

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	L1, 16 - 20 Good Street		
Suburb	Granville		
State or territory	New South Wales	Postcode	2142
Phone number	(02) 8863 8900	Fax number	
Email address	stephen.crawford@nat.awu.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	The Australian Workers' Union
Applicant's trading name or registered business name	AWU
Applicant's ACN (if a company)	
Applicant's ABN (if applicable)	28 853 022 982
Contact person	Stephen Crawford and Trevor Clarke (ACTU), tclarke@actu.org.au , (03) 9664 7386

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 Mr Mrs Ms 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 Horticulture Award 2020. The purpose of the application is to extend the duration of unpaid pandemic leave entitlements referred to therein which are otherwise due to expire on 31 December 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 the Fair Work Commission's "My Awards – All Matters" service in the usual way.

The Applicant asks that the Commission note that the Australian Council of Trade Unions has given notice of the intention to make the substantive application (and this application for directions) to the Australian Chamber of Commerce and Industry, the Australian Industry Group, Australian Business Industrial and the Commonwealth Attorney General's Department.

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	
Name	Daniel Walton
Date	10 December 2021
Capacity/Position	National Secretary



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.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS

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 Mr Mrs Ms Other please specify:

First name(s)

Surname

Postal address L1, 16 - 20 Good Street

Suburb Granville

State or territory New South Wales Postcode 2142

Phone number (02) 8863 8900 Fax number

Email address stephen.crawford@nat.awu.net.au

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

Legal name of business	The Australian Workers' Union
Trading name of business	AWU
ABN/ACN	28 853 022 982
Contact person	Stephen Crawford and Trevor Clarke (ACTU), tclarke@actu.org.au , (03) 9664 7386

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

MA000028, Horticulture Award 2020

1.2 What industry is the employer in?

Horticulture 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 entitlement to unpaid pandemic leave was first introduced in the modern award system by the Full Bench in April 2020, via the creation of “Schedule X” in the majority of modern awards. The terms of Schedule X as it appears in Horticulture Award 2020 are such that the entitlement will cease to operate, save in relation to periods of leave already commenced, after 31 December 2021.
2. The decisions of the Full Bench to introduce Schedule X into modern awards and, thereafter, to extend its period of operation¹, reflect the need to maintain a fair and relevant safety net in light of the regulatory gap exposed by the isolation and quarantine requirements associated with the public health response to the COVID-19 pandemic. In particular, those decisions have been informed by the following matters:
 - a) Personal leave may not be available for self-isolation (particularly where the employee remains fit for work);
 - b) Unfair dismissal protections do not extend to all employees;
 - c) General protection provisions may not apply to a self-isolating employee who is not themselves diagnosed or unwell;
 - d) Without an entitlement to absent themselves from the workplace on the grounds of isolation requirements, employees are placed in a position of choosing between contravening public health directions or guidelines or placing their employment in jeopardy;
 - e) Unpaid pandemic leave will facilitate the retention of employees in their employment; and
 - f) Facilitating employees to take leave when directed to self-isolate will assist in limiting the spread of COVID-19 allow effected businesses to continue operating.
3. When Schedule X was first introduced into modern awards, vaccination was not available. Vaccination became available to priority populations in February 2021. Currently vaccination is available to all persons aged 12 and over. The Australian Government Department of Health reports that 88.7% of people over the age of 16 are fully vaccinated.² However, the widespread availability and uptake of vaccination has not supplanted isolation and quarantine as a policy response to the pandemic. In particular (but subject to some exemptions):
 - a) In Tasmania, close, casual and secondary contacts of a person who has COVID-19 are required to quarantine for 14 days or such lesser period as advised by the Director of Public Health or their delegate.³
 - b) In Western Australia, close contacts of a person who has COVID-19, and other persons who are directed to be tested for COVID-19, must quarantine for 14 days or such other period as directed by an authorised officer.⁴

¹ [2020] FWCFB 1837, [2020] FWCFB 3444, [2020] FWCFB 3490, [2020] FWCFB 3925, [2020] FWCFB 5137, [2021] FWCFB 1621.

