Shop Distributive and Allied Employees' Association

THE UNION FOR WORKERS IN
RETAIL. FAST FOOD. WAREHOUSING.

# AG2022/142 - Application for termination of the *IPCA (VIC, ACT, NT) Enterprise Agreement 2011*


**Date Submitted:** 6 April 2022

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# I. INTRODUCTION

1. The Shop, Distributive and Allied Employees' Association ("SDA") refers to the above matter and its previous correspondence.

2. The SDA makes these submissions in accordance with the amended directions of Deputy President Young dated 23 February 2022.

# II. THE STATUTORY REQUIREMENTS

3. The Application filed on 20 January 2022 is made under section 225 of the Act which provides that:

> Application for termination of an enterprise agreement after its nominal expiry date
>
> If an enterprise agreement has passed its nominal expiry date, any of the following may apply to the FWC for the termination of the agreement:
>
> (a) one or more of the employers covered by the agreement;
>
> (b) an employee covered by the agreement;
>
> (c) an employee organisation covered by the agreement.[1]

4. The Application is made by Chantelle Zentveld, an employee covered by the Agreement. The Applicant is a member of the Shop, Distributive and Allied Employees' Association.

5. In his decision approving the enterprise agreement of 21 July 2011, Senior Deputy President Kaufman noted at [6] that 'The nominal expiry date of the Agreement is 21 July 2015.'

6. The relevant tests which the Commission must consider in connection with an application made pursuant to section 225 of the Act are set out in section 226. It provides that:

> 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

[1] s 225 *Fair Work Act 2009* (Cth).

(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[2]

# III. PUBLIC INTEREST

7. Section 226(a) of the Act establishes a test in relation to which the Commission must satisfy itself in terminating an Agreement, namely that 'it is not contrary to the public interest to do so'.

8. In the matter of *Tahmoor Coal P/L*[3] VP Lawler differentiated between the previous legislative test and the test propounded by the *Fair Work Act*. His Honour concluded that the test was only whether it was contrary to the public interest to terminate it. At paragraph 31 his Honour noted:

> "Logically, the termination of a given agreement may be in the public interest, may be contrary to the public interest or may be neutral in terms of the public interest. Section 226(b)(i) directs attention to whether termination would be contrary to the public interest."

9. In *Re Kellogg Brown and Root Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000*[4] public interest was defined at paragraph 23 as:

> "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. An example of something in the last category may be a case in which there was no applicable award and the termination of the agreement would lead to an absence of award coverage for the employees. 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."

[2] s 226 *Fair Work Act 2009* (Cth).
[3] [2010] FWA 6468.
[4] 139 IR 34, PR955357.

10. In considering the public interest and the maintenance of proper industrial standards it should be noted that the Agreement sought to be terminated has continued its operation approaching five years beyond its nominal expiry date.

11. In the matter of *Tahmoor Coal* VP Lawler stated at paragraph 54 that:

> *I respectfully agree with his Honour that it is not intended by the legislation that agreements should remain in place indefinitely and that it is unreasonable to lock an expired agreement in place indefinitely.*

12. For the same reasons, the Commission should here conclude that it is not contrary to the public interest to terminate the nominally expired agreement.

# IV. APPROPRIATENESS

13. Section 226(b)(i) of the Act requires, in determining whether it is appropriate to terminate an agreement that the views of the employees and each employee organisation be taken into account by the Commission.

14. The Applicant seeks the termination of the Agreement. Her statutory declaration dated 3 April 2022 is **attached** as Annexure A. The SDA supports the Applicant's application.

15. To date, no other views of employees regarding the termination of the Agreement have been made known.

16. As to the critical question of whether the termination of the Agreement and the return of employees to the Award confers material advantages for those employees that weigh in the Commission's assessment of the appropriateness of a decision to terminate, the SDA **attaches** as 'Annexure B', a detailed comparative analysis of the rights, entitlements and benefits of the Agreement vis-à-vis the Award. It is submitted that this analysis supports termination of the nominally expired Agreement.

