

ABOUT THE AFFIDAVIT FOR AN ENTERPRISE AGREEMENT – THE COMPARISON AND COMPLIANCE STATEMENT

When to use this affidavit

An application for the approval of an enterprise agreement, whether that be for a new enterprise agreement or a variation of an earlier enterprise agreement, must be accompanied by an affidavit, as required under rule 6.9 of the *Industrial Relations Commission Rules 2022* (NSW) (Rules) and Practice Note No. 3 – Approval of Enterprise Agreements (Practice Note). The affidavit is referred to in the Rules as a “comparison and compliance statement”.

The Industrial Relations Commission of New South Wales (Commission) can only approve an agreement if it is satisfied that the enterprise agreement meets the requirements for approval under the *Industrial Relations Act 1996* (NSW) (Act), the Rules and the Principles for Approval of Enterprise Agreements (Principles) which are at Annexure A of *Review of the Principles for Approval of Enterprise Agreements 2021/2022*.¹

In *Re State Super Enterprise Agreement 2024-2027*,² the Commission published a checklist summarising each of the requirements for the approval of an enterprise agreement. The affidavit should address each of the matters in each item of the Commission’s checklist. The affidavit must provide the basis upon which it is contended that any requirement in the checklist is fulfilled. The mere assertion of compliance in an affidavit will not suffice.

The following guide and attached pro forma affidavit is designed to assist an applicant for an enterprise agreement to adequately address these requirements, however it is intended to be a guide only. It does not supplant the Act, the Rules, the Principles, the Practice Note nor any relevant decisions of the Commission. It is the parties’ responsibility to ensure that the preliminary mandatory steps, content of the enterprise agreement, application for approval, affidavits and any other evidential material filed in support of an enterprise agreement, are compliant with the regulatory requirements.

¹ [2022] NSWIRComm 1005.

² (2024) 336 IR 145; [2024] NSWIRComm 8 at [88].

Preliminary Steps

Prior to filing an application for approval of an enterprise agreement, with the comparison and compliance statement, there are a number of mandatory steps that must be taken.

Notification to Registrar

If the enterprise agreement is one under which employees are a party (rather than a union on behalf of employees), the employer must advise the Industrial Registrar before or at the time of commencing formal negotiations with the employees, that an enterprise agreement is proposed or under negotiation, and the awards or enterprise agreements that then apply to the employees in accordance with s 36(2) of the Act. This should be done using [Form 15 – Notification of proposed enterprise agreement](#).

Content of the Agreement

The content of an enterprise agreement must comply with various provisions in the Act and the Principles.

Section 35(1)(a) of the Act requires the agreement to comply with the *Anti-Discrimination Act 1977*. Principle 1.5 provides that the terms and conditions of employment in a proposed agreement must not unlawfully discriminate, either directly or indirectly, on the grounds of a person's sex (including pregnancy and breastfeeding), race, marital or domestic status, homosexuality, age, disability, transgender identity or responsibilities as a carer or because of the sex (including pregnancy and breastfeeding), race, marital or domestic status, homosexuality, age, disability or transgender identity of the person's relative or associate. A model anti-discrimination clause is in Attachment 1 of *Review of the Principles for Approval of Enterprise Agreements 2021/2022*.³ However, inclusion of the clause alone does not mean the agreement will comply with the *Anti-Discrimination Act* and parties should ensure that nothing in the agreement has a direct or indirect discriminatory effect.

³ [2022] NSWIRComm 1005.

The Agreement is to:

- (1) state if it is an agreement made with one or more industrial organisations or with employees: ss 31(1)-(2) of the Act;
- (2) identify the parties to the agreement and describe the employees for whom it is made: s 38(2) of the Act;
- (3) cover all employees of the employer that would reasonably be expected to be covered, unless the employees to which it does apply comprise a distinct geographic, operational or organisational unit, or it is not unfair, having regard to the matters set out in Principle 2.2, for it not to cover the employees who are excluded: s 35(2) of the Act and Principles 2.1(d) and 2.2;
- (4) contain terms that facilitate the establishment of consultative mechanisms and procedures appropriate to the size, structure and needs of the enterprise for consultation on matters affecting their efficiency and productivity: Principle 2.6;
- (5) is to have a nominal term of not more than three years: s 42 of the Act;
- (6) contain procedures for dispute resolution or identify another relevant agreement or award that contains relevant provisions that apply (unless the employer employs fewer than 20 employees): s 39 of the Act; and
- (7) provide equal remuneration for men and women doing work of equal or comparable value under the agreement: Principle: 1.3.

