



August 2021

By email: [secureworkpilot@ecodev.vic.gov.au](mailto:secureworkpilot@ecodev.vic.gov.au)

**Re: Secure Work Pilot Scheme**

JobWatch thanks the Victorian Government for the opportunity to make a submission on this important Pilot.

**About JobWatch**

1. JobWatch is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.

2. JobWatch is funded by the Office of the Fair Work Ombudsman, Victoria Legal Aid and the Victorian Government. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).

3. JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:

- Information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (**TIS**);
- Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and
- Law reform work aimed at promoting workplace justice and equity for all workers.

4. Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 230,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time.

5. In the 2020-21 financial year, JobWatch assisted over 16,500 callers through the TIS. In addition, the legal practice gave legal advice and representation to over 500 clients. The vast

majority of our callers and clients are not union members and cannot afford to get assistance from a private lawyer.

### **Case studies provided in this submission**

6. This submission is based on the experiences of callers to JobWatch's TIS and clients of JobWatch's legal practice. The facts described in the case studies are not findings of a court or tribunal but rather they represent what our callers have told us on the TIS or what our clients have instructed the JobWatch lawyers. The case studies are already de-identified.

### **Groups for inclusion in the Pilot**

***1. Are the suggested criteria of insecure work appropriate to guide inclusion of occupations in the Pilot?***

***2. Which criteria and industries should be prioritised over others? Why?***

***3. Should the occupations identified above in the identified industries with high rates of casualisation and insecurity be considered for the Pilot?***

***4. What other specific occupations within the priority industries meet the criteria for potential inclusion?***

In JobWatch's experience, the following industries have a high concentration of casual workers, gig economy (or on-demand) workers and workers in sham contracting arrangements:

- Accommodation and food services
- Retail trade
- Arts and recreation
- Healthcare and social assistance
- Agriculture, fishing, and forestry
- Administrative and support services.

We also agree that workers in the following occupations ought to be included in the Pilot: commercial cleaning, hospitality, security, supermarket, and aged care workers.

We recommend that workers in food delivery, contract cleaning and those doing odd jobs/maintenance/repair work also be included.

We strongly agree that the criteria for inclusion in the Pilot should focus on things such as:

- A lack of entitlements to paid leave
- Unpredictable hours
- Lower financial security
- Any inherent vulnerability (eg CALD workers, temporary visa status, young workers, workers with a disability, including those with temporary disabilities or medical conditions, workers experiencing family and domestic violence and older workers)
- An imbalance of power.

The important thing, in our view, is to try to maximise the coverage of the Pilot. We want it to capture as many vulnerable workers as possible. That way, workers are encouraged to stay at

home when they (or a member of their family or household) are sick, instead of going to work and potentially infecting anyone with whom they come into contact.

We recommend that an intersectional lens be applied when measuring vulnerability and that any assessment of the criteria be conducted in the context of a public health and human rights framework. In other words, we want the criteria to be applied broadly. We do not want it to apply narrowly, so as to try to exclude applicants.

Apart from workers whose status is obviously that of a casual employee, workers who are paid on a cash in hand basis or who are in sham contracting arrangements, should also be included. So should workers in the gig or on-demand economy who are working under an ABN.

***Case study: Workers like Lina should be included in the Pilot***

*Lina is a young woman from a non-English speaking country. She arrived in Australia on a temporary visa and is enrolled in an English language course. She works as a student counsellor selling education packages for an education agent. She is paid \$500 per week for 35 hours of work plus commission if certain targets are achieved. This equates to a base pay of \$14.28 per hour. Lina was told that she needed an ABN for this job. She is paid fortnightly but is not given payslips or superannuation.*

***Case study: Workers like Jose should be included in the Pilot***

*Jose is a young man with limited English. He is in Australia on temporary visa. He was recruited by a labour hire operator to work on a farm. He never received a written contract and all correspondence from the farm where he worked was via WhatsApp in a group chat with other workers. Jose is paid between \$20-\$60 a day, depending on the fruit he picks.*

***Case study: Workers in these situations should all be included in the Pilot***

A number of JobWatch's clients have worked as cleaners for sole traders who tell them they will be paid a flat rate as contractors (no superannuation). Despite sending their bosses regular invoices, our clients typically instruct us that they were told where to perform their work, what to do and how to do it. They were often driven to and from the worksite by the employer. They did not use their own equipment and they could not sub-contract their work. They did not genuinely consider they were carrying on their own businesses.

