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## DECISION

*Fair Work Act 2009*  
s.604 - Appeal of decisions

### **"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)**

**v**

**Griffin Coal Mining Company Pty Ltd**  
(C2016/4201)

SENIOR DEPUTY PRESIDENT O'CALLAGHAN  
DEPUTY PRESIDENT BINET  
COMMISSIONER HAMPTON

ADELAIDE, 21 JULY 2016

*Appeal against decision [2016] FWCA 2312 of Commissioner Cloghan at Perth on 9 June 2016 in matter number AG2016/2085 - agreement termination – s.226 considerations - discretionary considerations - natural justice.*

[1] The “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) has lodged an appeal, for which permission is required, against a decision<sup>1</sup> and order<sup>2</sup> issued by Commissioner Cloghan on 9 June 2016. In the decision the Commissioner set out his reasons for concluding that the *Griffin Coal (Maintenance) Collective Agreement 2012* (the Agreement) should be terminated pursuant to s.225 of the *Fair Work Act 2009* (the FW Act) with effect from 10 July 2016. The AMWU appeal was also made against an earlier decision<sup>3</sup> made by the Commissioner in relation to a claim for the production of consolidated group forecasts for Griffin Coal. The AMWU did not pursue this aspect of its appeal.

[2] The Agreement achieved its nominal expiry date on 26 April 2016. It applies to maintenance employees engaged in the Griffin Coal mining operations in the Collie Basin in Western Australia. We note that production employees at the mining operations are covered by a separate enterprise agreement, the *Griffin Coal (Production) Agreement 2012*, which has yet to reach its nominal expiry date.

[3] The Commissioner’s decision recorded that, between March 2015 and February 2016, there were 24 bargaining meetings directed at achieving a new enterprise agreement. Following the lodgement of a s.418 application by Griffin Coal Mining Company Pty Ltd (Griffin Coal), the parties agreed to participate in conferences facilitated by the Commission in an effort to achieve an agreed position. There were then 15 such conferences before Griffin Coal lodged the application for the termination of the Agreement.

[4] After the matter was heard, but before a decision was issued, Griffin Coal advised that a proposal for a new enterprise agreement was being put to employees for endorsement and requested that the Commissioner’s decision be deferred pending that vote outcome and formal

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agreement approval. On 19 May 2016 Griffin Coal advised that the agreement proposal had been rejected by the employees and requested that the Commissioner's decision be handed down.

[5] In his decision, the Commissioner noted that Griffin Coal sought that the termination of the Agreement take effect one month after the decision to allow it to repeat an earlier offer to employees. There is no dispute that this occurred, but this offer was not accepted by the employees and did not resolve the matter.

[6] We note that the parties have continued discussions consequent upon the Commissioner's decision but that no replacement agreement or other arrangements have been agreed.

## **The Statutory framework**

[7] An employer, an employee or an organisation covered by an agreement may make an application for the termination of that agreement pursuant to s.225 of the FW Act, provided that the agreement has passed its nominal expiry date. Sections 226 and 227 specify the requirements on the Commission in the following terms:

### **“226 When the FWC must terminate an enterprise agreement**

If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

- (a) the FWC is satisfied that it is not contrary to the public interest to do so; and
- (b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:
  - (i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and
  - (ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

### **227 When termination comes into operation**

If an enterprise agreement is terminated under section 226, the termination operates from the day specified in the decision to terminate the agreement.”

## **The Commissioner's decision**

[8] In his decision, the Commissioner summarised the Griffin Coal business including its acquisition, from administration, by Lanco Resources Australia Pty Ltd in early 2011. He set out his conclusion that Griffin Coal had experienced substantial trading losses since 2011 and was heavily dependent on continuing financial support through the Lanco Group. He stated:

- “• Griffin Coal has experienced significant trading losses both at the Gross Profit line and also Profit Before Tax line in all financial periods from 2011 to year to date 2016;

- the trading losses equate to a cumulative loss for the period of 2011 to year to date 2016 of \$293.4 million and an average gross margin loss of \$48.9 million per year;
- given these losses, Griffin Coal only continues to operate with the financial support of its parent company, Lanco Infratech Limited;
- production in 2015 was approximately 2.26 million tonnes. Griffin loses money on every tonne of coal produced and sold. There is a significant gap between the cost per tonne incurred by Griffin Coal in running its operation and the income it receives from sales to customers. The prices for coal supplied to domestic customers are set under long term contracts;
- Griffin's largest operating cost is labour. The total for wages and salaries in 2015 (which includes maintenance and production employees, and staff) accounted for 43% of Griffin's total operating costs;
- Griffin Coal's immediate financial goal is to reduce its operating losses and become profitable so that it is sustainable for all stakeholders, including the sustainability of employment for employees.”<sup>4</sup>

[9] Having concluded that the underpinning modern award was the *Black Coal Mining Industry Award 2010* (the Award), the Commissioner summarised the views of the parties who gave evidence in the matter.

[10] Whilst we have considered his conclusions in greater detail in our subsequent findings, the Commissioner summarised his overall conclusions in the following terms:

“[172] I have considered this application in context of the facts and circumstances. While the AMWU opposed the application, there were numerous factors where both parties are in agreement. Where there are differences, I have taken them into account, particularly with respect to the “appropriateness test”.

[173] The inescapable fact is that after 12 months of bargaining and a vote on a proposed replacement agreement, the parties have not been able to reach agreement. The FW Act provides that a party can make application to terminate an enterprise agreement. Termination of the Maintenance Agreement will result in reduced conditions of employment for the employees, however, that is contemplated in the scheme of the FW Act. The public interest is not intended to be punitive but an examination of the facts and circumstances from a broader public perspective and not just the transaction of the bargaining. The FW Act poses the question of whether termination of an enterprise agreement will be contrary to the public interest – if not, and taking into account the views of the parties and the consequences of termination, the enterprise agreement must be terminated.

[174] Having considered all the facts and circumstances of Griffin Coal's application to terminate the Maintenance Agreement, I am satisfied, for the reasons set out above, that pursuant to s.226(1) of the FW Act, I must terminate the Maintenance Agreement because it is not contrary to the public interest to do so. In doing so, I have also

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considered termination of the Maintenance Agreement appropriate, taking into account the provisions in s.226(b)(i) and (ii) of the FW Act.”<sup>5</sup>

## **The Appeal Grounds**

[11] We note that in the appeal proceedings, a stay of the Commissioner’s decision was granted by consent, pending the determination of the appeal.

[12] The appeal as confirmed during the proceedings relies on the following grounds.

### **Ground 1 - Failure to properly apply the test as to the public interest**

- 1.1 The Commissioner erred in finding that there was a "presumption that termination of an enterprise agreement is, of itself, in the public interest unless the Commission is satisfied to the contrary" (at [107]).
- 1.2 The Commissioner failed to take into account or gave insufficient weight to the following considerations relevant to the public interest:
  - (a) The effect on the Collie community of the termination of the Agreement;
  - (b) The effect on the bargaining position of employees covered by agreements similar to the Griffin Coal (Maintenance) Collective Agreement 2012 [the Agreement] including:
    - Griffin Mining production workers who are covered by the Griffin Coal (Maintenance) Collective Agreement 2012 [the Production Agreement]
    - Premier Coal production and maintenance workers who are covered by the Premier Coal Limited Enterprise Agreement 2012-2016 ("the Premier Agreement"). Premier Coal is also in Collie and mines the same coal using identical processes to Griffin.
  - (c) No undertaking was given as to maintaining any of the terms and conditions applicable under the Maintenance Agreement;
  - (d) The contractual uncertainty that would arise given the letters of offer provided to the affected workers.