The Agreement is to, on balance and having regard to the matters set out in Principle 2.5, provide no net detriment to the employees when compared to the aggregate package of conditions of employment under relevant award(s): s 35(1)(b) of the Act and Principle 2.4(a); or if there are no relevant awards, it is not to, on balance, provide a net detriment to the employees when compared to the aggregate package of conditions of employment under an award that covers employees performing similar work: s 35(1)(b2) of the Act and Principle 2.4(b).

If the parties are uncertain as to which award may be appropriate for the purposes of the comparison required by s 35(1)(b2) of the Act, the parties may consider applying

to the Industrial Registrar pursuant to s 36A(2), for a determination of the relevant award against which the agreement will be compared for the purposes of the application of the 'no net detriment' test in s 35(1)(b2) of the Act.

Negotiations

The Principles and the Act require numerous things to occur during the negotiation process, regardless of whether the agreement is one directly with employees or with a union, all of which are designed to ensure that the employees are fully informed and consulted. They include:

- (1) the parties must carry out a negotiation process that involves all the parties and/or their representatives: Principle 2.1(a);
- (2) consultative processes are to be structured to encourage participation of all groups and categories of employees: Principle 4.1; with reasonable steps taken to consult with all employees who are to be covered by the agreement: Principle 4.2(a);
- (3) reasonable steps must be taken to ensure that employees who are to be covered by the agreement have an understanding of the agreement and its effect: Principle 4.2(b);
- (4) parties are to attend agreed meetings, provide agreed documentation and comply with agreed or reasonable negotiating procedures: Principle 5;
- (5) employees are to be given access to the proposed agreement and the relevant awards and reasonable time to seek independent advice: Principles 4.2(d)-(e);
- (6) employees are to be informed of the intention to have the agreement approved by the Commission and the consequences of the Commission's approval: Principle 4.2(c);
- (7) employees and any relevant union are to be given information that allows them to understand the nature and effect of the agreement: s 35(1)(c) of the Act and Principle 2.1(b); and

- (8) nothing is to occur that would coerce employees to enter into the agreement: s 35(1)(d) of the Act and Principle 2.1(c); and
- (9) parties are to consider matters such as workplace reform, productivity and efficiency and acknowledge the availability of the Commission to assist in the facilitation of cooperative employment relations principles: Principle 5.2.

Secret Ballot

If the enterprise agreement is one under which employees are a party (rather than a union on behalf of employees), s 36(4) of the Act requires that the agreement be approved in a secret ballot by not less than 65% of the employees who are to be covered by the agreement.

The secret ballot has to be conducted in a way which meets the following requirements of s 37 of the Act and Principle 2.3:

- (1) a returning officer who is not the employer or a person selected by the employer is to be appointed to conduct the secret ballot on behalf of the employees: s 37(1) of the Act and Principle 2.3(a);
- (2) to be eligible to vote, the person must be an employee who is to be covered by the agreement at the time the ballot is conducted: Principle 2.3(e);
- (3) each eligible employee can vote only once in a ballot: Principle 2.3(c);
- (4) the employees must be able to vote in secret: Principle 2.3(d);
- (5) the time/times fixed for the ballot must enable all eligible employees the opportunity to vote where practicable: Principle 2.3(e);
- (6) the ballots must be secure until counting commences: Principle 2.3(f);
- (7) the returning officer must count and declare the result of the ballot: Principle 2.3(g); and
- (8) the ballots must be retained until after the agreement is processed by the Commission: Principle 2.3(h).

