

24 August 2021

Ingrid Stitt MP
Minister for Workplace Safety
Department of Jobs, Precincts and Regions
GPO Box 4509
Melbourne VIC 3001



Dear Minister Stitt

RE: CONSULTATION ON SECURE WORK PILOT SCHEME

The Victorian Trades Hall Council (VTHC) welcomes the opportunity to make a submission to the consultation on the Victorian Government's Secure Work Pilot Scheme.

VTHC was founded in 1856 and is the peak body for unions in Victoria. VTHC represents over 40 unions and more than 430,000 workers in the state. These workers are members of unions that reach into every industry across Victoria, both in the public and private sectors, including workers employed in insecure arrangements such as casual work, short-term contracts, and platform-based gig work.

Since winning the Eight Hour Day in 1856, VTHC has had a long history of fighting for and defending the rights of workers in Victoria, including workers in insecure employment arrangements that are highly exposed to the economic and public health risks of COVID-19.

VTHC welcomes and commends the Victorian Government's proactive approach to address these risks faced by insecure workers. It demonstrates a strong commitment to safe and fair work conditions for all workers in Victoria, as well as a recognition of the need to address conditions of work in order to protect Victoria from the worst effects of COVID-19.

In August 2019, 23.2% (or 651,900) of Victoria's workers were employed casually without paid leave entitlements.¹ Many of these workers are essential workers or are employed by essential providers, as explored further below. Yet the insecure conditions of their employment mean that they are often forced to choose between paying for food and rent, or staying home when experiencing symptoms of illness.

The risks to workplace safety are magnified by the economic conditions that force workers to go to work even when they feel unwell. And the repercussions for public health are severe, especially during the pandemic of the highly-infectious coronavirus.

¹ Gilfillan, G. (2020), 'COVID-19: Impacts on casual workers in Australia—a statistical snapshot', Parliament of Australia, accessed: <https://www.aph.gov.au/AboutParliament/ParliamentaryDepartments/ParliamentaryLibrary/pubs/rp/rp1920/StatisticalSnapshotCasualWorkersAustralia>

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To ensure the Scheme provides an effective safety net that supports casual workers to take sick leave and carers leave, VTHC will make a number of recommendations to the design of the program to maximise its effectiveness:

- 1. COVERAGE (Q1.2):** In August 2020, there were 2.3 million employees who were not entitled to paid leave – equivalent to 22% of all employees or 18% of all employed people.² Research shows that the industries with the highest number of casual workers in 2018 were (in order): accommodation and food services, retail trade, healthcare and social assistance, construction, then manufacturing.³

These industries overlap significantly with industries that provide essential goods and services, and have therefore remained operational during the COVID-19 pandemic, including: restaurants and cafes; supermarkets and pharmacies; aged care; and primary industries that ensure adequate supply of food, which encompasses agriculture and meatworks.⁴

It is workers in these industries that are both disproportionately exposed to the insecurity of casual work and exposed to transmission of infectious diseases like COVID-19. Indeed, Victoria's worst outbreaks in 2020 occurred in aged care facilities,⁵ supermarkets,⁶ meatworks,⁷ and restaurants.⁸

This is why the Secure Work Pilot Scheme is so important, not only to provide a level of economic security to casual workers with no access to paid leave, but also to address the public health risks that come with casualisation, especially in our essential industries.

As such, VTHC recommends that the coverage of the Scheme during the pilot phase should guarantee coverage to Aged Care, Contract Cleaning, Security Services, Meatworkers, Hospitality (encompassing

² ABS (2020), 'Working arrangements', Australian Bureau of Statistics, accessed: <https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/working-arrangements/aug-2020>

³ AI Group (2018), 'Casual work and part-time work in Australia in 2018', AI Group, accessed: https://cdn.aigroup.com.au/Economic_Indicators/Research_Notes/2018/Ai_Group_casual_work_June_2018.pdf

⁴ Department of Health and Human Services (2021), 'Essential Workers and Essential Providers List', Victorian Government, accessed: https://www.dhhs.vic.gov.au/sites/default/files/documents/202102/Essential%20Workers%20and%20Essential%20Providers%20List_2.pdf

