follows:

(a) Section 768BB(1)(a) contemplates that a copied State instrument "would, or would be likely to" cover an employee organisation because of s 768AN(2). The subsection does not require the Commission to form a definite conclusion as to whether the copied State instrument would in fact cover the employee organisation. It is sufficient that it is "likely" that the copied State instrument would cover the employee organisation.

(b) Section 768AN(2) provides that a copied State instrument covers an employee organisation in relation to an employee if the instrument covers the employee and the original State award or State agreement covered the organisation in relation to the old State employer. Plainly, the subsection contemplates that an organisation which was covered by the original State award or agreement prior to the transfer of employees will be covered by any copied State instrument which comes into existence upon the transfer.

(c) Where s 768AN(2) applies, or is likely to apply, the Commission is able to make an order under s 768BB(1)(a) and (b) that the organisation covered by the original State award or agreement not be or cease to be covered by the copied State instrument and that, instead, another employee organisation is, or will be, covered.

(d) When making such an order the Commission is required by s 768BB(2) to consider whether the second employee organisation is a federal counterpart of the first employee organisation. The concept of a "federal counterpart" is dealt with in s 9A(1) of the RO Act which provides: (1) For the purposes of this Act, a federal counterpart for a particular association of employers or employees registered under a State or Territory industrial law is an organisation prescribed by the regulations to be a federal counterpart of that association.

(e) As such, what is contemplated by the provision is that a State-registered union that is covered by the original State award or agreement will, or will be likely to be, covered by a copied State instrument by operation of s 768AN(2) and, in those circumstances, the Commission can make an order under s 768BB(1) substituting the federal counterpart union.

30. To the extent that the HSU submits that the reference to an "employee organisation" in ss 768AN(2) or 768BB can only apply to an organisation registered under the RO Act, the submission cannot be accepted. If the submission were accepted, the provision would be rendered incapable of any operation. The "first employee organisation" referred to in s 768BB(1)(a) must be able to be a State-registered union.

31. The HSU relies upon the definition of "employee organisation" in s 12 of the FW Act which refers to an "organisation of employees" and the definition of

"organisation" which refers to an "organisation registered under the Registered Organisations Act". The term "employee organisation" in s 768BB cannot have been intended to be so limited. So much is clear from s 768BB(2) which requires the Commission, when making an order under subsection (1), to consider with the second employee organisation is a federal counterpart of the first employee organisation.

32. Applying the definition of a "federal counterpart in s 9A of the RO Act, the "first employee organisation" in s 768BB(1)(a) must be able to be "an association of … employees registered under a State or Territory law" in order for the federal counterpart provisions to apply. If that were not so, the Commission could never comply with the mandatory obligation in s 768BB(2) and the example given in the Explanatory Memorandum of the application of s 768BB could not arise. The CPSU is prescribed by Item 126 of Schedule 1A to the RO Act to be the federal counterpart to the PSA and the PSA is able to be the "first employee organisation" for the purposes of s 768BB(1)(a).

33. The Benevolent Society submits that an order under s 768BB(1) could only be made where an order is made about the coverage of a copied State instrument under s 768AB. The submission could not be accepted. Sections 768BA and 768BB serve different purposes. Section 768BA permits the Commission to make an order that a copied State instrument not cover a transferring employee and the transferring employee is instead covered by an enterprise agreement or named employer award.

34. Section 768BB, in contrast, allows orders to be made able the coverage of employee organisations in circumstances in which the copied State instrument will continue to operate. Indeed, the scenario postulated by the Benevolent Society of an order having been made under s768BA that an existing enterprise agreement apply to transferring employees, there would be no utility in an order being made under s 768BB(1). The copied State instrument would not, in that scenario, cover the transferring employees and there would be no utility in an order that the copied State instrument cover an employee organisation.

35. For these reasons, an order is capable of being made under s 768BB(1) that the copied State awards not cover the PSA and cover the CPSU with respect to transferring employees who transferred to the Benevolent Australia Disability Services on and from 28 July 2017. The PSA is the "first employee organisation" and the CPSU is the "second employee organisation" for the purposes of s 768BB(1). The application is precisely the circumstance contemplated by the Explanatory Memorandum in which s 768BB would be utilised.

36. Finally, the HSU raises some issues as to the form of the order sought. The CPSU proposes to amend the form of order sought to reflect an order both that the PSA not be covered by the relevant copied State awards and that the coverage of the CPSU be

in relation to transferring employees who transferred to Benevolent Australia Disability Services as of 28 July 2017.

Discretionary Considerations

37. The Benevolent Society and the HSU both submit that even if the other requirements of the section are met, the Commission should not make an order under s 768BB(1) as a matter of discretion.

38. The basis upon which the Commission is to determine whether to make an order under s 768BB is not entirely clear from the section. However, on its face, s 768BB is clearly intended to be a mechanical provision simply permitting the Commission to substitute a relevant organisation at the federal level for a State registered union which was party to or covered by the original State award or State agreement.

39. To the extent that there is a discretion, its exercise should be guided by the purposes of the section. The purpose of Part 6-3A in general is to ensure continuity of terms and conditions of employment, industrial regulation and industrial representation in the event of the transfer of employees from State public sector employment to a national system employer. As the Explanatory Memorandum made clear:

> Currently, where a non-national system employee transfers to employment with a national system employer due to a transfer of business (e.g. an outsourcing arrangement due to a restructure or pursuant to an arrangement for the sale of the employer's assets), the employee's terms and conditions of employment are determined by the industrial instrument governing employment with the new employer. This means that the employee loses the benefit of the terms and conditions in the industrial instrument with the non-national system employer. This will be the case even though they are performing the same work. The amendment Bill will ensure that a State public sector employee will continue to enjoy the terms and conditions of employment with the non-national system employer through the preservation of those terms and conditions where they become transferring employees in a transfer of business to a national system employer.

