REASONS FOR DECISION

Fair Work Act 2009
s.229—Bargaining order

Construction, Forestry, Mining and Energy Union
v
Anglo Coal (Capcoal Management) Pty Ltd T/A Capcoal
(B2016/1173)

DEPUTY PRESIDENT ASBURY BRISBANE, 8 DECEMBER 2016

Application for bargaining order – Alleged failure to meet good faith bargaining requirements – Section 228(1)(e) – Alleged capricious or unfair conduct that undermines freedom of association and collective bargaining – Restructuring resulting in redundancies – Reason for restructuring related to delays caused by employees taking protected industrial action – Construction of s. 228 – Finding that good faith bargaining requirements do not preclude restructuring and redundancies for valid business reasons – Conduct does not breach good faith bargaining requirements – Application for bargaining order dismissed.

OVERVIEW

[1] In a Decision given orally at a hearing on 25 November 2016 I dismissed an application made by the Construction Mining and Energy Union (CFMEU) under s. 229 of the Fair Work Act 2009 (the Act) and issued an order to that effect. The Application sought that the Fair Work Commission (the Commission) make a bargaining order against Anglo Coal (Capcoal Management Pty Ltd) (Capcoal). I also indicated to the parties that I would provide full reasons for the Decision to dismiss the application. These are my reasons.

[2] The bargaining order was sought on the basis that the CFMEU contends that by proposing and then deciding to make positions redundant at its German Creek Mine, at a time when bargaining for an enterprise agreement is underway and members of the CFMEU are engaging in sustained and ongoing protected industrial action, Capcoal is engaging in capricious or unfair conduct that undermines freedom of association or collective bargaining contrary to the good faith bargaining requirement in s. 228(1)(e) of the Act.

[3] The Order sought was that Capcoal not terminate the employment of any CFMEU members by reason of redundancy and that Capcoal provide to the CFMEU and its members a written apology for engaging in capricious or unfair conduct that undermines freedom of association or collective bargaining.

[4] Capcoal contends that, following extensive consultation with the CFMEU and its members, a decision has been made to change the way that Capcoal conducts its operations at the Mine. The change will result in positions being made redundant but will deliver

substantial commercial benefits to Capcoal. Capcoal submits that the CFMEU cannot rely upon the coincidence that enterprise bargaining is taking place (and has taken place for more than two years) to prevent the Company from making any significant change to the way it operates. Capcoal contends that the Commission cannot be satisfied that it has failed to comply with the good faith bargaining requirements and that even if the Commission could be so satisfied, it would not be reasonable in all of the circumstances for the Commission to make a bargaining order.

[5] The issues for determination are whether proposing and deciding to make 83 positions redundant in the circumstances that pertained at the Mine at the relevant time constitutes a breach by Capcoal of the good faith bargaining requirements in s. 228(1)(e) of the Act, and, if those requirements have been breached, whether it is reasonable for the Commission to make an Order under s. 229 of the Act.

[6] The application was made on 7 November 2016 and an urgent hearing was requested. The matter was listed for mention on 8 November 2016. In the interests of ensuring that there was adequate time for the parties to properly present their cases, Ashurst on behalf of the Company indicated that no action would be taken to implement the redundancies until the matter was heard. The parties conferred and agreed on an expedited timetable for the exchange of submissions and witness statements and the matter was listed for hearing on 17 November 2016.

[7] At the hearing the CFMEU was represented by Mr Docking of Counsel instructed by Mr Walkaden, the CFMEU's National Legal Officer. Capcoal was represented by Mr Neil SC who appeared with Mr Parken, instructed by Ashurst. The issues raised in the case are complex and there are no decided cases directly on point. I was greatly assisted by Counsel for both parties and the comprehensive written and oral submissions that were provided in a short time frame. I also acknowledge that Capcoal through Mr Neil SC provided an undertaking that no employee would be given notice of termination of employment before 12.00 midday on Friday 25 November 2016 in line with my expectation about when I would be in a position to release my Decision by that time. As previously noted, I informed the parties at a hearing commencing at 9.00 am on that date, that I had decided to dismiss the application.

FACTUAL BACKGROUND

[8] Evidence was given for the CFMEU by Mr Jeff Scales, Coal Operator at the German Creek Mine and Lodge President for the CFMEU at the Mine. Mr Scales gave oral evidence but was not required for cross-examination. Evidence was given for Capcoal by:

- Mr Mark Heaton, Executive Head of Open Cut Operations, Anglo American Metallurgical Coal Pty Ltd; and
- Ms Stephanie Joy Opperman, Human Resources Manager at the Capcoal Mine since 23 May 2016 and previously Human Resources Manager at Callide Mine.

[9] It is not in dispute that the Commission can be satisfied of certain factual matters as required by s. 230 of the Act, which are pre-requisite to the making of a bargaining order, namely that:

- an application for a bargaining order has been made – s. 230(1)(a);

- Capcoal has agreed to bargain – s. 230(2)(a);
- the CFMEU has complied with requirements in s. 290(4) to notify relevant bargaining representatives of its concerns – s. 230(3)(b).

[10] There are a number of other facts that are not in dispute. German Creek Mine is an open cut black coal mine. It is a joint venture between Anglo American Metallurgical Coal Pty Ltd (Anglo) and Mitsui Coal Holdings (Capricorn Joint Venture). The Capricorn Joint Venture contracts with Capcoal to manage, operate and provide services to the Mine, including labour. There are two enterprise agreements in operation at the Mine: the *Capcoal Surface Operations Union Collective Agreement* (the Surface Agreement) which has a nominal expiry date of 4 April 2014 and the *Capcoal Surface Operations Trades Union Collective Agreement* (the Trades Agreement) which has a nominal expiry date of 1 October 2014. The CFMEU is covered by both of these Agreements.

