

APPENDIX 6 TO ACTU SUBMISSION

Jurisdiction	Collective Agreement Assessment
<p><i>Industrial Relations Act 1996</i> (NSW) Refer section 35</p> <p>Refer also to <i>Principles for Approval of Enterprise Agreements</i> [1996] NSWIRComm 221</p>	<ul style="list-style-type: none"> • The agreement does not, on balance, provide a net detriment to the employees when compared with the aggregate package of conditions of employment under the State awards • In the case of an agreement that covers employees to whom Federal awards would otherwise apply, the employees are not disadvantaged in comparison to their entitlements under the Federal awards • in the case of an agreement that covers employees to whom no State or Federal award would otherwise apply, the agreement does not, on balance, provide a net detriment to the employees when compared with the aggregate package of conditions of employment under a State or Federal award that covers employees performing similar work to that performed by the employees covered by the agreement
<p><i>Industrial Relations Act 1999</i> (Qld) Refer section 160</p>	<ul style="list-style-type: none"> • The agreement does not disadvantage the employees covered by the agreement in relation to their employment conditions • An agreement disadvantages employees in relation to their employment conditions only if: <ul style="list-style-type: none"> (a) certification of the agreement: <ul style="list-style-type: none"> (i) would result in the reduction of the employees’ entitlements or protection under an award or industrial agreement that binds the employer; or (ii) if no award or industrial agreement binds the employer—would not provide employee entitlements or protection at least equal to the employees’ entitlements or protection under an appropriate award or industrial agreement nominated in the agreement; and (b) in the context of the employment conditions considered as a whole, the Commission considers the reduction is against the public interest.
<p><i>Fair Work Act 1994</i> (SA) Refer section 79(e)</p>	<ul style="list-style-type: none"> • the agreement— <ul style="list-style-type: none"> (i) is, on balance, in the best interests of the employees covered by the agreement (taking into account the interests of all employees); and (ii) does not provide for remuneration or other conditions of employment that are inferior to the standards that apply under Part 1 Division 2; and (iii) does not provide for remuneration or conditions of employment that are (considered as a whole) inferior to remuneration or conditions of employment (considered as a whole) prescribed by an award under this Act that applies to the employees at the time of the application for approval
<p><i>Industrial Relations Act 1994</i> (Tas) Refer section 61J</p>	<ul style="list-style-type: none"> • The Commissioner must ensure that an enterprise agreement does not disadvantage the employees to be covered by the agreement. • An enterprise agreement is taken to disadvantage employees if its approval would result, on balance, in a reduction in the overall terms and conditions of employment of those employees compared with the award or agreement that would otherwise apply to those employees.

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<p><i>Industrial Relations Act 1979</i> (WA)</p> <p>Refer sections 97VS and 97VU</p>	<ul style="list-style-type: none"> • An EEA disadvantages an employee only if its provisions result, on balance, in a reduction in the overall entitlements of the employee under an award or relevant order. • An EEA is to be taken to disadvantage the employee as mentioned in if — <ul style="list-style-type: none"> (a) it confers on the employer a power to change any term or condition of the employment without the consent of the employee; and (b) the employer could exercise the power in a way that would result, on balance, in a reduction in the overall entitlements of the employee. • In comparing the entitlements of an employee under an EEA to the entitlements that would be provided to the employee under an award or a comparable award or a relevant order, the Registrar must take into account all relevant benefits whether in the form of money or otherwise.
<p>FED <i>Workplace Relations Act 1996</i> (Cth)</p> <p>Pre-27 March 2006</p>	<ul style="list-style-type: none"> • An agreement passes the no disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment. • Subject to the relevant sections, an agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those employees under (a) relevant awards or designated awards; and (b) any law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant. • If (a) the only reason why the Commission must not certify an agreement is that the agreement does not pass the no-disadvantage test; and (b) the Commission is satisfied that certifying the agreement is not contrary to the public interest; the agreement is taken to pass the no-disadvantage test. • An example of a case where the Commission may be satisfied that certifying the agreement is not contrary to the public interest is where making the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the single business or part.