### **Ground 2 - Failure to properly identify the test as to appropriateness**

- 2.1 The Commissioner erred in failing to correctly apply the statutory test of whether or not it was appropriate to terminate the agreement.
- 2.2 The Commissioner erred in failing to apply any test that was apparent from the decision as to whether or not it was appropriate to terminate the agreement.

**Ground 3 - Failed to take into account relevant considerations**

3.1 The Commissioner erred in failing to take into account or failing to give sufficient weight to the following relevant considerations:

- (a) The Black Coal Mining Industry Award 2010 award provides for wages and conditions which are well below the standards provided for in the Agreement.
- (b) The terms and conditions in the Agreement were the industrial standards at the mine for many years.
- (c) Almost all of the facts and circumstances relied upon by the employer in support of its contention that the mine was not profitable had existed at the time the Agreement was made.
- (d) The Agreement reflected the industrial standards that apply to the coal industry in Western Australia.
- (e) The termination will cause an erosion of the industrial standards of the maintenance workers.
- (f) The termination results in the maintenance employees no longer being entitled to the level of benefits enjoyed by production workers at the mine.
- (g) The termination results in the maintenance employees no longer being entitled to terms and conditions enjoyed by other workers in the coal industry in Western Australia.
- (h) The company did not provide an undertaking as to the terms and conditions that it would apply to the employees if the Agreement was terminated.
- (i) The company had merely made a contractual offer to each of the employees to accept, for a short time, arrangements which are above the award but are still far less than the conditions in the Agreement.
- (j) There was a dispute over whether there was an express term of the employees' contracts provide an ongoing contractual right to be afforded the terms and conditions contained in the Agreement.
- (k) The effect of the termination on employees, is a substantial reduction in the terms and conditions of employment.
- (l) There are around 360 employees at the mine. There are only 53 maintenance employees.
- (m) The largest group is the production workforce. The production workers continue to be covered by the Production Agreement until July 2016.

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- (n) There is no proposal to reduce the staff employees' terms and conditions.
- (o) The maintenance employees were being unfairly asked to take a substantial cut in terms and conditions at a time when the other employees were not.
- (p) The altered position of the parties in the bargaining arising from the terminations of the Agreement.

**Ground 4 - Insufficient weight the views of the employees**

- 4.1 The Commissioner erred in failing to give sufficient weight to the views of the employees.

**Ground 5 - Insufficient weight to views of the AMWU**

- 5.1 The Commissioner erred in failing to give sufficient weight to the views of the AMWU.

**Ground 6 - Irrelevant Considerations**

- 6.1 The Commissioner erred in taking into account the following irrelevant considerations
  - (a) The objectives of the Maintenance Agreement.
  - (b) The vote of the employees for a proposed agreement which occurred after the hearing of the matter.

**Ground 7 - Error in concluding that the termination would lead to productivity benefits**

- 7.1 The Commissioner erred in concluding that the termination of the Agreement would lead to material productivity benefits in circumstances where the evidence was that the termination of the Agreement would merely lead to cost savings for the Respondent.

**Ground 8 - Failure to properly deal with forecast material**

- 8.1 The Commissioner erred in not requiring the Respondent to make available materials already in existence that forecast the likely future performance of its operations.
- 8.2 The Commissioner erred when, in considering the competing interests of the employer and workers, he considered only the past performance of the Respondent's operations and refused to consider future performance.

**Ground 9 - Natural Justice - taking into account evidence not before him in the proceedings**

- 9.1 The Commissioner erred in considering information that was not before him in the proceedings in circumstances where such evidence did not come into existence until after parties submissions.
- 9.2 The Commissioner erred in considering information that was not before him in the proceedings but of which he had become aware of in the course of his role conducting the conciliation.

**Ground 10 - Manifest injustice**

- 10 The Commissioner erred in that he failed to properly exercise the jurisdiction under s226 because upon the facts, the decision was unreasonable or plainly unjust in visiting extreme hardship on the employees.

[13] The AMWU assert that the Commissioner's decision involved significant errors in jurisdiction and in the exercise of his discretion and resulted in manifest injustice so as to make a grant of permission appropriate in the public interest.

[14] Griffin Coal opposed the granting of permission to appeal, and in the alternative, sought that the appeal be dismissed on the basis that there were no operative or real errors in the decision that would in any event have changed the outcome of the matter.

[15] As a matter of convenience, we have considered the appeal grounds in four broad categories.

1. The application of the public interest test – Ground 1
2. The application of the “appropriateness test” – Ground 2
3. Asserted Errors in the exercise of discretion – Grounds 3, 4, 5, 6, 7, 8 and 10
4. Natural Justice considerations – Ground 9

[16] Some of these grounds are inter-related and we have had regard to the matters raised under each of the grounds as part of our overall consideration of the appeal.

[17] We have summarised the positions of the parties with respect to these issues in the following terms.

**The application of the public interest test**

[18] The AMWU assert that the Commissioner mischaracterised the public interest test by finding that there was a “presumption that termination of an enterprise agreement is, of itself, in the public interest unless the Commission is satisfied to the contrary”,<sup>6</sup> and, in so doing, shifted the evidentiary burden away from Griffin Coal. Further, the AMWU assert that the Commissioner failed to properly recognise the effect of termination of the Agreement in terms of the public interest associated with the:

- Collie community

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- Bargaining interests of employees covered by agreements similar to this Agreement
- Absence of an undertaking to maintain the terms and conditions of the Agreement
- Uncertainties associated with letters of offer provided to employees.

[19] Griffin Coal assert that the Commissioner appropriately applied the public interest test and that his decision took proper account of the evidence and submissions put to him relative to that test such that no appealable error was established.

### **The application of the “appropriateness test”**

[20] The AMWU asserted that the Commissioner failed to properly distinguish and apply the considerations in s.226(b) so as to conclude that it was appropriate to terminate the Agreement, taking into account all the circumstances, including the views and circumstances of the employees, Griffin Coal and the AMWU, as an employee organisation covered by the Agreement. In this respect the AMWU asserted that the Commissioner conflated consideration of s.226(b) with the public interest considerations in s.226(a) and failed to make a distinct and separate finding under s.226(b) of the FW Act. Further, that the Commissioner did not adequately balance or weigh the circumstances that militated against the termination.

[21] Alternatively, even if the “appropriateness test” was correctly stated, the AMWU assert that the Commissioner failed to take appropriate account of, and/or to evaluate, the following issues in his consideration of s.226(b); namely the:

- Difference between the Award and the Agreement provisions,
- Long standing operation of the Agreement,
- Extent to which Griffin Coal was not profitable at the time the Agreement was made,
- Extent to which the Agreement reflected industrial standards applicable in Western Australia and its termination will erode those standards and disadvantage employees covered by the Agreement relative to other employees in that industry,
- Absence of an undertaking about arrangements which would apply after the Agreement was terminated,
- Griffin Coal offer of contracts for employees provided for benefits significantly less than those in the Agreement,
- Extent to which the Agreement provisions established an ongoing right to maintenance of the Agreement provisions,
- Size of the reduction in remuneration consequent on termination of the Agreement,
- Application of this reduction to only the maintenance employees as distinct from production employees,
- Absence of any proposal to reduce staff employment terms and conditions,
- Effect of the termination on the bargaining positions of the parties.