**Worker eligibility**

- 1. Are the proposed eligibility criteria appropriate? What other eligibility criteria should be considered?***
- 2. How should the eligibility of independent contractors be determined?***
- 3. Should the Pilot be means tested? If yes, how much should a worker earn before they are no longer eligible?***
- 4. Are there any additional considerations that need to be made for workers with multiple employers or working for multiple businesses?***

Through our involvement in the International Students Employment and Accommodation Legal Service (ISEALS), JobWatch and our partners<sup>1</sup> regularly speak to workers on student visas who may be pressured to work in excess of their permitted visa hours. This pressure may be overt pressure from the employer/principal (who threatens to give the job to someone else if the worker is not available) or because the worker is underpaid to such an extent that they feel they have no real option but to work extra hours. Either way, we recommend that workers in these situations should not be excluded from the Pilot.

Moreover, in recognition of the fact that the Pilot is intended to be a beneficial scheme, we consider that it should also extend to workers who have no work rights (eg those on a bridging visa with no work rights). People who work without work rights are arguably the most vulnerable workers of all, as they are too scared to speak up and complain about their exploitation. Without work and a minimum income, they would be surviving off charity.

### **Case study: workers like Pablo should be eligible**

Pablo was on a student visa when he started working on a casual basis in a restaurant. He performed various jobs for the same employer, ranging from food service to general maintenance. He was underpaid and was not given payslips or superannuation contributions. Because he was underpaid, he couldn't pay his college fees and so he lost his student visa. Eventually he couldn't afford his rent either so he was evicted and he became homeless. He continued to work even though he'd lost any work rights under a visa.

### **Receiving and drawing down payment allocation**

- 1. Should the number of days allocated be prorated relative to full-time employment? For example, if workers on average work 20 hours per week or less, should they only receive 2.5 days per calendar year?***
- 2. How should payment applications be made? In full day, half day or other smaller increments? For example, if a worker was only rostered to work a minimum shift of three or four hours, how much should they be able to claim?***
- 3. Should seasonal workers be eligible for the same number of days, or how should the allocation be calculated for these workers?***
- 4. Should there be limits on the number of hours eligible workers can apply for each time they access a payment?***

We agree that eligible workers should be paid at the national minimum wage for up to five days per calendar year. We also agree that the five days per calendar year is per worker and it should not accumulate across multiple employers. Moreover, the days should not accrue if they are unused, meaning that they should reset at the beginning of each calendar year.

We recommend that eligible workers be entitled to the full five days within a 12-month period as soon as they start a job. We do not consider that the entitlement should accrue throughout the year. If a person is unlucky enough to need the full five days within the first couple of months, then so be it. That is when the worker needs the payment because that is when they (or a member of their family or household) is sick.

---

<sup>1</sup> Our project partners are WEstjustice, Springvale Monash Legal Service, Victoria Legal Aid and Study Melbourne.

***Case study: Workers like Sharon should receive the full payment allocation***

*Sharon commenced a full-time admin role in April and, within a couple of weeks of starting this new job, she became unwell. She went to the doctor and got a medical certificate for two days off but she wasn't eligible for any paid sick leave because she hadn't worked for long enough.*

In relation to how payments should be made – whether in full day, half day or smaller increments: from a practical point of view, it may be easier to administer the Pilot if payments were made in not less than half day amounts. However, we do not have a strong view about this. The important point here is that a worker who may have multiple employers/principals, ought to be able to produce evidence of all the hours they would have worked on a particular day (across all their various jobs) in order to be compensated for the total hours (eg full day or half day), not just for the smaller increments they might have worked for the main/predominant employer/principal.

In relation to the rate of pay, we note that the Consultation Paper only referred to the national minimum *adult* rate of pay. We recommend that the national minimum *junior* rates of pay, along with the trainee and apprentice pay rates, be adopted as needed.

In light of the beneficial nature of the scheme, we recommend that the allocated five days not be prorated for workers who work less than full-time hours. For example, if a worker who only usually works on a Monday and Tuesday is unlucky enough to need the payment on five different Monday throughout the year, then so be it. It is in the best interests of the broader community that the Pilot operate in this way.

We also consider that seasonal workers should be eligible for the full five days, for the same reasons as outlined above.

**Types of leave covered in the Pilot**

***1. Are the definitions of leave types under the National Employment Standards appropriate? If not, what alternatives could be considered?***

We agree that the definitions of leave under the National Employment Standards are appropriate.

**Registering and making a claim**

- 1. Should the employer or business be involved in the Pilot (which could include being registered, confirmation of employment status or confirmation of unpaid sick or carer's leave)?***
- 2. Are there any additional considerations that would streamline the operation of the Pilot, including ensuring timely access to payment and minimising paperwork that Pilot participants must provide?***
- 3. What timeframes would be reasonable to require workers to submit a claim after a period of being unable to work?***

**4. Are there any additional considerations that would help ensure the integrity of the Pilot, including any assurance or audit processes that should be established?**

**5. If an online platform were to be established, what information should be made available to insecure workers (e.g. referrals to other relevant agencies or organisations including Wage Inspectorate Victoria, Fair Work Ombudsman etc.)**

Our strong recommendation here is to leave employers/principals out of the claims process all together. They should not, in our view, be involved in the Pilot. That would only exacerbate the power imbalance and lead, in many cases, to exploitation and abuses of the Pilot.

