

Form F48 – Application for directions on procedure

Fair Work Commission Rules 2013, Rule 7

This is an application to the Fair Work Commission for directions about procedure in relation to a matter in accordance with the [Fair Work Act 2009](#).

The Applicant



These are the details of the person who is making this application. The applicant for directions on procedure may be different from the applicant in the matter before the Commission.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address	Suite 46, 255 Drummond St		
Suburb	CARLTON		
State or territory	Victoria	Postcode	3053
Phone number	+61 418 538 989	Fax number	
Email address	leighs@hsu.net.au		

If the Applicant is a company or organisation

If the Applicant is a company or organisation please also provide the following details

Legal name of Applicant	Health Services Union
Applicant's trading name or registered business name	HSU National
Applicant's ACN (if a company)	
Applicant's ABN (if applicable)	68 243 768 561
Contact person	Leigh Svendsen

Does the Applicant need an interpreter?



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes – Specify language

No

Does the Applicant require any special assistance at the hearing or conference (e.g. a hearing loop)?

Yes – Please specify the assistance required

No

Does the Applicant have a representative?



A representative is a person or organisation who is representing the Applicant. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

Applicant's representative



These are the details of the person or organisation who is representing the Applicant (if any).

Name of person			
Firm, organisation or company			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

Is the Applicant's representative a lawyer or paid agent?

Yes

No

The other party



These are the details of the other party in the matter.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

If the other party is an organisation

If the other party is an organisation please also provide the following details

Legal name of organisation	
Trading name of organisation	
ABN/ACN	
Contact person	

1. Preliminary

1.1 Are you seeking directions for an existing matter?

Yes – Go to 1.2

No – Go to 1.3

1.2 What is the name and matter number for the matter?

1.3 What is the type of matter that you want to initiate?

Briefly, provide the details of the type of matter.

An application to vary the Aged Care Award 2010. The application is made in response to the Statement of the Commission [2021] FWC 1148, to extend the duration of entitlements referred to therein which are otherwise due to expire on 29 March 2021.

2. Reasons for seeking directions

2.1 Why are you applying to the Commission for directions?

The procedure is not prescribed by the FW Act, the Fair Work Commission Rules, the regulations or any other Act or regulations. Provide details below.

You are in doubt about the proper procedure to follow. Provide details below.

Rule 49 requires this application to be made in connection with an application to vary a modern award.

3. Proposed directions.

Set out your proposed directions you are seeking, if any (optional).

1. That the attached application to vary a modern award be published in the Fair Work Commission's website at a location deemed appropriate to the Commission.
2. That, upon such publication, the application be deemed served.
3. That notice of the application be given by the Fair Work Commission to subscribers to Fair Work Commission's "My Awards – All Matters" service in the usual way.
4. That notice of the application be given by the Fair Work Commission to subscribers to Fair Work Commission's "Health sector awards – pandemic leave" service in the usual way.

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	Leigh Svendsen
Name	Leigh Svendsen
Date	22 March 2021
Capacity/Position	Senior Industrial & Compliance Officer



Where this form is not being completed and signed by the Respondent, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

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Form F46 – Application to vary a modern award

Fair Work Act 2009, ss.157–160

This is an application to the Fair Work Commission to make a modern award or make a determination varying or revoking a modern award, in accordance with Part 2-3 of the [Fair Work Act 2009](#).

The Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address	Suite 46, 255 Drummond St		
Suburb	CARLTON		
State or territory	Victoria	Postcode	3053
Phone number	+61 418 538 989	Fax number	
Email address	leighs@hsu.net.au		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Health Services Union
Trading name of business	HSU National
ABN/ACN	68 243 768 561
Contact person	Leigh Svendsen

Does the Applicant need an interpreter?



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes – Specify language

No

Does the Applicant require any special assistance at the hearing or conference (eg a hearing loop)?

Yes – Please specify the assistance required

No

Does the Applicant have a representative?



A representative is a person or organisation who is representing the applicant. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

Applicant's representative



These are the details of the person or organisation who is representing the Applicant (if any).

Name of person			
Firm, organisation or company			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

Is the Applicant's representative a lawyer or paid agent?

Yes

No

1. Coverage

1.1 What is the name of the modern award to which the application relates?



Include the Award ID/Code No. of the modern award

MA000018, Aged Care Award 2010

1.2 What industry is the employer in?

Aged care industry.

