

[2016] FWCA 2312



DECISION

Fair Work Act 2009

s.225 - Application for termination of an enterprise agreement after its nominal expiry date

The Griffin Coal Mining Company Pty Ltd
(AG2016/2085)

GRIFFIN COAL (MAINTENANCE) COLLECTIVE AGREEMENT 2012

Coal industry

COMMISSIONER CLOGHAN

PERTH, 9 JUNE 2016

Termination of enterprise agreement.

[1] This is an application by Griffin Coal Mining Company Pty Ltd (**Griffin Coal**) for the termination of the *Griffin Coal (Maintenance) Collective Agreement 2012* (**Maintenance Agreement**) pursuant to s.225 of the *Fair Work Act 2009* (**FW Act**).

[2] At the hearing, Griffin Coal was represented by Mr H J Dixon SC and Mr A Power of Counsel. Evidence was given for Griffin Coal by:

- Mr Raj Kumar Roy, President, Griffin Coal and Chief Operating Officer, Lanco Infratech Limited (**LITL**) and its associated entities (**the Lanco Group**);
- Mr Vanga Vinod Kumar, Executive Director, Griffin Coal; and
- Mr Anthony Durack, Industrial Relations Consultant.

[3] Mr A Slevin of Counsel and Mr T Kucera, Senior Associate, Turner Freeman Lawyers, represented the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (**AMWU**) who opposed the termination of the Maintenance Agreement. Evidence for the AMWU was given by:

- Mr Michael Salt, AMWU Organiser for the "South West" of Western Australia;
- Mr Brett King, Boilermaker/Welder and Senior Steward, AMWU;
- Mr Wayne Chappell, Boilermaker/Welder and Senior Steward, AMWU; and
- Mr Vincent Anthony Smith, Partner, Restructuring Services, Ernst & Young.

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[4] Despite the hearing of the application, the parties continued bargaining on a replacement enterprise agreement to the Maintenance Agreement. Bargaining was facilitated by the Commission.

[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.

[7] This is my decision and reasons for decision on Griffin Coal's application to terminate the Maintenance Agreement.

RELEVANT STATUTORY FRAMEWORK

[8] Section 226 of the FW Act 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
- (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.”

[9] As the Maintenance Agreement has passed its nominal expiry date, and Griffin Coal is the employer covered by the Agreement, I am satisfied that the application has been properly made.

[10] Put shortly, the Fair Work Commission (**Commission**) must, according to the FW Act, terminate the Agreement if:

- it is satisfied that it is not contrary to the public interest;
- it is appropriate, taking into account all the circumstances including the views of the employer, employees and the AMWU; and
- the likely effects on the employer, employees and AMWU should the Maintenance Agreement be terminated.

[11] For ease of reading, I have referred to the above “tests” in this Decision as:

- the views of the parties;
- public interest;
- the likely effects should the Maintenance Agreement be terminated; and
- all other relevant circumstances.

RELEVANT PROVISIONS OF THE AGREEMENT

[12] The nominal expiry date of the Maintenance Agreement is 26 April 2015.

[13] The AMWU was a bargaining representative for the Maintenance Agreement and gave notice that it wanted to be covered by the Maintenance Agreement pursuant to s.183 of the FW Act.

[14] In accordance with Clause 5 of the Maintenance Agreement:

“the principal objective of the Agreement is to secure the future of Griffin and employees covered by it through the establishment of efficient and effective operating practices which, in turn, will minimise Griffin’s cost of operations and lead to an expansion of operations”.

[15] To achieve this objective, subclause 5.2 of the Maintenance Agreement states:

“(a) the parties jointly commit to a process of continuous improvement to make the Mine operations as safe, cost efficient and productive as possible and to maximise the use of Griffin’s resources for the purpose of maintaining or increasing demand for Griffin’s coal.”

[16] In view of the fact that the Maintenance Agreement has passed its nominal expiry date, it is useful to set out what has occurred to secure a replacement enterprise agreement.

RELEVANT PROCEDURAL BACKGROUND TO BARGAINING FOR A REPLACEMENT ENTERPRISE AGREEMENT

[17] Between 12 March 2015 and 4 February 2016, there were twenty-four (24) bargaining meetings.

[18] On 26 November 2015, the AMWU made application for a Protected Action Bargaining Order (PABO). The Order was granted on 7 December 2015. The members of the AMWU voted to approve protected industrial action on 11 January 2016.

[19] By an undated letter received on 13 January 2016, Griffin Coal was notified by the AMWU of proposed industrial action commencing on 19 January 2016 and continuing indefinitely.

[20] On 18 January 2016, Griffin Coal made application, pursuant to s.418(2)(b) of the FW Act, for an order to stop the proposed industrial action.