40. The preservation of conditions of employment extends to preserving the capacity of State public sector employees to continue to be represented by the same industrial organisation or association following transfer of employment to a national system employment. Again, the Explanatory Memorandum indicated that:

> Currently, there is no ability for a State public sector employee who transfers to the national system to remain represented by their State employee association. In this way, the Bill promotes the rights outlined above through establishing a

> framework under which a State public sector employee who transfers to employment with a national system employer may, conditional upon certain requirements being met by the State employee association, remain represented by the State employee organisation, at least for a transitional period. This period is intended to give the State association and the employee a period of time to adjust to the effects of being covered by a copied State instrument.

41. The objective of permitting State public sector employees to maintain continuity of industrial representation was facilitated by, for a transitional period, registration by State employee associations and by s 768BB permitting the substitution of a federal counterpart union where the State employee association cannot continue representation. This is made clear by s 768BB(2) which requires the Commission to consider whether the organisation sought to be substituted is the federal counterpart to a union which was covered by the original State instrument.

42. To the extent that the Commission has a discretion under s 768BB it should be guided by the objective of ensuring continuity of industrial regulation and representation upon the transfer of employees from State public sector employment to a national system employer.

General "Merit" Considerations

43. The Benevolent Society submits that no "merit case" has been made out for the making of the order sought. The submission ignores the obvious merits in permitting continuation of coverage of an organisation under a copied State award or agreement. In particular, in the current matter:

> (a) The PSA is the only union which is covered by and party to the various awards of the NSW Industrial Relations Commission which have become copied State awards for the transferring employees as a result of the transfer to the Benevolent Society.
>
> (b) No other union aside from the PSA and its federal counterpart, the CPSU, has any history in the making or maintenance of the awards which have become copied State award applying to the Benevolent Society as a result of the transfer of functions.
>
> (c) The PSA has been exclusively representing the industrial interests of the relevant class of employees for many years and it is not suggested that any other union, including the HSU, in fact has any members or takes any steps to represent any of the transferring employees.

> 44. In those circumstances, the purposes of s 768BB compel the conclusion that an order should be made that the CPSU be covered by the various copied State awards for the transitional period of their operation.
>
> …
>
> [N.B. Because the HSU played no part in the proceedings the further submissions dealing with Demarcation Issues, a Memorandum of Agreement and Other Demarcation Considerations have not been reproduced here]
>
> Conclusion
>
> 66. The Commission would grant the application."
>
> (References omitted)

Evidence

CPSU - Mr T Wright

[27] In support of their submissions the CPSU first called Mr T Wright, Assistant General Secretary of the PSA NSW, and the Assistant Branch Secretary of the CPSU NSW. Mr T Wright has two affidavits, one dated 29 September 2017, [45] and the other 10 November 2017.[46]

[28] Mr Wright made an amendment to his first affidavit, that the date referred to in paragraph 28 be changed to 3 August. In addition, he made an amendment to his second affidavit, that the content from paragraph 8 be not relied upon as it refers to the submissions of the HSU (which withdrew its objection).[47]

[29] Mr Wright's first affidavit largely contained evidence to prove: the history of the PSA NSW and the CPSU and the relevant law regarding the transferring state instruments. In addition he gave evidence that, upon TBS winning the tender to initiate the transfer, TBS rejected the CPSU's assertion that it become the relevant employee organisation, and TBS refused right of entry to CPSU delegates on 3 August 2017 and 19 September 2017.[48]

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[45] Affidavit Of Troy Wright Dated 29 September 2017 (Exhibit 5), PN54.

[46] Affidavit Of Troy Wright Dated 10 November 2017 (Exhibit 6), PN61.

[47] PN57.

[48] Affidavit Of Troy Wright Dated 29 September 2017 (Exhibit 5).

[30] Mr Wright's second affidavit is in reply outlined the history of Rule 5(c)(i) of the Administrative and Clerical Officers Association (**ACOA**), inserted in 1988. He stated that his understanding of this change was so

> "that the coverage of the union would extend to an entity if the source of its funding was indirectly, or directly from the Commonwealth Government."[49]

[31] He then responds to the statement of Ms Toohey dated 26 October 2017,[50] stating

> "I refer to paragraph 27 of Ms Toohey's Statement. Under the freedom of association principles, an employee in Australia is free to join a union of their choice, regardless of the employer's wishes. The PSA/CPSU has a long history of coverage of these members and the PSA is the only union which is covered by and party to the various awards of the NSW Industrial Relations Commission which have become copied State instruments for the transferring employees as a result of the transfer to TBS"
>
> It is implausible that TBS were not aware that the PSA was party to the state industrial instruments and had coverage of the transferring employees. If a reference to the "incumbent organisations" is a reference to the unions who are party to the Benevolent Society Enterprise Agreement 2016-2019, the ASU, United Voice and the Independent Education Union (lEU). None of these unions have intervened in these proceedings or have sought to cover the transferring employees." [51]

[32] In Cross-Examination, Mr Dixon drew took Mr Wright to:

a) a letter from a Mr I Latham, Industrial officer for the ACOA enclosing the decision of M J Boland, Deputy Industrial Registrar,[52]

b) the decision of Williams SDP, 9 August 2001,[53]

c) the decision of Lacy SDP, 24 January 2005,[54]

d) the decision of Hamberger SDP, 22 April 2016,[55]

e) the decision of Williams SDP, 10 August 2004,[56]

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[49] Affidavit Of Troy Wright Dated 10 November 2017 (Exhibit 6), para 2.

[50] Affidavit Of Joanne Toohey (Exhibit G).

[51] Affidavit Of Troy Wright Dated 10 November 2017 (Exhibit 6), para 4, 5.

[52] Exhibit A, PN141.

