Chapter 4

Saving the silver: termination of enterprise agreements

4.1 A spate of cases was brought to the committee's attention over the course of this inquiry where employers have seemingly sought to unilaterally terminate enterprise agreements that have passed their nominal expiry date. It is apparent that this is done by employers in order to significantly reduce employee wages and conditions, often for the purpose of obtaining an advantage in negotiations for a replacement agreement.

4.2 Terminated agreements take with them all conditions secured in previous bargaining rounds and have the effect of placing employees back on the relevant industry award—that is, the legal minimum. Once on the award, employees have little ability to negotiate, and are instead manoeuvred into accepting terms and conditions vastly inferior to those they worked under previously: from the bottom of the bargaining floor, anything looks like an improvement.

4.3 This chapter looks at the questionable practice of agreement termination and outlines a number of illustrative case studies.

Agreement termination under the FWA

4.4 Under the *Fair Work Act 2009* (FWA, the Act) enterprise agreements contain a nominal expiry date of up to four years. Existing agreements continue to operate beyond the expiry date until new agreements are negotiated and approved, or they are terminated by the Fair Work Commission (FWC).

4.5 The Act provides two ways in which enterprise agreements may be terminated:

- Under section 219, where agreements are in term and where employees and employers jointly agree to a termination;
- Under section 225, where agreements have passed their nominal expiry date.[1]

4.6 In the latter case, where the nominal expiry date has passed and agreements have rolled over, an application can be made to the FWC for the agreement to be terminated. Applications can be made unilaterally by an employer, employee or employee organisation covered by the agreement. The decision to terminate an agreement, however, rests with the FWC.[2]

4.1 If an application for termination is made, section 226 of the Act states that the FWC must approve the application if:

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1 Australian Manufacturing Workers' Union (Western Australian branch), *Submission 154*, p. 2.

2 Department of Employment, *Submission 149*, p. 5.

(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.[3]

4.7 Until recently, applications for termination were uncommon, and the authorities on agreement termination were *Tahmoor Coal*[4] in 2010 and *Aurizon*[5] in 2015. In each of these two cases the FWC took a very different view.

Tahmoor Coal

4.8 The FWC set a relatively high bar in *Tahmoor Coal*, rejecting the company's application for termination on the basis that bargaining for a new agreement was still ongoing, finding that:

> …[I]t will generally be inappropriate for the [Commission] to interfere in the bargaining process so as to substantially alter the status quo in relation to the balance of bargaining between the parties so as to deliver to one of the bargaining parties effectively all that it seeks from bargaining.[6]

4.9 In other words, the FWC was reluctant to terminate nominally expired agreements while negotiations were ongoing for new agreements. This was in recognition of the profound effect terminating an agreement could have on the bargaining process.

4.10 The approach taken in *Tahmoor* was generally adhered to, until *Aurizon.*

Aurizon

4.11 The *Aurizon* case unfolded in 2015. The company had been privatised but ongoing employees were protected by the provisions of their enterprise agreement during negotiations for a new agreement. Rather than negotiate, the company applied to have its agreements terminated.[7]

4.12 To the surprise of many, the FWC decided to uphold the application, terminating all 12 nominally-expired enterprise agreements at *Aurizon* and its related companies.

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3 Section 226, *Fair Work Act 2009*.

4 See *Tahmoor Coal Pty Ltd* [2010] FWA 646.

5 See *Aurizon Operations Limited: Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540.

6 Cited in Australian Council of Trade Unions, *Submission182*, p. 14.

7 Queensland Council of Unions, *Submission 205*, p. 14. "Aurizon" refers to Aurizon Operations Limited, Aurizon Network Pty Ltd and Australia Eastern Railroad Pty Ltd.