[22] In this respect the AMWU asserted that the Commissioner’s decision failed to apply the approach adopted by the Commission in other, comparable matters.<sup>7</sup>

[23] Further, and in the alternative, the AMWU argued that the Commissioner gave insufficient weight to the views of the employees and the AMWU. In this respect the AMWU asserted that the Commissioner only considered the views of two employees, Mr Chappell



and Mr King and did not properly consider the AMWU views about the termination of the Agreement.

[24] The Griffin Coal position in this respect was that a proper reading of the Commissioner's decision demonstrated that he correctly applied s.266(b) and regarded this as a test distinct from the public interest test. Griffin Coal assert that the Commissioner's decision took appropriate account of the evidence before him and the overall circumstances of the matter. Further, that the decision weighed the likely effects of the termination of the Agreement on the parties, including the capacity for on-going bargaining strategies.

#### **Asserted Errors in the exercise of discretion**

[25] The AMWU contend that the Commissioner's decision was in error in that he took into account the objectives of the Agreement and the vote on an agreement proposal which occurred after the hearing of the matter. In this latter respect, the AMWU referred to the conciliation process in which the Commissioner had been involved, even after the hearing.

[26] The AMWU contended that the Commissioner's decision was in error in that he concluded that termination of the Agreement would lead to productivity benefits. It contended that in this respect, the ratio of the decision was flawed and that it was also inconsistent with the approach toward productivity adopted by the Commission in other matters.<sup>8</sup>

[27] The AMWU asserted that the Commissioner erred by taking into account in his decision, a statement he issued in the course of earlier conciliation proceedings<sup>9</sup> such that the parties were not given the opportunity to make submissions about this. This is also relevant to the natural justice considerations outlined below.

[28] The Griffin Coal position with respect to these issues was that the Commissioner's reference to the objectives of the Agreement was not fundamental to his decision and did not represent inherent unfairness.

[29] Similarly, Griffin Coal asserted that the Commissioner's reference to the vote which rejected the agreement proposal was not of a nature that it would have altered the outcome in this matter.

[30] In terms of the Commissioner's reference to productivity benefits, the Griffin Coal position was that the Commissioner simply concluded that the termination of the Agreement had the potential to deliver productivity benefits. In any event, Griffin Coal asserted that the evidence before the Commissioner permitted the conclusion he reached.

[31] Griffin Coal asserted that the Commissioner's reference to the statement he issued in the course of the conciliation proceedings did not reflect error in that it was clearly supported by the evidence before him in the hearing of the termination application and the AMWU had the opportunity in that hearing to make submissions about these matters.

#### **Natural Justice considerations**

[32] The AMWU assert that the Commissioner's decision evidences reliance on a number of matters about which it was not given the opportunity to make submissions or give evidence such that this represented a denial of natural justice. In this respect the AMWU primarily

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referred to the extent to which the Commissioner took account of the vote in which employees rejected the agreement proposal which was finalised after the hearing of the matter concluded.

[33] The Griffin Coal position in this respect is that the Commissioner's reference to this vote did not alter the conclusion he reached and that, in any event, the AMWU could have sought to make submissions on this issue but did not seek to do so.

## Consideration

[34] The AMWU appeal can only proceed with the permission of the Commission.<sup>10</sup> The FW Act also provides that in a matter of this kind, without limiting when the FWC may grant permission, the FWC must grant permission if the FWC is satisfied that it is in the public interest to do so.<sup>11</sup> In this respect we are satisfied that permission should be granted. The appeal raises a number of important issues including the manner in which this matter proceeded at first instance and whether this gave rise to natural justice considerations. Further, there are issues associated with the nature of the tests applied by the Commissioner and the manner in which these tests were characterised in his decision.

[35] We have applied the accepted principles to our consideration of the appeal. These are derived from the High Court decision in *House v King* in the following terms:<sup>12</sup>

“The manner in which an appeal against an exercise of discretion would be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.”<sup>13</sup>

[36] A number of the matters raised in this appeal go to the manner in which the Commissioner exercised the discretion available to him under s.226. In these respects, we have adopted the approach set out by the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* in the following terms:

“19 “Discretion” is a notion that “signifies a number of different legal concepts”. In general terms, it refers to a decision-making process in which “no one [consideration] and no combination of [considerations] is necessarily determinative of the result”. Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for

example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.”<sup>14</sup>

(references omitted)

[37] The nature of that discretion relative to s.226 was described in the following terms by a Full Bench in *AWX Pty Ltd T/A AWX*:<sup>15</sup>

“[18] We begin an examination of this aspect by noting that the application of s.226 of the Act is an exercise in discretion by the decision maker. The provision requires that an instrument must be terminated if the Commission is satisfied that it is not contrary to the public interest and after taking account of all the circumstances including the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them. We have applied this approach to the decision under appeal.”

[38] One other preliminary issue requires consideration. At the commencement of the appeal proceedings we alerted the parties to correspondence and telephone calls received by the Commission from persons (some of which were made on an anonymous basis) and various businesses and community groups from in, and around, Collie. Copies of correspondence received by the Commission were provided to the parties. In the main, these communications expressed dismay over the Commissioner’s decision. The Commission had responded to these communications by advising of the appeal proceedings and confirming that no further comment would be made pending the outcome of the appeal. Copies of the written advices received by the Commission were provided to the parties.

[39] There was no dispute that, consistent with the normal appeal approach, while the appeal would proceed by way of a rehearing, the Commission’s powers on appeal could only be exercised in the event that appealable error was established. Accordingly, this material could only be taken into account in the event that the Commissioner’s decision was found to be in error. As a consequence of our final conclusions in this matter, we have not had regard to this material in our review of the Commissioner’s decision. We have also not had regard to certain evidence sought to be led by Griffin Coal concerning the process followed to acquaint the Commissioner with the outcome of the ballot for the proposed new agreement that was conducted after the decision at first instance was reserved. In this respect we note that facts about the sequence of events following the hearing were not in contention.

### **The application of the public interest test**

[40] The requirement for consideration of the public interest arises from s.226(a) which relevantly states:

#### **“226 When the FWC must terminate an enterprise agreement**

If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

- (a) the FWC is satisfied that it is not contrary to the public interest to do so; and

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...”

[41] In his decision the Commissioner stated:

“[107] In my view, s.226(a) is drafted in such a way that there is a presumption that termination of an enterprise agreement is, of itself, in the public interest unless the Commission is satisfied to the contrary. However, that does not relieve Griffin Coal of the obligation to set out the facts and circumstances which demonstrate that termination of the enterprise agreement is consistent with the public interest. Likewise, it is for a party, resisting the termination application, to demonstrate that not terminating the enterprise agreement, is in the public interest.”<sup>16</sup>

[42] The Commissioner’s characterisation of s.226(a) in this respect does not properly reflect the FW Act. However, we think that read fairly, and as a whole,<sup>17</sup> his decision does not misrepresent the obligations inherent in s.226(a). The balance of the decision makes it clear that the test is that which is set out in the FW Act and that issues of a presumption of a particular position do not arise. The Commissioner’s decision provides some further clarity of his position in the following terms:

“[106] Griffin Coal submits that a precondition of the Commission exercising its power to terminate an enterprise agreement is, “satisfaction that it is not contrary to the public interest to do so”. I agree.”<sup>18</sup>

(references omitted)

[43] The Commissioner’s approach to public interest considerations is then made clear by the manner in which he proceeds to detail his conclusions about this issue, including by reference to relevant authorities.

