

IN THE FAIR WORK COMMISSION

Matter No.: AM2020/12
Subject: Variation of awards on the initiative of the Commission
(additional measures during COVID-19 pandemic)

SUBMISSIONS OF THE VICTORIAN AMBULANCE UNION INCORPORATED

1. These submissions are made in response to the provisional views set out in the Statement dated 1 April 2020¹ (“the Statement”) made by a Full Bench of the Fair Work Commission.
2. The Victorian Ambulance Union Incorporated (“the VAU”) supports the provisional views set out in the Statement, subject to the submissions set out in paragraphs 6 to 14 below. These submissions are made in relation to the proposed insertion of the proposed provision for unpaid pandemic leave² into the *Ambulance and Patient Transport Industry Award 2020* (“the relevant award”). The relevant award covers employers in the ambulance and patient transport industry and their employees in the classifications listed in that award.³
3. The VAU is the dedicated industrial association for workers in the ambulance and patient transport industry in Victoria. The VAU represents its members in relation to all matters pertaining to their working relationships including enterprise bargaining, rostering issues, flexible working arrangements, workplace injuries, occupational health and safety, and disciplinary matters. The VAU advocates for its members in relation to policy issues and reform, including in relation to ambulance resourcing, hospital ramping, mental health, drug reform, occupational violence and improvements within the private patient transport industry. The VAU has made contributions on behalf of its members to many recent

¹ [2020] FWCFB 1760

² Ibid at [59]

³ *Ambulance and Patient Transport Industry Award 2020* cl 4

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commissions of inquiry, parliamentary hearings and consultation processes relating to the ambulance and patient transport industry.

4. The VAU welcomes the Commission's acknowledgement that "employees interacting with the public are more likely to be exposed to COVID-19 and hence more likely to benefit from the provision of pandemic leave. Such employees would include those in health care, social assistance, education and retail."⁴ This includes employees in the ambulance and patient transport industry. The World Health Organization ("WHO") has also acknowledged that "health workers are at the front line of the COVID-19 outbreak response and as such are exposed to hazards that put them at risk of infection."⁵
5. The VAU submits that all reasonable measures should be taken to support the important public policy objective⁶ of encouraging employees in the ambulance and patient transport industry to self-isolate when they should do so. Clearly this would be in the interests of the health and safety of those employees and their co-workers. But it would also be in the interests of the public, by preventing the risk of infection to patients, who may be particularly vulnerable to the disease by reason of the health issue(s) that have caused them to require ambulance or patient transport services in the first place. Further submissions are made in relation to the special category of health workers, and the special measures that ought to be taken to protect them and their patients, in paragraphs 15 to 21 below.

The proposed term

6. As indicated above, the VAU supports the proposed provision for unpaid pandemic leave⁷, subject to one minor amendment to clause X.2.1(a). The VAU respectfully submits that "premises" should be replaced with "a workplace".
7. Most employees in the ambulance and patient transport industry are required to work at a workplace that are not "premises" within the ordinary meaning of that expression. The VAU is concerned that clause X.2.1(a) may be misinterpreted by some employees who may

⁴ [2020] FWCFB 1760 at [87]

⁵ *Coronavirus disease (COVID-19) outbreak: rights, roles and responsibilities of health workers, including key considerations for occupational safety and health*, World Health Organization, Interim Guidance, WHO Doc WHO/2019-nCov/HCW_advice/2020.2 (19 March 2020)

⁶ [2020] FWCFB 1760 at [64] and [116]

⁷ *Ibid* at [59]

consider that they are not entitled to the leave in circumstances where they are not required to work at a premises such as a property comprised of a building and grounds. Most employees in the ambulance and patient transport industry are required to work at places other than a property comprised of a building and grounds, such as a vehicle.