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<p>FED <i>Workplace Relations Amendment (Work Choices) Act 2005¹</i></p> <p>27 March 2006 to 6 May 2007</p>	<ul style="list-style-type: none">• Workplace agreements operated from the date of lodgement with the Office of the Employment Advocate (OEA). The Act did not require the OEA to assess the content of workplace agreements when they were lodged. However, it was empowered to consider the content and remove any prohibited content.• Under the Work Choices amendments, there were no legislated content that agreements were required to include. The Act provided instead that if an agreement did not include a dispute settlement procedure then a model dispute resolution term would be taken to be a term of the agreement. Similarly, the Act provided for a legislated nominal expiry date (NED) for agreements that operated if the agreement did not contain one or contained a NED that was inconsistent with section 352 of the WR Act.• The Work Choices amendments also provided for protected award conditions, which would be read into an agreement unless the agreement specifically excluded or modified them. Section 354 of the WR Act defined the protected award conditions as:<ul style="list-style-type: none">○ rest breaks;○ incentive-based payments and bonuses;○ annual leave loadings;○ observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days;○ days to be substituted for, or a procedure for substituting, days referred to in paragraph (d);○ monetary allowances○ loadings for working overtime or for shift work;○ penalty rates;○ outworker conditions;○ any other matter specified in the regulations.• Under the Work Choices amendments there were a number of restrictions on the content of workplace agreements, including matters defined as prohibited content in the Workplace Relations Regulations 2006 and restrictions on calling up terms of other industrial instruments (s.355).• The Work Choices amendments introduced the Australian Fair Pay and Conditions Standard (the Standard), which consisted of five statutory minimum conditions of employment, being:<ul style="list-style-type: none">○ a maximum of 38 ordinary hours per week (plus reasonable additional hours)○ four weeks paid annual leave (with an additional week for shift workers) for permanent employees○ 10 days paid personal per year (and where this paid personal leave has been exhausted, two days unpaid carer's leave per occasion) and two days paid compassionate leave per occasion○ up to 52 weeks unpaid parental leave (including maternity, paternity and adaption) for eligible employees, and
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¹ The summary is taken from '[Agreement Making in Australia under the Workplace Relations Act 2007-2009](#)', report prepared by the Department of Education, Employment and Workplace Relations 2010 ('Agreement Making in Australia Report 2007-2009')

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	<ul style="list-style-type: none"> ○ guaranteed basic rates of pay and guaranteed casual loadings under an applicable Australian Pay and Classification Scale (APCS), underpinned by the Federal Minimum Wage. ● The Standard prevailed over a workplace agreement or contract of employment to the extent that it provided for more favourable entitlements in a particular respect (s.172(2)).
<p>FED</p> <p><i>Workplace Relations Amendment (A Stronger Safety Net) Act 2007²</i></p> <p>7 May 2007³ to 27 March 2008</p>	<ul style="list-style-type: none"> ● The Workplace Authority (formerly the OEA) was introduced and all new workplace agreements would (where applicable) be tested against the 'fairness test'. ● The fairness test was applied to all collective agreements and to individual agreements where: <ul style="list-style-type: none"> ○ the employee covered received a gross basic salary of up to \$75 000 per annum ○ where the employer and one or more employees covered by the agreement would otherwise have been covered by an award (or worked in an industry or occupation where the terms and conditions of the kind of work performed by the employees would usually be regulated by an award), and ○ where the agreement excluded or modified one or more protected award conditions. ● The Workplace Authority Director had to be satisfied, 'that on balance, the collective agreement [provided] fair compensation, in its overall effect on the employees whose employment [was] subject to the collective agreement' in lieu of protected award conditions. ● This provision had the effect that a collective agreement could provide a benefit to some employees but not others in lieu of protected award conditions, as long as the agreement overall provided fair compensation in lieu of the protected award conditions. The Workplace Authority's 'Fairness Test policy guide'⁴ stated in relation to the provisions in s.346M that '[a] relevant consideration in this regard will be the categories, number and proportion of employees who may be affected by the exclusion or modification of some or all protected conditions.' ● The Workplace Authority's 'Fairness Test policy guide' also explained that it was expected that 'in most instances fair compensation will be provided by way of a higher hourly rate of pay'. However, the fairness test also specifically allowed non-monetary compensation to be provided in lieu of protected award conditions and the Policy Guide provided detailed notes about how non-monetary compensation would be assessed under the fairness test.

² This summary is taken from 'Agreement Making in Australia Report 2007-2009' at [x]

³ The amendments to the WR Act made by the Workplace Relations Amendment (A Stronger Safety Net) Act 2007 provided that agreements lodged on or after 7 May 2007 would be tested against the fairness test.

⁴ Workplace Authority, Fairness Test policy guide (Version 1.0), 2007, p18

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<p>FED</p> <p><i>Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008⁵</i></p> <p>28 March 2008 to 30 June 2009</p>	<ul style="list-style-type: none"> • The fairness test was replaced with a ‘no-disadvantage test’ (NDT) for all new collective agreements • Under the NDT, a workplace agreement was compared with the entirety of any reference instrument, rather than with the more limited set of protected award conditions. • Severance pay and long service leave were not protected award conditions and thus were not considered within the scope of the fairness test. • A collective agreement would not pass the NDT if any employee was disadvantaged compared with the award, whereas an agreement could pass the fairness test if some employees were disadvantaged. • Agreements would apply from approval, not from lodgement.
<p>FED</p> <p><i>Fair Work Act 2009</i></p> <p>From 1 July 2009 to current</p>	<ul style="list-style-type: none"> • Introduction of the ‘Better off overall test’. • An enterprise agreement, that is not a greenfields agreement, passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee. • The test time is the time the application for approval of the agreement by the FWC was made under section 185. • For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee. • The FWC may approve the agreement under this section if the FWC is satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest. • An example of a case in which the FWC may be satisfied of the matter referred to in subsection (2) is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement.

⁵ This summary is taken from Agreement Making in Australia Report 2007-2009’ at [x]