⁵ Swan, N. & Jackson, W. (2020), 'Why did so many healthcare workers in Victoria catch COVID-19?', ABC News, accessed: <https://www.abc.net.au/news/2020-11-11/why-did-so-many-healthcare-workers-in-victoria-catch-covid-19/12869008>

⁶ Deery, S. et al (2021), 'Victoria to close NSW border after five new cases, masks among restrictions to return', Herald Sun, accessed: <https://www.heraldsun.com.au/coronavirus/the-three-new-coronavirus-cases-in-victoria-are-believed-to-be-linked-to-the-sydney-outbreak/news-story/bd609e6e4985bb3d8ad89a3513614451>

⁷ Baker, R. et al (2020), 'Labour hire firm told of COVID-19 outbreak days before Cedar Meats', The Age, accessed: <https://www.theage.com.au/national/victoria/labour-hire-firm-told-of-covid-19-outbreak-days-before-cedar-meats-20200507-p54qx7.html>

⁸ Cowie, T., Sakkal, P. and Dow A. (2020), 'Two more COVID cases linked to Thai restaurant as testing wait times hit four hours', The Age, accessed: <https://www.theage.com.au/national/victoria/covid-confirmed-in-regional-victoria-no-new-community-cases-20210101-p56r5e.html>

the Restaurant Award, Fast Food Award, Café and Restaurant Award), Retail and Horticulture industries.

- 2. ELIGIBILITY (Q2):** All workers that work in Victoria, who are employed casually or through independent contracting in the industries above, should be eligible to be part of the Pilot Scheme. Eligibility should not be means-tested, so that workers will not be required to have worked for a minimum number of hours or undertake a waiting period after registration to access the payment.

Further consideration should be given to ensure border community workers are considered in the scope of the Pilot Scheme.

- 3. ENTITLEMENT AMOUNT (Q3.1):** VTHC recommends that the provision of payment equivalent to 5 days at the minimum wage should be provided as 38 hours, in line with the maximum weekly hours set out in the NES,⁹ available for all eligible workers to be drawn down upon hour-for-hour on any shift missed due to sickness or caring responsibilities. This is to encourage all workers, no matter the length of their shift, to use the Scheme.

Provisions of payment on a presumed 7.5-hour work day runs the risk of disadvantaging workers with changing work hours. For example, being able to request payment hour-by-hour means a worker rostered for a 10-hour shift will not have to choose between a pay cut (receiving pay for only 7.5 hours) or taking sick leave.

It also aims to maximise the bank from which a worker can draw down upon to take sick leave or carer's leave. For example, if a worker is only taking sick leave on a 4-hour shift, they should be able to retain 34 remaining hours of sick leave through the Pilot Scheme, rather than use up all the hours of a standard 7.5-hour work day each time they make a request.

- 4. TYPES OF LEAVE (Q4):** VTHC recommends that the definition of personal leave outlined in the National Employment Standards (NES) is appropriate for adoption in the Pilot Scheme.

The NES set out 11 national minimum employment entitlements that apply to all employees in Australia. Sick or carer's leave (personal leave) can be used when an employee is ill or injured or when they need to take time off to care for an immediate family or household member who is sick or injured or require help during a family emergency.^{10 11}

⁹ Fair Work Ombudsman (2021), 'Maximum Weekly Hours', Fair Work Ombudsman, accessed: <https://www.fairwork.gov.au/tools-and-resources/fact-sheets/minimum-workplace-entitlements/maximum-weekly-hours>

¹⁰ Fair Work Ombudsman (2021), 'National Employment Standards', Fair Work Ombudsman, accessed: <https://www.fairwork.gov.au/employee-entitlements/national-employment-standards>

¹¹ Fair Work Ombudsman (2021), 'Sick and carers' leave', Fair Work Ombudsman, accessed: <https://www.fairwork.gov.au/leave/sick-and-carers-leave>

'Immediate family' encompasses parents, children, grandparents, siblings, spouses, de facto partners and any step-relations. 'Household member' encompasses all housemates.¹²

- 5. PAYMENT AMOUNT:** VTHC recommends that the payment amounts available through the Pilot Scheme be calculated on normal take-home pay relevant for the shift that is not being worked, with a pay rate floor at the minimum pay rate set out in the relevant Award.

