



9 January 2017

BY EMAIL: eec.sen@aph.gov.au

Mr. Stephen Palethorpe
Committee Secretary
Senate Standing Committee on Education and Employment
Parliament House
CANBERRA ACT 2600

Dear Mr. Palethorpe

Submission for the Inquiry into Corporate Avoidance of the *Fair Work Act 2009*

I refer to the letter dated 1 December 2016 from the Senate Standing References Committee on Education and Employment (**Committee**) to The Griffin Coal Mining Company Pty Ltd (**Griffin**), inviting Griffin to provide a written submission to the Inquiry into corporate avoidance of the Fair Work Act 2009 (**Inquiry**).

The Committee has requested that Griffin address matters surrounding the termination of the *Griffin Coal (Maintenance) Collective Agreement 2012* (**Agreement**), and ongoing negotiations for a replacement agreement for the maintenance employees in Collie. Set out below are the relevant facts regarding Griffin's negotiations with the AMWU and the decision to apply for termination of the Agreement.

Griffin is making substantial operating losses and has been for a long period of time. Each tonne of coal costs substantially more to produce than we get under our long term domestic supply contracts (our only contracts). Since being bought out of administration by Lanco in 2010, Griffin has lost over \$300 million in respect of its ongoing day to day operations (on average nearly \$50m per year or \$1m per week). This does not include borrowing costs of the parent entity. This position was verified by the AMWU's own financial expert, Ernst & Young, in the Fair Work Commission termination case. A copy of a Commission's statement based on this report is **attached** to these submissions.

Lanco purchased Griffin out of administration with a plan to expand operations and export coal in significant volumes to make the company profitable. At that time, the price in the international market would have supported further investment to expand operations to export. The 2012 Agreement was made in this context for a 3 year term. It applied to Griffin's maintenance employees from 4 May 2012 and reached its nominal expiry date on 26 April 2015. Under the Agreement, maintenance employees received salary increases of over 19%.

Export prices for coal then deteriorated quickly. Griffin's plans to expand and export became unviable. Griffin had no ability to cover losses on domestic sales and no export option. Griffin was unable to obtain finance for repairs to keep its fleet operating. Griffin tried to negotiate employment changes with the AMWU (and CFMEU), such as different rosters, to improve



efficiency and bring the costs down. The AMWU refused to engage while the Agreement was still within its nominal term (as did the CFMEU in relation to production employees).

Negotiations then began to replace the Agreement in March 2015. There was over 9 months of bargaining before Griffin applied to terminate the Agreement. It was another 8 months until termination took effect in August 2016. Bargaining continued throughout - 42 meetings including 17 facilitated conferences in the Fair Work Commission. An agreement was in fact made in the Commission but then not supported by the AMWU at the workplace and voted down by employees in April 2016.

The decision to apply to terminate the Agreement was not taken lightly. It became necessary for a number of reasons. These were articulated in the Fair Work Commission and accepted by the Commission. Not least of these reasons were the dire financial circumstances faced by Griffin and the need to make operational changes which were not possible under the Agreement.

Griffin is only able to continue operating with support from its parent and its banks. Ongoing losses are being funded by debt. This is unsustainable. A new enterprise agreement that locks in losses for the period of another agreement would jeopardise further funding and likely cause Griffin to cease operation with the loss of over 300 jobs. Griffin Coal is a vital member of the South West community in Western Australia with a number of key local industries dependent on the viability of the mine. There would be a significant detrimental knock-on effect if Griffin cannot continue operating.

Griffin's goal is to survive by initially reaching a self-sustaining position. That is, a break-even operating position (unrelated to borrowing costs). This will assist to underpin further funding to continue operating. Given that income from domestic contracts is effectively fixed, this has to come from a reduction in costs. We have been working hard at operational improvements. However, labour costs are by far the largest operating cost and at about 50% they are out of all proportion as a percentage of total operating costs.

Lanco has, through these challenging times, consistently continued to support Griffin and has to date ensured jobs are retained and employees are paid notwithstanding the ongoing losses and escalating debt (and notwithstanding the significant resistance to change from the unions and employees). If Griffin can survive and export prices recover sufficiently there is still the prospect of expansion and creation of additional jobs. However, that is for the future. What we are dealing with currently relates to the domestic market only. We are determined to trade through this situation so as to preserve jobs and value for all stakeholders. We are acutely aware of the potential impact for employees, their families, our customers and suppliers, and the wider Collie community if Griffin closes. Unfortunately, despite our best efforts, we have not succeeded in persuading the AMWU of the reality of the situation and been able to secure their support for survival of the business.