> In its reasons, it [FWC] departed from the view expressed in Re *Tahmoor* and found that there was no indication in the Fair Work Act that there should be a predisposition against the termination of enterprise agreement that had passed its nominal expiry date.[8]

4.13 The *Aurizon* decision set a new precedent, the FWC 'finding that it will not always be inappropriate to terminate an expired enterprise agreement while bargaining is ongoing.'[9] This, the ACTU submitted, reset the rules by which employers had to abide:

> The legal orthodoxy therefore is effectively that employers now have a new species of protected industrial action available to them in bargaining, which is to threaten to reduce workers terms and agreements to the award minimum, in order to economically coerce those workers to accept the offers it has made in bargaining.[10]

4.14 The *Aurizon* decision was pivotal. As put by the Queensland Council of Unions (QCU):

> Unions had a belief that the public interest arguments required to bring about the termination of an agreement may have protected these employees. The interpretation placed on section 226 of the Fair Work Act 2009 in this case now places doubt over the protection offered by existing agreements.[11]

Agreement termination as economic coercion

4.15 All enterprise agreements negotiated in good faith between employers and employees provide for pay and other conditions which both parties are bound by and agree to when entering an employer-employee relationship. When these agreements expire, and it comes time to negotiate new ones, the existing conditions form the starting point for negotiations—employers may wish to remove some conditions in order to make financial savings, and employees may seek a further improvement on the status quo, or, at the very least, may wish to minimise any erosion of existing conditions. What follows is the process of bargaining until a compromise serving both parties' interests is reached.

4.16 Terminating an existing agreement disrupts that process, as the ACTU pointed out:

> It is our strong view that such a bargaining strategy is illegitimate, as it is effectively penalising workers for their stance in bargaining.[12]

4.17 Terminating an agreement while the parties are negotiating, or preparing to negotiate its replacement can produce a seismic shift in the bargaining outcome by

8 Australian Council of Trade Unions, *Submission 182*, p. 15.

9 AMWU (WA branch), *Submission 154*, p. 3.

10 ACTU, *Submission 182*, p. 15.

11 Queensland Council of Unions, *Submission 205*, p. 14.

12 ACTU, *Submission 182*, p. 15.

taking away any leverage employees might have had and allowing employers to maximise this advantage.

4.18 The years since the *Aurizon* decision have seen a marked increase in the number of applications for agreement termination.[13] When these cases are analysed it becomes clear that employers are indeed taking advantage of the opportunity to use the threat of termination as a coercive bargaining strategy to secure agreements which employees would otherwise reject.

4.19 This is best illustrated through real-life examples of agreement terminations brought to the committee's attention over the course of this inquiry. For the purposes of this report, the committee will focus primarily on the Griffin Coal Mining Company case, the Parmalat dispute and the Esso controversy.

Griffin Coal, Collie

4.20 Collie is a coal-mining town in Western Australia with a 120-year history in the industry; a blue-collar town whose coalfields once boasted a record 24 years without a strike or day off.[14]

4.21 Today the town is host to two operators: Premier Coal and Griffin Coal. The latter is a subsidiary of India-based Lanco Infratech Ltd and as at December 2016 employed approximately 270 blue-collar employees—production and maintenance workers—who were covered by two separate enterprise agreements and represented by two different unions: the CFMEU (production) and the AMWU (maintenance).

4.22 From 27 April 2012 Griffin's maintenance employees were covered by the *Griffin Coal Mining Company (Maintenance) Collective Agreement 2012*, with a nominal expiry date 26 April 2015. Negotiations for a replacement enterprise agreement were protracted—the parties could not come to an acceptable compromise despite months of bargaining.

4.23 On 15 January 2016 Griffin Coal successfully made an application under section 225 of the Fair Work Act to terminate the 2012 agreement on the basis that termination would:

- remove restraints and inefficiencies in the 2012 agreement;
- improve productivity;
- enable more efficient use of the workforce;
- reduce operational costs and losses;
- promote efficiency; and
- not preclude implementation of a new EA.[15]

13 Queensland Council of Unions, *Submission 205*, p. 14.

14 Mr Michael Murray, Member for Collie-Preston, Western Australian Parliament, *Proof Committee Hansard*, 3 February 2017, p. 5.