[53] Exhibit B, Williams SDP, 9 August 2001, PR907546, PN147.

[54] Exhibit C, Lacy SDP, 24 January 2005, PR955207, PN152.

[55] Exhibit D, Hamberger SDP, 22 April 2016, PR577056, PN169.

[33] However, no relevant concessions were made by Mr Wright.

[34] Mr Dixon then drew Mr Wright's attention to Annexure A of the affidavit of Ms Pettifer, dated 26 October 2017,[57] which identified BA-DS as the employer of the transferring employees.[58]

[35] Mr Wright stated that he was not aware that BA-DS (instead of TBS) was the true employer of the transferring employees until the day of the hearing.[59] Additionally, he stated that it was not the CPSU's intention to sign up any members beyond those engaged by BA-DS, [60] and that the CPSU did not attempt to organise in TBS prior to the transfer.[61]

[36] Mr Dixon then put to Mr T Wright that the service delivery modelling TBS and BA-DS are using are different to that of FACS in that the agreements TBS has to provide disability services are with the end user, not tripartite with the Commonwealth[62]. Mr Wright agreed.

[37] During re-examination Mr Wright stated that he was not personally involved in any of the decisions he was questioned on, bar the decision of Hamberger SDP of 22 April 2016.[63] In relation to this latter decision, when questioned, Mr Wright stated that it was regarding the privatisation of "the home care service" which was funded by "Home Care Service of NSW", and was state owned and administered. He was unsure as to whether Australian Unity, the new employer, attracted substantial Commonwealth funding.[64]

CPSU - Ms K Cruden

[38] The CPSU then called Ms K Cruden, Industrial Manager of the FACS and Health Team in the PSA and CPSU, who made one affidavit dated 10 November 2017.[65]

[39] Ms Cruden's affidavit explained that the PSA/CPSU have tried to foster a relationship with TBA, that TBS has refused to recognise their coverage of the transferring employees, and of the instance where CPSU organisers were denied entry to TBS on 3 August 201[66]

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[56] Exhibit E, Williams SDP, 10 August 2004, PR950621, PN188.

[57] Affidavit of Wendy Pettifer (Exhibit I), PN925.

[58] PN189.

[59] PN190.

[60] PN193.

[61] PN196.

[62] PN224.

[63] PN227 – PN229.

[64] PN229-PN238.

[65] Affidavit Of Kristine Marie Cruden (Exhibit 7), PN256.

[40] Ms Cruden responded to the affidavit of Ms Pettifer, dated 26 October 2017.[67] In summary, Ms Cruden outlined the "transfer order" regarding the benefits of the transferring employees. It states that the intent of the transfer was to enable continuity in clients and in service delivery, meaning the manner in which they work would remain largely the same.[68] It defines the NDIS as a "Medicare Type insurance scheme", and states that a client applies to the NDIA, who then assess for certain services and is then made a support plan specifying which services are approved.[69]

[41] Ms Cruden went on to respond to the affidavit of Ms Toohey, dated 26 October 2017.[70] Ms Cruden stated that, after conducting ASIC searches, she is of the opinion that the 70 separate subsidiaries and related bodies corporate of TBS gets the majority of their funding from the NDIS. Ms Cruden went on to discuss various industrial conditions in TBS and how the CPSU has tried to work together with TBS to alleviate issues.

[42] In cross examination Ms Cruden was asked her understanding about whether TBS is required to enter into various forms of service agreements with its clients that can be terminated on 30 days' notice and whether, if TBS was not an effective provider, that it could lose its clients on this basis.[71] Ms Cruden was then questioned about client agreements with the NDIS[72]. Ms Cruden conceded she was not familiar with these arrangements.

TBS - Ms J Toohey

[43] In support of their submissions TBS first called the witness Ms J Toohey, Chief Executive Officer of TBS, who made an affidavit dated 26 October 2017.[73]

[44] Ms Toohey gave evidence about the background of TBS, the NDIS and the phasing agreements that moved employees from the FACS to BA-DS.[74] She went on to outline the existing industrial arrangements and coverage with staff. It states that 297 of the transferring employees hold positions very similar to roles within TBS, and argues that as a result would be covered by the Social, Community, Home Care and Disability Services Industry Award 2010 (SCHADS Award) and the Australian Municipal, Administrative, Clerical and Services

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[66] Affidavit of Kristine Marie Cruden (Exhibit 7), page 2.

[67] Affidavit of Wendy Anne Pettifer (Exhibit I).

[68] Affidavit of Wendy Anne Pettifer (Exhibit I), page 3.

[69] Affidavit of Wendy Anne Pettifer (Exhibit I), page 4.

[70] Affidavit Of Joanne Toohey (Exhibit G).

[71] PN264 – PN271.

[72] Bundle Of Documents Commencing With Letter To Benevolent Australia Disability Services Ltd Dated 15/08/2017 (Exhibit J), PN272.

[73] Affidavit Of Joanne Toohey (Exhibit G) PN322.

[74] Affidavit Of Joanne Toohey (Exhibit G), pages 1-2.