There is a risk that any scheme that provides flat payment of \$20.33 per hour (the current national minimum wage), excluding casual loading or shift penalties, may create a disincentive for workers from utilising the Secure Work Pilot Scheme. Workers may perceive the Pilot Scheme payment amount to be insufficient to enable them to take leave. The Pilot Scheme must be designed to avoid workers having to choose between staying home sick and taking a pay cut, or turning up to work sick in order to receive their full wage.

Similarly, any exclusion of penalty rates for weekends and public holidays within the Pilot Scheme also runs the risk of incentivising workers to come to work sick in order to receive the additional income that comes from penalty rates.

For example, a casually employed Level 1 security officer under the Security Services Industry Award working 8 hours on a Sunday would normally earn a *minimum* of \$411.12 (\$51.39/hour).¹³ If they are paid a flat rate of \$20.33 through the Secure Work Pilot Scheme at the national minimum wage without casual loading or weekend penalty rates, they would receive a payment of only \$162.64, which is less than half of their normal take-home pay. It is clear in situations like these that workers are still likely to lose a significant amount of income if they take sick leave, and will not be adequately supported by a payment amount calculated at the national minimum wage, without penalty rates, to continue to pay basic living costs.

- 6. MAKING A CLAIM (Q5):** For the purposes of the Pilot Scheme, a model where workers register themselves individually may be most efficient, especially while participation is voluntary. Under a worker registration model, workers should provide basic identification documents and proof of employment. Proof of employment should be able to encompass formats beyond formal contracts or payslips, such as text messages confirming employment or bank statements to prove payment from an employer.

The timeframe of payment must be as quick as possible if the Pilot Scheme intends to create genuine incentives to stay home when sick. When workers expect to have to wait weeks to receive payment to put food on the table, they are unlikely to utilise the Pilot Scheme even if

¹² Ibid.

¹³ Fair Work Ombudsman (2021), 'Pay Guide - Security Services Industry Award [MA000016]', Fair Work Ombudsman, accessed: <https://www.fairwork.gov.au/ArticleDocuments/872/security-services-industry-award-ma000016-pay-guide.docx.aspx>

they do need to take sick leave. As such, VTHC recommends that payments must be processed within a maximum of 3 business days.

VTHC recommends that, when the Pilot Scheme has proven to be successful and the Victorian Government intends to establish a sick and carers payment scheme permanently, then the Victorian Government should ensure that the employer is required under legislation to register their workers, in order to maintain the employment relationship between employer and employee. It should function so that when the worker requests and receives approval to take sick leave, the employer pays the worker for the missed shift and is then reimbursed by the Scheme. The worker is then notified of the amount requested and received by the employer.

If an employer fails to register their worker in a permanent scheme, they should receive a proportionate fine. Workers must also be able to report to the Scheme if their employer refuses to register. Under the employer registration model, auditing processes like spot checks will be important to detect and discourage employer misuse of the scheme.

- 7. EVIDENTIARY REQUIREMENTS (Q6):** VTHC recommends that the evidentiary requirements for workers to sign up and request payment must be as low as possible to avoid creating additional expenses for the worker that create further barriers to using the Scheme (such as paying to see a GP to obtain a medical certificate).

A standard consultation with a GP that is not bulk-billed is at least \$78.¹⁴ This could easily outweigh the entire payment amount of a worker who might only be working a 3-hour shift, and would significantly eat into the income that workers need to pay for basic living expenses. The cost burden of obtaining a medical certificate is likely to disincentivise low-income workers from accessing the Pilot Scheme if it is made a prerequisite for receipt of payment.