15 AMWU (WA branch), *Submission 154*, p. 3.

4.24 The AMWU, representing Griffin Coal's maintenance employees, opposed the application on the following grounds:

- If the 2012 Agreement were to be terminated, the maintenance workers would fall back to the *Black Coal Mining Industry Award 2010* (the Black Coal Award), which would significantly reduce the wages and entitlements of the employees.
- It would create inequality on site, in that the majority of the blue collar workers – the production employees – would continue to be covered by an enterprise agreement with substantially higher terms and conditions of employment.
- The termination would erode the industrial standards not just for the Griffin Coal maintenance workers, but also for all other workers in the coal industry in Western Australia.
- Negotiations for a replacement agreement were ongoing, and terminating the 2012 Agreement would fundamentally alter the employees' bargaining position in the negotiations.[16]

4.25 The FWC heard the application over two days on 6 and 8 April 2016. On 9 June 2016 Commissioner Cloghan found in favour of Griffin Coal. A subsequent AMWU appeal was not successful.[17]

The effect of termination on wages and conditions

4.26 By terminating the 2012 agreement, the FWC decision effectively put Griffin Coal's maintenance employees back on the Black Coal Mining Industry Award, resulting in a significant reduction in pay and conditions:

- A reduction in the base rate of pay of over 40 per cent.[18]
- A move from a 42-hour to a 49-hour working week.
- A move from a four-panel "even time" roster based on 12-hour shifts to a three-panel roster based on 10.5 hour shifts, equating to fewer days off and fewer weekends at home.
- Considerable erosion of superannuation entitlements.
- Considerable erosion of the accrued value of annual and long service leave and redundancy benefits.[19]

4.27 To the employer, these may simply be figures contributing to the bottom line. For employees, their families and households, the impact of such sizable reductions

16 AMWU (WA branch), *Submission 154*, p. 3.

17 AMWU (WA branch), *Submission 154*, p. 3.

18 It must be noted that Griffin Coal offered to continue to pay workers at 40 per cent above the award until March 2017; see Griffin Coal, *Submission 118*, p. 3. Negotiations however continued with the threat of being returned to the award hanging over workers.

19 AMWU (WA branch), *Submission 154*, p. 3.

can be devastating. This is particularly pronounced in cases where employees and their families have borrowed money to buy a home on the basis of what they thought were set, legally enforceable incomes, and where the prospects of alternative employment are poor, as they are in Collie. And the effects do not stop there:

> It must also be remembered that a pay cut impacts not only on immediate incomes but also the value of accrued entitlements such as long service leave. Further, there are flow-on effects to communities as a result of reduced disposable incomes.[20]

4.28 Not only did terminating the agreement place Griffin Coal's maintenance employees onto the industry award—the minimum pay and conditions allowed under law—it also lowered the bargaining floor and exacerbated the power imbalance between the employer and the employed.

In their own words

I have lost 43% of my income and now work 49 hours per week up from 42 hours. Sporting clubs and volunteer groups are also seeing a big drop in support where the wives now are running the clubs and volunteer groups because their partners are at work. We need help.

Mr Rodney Latham, Griffin Coal maintenance worker, Collie

We've had a massive cut in our annual income, and the funny thing is, my husband has to work 60 extra shifts a year to get that pay cut, and it will be nearly 50% come February 2017.

Ms Jane Beauglehole, wife of Griffin Coal maintenance worker, Collie

I am aware that things change, and myself and my fellow employees have tried to be flexible. We have tried to work with the company. For months we went back and forth giving concessions, and each time the company simply refused. The lack of negotiation and contempt that the company displayed was staggering. They have spent millions on expensive lawyers who advise them in exactly how to refuse to engage in any agreement.

Mr Brett Pernich, Griffin Coal maintenance worker, Collie

The maintenance workforce had been aware of Griffins' plight to turn around its loss making business and so offered approximately a 15% pay cut along with a four year wage freeze. This offer was clearly not enough for Griffin Coal as it set its bargaining position at a point so low that a new agreement was unattainable to reach… Commissioner Danny Cloughan had stated in his decision that [the agreement was terminated] to help assist both parties in reaching a new agreement. This far his decision has failed to accomplish its desired outcome and has placed employees and their families under enormous pressure both financially and mentally.

Mr Paul Beauglehole, Griffin Coal maintenance worker, Collie

20 ACTU, *Submission 182*, p. 16.

The award is 35 hours per week but I am being forced to work a 2 and 1 roster and 46.66 hours. I class this as excessive hours and having to work 2 out of 3 weekends is unreasonable. It has caused great stress to myself and my family and my quality of life has been greatly affected. I am being forced to work excessive overtime for greatly reduced income. When I bring this up with my HR department they continually ignore my objections and tell me to seek counselling.