17. In *Energy Resources of Australia Ltd v Liquor, Hospitality and Miscellaneous Union*[5] it was held that an Agreement was not to continue indefinitely and that the longer after the expiry of an enterprise agreement the stronger the case for termination.

> "[29] In my view it is unreasonable to lock such an agreement in place indefinitely. The legislative scheme supports the ending of agreement obligations at or after the nominal period of the agreement. Termination of the Agreement does not preclude further enterprise bargaining. Regular revisions and renewal of enterprise arrangements is desirable.
>
> [30] I acknowledge the understandable concerns of employees at the loss of entitlements. The loss of some employee entitlements is almost

[5] [2010] FWA 2434.

> inevitable when an agreement is terminated. In this case the undertakings given by ERA are not insignificant. In my view the loss in this case is not such as to outweigh the other factors which support the notion that a party to an expired agreement should be entitled to withdraw from it.
>
> [31] The longer the time after expiry of the nominal term the stronger the case for termination. This agreement passed its nominal expiry date almost ten years ago. Where the continuation of the Agreement could have detrimental affects on the operation and the level of consistency of terms and conditions of employment the case for preventing termination is further diminished. I find that this circumstance exists in this case."

18. In *Gangell v Lobethal Abattoirs Pty Ltd* [2018] FWCFB 4344 the Full Bench of the Commission has highlighted the importance of applications such as this application being dealt with expeditiously, with reference to section 577(b), particularly where (as is the situation here) the conditions in the Agreement have fallen well below the minimum terms in the award.

19. At [22] to [25] President Ross, Deputy President Asbury and Commissioner Hampton relevantly observed:

> "[22] Further, we apprehend that the Deputy President intends to consider the status of the matter at the 3 August 2018 conference. In that regard, we observe that while s.589 of the Act confers a broad discretion on the Commission to make decisions as to how, when and where a matter is to be dealt with, this must be read with s.577, which requires the Commission to perform its functions and exercise its powers in a manner that is quick and informal.
>
> [23] We would also observe that the need to deal with an application expeditiously is particularly important in cases where, as here, there are assertions that employees to whom the agreement applies are at times earning less than under the relevant modern award.
>
> [24] Section 578 requires that in performing functions or exercising powers the Commission must take into account the object of the Act, which is to provide a balanced framework for cooperative and productive workplace relations that promotes economic prosperity and social inclusion for all Australians by (among other things):
>
> '(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…'

> [25] Subject to the application of all of the relevant considerations, it would be prima facie contrary to the object of the Act to permit an agreement that has passed its nominal expiry date to continue to operate in circumstances where its provisions as a whole are less beneficial than those provided by the relevant modern award."

20. The Agreement is now almost seven (7) years beyond its nominal expiry date which adds further weight to the application to terminate.

21. The maintenance of the Award as a safety net is an objective of the Act itself. The objects of the Act at section 3(b) include:

> 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.

22. Furthermore, the Commission has at no time considered the inability of an employer to comply with the legal minima of the Act and the Awards as a consideration which ought properly weigh as a relevant consideration against the termination of an expired enterprise agreement.

23. This may be considered illustrated in Paragraph 56 of *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v The Griffin Coal Mining Company Pty Ltd*[6] where the full bench of the Commission consisting of Senior Deputy President O'Callaghan, Deputy President Binet and Commissioner Hampton upheld the earlier decision of Commissioner Cloghan which stated:

> 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.[7]

# V. OTHER CONSIDERATIONS

24. To the extent that the Agreement contains terms and conditions now less advantageous than the safety net offered by the Award, the effect of maintaining this Agreement would be to in fact circumvent the objects of the Act.

[6] [2016] FWCFB 4620.
[7] The Griffin Coal Mining Company Pty Ltd (AG2016/2085), [171].

# VI. CONCLUSION

25. The absence of any demonstrated proper reason why termination should be deferred or delayed, any order that the Agreement be terminated should operate forthwith.

## INDEX OF ANNEXURES

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| Annexure A | Statutory Declaration of Chantelle Zentveld dated 3 April 2022. |
| Annexure B | FFIA and IPCA (VIC, ACT, NT) Enterprise Agreement 2011. |