Pursuant to Principle 2.3, unless the Commission gives leave, the conditions of the ballot must include that:

- (1) each ballot form must be initialled by the returning officer;
- (2) counting must not commence until the ballot has closed;
- (3) scrutineers may observe the count of the ballot papers; and
- (4) the Commission may inspect the ballot papers.

Finalising the Agreement

Once approved, an enterprise agreement must be signed by or on behalf of the parties to it. The persons or entities who may sign an Enterprise Agreement are set out in s 31 of the Act. In addition, where an agreement has been approved by a secret ballot pursuant to s 36(4) of the Act, one or more employees may be nominated by the employees to sign the agreement on behalf of all the employees covered by the agreement: Principle 3.3.

Content of the supporting affidavits

The following summarises the matters that need to be included in the affidavit that must be filed with an application for the approval of an enterprise agreement. The affidavit must address all the requirements for the approval of an enterprise agreement. An affidavit must provide the basis upon which it is contended that any requirement is fulfilled. The mere assertion or statement of compliance as a concluded fact will not suffice.

Effect of the Enterprise Agreement

Pursuant to r 6.9(2)(a) of the Rules, the affidavit must identify the awards or contract determinations, if any, over which the agreement will prevail, and other enterprise agreements that will be rescinded or replaced if the agreement is approved.

Coverage of the proposed agreement

The affidavit should identify the employees covered by the enterprise agreement.

If the enterprise agreement is to apply to all employees of the employer to whom the agreement relates at a distinct geographic, operational, or organisational unit, the statement needs to identify the distinct geographic, operational or organisational unit to whom the agreement relates.

Pursuant to s 35(2) of the Act, the Commission is not to approve an enterprise agreement that will not cover all the employees of the employer, if it is satisfied that the matters set out in s 35(2) of the Act apply. Therefore, the affidavit must explain why the employees excluded would not reasonably be expected to be covered, given the nature of the work performed under the agreement and the organisational and operational relationships between the employees covered by the agreement and the excluded employees, and why it is not unfair to exclude the employees from the agreement: r 6.9(4) of the Rules. The applicant can rely upon the considerations in Principle 2.2, which are the wishes of the parties, the award coverage of employees not covered by the proposed agreement, the history of industrial regulation at the enterprise or workplace, and any matters which the Commission would consider relevant.

Process Followed to Prior to Concluding the Agreement

The affidavit should explain the steps taken prior to concluding the enterprise agreement. Such steps will or may include the following.

- (1) **Consultative processes:** the statement must explain how the negotiation and consultative processes meet the requirements of Principles 2.1, 4.1, 4.2, 5 and s 35(1)(c)-(d) of the Act.
- (2) **Secret ballot:** if the enterprise agreement is one under which employees are a party (rather than a union on behalf of employees), the statement must set out how the secret ballot approving the enterprise agreement was conducted.

Criteria for approval of enterprise agreements

The affidavit must set out, briefly but specifically, the basis on which it is contended that the enterprise agreement meets the requirements for approval.

Compliance with *Anti-Discrimination Act 1977* (NSW) (s 35(1)(a), r 6.9(3)(b) and Principle 1.4(b) and 1.5)

The affidavit must set out the basis on which it is contended that the agreement complies with the relevant statutory requirements, including the *Anti-Discrimination Act 1977* (NSW).

No net detriment to the employees (sub-ss 35(1)(b), (b1) and (b2), rr 6.9(2)(b) and 3(a) and Principle 3.4)

Pursuant to r 6.9(2)(b) of the Rules, the affidavit must compare the conditions of employment or engagement under the agreement with the comparative conditions of employment and, pursuant to r 6.9(3)(a) it must also set out the basis on which it is contended that the conditions of employment or engagement under the agreement, if compared with the comparative conditions of employment, do not, considered as a whole, result in a net detriment to the employees covered by the agreement.

“Comparative conditions of employment” is defined in r 6.9(5) of the Rules to mean: the conditions of employment or engagement that would otherwise apply under the relevant award or if there is not relevant award, the relevant employment conditions.