[11] Capcoal and the CFMEU have been engaged in enterprise bargaining for a replacement agreement for the Surface Agreement, since February 2014. Bargaining is continuing and the most recent meeting was held on 17 November 2016, the day that the hearing of this application was held. Since 19 August 2016 members of the CFMEU have been taking protected industrial action. That industrial action is described in uncontested evidence of Mr Scales (CFMEU Lodge President) as sustained and ongoing. Mr Scales states that industrial action commenced on 19 August 2016 with CFMEU members taking part in a four hour stoppage and thereafter on almost every day in the period from 20 August 2016 the CFMEU and its members have been organising and participating in stoppages of work by particular crews for the duration of a shift. As at 7 November 2016 when Mr Scales made a statement for these proceedings, the CFMEU had notified Capcoal of continuing protected industrial action in the form of shift length stoppages by particular crews.[1]

[12] On 28 September 2016, Mr Gentle, the Acting General Manager and Site Senior Executive for the Mine, corresponded with the District Vice President of the CFMEU, Mr Power, notifying of a proposed change (the Proposal). The Proposal was described as a reduction of capacity through the "parking" of a large piece of excavation equipment, an electric shovel or rope shovel (the Shovel).

[13] There was a series of discussions and exchanges of correspondence about the Proposal. On 4 November 2016, Mr Gentle wrote to Mr Scales informing him that a decision had been made to adopt the Proposal with some modification and confirming that there would be a reduction of 83 positions across the site.[2] On 7 November 2016, Mr Gentle wrote to employees referring to an earlier letter of 4 November 2016 informing them of the decision to permanently park up the Shovel, and notifying them that 83 positions at the Mine would be made redundant.[3] A further letter was sent to Mr Scales on 4 November 2016 containing information in relation to assessment criteria for selecting employees for redundancy and attaching a slide presentation proposed to be utilised for the purposes of briefing employees.[4]

LEGISLATION

[14] Legislative provisions in relation to bargaining orders are found in Sub-division A of Part 2-4, Division 8 of the Act. The relevant provisions are in the following terms:

Subdivision A—Bargaining orders

228 Bargaining representatives must meet the good faith bargaining requirements

(1) The following are the ***good faith bargaining requirements*** that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

(2) The good faith bargaining requirements do not require:

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

229 Applications for bargaining orders

Persons who may apply for a bargaining order

(1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for an order (a ***bargaining order***) under section 230 in relation to the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

Multi-enterprise agreements

(2) An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement.

Timing of applications

(3) The application may only be made at whichever of the following times applies:

(a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:

(i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or

(ii) after an employer that will be covered by the proposed enterprise agreement has requested under subsection 181(1) that employees approve the agreement, but before the agreement is so approved;

(b) otherwise—at any time.

Note: An employer cannot request employees to approve the agreement under subsection 181(1) until 21 days after the last notice of employee representational rights is given.

Prerequisites for making an application

(4) The bargaining representative may only apply for the bargaining order if the bargaining representative:

(a) has concerns that:

(i) one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

(ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

(b) has given a written notice setting out those concerns to the relevant bargaining representatives; and

(c) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and

(d) considers that the relevant bargaining representatives have not responded appropriately to those concerns.

Non-compliance with notice requirements may be permitted

(5) The FWC may consider the application even if it does not comply with paragraph (4)(b) or (c) if the FWC is satisfied that it is appropriate in all the circumstances to do so.

230 When the FWC may make a bargaining order

Bargaining orders

(1) The FWC may make a bargaining order under this section in relation to a proposed enterprise agreement if:

(a) an application for the order has been made; and

(b) the requirements of this section are met in relation to the agreement; and

(c) the FWC is satisfied that it is reasonable in all the circumstances to make the order.

Note: See also section 255A (limitations relating to greenfields agreements).

Agreement to bargain or certain instruments in operation

(2) The FWC must be satisfied in all cases that one of the following applies:

(a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;

(b) a majority support determination in relation to the agreement is in operation;

(c) a scope order in relation to the agreement is in operation;

(d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

Good faith bargaining requirements not met

(3) The FWC must in all cases be satisfied:

(a) that:

(i) one or more of the relevant bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

(ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

(b) that the applicant has complied with the requirements of subsection 229(4) (which deals with notifying relevant bargaining representatives of concerns), unless subsection 229(5) permitted the applicant to make the application without complying with those requirements.

Bargaining order must be in accordance with section 231

(4) The bargaining order must be in accordance with section 231 (which deals with what a bargaining order must specify).

231 What a bargaining order must specify

(1) A bargaining order in relation to a proposed enterprise agreement must specify all or any of the following:

(a) the actions to be taken by, and requirements imposed upon, the bargaining representatives for the agreement, for the purpose of ensuring that they meet the good faith bargaining requirements;

(b) requirements imposed upon those bargaining representatives not to take action that would constitute capricious or unfair conduct that undermines freedom of association or collective bargaining;

(c) the actions to be taken by those bargaining representatives to deal with the effects of such capricious or unfair conduct;

(d) such matters, actions or requirements as the FWC considers appropriate, taking into account subparagraph 230(3)(a)(ii) (which deals with multiple bargaining representatives), for the purpose of promoting the efficient or fair conduct of bargaining for the agreement.

(2) The kinds of bargaining orders that the FWC may make in relation to a proposed enterprise agreement include the following:

(a) an order excluding a bargaining representative for the agreement from bargaining;

(b) an order requiring some or all of the bargaining representatives of the employees who will be covered by the agreement to meet and appoint one of the bargaining representatives to represent the bargaining representatives in bargaining;

(c) an order that an employer not terminate the employment of an employee, if the termination would constitute, or relate to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining);

(d) an order to reinstate an employee whose employment has been terminated if the termination constitutes, or relates to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining).

(3) The regulations may:

(a) specify the factors the FWC may or must take into account in deciding whether or not to make a bargaining order for reinstatement of an employee; and

(b) provide for the FWC to take action and make orders in connection with, and to deal with matters relating to, a bargaining order of that kind.