Given this, neither employers nor the Pilot Scheme should require medical certificates for a worker to apply for sick leave and payment from the Pilot Scheme. An online declaration similar to a Statutory Declaration should suffice as evidence to avoid putting extra costs onto the worker, given that identification details will already be on file when the worker registers for the Pilot Scheme. If proof of lost income is necessary, workers should be able to submit 'informal' proof (to include situations where a worker is called in for a shift via a phone call or a text message).

If any evidence is to be required, the evidentiary burden should only apply for 3 or more consecutive days of sick or carers leave taken, in

¹⁴ Scott, A. & Sivey, P. (2016), 'FactCheck: Have average out-of-pocket costs for GP visits risen almost 20% under the Coalition?', The Conversation, accessed: <https://theconversation.com/factcheck-have-average-out-of-pocket-costs-for-gp-visits-risen-almost-20-under-the-coalition-66278>

line with the Victorian Public Service Enterprise Agreement 2020 set out in Clause 51.10(a)(ii).¹⁵

- 8. ACCESSIBILITY:** VTHC recommends that the Scheme ensures all portals and communications must be available in community languages. Workers with disability or who are not computer literate must have alternative means of registering beyond the online portal, such as a hotline or through a caseworker or support worker.

The Victorian Government must work with unions to ensure that the Scheme is accessible to workers from different linguistic or skills backgrounds, from different industries.

WORKPLACE PROTECTIONS (Q7): VTHC stresses that the Victorian Government must ensure that workers who utilise the Pilot Scheme are protected from adverse action from their employers. The Pilot Scheme provides financial support to enable casual workers to take sick leave, but must also prevent the employer from taking adverse action against the employee for participating in the scheme.

The Victorian Government must take measures to ensure that employers do not force workers to attend work despite taking sick leave, or refuse to offer shifts to workers in the future as a result of participating in the scheme. The purpose of the scheme is undermined if employers are not prevented from requiring workers to attend shifts while on sick leave. Workers and their unions must be able to pursue disputes or raise issues arising from the use of the scheme with relevant regulators.

The *Occupational Health and Safety Act (2004) (Vic)* (OHS Act) provides a broad framework that applies beyond employees. VTHC suggests amending sections 21 and 23 of the OHS Act to provide statutory protection for workers participating in the scheme. Under section 21 of the OHS Act, employers currently have a legal obligation to 'so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health' and 'provide or maintain [...] systems of work that are, so far as is reasonably practicable, safe and without risks to health'.¹⁶ The obligation to provide a safe system of work extends to independent contractors under section 21. Under section 23 of the OHS Act, employers also have a duty to 'ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.' Section 23 extends obligations to third parties such as visitors and customers of the business and self-

¹⁵ Fair Work Commission (2020), Victorian Public Service Enterprise Agreement 2020, Victorian Government, accessed: <https://www.vic.gov.au/sites/default/files/2020-10/Victorian-Public-Service-Enterprise-Agreement-2020.pdf>

¹⁶ Victorian Legislation (2021), Australasian Legal Information Institute (2021), 'Occupational Health And Safety Act 2004 - SECT 21', Victorian Government, accessed: https://content.legislation.vic.gov.au/sites/default/files/d18b764f-6c2d-3b4f-82ef-63e2f905e764_04-107A.pdf, pp. 22-23.

employed workers who may not be captured under section 21. The Victorian Inquiry into the On Demand Workforce found that these provisions provide protections to platform workers in relation to their health and safety.¹⁷ During the Victorian Inquiry, WorkSafe confirmed that platform businesses have statutory occupational health and safety duties to workers regardless whether employment or independent contracting arrangements are used.¹⁸ Amending the OHS Act to provide statutory protection for workers who participate in the scheme is also in line with the objects of the Act.¹⁹

Amendments to the OHS Act will provide protection for workers against adverse action under the *Fair Work Act (2009) (Cth)*. The general protection provisions apply to employees, prospective employees, independent contractors and prospective independent contractors. Under section 340 of the *Fair Work Act*, a person must not take adverse action against another person because the person has a workplace right. Section 341 of the *Fair Work Act*, provides that a person has a workplace right if the person is entitled to the benefit of a workplace law. Section 12 of the *Fair Work Act* defines a workplace law as any State law that regulates the relationships between employers including dealing with occupation health and safety.