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[21] Griffin Coal's application was heard in the Commission on 19 January 2016. At the hearing, the parties agreed to a course of action in which the industrial action, of which implementation was uncertain, was lifted at 5:00 pm that day and two (2) further bargaining meetings would occur prior to a report back to the Commission on 4 February 2016. In the course of proceedings, Griffin Coal agreed that, should the AMWU make application pursuant s.459 of the FW Act for an extension of 30 days to take protected industrial action, it would not be opposed.

[22] The s.418 application by Griffin Coal was discontinued.

[23] At the conclusion of the report back conference on 4 February 2016, the parties agreed to a schedule of conferences, facilitated by the Commission, in an endeavour to reach agreement on a replacement enterprise agreement.

[24] At the time of the hearing, there had been fifteen (15) conferences, facilitated by the Commission, in an endeavour to reach agreement on a replacement enterprise agreement.

[25] At the end of those bargaining meetings, the AMWU stated to the Commission that it is unable to agree or disagree that Griffin Coal has "communicated to employee bargaining representative the financial and economic imperatives for change in order to achieve a sustainable business". Further, the AMWU is unable to agree or disagree that the range of provisions in the Maintenance Agreement which Griffin Coal regards as key provisions, includes: rates of pay, rosters, use of contractors, manning levels, superannuation and fares and allowances.¹

[26] In view of the significant amount of evidence, I find the AMWU's response of neither agreeing nor disagreeing to the above statements not one of doubt, but denial. The evidence is plain on these issues.

[27] The simple fact is that, after over 12 months of bargaining prior to the hearing, the parties are unable to reach agreement on a replacement agreement.

[28] While there have been other matters, a fair summary would be to say that circumstances have led to two different paths being adopted by the parties. Firstly, bargaining for a replacement agreement facilitated by the Commission since 4 February 2016, and secondly, processes leading to this termination application been heard and determined.

RELEVANT BACKGROUND

[29] Griffin Coal holds mining tenements under the *Collie Coal (Griffin) Agreement Act 1979* (WA) in and around Collie, Western Australia.

[30] Griffin Coal mines thermal coal which is used in power stations to produce high pressure steam that drives turbines to generate electricity.

[31] Seventy-five per cent of the coal mined at Collie is used for power generation. The remaining 25% is sold to other users involved in commercial operations.

¹ Exhibit A3 and R2 (73)

[32] Mining operations are open cut.

[33] Griffin Coal currently supplies coal solely to a domestic market, however, the coal is suitable as steaming coal on the international market.

[34] Between 4 January 2010 and 28 February 2011, Griffin Coal and a related entity, Carpenter Mine Management Pty Limited (**Carpenter**), were under the administration of Korda Mentha, pursuant to the provisions of the *Corporations Act 2001* (Cth).

[35] Carpenter provides administrative and other mining services to Griffin Coal.

[36] On 28 February 2011, the Lanco Group, through its Australian subsidiary, Lanco Resources Australia Pty Ltd, acquired 100% of the shares in Griffin Coal and Carpenter, from the administrator for a purchase price of approximately \$740 million.

RELEVANT INDUSTRIAL INSTRUMENTS

[37] Maintenance employees are covered by the Maintenance Agreement.

[38] Production employees are covered by the *Griffin (Production) Collective Agreement 2012* (**Production Agreement**).

[39] The relevant modern award for the maintenance and production employees is the *Black Coal Mining Industry Award 2010* (**Black Coal Award**).

GRIFFIN COAL'S CUSTOMERS

[40] Griffin Coal has essentially three (3) domestic contracts for its coal, of which two (2) are long term.

[41] Until November 2014, Griffin Coal exported coal to a number of international customers through the Kwinana Bulk Handling Facility (**KBHF**).

[42] The parties agree that globally, "the coal mining industry is facing a number of challenges".²

GRIFFIN COAL'S FINANCIAL POSITION

[43] In view of the sceptical and dubious assessment of Griffin Coal's financial position, I set out the "headline" conclusions of Mr Smith's report, which were incorporated into a Statement issued by the Commission on 2 May 2016. They are as follows:

- 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;

² Exhibit A3 (33) and R3(33)

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- 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.

RELEVANT LEGISLATIVE CONTEXT

[44] Enterprise agreements are simply collective agreements between one or more national system employers, and the relevant employees set out in the agreement.

[45] Enterprise agreements are made pursuant to Part 2-4 of the FW Act. The objective of Part 2-4 is to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, that delivers productivity benefits.

[46] Before an enterprise agreement can become operative, it must be approved by the Commission.

[47] A modern award does not apply to an employee when an enterprise agreement applies to that employee's employment.

[48] In the case of this application, the Black Coal Award only applies if the Maintenance Agreement is terminated (subject to a dispute on a matter which is not relevant for my purposes).

[49] For an enterprise agreement to be approved by the Commission, it must have a nominal expiry date of no more than four (4) years from the date of approval.