232 Operation of a bargaining order

A bargaining order in relation to a proposed enterprise agreement:

(a) comes into operation on the day on which it is made; and

(b) ceases to be in operation at the earliest of the following:

(i) if the order is revoked—the time specified in the instrument of revocation;

(ii) when the agreement is approved by the FWC;

(iii) when a workplace determination that covers the employees that would have been covered by the agreement comes into operation;

(iv) when the bargaining representatives for the agreement agree that bargaining has ceased.

Note: See also section 255A (limitations relating to greenfields agreements).

233 Contravening a bargaining order

A person to whom a bargaining order applies must not contravene a term of the order.

Note: This section is a civil remedy provision (see Part 4-1).

THE CFMEU CASE

[15] The Form F32 Application for a bargaining order filed by the CFMEU, states that on 28 September 2016 Capcoal advised the CFMEU and the workforce that it was considering a proposal to make 90 roles redundant (the Proposal). On 4 November 2016 Capcoal informed the CFMEU and the workforce that consultation in relation to the proposal was complete and that it had decided to implement the change by making 83 roles redundant. Capcoal also advised that further consultation would occur pursuant to the Trades Agreement and s. 531 of the Act, before affected employees would be notified.

- Capcoal initially cited an "unplanned delay" as the reason for the proposal and until correspondence on 21 October 2016 Capcoal refused to provide an explanation of the reasons that had caused an "unplanned delay" and consistently rejected requests from Union representatives to provide an explanation asserting that the reason was "irrelevant";
- It was not until 21 October 2016 that Capcoal explained that there was "insufficient personnel to adequately man and operate the truck and shovel fleet" and that it had formed this view in September 2016 approximately one month after the protected industrial action by CFMEU members commenced;
- Capcoal's conduct in proposing redundancies is inherently irreconcilable with its belated explanation that such redundancies are required as a result of there being an insufficient number of employees;
- Capcoal made about 80 employees redundant in late October or early November 2015;
- The 2015 redundancies were effected by way of voluntary redundancy in contrast to the process Capcoal is adopting in the present case where selection criteria to be used by Capcoal are almost entirely subjective and place considerable importance on behavioural and attitudinal criteria;
- There are a significant number of embedded contractors and labour hire employees working in production and maintenance roles at the Mine and notwithstanding Capcoal's assertion that contractors and labour hire employees are engaged to manage peaks and troughs, Capcoal is proposing to apply selection criteria to both permanent employees and contractors/labour hire employees and it is only when all relevant considerations are determined to be equal between these types of employees that preference would be given to permanent employees;
- Importantly, this process and consideration is to be extended to 30-40 contractors and labour hire employees who have only started working at the mine in the past few months;
- The increase in contractors and labour hire employees – who are currently being recruited for ongoing work and offered an immediate start – is at odds with Capcoal's justification for the redundancies, namely that the parking up of equipment has meant that the mine requires less labour.

[16] The CFMEU asserts that these matters demonstrate that the Proposal is motivated and/or being conducted in a manner in response to the bargaining position and/or the protected industrial action being taken by the CFMEU and its members. For that reason, the CFMEU asserts that the conduct of Capcoal in advancing the Proposal is capricious or unfair conduct that undermines freedom of association or collective bargaining. According to the CFMEU, it follows that Capcoal has not been meeting and is not meeting, the good faith bargaining requirements if s. 228(1)(e) of the Act.

[17] The CFMEU case as articulated in its written and oral submissions, can be summarised as follows. The termination of the employment of any CFMEU member would constitute or relate to a failure by Capcoal to meet the good faith bargaining requirement referred to in s. 228(1)(e) of the Act:

- failing to refrain from capricious conduct that undermines freedom of association or collective bargaining; or
- failing to refrain from unfair conduct that undermines freedom of association or collective bargaining.

[18] On a proper construction and application of s. 231(2)(c) of the Act, the FWC should be satisfied that – even on the evidentiary case presented by Capcoal – the proposed terminations constitute or relate to, a failure by Capcoal to meet the good faith bargaining requirement referred to in s. 228(1)(e) arising from any one or combination of the following alternatives:

1. Capcoal's unfair conduct – ie. conduct that is not fair, biased or partial, not just or equitable that undermines freedom of association or collective bargaining. Satisfaction of this alternative is achieved purely by objective considerations and does not require the Commission to be satisfied about any corporate state of mind or mental element or motive.
2. Capcoal's unfair conduct – ie. conduct marked by deceptive dishonest practices undermining freedom of association or collective bargaining. Satisfaction of this alternative does not appear to involve subjective considerations and might require the Commission to be satisfied about corporate state of mind, mental element or motive as provided in s. 793 of the Act.
3. Capricious conduct – ie. conduct subject to, led by or indicative of sudden change of mind without apparent or adequate motive or a whim that undermines freedom of association or collective bargaining. Satisfaction of this alternative also does not appear to involve subjective considerations and might require the Commission to be satisfied about the corporate state of mind or mental element or motive.

[19] The CFMEU refers to the principles of statutory construction, the purpose of the Act and extrinsic materials as establishing a number of relevant principles. The Objects of the Act in s. 3(e) and (f); ss. 334 and 336 in Part 3-1 General Workplace Protections and s. 171 Objects of Part 2-4 Enterprise agreements respectively refer to:

- Recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination (s. 3(e));
- 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 (s. 3(f));
- Provisions relating to protected industrial action (s. 347(f), s. 408 and s. 409);
- Providing a simple, flexible and fair framework that enables collective bargaining in good faith at enterprise level and enabling the Commission to facilitate good faith bargaining including through making bargaining orders (s. 171).