The terms and conditions of employment at Griffin have been unrealistically generous for a long period. They were set in a different time when commodities (and particularly coal) market opportunities and relevant revenues were greatly optimistic. Our challenge now is to reset the business to reflect current reality. If they are not re-balanced the business cannot continue. We understand that it is not easy to accept a reduction in terms and conditions of employment but we are seeking the changes that are necessary for survival of the business. There is no joy in this task. It is not easy. Members of management have been put under significant personal pressure. However, if sustainable employment terms and conditions are not achieved we will fail all of our stakeholders, including our employees.

ENABLING SUSTAINABLE, DEPENDABLE ENERGY SUPPLY



The Fair Work Act contains various obligations and mechanisms to facilitate the making of an agreement in good faith. Griffin has complied with all of the rules. There has been no avoidance of the Fair Work Act as stated in the terms of reference for this Inquiry.

The AMWU has instigated protected industrial action on a number of occasions, as they are entitled to do. Griffin has not yet responded with its own lock-out action despite the additional losses that flow from the AMWU industrial action.

The purpose of an enterprise agreement is to have an agreement which suits the enterprise and the employees who work in it. While it would be nice for the economy and the business to perform on an upward trend at all times, that is not the current reality for many businesses, particularly in our sector. A business must be able to adjust. The Agreement was very generous to employees and completely uneconomic for Griffin. It was made on the basis of an optimistic plan which did not eventuate. It was already historically high and had restraints and restrictions which made it impossible for Griffin to make necessary changes to adjust.

Given maintaining the status quo was an advantageous position for employees, the option of applying for termination of the Agreement was the only mechanism available for Griffin as a circuit breaker. Without termination of the Agreement as determined by the Fair Work Commission, it is unlikely that funding would have continued and as a result Griffin would have ceased operations by now.

It is the case that since termination of the Agreement, maintenance employees' base conditions are as per the Black Coal Mining Industry Award 2010. Every modern award has to meet the modern award objective of providing fair and safety net terms and conditions. Termination of an enterprise agreement does not affect the maintenance of proper industrial standards where all relevant employees are covered by a modern award and the national employment standards which, following termination, ensure the maintenance of such standards.

However, Griffin has offered and at this stage is still paying 40% above the Award pay rate. The maintenance employees currently work 14 shifts of 10 hours every 3 weeks, an average of 46.67 hours per week, and receive approximately \$115,000 on an annualised basis. Leave is substantially more generous than other industries – 6 weeks annual leave and 3 weeks personal leave each year.

Griffin has put a further proposed enterprise agreement to vote of employees on 15-17 December 2016. This was the best offer Griffin can make at this time for the business to be sustainable. Unfortunately, it was rejected by employees. This offer included:

- The main day/night roster with 14 shifts of 10.5 hours every 3 weeks. For working this, there were average annualised earnings of approximately \$123,000 for a level 2 employee (i.e. all current employees);
- Some day shift only rosters available;
- Increased superannuation to 11.5%;
- A \$2,500 up-front transition payment;
- Leave entitlements of 6 weeks' annual leave, 3 weeks' personal leave and 13 weeks' long service leave after 8 years' service; and
- Specific protection for employees from being terminated and replaced by contractors.

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I do not consider it is my role (and Griffin has no agenda) to comment on the genesis or history of the provisions of the Fair Work Act to terminate an expired enterprise agreement. It is clear that the Fair Work Commission has a number of factors it must take into account in its deliberations. The fact that the Fair Work Commission ultimately found in Griffin's favour may say more about the circumstances that Griffin finds itself in, rather than the mechanism itself.

Enterprise agreements are intended to apply for a limited period and either be renegotiated, renewed varied, replaced, terminated or left unaltered depending on negotiations between the parties and the operation of the relevant legislative provisions. There is no express term or contextual intention in the Fair Work Act that enterprise agreements are to be 'locked in' forever. To the contrary, agreements have a finite nominal life.

An enterprise agreement made under certain circumstances might no longer deliver productivity benefits or may never have done so (as was the case here). Termination of such an enterprise agreement might better support good faith bargaining for an agreement that delivers productivity benefits at an enterprise level. As I have already said, absent this circuit breaker, Griffin may no longer be operating. As the Fair Work Commissioner stated:

"I am left with the observation that unproductive, inefficient, inflexible and unprofitable businesses do not remain in existence as some sort of societal right."

A copy of the Fair Work Commission decision and the Full Bench decision are **attached** to these submissions.

It appears that the ability to apply to terminate an enterprise agreement is a very necessary part of the various obligations and mechanisms for making enterprise agreements under the Fair Work Act provisions. Griffin has at all times sought to reach a new enterprise agreement that provides certainty for employees and sustainability for the business.

We would be happy to address any other specific matters relating to the termination case and Griffin's bargaining, subject to confidentiality given bargaining is ongoing with both the AMWU and CFMEU.

Yours sincerely,

TERRY GRAY
Chief Operating Officer
The Griffin Coal Mining Company Pty Ltd