In the case of an agreement that covers employees to whom a State award would otherwise apply, the Commission will need to be satisfied that the proposed agreement does not, on balance, provide a net detriment to the employees when compared with the aggregate package of conditions of employment under the applicable State award: s 35(1)(b) of the Act.

In the case of an agreement that covers employees to whom a Federal award would otherwise apply, the Commission will need to be satisfied that the employees are not disadvantaged in comparison to their entitlements under the Federal award: s 35(1)(b1) of the Act.

If no award covers the employees, a suitable comparator award needs to be chosen and the Commission will need to be satisfied that the proposed agreement does not, on balance, provide a net detriment to the employees when compared with the aggregate package of conditions of employment under the comparator award: s 35(1)(b2) of the Act.

The applicant may explain why the agreement poses no net detriment with reference to the considerations in Principle 2.5:

- (1) the benefits and conditions applying under the proposed enterprise agreement in comparison to those applying under the relevant award/s;
- (2) the conditions in the proposed enterprise agreement being considered as an aggregate package;
- (3) provisions in the *Work Health and Safety Act 2011* (NSW) and regulations directly relevant to the change in work patterns to be performed under the agreement;
- (4) the needs and circumstances of the enterprise;
- (5) the wishes of the parties to the agreement;
- (6) any other matters the Commission considers relevant;
- (7) test case decisions of the Commission;
- (8) State decisions setting principles or provisions pursuant to s 51 of the Act; or
- (9) minimum sick leave provisions for awards as prescribed under s 26 of the Act; where such provisions or principles are found in the relevant award/s or which apply to awards generally.

A mere assertion that there will be “no net detriment” will not suffice. It is necessary to provide a comparison of rates of pay and total remuneration along with a comparison of conditions (to the extent the agreement does not simply adopt existing award conditions). Any detrimental differences should be clearly identified along with an explanation as to why, despite such differences, it is contended that the agreement will not result in a net detriment to employees.

Parties’ understanding of the effect of the agreement (s 35(1)(c), r 6.9(3)(c))

Section 35(1)(c) of the Act and r 6.9(3)(c) of the Rules require the parties to understand the effect of the proposed agreement.

The following factors are examples of reasons as to why employees who are parties to the proposed agreement would understand its effect:

- (1) consultations occurred during the negotiation of the agreement;
- (2) reasonable steps were taken to ensure that employees who will be covered by the agreement have an understanding of the agreement and its effect;
- (3) employees had access to the proposed agreement and relevant award/s; and/or
- (4) employees had reasonable time to seek advice independent from the employer.

Duress (s 35(1)(d), r 6.9(3)(d))

Section 35(1)(d) of the Act and r 6.9(3)(d) of the Rules requires the parties to not have entered the agreement under duress. A party will be considered to have entered the agreement under duress if their decision was the result of illegitimate pressure from the other party, e.g., threatened or actual unlawful activity (including illegal industrial action), threatened or actual removal of employee benefits etc.

The following factors are examples of reasons as to why employees who are parties to the proposed agreement did not enter into it under duress:

- (1) negotiation processes involved all the parties and/or their representatives;
- (2) consultations occurred during the negotiation of the agreement and were structured to encourage participation from all groups and categories of employees, including part-time and casual employees; and/or
- (3) employees sought advice independent from the employer.

Dispute resolution procedure (s 39)

The affidavit should identify which clause or clauses in the proposed agreement contains a dispute resolution procedure, in compliance with s 39 of the Act. Alternatively, it should identify an applicable dispute resolution clause in another relevant agreement or award or indicate that the employer to which the agreement

applies employs fewer than 20 employees and that the agreement does not include a dispute resolution clause.

Consultation (Principle 2.6)

The affidavit should identify which clause or clauses in the proposed agreement meet the consultation requirements of Principle 2.6.

Departure from the Principles (r 6.9(3)(e))

Rule 6.9(3)(e) of the Rules requires that if the agreement departs from the Principles in any way, the affidavit should set out why any departure from the Principles does not prejudice the interests of the parties to the agreement.