[20] The CFMEU also referred to extrinsic materials in the form of the *Explanatory Memorandum to the Fair Work Bill 2008* to demonstrate that the Legislature recognised that industrial action can have a negative impact, particularly in terms of productivity but that bargaining participants should have the right to take protected industrial action and an employer should have the right to provide a proportionate response. In relation to good faith bargaining, the CFMEU referred to item 951 of the *Explanatory Memorandum* as follows:

> "951. The good faith bargaining requirements are generally self-explanatory. The last requirement, 'refraining from capricious or unfair conduct…' is intended to cover a broad range of conduct. For example, conduct may be capricious or unfair conduct if an employer:
>
> - Fails to recognise a bargaining representative;
> - Does not permit an employee who is a bargaining representative to attend meetings or discuss matters relating to the terms of the proposed agreement with fellow employees;
> - **Dismisses or engages in detrimental conduct towards an employee because the employee** is a bargaining representative or **is participating in bargaining**; or
> - Prevents an employee from appointing his or her own representative."

[21] The CFMEU submits that whether an objective or subjective approach is applied, Capcoal's response has not been proportionate to the recognised right of bargaining participants to take protected industrial action, nor to the negative impact on the mine's productivity. The CFMEU also points to the decision of a Full Bench of the Commission in *CFMEU v Woodside Burrup and another*[5] where it was observed that effective industrial action will almost certainly always cause damage to an employer's business and disrupt the business operations of the employer.

[22] In relation to alternative one and in support of its proposed construction of the good faith bargaining provisions the CFMEU referred to s. 231(2)(c) of the Act with respect to orders that the Commission may make in relation to breaches of the good faith bargaining requirement in s. 228(1)(e). In particular the CFMEU points to the fact that s. 231(2)(c) and (d) provide that the Commission may make orders that the employer not terminate or reinstate an employee if the termination would or does constitute or relate to a failure of a bargaining representative to meet a good faith bargaining requirement in s. 228(1)(e). In particular the CFMEU points to the use of the term "relates to" and contends that the principles of statutory construction concerning such expressions have a broad and ambulatory import.[6]

[23] The ordinary and grammatical meanings of the words appearing in the relevant provisions, as defined in the Macquarie Dictionary are as follows:

> *Constitute* – to compose; form.
>
> *Unfair* – not fair, biased or partial, not just or equitable, unjust;
>
> *Conduct* – Personal behaviour, way of acting; Direction or management, execution;
>
> *Undermined, undermining* – To effect injuriously or weaken by secret or underhand means; to weaken insidiously; destroy gradually.

[24] In relation to events supporting the submission that Capcoal's conduct was unfair and undermined freedom of association and collective bargaining on the basis set out as alternative one, the CFMEU referred to evidence before the Commission which can be summarised as follows. Following redundancies in October – November 2015 which were effected by offering voluntary redundancy (which was oversubscribed), Capcoal increased the number of contractors and labour hire employees and offered overtime.[7]

[25] Mr Heaton's evidence is that a business plan whereby the continued use of the shovel for pre-stripping was approved as the best financial option for the mine on the basis that it would deliver the highest cash flow over three years, was concluded and approved in or about July 2010.[8] Sustained and ongoing protected industrial action has been taken by CFMEU members since 19 August 2016,[9] with almost all of the Shovel operators being CFMEU members.[10] It is acknowledged by Mr Heaton that the industrial action had a negative impact on the productivity of the mine due to a lack of available manpower.[11] On 15 September 2016, Mr Heaton sent a note addressed to all staff (but according to Mr Heaton's oral evidence sent only to those attending for work as per their normal rosters), which stated that:

> *"The strike is having an impact as you would expect and the mine plan (and as a result, potentially jobs" is being put at risk by decisions taken by the CFMEU. However, the flexibility and co-operation being demonstrated by all of you means the impact is being reduced and we are continuing to operate, produce coal and meet our obligations to customers."*[12]

[26] This note was sent under cover of an email from Ms Oppermann stating that: "…we have been able to operate at a reduced capacity, despite the continued business interruptions from Protected Industrial Action."[13] The CFMEU also pointed to Mr Heaton's evidence that on 23 September during a telephone call with Mr Gentle and others, he was made aware of an option in relation to permanently parking the Shovel and ancillary requirements (trucks, graders and watercarts) and restructuring the mine to identify surplus positions for removal, termed "MOP9A".[14]

[27] On 28 September 2016, Ms Oppermann advised Mr Scales during a telephone conversation that Capcoal was considering making 90 positions redundant as a result of parking up the Shovel and an "unplanned delay". Thereafter, there was a series of communications in which Capcoal's management refused to provide an explanation about the unplanned delay and denied that the unplanned delay or the parking of shovel had anything to do with protected industrial action as follows:

- 28 September 2016 letter from Mr Gentle to the CFMEU notifying of the Proposal and attaching a letter to employees advising that the Company has reviewed its mine plan and subject to consultation is proposing to reduce production through parking the shovel and ancillary equipment and attaching a Q&A which contained the following:

  "Q. Are you doing this because of the protected industrial action that the CFMEU has been taking?

  A. No. Capcoal has reviewed the current mine plan because of an unplanned delay. From this review, a proposal to park equipment is being considered.

> The reasons for the unplanned delay are not relevant to our considerations regarding the option that might be implemented in response to this delay."[15]

- Consultation meetings on 30 September[16], 4 October[17] and 10 October 2016[18] at which Mr Gentle said that the cause of the unplanned delay was was "irrelevant";
- 4 October 2016 consultation meeting at which Mr Gentle failed to explain the "unplanned delay" or the cause and variously stated that "change to mine sequencing is due to a delay in the mine plan" and that the reason for the delay was "irrelevant";
- Correspondence from the CFMEU to Mr Gentle on 13, 14, 25 October and 1 November[19] seeking explanation for the unplanned delay;
- Correspondence from Mr Gentle to the CFMEU and other Unions on 21 October 2016 asserting in relation to the unplanned delay that:

"Capcoal maintains that the reason for the unplanned delay is irrelevant. However, it appears to have become a distraction from a proper focus on the real subjects for consultation.