Union (ASU).[75] The remaining staff, barring nurses, would normally be covered by the HSU.[76] Finally, Ms Toohey outlined the changes made to TBS to integrate FACS transferring staff. She stated that the introduction of the CPSU as an employee organisation does not fit with "TBS' objective to integrate DS and TBS staff."[77]

[45] In examination in chief, Ms Toohey made several changes to her affidavit. Firstly, that in paragraph 19(h) the number of Senior Managers transferred changed from 19 to 9.[78] This meant that the total when added to the 297 employees in the right hand column of paragraph 17, that forms the contingent of transferred employees being 688.[79] Lastly, she confirmed that BA-DS is a registered provider under the NDIS.[80]

[46] I asked Ms Toohey to explain the mechanism to by which the transferring employees where transferred. Ms Toohey explained:

> "As part of the transfer, the mechanism for the transfer was such that a separate legal entity had to be established and a single share, which was the share that we were acquiring - it was like any other merger and acquisition process, if you like - would then get transferred over into the separate entity. That is then when we established Benevolent Australia Disability Services. So all the employees and anything else that was transferred across then transferred across to Benevolent Australia Disability Services, which is a separately owned entity of The Benevolent Society.
>
> […]
>
> So the mechanism, which was the Enabling Act, was the Act that the New South Wales government put in place when it made the decision following the signing of the bilateral agreement with the Commonwealth to move itself out of direct service delivery and transfer all its service delivery for its ageing and disability services across to the non-government sector. What the Enabling legislation does is it allows for things like the two year employment guarantee, the public state awards, the continuation of terms and conditions of employment, areas such as continuity of service, delivery for clients"[81]

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[75] Affidavit Of Joanne Toohey (Exhibit G), page 3.

[76] Affidavit Of Joanne Toohey (Exhibit G), Page 4.

[77] Affidavit Of Joanne Toohey (Exhibit G), page 5.

[78] PN317.

[79] PN318.

[80] PN319.

[81] PN327-335.

[47] Ms Toohey was cross-examined.[82] She agreed that as a consequence of establishing the NDIS, the Commonwealth government entered into an agreement with the NSW government meaning that the latter would cease to providing disability services. And that once the NDIS had been fully implemented, the funding for the provision of disability services would be provided through what is now known as the National Disability Insurance Agency, the NDIA, a Commonwealth agency. She also agreed that as a consequence of that agreement NSW government services were transferred to the non-government sector. Additionally, that TBS was successful in tendering to take over these previously NSW services. [83]

[48] Mr Gibian put it to Ms Toohey that once the NDIS is fully implemented, the funding for those clinical services will be provided through the NDIA. She replied:

> "Look, only some of the funding will be provided through NDIA. Upon transfer, only - we were actually receiving no NDIS funding at all upon transfer and so the funding will be between both the NDIS, through Medicare billing, through private fee for service. We have no funding agreement with the Commonwealth for any disability services funding."[84]

[49] Ms Toohey then clarified that of the services that were transferring over, the work prior to the transfer would need to change post transfer because a large portion of the work they did would attract no revenue.[85] Additionally, that TBS had undertook to continue the same services to the same clients of FACS for a period of at least 2 years.[86] This was cross referenced with a clause in the Implementation Sale Agreement (**ISA**) references in a letter to Ms Toohey from Mr C Leech.[87]

[50] Ms Toohey then explained that the "transfer agreement" the NSW legislation prescribes is one of the annexures to the ISA. [88] And, that the "transfer order" was nothing more than just a schedule of a number of names of the transferring employees.[89]

[51] Ms Toohey then agreed that the ISA included an "employee guarantee period" of 2 years, where TBS was prevented from terminating the employment of employees other than for misconduct, maintain the existing terms and conditions of employment, recognised

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[82] PN390.

[83] PN392-400.

[84] PN402.

[85] PN403.

[86] PN404-409.

[87] PN415. Later marked into evidence as Exhibit 9.

[88] PN424.

[89] PN431.

continuity of employment for entitlements such as leave and would not seek to make an enterprise agreement applying to the transferring employees.[90]

[52] Ms Toohey then agreed that TBS was aware prior to the transfer, and agreed to it, that the existing employees were covered by a number of awards made by the New South Wales Industrial Commission, and that those instruments had been made with the involvement of the PSA, and that some of the transferring employees were members of the PSA.[91] And, that as a consequence, that these employees would have different conditions than the existing workforce of TBS for a least 2 years.[92]

[53] Ms Toohey confirmed that when PSA wrote to TBS seeking a meeting to discuss their members, that TBS refused to meet with the CPSU, with reference to annexure D to Mr Wright's first affidavit.[93]

[54] Mr Gibian put it to Ms Toohey that she did not want public sector unions in The Benevolent Society, to which she replied:

> "That's not what I said at all actually. What I actually said was that there were unions who were connected to our organisation who would already adequately cover the transferring employees. I talked about some of the difficulties that we had in the transferring employees and some of the practices that we were having to adjust to, but I never said that I did not want public sector union in our organisation.[94]

[55] Ms Toohey agreed that she knew that the transferring employees were likely to want to maintain their membership with the PSA or its federal counterpart, and then later that she opposed the CPSU or the PSA being able to represent persons who are employed now within The Benevolent Society group.[95]

[56] Ms Toohey agreed with a proposition that I put that, in essence, she was saying to BA-DS employees, "You can't have the union you want that has been representing you all these years. You can only have these ones."[96]

[57] Mr Gibian put it to Ms Toohey that, in relation to any of the copied state instruments, no employee organisation other than the PSA was involved, to which she replied that she did

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[90] PN433-439.

[91] PN440-446.

[92] PN449.

[93] Affidavit Of Troy Wright Dated 29 September 2017 (Exhibit 5).

[94] PN474.

[95] PN504.