Mr Greg Avins, Griffin Coal maintenance worker, Collie

The Griffin Maintenance Enterprise Bargaining Agreement was cancelled by the Fair Work Commission and they have taken a 43% pay cut along with a FIFO style roster of increased hours that is not family friendly. This means the men work 7 days straight, 3 days off, 7 days on, 4 off. Griffin are getting the best out of my man, while at home he is exhausted recovering from his long hours. The cancellation of the maintenance workers EBA has affected our life as well as our Collie community.

Ms Leonie Scoffern, wife of Griffin Coal maintenance worker, Collie

Reasons for the application

4.29 Submissions provided to the committee discussed the reasons for the termination at length, going into Griffin Coal's motivations for applying to the FWC, as well as the wisdom of the FWC's decision.

4.30 Unsurprisingly, Griffin Coal's perspective differed markedly from that of its employees and their union, the employer describing agreement termination as a necessary, if unfortunate, consequence of financial hardship. Neither Griffin Coal's employees nor their union were persuaded by the company's narrative, instead painting a very different picture of the breakdown in negotiations.

4.31 The committee reviewed evidence provided by the AMWU, Griffin Coal and a considerable number of individual employees. While it is not the committee's place or intention to arbitrate individual industrial disputes or comment on the content of specific agreements, the respective positions are briefly outlined below.

The employer's view

4.32 Griffin Coal stressed that its decision to apply for a termination of the 2012 agreement was not taken lightly, and was pursued as a measure of last resort only when it became necessary. The decision was made necessary, Griffin Coal submitted, for a number of reasons:

> Not least of these reasons were the dire financial circumstances faced by Griffin and the need to make operational changes which were not possible under the Agreement.[21]

4.33 The financial circumstances described meant that Griffin Coal was only operating with financial support from its parent company and banks, with ongoing

21 Griffin Coal, *Submission 118*, p. 2.

losses unsustainably funded by debt. Retaining the pay and conditions offered by the 2012 agreement, Griffin Coal submitted, was an untenable option:

> A new enterprise agreement that locks in losses for the period of another agreement would jeopardise further funding and likely cause Griffin to cease operation with the loss of over 300 jobs. Griffin Coal is a vital member of the South West community in Western Australia with a number of key local industries dependent on the viability of the mine. There would be a significant detrimental knock-on effect if Griffin cannot continue operating.[22]

4.34 Pay and conditions at Griffin Coal had been 'unrealistically generous for a long period', the company asserted, and were set 'at a time when commodities (and particularly coal) market opportunities and relevant revenues were greatly optimistic.'[23]

4.35 Reducing staffing costs was necessary for survival:

> Griffin's goal is to survive by initially reaching a self-sustaining position. That is, a break-even operating position (unrelated to borrowing costs). This will assist to underpin further funding to continue operating. Given that income from domestic contracts is effectively fixed, this has to come from a reduction in costs. We have been working hard at operational improvements. However, labour costs are by far the largest operating cost and at about 50% they are out of all proportion as a percentage of total operating costs.[24]

4.36 In essence, Griffin Coal's argument was that failing to cut staffing costs would ultimately force the company to cease operating in Collie, which would be to the wider community's detriment:

> If they [workers' pay and conditions] are not re-balanced the business cannot continue. We understand that it is not easy to accept a reduction in terms and conditions of employment but we are seeking the changes that are necessary for survival of the business. There is no joy in this task. It is not easy. Members of management have been put under significant personal pressure. However, if sustainable employment terms and conditions are not achieved we will fail all of our stakeholders, including our employees.[25]

4.37 In the company's view, what employees were asking for was unreasonable:

> While it would be nice for the economy and the business to perform on an upward trend at all times, that is not the current reality for many businesses, particularly in our sector. A business must be able to adjust. The Agreement was very generous to employees and completely uneconomic for Griffin.[26]

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22 Griffin Coal, *Submission 118*, p. 2.