The explanation is that in September 2016 it became apparent that it would be necessary to adjust the then existing mine plan in order to meet the requisite coal production levels at a cost that was in line with our commercial imperatives.

This is because there were (and, as it happens, are still currently) insufficient personnel available to adequately man and operate the truck and shovel fleet.

The proposal is therefore that the mine adopt a new mine plan, features of which are, as advised, that there will be less work for the trucks to perform and next to no work for the shovel to perform in the foreseeable future. The new mine plan is based on the efficient and cost effective operation of the mine."[20]

- Further correspondence from Mr Gentle to the CFMEU and other unions on 28 October 2016 stating in response to a request for an explanation of the unplanned delay that:

"This aspect of your letter is a convincing demonstration, if one be needed, of the fact that exploration of the reason for the 'unplanned delay' is a distraction from a proper focus on the real subjects of consultation.

Obviously you are angling for something that can be taken to be an admission that the protected industrial action taken by members of the CFMEU is an operative and substantial factor for the Proposal, seemingly with a view to using it for purposes that have go nothing to do with consultation.

Let me say now, and unequivocally, so there can be no misconception, that the protected industrial action is not a factor in the Proposal and, if a decision is ultimately taken to implement the Proposal, it will not be a factor in that decision.

As at about July 2016, the business case was marginally in favour of continuing the use of the P&H4100 Shovel and its supporting fleet, on the assumption that the shovel stayed on schedule according to the mine plan.

However, the shovel did not stay on schedule. As I have already told you, in September 2016 it became apparent that it would be necessary to adjust the then existing mine plan in order to meet the requisite coal production levels at a cost that was in line with our commercial imperatives, and that this was because there were insufficient personnel available to adequately man and operate the truck and shovel fleet.

At that point it became clear that the Proposal, which involved parking the P&H4100 Shovel and its supporting fleet indefinitely, as opposed to resuming their use within the foreseeable future, offered significant commercial advantages to Capcoal. By way of illustration, as at October 2016, Capcoal's forecasts showed that to do so would give rise to an improvement in Capcoal's free cash flow over the next three years in the order of $40 million.

These commercial advantages were, and remain, the operative reason for the Proposal."[21]

[28] The CFMEU also referred to Mr Heaton's evidence about meeting with Mr Gentle and being given a confidential briefing note dated 2 November 2016. The briefing note states that, as at about July 2016, the business case was marginally in favour of continuing the use of the P&H4100 Shovel and its supporting fleet on the assumption that the shovel stayed on schedule according to the mine plan at the time. The briefing note goes on to state that the Shovel had not stayed on schedule because there were insufficient personnel available to adequately man and operate the truck and shovel fleet, giving rise to the unplanned delay. The briefing note also refers to proposals from employees including the removal of labour hire workers and contractors prior to redundancies and that these have not been accepted. The briefing note further refers to suggestions for voluntary redundancy and last on first off as criteria for reducing employee numbers and the subjectivity of selection criteria. These are said to be "*extraneous to the proposal*." Further, the briefing note contains the following statement:

"A number of allegations have been made against Capcoal during the consultation process, including, for example, allegations of unlawful adverse action and failure to consult. I regarded these issues as extraneous to the Proposal."[22]

[29] Reference was also made to Mr Heaton's witness statement and various admissions to the effect that the circumstance described as an unplanned delay was a "delay" because it entailed a delay in the planned work schedule that was predicated on a continued use of the Shovel and "unplanned" because industrial action had not been foreseen and the proposal for the 2017-2019 business plan assumed that there would be no delay in the scheduled work this year. Mr Heaton also said that he sent the memo dated 15 September 2016[23] to employees in the hope that they would understand the potential impact of the unplanned work stoppages and come back to work so that the mine could get the shovel back up and operating.[24]

[30] Another such statement was said to be in paragraphs 119 and 189 of Mr Heaton's witness statement as follows:

"119. While I appreciate, acknowledge and respect the right of employees to engage in protected industrial action, I was seriously concerned about the effect it was having on the viability of what was then proposed to be the business plan for the Mine and, in turn, the potential impact that might have on jobs at the mine…

> *189. Of course, I knew that one of the circumstances that gave rise to the commercial advantages of implementing the proposal was that we had not used the Shovel for such a period of time the we had reached and then passed the point of 'no return', that one of the reasons why we had to stop using the Shovel was that we did not have enough labour to do so while continuing to extract enough coal (see paragraph 107) and that one of the reasons why we did not enough labour was that some employees were taking protected industrial action."*[25]

[31] The CFMEU pointed to Mr Heaton's evidence that he obtained legal advice on 2 November 2016. In relation to this, Mr Heaton said that at his request he received legal advice as to the considerations that he could not take into account when making a decision on whether or not the Proposal should be adopted or implemented. Mr Heaton said that he asked for this advice because there were some reasons for the decisions that he might have to make that were unlawful and if he decided to adopt the Proposal it was likely that his reasons would be scrutinised including in proceedings in Courts or the Commission. Mr Heaton also said that he wanted to ensure that he had a clear idea of his obligations under law – and specifically what he could or could not lawfully consider – before he was required to make any decision as to the proposal. Mr Heaton tendered the legal advice received by him from Ashurst.[26]

[32] The CFMEU also referred to a letter dated 4 November 2016 sent by Mr Gentle to Mr Scales confirming that a decision had been made to permanently park up the Shovel resulting in 83 positions being made redundant. The letter and an attached Question and Answer document indicates that redundancies will not be effected by a voluntary process and will be via selection. In response to a question about why Capcoal is implementing redundancies when there are still contractors on site, the Question and Answer document states that the reduction in positions will impact on permanent employees, labour hire workers and contractors and that everyone will be rated according to the same criteria, and that where an employee and a labour hire or contract worker is rated equally and all other things are equal, the employee will be given preference in retention. The Question and Answer document also states in response to a question about whether bargaining will continue in relation to replacement agreements that those negotiations have continued during consultation about the Proposal and will continue, as the decision is a separate and distinct process to enterprise bargaining.[27]