2. Application

2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

a determination varying a modern award

a modern award

a determination revoking a modern award

2.2 What are the details of your application?

A draft determination is attached to this application.

Attach additional pages, if necessary.

2.3 What are the grounds being relied on?

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.



You must outline how the proposed variation etc is necessary in order to achieve the modern awards objective as well as any additional requirements set out in the FW Act.

1. The variation proposed by the Applicant relates to continuation of the period of operation of
 - a. Schedule Y of the Award; and
 - b. The entitlement in Schedule X of the Award to unpaid pandemic leavebeyond 29 March 2021 and until 31 December 2021.

2. In extending the duration of the operation of Schedule X in multiple awards from 30 September 2020 to 29 March 2021, the Full Bench in [2020] FWCFB 5137 said:

“The observations made in the 8 April decision in respect of the basis for the initial insertion of Schedule X into the relevant Awards remain apposite. In particular, the COVID-19 pandemic is still in progress and without the continued operation of Schedule X there would be a ‘regulatory gap’ in the award safety net concerning persons who are required to self isolate. Continuing access to unpaid pandemic leave will enable more people to remain in employment and will support the important public policy objective of encouraging those who should self isolate to do so, thereby limiting the spread of COVID-19 in workplaces and allowing business to continue to operate”¹

3. The COVID-19 pandemic is still in progress:
 - a. Each State and Territory continues to have declarations and/or orders in place so as to enable enhanced public health and enforcement powers in connection with the

¹ At [11].

Pandemic², which have been regularly renewed since being made between January and March 2020 and resulted in numerous public health orders being issued in an effort to reduce transmission;

- b. International travel into Australia is remains prohibited, save for Australian citizens and residents and their immediate family and travellers who have been in New Zealand for the previous 14 days.³
- c. Persons returning to Australia, save for those who have been only in New Zealand or are in some special exemption categories, are required to quarantine for a minimum of 14 days and up to 24 days and be tested for COVID-19.⁴
- d. There has been transmission linked to quarantine breaches in Victoria (July 2020, February 2021), New South Wales (August 2020, December 2020, March 2021) South Australia (November 2020), Tasmania (February 2021), Queensland (January 2021, March 2021) and Western Australia (February 2021), resulting in contact tracing efforts triggering requirements for testing and isolation.
- e. Whilst the pandemic is presently well controlled, the risk of outbreaks and associated intensive periods of contact tracing and testing remains.
- f. Testing, including at specialist testing facilities, continues with over 270,000 tests conducted in the week to 14 March 2021⁵.

4. The Victorian Government Coronavirus website says:

Pandemic Leave Disaster Payment

The \$1500 Pandemic Leave Disaster Payment is a one-off payment to help Victorian workers who have been directed to self-isolate or quarantine for 14 days, or care for someone who has been directed to self-isolate or quarantine.

The Pandemic Leave Disaster Payment recognises that the requirement to self-isolate or quarantine at home can cause a financial burden for some individuals and families who are without an income during this period.⁶

Similar to Victoria, the Pandemic Leave Disaster Payment is available in all states and territories except the Northern Territory.⁷ This continued availability of such a payment points to the fact that governments around Australia are still concerned about preventing another outbreak of SARS-CoV-2 (the virus which causes the COVID-19 disease).

² [Public Health \(Emergency\) Declaration Further Extension 2021 \(No 1\) \[ACT\]](#); [Approval of extension of a major emergency declaration under section 23 of the Emergency management Act 2004 \[SA\]](#); [Extension of State of Emergency Declaration](#) and [Extension of Declaration \(No.2\) of a Public Health State of Emergency \[WA\]](#); [Public Health \(Further Extension of Declared Public Health Emergency- COVID-19\) Regulation \(No.6\) 2020 \[Qld\]](#); [Extension of Operation of a Declaration of Public Health Emergency \[NT\]](#); [Extension of Emergency Declaration \[Tas\]](#); [Extension of Declaration of a State of Emergency \[VIC\]](#). In NSW there are ministerial powers under section 7 of the *Public Health Act 2010* to regulate by Order in the absence of an emergency being declared more broadly. A [number of such Orders](#), specific to the COVID-19 pandemic, remain in force.