[50] Within the term of an enterprise agreement, that enterprise agreement may be varied:

- by agreement between the employer(s) and employees (s.207);
- at the request of the employer(s), where a majority of employees have voted to approve the variation (s.208); or
- where there is ambiguity, uncertainty or discriminatory provisions (s.217).

[51] An enterprise agreement can be terminated:

- by agreement between the employer(s) and employees (s.219);

- at the request of the employer(s), where a majority of employees have voted to approve the termination (s.220); or
- where it has passed its nominal expiry date, on application by:
 - an employer(s); or
 - an employee covered by the agreement; or
 - an employee organisation covered by the agreement (s.225).

[52] The characteristics of an enterprise agreement having a nominal expiry date, provision for variations and termination, reveal a sense of impermanence. The concept of enterprise agreements being permanent extends only so far as its nominal term, subject to any variation, replacement or termination. After an enterprise agreement passes its nominal expiry date, that permanence is subject to:

- continuation (which is subject to the wishes of the parties);
- negotiation and replacement; or
- termination by the Commission on application by a party covered by the agreement.

[53] Instinctively, there may be a preference of the parties, for the “known” in terms of conditions of employment. However, it would appear that the legislators of Part 2-4 of the FW Act recognised the need not to cast an enterprise agreement “in stone”, and provide the parties with the ability to set express timelines for the duration of an agreement, to vary them or ultimately, terminate their existence.

[54] I consider it fair to say that Parliament, subject to non-permitted, unlawful and mandatory matters, left the parties to agree on the individual terms and conditions of employment. However, legislators have also provided a number of options for parties to respond to changing circumstances within the term of an enterprise agreement and after its nominal expiry date.

[55] I think it can be said with a reasonable degree of accuracy that, after an enterprise agreement has reached its nominal expiry date, the option adopted by the majority of parties is to reach agreement on a successor enterprise agreement. However, in the case of this application, the parties have not been able to agree on a successor enterprise agreement, for reasons which will now be considered.

THE VIEWS OF THE PARTIES

Employees

Mr King

[56] Mr King is 53 years of age and is married with three (3) children, aged between 22 and 28 years.

[57] Mr King has been employed at Griffin Coal since January 1984.

[58] Mr King has lived in Collie since 1982.

[59] Mr King opposes the termination of the Maintenance Agreement because of:

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- the likely loss of 12 hour shifts, the proposed roster structures and associated effect on family and community life;
- a reduction in remuneration and other benefits;
- it would give Griffin Coal “an enormous and unfair advantage of negotiating for a new agreement as we [employees and AMWU] would be negotiating from a position of significant weakness”;
- an alleged significant reduction in his superannuation entitlement;
- alleged loss of entitlement for income protection and death benefit;
- a reduction in entitlements on resignation or termination, including the loss of accrued sick leave; and
- a reduced basic hourly rate of pay which is used to determine the value of entitlements, including that paid on redundancy.

[60] Mr King’s annual salary is \$139 301.

[61] Griffin Coal is currently making a superannuation payment of 13.514% to Mr King’s superannuation fund which it is seeking to reduce to 9.5%.

[62] Mr King has set out, in his witness statement, a comparison of what he would expect to receive on a monetary basis pursuant to the Maintenance Agreement vis-à-vis the Black Coal Award.

[63] In summary, Mr King states:

“The loss of entitlements is of great concern to the workers covered by the EBA. The workforce is generally aged. Many workers covered by the agreement have been there longer than me, and are over 60 years of age...More generally, the attitude is that we must do what is needed to protect the established entitlements including, importantly superannuation for retirement”.³

Mr Chappell

[64] Mr Chappell is 53 years of age and has two children, aged 29 and 26.

[65] Mr Chappell has been employed at Griffin Coal since August 1987.

[66] Mr Chappell has lived in Collie all his life.

[67] Mr Chappell’s reasons for opposing the termination of the Maintenance Agreement are the same, if not, similar to Mr King.

³ Exhibit R8

[68] Mr Chappell makes similar comparisons between what he earns and his entitlements under the Maintenance Agreement vis-à-vis the Black Coal Award.

[69] Put shortly, both employees primarily oppose the termination of the Maintenance Agreement on the grounds that the terms and conditions of employment in the Black Coal Award are less favourable. Mr Chappell goes further to say, in relation to rosters, that “Griffin could introduce any roster system it saw fit to introduce”.⁴

AMWU

[70] Collie Coal Mines, including Griffin Coal, fall within Mr Salt’s area of responsibilities.

[71] Mr Salt acknowledges that the Maintenance Agreement was negotiated before the commencement of his employment with the AMWU. Consequently, his written evidence traverses: the transfer of maintenance and production work from Griffin Coal to Carna Group Pty Ltd (**Carna**) between March and November 2014; bargaining to replace the Maintenance Agreement; industrial action and the AMWU’s opposition to termination of the current enterprise agreement.