We also recommend that the time limit for workers to make a claim be increased to 28 days.

Reasonable steps should be taken to ensure that any online claims portals be readily accessible and that the information about the claims process be provided in the most commonly spoken languages among people working in the target industries and occupations. Referral pathways for relevant statutory agencies, community legal centres and multicultural community organisations should be clearly explained.

### **Documentation required to support applications and payments**

**1. Is this the right level of evidence workers should be required to provide?**

**2. Should some workers demonstrate that they would otherwise have been working for the period in which the application is made?**

**3. Should workers have to submit forms of evidence to support every individual application or have the information available if requested through regular auditing processes?**

Whilst we agree that eligible workers should be required to provide evidence if requested to support their application for a payment, we do not consider that payslips should be relied upon by the Pilot's administrators, so as to exclude people from the scheme. Through our work with international students on the ISEALS and with countless other temporary visa holders over the years, we have come to understand that newly arrived migrant workers often find themselves working in cash in hand or sham contracting arrangements. The workers would much prefer to be "on the books" and be given written employment contracts and payslips, but ultimately, they just want a job that pays the bills and accordingly they often accept substandard conditions.

A worker should, in our view, be asked to provide any evidence they have of the fact that they expected to work a full or part day on the day for which they are claiming a payment. This could be in the way of screen shots of correspondence with their boss/employer/principal, photos of rosters, bank statements showing payments received from a certain employer/principal, printouts from an app like the Fair Work Ombudsman's *Record My Hours App* (that shows how many hours and the pattern of work undertaken at a particular address) etc.

A worker could also be asked, by the Pilot's Administrators, to provide a statutory declaration, in the absence of any other helpful evidence to establish that they expected to work on a certain day (how many hours, in what role, doing what duties etc).

**Case study: A worker like Krishna should not be required to produce payslips or bank statements**

*Krishna is an Indian migrant who was working as an Indian cook on a sponsored visa. After realizing that his employer was not making the required superannuation contributions, he asked his employer about this and he was told words to the effect of: "I don't have funds to pay your super; it's you people that are supposed to be paying me." Krishna's employer went onto making several verbal requests for money, saying he needed money to pay tax and other debts. Krishna said he didn't have any money available and the employer immediately stopped paying his fortnightly wages. Krishna felt he had no choice but to continue working his full-time hours even though he was receiving no pay. Whenever he asked his employer about his pay, he was told "Pay me the amount that I am asking and I will pay your wages into your account."*

**Protections for workers who apply to use the Pilot**

**1. What issues might insecure and casual workers face in maintaining a positive working relationship with the business they work for? Should there be any additional protections for workers to access the scheme and what form could they take?**

**2. What issues might businesses who have casual and insecure workers face if their workers access the Pilot? What aspects of the scheme design could address these issues?**

We recommend that there be an extensive education campaign (delivered in multiple languages) to raise awareness about the Pilot.

Partnership projects between the Victorian Government, community legal centres and multicultural organisations should be implemented to help deal with the expected increase in demand for legal advice and representation related to punitive action that may be taken by (or threatened by) employers/principals who are not happy that instead of going to work on a certain day, a worker may instead elect to stay at home (sick or to take care of a sick person in their family or household) and make a claim for payment from the Pilot.

Finally, we recommend that the definition of the protected attribute of "employment activity" in the *Equal Opportunity Act 2010 (Vic) (EO Act)* be amended. This would be done to strengthen the protections for all the precarious workers (including those on sham contracting arrangement's and also those working lawfully under an ABN) who, at a certain point, may need to call their boss/employer/principal to notify them that they are sick and come to work or they need to have a day of unpaid carer's leave. Currently, the definition of *employment activity* is, as per section 4 of the EO Act:

(a) an employee, in the employee's individual capacity—

(i) making a reasonable request to the employee's employer, orally or in writing, for information regarding the employee's employment entitlements; or

(ii) communicating to the employee's employer, orally or in writing, the employee's concern that the employee has not been, is not being or will not be given some or all of the employee's employment entitlements; or

(b) a contract worker, in the contract worker's individual capacity—

(i) making a reasonable request to the contract worker's principal, orally or in writing, for information regarding the contract worker's employment entitlements; or

(ii) communicating to the contract worker's principal, orally or in writing, the contract worker's concern that the contract worker has not been, is not being or will not be given some or all of the contract worker's employment entitlements...

We do not consider that the current definition would afford adequate protection to workers in situations where they would **not** be making requests for information, and nor would they be communicating a concern that they have not been given an employment entitlement.

We thank you for considering our submission.

Please do not hesitate to contact us with any questions.

Yours sincerely,



Gabrielle Marchetti  
Principal Lawyer  
JobWatch Inc