[96] PN512.

not know.[97] She subsequently agreed that she did not take any steps to ascertain this fact leading into the hearing.[98]

[58] Ms Toohey then confirmed that the number of staff occupying existing roles was 501, covered by 5 different unions,[99] and that the biggest challenge regarding the transfer was to create "one culture".[100] She agreed that this one culture had been achieved prior to the transfer with the involvement of these 5 unions. Mr Gibian then asked whether the addition of the CPSU would create "some inseparable difficulties to the organisation", to which Ms Toohey replied that the involvement of unions does not play a part in the organisational culture of TBS.[101] She confirmed she is not concerned, from an organisational culture perspective, with the involvement of the CPSU.[102]

[59] Mr Gibian then drew the Commission's attention to paragraph 27 of her affidavit, which states "In my view the introduction of a new Employee Organisation (in particular an Employee Organisation that TBAS has had no relationship with ever) does not fit with TBS' objective to integrate DS and TBS staff." [103] And asked "When you say that it doesn't fit the objective of integrating those staff, you weren't referring to organisational culture in that respect. Is that right?"[104] Ms Toohey replied:

> "No. What I was referring to was the fact that we would be dealing with staff from the same disciplines doing identical work and dealing with two completely different unions about those staff members in the organisation who were doing exactly the same thing. Employed on very different terms and conditions, but essentially doing the same role in the organisation. So even if we were to look at an enterprise agreement in two or three years' time, that would essentially be the same thing; that we would be dealing with different unions around exactly the same classifications within the organisation. That cultural piece for us, already knowing that we had staff who were on different terms and conditions who are the transferring employees, you know, those sorts of considerations are incredibly important in ensuring that we end up with one fully integrated organisation."

[60] As cross-examination continued, Ms Toohey explained again the employee guarantee period of 2 years and the way in which a particular person engages TBS and the interactions

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[97] PN544.

[98] PN548.

[99] PN552.

[100] PN553.

[101] PN557.

[102] PN558.

[103] Affidavit Of Joanne Toohey (Exhibit G).

[104] PN562.

of the NDIA in this process.[105] This involves either billing the NDIA or the participant directly.[106] Ms Toohey confirmed that TBS is not seeking to profit from disabled people, but instead recover the costs of providing its services. [107]

[61] I asked Ms Toohey whether the money TBS receives comes indirectly from the Commonwealth. After some clarification Ms Toohey agreed it did.[108] In addition Ms Toohey conceded that BA-DS was, in a way, structured like a labour-supply company,[109] and that BA-DS renders an invoice to TBS internally for employment costs.[110]

[62] Ms Toohey then gave some inconsistent evidence about whether, if Mr Wright came to TBS tomorrow with his "PSA hat" on, she would deny him entry.[111] Mr Dixon sought to clarify the evidence.[112]

> "Mr Dixon: Ms Toohey, if a person from the PSA came to TBS or BA-DS tomorrow, or next week with a copied state award which purported to give a right to consult, for example, under the dispute settlement procedure what would your position be, vis-à-vis the recognition of that right under the copied state instrument?"[113]
>
> Ms Toohey: "I would absolutely give them those rights in the organisation."[114]

[63] Ms Toohey went on to confirm in the context of this example she would extend the same recognition to right of entry, attending inductions, and delegate rights to the PSA if she had legal advice that these rights existed. Finally, she stated the reason for her previous inconsistent statement was that she "mistakenly put the CPSU and the PSA together and I shouldn't have done that because the matter is about the CPSU's right of coverage".[115]

[64] Ms Toohey went on to confirm that BA-DS is obliged to recognise state awards, that the PSA was covered by those awards and that there is no policy in TBS or BA-DS to exclude any union from TBS.[116]

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[105] PN564-PN583.

[106] PN583.

[107] PN595-PN596.

[108] PN600.

[109] PN607.

[110] PN611.

[111] PN646.

[112] PN649.

[113] PN704.

[114] PN704.

[115] PN706.

[116] PN708-PN710.

[65] Ms Toohey also clarified that the revenue BA-DS is receiving is reimbursement for services rendered and that it is not a funding agreement with the Commonwealth.[117]

[66] Ms Toohey was given various copies of the copied state awards, shown that they refer to the PSA, and then asked whether she would allow PSA staff, under the rights referred to in the copied state awards to exercise those rights. She confirmed that she would.[118]

[67] I then brought Ms Toohey's attention to the fact Mr Wright wrote to her on 13 April on the PSA letterhead.[119] Ms Toohey stated that it was also the timing of this letter which predated the transfer of the employees which posed a problem. I asked whether, if this letter was sent after the transfer, she would not have objected, to which she agreed.[120]

[68] Mr Gibian further cross-examined Ms Toohey drawing her attention to the letter of 13 April,[121] which indicated that the PSA is an associated body of the CPSU the right to enrol and represent this cohort of employees will continue upon their transfer. Similarly, he then drew her attention to TBS' reply on 26 April 2017, which referred to the CPSU's rules in its refusal to meet with the union.[122] Ms Toohey agreed that she did not tell the CPSU that if Mr Wright approached TBS with his "PSA hat" on, that they would be open to discussion.[123] She also confirmed that she knew that Mr Wright is both the branch secretary of the CPSU for NSW and the assistant general secretary of the PSA.[124]

[69] When asked on what basis she denied him entry, Ms Toohey replied it was because he was presenting himself as the CPSU, not the PSA.[125]

[70] I then queried Ms Toohey on the utility of her case to deny the CPSU entry, which she replied:

> "If the PSA is the organisation who has had the longstanding relationship with the employees which has been asserted several times, then for me it would be the PSA then who would be the ones we would be looking to maintain the relationship with, not

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[117] PN712.

[118] PN720-PN734.

[119] Affidavit Of Troy Wright Dated 29 September 2017 (Exhibit 5), Annexure C.

[120] PN745.

[121] Affidavit Of Troy Wright Dated 29 September 2017 (Exhibit 5), Annexure C.

[122] Affidavit Of Troy Wright Dated 29 September 2017 (Exhibit 5), Annexure D.

[123] PN763.

[124] PN766.

[125] PN767.