Equal remuneration

It is important that the affidavit explain the *basis* upon which is contended that the agreement 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 agreement that ensures equal remuneration and other conditions of employment for men and women under the agreement who are performing work of equal or comparable value should provide for:

- (1) equal rates of pay and allowances for men and women;
- (2) the same eligibility criteria for employment for men and women for each job classification;
- (3) the same duties for men and women under each job classification;
- (4) conditions of employment which ensure equal access to employment for men and women;⁴ and

⁴ *Re Crown Employees (Teachers in Schools & TAFE & Related Employees) Salaries & Conditions Award* (2002) 116 IR 361; [2002] NSWIRComm 144 at [34].

- (5) 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.⁵

Public interest

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:

- (1) the objects of the Act in s 3 of the Act;
- (2) the state of the economy of NSW and the likely effect of its decisions on the economy; and
- (3) 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.

It is important that an affidavit filed in support of the approval of an enterprise agreement, explain the *basis* upon which it is contended that the new or varied agreement 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.

The objects of the Act listed in s 3 which may be relevant when seeking approval of an enterprise agreement might include:

- (1) the promotion of productivity and efficiency;
- (2) the promotion of participation in industrial relations by employees and employers at an enterprise or workplace level;
- (3) the prevention and elimination of discrimination in the workplace, in particular ensuring equal remuneration for all persons doing work of equal or comparable value;

⁵ *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].

- (4) the encouragement of co-operative workplace reform and equitable, innovative and productive workplace relations; and
- (5) 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 agreement will have on the economy, parties should consider whether the proposed agreement will or may:

- (1) have no or negligible impact on the economy (e.g., the agreement 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);
- (2) have a positive impact on the economy and, if so, how;
- (3) have a negative impact and, if so, how and why in those circumstances the Commission nevertheless should make the agreement (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 agreements that affect public sector employees the affidavit should explain the effect of the proposed agreement 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.

Who should make the affidavit?

Generally, the affidavit will be prepared by the party filing the application. Where individual employees are the applicant, a selected representative of the employees can attest the affidavit.

The affidavit to be filed in support of the approval of an enterprise agreement necessarily requires the expression of opinions. The affidavit should therefore be made by an appropriately qualified person with knowledge of the matters attested to, containing evidence which sets out what experience and/or expertise 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. While the affidavit will usually form the evidentiary basis upon which the Commission will consider whether the enterprise agreement meets all the requirements for approval, the parties may tender additional evidence if they consider this to be necessary.

The affidavit should be filed with the application for the approval of an enterprise agreement ([Form 14A - Application in respect of an industrial instrument](#)).

What documents need to be attached to this affidavit?

The following documents need to be attached to this affidavit:

- (1) a copy of the agreement, signed by or on behalf of the parties; and
- (2) the notice explaining the secret ballot to employees.

PRO FORMA AFFIDAVIT

- 1 I [#say on oath #affirm]:
- 2 I am [role of deponent]. [Set out position, qualifications and relevant experience that in your view qualify the deponent to give the opinion evidence set out below].
- 3 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].
- 4 This affidavit is made in support of an application for approval of [*insert name of enterprise agreement*] (the proposed agreement).
- 5 If approved the proposed agreement will prevail over [*applicable State award*]. The proposed agreement [*is a new agreement OR replaces existing enterprise agreement/existing contract agreement*].
- 6 The proposed agreement has a nominal term of [*no more than three years*] pursuant to s 42 of the Act, commencing on [*date*] and ending on [*date*].
- 7 A copy of the agreement which has been signed by the parties to it is annexed to this affidavit and marked "A".
- 8 The proposed agreement provides for: [*changes to remuneration, conditions of employment, including (identify key changes from existing entitlements)*].

Coverage of the proposed agreement

- 9 The parties to the proposed agreement are [*complete*].