³ [Australian Government – Coronavirus \(COVID-19\) advice for international travellers](#): <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/isolation-for-coronavirus-covid-19> (13 October 2020)

⁴ *Ibid*; <https://www.health.nsw.gov.au/Infectious/factsheets/Pages/hotel-quarantine.aspx> (16 March 2021); <https://www.smartraveller.gov.au/covid-19/trying-get-home/covid-19-re-entry-and-quarantine-measures>

⁵ Australian Government Department of Health: [Tests conducted and results](#)

⁶ <https://www.coronavirus.vic.gov.au/financial-and-other-support-coronavirus-covid-19>

⁷ <https://www.servicesaustralia.gov.au/individuals/services/centrelink/pandemic-leave-disaster-payment>

5. Persons who have come into contact with a confirmed case of COVID-19 and persons who have COVID-19 must self-isolate for a period of 14 days at a minimum.⁸
6. Symptoms of COVID-19 can be mild and are not unusual in other common conditions.⁹ Persons experiencing even mild symptoms of COVID-19 are encouraged by the Department of Health to get tested.¹⁰ Persons who undergo a COVID-19 test are advised by the Department of Health that they:
“...need to stay at home and avoid contact with other people. You will need to do this until you either have a negative test result or your symptoms have gone. It may take a day or two for your test results to come back”¹¹.
7. In the decision of 27 July 2020 which established Schedule Y, the Full Bench noted that:
*[56]...The requirement for self-isolation is primarily to prevent the spread of infection which, in the aged care sector is especially critical because of the vulnerability of aged persons to COVID-19 fatalities. Thus, the requirement to self-isolate may be said to be in the public interest. However, absent a paid pandemic leave entitlement or access to other leave entitlements, the employee bears the cost of this. For low-paid employees, this is likely to place them in significant financial difficulty and even distress. Further, as we found in our 8 July Decision at paragraph [123], there is a real risk that employees who do not have access to leave entitlements might not report COVID-19 symptoms which might require them to self-isolate, but rather seek to attend for work out of financial need. This represents a significant risk to infection control measures. These matters weigh significantly in favour of the introduction of a paid pandemic leave entitlement.*¹²
8. Any absence of entitlements of the nature proposed by the Applicant would be accompanied by a risk of employees continuing employment, or seeking secondary employment, in order to maintain or supplement their incomes when they are required to self-isolate. These issues were clearly seen in Victoria during its “second wave” of outbreaks, which led to specific rules around workers only being allowed to work at one site.¹³
9. Despite the fact that Commonwealth Government funding support for single-site arrangements ended in all states in late January 2021¹⁴ this situation is not permanent and could change at any moment. Recognising the ongoing threat of COVID-19, the Queensland Government's most recent Aged Care Direction (No. 25) relevantly provides:
*It is recommended that the operator of a residential aged care facility ensure, to the extent possible, that employees, contractors, volunteers and students do not work across multiple care facilities.*¹⁵
Similarly, the Aged Care Quality and Safety Commission encourages “..providers to limit workplace mobility where possible” and keep “a register for recording each workers mobility”.¹⁶

⁸ <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/isolation-for-coronavirus-covid-19> (13 October 2020)

⁹ https://www.health.gov.au/sites/default/files/documents/2020/10/coronavirus-covid-19-identifying-the-symptoms_2.pdf

¹⁰ <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19>

¹¹ <https://www.health.gov.au/sites/default/files/documents/2020/08/testing-for-covid-19.pdf>

¹² <https://www.fwc.gov.au/documents/sites/health-sector-pandemic-leave/decisions-statements/2020fwcfb3940.pdf>

¹³ <https://www.health.gov.au/news/announcements/supporting-victorian-residential-aged-care-providers-to-transition-their-workforce-to-single-site-operations-guiding-principles-support-hub>

¹⁴ <https://www.health.gov.au/news/announcements/funding-support-for-single-site-arrangements-is-ending>

¹⁵ <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/aged-care>

¹⁶ Aged Care Quality and Safety Commission Information and Resources, posted 16 November 2020.