[44] Notwithstanding subsequent legislative changes, there is no error in the Commissioner adopting the approach in *Kellogg Brown & Root v Esso Australia Pty Ltd*<sup>19</sup> with respect to the concept of public interest considerations. Subsequent decisions of the Commission<sup>20</sup> and the Federal Court<sup>21</sup> under the FW Act have endorsed that approach.

[45] The range of issues considered by the Commissioner included consideration of the provisions and objectives of the FW Act and those of the Agreement were within his discretion. He proceeded to consider the bargaining process in the context of whether that process was consistent with the FW Act and general norms. Having done so, the Commissioner stated:

“[130] In summary, I have construed the public interest, in part, as the various means to achieve the objects of the FW Act including Part 2-4, flexibility for businesses, the promotion of productivity and economic growth. These have to be balanced against an enforceable guaranteed safety net of the Black Coal Award.”<sup>22</sup>

[46] In the context of the Commissioner’s overall assessment of public interest issues, we do not regard this observation as indicative of appealable error. The Commissioner’s consideration of the public interest associated with Griffin Coal’s intention to increase its production and undertake export activities<sup>23</sup> is a factor which falls within the concept of

public interest considerations. In this context we are satisfied that the Commissioner took into account broader community interests and balanced the potential for growth of the Griffin Coal operations with his recognition of the reduction in wages consequent upon termination of the Agreement. As the Commissioner observed, the quantum of that reduction is very much a matter in the hands of the parties to the Agreement.

[47] In his decision, the Commissioner commenced his consideration of the public interest test by reviewing the objects of the FW Act. There is no error in this respect. *In Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd*<sup>24</sup> (*CEPU v Aurizon*) the Full Federal Court addressed an appeal involving a contention that a Full Bench of the Commission misread the relevant objects of the FW Act in its consideration of public interest issues relating to the termination of an agreement. The Full Federal Court referred to the objects of the FW Act in the following terms:

“21. In their outline, the applicants identified the essence of that challenge as the Commission having “asked itself the wrong question and/or made an error of law”. On no view, however, did the Commission ask itself the wrong question. The questions posed by s 226 of the FW Act were specifically asked, and answered. As the applicants’ case was developed in argument, however, it became clear that the essence of their complaint was that the Commission misunderstood the way in which the objects of the FW Act informed the assessment of where the public interest lay under s 226(a). Specifically, it was said to be a jurisdictional error for the Commission to have perceived it to be an object of the FW Act to promote productivity per se, rather than, in the words of s 3, to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by, inter alia, achieving productivity through an emphasis on collective bargaining, or, in the words of s 171, to provide a simple, flexible and fair framework that enables collective bargaining in good faith.

22. We do not accept that the Commission made a jurisdictional error of this kind. Indeed, we consider that the answer to the applicants’ case in court has already been provided in the Commission’s own reasons. In our view, the Commission’s own description of the statutory environment which informed its task under s 226, as summarised in paras 15-18 above, was unexceptionable. Save to make the limited number of points which follow below, we would not wish to add anything to that description.

23. First, both s 3 and s 171 of the FW Act set out the objects of the provisions to which they refer (the FW Act as a whole and Pt 2-4 respectively). While the Commission would undoubtedly be required to exercise any otherwise unconfined discretion in a way that was not antagonistic to these objects, it must be remembered that the primary means by which the legislature sought to achieve them was to enact the detailed provisions of the FW Act itself. It will be the section, or group of sections, that applies directly that will most usefully indicate what it was the legislature was seeking to achieve in a particular situation. What the Full Court said about s 208 of the FW Act in *Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152, 178-179 [86] was an instance of this approach.

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24. Secondly, the importance of enterprise agreements in the regulation of terms and conditions of employment under the FW Act cannot be gainsaid. Neither can the central role of collective bargaining in that arena. But we would agree with the Commission insofar as it observed that there is no indication in the FW Act that the existence of a previously-negotiated enterprise agreement should, *a priori*, be regarded as providing particular encouragement to collective bargaining. Indeed, the legislation contemplates that, at least generally, once a new enterprise agreement has been made, it will apply to those covered by it at least until its nominal expiry date. Under such an environment of stable industrial regulation, what need there would be for further collective bargaining is not immediately obvious. This perception of the scheme of the FW Act is, of course, consistent with the terms of s 417 – and its companion provision, s 413(6) – which proscribe industrial action until the nominal expiry date of the applicable enterprise agreement.

25. Thirdly, and relatedly, the period after the nominal expiry date of an enterprise agreement is likely to be the very time that the parties concerned are engaged in serious, if not disputatious, collective bargaining. There is, of course, no suggestion in the FW Act that the relevant employer and its employees would not commence to bargain before, even well before, that date (as happened in the present case), but, if they do so and conclude the terms of a new agreement, the existing agreement will cease to apply immediately it passes its nominal expiry date (s 58(2)(d)(ii)). Alternatively, if there is no new agreement until after the existing agreement has passed its nominal expiry date, the existing agreement will cease to apply when the new one comes into operation (s 58(2)(e)). In the context of an ongoing, single-enterprise, business, the most obvious situation in which recourse might be had to s 226 of the FW Act would be where an existing agreement had passed its nominal expiry date (a jurisdictional fact under the section) but where no new agreement had been made. This is the very situation in which collective bargaining is likely to be proceeding; and it is the only time in which industrial action associated with such bargaining might be – subject to compliance with other statutory requirements – protected under Div 2 of Pt 3-3 of the FW Act. The proposition that, as a matter of statutory policy, there should be a predisposition towards regarding it as contrary to the public interest to terminate an enterprise agreement during a period when collective bargaining is taking place must, in the circumstances, be regarded as a most unlikely one.<sup>25</sup>

[48] To the extent that it is relevant to this appeal, we consider that the Commissioner was clearly entitled, on the evidence before him, to take into account the potential benefits of increased productivity as much as these could create or facilitate job retention and expansion. We will return to this aspect as part of our broader consideration.

[49] We are satisfied that the Commissioner's approach to public interest considerations was consistent with the requirements established by s.226(a). The Commissioner noted the lengthy and ongoing bargaining process and the extent to which there was an enforceable guaranteed safety net.<sup>26</sup> We do not consider that the Commissioner's decision with respect to the public interest considerations is infected by appealable error because it did not specifically refer to the position of other employees, covered by different agreements. It is clear from the decision that the Commissioner had particular and specific regard to the circumstances associated with this application. Indeed, a conclusion that presumed some form of flow on consequence for other employees, not covered by this agreement, was simply not open to the

Commissioner on the evidence before him. Similarly, evidence about the effect of termination of the Agreement on the Collie Community does establish appealable error on the part of the Commissioner. In that regard, and consistent with our observations later in this decision, there was only limited evidence which does not support a definitive conclusion.

[50] We do not consider that the absence of an undertaking provided by Griffin Coal as to the maintenance of the Agreement terms and conditions for a period of time after the termination took effect means that the Commissioner was in error in concluding that the public interest test was met. Two observations are appropriate in this regard. Firstly, in his decision, the Commissioner noted that no undertakings had been proffered but that Griffin Coal had sought that the termination be delayed by one month from the date of any decision to enable it to repeat an offer to employees which was substantially in excess of the relevant Award benefits. There is no dispute that this occurred. To the extent that this was an offer of a contractual nature, we think there is little difference between an offer of this nature and offers of undertakings which have sometimes accompanied other applications for the termination of agreements.