23 Griffin Coal, *Submission 118*, p. 2.

24 Griffin Coal, *Submission 118*, p. 2.

25 Griffin Coal Mining Company, *Submission 118*, p. 2.

26 Griffin Coal, *Submission 118*, p. 3.

4.38 Far from agreeing with Griffin Coal's assessment, the AMWU explained that negotiations for a new agreement were in fact stymied from the start due to Griffin Coal's unbending determination to substantially increase the hours worked and reduce the rates that are paid to its maintenance workers.[27]

4.39 Griffin Coal, the AMWU submitted, did not waver from this position during or after the agreement termination:

> Last month, the AMWU took the enormous step of presenting a possible three-panel roster to Griffin Coal. Even this was rebuffed on the basis that it did not provide enough cuts.[28]

4.40 The union also drew the committee's attention to the singular nature of Griffin Coal's position towards its maintenance workers, who the company appears to expect will shoulder the lion's share of its cost-cutting:

> Despite Griffin Coal's constant protestations that they need to reduce labour costs and the 2012 Agreement was a significant barrier to a productive workforce, Griffin Coal have not attempted to move the production workforce or the managerial/administrative staff onto the same arrangements as maintenance workforce.
>
> The 230 production workers are still working an even time roster, and continue to earn wages under their agreement. This is despite their agreement expiring earlier this year in July. The managers and supervisors continue to work an even time roster, with no loss of earnings.[29]

4.41 When asked by the committee, Griffin Coal's Chief Operating Officer, Mr Terry Gray, confirmed that only maintenance workers had had their agreement terminated and pay and conditions cut. At the time of the public hearing, no application had been made to terminate Griffin Coal production workers' enterprise agreement, which had nominally expired, and white-collar administrative staff had not had wages reduced.[30]

Employee views

4.42 Employees rejected Griffin Coal's assertion that they had enjoyed unrealistically high wages and conditions for too long. Mr Brett Pernich, an electrician with Griffin Coal, stated:

> All this stuff about being high-paid and all of that? We were actually below industry standard, if you like.[31]

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27 AMWU (WA branch), *Submission 154*, p. 2.

28 AMWU (WA branch), *Submission 154*, p. 4.

29 AMWU (WA branch), *Submission 154*, p. 4.

30 See discussion with Mr Terry Gray, Chief Operating Officer, Griffin Coal Mining Company Pty Ltd, *Proof Committee Hansard*, 6 February 2017, p. 12.

31 Mr Brett Pernich, *Proof Committee Hansard*, 3 February 2017, p. 9.

4.43 Others called on the company to take responsibility for its financial management. Their evidence was diametrically opposed to Griffin Coal's narrative, and questioned the company's determination to address its financial problems by slashing staffing expenditure:

> [T]hough the company promotes its excessive financial losses, it still somehow maintains a team of top-notch lawyers to break its employees down to wages and conditions from several decades ago, yet fails to find the same amount of money to execute its main duty and reason for existence: to mine coal.[32]

> The numbers do not add up. Even if we worked for nothing, which they would be quite happy to agree to, it would still not be enough to save this company.[33]

> My employer the Griffin Coal Mining Company has set many new precedents in Corporate Australia since coming under the ownership of Indian giant Lanco Infratech. Over the past 6 years Griffin Coal has managed its business into a state of decay and has focused the blame on everyone else but themselves.[34]

4.44 It is beyond the scope of this inquiry to delve into Griffin Coal's financial circumstances, however the committee notes that parent company Lanco Infratech went into receivership in April 2017.[35]

4.45 The committee also notes reports that accrued entitlements earned by Griffin Coal's workers at $62 an hour are to be paid out at only $30 an hour.[36]

Parmalat

4.46 Parmalat Australia is one of the major dairy manufacturers operating in Australia and is part of a European multinational—Lactalis Group of Companies. Parmalat took over the ownership and operation of the former Fonterra Echuca dairy product manufacturing site in February 2016, transferring existing Fonterra employees into its employment in the process.

4.47 Under transmission-of-business provisions within the FWA, Parmalat recognised all employment service and entitlements of the transferred employees. Parmalat was bound by the provisions of the existing enterprise agreement, negotiated by employees prior to Parmalat taking over. Many of those provisions had featured in enterprise agreements covering the site for over 15 years.[37]

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32 Mr Brett Pernich, *Submission 172*, p. 1.