10. The nationwide vaccination program is a critical intuitive in reducing the likelihood of further outbreaks. Despite indications that the vaccines would be available to to all Australians by the end of October 2021:¹⁷
 - a. as at 17 March 2020 there had reportedly been 182,400 vaccines administered against a target of 4 million for the month of March.¹⁸
 - b. Whilst workers in the residential aged care workforce are among those who qualify for “stage 1a” vaccinations, this requires 1.4 million doses and only commenced on 22 February 2021.¹⁹
 - c. The Prime Minister has since clarified that only the first dose of vaccines is likely to be administered by the end of October 2021.²⁰
 - d. It is presently unclear when the vaccination program will conclude, for stage 1a or at all.
11. The SARS-CoV-2 virus is now mutating with various strains now being identified. The United Kingdom has identified a variant called B.1.1.7 with a large number of mutations in late 2020. In South Africa and Brazil other variants have been detected. The United States Centers for Disease Control and Prevention (CDC) states the following about these variants:

*These variants seem to spread more easily and quickly than other variants, which may lead to more cases of COVID-19. An increase in the number of cases will put more strain on health care resources, lead to more hospitalizations, and potentially more deaths.*²¹
12. Evidence is unfortunately growing that new variants of SARS-CoV-2 can evade immunity produced by vaccines or previous infections.²² This means it is likely that new vaccines will need to be developed in the coming months and years. This fact should be sufficient to maintain the entitlement in circumstances where the pandemic is ongoing with its end uncertain.
13. The employees to whom the modern award applies are low paid relative to those who are not award dependent.
14. The variation proposed will assist to maintain the living standards of employees covered by the modern award in the event they contract COVID-19, irrespective of the extent of their entitlement to personal leave.
15. The variation proposed will continue to assist employees to remain in employment when required to self-isolate and support their personal well-being.
16. The variation proposed may avoid short term costs to employers which could arise if employees cease employment and are required to be replaced.
17. The variation proposed will continue to assist the public health objective of limiting the spread of COVID-19 and mitigate the risk to the national economy associated with the spread COVID-19.

¹⁷ <https://www.pm.gov.au/media/first-covid-19-vaccinations>; <https://www.abc.net.au/news/2021-03-02/covid-live-updates-coronavirus-vaccine/13204614>

¹⁸ <https://www.theguardian.com/australia-news/datablog/ng-interactive/2021/mar/16/covid-vaccine-tracker-australia-distribution-rollout-progress-schedule-coronavirus-jab-news>

¹⁹ <https://www.health.gov.au/sites/default/files/documents/2021/02/covid-19-vaccination-covid-19-vaccination-phase-1a-rollout-presentation.pdf>

²⁰ <https://www.sbs.com.au/news/vaccine-rollout-completion-not-possible-by-end-of-october>

²¹ <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html>

²² <https://www.nature.com/articles/d41586-021-00241-6>

18. The variation proposed for employees who contract COVID-19 is simpler to understand and is less complex for business to administer than managing the interaction between NES personal leave entitlements and section 130 of the FW Act.
19. The variation proposed will neither encourage or discourage collective bargaining, but will address a need for employers and employees who do not collectively bargain.
20. The overall costs to business of the proposed variation are mitigated by:
- a. Lump sum funding boosts of \$205 million in June 2020 and \$217.6 million in October 2020 intended to be used for “..infection prevention and control and additional staff costs”, among other purposes.²³
 - b. \$8.4 million in supplementary payments to help cover “quarantine costs”²⁴.
 - c. \$61.3 million from the *Aged Care Support Program*²⁵ which provides reimbursements to residential and home care providers nationally over the period 24 February 2020 – 31 May 2021. Those reimbursements, which are expected to take only 4 weeks once applied for,²⁶ specifically address (among other things) “replacing existing staff who are infected or isolated due to COVID-19”²⁷ including “salary and wages for existing and new employees including full time, part time and casual staff [and] contractor expenses”²⁸ and allow for a 30% “labour on cost and administrative overhead” for each claim.²⁹
 - d. \$57.8 million additional funding over 2020-21 to “..increase the scope of aged care services funded by the Commonwealth under the National Partnership on COVID-19 Response to include infection prevention and control activities and resources for coordinated COVID-19 preparedness and response”.³⁰
 - e. \$6.3 million additional funding in 2020-21 “to temporarily suspend the reduction in the residential aged care subsidy paid when a resident is on extended hospital leave, for the period 1 July 2020 to 30 June 2021”.³¹
 - f. The potential for the further extension of *Support for Aged Care Workers in COVID-19* grant program and addition of eligible hotspots.³²
 - g. The present minimal rate of transmission.
21. The variation proposed to Schedule Y is intended to operate for a limited period of time, adopting an end date which is co-existent with date sought for the unpaid “Schedule X” entitlement. The last extension to Schedule Y was made on the same basis.³³
22. The terms sought to be retained in the modern award are about matters which are permitted to be included in a modern award pursuant to paragraph (h) of subsection 139(1) and section 142 of the FW Act.