[51] Secondly, there is no requirement in s.226(a) for an undertaking to be provided. As the Federal Court observed in *CEPU v Aurizon*:

“40. The FW Act did not require the Commission to have regard to any particular considerations when deciding whether or not it was satisfied, for the purposes of s 226(a), that it was not contrary to the public interest to terminate an agreement. The applicants must, therefore, establish, by reference to the subject-matter, scope and purpose of the FW Act, that the Commission was obliged to have regard to the “significant relevant consideration”, identified by them, when determining where the public interest lay. That consideration, as has already been noted, was “that termination of the agreements was bound to have an effect on an access undertaking that the Respondents had had to give under the [QCA Act].”<sup>27</sup>

[52] We are not satisfied that the AMWU has demonstrated appealable error with respect to the Commissioner’s finding that an element of his public interest considerations included business flexibility, productivity and economic growth consistent with the objects of the FW Act.<sup>28</sup>

### **The application of the “appropriateness test”**

[53] The second ground of the AMWU appeal goes to whether the Commissioner failed to correctly apply s.226(b) of the FW Act which relevantly states:

#### **“226 When the FWC must terminate an enterprise agreement**

If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

...

(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:

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- (i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and
- (ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.”

**[54]** The Commissioner’s decision stated:

“[136] Griffin Coal, the AMWU and the employees agree that termination of the Maintenance Agreement will provide for the employees to be employed pursuant to:

- the Black Coal Award and the National Employment Standards (NES);
- their contracts of employment; and
- any terms of an offer above the Black Coal Award (should employees accept).

[137] Apart from agreement on this factual situation, the parties were unable to agree on the consequences in the event the Maintenance Agreement is terminated.”<sup>29</sup>

(references omitted)

**[55]** The Commissioner continued to note the competing assertions made by Griffin Coal and the AMWU and its members. The Commissioner took into account the likely effect of terminating the Agreement on employees and on Griffin Coal. The Commissioner had particular regard to the financial difficulties facing Griffin Coal. Two employees gave evidence in the matter. There is no assertion that other employees were denied the capacity to give evidence or that these two employees were not representative of employees generally. The Commissioner’s decision recognised that evidence and the asserted effects that termination of the Agreement would have on them, their families, and community life. The Commissioner noted concerns about the extent to which termination of the Agreement would give Griffin Coal an unfair bargaining advantage. In this respect the Commissioner noted that employees had been given the opportunity to consider a replacement Enterprise Agreement and had elected not to do so. The Commissioner noted the AMWU concerns about the effect of termination of the Agreement on that union but concluded that termination of the Agreement would not extinguish the role of the union with respect to both the employees covered by the Agreement and its broader membership interests.

**[56]** Fairly read, we think the Commissioner’s decision must be taken as demonstrating consideration of the competing interests of Griffin Coal, the employees covered by the agreement and the interests of the AMWU. The Commissioner stated:

“[168] The reality is that the conditions of employment, before and after termination of an enterprise agreement, will be different. However, that does not remove all the other factors which impact upon the profitability of the mine or security of employment.

[169] The Employer is asserting the effect of termination of the Maintenance Agreement is necessary but not sufficient to improve efficiency and productivity. However, in doing so, the Employer contends that the employees’ employment will be more secure than if termination of the agreement does not happen.



[170] In short, with respect to “effects” of termination of the Maintenance Agreement, with few exceptions, we are not dealing with scientific causal connections but descriptive commentary on consequences.

[171] However, I am left with the observation that unproductive, inefficient, inflexible and unprofitable business do not remain in existence as a some sort of societal right. Griffin Coal relies on that sense of circumstances, when stating its facts and inferences.

[172] I have considered this application in context of the facts and circumstances. While the AMWU opposed the application, there were numerous factors where both parties are in agreement. Where there are differences, I have taken them into account, particularly with respect to the “appropriateness test”<sup>30</sup>

[57] We are not satisfied that the Commissioner’s decision demonstrates error relative to the application of s.226(b).

#### **Errors in the exercise of discretion**

[58] The Commissioner clearly took account of the extent to which the Award prescribes rates well less than the Agreement.<sup>31</sup>

[59] Further, and in terms of his considerations from an employee perspective, the Commissioner stated:

“[94] The AMWU’s perspective is to represent its members. Accordingly, as an employee organisation, opposes termination of the Maintenance Agreement due to the reduction in conditions of employment of its members. However, it acknowledges that the effect of termination of the Maintenance Agreement, on individual employees, will vary from individual employee to individual employee. I agree.”

...

[154] Secondly, Mr King put evidence that termination would lead to a “massive reduction in remuneration and other benefits”. While not endorsing Mr King’s description of the reduction, it is true that the Black Coal Award contains terms and conditions less favourable than the Maintenance Agreement, however, such conditions are a guaranteed safety net of fair, relevant and enforceable minimum terms.”<sup>32</sup>

(references omitted)

[60] We do not consider that the absence of a precise characterisation of this differential is indicative of appealable error. The Commissioner made it very clear that the extent of the differential would depend on the position ultimately adopted by the employees. He stated:

“[157] While the terms and conditions of employment may change for the employees as a result of termination of the Maintenance Agreement, there are two elements of bargaining that will not change for employees. Firstly, the ability, should they so wish, to take protected industrial action. Secondly, that a proposed replacement agreement

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cannot be “made”, unless and until, a majority of voters vote to approve a successor enterprise agreement; these employee rights do not change as a result of termination of the Maintenance Agreement.”<sup>33</sup>

[61] In reaching this conclusion we note that the Commissioner had been clearly advised that the agreement proposal negotiated with the AMWU and employee representatives had been rejected by employees. Further, it is apparent that rostering arrangements will impact on earning capacities. Additionally, the termination of the agreement was deferred for a month to enable employees to decide if they wished to accept the Griffin Coal alternative proposal. In these respects the positions adopted by the employees covered by the Agreement had the potential to substantially impact on employment arrangements so that a definitive comparison with the Award and with the Agreement would be fraught with difficulty. To the extent that the Commissioner concluded that the Award represented a fair safety net, we think this was the only logical conclusion open to him, consistent with the function of modern awards under the FW Act.

[62] Equally, it is apparent that the Commissioner recognised and took into account the extent to which the Agreement and its predecessors had long regulated employment at Griffin Coal. The Commissioner also recognised that the Griffin Coal mine had profitability issues which pre-dates the Agreement. The Commissioner stated:

“[167] Just as it can be said that Griffin Coal’s losses are not entirely due to the Maintenance Agreement, it can be argued that the consequences which exist after the termination of the Maintenance Agreement, may not be entirely due to the termination of that enterprise agreement.”<sup>34</sup>

[63] That assessment was made in the context of substantial evidence relative to Griffin Coal’s financial position and the Commissioner’s observations that a significant impediment in the bargaining process has been employee reluctance and resistance to accept Griffin Coal’s current loss-making situation. That observation was open to the Commissioner given the evidence and material before him.