[72] The AMWU opposes the termination of the Maintenance Agreement because:

- it will “cause a substantial reduction in the pay conditions and protections of the Union’s members”;
- the Union has not been provided with any material which would support the contention that a change in employment conditions will make a material difference to the profitability of the mine, or make its members’ employment more secure;
- the pay and conditions at Premier Coal [the other Collie coal mine operations] are very similar for maintenance employees; both are paid significantly above the Black Coal Award. Should the Maintenance Agreement be terminated, employee entitlements for Griffin Coal maintenance employees would become “significantly inferior” to Premier Coal maintenance employees⁵;
- Griffin Coal has given no undertakings which would mitigate the effect on employee entitlements following any cancellation of the Maintenance Agreement (this matter is considered later in this Decision); and
- Griffin Coal may wish to take advantage of reduced entitlements to make positions redundant and replace those employees with contractors.

Griffin Coal

[73] Mr Roy’s evidence is that Griffin Coal loses money on every tonne of coal produced and sold under its domestic contracts.⁶

⁴ Exhibit R9 (35)

⁵ Exhibit R6 (79)

⁶ Exhibit A8 (51)

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[74] At the time of acquisition by Lanco, Griffin Coal was producing four (4) million tonnes of coal per annum. It was intended to continue exporting one (1) million tonnes through the KBHF. Without exports, Griffin Coal's domestic production is limited.⁷

[75] From 2011, the international price of thermal coal has declined. The decline appears to be associated with both a decrease in global demand and increased supply. A report by the Commonwealth Government's Chief Economist expects such conditions for thermal coal to continue in 2016.⁸

[76] The "Newcastle" benchmark for the spot price of thermal coal was approximately \$US120 in February 2012. At the beginning of 2015, the spot price was \$US62 - by November 2015, the spot price was \$US52 a tonne.

[77] The decline in thermal coal on the international market was a major factor in causing Griffin Coal to cease exporting coal in the last quarter of 2014.⁹

[78] Mr Roy's evidence is that the declining international market for thermal coal was also the reason for Griffin Coal "shelving" its plan for exporting coal through the Port of Bunbury.¹⁰

[79] The drop in the spot price of thermal coal on the international market is not the only difficulty faced by Griffin Coal. Mr Roy gives evidence of geological difficulties, in what he describes as "dewatering challenges" (high water table), multiple thermal coal seams (lower coal recovery), high clay content at the Ewington mine site making it unsafe for vehicles and noise restrictions due to the proximity of some mining areas being close to the Collie township.¹¹

[80] In addition to these difficulties, Mr Roy, in his evidence, refers to the "significant cost of labour, which was exacerbated by the local Western Australia "mining boom" and the rigidity of the terms and conditions of Griffin's enterprise agreements", including the Maintenance Agreement.¹²

[81] Labour costs are Griffin Coal's largest operating cost.

[82] Without setting out Mr Roy's uncontested evidence (for commercial reasons) the cost of producing one (1) tonne of coal (exclusive of royalties) is 52% more than it receives (exclusive of royalties) from its domestic supply contracts.

[83] In short, Mr Roy's evidence is Griffin Coal cannot continue to sustain losses it has incurred since 2011 and he gave evidence of the necessity to introduce a range of measures to

⁷ Exhibit A8 (45)

⁸ Exhibit A8 (2) and (27)

⁹ Exhibit A8 (44)

¹⁰ Exhibit A8 (44)

¹¹ Exhibit A8 (46)

¹² Exhibit A8 (46)

achieve sustainability. The imperative to act, is in the context of the ongoing losses to date of approximately \$290m.¹³

[84] Mr Roy's evidence sets out a range of measures to achieve sustainability which includes: looking for additional customers to supply coal in the domestic market; approaching current customers to renegotiate prices under the domestic supply contracts; purchasing and refurbishing mining equipment instead of hiring; "freezing" staff wages (since March 2011); attempting to change the production employees' work roster and reducing operating costs, through the replacement enterprise agreement.¹⁴

[85] With respect to the Maintenance Agreement, Mr Roy's evidence is that the Agreement significantly impairs Griffin Coal's "ability to operate productively and efficiently, and contribute in a significant way to its costs of production".¹⁵

[86] According to Mr Roy, it is imperative that the Employer addresses the restrictive provisions in the Maintenance Agreement, costs and other measures to make the business sustainable.¹⁶

[87] In the longer term, Mr Roy's evidence is that the business wishes to expand its operation, and subject to the international export coal price, develop infrastructure at the Port of Bunbury to enable the export of coal.¹⁷