- 10 The proposed agreement will apply to [*identify the employees who are to be covered by the agreement and where relevant the distinct geographic, operational, or organisational unit of employees to whom the agreement relates*].
- 11 [*If the proposed agreement does not apply to all of the employees of the employer and are not a distinct geographic, operational, or organisational unit of employees*] The enterprise agreement does not apply to all of the employees of the employer. The employees excluded would not reasonably be expected to be covered given the nature of the work performed under the agreement and the organisational and operational relationships between the employees covered by the agreement and the excluded employees given [*complete by reference to the factors under s 35(2) of the Act*].

Process Followed Prior to Concluding the Agreement

Prior to negotiations [Include only where the enterprise agreement is one to which employees are a party]

- 12 The employer notified the Industrial Registrar on [provide date of notification] that the proposed agreement was [proposed OR under negotiation], and advised the State or Federal awards or enterprise agreements that then applied to the employees.

Consultative processes

- 13 Consultative processes during the negotiation of the agreement were structured in a way to encourage participation of all groups and categories of employees, including part-time and casual employees, pursuant to Principle 4.1 as follows. [*Explain consultative processes during negotiation process.*]
- 14 During the negotiation process, parties attended meetings that they agreed to attend, provided documentation that they agreed to provide, and complied with agreed or reasonable negotiation procedures, pursuant to Principle 5.1. [*Explain steps during negotiation process.*]

- 15 The parties considered matters such as workplace reform, productivity and efficiency pursuant to Principle 5.2. *[Explain relevant considerations during negotiation process.]*

Secret ballot [Include only where the enterprise agreement is one to which employees are a party]

- 16 The proposed enterprise agreement was approved in a secret ballot, pursuant to the requirements in s 36(4) of the Act and Principle 2.3.
- 17 The returning officer was *[name and position]*. S/he was not chosen by the employer. *[Explain process of appointment.]*
- 18 The list of eligible voters was prepared *[describe method so Commission can be satisfied that all those eligible were given the opportunity to vote]*.
- 19 A notice explaining the ballot was sent to employees on *[date]*. A copy is attached to this affidavit and marked "B". The Notice included a copy of the proposed enterprise agreement, explained the method of voting, and that the date and time for voting would start on *[date and time]* and finish on *[date and time]*.
- 20 The ballot method used was as follows. *[Describe ballot method, including the way in which the method adopted ensured that it was secret, and that each employee could only vote once]*. *[Where using paper ballots]* Each ballot paper was signed by the returning officer before being given to a voter.
- 21 The ballot was concluded on *[date]*.
- 22 The ballots were secured *[describe how ballots were secured if in paper or electronic form and not accessible by anyone other than the returning officer at the conclusion of the ballot]*.
- 23 The votes were counted by the returning officer on *[date]* in front of scrutineers *[describe location, those present]*.

- 24 There were [x] number of employees eligible to vote, out of which [x] number voted. [x] employees voted in favour of approving the proposed agreement, [x] voted against, and [x] made informal votes. That means that [x]% of eligible votes voted in favour of approving the agreement. This satisfies the requirement in s 36(4) that the agreement must be approved in a secret ballot by not less than 65% of employees who are to be covered by the agreement at the time the ballot is conducted.

Criteria for approval of enterprise agreements

- 25 In my opinion the proposed agreement meets all of the requirements for approval under the Act and Principles for the following reasons.

Compliance with Anti-Discrimination Act 1977 (s 35(1)(a), Principle 1.4(b) and 1.5)

- 26 The proposed agreement complies with the *Anti-Discrimination Act 1977* (NSW) noting *[explain compliance with Anti-Discrimination Act.]*
- 27 At clause [x] the agreement contains an anti-discrimination clause in the form of, or which is relevantly similar to, the model anti-discrimination clause in Attachment 1 of *Review of the Principles for Approval of Enterprise Agreements 2021/2022* [2022] NSWIRComm 1005.