[64] With respect to the AMWU contention that the Commissioner did not properly consider the extent to which the Agreement reflected the industrial standards applicable to the coal industry in Western Australia we have noted the Commissioner’s recognition of the AMWU position relative to the comparative position of the Agreement relative to other agreements.<sup>35</sup> We see no error in the Commissioner’s recognition that the structure of the FW Act enabled reversion to award conditions in the event that s.226 considerations led to the termination of an Agreement. Indeed, the Commissioner’s observation that the AMWU and other unions have recognised that certain agreement provisions have had to be reduced to accommodate situations confronting various businesses, appears to us to reflect the reality that agreement content can take account of changing economic circumstances. Simply put, the Commissioner had significant regard to the financial imperatives confronting Griffin Coal and to the evidence before him that indicated that the current loss making situation could not be indefinitely sustained. The Commissioner stated:

“[148] Put ungraciously, it could be stated that employees, subject to the Maintenance Agreement and its predecessor, have benefitted from the willingness of its employer to incur continued losses to the extent of approximately \$300m since 2011. The willingness to continue incurring losses has reached a point where the Employer

considers it prudent, both financially and operationally, to reform its mine operations to ensure, as best as possible, the continued support it receives from its “parent” company.

[149] The likely effects for Griffin in the short to medium term are both local and global. Locally, Griffin Coal wants to rebalance its “books” and address operational issues. Globally, Griffin Coal must wait until the market generates a higher price for thermal coal. Any projections in the short and medium term are laden with uncertainty.”<sup>36</sup>

[65] We have already addressed the assertion that the absence of an undertaking from Griffin Coal meant that the Commissioner’s conclusion was in error. That assertion is not supported by the provisions of s 226 and the relevant authorities.

[66] Equally, to the extent that there may be questions about the enforceability of the offers put by Griffin Coal to its employees before the Agreement was terminated, we have noted that, not only is it the case that there is no legislative requirement for undertakings of this nature, but that the enforceability of undertakings generally may be the subject of conjecture. In *Aurizon*,<sup>37</sup> the Full Bench observed:

“[175] We accept that the preponderance of the employees who are covered by the twelve agreements oppose the termination of those agreements. It is also clear that the employee organisations that are covered by those agreements opposed their termination. We also accept that there is a sound basis for these parties to oppose the termination of the agreements. Employees are understandably concerned that termination of the agreements which currently apply to their employment will result in a diminution of the terms and conditions of employment that they currently enjoy. This is not an insignificant matter. However, the Undertaking given by Aurizon for the maintenance of the core terms and conditions of employment applicable to employees, including wages and allowances, for a period after any termination of the enterprise agreements, should that occur, goes some way to assuage that concern.

[176] Although there has been doubt expressed about the enforceability of the Undertakings, it is to be expected, if the application is granted, that Aurizon as a publicly listed company, will make good on the undertakings given during the public hearings of this application. Moreover we are satisfied that the safety net terms and conditions of employment will not be disturbed. Ultimately, it cannot be expected that terms and conditions of employment contained in an enterprise agreement with continue unaltered in perpetuity after the agreement has passed its nominal expiry date. Terms and conditions may be altered by making a new agreement or by terminating the existing agreement. The statute guarantees the continuation of the safety net, not the terms and conditions contained in a nominally expired enterprise agreement.

[177] Given the matters earlier discussed we are not satisfied that the prospect of a reduction in the terms and conditions of employment of the employees covered by the 12 agreements at some time in the future (assuming new enterprise agreements are not made) is so significant a factor as to outweigh these other matters.”

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[67] To the extent that there was a dispute over whether there was an express term of the employees' contracts to provide an ongoing contractual right to be covered by the terms of the Agreement, we are not satisfied that this was established, or that the Commissioner's decision was in error.

[68] It is clear from the Commissioner's decision that he was aware of the differentiation between maintenance employees covered by the Agreement and production employees covered by the *Griffin (Production) Collective Agreement 2012*. We are not satisfied that the differentiation between maintenance and production employees represents any form of error associated with the Commissioner's decision. Further, we are not satisfied that the Commissioner's decision is in error because it did not conclude that salaried staff employee terms and conditions mitigated in favour of not terminating the Agreement. The Commissioner clearly noted that Griffin Coal had "frozen" staff wages since March 2011.<sup>38</sup> The evidence before the Commissioner established the difficulties which Griffin Coal had in achieving efficiency gains in the context of the existing Agreement provisions.<sup>39</sup>

[69] The AMWU contention that the Commissioner was in error in failing to take proper account extent to which the termination of the Agreement altered the bargaining position of the parties reflects a disagreement with the Commissioner's conclusion rather than error in that conclusion. The Commissioner dealt with the potential impact of the termination of the Agreement on the bargaining process at various points in his decision.<sup>40</sup> The effect of termination of an agreement on the respective bargaining positions was considered at some length by the Full Bench in *Aurizon*. We adopt the conclusions of that Full Bench in the following terms:

"[158] As we have earlier indicated, there is nothing inherently inconsistent with the termination of an enterprise agreement that has passed its nominal expiry date and the continuation of collective bargaining in good faith for an agreement. Neither the Unions nor Aurizon have suggested that bargaining will stop if the agreements are terminated. Neither have suggested that they will not pursue new agreements or that they will cease bargaining if the agreements are terminated.

[159] While we accept that a termination of the agreements will disturb the current bargaining positions, we do not accept, as the Unions submit, that this is counter to the object of a fair framework for collective bargaining and facilitating good faith bargaining. Collective bargaining will remain available to the bargaining parties. The bargaining parties in their bargaining will continue to be required to meet the good faith bargaining requirements. The disturbance of the bargaining position does not result in the disappearance of collective bargaining or the rules by which the bargaining parties must abide.

[160] Moreover the Unions and employees will have available to them the full arsenal of tools under the Act to exert legitimate industrial pressure on Aurizon to bargain and to reach agreement. It is therefore not correct that the termination of the agreements results in little or no incentive on Aurizon to bargain.<sup>41</sup>

[70] Consequently, we are not satisfied that, in reaching his conclusion, the Commissioner failed to take into account relevant considerations.

[71] The AMWU asserts that the Commissioner failed to give sufficient weight to the views of the employees and of the AMWU itself. In this regard we consider that the Commissioner clearly took into account, and assessed the evidence of the two employee witnesses, Mr King and Mr Chappell. Further, the Commissioner had regard to the evidence of the AMWU Organiser, Mr Salt.<sup>42</sup> We are not satisfied that appealable error has been established relative to the Commissioner's considerations in these respects. Further, we note that only limited evidence and submissions about the impact of the termination of the Agreement in the broader Collie community was before the Commission at first instance. Had more extensive material been provided, this would have required more detailed consideration in the decision.

[72] The AMWU contention that the Commissioner erred in taking into account the objectives of the Agreement does not reflect appealable error. The Commissioner was able to take those objectives into account and we are satisfied that he did so in the context of the evidence before him about Griffin Coal's financial position and its objectives of achieving increased productivity outcomes consistent with the Agreement objectives. It is clear that the Commissioner took the Agreement objectives into account as only one of the various factors to which he had regard.

[73] The Commissioner observed:

“[127] Finally, the AMWU submitted at the time of hearing that the Employer has not put a proposed replacement agreement to a vote of the workforce, and consequently, employees have not had an opportunity to vote on a proposed agreement. Since the hearing, Griffin Coal put to employees a proposed agreement which was agreed to by the Employer and AMWU bargaining representatives on 2 May 2016. Of the 57 eligible voters, 52 voted against the proposed agreement and one (1) voter, voted for the agreement.”<sup>43</sup>

[74] Whilst we have addressed the contention that the Commissioner's recognition of the vote which occurred after the hearing of the matter represented a denial of natural justice, later in this decision, we are not satisfied that this was an irrelevant consideration. The AMWU argued to the Commissioner that one of the reasons why the Agreement should not be terminated was that Griffin Coal had not put a proposed replacement agreement to a vote of the workforce. We consider that the Commissioner quite appropriately recognised that, by the time the decision was issued this had, in fact, occurred and the agreement proposal endorsed by both Griffin Coal and the AMWU bargaining representatives, had been rejected.