> the CPSU. The CPSU doesn't have – we don't believe the CPSU has coverage in this matter and certainly over the employees that have transferred."[126]

[71] Ms Toohey reiterated that she does not believe the CPSU has coverage, and that she is "more than comfortable dealing with the PSA, as required under the state agreements."[127]

[72] Mr Gibian asked Ms Toohey whether she knew that CPSU is the Federal counterpart organisation to the PSA, and that Mr Wright is the both the assistant branch secretary of the CPSU, and the assistant general secretary of the PSA, which she confirmed. He then asked whether she was aware of that employees and organisers of the PSA and CPSU are jointly employed by the Federal and state organisations, to which she stated she was not aware.[128] Finally he posited that it was the exact same union staff turning up to the workplace, regardless of whether they are wearing their "PSA hats" or "CPSU hats". Ms Toohey replied "I just want to be clear about which organisation I'm actually dealing with.".[129]

[73] Upon further questioning Ms Toohey conceded that if Mr Wright wrote to her on PSA letterhead, and changed all the references to CPSU to PSA, her response would be substantially different, and that TBS would talk about consultative arrangements, and finally that if he attended the workplace in a PSA lanyard, she would meet with him.[130]

TBS - Wendy Pettifer

[74] In her witness statement Ms Pettifer, provided evidence about the transfer of the FACS staff. She then went on to describe the NDIA Registration process.[131] After this process, when the transfer occurred, only a small number of clients transferred to BA-DS, however, the majority of clients transferred to TBS to be funded by FACS. In her evidence she outlined the Client Agreement clients who received new service post transfer signed with TBS. In addition, TBS entered into a brokerage agreement with BA-DS.

[75] Ms Pettifer went on to describe billing under the NDIS and State funding arrangements, whereby approximately 80% of TBS's disability clients are still funded by FACS, which will change over time. Finally she described billing under the NDIS and described it as an insurance scheme similar to Medicare.

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[126] PN809.

[127] PN811.

[128] PN815.

[129] PN817.

[130] PN891-PN893.

[131] Affidavit of Wendy Anne Pettifer (Exhibit I).

[76] Mr Dixon did draw the Commission's attention to a bundle of documents, beginning with a letter to BA-DS dated 15 August 2017.[132] The witness was then directed to an agreement governing the relationship of a client with TBS, whereby a private client would pay to TBS for any services outside of the NDIS.[133] She was then directed to a service agreement who has allowed the NDIA to manage their fund and explained that receives an amount of money into a fund from the NDIA and can elect to either the NDIA manage, or self-manage the fund.[134] This particular agreement was where the NDIA was managing the fund, which Ms Pettifer explained meant that the BA-DS invoices the DNIA for services rendered.[135]

[77] Subsequently, the Ms Pettifer was referred to an additional agreement, [136] and then asked about the tax invoices in the bundle of documents.[137] She explained that this showed that invoicing people directly for services occurs. Further documentation showing correspondence between TBS and the NDIS was explained, showing how the "NDIS Number" is linked to an individual receiving service and then uploaded with regards to quantity to the NDIA portal.[138][139] Finally, correspondence which functions as an invoice was shown to her.[140]

[78] In cross-examination, Mr Gibian asked Ms Pettifer's if she was involved in managing the transition from "block funded services" to the NDIS, which she confirmed. [141]

[79] Mr Gibian asked if TBS planned to transition away from these services by June 2018. Ms Pettifer confirmed this and stated that it would be replaced by a number of different revenue streams.[142] Ms Pettifer then when on to explain how an individual can apply to become a participant in the NDIS, have a participant plan prepared for them which sets out

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[132] Bundle Of Documents Commencing With Letter To Benevolent Australia Disability Services Ltd Dated 15/08/2017 (Exhibit J).

[133] Bundle Of Documents Commencing With Letter To Benevolent Australia Disability Services Ltd Dated 15/08/2017 (Exhibit J), Annexure B,.

[134] Bundle Of Documents Commencing With Letter To Benevolent Australia Disability Services Ltd Dated 15/08/2017 (Exhibit J), Annexure C.

[135] PN935.

[136] Bundle Of Documents Commencing With Letter To Benevolent Australia Disability Services Ltd Dated 15/08/2017 (Exhibit J), Annexures D.

[137] Bundle Of Documents Commencing With Letter To Benevolent Australia Disability Services Ltd Dated 15/08/2017 (Exhibit J), Annexures E-F.

[138] Bundle Of Documents Commencing With Letter To Benevolent Australia Disability Services Ltd Dated 15/08/2017 (Exhibit J), Annexure G.

[139] PN945.

[140] Bundle Of Documents Commencing With Letter To Benevolent Australia Disability Services Ltd Dated 15/08/2017 (Exhibit J), Annexure H.

[141] PN966.

[142] PN968.

the supports the person is entitled and the funding provided by the NDIA. Further, that NDIS providers need to be registered with the NDIA, and that people who are self-managed can use providers that are unregistered.[143]

[80] Ms Pettifer confirmed that both TBS and BA-DS are registered. With the staff being employed by BA-DS, but providing services through TBS.[144] She went on to confirm that in the instance of a self-managed fundee, TBS received revenue from NDIA in return of services to clients who have service agreements, and that they don't have any agreements with the NDIA, only with clients.[145]

[81] Mr Gibian asked if private clients, not funded through the NDIS provided approximately 5% of revenue for TBS, which Ms Pettifer confirmed, clarifying that this was prior to the transfer of disability services.[146] Mr Gibian asked Ms Pettifer about Annexure C of her affidavit,[147] the "Provider Toolkit Module 3: Terms of Business. In the Section "Payments and Pricing" where is Ms Pettifer explained there is a cap of maximum cost for all clients who are not self-managed, whereas self-managed clients do not need to adhere to the price guide.[148] Ms Pettifer confirmed that all that can be received by TBS is the service amount.[149]

[82] Ms Pettifer was referred to the bundle of documents, Exhibit J, Annexure G, the CSV Report, and confirmed it is a summary of the services that are provided to individual clients who have their funds managed by the NDIA.[150]

[83] When re-examined Ms Pettifer about Annexure G of Exhibit J, the CSV Report Invoice, Ms Pettifer stated:

> "So my understanding of that is that under section 45 of the NDIS Act that describes payments of NDIS amounts, it only speaks about amounts that are payable to participants or persons who are managing funding and it doesn't differentiate between who is actually managing those funds. So the funds can be managed by the person themselves, by a nominated plan manager or the NDIA and there's no differentiation made. So the funds, once they've been assessed by the NDIA, belong to the participant.