No net detriment to the employees (s 35(1)(b), (b1) and (b2), and 3(a) and Principle 3.4) [Delete reference to sections not applicable]

- 28 The proposed agreement applies to employees to whom *[applicable State/Federal award]* would apply. Pursuant to [s 35(1)(b) or s 35(1)(b1) of the Act, the proposed agreement does not, on balance, provide a net detriment to the employees when compared with the *[aggregate package of conditions of employment under applicable State award or entitlements under applicable Federal award]*.

OR

- 29 The proposed agreement applies to employees who perform similar work to employees who are covered by [*comparable State/Federal award*]. [*Briefly explain why the employees covered by the agreement do comparable work to employees covered by the identified award, e.g., due to the nature of the duties, industry, and/or qualifications and training of the employees covered by the proposed award. If there is more than one comparable State/Federal award, the affidavit may make multiple comparisons or identify why the award(s) not chosen was unsuitable for comparison.*] Pursuant to s 35(1)(b2) of the Act, the proposed agreement does not, on balance, provide a net detriment to the employees when compared with the aggregate package of conditions of employment under [*comparable State/Federal award*].
- 30 The comparison rates of pay are as follows: [*Identify the differences in rates of pay, total remuneration.*]

Remuneration in the Enterprise Agreement			Remuneration in the comparative industrial instrument		
Proposed Classification	Minimum Rate	Maximum Rate	Equivalent Classification	Minimum Rate	Maximum Rate
[Level 1]	[\$xx]	[\$xx]	[Level 1]	[\$xx]	[\$xx]
[Level 2]	[\$xx]	[\$xx]	[Level 2]	[\$xx]	[\$xx]
[Level 3]	[\$xx]	[\$xx]	[Level 3]	[\$xx]	[\$xx]
[Level 4]	[\$xx]	[\$xx]	[Level 4]	[\$xx]	[\$xx]

- 31 The conditions of employment between the award and the proposed agreement differ as follows: [*Complete*].
- 32 While they are not the same, [*Give brief and specific reasons explaining why the employment conditions under the agreement will result in “no net detriment” compared to the State/Federal award. Clearly identify any detrimental differences and explain why, despite these differences, the agreement will not result in a net detriment to employees.*]

Parties' understanding of the effect of the agreement (s 35(1)(c))

- 33 In my opinion the Commission can accept that the parties understand the effect of the proposed agreement because *[Explain how the steps taken throughout the process that would allow for a conclusion that the parties understand the effect of the proposed agreement.]*

Duress (s 35(1)(d))

- 34 In my opinion the parties did not enter into the agreement under duress. I say that noting: *[Explain how parties did not enter into the agreement under duress.]*

Dispute resolution procedure (s 39)

- 35 The proposed agreement contains a dispute resolution clause at clause [x]. *[Alternatively]* The proposed agreement does not contain a dispute resolution procedure as a procedure is established by clause [x] of *[applicable award or agreement]* which applies.

Consultation (Principle 2.6)

- 36 The proposed agreement, where appropriate, facilitates the establishment of consultative mechanisms and procedures appropriate to the size, structure and needs of the enterprise for consultation on matters affecting its efficiency and productivity, pursuant to principle 2.6. In particular *[Explain clauses in the agreement which facilitate the establishment of appropriate consultative mechanisms and procedures.]*

Departure from the Principles (Rule 6.9(3)(e))

- 37 *[If the agreement departs from the principles in any way, the affidavit should set out why any departure from the principles does not prejudice the interests of the parties to the agreement: rule 6.9(3)(e).]*

Equal remuneration

- 38 The proposed agreement provides equal remuneration and other conditions of employment for men and women under the agreement who are performing work of equal or comparable value for the reasons that follow.
- 39 The proposed agreement 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.
- 40 *[Where applicable]* The proposed agreement 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

- 41 The approval of this enterprise agreement 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)

- 42 The proposed agreement 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

- 43 It is expected that the approval of this enterprise agreement *[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 Enterprise Agreement covers public sector employees]

- 44 It is expected that the approval of this enterprise agreement will *[explain the anticipated effect the approval of the enterprise agreement will have on the fiscal position and outlook of the Government and why that is the case]*.