[33] Further, Mr Scales' evidence about a consultation meeting held on 8 November 2016 at which Mr Scales asserts that Ms Oppermann would not discuss CFMEU questions about the basis on which Capcoal asserted that the change in the Mine plan and the protected industrial action were not related. Further Ms Oppermann refused to provide current or proposed Mine plans and organisational charts. Mr Scales also said that Company representatives stated that the Shovel would "*be utilised if needed but it's not scheduled to be used for the period 2016-2020. It's not in the mine plan.*"[28] Mr Scales also gave evidence that at the meeting he asked whether in selecting employees for redundancy on the basis of criteria such as quality of work, he asked how this could be done when a labour hire employee who had worked for three weeks was being assessed against an employee such as Mr Scales who had been taking protected industrial action for the same three week period. According to Mr Scales, no response was provided to his question.[29]

[34] It was also submitted that Mr Gentle contributed to the making of the decision and with Mr Heaton, was an essential part of the process leading to the ultimate decision. In this regard reference was made to the judgement of Justice Gray in *National Tertiary Education Union v Royal Melbourne Institute of Technology*[30] where his Honour referred to authorities dealing with circumstances in which a decision is made by a committee or other deliberative body. In that case, Justice Gray was dealing with an adverse action claim and considering the task of the Court in making a finding as to the minds of which natural person or persons constitute the directing mind and will of a corporate body for the purpose of determining the state of mind of the corporate body. His Honour observed that a division of function amongst officers of a corporation will not relieve the corporation of responsibility for different aspects of the one transaction and that states of mind other than knowledge, such as reason or intent.[31] The CFMEU submitted that it was significant that Capcoal did not call Mr Gentle as a witness in the present case, notwithstanding that (according to responses provided by Mr Heaton in cross-examination) Mr Gentle was at site on that day and there was evidence that he was not available to give evidence.

[35] In relation to alternative 2 – the contention that Capcoal's conduct is unfair on the basis that it is marked by deceptive and dishonest practices undermining freedom of association and collective bargaining, the CFMEU accepts that satisfaction of the Commission would appear to involve subjective considerations and might require the Commission to be satisfied about the corporate state of mind or mental element or motive. In this regard, reference was made to s. 793 of the Act in relation to conduct of a body corporate.

[36] In support of the Commission being satisfied of alternative 2, the CFMEU pointed to the evidence of the chronology of events set out above. The CFMEU submitted that the proposed redundancies are motivated by and/or being conducted for reasons including the bargaining position of the CFMEU and its members and/or the protected industrial action taken by the CFMEU and its members. In this regard, the CFMEU relies on Mr Gentle conducting himself in a manner consistent with guilt by virtue of his dishonest responses to the CFMEU and employees regarding the "unexplained delay".

[37] In this regard, reference was made to the judgement of Justice Fryberg in *Lightning Bolt Co Pty Ltd v Skinner &* Anor.[32] In that case, his Honour was considering an appeal from a decision of the Anti-Discrimination Tribunal which had found that the Company had contravened relevant legislation by dismissing two employees for the substantial reason of their age. The Company argued that a more probable and innocent explanation was available on the evidence, and that based on the judgement of Justice Fullagher in *Department of Health v Aramugam* if all that is proved, by inference or otherwise is less than all of the total elements required for a complaint to succeed, then neither a total absence of explanation or non-acceptance of an explanation can, by itself, provide an element of the proof required. Justice Fryberg noted that Justice Fullagher was not in that case dealing with circumstances where rejection of the defendant's explanation involved a finding that the defendant had lied or conducted himself in such a manner as to indicate a consciousness of guilt.[33]

[38] In dismissing the appeal, Justice Fryberg held that the explanations for the dismissals provided by the Company's management were dishonest and that once those dishonest explanations were rejected the Tribunal could draw available inferences that the reason for the dismissals was the age of the employees concerned, with greater certainty, and that the Tribunal had done so.[34]

[39] In support of the submission in relation to alternative 2, the CFMEU also pointed to the evidence of Mr Scales in relation to contractors. That evidence can be summarised as follows. Since the commencement of industrial action, Capcoal has increased the number of contractors and labour hire employees working at the Mine. It is Mr Scales' understanding that between 30 – 40 contractors and labour hire employees have been engaged to work on a regular and ongoing basis at the mine since the time when protected industrial action commenced. In support of this assertion Mr Scales referred to his own knowledge and also tendered an email to a CFMEU member from a labour hire contractor, offering ongoing work as an operator of an excavator on a 5/2 Monday to Friday rotating roster comprising 8.5 hour shifts.[35] According to Mr Scales, given the redundancy process described by Capcoal, it may be that sub-contractor/labour hire employees who have recently started work at the Mine are retained while long serving employees are made redundant.

[40] Approximately one hour after being notified by Capcoal that 83 positions were to be made redundant, Mr Scales was notified that another labour hire company was advertising for production operators and CHPP operators for a coal mining project in the Bowen Basin near Middlemount. The advertisements offer ongoing work and an immediate start. The production operator roles are offered on the basis of a 5/2 roster. The German Creek Mine is the only operation near Middlemount that uses such a roster for production operators. Mr Scales tendered the advertisements and said that they were advertised on the contractor's website and on seek.com and that he accessed the advertisements on seek.com on 7 November 2016.[36] Further, Mr Scales asserted that another contracting company performing rehabilitation work around the mining lease is currently or has just finished training 40 workers to undertake production roles at the Mine, such as operating dump trucks and that these workers will replace those the Company is currently proposing to make redundant.

[41] Mr Scales also said that during consultation about the redundancies, Capcoal did not say that the Shovel and trucks are to be parked up permanently and not used again. Rather, Company representatives stated that the equipment would be used again as required. Mr Scales asserts that if the redundancies were implemented it would be pretty straightforward for the Company to revisit the mine plan and increase production capacity.