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[143] PN967-PN974.

[144] PN976-PN978.

[145] PN984.

[146] PN1010.

[147] Affidavit of Wendy Anne Pettifer (Exhibit I)..

[148] PN1015-PN1018.

[149] PN1020.

[150] PN1028.

> And where we invoice the NDIA it's only because the client has agreed that NDIA should be managing those funds, and the NDIA will only pay us if we can demonstrate that we've provided the services that we agreed with the client, which is why the service agreement is with the client and that's no different to when we invoiced somebody who self-managed, no different to when we invoiced somebody who is privately funded, and no different to how we would invoice someone who was having their plan managed by a nominated planner. And so that's why they get the agreements with the client and if we provide more hours of service to a client than we agreed in the service agreement the NDIA won't pay us because the client doesn't have that money."

TBS – Dirk Duvenhage

[84] Mr Duvenhage Director of Finance at TBS was not required for cross-examination. In his witness statement Mr Duvenhage gave evidence about the transfer of employees, and the Brokerage Agreement between BA-DS and TBS. He went on to describe several agreements. Firstly, CST Agreement between FACS and TBS to ensure the continuation of various services. And secondly, a Group Homes Agreement between FACS and TBS which provides funding so that BA-DS employees can continue to provide specified services. It states that approximately 80% of disability support clients are funded through funding by FACS set out in these two agreements. Finally it states that BA-DS has no other source of income other than through the NDIS and the arrangements described above with FACS.[151]

Consideration

[85] In light of the evidence in the proceedings I make the findings of fact contained in the ASOF. I also find that;

a) On and from 1 August 2017 almost 700 former employees of ADHC became employees of BA-DS. That is to say, they did not become employees of TBS despite:
    i. the letter of offer coming from TBS (and it not mentioning BA-DS).

    ii. the transfer of employment letter from FACS referring only to TBS (and not mentioning BA-DS, but only to the NSW Government and TBS "working together to set up a new company").[152]

b) The Ministerial Order provided "for the transfer of employment of Disability Service Employees identified in [the] Order to Benevolent Australia Disability Services Limited (ABN 48 619 338 153)".

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[151] Affidavit of Mr Duvenage (Exhibit K).

[152] *National Disability Insurance Scheme (NSW Enabling) (Service Group 22 Transferring Employees) Order 2017.*

c) BA-DS is a company limited by guarantee.

d) TBS acquired BA-DS under the terms of the Implementation and Sale Agreement entered into by TBS and the NSW State Government.

e) There is also a Brokerage Agreement between TBS and BA-DS dated 28 July 2017 (entitled "Intra-group Services Agreement"). Through this arrangement:

i. The former employees of ADHC (now employees of BA-DS) provide services to clients with disabilities.
ii. TBS invoices the clients for those services.
iii. TBS receives the funds.
iv. TBS remits some of those funds back to BA-DS to pay its employees.

f) "But for payments made via the NDIS, and interim NSW Government agreements involving FACS, BA-DS receives no other income."[153]

g) The arrangement whereby the employees are employed by BA-DS and the funds are received by TBS, from either the Commonwealth directly or indirectly through recipients of NDIS funding, is an administrative/financial convenience to TBS and BA-DS as part of an intra TBS group of companies.

h) The Commonwealth funding for the NDIS now comes to providers like TBS through the choices made by the recipients, that is to say the funding that comes to TBS is now indirect (although there is still some direct funding by the Commonwealth until the NDIS scheme is fully operational). Further the funding received by BA-DS (whose employees provide the services to TBS) is also indirect (i.e. it comes via TBS which renders invoices to its clients).

i) The awarding of the tender to TBS constituted transfer of business from the NSW state public sector to a national system employer for the purposes of the FW Act.

j) TBS was then required to comply with the Copied State Awards. BA-DS is also required to comply with the Copied State Awards.

k) Employees of the ADHC division of the NSW FACS Department have historically been represented by the PSA NSW.

l) The PSA NSW is covered by the State Awards and, therefore, "would be" covered by the Copied State Awards.

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[153] Statement of Joanne Kathryn Toohey (Exhibit G), para 12.

m) The PSA NSW:

   i. is not a registered organisation of employees for the purposes of the *Fair Work (Registered Organisations) Act 2009 (Cth)* or the FW Act, and
   ii. is no longer a transitionally recognised organisation of employees for the purposes of the *Fair Work (Registered Organisations) Act 2009 (Cth)* or the FW Act.

n) The PSA NSW cannot now represent the interests of the former ADHC employees now employed by TBS. That is to say, although TBS is now required to comply with the Copied State Awards, the union (PSA NSW) that historically represented employees covered by those awards cannot do so in the federal jurisdiction.

o) Members of the PSA NSW are also members of the CPSU.

p) The CPSU is the federal counterpart of the PSA NSW. The PSA NSW is also an "Associated Body" within the Rules of the CPSU.

q) Rule 2 Part I(A.1)(i)(f) of the Rules of the CPSU makes the former ADHC employees eligible to be members of the CPSU because they are,

> "employed … by a body (… corporate …) [namely, BA-DS] being a … body that is financed … in substantial part … indirectly by money provided by the Commonwealth"

r) It is not relevant in these proceedings that, in other proceedings, the CPSU has sought to amend its rules to provide for a "company" or a "corporation" to extend its coverage. It is not necessary in the present matter.

s) The financing is indirectly made by money provided by the Commonwealth because (in circumstances where the Commonwealth is not directly funding TBS (and in some cases it still does)):

   i. the Commonwealth provides funds directly to people with disabilities,
   ii. the direct recipients of Commonwealth funds choose a NDIS provider (in the present matter TBS),
   iii. TBS invoices the recipients of Commonwealth funds for the provision of NDIS services,
   iv. through a Brokerage Agreement TBS pays BA-DS so that it can pay its employees (the former ADHC employees) who are the people who actually provide the NDIS services to the people with disabilities (who are in receipt of Commonwealth funds).