[88] Mr Kumar, as the Executive Director, gave more detailed evidence of the manner in which the Maintenance Agreement imposes costs, inefficiencies and restraints on productivity at Griffin Coal. Mr Kumar sets out the key issues which Griffin Coal requires addressing and they are: salaries, overtime, rosters, breaks during shifts, use of contractors, staffing, superannuation, travelling allowance, personal leave and long service leave.¹⁸

[89] Both Mr Kumar and Mr Durack gave evidence of the 24 bargaining meetings held since March 2015. Mr Durack sets out succinctly the Employer's objectives in bargaining and that is to:

- "remove restraints, restrictions and inefficiencies in the Maintenance Agreement, so that Griffin can organise and run its operation more efficiently, with increased productivity and reduced costs; and
- to remove over-generous entitlements and some outdated entitlements, while nonetheless, providing terms which exceed entitlements under the modern award [Black Coal Award] and applicable legislation".¹⁹

[90] I am satisfied from the evidence of Mr Kumar and Mr Durack that they both, in bargaining, have conveyed the seriousness of Griffin Coal's financial situation and that the

¹³ Exhibit A8 (60)

¹⁴ Exhibit A8 (60)

¹⁵ Exhibit A8 (74)

¹⁶ Exhibit A8 (75)

¹⁷ Exhibit A8 (76)

¹⁸ Exhibit A9

¹⁹ Exhibit A11 (18)

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business is not sustainable under the current terms of the Maintenance Agreement. Both Griffin Coal and the AMWU have made concessions, however, from Griffin Coal's perspective, there is little prospect of agreement until accord is reached particularly on: rates of pay, rosters, staffing, superannuation, redundancy and contractors.

PUBLIC INTEREST

[91] In bargaining, the parties have a complex relationship with reality.

[92] Reality usually begins with self-interest and not an equal consideration of the interests of the other party involved.

[93] Mr King gives little consideration to the interests of Griffin Coal in seeking termination of the Maintenance Agreement. Mr Chappell's written evidence is similarly framed.

[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.

[95] Mr Salt's evidence is that more than 50% of the maintenance employees have more than 20 years continuance service. Many have more than 30 years' service²⁰. Mr King's evidence is that many are over 60 years of age²¹. Intuitively, I consider it fair to conclude that Messrs King and Chappell will be less impacted by termination of the Maintenance Agreement, than the person with short service, starting a family and be in a different segment of the normal financial lifecycle.

[96] If self-interest was the test in terminating an enterprise agreement, it would generally be a contest between competing financial imperatives. Each party would set out criteria on which their argument should be tested against. Rather than have this competition, Parliament has set the "test" of the public interest.

[97] In *Kellogg Brown & Root Pty Ltd v Esso Australia Pty Ltd* [2005] AIRC 72 (**Kellogg Brown**), the Full Bench of the AIRC stated, at paragraph [23]:

"The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards...While the content of the notion of public interest cannot be precisely defined, **it is distinct in nature from the interests of the parties**. And although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them." (my emphasis)

[98] In *Kellogg Brown*, the Full Bench was considering an appeal against a decision of Whelan C not to terminate various agreements, as it would be contrary to the public interest.

²⁰ Exhibit R6 (82) and (83)

²¹ Exhibit R8 (39)

[99] The provisions of s.170MH(3) of the *Workplace Relations Act 1996* (**WR Act**), which the Full Bench was considering, are similar to s.226(a) of the FW Act. In both cases, the provisions deal with whether the Commission is satisfied that termination of an agreement, “is not contrary to the public interest”.

[100] The Full Bench states, and appears to endorse, at paragraph [11]:

“The Commissioner pointed out that because of its effect on the employees' wages and conditions the termination of the agreements would result in confusion and a deterioration in the industrial climate and might lead to a change in the relative bargaining strength of the parties. **The Commissioner found that such consequences appeared to be within the scheme of the Act and did not of themselves raise issues affecting the public interest.** In the particular circumstances of this case, however, the Commissioner found that there were two considerations which indicated that termination of the agreements would be contrary to the public interest. The first concerned Esso's role in the negotiations. The second concerned the offshore roster. Since they were the focus of most of the submissions we shall deal with these two considerations in some detail later.” (my emphasis)

[101] The first consideration of Esso's role in negotiations, does not relate to the circumstances of this application. However, the second concerned a proposed roster for employees.

[102] Whelan C found in relation to the employer's roster claim that, when taking into account the WR Act on a whole, a change in the roster was contrary both to the personal interest of the employees and to the public and the community in general.²²

[103] While the specifics of the *Kellogg Brown* appeal were dealing with a proposed change to the roster, in my view, the comments by the Full Bench are equally applicable to any claims discussed by these parties in bargaining.