² Australian Government Department of Health: [COVID-19 vaccination daily rollout update](#), accessed 10 Dec 2021.

³ [Direction Under Section 16 \(Quarantine – No, 5\)](#), issued under the *Public Health Act 1997* (TAS).

⁴ [Quarantine \(Undiagnosed\) Directions](#), issued under the *Emergency Management Act 2005* (WA).

- c) In Queensland, a close contact⁵ or secondary contact⁶ of a person who has COVID-19 must quarantine for 14 days or such other period as directed by an emergency officer.
- d) In the Northern Territory, close contacts of a person who has COVID-19, and other persons suspected of being infected, are required to isolate until otherwise notified in writing.⁷ It is understood that the isolation period is generally 14 days.⁸
- e) In South Australia, close contacts of a person who has COVID-19 are required to isolate in accordance with the directions of an authorised officer.⁹
- f) In the Australian Capital Territory, close contacts of person that has COVID-19 are required to quarantine for 7 days if they are fully vaccinated (provided the infected person has not been diagnosed with the Omicron variant), although they are not permitted to enter particular high risk places on days 8-14. Close contacts who are not fully vaccinated must quarantine for 14 days.¹⁰
- g) In New South Wales, close contacts of a person that has COVID-19 are required to quarantine for a period of up to 7 days if fully vaccinated. Close contacts who are not fully vaccinated may be required to quarantine for up to 14 days.¹¹
- h) In Victoria, a close contact of a person that has COVID-19 is required to quarantine for a period of up to 7 days if fully vaccinated. An unvaccinated close contact is required to quarantine for up to 14 days.¹²

4. Whilst COVID-19 vaccinations are safe, effective and to be encouraged, they do not provide protection against infection or transmission in all cases, suggesting that testing, tracing isolation and quarantine (“TTIQ”) will be part of the mix of policy responses to the pandemic for the foreseeable future. For example, modelling undertaken for the Victorian Department of Health indicates (with respect to the Delta variant of the virus) that persons who are fully vaccinated (with either AstraZeneca or Pfizer vaccines) reduce their risk of infection of between 62%-80% and reduce their risk of onward transmission by between 45% to 56%.¹³ Modelling undertaken for National Cabinet has observed that “Assessment of the continuing impact of TTIQ in transmission will be an important component of ongoing weekly situational assessment given its impact on TP [transmission potential] in the population”¹⁴.

⁵ [Management of Close Contacts Direction \(No. 3\)](#), issued under the *Public Health Act 2005* (QLD).

⁶ [Management of Secondary Contacts Direction \(No.2\)](#), issued under the *Public Health Act 2005* (QLD).

⁷ [COVID-19 Directions \(No. 21\) 2020 – Directions for Potentially Infected Persons](#), issued under the *Public and Environmental Health Act 2011* (NT).

⁸ Northern Territory Government: [Quarantine information for close contacts](#), accessed 1 December 2021.

⁹ [Emergency management \(COVID-19\) \(Isolation Following Diagnosis or Close Contact\) Direction 2020](#), issued under the *Emergency Management Act 2004* (SA).

¹⁰ [Public Health \(Diagnosed People and Close Contacts\) Emergency Direction 2021 \(No 7\)](#), issued under the *Public Health Act 1997* (ACT).

¹¹ [Public Health \(COVID-19 Self-Isolation\) Order \(No 3\) 2021](#), issued under the *Public Health Act 2010* (NSW).

¹² [Diagnosed Persons and Close Contacts Directions \(No 35\)](#), issued under the *Public Health and Wellbeing Act 2008* (VIC).

¹³ Abeyasuriya, R., Delpont, D., Sacks-Davis, R., Hellard, M., Scott., N., “Know-C19- A policy, health and implementation response to COVID-19”, Burnet Institute 18/9/2021.