8. In circumstances where this new provision is to be interpreted by employees in the context of the extraordinary and unusual stress and pressure caused by the COVID-19 pandemic, particularly for health workers, the VAU submits that more common and ordinary nomenclature ought to be used in the provision. In order to achieve the modern awards objective, the provision ought to be simple and easy to understand.⁸
9. The expression “premises” is not used in the relevant award. The relevant award uses the expression “workplace” instead.⁹ In the interests of the internal consistency of the relevant award, the same nomenclature should be used in the proposed clause X.2.1(a). It would also be consistent with Commonwealth legislation such as the *Work Health and Safety Act 2011* (Cth) (“the WHS Act”). The expression “workplace” is used for the purposes of that Act and is defined as follows:
 - (1) A **workplace** is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.
 - (2) In this section, **place** includes:
 - (a) a vehicle, vessel, aircraft or other mobile structure; and
 - (b) any waters and any installation on land, on the bed of any waters or floating on any waters.¹⁰
10. Employees in the ambulance and patient transport industry who are required to work in a vehicle are clearly at “a workplace” operated by their employer within the meaning of the WHS Act.
11. The expression “premises” is defined in the *Fair Work Act 2009* (Cth) (“the FW Act”) as follows:

⁸ *Fair Work Act 2009* (Cth) s 134(1)(g)

⁹ See, for example, *Ambulance and Patient Transport Industry Award 2020* cls 3.3, 14.2, 18.3(b)(ii), 20.5(c) and 30.8(b)

¹⁰ *Work Health and Safety Act 2011* (Cth) s 8

premises includes:

- (a) any land, building, structure, mine, mine working, aircraft, ship, vessel, vehicle or place; and
- (b) a part of premises (including premises referred to in paragraph (a)).¹¹

12. If the expression “premises” is inserted into the relevant award, it is likely that it would be given the meaning provided by section 12 of the FW Act on a strict legal interpretation.¹² However, while the industrial parties are dealing with the COVID-19 pandemic, the VAU submits that the entitlement to unpaid pandemic leave should not be a matter of legal complexity. The VAU notes the Commission’s reluctance to introduce “an unwarranted degree of complexity” into the proposed award term.¹³
13. The expression “premises” is defined in the Macquarie Dictionary as “the property forming the subject of a conveyance”¹⁴ and “a house or building with the grounds, etc., belonging to it”.¹⁵ Further, “the use of *premises* to mean a building and grounds derives from its use to refer to the people and items listed as the preliminary to a conveyancing deed.”¹⁶ As indicated above, the VAU submits that the ordinary meaning of “premises” is property comprised of building and grounds. Many people would not immediately understand it to include a vehicle. It would be regrettable if any employer or employee in the ambulance and patient transport industry were to misunderstand the unpaid pandemic leave entitlement by giving the ordinary meaning to the expression “premises”.
14. The VAU respectfully submits that, in order to avoid such misinterpretation and in order to achieve the objective of simplicity and ease of understanding¹⁷, the expression “a workplace” should be used instead of “premises”.

¹¹ *Fair Work Act 2009* (Cth) s 12

¹² *Acts Interpretation Act 1901* (Cth) s 46(1)(b)

¹³ [2020] FWCFB 1760 at [62]

¹⁴ *Macquarie Dictionary* (online at 5 April 2020) ‘premise’ (def 2(a))

¹⁵ *Ibid* (def 2(b))

¹⁶ *Ibid* (‘Usage’)

¹⁷ *Fair Work Act 2009* (Cth) s 134(1)(g)