[104] At paragraph [47], the Full Bench states:

“While appreciating the Commissioner's concern that termination would facilitate the contractors' pursuit of the 14 day roster, it seems to us that in the circumstance **no true public interest issue arose.** There was no necessary causal connection between the termination of the agreements and the imposition upon the offshore employees of the 14 day roster.” (my emphasis)

[105] My understanding of why the Full Bench considered that the Commission, in the first instance, erred is because:

- any claim by a party to bargaining is what it is – a claim. To speculate on the consequences of claims of one party is to ignore the process of bargaining in which it is assumed that an agreement will be reached or that “any agreement reached will take a particular form or will have a particular effect”²³;

²² *Kellogg Brown* paragraph [16]

²³ *Kellogg Brown* paragraph [48]

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- the Commission should be “slow to censor a subject matter” of bargaining prior to bargaining being concluded, unless it is a non-permitted or unlawful matter²⁴; and
- the inconclusive evidence relied upon to reach the conclusion that the change in roster would have a detrimental effect on the family responsibilities of employees²⁵.

[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”.²⁶ I agree.

[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.

[108] While some would disagree, I shall proceed on the basis that the FW Act is enacted for the public good. For that reason, it appears that the Full Bench in *Kellogg Brown* referred to public interest includes the various objects of the FW Act.

[109] While I have referred to *Kellogg Brown*, Mr Slevin made the observation, with which I agree, that there is no “a priori factors that would determine the application one way or the other. All the circumstances in this case must be considered against the statutory test. It comes down to that”.²⁷ Consequently, for the purposes of this Decision, I intend to primarily focus on the facts and circumstances against the statutory test.

[110] Before I turn to consider the public interest, in the form of society’s interest in workplace relations²⁸, it is necessary to briefly consider the appropriate standard of review, which I should adopt when considering whether the termination is not contrary to public interest.

[111] In reviewing whether the termination of the Maintenance Agreement is not contrary to the public interest, I have applied s.577 of the FW Act, in particular, s.577(a) and (d), and have taken into account, in s.578(a) and (b), the following:

- the objects of the Act, and any objects of the part of the Act; and
- equity, good conscience and the merits of the matter.

[112] The object of the FW Act, as the AMWU highlight, is:

²⁴ *Kellogg Brown* paragraph [47]

²⁵ *Kellogg Brown* paragraphs [43] and [47]

²⁶ Exhibit A1 (16)

²⁷ Transcript PN1415

²⁸ Section.4(1) of the FW Act

“...to provide a balanced framework for **cooperative and productive workplace relations** that promotes economic prosperity and social inclusion for all Australians”²⁹ (AMWU emphasis).

[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 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.

[114] The AMWU also emphasise that paragraphs 3(a) to (g) of the FW Act are not objects of the FW Act, but the means by which the object is achieved. I agree.

[115] Paragraphs 3(a) to (g) of the FW Act are, in effect, the aids to which the object of the FW Act is achieved. Relevantly, they are as follows:

“(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions...; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) ...; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) ...”

[116] The object of Part 2-4 Enterprise Bargaining is at s.171 of the FW Act and relevantly at s.171(a) reads:

“to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits”.

[117] It is important to note that the laws set out in Part 2-4 are intended to arrive at the objective of “enterprise agreements that deliver productivity improvements”. The Employer

²⁹ Exhibit R1 (18)

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submits that this is the intended destination of what it is seeking, that is, an enterprise agreement which arrives at productivity improvements.

[118] Consistent with the object of both the FW Act and Part 2-4, the employees and the Employer agreed that the principal objective of the current Maintenance Agreement is to:

- “secure the future of Griffin and employees covered by it”

through:

- “the efficient and effective operating practices”

which:

- “will minimise Griffin’s cost of operations”

and:

- “lead to an expansion of operation”.

[119] At subclause 5.2 of the Maintenance Agreement, the parties jointly commit to, among other things, to making the mine safe, cost efficient, productive, maximise resources (human and capital) for the purposes of maintaining and increasing the demand for the mine’s coal.

[120] I would have thought that the objectives in the Maintenance Agreement are more apposite today, in view of Griffin Coal’s financial situation, than in August 2012 when it was made and approved by the Commission.

[121] The AMWU’s preference is that the Maintenance Agreement be replaced by a further agreement, thus “promoting the object of the Act to encourage cooperative and productive workplace relations” and that termination of the agreement would be contrary to this objective. The AMWU submit that it is important for the Commission to note a number of matters which I have considered below.³⁰

[122] Firstly, that bargaining for a replacement agreement is still proceeding. While that is true, it is unexceptional in the circumstances and an agreed parallel course of action.

[123] Secondly, “to date”, bargaining between the parties “had been” cooperative. From my observation, that is also true but not unusual.