¹⁴ Doherty Modelling, Final Report to National Cabinet, 5/11/2021, at p 6.

5. The number of active COVID-19 cases nationally is currently 14,807¹⁵. This is significantly higher than the numbers seen when Schedule X was first introduced by the Full Bench in April 2020. Coupled with the loosening of restrictions in Victoria and New South Wales since October 2021, it is likely that more workers who are otherwise permitted to work are currently subject to isolation or quarantine requirements than when Schedule X was first introduced.

6. Interstate border restrictions have eased in recent months. If current restrictions remain at their present level, holiday travelers (aside from those who have been identified as close contacts) will be able to enter a State or Territory as set out in the table below, without the necessity to quarantine. The approaching Christmas-New Year period is generally a peak holiday season. This might reasonably be expected to increase the level of community transmission, case numbers and consequently the number of workers required to isolate or quarantine (wherever their exposure may occur).

Source	Destination	Qualification
VIC	NSW	Unvaccinated travellers 16 years or over not permitted to enter.
ACT	NSW	Persons who have been in particular locations 7-14 days prior to travel may be denied entry or required to quarantine.
NT, QLD, SA, Tas, WA	NSW	N/A
All	VIC	N/A
All	ACT	Unvaccinated travellers and from those from particular locations require an exemption.
Tas, QLD	WA	N/A
NT, SA	WA	Travellers aged 12 and over must be vaccinated.
SA, WA, Tas, NT (other than Greater Katherine and Robinsons River) ¹⁶	QLD	N/A
SA, Tas, QLD	NT	Travellers aged 12 and over must be vaccinated.
All	SA	Travellers aged 12 and over must be vaccinated and from an LGA of low or very low risk.
SA, WA, QLD (except for some high risk locations), NT (except for some high risk locations).	TAS	N/A

Source: healthdirect.gov.au

¹⁵ Australian Government Department of Health: [Coronavirus \(COVID-19\) case numbers and statistics](#), accessed 10 Dec 2021.

¹⁶ It is proposed that from 13 December, vaccinated travellers from Hotspots (including NSW and VIC) will be permitted to enter without quarantine, subject to pre and post entry testing requirements.


7. On the basis of the above, an entitlement to unpaid pandemic leave will remain necessary in Schedule X of the Horticulture Award 2020 beyond 31 December 2021 to ensure the modern award objective is met. Whilst it is presently unknown for how long it will remain necessary in the relevant sense, the applicant seeks an extension until 30 June 2022 on the basis that the implications of the Omicron variant are presently not well understood and noting that the date for the expiry of the entitlement can be revised should the need arise.
8. No grounds are advanced for the continuation of the entitlement to annual leave at half pay also found in that Schedule.
9. The application is advanced as a supplement to, rather than in substitution for, the applicant's support and advocacy (together with other organisations) for broader policy responses to the pandemic including:
- a) All workers having strong, effective and enforceable COVID safe practices in their workplace;
 - b) Workers having the right to safely test, isolate and quarantine where necessary without loss of income or job security;
 - c) Proper income support for workers and businesses that are impacted by COVID – both directly from local outbreaks and responding public health measures and indirectly where their sector is impacted; and
 - d) A health system, with adequate funding, prepared and ready to deal with the anticipated increase in case numbers.
10. 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	
Name	Daniel Walton
Date	10 December 2021
Capacity/Position	National Secretary



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.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS

MA000028 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; AM2021/X)

HORTICULTURE AWARD 2020
[MA000028]

Horticulture

JUSTICE ROSS, PRESIDENT

MELBOURNE, X DECEMBER 2021

Award flexibility schedules – Schedule X-Additional measures during the COVID-19 pandemic – Horticulture Award 2020.

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

1. By deleting the words “31 December 2021” in clause X.1 and inserting “30 June 2022”.
2. By deleting the words “31 December 2021” in clause X.2.1(d) and inserting “30 June 2022”.

B. This determination comes into operation on XX December 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 XX December 2021.

PRESIDENT