[86] I accept the submissions of the TBS about the meaning of the verb "finance" and that it requires the provision of funding. Indirectly, that it what occurs in the TBS model. The fact that the initial expenditure by the Commonwealth is a payment to an individual recipient does not deprive it of the character of being funds indirectly being provided to a body providing the disability services.

[87] In essence there are a number of interventions between the direct payment made by the Commonwealth and the funds getting to the former employees of ADHC:

a) Commonwealth,
b) Person with a disability,
c) TBS (NDIS provider),
d) BA-DS (employer), and
e) Former employees of ADHC.

[88] But, nonetheless, there is a clear line of sight (albeit indirect) between the Commonwealth and BA-DS. It is monetary support for the operations of TBS and BA-DS. It is sufficient to satisfy the Rules of the CPSU.

[89] I reject the submission of TBS that the Rules of the CPSU can only capture bodies that are controlled by the Commonwealth. To adopt that construction would be to insert words into the Rules that are not there. There is no warrant to do so. The words must be given their ordinary meaning. They must not be construed narrowly.

[90] Rule 2, Part I(A.1)(i)(f) must be given some work to do. It is intended to extend the operation of the Rule. It not confined by what proceeds it. It might give it context, but no more. The NDIS is a public purpose. The recipient of the money cannot spend it other than in accordance with their management plan.

[91] Further, I reject the TBS submission that the relationship between the person with a disability and it is commercial in nature. It is not. It is an agreement for the provision of a disability service by a not-for-profit organisation. It is not a commercial transaction as that phrase is properly to be understood. The exemption in the Rules of the CPSU relates to the provision of goods and services "to the Commonwealth". The services provided to the people with disabilities in receipt of Commonwealth funding under the NDIS are not being provided to the Commonwealth. The exemption in Rule 2 Part I(A.1)(i)(f)(A) does not apply.

[92] The construction of the Rules of the CPSU for which it contends would enable fairness and representation at work for the former employees of ADHC. It would recognise their human right to freedom of association and the right to be represented. To deny the former employees of ADHC the right to choose to be represented by the federal counterpart (CPSU) of the union that has historically represented them (PSA NSW) would be violation of that human right.

Application of s.768BB

[93] S.768BB has a simple purpose. It is to allow the Commission to substitute coverage by a State-registered union (which is a party to relevant State awards or agreements) by ordering that copied State instruments instead cover the federal counterpart union. The scheme is intended to ensure continuity of terms and conditions of employment, industrial regulation and industrial representation where employees move from the State public sector to a national system employer. It was intended to cover the very situation that former ADHC employees find themselves in, in the present matter.

[94] By reason of the above I am satisfied that the CPSU is entitled to represent the industrial interests of the former employees of ADHC with the consequence that the CPSU is able to make the present application to the Commission.

[95] I am also satisfied that, subject to the further programming of the matter, I should exercise the discretion in s.768BB in favour of making an order that the CPSU be covered by the Copied State Instruments.

The future of the application

[96] However, by reason of the finding of fact made above, that Benevolent Australia – Disability Services Ltd is the proper employer of the former ADHC employees, it seems that the CPSU named the incorrect respondent (The Benevolent Society) in its Form F1 Application.

[97] That raises the issue of the capacity of the Commission to amend the application pursuant to section 586 of the FW Act. The CPSU has not sought leave to amend the Form 1 Application, but, in fairness to it I think I should:

a) provide the CPSU with an opportunity to do so, and

b) also provide any interested party with an opportunity to make a submission about the power of the Commission to allow any amendment noting that,

    i. the Commission is required to act "equity, good conscience and the merits of the matter" by section 578 of the FW Act, and

    ii. the objects of the FW Act provide that there should be "accessible and effective procedures to resolve grievances and disputes".

[98] By the time of hearing, the proposed form of Order (Exhibit 2) filed by the CPSU identified the employment as having been transferred to BA-DS and identified BA-DS as the respondent. For the reason above I am inclined to make the Order.

[99] However, I am conscious that no representative of BA-DS appeared at the hearing. Likely, because it is was acquired by TBS, it officers were aware of the proceedings. It could have participated if it had wanted to. I would have given it leave to do so. However, in circumstances where it did not participate, as a matter of procedural fairness, I want to give BA-DS an opportunity to comment on the proposed form of Order.

Directions

[100] Accordingly, the Commission, as presently constituted, directs that,

a) By **5.00 pm on Friday, 16 March 2018** the CPSU must file in the Commission and serve on TBS and BA-DS any proposed amendment of the Form F1 and the proposed form of Order.

b) By **5.00 pm on Friday, 23 March 2018** any interested party must file in the Commission and serve on the CPSU any submission relating to the proposed amendment of the Form F1 and the proposed form of Order.

c) By **5.00 pm on Thursday, 29 March 2018** the CPSU must file in the Commission and serve on any interested party which has filed submission in the matter its reply.

d) By **5.00 pm on Thursday, 5 April, 2018** all parties must contact the chambers of the Commissioner Johns to advise whether they are content for the issue of amendment and the final form of Order to be determined on the papers filed as a consequence of these Directions.

COMMISSIONER

Appearances:

Mr M Gibian for the CPSU instructed by *Ms A McRobert*

Mr T Dixon for the Benevolent Society instructed by *Mr N Chadwick*

Hearing details:

Sydney

Friday, 15 December 2017

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