

ABOUT THE AFFIDAVIT FOR A CONSENT AWARD

When to use this affidavit

An application for the making of an award by consent, whether that be for a new award or a variation to an existing award, must be accompanied by an affidavit, as required by rule 6.8 of the *Industrial Relations Commission Rules 2022* (NSW) (Rules) and Practice Note 6. The affidavit is to be filed either with the consent application or within seven days of the date on which the consent application is filed (see PN 6 [4]).

The affidavit must set out the way in which the consent award provides for equal remuneration and other conditions of employment for men and women doing work equal or comparable value and the reasons why the making of the consent award is in the public interest having regard to the matters set out in the Act, pursuant to ss 23 and 146(2) of the *Industrial Relations Act 1996* (NSW) (Act) respectively. Ideally the affidavit will also outline the nature of the changes being made in the proposed new award or by way of a variation to an existing award. The pro forma affidavit set out below assists the parties to adequately address these requirements, however it is intended to be a guide only. It does not supplant the Act, the Rules, relevant Practice Notes (principally PN 6 and PN 32), the Award Making Principles (*State Wage Case 2024 (No 4)* [2024] NSWIRComm 25) or any relevant decisions of the Commission and it is the parties' responsibility to ensure that the affidavit and any other evidential material filed in support of a consent award are compliant with the regulatory requirements.

Pursuant to Award Making Principle 3.1(6), where an application for a new award or a variation to an existing award, is consented to by the parties, and provided the application otherwise complies with the requirements of the Act, the award may be made or varied without the application needing to be considered as an Arbitrated Case under Principle 9. While the Commission will place great weight on the fact an application is made by consent, there are nonetheless matters to which the Commission must still have regard. The affidavit required by rule 6.8 of the Rules is directed to those matters.

Content of the affidavit

Equal remuneration

Section 3(f) of the Act provides that an object of the Act is to prevent and eliminate discrimination in the workplace and in particular, to ensure equal remuneration for men and women doing work of equal or comparable value.

Consistent with s 3(f), s 23 of the Act requires the Commission, when making an award, to ensure that it “provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value”. In addition, s 169 of the Act stipulates that the Commission must, in the exercise of its functions, take into account the principles contained in the *Anti-Discrimination Act 1997* (NSW).

It is important that the affidavit explain the *basis* upon which is contended that the new or varied award provides for equal remuneration and other conditions of employment for men and women doing work of equal or comparable value and does not just state this as a concluded fact.

A proposed award that ensures equal remuneration and other conditions of employment for men and women under the award who are performing work of equal or comparable value should provide for:

- (a) equal rates of pay and allowances for men and women;
- (b) the same eligibility criteria for employment for men and women for each job classification;
- (c) the same duties for men and women under each job classification;
- (d) conditions of employment which ensure equal access to employment for men and women;¹ and

¹ *Re Crown Employees (Teachers in Schools & TAFE & Related Employees) Salaries & Conditions Award* (2002) 116 IR 361; [2002] NSWIRComm 144 at [34].

- (e) payment of salaries and allowances to part-time and casual employees on a pro rata basis, acknowledging that women are more likely to engage in work on a part-time or casual basis.²

Subsection 146(2)

Subsection 146(2) of the Act requires the Commission to take into account the public interest in the exercise of its functions. It must have regard to:

- (a) the objects of the Act in s 3;
- (b) the state of the economy of NSW and the likely effect of its decisions on the economy; and
- (c) for the exercise of a function about public sector employees, the fiscal position and outlook of the Government and the likely effect of the exercise of its function on the position and outlook of the Government.

Again, it is important that the affidavit explain the *basis* upon which it is contended that the new or varied award is in the public interest having regard to matters set out at s 146(2) of the Act and does not just state this as a concluded fact.

As explained in Award Making Principle 2.1 (see *State Wage Case 2024 (No 4)* [2024] NSWIRComm 25), the objects of the Act listed in s 3 to which the Commission must have regard when making or varying an award will include:

- (a) the promotion of productivity and efficiency;
- (b) the promotion of participation in industrial relations by employees and employers at an enterprise or workplace level;

² *Crown Employees (NSW Police Force Special Constables) (Security) Award 2023* [2024] NSWIRComm 1034 at [38]; *Crown Employees (NSW Police Force Special Constables) (Security) Award 2024* [2024] NSWIRComm 10 at [9].

- (c) the prevention and elimination of discrimination in the workplace, in particular ensuring equal remuneration for all persons doing work of equal or comparable value;
- (d) the encouragement of co-operative workplace reform and equitable, innovative and productive workplace relations; and
- (e) strategies to attract and retain skilled staff where there are skill shortages so as to ensure effective and efficient delivery of services.

These matters should be considered when preparing the affidavit.