When considering an ongoing scheme beyond the Pilot Scheme, an employer registration model would be vital to maintaining the employment relationship. The Victorian Government must ensure that employers are prevented from making misrepresentations to receive 'kickbacks'. For example, measures must be implemented to minimise the risk that the employer pays the worker for a 4-hour shift, but requests reimbursement through the Scheme for a 6-hour shift.

- 9. WORKPLACE RIGHTS EDUCATION:** VTHC recommends that the Victorian Government utilise the Pilot Scheme as an opportunity to educate workers in Victoria about their workplace rights. Resources such as workplace rights factsheets, especially around minimum wages in the relevant Award, should be made accessible for all workers in the Scheme, especially when a worker is first signed up to the scheme.

The development of these resources should be led by Victorian unions, with the Victorian Government assisting in translation into community languages.

¹⁷ Industrial Relations Victoria (2020), 'Report of the Inquiry into the Victorian On-Demand Workforce', Victorian Government, accessed: https://engage.vic.gov.au/download_file/29834/2303, p. 115.

Industrial Relations Victoria (2020), 'Report of the Inquiry into the Victorian On-Demand Workforce', Victorian Government, accessed: https://engage.vic.gov.au/download_file/29834/2303, p. 117.

¹⁹ Victorian Legislation (2021), Australasian Legal Information Institute (2021), 'Occupational Health And Safety Act 2004 - SECT 21', Victorian Government, accessed: https://content.legislation.vic.gov.au/sites/default/files/d18b764f-6c2d-3b4f-82ef-63e2f905e764_04-107A.pdf, Section 2.

Contact details for Wage Inspectorate Victoria, trade unions, and community legal centres such as the Young Workers Centre and the Migrant Workers Centre, should also be made available to any worker who discovers in the course of utilising the Secure Work Pilot Scheme that they are experiencing wage theft.

10. CONFIDENTIALITY (Q7): VTHC recommends that the Victorian Government provide assurance to all workers registered within the Pilot Scheme that no information will be shared with any Federal Government departments or agencies without informed prior consent.

This is to alleviate concerns that migrant workers may have in relation to their visa status, particularly given the precarious position that temporary visa workers are in when their visa is tied up with their employer. Temporary visa holders should be encouraged as much as possible to participate in the Scheme by ensuring they are protected from adverse action from their employer or negative consequences from immigration authorities.

11. EVALUATION: VTHC recommends that the evaluation of the Pilot Scheme be both qualitative and quantitative, and include an assessment of the economic impacts of the Pilot Scheme (e.g. whether the Pilot Scheme allowed workers to pay for basic living expenses during sick leave), social impacts (e.g. demographic analysis of workers that registered or utilised the Scheme), as well as the efficacy of the model of the Scheme (e.g. ease of access or any barriers workers experienced when requesting a payment).

Trade unions should also be a primary participant in any evaluation process, to assess the impact on workplace safety and the efficacy of the program from the perspective of workers.

Once again, VTHC commends the Victorian Government's commitment to the health and economic security of insecure workers in Victoria, and its acknowledgement of the broad impacts that job insecurity has on the wider community, especially during a pandemic.

What is important now is to ensure that the Pilot Scheme is designed to put workers first, allow the greatest ease of access that is possible, and ensure that as many workers as possible can benefit from and test this Scheme.

To ensure that workers are genuinely protected and empowered, ongoing engagement with unions at all stages of planning and implementing the Scheme will be indispensable.

This submission should be read in conjunction with any submissions from Victorian trade unions. Nothing in this submission is intended to override or conflict with the submissions of Victorian unions.

If you have any questions or would like further information, please do not hesitate to contact Politics and Research Lead, Ted Sussex, on tsussex@vthc.org.au

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A Threlfall', with a large, sweeping loop at the end.

Amanda Threlfall
Assistant Secretary
Ref: AT:JK 91.143