[42] Mr Scales said that over the time he has worked at German Creek, Capcoal has increased the number of contractors and labour hire employees working on a regular and ongoing basis in production and maintenance. Mr Scales summarises the contractors in the production roles below as follows:

1. Drill and Blast Department – 30 contractors, 7 labour hire, 1 permanent employee.
2. Prestrip crews (3 crews) – each crew has "about 20 labour hire" employees and 34 permanent employees. In total there are "about 55 to 65 labour hire and 102 permanent employees" in prestrip.
3. Dragline crews (4 crews) – 6 permanent on each crew. 8 labour hire and 24 permanent on the draglines in total.
4. CHPP (4 crews) – 11 permanent employees on each crews. 10 labour hire employees and 44 permanent employees in total.
5. Blast Department – said to be "completely outsourced" although it is unclear how this relates to the numbers of labour hire employees in category 1 above.

[43] Labour hire workers in these departments are "embedded"; they work the same rosters and in the same crews as permanent employees doing the "exact same work".

[44] Mr Scales also tendered an article from the *Australian Coal Report* issue 673, dealing with recent events at the Mine. That article was written by Ms Gomati Jagadeesan and states:

> *"Even without the geological issues, production at Anglo's Capcoal complex had been patchy. The complex which includes two open cut mines – Lake Lindsay and Oak Park – has seen strident industrial action for the last two months as both the company and a key union remained at loggerheads over an enterprise agreement.*
>
> *Around 140 members of the Construction Forestry Mining and Energy Union (CFMEU), working in the open cut mine, are still on strike. The striking workers are also understood to include excavator operators and those working at the coal preparation and handling plant (CHPP) and as a result CHPP utilisation is sub-optimal, and overburden removal has been impacted.*
>
> *A second source close to Anglo said given the 'unplanned delays the Company was reviewing the mine operating plan. The review of the mine plan is understood to involve 'parking up a whole pre-strip circuit' which essentially will lead to a scaling back output at the open cut operations and result in around 83 forced redundancies.*
>
> *'There are several causes of the unplanned delay. The issues at Grasstree and the protected strike action have come into the equation' the source said, adding that 'Anglo has been engaged in consultation with the workforce for three weeks now' to alter the mining operations.*
>
> *Sources say Anglo idling the pre-strip circuit achieves two key outcomes – importantly it is able to get rid of half of the striking unionised workforce and secondly it will leave some more coal resources underground – a strategy that might be useful as the Capcoal operation is prepped for sale."*[37]

[45] An attendance notice and notice to produce was issued to Ms Jagadeesan by the Commission at the request of the CFMEU. Ms Jagadeesen objected to the notice on the grounds of journalist privilege and was represented at the hearing by Counsel. Upon Counsel advising the Commission that the sources mentioned in the article were external to Capcoal and that Ms Jagadeesen had promised those sources that their identities would be kept confidential, the application was not pressed and the notices were set aside.

[46] In response to Mr Heaton's evidence, Mr Scales produced a third witness statement in which he maintained that the labour hire employees performing remediation work would commence operating an EX2500 mining excavator on a 7 day 10 hour roster after the redundancies were implemented. That work is currently performed by Capcoal employees and some labour hire employees working a 5 day roster. Mr Scales also said that he was not aware of the Company undertaking an assessment of the skills of permanent and labour hire/contract employees prior to the redundancies in 2015 and that the Company did not provide a copy of any selection criteria that it was proposing to use, or invite feedback about criteria at that time. In relation to employees who volunteered for redundancy in 2015 and were not accepted, it is Mr Scales' understanding that such employees were not advised of the reason for their application being rejected.[38] In oral evidence, Mr Scales maintained that at no time during the 2015 redundancies was the CFMEU provided with a table setting out criteria for selection for redundancy as has occurred in the present case.

[47] In relation to alternative 3, the CFMEU also accepted that satisfaction by the Commission does appear to involve subjective considerations and may require the Commission to be satisfied about the corporate state of mind or mental element. The CFMEU submits that the evidence establishes that Capcoal did not have an adequate motive to make the disproportionate change arising from any negative productivity impact. The conduct of Capcoal is capricious conduct in that it is subject to, led by, or indicative of a sudden change of mind without apparent or adequate motive or a whim that undermines freedom of association or collective bargaining.

[48] In oral submissions, Mr Docking for the CFMEU said that Capcoal's case is effectively that it should have managerial prerogative unfettered by anything in the Act and be able to manage its business as it pleases. In relation to the objects of the Act, the Commission should promote the clear purpose that, when undertaking industrial action, it is accepted that such action should be able to be effective and that industrial action may well harm an employer's business. Putting it bluntly, according to the CFMEU's submission, why else is protected industrial action taken other than to put appropriate pressure during that period of action in support of achieving bargaining outcomes? In response to a proposition that the employer is not obliged to do nothing in such circumstances, Mr Docking submitted that the employer could have applied to the Commission to suspend or terminate the industrial action under s. 423 of the Act on the basis of significant economic harm and the Act provides "remedies or the armoury of responses that were available." These include response action which can be taken by employers to industrial action taken by employees.