When addressing the state of the economy of NSW and the likely effect the new or varied award will have on the economy, parties should consider whether the proposed award will or may:

- (a) have no or negligible impact on the economy (e.g. the award applies to a small number of employees; the economy is healthy and pay increases affordable; or the proposed wage increase is offset by efficiency improvements in the workforce that will or have resulted in cost savings);
- (b) have a positive impact on the economy and, if so, how (e.g. it will have a stimulatory effect at a time of economic downturn- see *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters (No 2)* [2020] NSWIRComm 1066 at [115] – [128]); and
- (c) have a negative impact and, if so, how and why in those circumstances the Commission nevertheless should make the award (e.g. an increase in salaries may exacerbate high inflation, however unless pay rates are lifted workers will experience a loss in the value of their pay and gross state product and government revenue are otherwise healthy).

In respect of variations to awards that affect public sector employees the affidavit should explain the effect of the proposed award on the Government's fiscal position and outlook. The fiscal position of the Government generally refers to the financial

state of the Government, encompassing its revenue, spending and debt levels. This can be done, for example, by evidence as to the Government's view about the financial impact of the changes to its fiscal position and outlook and/or the manner by which any changes are being funded. Alternatively, it might be done by evidence that it will have no fiscal impact, or evidence that its impact is negligible and the Government consents to the change.

No Extra Claims Commitments

If the proposed new award or varied award involves the parties giving a no extra claims commitment, it may be appropriate to alert the Commission to the terms of the commitment in the affidavit. Parties should have regard to Award Making Principle 4 when making no extra claims commitments.

Who should make the affidavit?

In the absence of agreement between the parties, the obligation to file the affidavit is the responsibility of the applicant (see PN 6 [5]). The Commission will determine the application on the evidence before it, and the evidence does not have to be limited to a single affidavit.

The affidavit to be filed in support of a consent award necessarily requires the expression of opinions. The affiant should therefore be made by an appropriately qualified person with knowledge of the matters attested to, containing evidence which sets out what experience allows them to give such opinions. It may be necessary, for that reason, to have more than one affidavit filed in support of the application.

As explained in PN 6 [6], the affidavit will usually form the evidentiary basis upon which the Commission will consider the requirements of ss 10, 15, 17, 23 and 146(2) of the Act; however the parties may tender additional evidence if they consider this to be necessary.

AFFIDAVIT (APPLICATION FOR A CONSENT AWARD)

I [#say on oath #affirm]:

#I am [role of deponent]. [Set out position, qualifications and relevant experience of deponent].

Generative artificial intelligence was not used to generate:

- (a) this affidavit;
- (b) any annexure/exhibit to this affidavit;
- (c) [where applicable] other than annexure/exhibit marked [insert] in accordance with leave granted by [name of decision maker] and [date].

This affidavit is made in support of an application for approval of [*insert name of consent award*] (the proposed award).

The proposed award replaces [*previous award*]. It has a nominal term of [*not less than 12 months nor more than 3 years*].

The proposed award provides for: [changes to remuneration, conditions of employment, including (identify key changes)].

In my opinion the proposed award meets the requirements for approval under ss 23 and 146(2) of the *Industrial Relations Act 1996* (NSW) for the reasons explained below.

Equal remuneration

The proposed award provides equal remuneration and other conditions of employment for men and women under the award who are performing work of equal or comparable value for the reasons that follow.

The proposed award provides: [include, amend or delete as applicable]:

- (a) equal rates of pay and allowances for men and women;
- (b) the same eligibility criteria for employment for men and women for each job classification;
- (c) the same duties for men and women under each job classification; and
- (d) conditions of employment which ensure equal access to employment for men and women.

[Where applicable] The proposed award contains clauses which can ensure equal remuneration and other conditions of employment for men and women as follows:

- (a) [see examples of such clauses in the Note above]

Public interest

The making of this consent award is in the public interest, having regard to the factors in s 146(2) of the *Industrial Relations Act 1996* (NSW).

Objects of the Industrial Relations Act 1996 (NSW)

The proposed award accords with the objects in s 3 of the Act, for the following reasons [amend as appropriate]:

- (a) [clause X] promotes efficiency and productivity in the economy of the State by [insert how];
- (b) [clause X] promotes participation in industrial relations by employees and employers at an enterprise or workplace level by [insert how];
- (c) [clause X] is directed toward the prevention and elimination of discrimination in the workplace and in particular to ensuring equal remuneration for men and women doing work of equal or comparable value [add further details as appropriate];

- (d) [clause X] encourages and facilitates co-operative workplace reform and equitable, innovative and productive workplace relations by [insert how]; and
- (e) [clause X] is directed to attracting and retaining skilled staff in circumstances where there are skill shortages so as to ensure effective and efficient delivery of services [add further details as appropriate].

Economy of New South Wales

It is expected that the creation of this award [will /will not] have an adverse effect on the state of the economy of New South Wales. [Explain.]

Fiscal position and outlook of the Government [Include only if Award covers public sector employees]

It is expected that the creation of this award will [explain the anticipated effect the new or varied award will have on the fiscal position and outlook of the Government and why that is the case.

No Extra Claims

[Explain, as necessary, the terms of any no extra claims commitment included in the new or varied award.]