33 Mr Brett Pernich, *Submission 172*, p. 1.

34 Mr Paul Beauglehole, *Submission 169*, p. 1.

35 See www.watoday.com.au/wa-news/parent-company-of-collie-miner-griffin-coal-put-into-administration-20170505-gvz31b.html (accessed 11 July 2017).

36 See www.sbs.com.au/news/article/2017/05/05/collie-wa-mine-owners-receivership (accessed 11 July 2017).

37 Parmalat Echuca AMWU and ETU members, *Submission 201*, pp. 1–2.

4.48 The agreement Parmalat inherited had a nominal expiry date of 31 August 2016—negotiations for a new agreement began between Parmalat, the AMWU and ETU (unions representing the workers) in July 2016.

4.49 A submission from workers (and members of the AMWU or ETU) described Parmalat's opening position:

> At the start of enterprise agreement negotiations, Parmalat presented a very aggressive log of claims attacking Echuca site employment conditions. The following were part of the company log of claims:
>
> - A four year wage freeze;
> - A reduction of employer superannuation contributions;
> - The company to have total freedom to engage contractors and labour hire personnel to do the work on the Echuca site. No minimum wage rates and employment conditions were to apply to such labour. (This would results in a 40% to 50% reduction in wage rates paid on the site);
> - A significant reduction to employee rights in relation to union representation.[38]

4.50 Parmalat, in turn, submitted that workers had made the following log of claims:

- Wage and allowance increases of 5.0 per cent per annum.
- Any time worked by an employee on a rostered day off would be paid at double time for the whole day, with the employee to be provided with an additional day's leave.
- A right for all categories of permanent employees to be offered overtime work before any casual employee is allocated work (under the 2015 Enterprise Agreement this 'right of first refusal' was granted only to particular categories of employees).
- A requirement that changes to manning levels were only able to be implemented if agreed by the majority of employees covered by the new enterprise agreement.
- An increase of paid union meetings from 4 hours per year to 70 hours per year.
- An increase of two pay levels (to a majority of employee) from level 6 to level 8.[39]

4.51 As with the Griffin Coal case, considering the parties' respective bargaining positions is beyond the scope of this inquiry.

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38 Parmalat Echuca AMWU and ETU members, *Submission 201*, p. 2.

39 Parmalat Australia Pty Ltd, *Submission 211*, p. 3.

4.52 The company did not wait long to seek to terminate the existing agreement once employees rejected the above proposal, applying to the FWC in early October 2016—five weeks after the agreement's nominal expiry date.[40]

4.53 The impact of a termination would have been considerable:

> If the Fair Work Commission approved Parmalat's application to terminate the existing Echuca site Enterprise Agreement, the wage rates of all employees would be reduced by at least 40%. Such an agreement termination would result in further reductions in wages with lower overtime and shift penalty loadings applying. The combined effect of the application of award rates and penalty loadings would be an approximate 50% reduction in the wage entitlements paid to Echuca site employees. This would mean that the annual wage bill paid to the current 70 Echuca site employees would be millions of dollars less than was paid to these employees in the calendar year 2016.[41]

4.54 The unions responded by announcing protected industrial action. Within the first hour of the strike, Parmalat implemented an indefinite lockout of its Echuca site workers and negotiations for a new agreement unfolded with the spectre of termination hanging over them.[42]

4.55 The committee was pleased to note that the agreement was not terminated, due at least in part to a delay in the FWC's processing of Parmalat's application for termination.[43]

4.56 With the threat of termination withdrawn, the parties ultimately reached a mutually acceptable agreement through continued negotiation.

Esso Australia

4.57 A case which graced headlines across the country is that of Esso Australia, a company which applied to have enterprise agreements covering its oil and gas onshore and offshore operations terminated in August 2016, following protracted negotiations with employees and the unions representing them, the Australian Workers' Union (AWU), Electrical Trades Union (ETU) and AMWU.

4.58 Both sides agree that negotiations were long-drawn-out.[44]

4.59 Speaking before the committee, executives representing the company described the termination application as a means of bringing negotiations to a head

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40 Parmalat Echuca AMWU and ETU members, *Submission 201*, p. 2.