²³ https://mcusercontent.com/1108de8332cef333bc1956686/files/f643cf04-f351-4e08-9baa-25acf926799e/Letter_to_residential_aged_care_service_providers_from_Minister_Colbeck_13_October_2020.pdf

²⁴ <https://www.health.gov.au/sites/default/files/documents/2020/10/budget-2020-21-aged-care-covid-19-pandemic-response.pdf>

²⁵ <https://www.grants.gov.au/Go/Show?GoUuid=068A9519-03B3-6B9E-7B61-126A5ABA12C1&keyword=GO3844>; <https://www.health.gov.au/news/financial-support-for-aged-care-providers-directly-impacted-by-covid-19>

²⁶ [COVID-19 Aged Care Support Program Guidelines](#), at section 6.2

²⁷ [COVID-19 Aged Care Support Program Guidelines](#), at section 5.1

²⁸ [COVID-19 Aged Care Support Program Guidelines](#), at section 5.2

²⁹ [COVID-19 Aged Care Support Program Guidelines](#) at Appendix A.

³⁰ MFEFO Appendix A Statement of “[Policy decisions taken since the 2020-21 Budget](#)”, at page 157.

³¹ MFEFO Appendix A Statement of “[Policy decisions taken since the 2020-21 Budget](#)”, at page 157

³² <https://www.fwc.gov.au/documents/sites/health-sector-pandemic-leave/submissions/am202013-sub-vic-gov-261020.pdf>

³³ [2020] FWCFB 5768 at [29].

23. The Commission has already made findings that employees in the residential aged care sector are exposed to an elevated risk of being required to self isolate, including on the basis of expert material. That risk did manifest itself: As at 12 March 2021 there have been 214 Residential Aged Care Facilities in which an outbreak has occurred and 2,227 cases of COVID-19 among their staff against 2,029 cases among the residents.³⁴
24. The Commission has taken note in extending the Schedule Y entitlement in the past of the “rapidity in which further waves of infection may spread”³⁵.
25. In light of the above matters, the Commission:
- a. can be satisfied that it remains premature to say the risks it has identified will cease to manifest³⁶; and
 - b. cannot be satisfied that the application to extend the Schedule Y entitlement “serves no purpose”³⁷.
26. The granting of the applications to extend the operation of the relevant entitlements until 31 December 2021 does not prohibit the Commission from calling the matter on prior to that date (either on application or on its own initiative) to consider a different sunset date.
27. For the foregoing reasons, the variation of Schedules X and Y of the modern award in the terms sought by the Applicant is, fair, relevant and necessary.
28. Such further or other grounds as the Commission considers appropriate.

Attach additional pages, if necessary.

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	Leigh Svendsen
Name	Leigh Svendsen
Date	22 March 2021
Capacity/Position	Senior Industrial & Compliance Officer



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

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³⁴ <https://www.health.gov.au/sites/default/files/documents/2021/03/covid-19-outbreaks-in-australian-residential-aged-care-facilities-12-march-2021.pdf>

³⁵ [2020] FWCFB 5768 at [27]

³⁶ [2020] FWCFB 5768 at [27]

³⁷ [2020] FWCFB 5768 at [29]

MA000018 PRXXXTBC
FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s.157 — FWC may vary etc. modern awards if necessary to achieve modern awards objective

COVID-19 Award Flexibility Schedules
(AM2020/93; AM2020/13; AM20201/X)

AGED CARE AWARD 2010
[MA000018]

Aged care

JUSTICE ROSS, PRESIDENT

MELBOURNE, X MARCH 2021

Award flexibility schedules – Schedule X-Additional measures during the COVID-19 pandemic – Aged Care Award 2010.

A. Further to the decision [2021 FWC FB XXX] issued by the Full Bench on X March 2021, the above award is varied as follows:

1. By deleting the words “29 March 2021” in clause X.1 and inserting “31 December 2021”.
2. By deleting the words “29 March 2021” in clause X.2.1(d) and inserting “31 December 2021”.
3. By deleting the words “29 March 2021” in clause Y.1 and inserting “31 December 2021”.
4. By deleting the words “29 March 2021” in clause Y.2.5 and inserting “31 December 2021”.

B. This determination comes into operation on 30 March 2021. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee’s first full pay period that starts on or after 30 March 2021.

PRESIDENT