[75] The AMWU assert that the Commissioner erred in concluding that termination of the Agreement would lead to productivity benefits. In our view, this contention is misconstrued. The Commissioner had before him substantial evidence relating to Griffin Coal's concerns about productivity and efficiency and the extent to which the Agreement impaired improvements in that regard.<sup>44</sup> However, the Commissioner's conclusions with respect to productivity were more circumspect. The Commissioner stated:

“[113] While the AMWU provide emphasis on a cooperative and productive workplace relations, it overlooks, in my view, that the FW Act is intended to be “a balanced framework”. Part of that balanced framework is the provision of termination of enterprise agreements. It cannot be assumed that termination of an enterprise

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agreement and cooperative relations are mutually hostile to each other. Nor, can it be guaranteed that termination of an agreement and increased productivity go together.”<sup>45</sup>

[76] Having considered the competing positions of the parties, the Commissioner stated:

“[142] I do not think it can be disputed that the likely effect of terminating the Maintenance Agreement will result in employees receiving less favourable conditions of employment. An effect which they oppose.

[143] Similarly, I do think it can be disputed that the introduction of the Black Coal Award will provide Griffin Coal with greater flexibility to operate its business and reduce costs/losses.

[144] Whether termination of the Agreement leads to greater efficiency, improved productivity, flexibility, reduced costs and ensures progressive viability of the business, is dependent on a number of conditions and not only the employees’ terms and conditions of employment. However, it is a reasonable inference that these factors should assist in achieving Griffin Coal’s objectives of sustainability, as well as expanding coal operations and employing more people.”<sup>46</sup>

[77] We have concluded that these matters were able to be taken into account in the Commissioner’s ultimate conclusions within the discretion available to him, such that no appealable error is disclosed. To the extent that the AMWU asserts that the Commissioner’s findings about Griffin Coal’s financial position is accompanied by error, we are satisfied that those findings were open to him on the evidence before him, which included the evidence of Mr Smith, called by the AMWU.

[78] To the extent that the AMWU asserts that the Commissioner’s decision was in error in that it did not properly deal with the anticipated future performance of Griffin Coal, we are not satisfied that position has been made out. The Commissioner noted the market within which Griffin Coal operates and its financial position. We are satisfied that the Commissioner’s reference to a statement he issued on 2 May 2016 was supported by the evidence put to him in the course of the hearings of this matter. Further, the Commissioner was entitled to note issues associated with the future related to the national and international coal prices.<sup>47</sup> The Commissioner’s decision took into account the extent to which productivity improvements and market conditions meant that projections are inherently difficult. The Commissioner noted that the application of the Award conditions would provide Griffin Coal with greater flexibility<sup>48</sup> and recognised the links between termination of the Agreement and productivity.<sup>49</sup>

[79] His conclusion, to the effect that the Agreement contributed to productivity impediments, inefficiencies and inflexibility,<sup>50</sup> was open to him on the evidence and we consider that, in the circumstances apparent here definitive projections would be fraught with difficulty. We do not discern appealable error in this respect.

[80] Finally, in this category of appeal ground, the AMWU asserted that the decision was unreasonable or plainly unjust in visiting extreme hardship on the employees. We are unable to agree. A fair reading of the Commissioner’s decision confirms that he took into account all of the material put before him in the context of the considerations required of him pursuant to s.226, including the inability of the parties to reach an agreement and the inefficiencies

inherent in the current Agreement, it was appropriate to terminate that Agreement. Put another way, the evidence before the Commissioner permitted a conclusion that, if the Agreement was not terminated in these circumstances, its continuation could have dire consequences for the continuation of the Griffin Coal operation, and by implication, its employees.

### **Natural Justice Considerations**

[81] The AMWU contend that it was denied natural justice in that the Commissioner considered information provided to him about the employee vote on a replacement agreement after the hearing of the matter and in a manner which denied it the opportunity to make further submissions. A denial of natural justice would represent jurisdictional error and we have considered this appeal ground on that basis.

[82] In his decision, the Commissioner stated:

“[5] On 2 May 2016, Griffin Coal and AMWU bargaining representatives finalised a replacement agreement to go to a vote of employees. On 5 May 2016, Griffin Coal requested that I delay issuing a decision on its application pending the vote of employees and formal approval of the proposed enterprise agreement by the Commission.

[6] On 19 May 2016, Griffin Coal advised the Commission that the employees had voted not to approve the replacement agreement finalised by the bargaining representatives on 2 May 2016, and requested that I hand down my decision.”<sup>51</sup>

[83] Following the hearing of this matter the Commissioner indicated to the parties that his decision would be handed down on 12 May 2016. There is no dispute that, on 5 May 2016, after the hearing of the matter had concluded and final submissions had been made, Griffin Coal provided advice to the Commissioner and to the AMWU which confirmed that Griffin Coal and AMWU bargaining representatives had finalised an agreement to go to a vote of employees. This advice detailed the schedule for the voting arrangements and requested that the Commissioner delay handing down his decision pending the outcome of this vote. This advice confirmed that, if the vote was in favour of the agreement, a further delay would be requested pending approval of the agreement by the Commission. The advice continued, to state:

*“If the vote is not in favour of the proposed agreement then we will advise the Commission and ask that the Commission and down his decision as soon as possible.”*<sup>52</sup>

[84] The ballot result declaration was made on 19 May 2016 and was provided to both Griffin Coal and to the AMWU. On that same day Griffin Coal confirmed to the Commissioner, with a copy to the AMWU that the outcome of the vote was that, of 57 eligible voters, the result was 52 against and 1 for. This advice continued, to state:

*“Accordingly, Griffin Coal request the Commission and down its decision in application AG 2016/2085 as soon as possible.”*<sup>53</sup>

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**[85]** There is no dispute that the Commissioner took this advice into account. The AMWU argue that the process adopted by the Commissioner was procedurally unfair in that it was not put on notice that the Commissioner was going to rely on the vote outcome.

**[86]** There is also no dispute that the AMWU did not seek to further address the Commissioner after this vote declaration and the advice provided by Griffin Coal to the Commissioner. The Commissioner's decision was handed down some three weeks after that advice.

**[87]** The Commissioner placed some reliance on the extent to which there was no agreement. This occurred relative to two discrete issues. Firstly, as we have already observed, the Commissioner addressed the AMWU submission, made in the course of the hearing of the matter, that no proposed replacement agreement had been put to the workforce and that, consequently employees had not been able to vote on a proposed agreement. Secondly, the Commissioner took into account<sup>54</sup> that the employees had elected not to vote for the proposed replacement agreement.

**[88]** The Commission's obligations regarding the manner in which it must perform its functions and exercise its powers are set out in ss.577 and 578 of the Act. Relevantly, the Commission must act in a manner that:

“ ...

- (a) is fair and just; and
- (b) is quick, informal and avoids unnecessary technicalities; and
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).

578 Matters the FWC must take into account in performing functions etc.

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

- (a) the objects of this Act, and any objects of the part of this Act; and
- (b) equity, good conscience and the merits of the matter; ...”