41 Parmalat Echuca AMWU and ETU members, *Submission 201*, p. 2.

42 Parmalat Echuca AMWU and ETU members, *Submission 201*, p. 3.

43 Parmalat Echuca AMWU and ETU members, *Submission 201*, p. 3.

44 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 5.

and a path 'within the Fair Work Act to essentially get to an end point, rather than ongoing negotiations.'[45]

4.60 The AWU described the potential impact of such a termination:

> Esso has told the AWU that if the EAs are terminated by the FWC, pay rates won't be cut for six months, but after that all bets are off. It is anticipated that in event of a termination, cuts could be 40% or 50%.
>
> Termination of these agreements would inevitably affect the pay and conditions of those in some of the most dangerous workplaces in the country. It is a threat, and one not taken lightly by the AWU, particularly in the light of terminations already achieved in oil and gas, mining and freight industries.[46]

4.61 This case had a pronouncedly different outcome than that of Griffin Coal. In response to the company's application to have its agreements terminated, the unions notified the company that 600 workers would go on strike, potentially affecting gas supplies to Victoria, New South Wales and Tasmania.

4.62 So concerned was the Victorian state government about the prospect of large-scale industrial action against the largest domestic supplier of gas, that it intervened, applying to the FWC to stop termination proceedings and force the parties back to the negotiating table.[47] In this case it is clear that the union's leverage in raising the prospect of large-scale industrial action—which could have brought much of the nation's gas supply to a screeching halt—made the difference for these workers.

Does agreement termination constitute avoidance of the FWA?

4.63 Employers are quick to point out that applying to have agreements terminated is well within the law. For example Griffin Coal submitted:

> The Fair Work Act contains various obligations and mechanisms to facilitate the making of an agreement in good faith. Griffin has complied with all of the rules. There has been no avoidance of the Fair Work Act as stated in the terms of reference for this Inquiry.[48]

4.64 On the face of it at least, none of Griffin Coal's actions appear to be illegal, nor has anyone alleged differently. Instead, these cases expose a flaw in the FWA, because agreement termination allows employers to subvert the bargaining process and coerce employees. The ACTU described the use of such tactics as 'illegitimate':

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45 See Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 32, and Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 5.

46 Australian Workers' Union Victorian Branch, *Submission 193*, p. 4.

47 'Emergency intervention in Esso work dispute to avoid gas and power crisis', *The Sydney Morning Herald*, 2 December 2016, available at: http://www.smh.com.au/business/workplace-relations/emergency-intervention-in-esso-work-dispute-to-avoid-gas-and-power-crisis-20161201-gt2d0z.html (accessed 6 September 2017).

48 Griffin Coal, *Submission 118*, p. 3.

> It is our strong view that such a bargaining strategy is illegitimate, as it is effectively penalising workers for their stance in bargaining. The Fair Work Act is otherwise very clear in not permitting employers to engage in forms of economic coercion against their workforce during bargaining except by way of a lockout in response to protected industrial action.[49]

A problem with the FWA

4.65 Many witnesses called into question the prudence of the FWC's decision to terminate the Griffin Coal agreement, questioning whether the commissioner gave enough weight to the interests of the employees and the wider community.[50]

4.66 Mr Jay Scoffern, a maintenance worker with ten years' service at Griffin Coal, gave this account of his encounter with the commissioner who decided the employees' fate:

> Mr Cloghan told me personally that he couldn't listen to “bush lawyers” and “bush accountants”. Why not? Fair Work to my understanding was a method for lament to strike a fair and honest deal with a big company without the use of lawyers. Not so, I believe not one thing that the AMWU members put forward against the termination of the EBA was considered adequately.[51]

4.67 In assessing an application for agreement termination, a single Fair Work commissioner exercises discretion in determining whether termination is in the public interest. Appealing this decision is almost futile, as a lawyer acting for the AMWU explained:

> The only way you can overturn a single commissioner's decision is to demonstrate that there was an error of law. This is why we say there is a problem with the act. What the full bench ultimately said was that the commissioner applied the legal tests but he exercised his discretion in a particular way. There is a really old authority of the house and the king[52] which effectively says that it is very, very difficult to overturn discretionary decisions of single commissioners.[53]

4.68 In other words, the way in which a single commissioner exercises his or her discretion is very difficult to appeal, since appeals are not an assessment of the rationale behind a particular decision, but rather about the commissioner's authority to exercise discretion.[54]

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49 ACTU, *Submission 182*, p. 15.