Prospective application under section 158 of the FW Act

15. The VAU notes the Commission’s statement that “the variations [proposed in the Statement] do not preclude other variation applications being made to modern awards to provide additional measures during the COVID-19 pandemic. Indeed we encourage the industrial parties to continue (or enter into) discussions directed towards consent applications to vary modern awards. The Commission is available to assist in facilitating those discussions on request.”¹⁸ Further, “the measures we are proposing to take are not intended to disturb the initiatives that are being taken by businesses to ameliorate the impact of the COVID-19 pandemic on employees.”¹⁹ “Further consideration can be given to the scope of the proposed term at a later stage, if the circumstances so warrant.”²⁰
16. Members of the VAU will be giving consideration to making an application under section 158 of the FW Act to vary the relevant award so that it provides for two weeks’ paid pandemic leave if an employee is required to self-isolate or is otherwise prevented from working by measures taken in response to the COVID-19 pandemic. Many employers in the ambulance and patient transport industry in Victoria are already providing such paid pandemic leave (however described) to the extent that members of the VAU would argue that this form of paid leave is developing expeditiously to become part of the industry’s “safety net” for the purposes of the modern awards objective.²¹
17. However, some employers in the ambulance and patient transport industry have so far refused to provide their employees with paid pandemic leave and, of those employers, many of them and their employees rely upon the relevant award for their terms and conditions of employment. The VAU notes that many employees in the ambulance and patient transport industry may be ineligible for the assistance outlined in paragraphs [112] to [114] of the Statement, including the JobKeeper payment. Paid leave is required to enable these workers to self-isolate when they should do so.
18. As indicated above, the VAU considers that health workers, including its members, are in a special category that calls for additional industrial protection during the COVID-19

¹⁸ [2020] FWCFB 1760 at [2]

¹⁹ *Ibid* at [44]

²⁰ *Ibid* at [66]

²¹ *Fair Work Act 2009* (Cth) s 134(1)

pandemic. The advice published by the Department of Health clearly indicates that employees in the ambulance and patient transport industry are at an increased risk of exposure to COVID-19.²² The advice published by the WHO indicates the same.²³ A corollary is that employees in this industry are at an increased risk of exposing others to COVID-19 if they are infected but asymptomatic. As indicated above, it is inherent in the nature of ambulance and patient transport services that employees are in close contact with patients for whom COVID-19 may pose a serious health risk.

19. Ambulance Victoria has confirmed publicly that about 81 of its employees are unable to work because of self-isolation or other preventative measures related to the COVID-19 pandemic.²⁴ The VAU notes that Ambulance Victoria is one of the employers that are providing a form of paid pandemic leave.²⁵
20. The VAU considers it remarkable that any employer in the ambulance and patient transport industry would refuse to provide its employees with paid pandemic leave. St John and Wilson Medic One have so far refused to do so. No health worker should be placed in “the invidious position of either contravening public health directions or guidelines, or placing their employment in jeopardy.”²⁶ This situation devolves the proprietors’ responsibility to patients in the knowledge that their employees genuinely care for their patients and would refuse to put them at risk, even when it is to their own detriment.
21. Indeed, in the case of health workers at least, the VAU expected that the ground for discussions between the industrial parties would have included some of the more extensive aspects of a proposed entitlement such as those referred to in paragraph [65] of the Statement (e.g. express operation on a ‘per occasion’ basis and provision for those caring for others who are compelled to self-isolate). But in circumstances where there are award-reliant employers in the industry that continue to refuse to provide even a basic form of paid pandemic leave to their employees, the VAU considers that there is a strong basis for

²² Commonwealth Department of Health, *Coronavirus disease (COVID-19): Information for paramedics and ambulance first responders*, March 2020

²³ WHO (n 5)

²⁴ Cameron Houston, ‘Paramedics off the road amid concerns of exposure to COVID-19’, *The Age* (online, 1 April 2020) <<https://www.theage.com.au/national/victoria/paramedics-off-the-road-amid-concerns-of-exposure-to-covid-19-20200401-p54fwx.html>>

²⁵ The Emergency Services Telecommunications Authority and National Patient Transport Pty Ltd are also providing a form of paid pandemic leave. The Royal Flying Doctor Service, Medical Edge Australia and Paramedic Services Victoria are providing the paid leave in more limited circumstances.

²⁶ [2020] FWCFB 1760 at [50]

one or more of its members to apply to vary the relevant award to achieve a fair and relevant minimum safety net during the pandemic.

VICTORIAN AMBULANCE UNION INCORPORATED

6 April 2020