[124] Thirdly, bargaining is difficult because Griffin Coal is seeking to “significantly reduce the wages and conditions enjoyed by the employees under the current agreement and previous agreement”. There is no dispute that Griffin Coal is seeking to reduce conditions of employment. However, Griffin Coal describes its objective, in uncontested evidence to, “remove restraints, restrictions and inefficiencies [so that it] can organise and run its operations more efficiently, with increased productivity and reduced cost...and, remove over-generous entitlements and some out-dated entitlements, while nonetheless, providing terms

³⁰ Exhibit R1 (23)

that exceed entitlements under the modern award”.³¹ Further, it is an inherent consequence of the scheme of the FW Act.

[125] Fourthly, in the course of bargaining, the AMWU has significantly modified its position to come to an agreement. That is also true but Griffin Coal has also modified its preferred position in negotiations. This is what is expected in good faith bargaining, especially in the circumstances of these negotiations.

[126] Fifthly, significant effort has been expended in bargaining. This is also true but not unexpected or unforeseen in the circumstances of bargaining.

[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.

[128] Part of the AMWU’s case is that it has not seen any documentation which would support a contention that termination of the Maintenance Agreement will make a “material difference to the profitability of the mine or make the employment of the union’s members more secure”.³²

[129] The reality is that this is not a documentary exercise. As I stated in my Decision, [2016] FWC 2085:

“[40] Forecasts are generated for internal management purposes.

[41] Forecasts are prepared at a point-in-time, and reflect management judgement. This judgement is based on assumptions made at the time of the preparation of the forecasts. Forecasts are, in short, business expectations.

[42] Forecasts, as the Australian Concise Oxford Dictionary states are a “conjectural estimate of something future” and “prediction”. The fact that outcomes, whether positive or negative, are different to what was predicted is unremarkable. Internal consensus by management is no guarantee of a forecasted outcome – nor is external endorsement or a contrary view.

[43] Information and assumptions contained in forecasts could be incomplete, optimistic, pessimistic, insufficient, vague, imprecise, embryonic and so forth. This is not to say that the Australian group of companies consolidated forecasts suffer from all or any of these factors, except to say that they are a point-in-time exercise, in which circumstances can and do change. Further, and importantly, the veracity of the information which goes into forecasts, is always exposed to doubt and challenge.”

[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

³¹ Exhibit A11 (16)

³² Exhibit R6 (73)

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of productivity and economic growth. These have to be balanced against an enforceable guaranteed safety net of the Black Coal Award.

[131] I have also construed the public interest of the Employer's stated intent to increase the extraction of coal, to re-enter its export market and associated work involved in exporting coal from the Port of Bunbury. Should the Employer's long view come to fruition, this will result in increased employment and economic benefit to the community.

[132] I am also satisfied that before, and since the vote on the proposed replacement agreement, that termination of the Maintenance Agreement will assist the parties in arriving at a mutually satisfactory successor enterprise agreement. Encouraging the parties to reach agreement is consistent with the public interest and the objects of the FW Act.

[133] Finally, I have taken into account, the AMWU's contention that Griffin Coal has given no undertakings which would mitigate the effect on employee entitlements.

[134] Griffin Coal has submitted that should the Commission determine to terminate the Maintenance Agreement, termination takes effect one (1) month from the Decision. This would allow the Employer to repeat its offer to employees to increase the minimum rate of pay in the Black Coal Award by 40% and some other entitlements³³ within 14 days of the Commission Decision. It should be noted that this offer was previously made to employees and rejected. However, this offer will be repeated by Griffin Coal.

[135] In conclusion, for the above reasons, I am satisfied that it would not be contrary to the public interest to terminate the Maintenance Agreement.

THE LIKELY EFFECTS THAT TERMINATION OF THE AGREEMENT WILL HAVE ON THE PARTIES

[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.³⁴

[138] Griffin Coal asserts that termination of the Maintenance Agreement will:

- remove restraints, restrictions and inefficiencies arising from the terms and conditions in the Agreement;
- enable the Employer to utilise its workforce more efficiently;

³³ Transcript PN1303 and PN1305

³⁴ Exhibit A3 (89a) and Exhibit R2

- enable the Employer to readily and reasonably organise its business to meet changing demands in a difficult competitive environment;
- reduce its operational costs and thereby operational losses;
- promote efficiency;
- contribute to the viability of the Employer's coal mining operations;
- improve productivity, expand and employ more people; and
- not prevent the making of a new enterprise agreement appropriate to the particular circumstances of the Employer's operations.

[139] The AMWU, on behalf of its members, simply disagrees with such assertions.

[140] Further, Griffin Coal asserts that termination of the Maintenance Agreement will have the following effect on the AMWU and employees:

- not prevent the continuation of good faith bargaining to facilitate the making of a replacement enterprise agreement;
- contribute to sustainable long term employment;
- not have an adverse impact on the AMWU as bargaining representative.³⁵

[141] Similarly, the AMWU disagrees with such assertions.³⁶

[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.

[145] As I indicated in my Statement to the parties on 2 May 2016, at the "heart" of Griffin Coal's application to terminate the Maintenance Agreement is its financial position.