**[89]** These obligations reflect the general requirement of the Commission to ensure a fair hearing which is fundamental to the justice system and goes to the basis of the Commission's obligations to the parties who appear before it.<sup>55</sup>

**[90]** We have considered whether the Commissioner's reliance on the information provided to him and to the AMWU by Griffin Coal on 19 May 2016 denied the AMWU the opportunity for a fair hearing. We do not consider this is the case for the following reasons.



Firstly, the information about the proposed vote and the rejection of the replacement agreement proposal was provided to both the Commissioner and to the AMWU. The AMWU had made submissions about the need for a vote in the course of the hearing. We think the Commissioner was entitled to expect that, if the AMWU sought to be heard relative to the vote, a request to that effect would have been made. Secondly, the two discrete references to the vote need to be considered in their respective contexts. As indicated above, one of its submissions in opposition to the termination of the Agreement involved the AMWU's contention that it was significant that no vote had been put to employees. We think the information provided to the Commissioner and to the AMWU was sufficiently unambiguous so that the Commissioner was entitled, without seeking further comment from the AMWU, to recognise that a replacement agreement proposal had been put to employees. His remarks in this regard reflect little more than an observation of undisputed facts. Secondly, the Commissioner's subsequent observations about the inability of the parties to reach an agreed position reflected the reality apparent in the course of the hearing of the matter, which was a reality which was not altered by the vote to reject the replacement agreement proposal. Had it been the case that the Commissioner made findings about the nature of that proposed replacement agreement, we may well have arrived at a quite different conclusion but in the circumstances of this matter we do not consider that the obligation to ensure a fair hearing was compromised.

[91] We also do not consider that the Commissioner's reference to the Statement issued by him during the lengthy conciliation process reflected any denial of natural justice. The statement formed part of the broad context for the decision and we note that the views expressed therein were known to both parties and are consistent with the evidence that was provided by Griffin Coal during the course of the s.225 proceedings.

## **Conclusion**

[92] For the reasons we have set out, we are satisfied that the Commissioner examined all of the relevant factors required pursuant to s.226 of the FW Act and that this was undertaken in an equitable and fair manner. The Commissioner's decision was clearly reached on the basis of a comprehensive consideration of the circumstances of the application before him and the application of the appropriate considerations arising under the Act. We are also not satisfied that the AMWU has identified appealable error in the exercise of the Commissioner's discretion. Accordingly, although we have granted permission to appeal, the appeal itself must be dismissed on this basis.

[93] We also observe that there are a number of unique circumstances associated with this matter including the financial and trading position of Griffin Coal and the extensive bargaining and conciliation process, including the comprehensive participation of the Commission. In this respect we note that neither party raised any concerns at the Commissioner's involvement in both the protracted conciliation process and the determination of the s.225 application.

[94] Further, the disposition of the stay, granted by consent in this matter, causes us some concern. The effect of that stay has been to maintain the standing of the Agreement pending the determination of this appeal. In the normal scheme of things an appeal decision of this nature would simply result in a stay order being set aside. As we comprehend it, Griffin Coal ultimately seek to reach some form of agreement with its maintenance employees and we were informed during the appeal proceedings that further negotiations were being conducted.

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We are concerned that from a practical workplace relations perspective, the simple and immediate removal of the stay may not assist in this respect. Consequently, and notwithstanding our decision, the disposition of the stay and arrangements applicable to Griffin Coal maintenance employees as a result of this decision will be the subject of a brief telephone hearing before Senior Deputy President O’Callaghan, as a matter of urgency.



*Appearances:*

*S Cranshaw* senior counsel with *A Slevin* of counsel for the Appellant.  
*H Dixon* senior counsel with *A Gotting* of counsel for the Respondent.

*Hearing details:*

2016.  
Perth:  
July 5.

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<sup>1</sup> [2016] FWCA 2312

<sup>2</sup> PR581388

<sup>3</sup> [2016] FWC 2085

<sup>4</sup> [2016] FWCA 2312, para [43], dot points

<sup>5</sup> [2016] FWCA 2312, paras [72] – [74]

<sup>6</sup> [2016] FWCA 2312, para [107]

<sup>7</sup> see *Aurizon Operations Ltd and others* [2015] FWCFB 540

<sup>8</sup> *Schweppes Australia Pty Ltd* [2012] FWAFB 7858

<sup>9</sup> [2016] FWCA 2312, para [43]

<sup>10</sup> s.604(1) of the FW Act

<sup>11</sup> s.604(2) of the FW Act

<sup>12</sup> (1936) 55 CLR 499

<sup>13</sup> cited at para [6] in [2013] FWCFB 8726

<sup>14</sup> [2000] 203 CLR 194, para 19

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<sup>15</sup> [2013] FWCFB 8726

<sup>16</sup> [2016] FWCA 2312, para [107]

<sup>17</sup> see *Linfox Australia Pty Ltd v Fior Work Commission* [2013] FCAFC 157 at paras [47] to [49]

<sup>18</sup> [2016] FWCA 2312, para [106]

<sup>19</sup> [2005] AIRC 72

<sup>20</sup> see, for example *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540

<sup>21</sup> [2015] FCAFC 126, para 11

<sup>22</sup> [2016] FWCA 2312, para [130]

<sup>23</sup> [2016] FWCA 2312, para [131]

<sup>24</sup> [2015] FCAFC 126

<sup>25</sup> [2015] FCAFC 126, paras 21 - 25

<sup>26</sup> [2016] FWCA 2312, para [130]

<sup>27</sup> [2015] FCAFC 126

<sup>28</sup> [2016] FWCA 2312, para [130]

<sup>29</sup> [2016] FWCA 2312, paras [136] and [137]

<sup>30</sup> [2016] FWCA 2312, paras [168] – [172]

<sup>31</sup> [2016] FWCA 2312, para [142]

<sup>32</sup> [2016] FWCA 2312, paras [94] and [154]

<sup>33</sup> [2016] FWCA 2312, para [57]

<sup>34</sup> [2016] FWCA 2312, para [167]

<sup>35</sup> [2016] FWCA 2312, para [72]

<sup>36</sup> [2016] FWCA 2312, paras [148] and [149]

<sup>37</sup> [2015] FWCFB 540

<sup>38</sup> [2016] FWCA 2312, para [84]

<sup>39</sup> see, for example, [2016] FWCA 2312, para [86]

<sup>40</sup> [2016] FWCA 2312, paras [100], [121] – [126], [155] – [160]

<sup>41</sup> [2015] FWCFB 540

<sup>42</sup> [2016] FWCA 2312, para [95]

<sup>43</sup> [2016] FWCA 2312, para [127]

<sup>44</sup> [2016] FWCA 2312, paras [80] – [89]

<sup>45</sup> [2016] FWCA 2312, para [113]

<sup>46</sup> [2016] FWCA 2312, para [142] – [144]

<sup>47</sup> [2016] FWCA 2312, paras [74] – [78] and [149]

<sup>48</sup> [2016] FWCA 2312, para [143]

<sup>49</sup> [2016] FWCA 2312, para [144]

<sup>50</sup> [2016] FWCA 2312, [171]

<sup>51</sup> [2016] FWCA 2312, [5] and [6]

<sup>52</sup> Email of 5 May 2016

<sup>53</sup> Email of 19 May 2016

<sup>54</sup> [2016] FWCA 2312, paras [158] – [160]

<sup>55</sup> see, for example, *Ebner v The Official Trustee in Bankruptcy* (2000) ALR 644 at 646