50 See for example Mr Mick Murray MLA, Member for Collie-Preston, *Submission 166*, p. 3.

51 Mr Jay Scoffern, *Submission 168*, p. 1.

52 *House v The King* (1936) 55 CLR.

53 Mr Timothy Kucera, Turner Freeman Lawyers, acting for AMWU, *Proof Committee Hansard*, 3 February 2017, p. 17.

54 See discussion in *Proof Committee Hansard*, 3 February 2017, p. 17.

Defining the public interest

4.69 The FWA does not clearly articulate the public interest issues that the FWC should or must consider in making its decisions. The ACTU argued that it is therefore unclear:

> …whether there is any public interest in employers actually continuing to be bound by the agreements they sign; or any public interest in protecting workers from economic coercion when they seek to bargain collectively.[55]

4.70 It is worth noting again that in the Griffin Coal case, the employer argued that the company's survival depended on reducing staffing expenditure.[56] Griffin Coal's Chief Operating Officer, Mr Terry Gray, told the committee that the maintenance workers' salary cuts were necessary in order to prevent the company from continuing to operate at a significant loss:

> We understand quite genuinely that the scale of the change that we are asking the employees to take is significant, that it does create significant financial on-costs for these individuals, but it is in our view a very necessary step in order to take this business forward with sustainability.[57]

4.71 It is also worth noting that the termination did not prevent Griffin Coal's continued financial decline.[58] Together with the fact that terminating the agreement undermined the bargaining process and had a devastating effect on workers, their families and the small Collie community, the 'public interest' remains an obscure justification.

Committee view

4.72 Terminating an existing agreement imposes an unnatural end to the bargaining process. It lowers the bargaining floor and effectively allows employers to coerce employees into accepting anything better than the legal minimum. Put aptly by Mr Ben Davis, Secretary of the AWU Victoria, submitted that the leverage termination gives employers, forces unions and the workforce 'into basically trying to save the silver'.[59]

4.73 The committee is of the view that enterprise agreement termination is being used as an uncompromising bargaining strategy by some employers, with blithe disregard for both employees' right to bargain, and the objectives of the FWA. The committee concludes that these cases expose a failure of the Act to protect workers.

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55 ACTU, *Submission 182*, p. 15.

56 Griffin Coal, *Submission 118*.

57 Mr Terry Gray, Chief Operating Officer, Griffin Coal, *Proof Committee Hansard*, 6 February 2017, p. 2.

58 See www.sbs.com.au/news/article/2017/05/05/collie-wa-mine-owners-receivership (accessed 18 July 2017).

59 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 32.

4.74 There is, however, nothing illegal about employers exploiting loopholes in the FWA to pursue ruthless industrial strategies, and therein lies the problem. Employers are within their rights in applying for expired agreements to be terminated, and the FWC is makes a decision to accept or reject the application applying the test prescribed by the Act as it has been interpreted in *Aurizon*.

4.75 The committee holds that, as EBAs are entered into by agreement by the employer and employees, terminations should only be approved by the FWC when there is mutual agreement of both parties. To allow one party to unilaterally apply and be granted termination appears to fundamentally undermine the purpose employer-employee enterprise agreement making.

4.76 The committee concurs with the AMWU's view that section 225 of the FWA 'in its current form threatens collective bargaining and democratic participation by workers in the industrial instrument that covers their terms and conditions.'[60]

4.77 The committee concludes that section 226 of the Act should be amended to prevent the FWC from terminating an agreement where workers would be worse off as a result of the termination. This would have the effect of protecting the living standards of workers as the parties go about the task of negotiating a new collective agreement. Failing to do so will allow further erosion of the collective bargaining process and expose workers to significant vulnerability. Any remaining concerns about the public interest could readily be covered off via changes to part 2-5 of the Act referred to in chapter 3 of this report.

Recommendation 1

4.78 **The committee recommends section 226 of the Act should be amended to prevent the FWC from terminating an agreement where workers would be worse off as a result of the termination.**

60 AMWU (WA), *Submission 154*, p. 7.