³⁵ Exhibit A3 (89)

³⁶ Exhibit R2

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[146] From my perspective, a significant impediment in bargaining has been a reluctance and, in some cases, a resistance to accept Griffin Coal's financial position.

[147] Griffin Coal's financial position has now been incorporated into these proceedings and the essential elements set out at paragraph [43].

[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.

[150] I now turn to the likely effects on the employees and the evidence of Mr King and Mr Chappell.

[151] The effect of termination of the Maintenance Agreement will have on Mr King can be divided into three components. Firstly, his objection to any change in the roster because of the "associated effect on family and community life". There was no elaboration or evidence by Mr King as to what this meant.³⁷

[152] I note Mr King's evidence about the roster when he started work in 1984, and its difficulty upon family and community life. Mr King is "very opposed" to returning to any "structure of that kind".³⁸

[153] From his evidence, I consider it can be inferred that the current roster suits Mr King's family and community life and he is opposed to any change.

[154] Secondly, Mr King put evidence that termination would lead to a "massive reduction in remuneration and other benefits".³⁹ 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.

[155] Thirdly, Mr King gave evidence that termination would have the effect of "giving" Griffin Coal "an enormous and unfair advantage" in bargaining as the employees would be negotiating from a "position of weakness".

[156] The FW Act, neither in bargaining nor with respect to termination of an agreement, expresses an objective of equity in relation to a party's "power" status. The overall objective,

³⁷ Exhibit R8 (24)

³⁸ Exhibit R8 (22)

³⁹ Exhibit R8 (24)

as set out in Part 2-4 and is one of a framework that is simple, flexible and fair. Accordingly, the only “vehicle” in which an alleged “unfair advantage”, can be considered is in s.226(b)(ii).

[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 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.

[158] Griffin Coal’s application to terminate the Maintenance Agreement has been “on foot” since 14 January 2016. If Mr King considered that termination of the Maintenance Agreement would lead to an “enormous and unfair advantage” in bargaining, he and the other employees have had the opportunity to reach agreement on a replacement enterprise agreement, and have chosen not to do so.

[159] Further, and importantly, after giving evidence of “unfair advantage” and “weakness” in bargaining, employees have had the opportunity to consider a replacement enterprise agreement and avoid this alleged power inequity in bargaining. The employees chose not to vote for the proposed replacement agreement.

[160] The employees had the power of the ballot paper to avoid the inequity which Mr King complains of. Instead, the employees took a deliberate decision, and risk, on the Employer’s application to terminate the Maintenance Agreement and the effects of such an outcome.

[161] In conclusion, I turn to the effects of termination of the Maintenance Agreement on the AMWU.

[162] The AMWU submits that the likely effect of termination of the Maintenance Agreement upon itself is:

- “that it will be more difficult for [the] AMWU to represent the industrial interests of its Members and make disputes more difficult to resolve; and
- the AMWU is a coal industry union. It also has an interest in preserving the industrial standards of the Collis (sic) area and in the industry generally”.⁴⁰

[163] With respect to the first matter, if the AMWU is referring to its status quo as a bargaining representative, the effect of terminating the Maintenance Agreement has no effect on the rights and entitlements of the Union under the FW Act. If the AMWU is referring to its more broader role of an employee organisation, I am unable to, and it would be inappropriate, to speculate on why termination of the Agreement would make the AMWU’s role in representation and resolving dispute, more difficult. Disputes will come and go – termination of the Maintenance Agreement, if it is a factor in resolving a dispute, will be one of many factors which will have an effect in resolving a dispute.

[164] With regard to the AMWU’s interest in preserving standards in the coal industry and the industry generally, I have no quarrel with. However, that interest will not be extinguished

⁴⁰ Exhibit R1 (40) and (41)

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by termination of the Maintenance Agreement. Further, the AMWU, and other unions, have in recent times been involved in the bargaining which has, for a variety of reasons, involved a de-escalation of some terms and conditions of employment, and a regression of others. I am sure this is not something unions have ordinarily wanted to do, but it is a response to changing circumstances.

CONCLUSION

[165] The Commission's role in an application to terminate an enterprise agreement is to apply the circumstances to the statutory provisions in s.226 of the FW Act.

[166] The FW Act sets out the jurisdictional preconditions to terminate an enterprise agreement. Both parties gave prominence to the factors relevant to their respective cases. The parties asked the Commission to give greater weight to their submissions and evidence than the other party's submission and evidence.

[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.

[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".

[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 considered termination of the Maintenance Agreement appropriate, taking into account the provisions in s.226(b)(i) and (ii) of the FW Act.

[175] In accordance with the submission of Griffin Coal, termination of the Maintenance Agreement will take effect from 10 July 2016. An Order to this effect is attached to this Decision.



COMMISSIONER

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