[49] The CFMEU did not contend that an employer is not permitted to change its operations in any way while industrial action is occurring. Rather, the CFMEU contends that on the facts and in the circumstances of the present case, the proposal and the announcement that it is to be implemented, falls with the terms unfair or capricious conduct. The first alternative is an objective test. Mr Heaton's evidence appears to be directed to a general protections application where the question is: what are the reason or reasons? On this basis, the Commission has to determine causation or if there is a cause or a link. A practical common sense way to approach the question is to consider whether a matter has a causal link in a significant or substantial way. In this regard, reference was made to the judgement of Justice Perram in *CFMEU v Endeavour Coal*[39] who observed that:

> *"...there is a factual distinction between factoring something into one's consideration of a matter and making a decision about the matter itself. To give an example, in reaching the conclusions I have reached on this appeal, I have taken the CFMEU's submissions into account and they have formed an important element in my decision making processes. However, as will be apparent, the fact that I have had regard to them does not entail that they may therefore be described as constituting part of my subjective reasons for decision. Of course, if by reason one means 'cause' then one gets a different result. On that view of things, Mr McDermott's prior record was causally connected to the decision to transfer him to a different shift. That approach to the reason in question is prevented however, by CFMEU v BHP. The inquiry thrown up by s. 340 is not one concerned with causation but, rather, the subjective reasons for the actions of the decision maker."*

[50] The CFMEU relied on this judgement on the basis that the issue for determination in the present matter is whether something is causally connected. The protected industrial action

is causally connected with the decision to park up the Shovel and ancillary equipment and to terminate the employment of 83 employees. The CFMEU submits that the approach the Commission should take in determining whether the good faith bargaining requirements have been breached is to determine causation rather than the reasons advanced by witnesses for Capcoal.

[51] It is not open to take a general protections approach as Mr Heaton attempted to do, and state that these were not his subjective reasons. In support of the need to consider causation, reference was also made to the judgement of Justice Bromberg in *Endeavour Coal* who held that even in a case which requires examination of the reasons of a decision maker, it is not a test of whether something is objective or subjective. In that case, Justice Bromberg observed that the requisite connection is between reason and protected activity and not merely adverse action and protected activity. A nexus between adverse action and protected activity may be instructive as to whether a nexus between reason and protected activity existed. But because adverse action may be happenstance or coincidental with protected activity, the fact of that connection can never be determinative. His Honour went on in *Endeavour to state:*

> *"The focus is upon reason and its connection to protected activity…The questions that then arise are these: Why was the adverse action taken? By reference to the actual reasons of the decision maker, was it because of or including because of the protected activity.*
>
> *Whether a connection between reason and protected activity is sufficient to constitute a substantial and operative reason is a question of characterisation to be determined by reference to the evidence. To illustrate, if a decision maker said: 'I took adverse action because the employee exercised a workplace right', there would be a straightforward and unambiguous connection between reason and the protected activity, and the conclusion that the latter was a substantial and operative reason for the former would be difficult to resist. But that is not the only kind of 'connection' that would suffice. If the decision-maker said, 'I took adverse action because I wanted my employee to do X, but she was not there to X because she was on annual leave, and that was inconvenient for me' it would be open to the finder of fact to conclude that sufficient connection existed between the reason advanced and the protected activity such that the protected activity could properly be said to be a substantial and operative reason for the adverse action."*[40]

[52] In its initial application the CFMEU made a number of assertions about other matters said to constitute capricious and unfair conduct that undermines collective bargaining and freedom of association. Those matters, which were not pressed in the CFMEU's written or oral submissions can broadly be summarised as:

- The decision to implement the restructuring by way of forced redundancies in circumstances where a restructuring in late 2015 was implemented by way of calling for volunteers and where a significant number of volunteers had been rejected;
- The addition of factors to selection criteria which had previously been used to select employees for redundancy;
- The decision to rank employees with labour hire employees and contractors including those who had been specifically engaged after the commencement of protected industrial action to perform work which would have been performed by employees taking protected industrial action.

CAPCOAL'S CASE

[53] Capcoal submits that the question for determination is: can the CFMEU rely upon the coincidence that enterprise bargaining is taking place (and has taken place for more than two years) to prevent Capcoal making any significant change to the way it operates the Mine?

[54] Capcoal further submits that subsection 231(2)(c) specifically empowers the Commission to make an order that an employer not terminate the employment of an employee where that termination would constitute, or relate to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in s.228(1)(e). However, contrary to the submission of the CFMEU, the use of 'relate to' in that subsection does not obviate the need for the Commission to be first satisfied that Capcoal has not met, or is not meeting, the good faith bargaining requirements. The Commission must be satisfied that Capcoal has not met, or is not meeting, the good faith bargaining requirements before considering whether any order could be made at all: see s.230(3)(a)(i). Consideration of s.231(2)(c) only arises once the Commission is satisfied of that necessary jurisdictional prerequisite.

[55] On a proper construction of s.231(2)(c), therefore, the words 'constitute, or relate to' are words designed to limit the circumstances in which the Commission may make a bargaining order preventing an employer from terminating an employee in circumstances where that termination would itself constitute, or otherwise relate to, a breach of s.228(1)(e). An application for a bargaining order is not, as the CFMEU's submissions appear to treat it, a general protections claim in another form.

[56] Demonstrating a breach of s.228(1)(e) of the Act requires that the Commission be positively satisfied of two distinct but related objective facts.[41]

(a) that the bargaining representative has not refrained from conduct which is 'capricious' or 'unfair' (or, to express the same concept in another way, that the bargaining representative has in fact engaged in conduct which is 'capricious' or 'unfair');[42] *and*

(b) that that conduct undermines either freedom of association or collective bargaining or both. This means that the Commission must be positively satisfied that the relevant bargaining representative's capricious or unfair conduct has caused the proscribed effect.[43]

[57] Allegations that s.228(1)(e) has not been met by a bargaining representative are serious and a proper evidentiary basis for the making of any bargaining order is required.[44] In order to decide whether or not such an allegation is made out the Commission is required to ask whether a reasonable person, on the balance of probabilities, would conclude that the conduct of the relevant bargaining representative was capricious or unfair conduct that undermines freedom of association or collective bargaining.[45] The expression 'refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining' is not to be read as applicable to conduct which is not part of, or connected to, the bargaining process.[46]

[58] The relationship is one of cause or action (capricious or unfair conduct) on the one hand, and effect or reaction (the undermining of freedom of association or collective bargaining) on the other hand. The types of conduct which may constitute unfair or capricious

conduct which undermines freedom of association or collective bargaining is therefore confined to conduct which involves some direct or indirect interference in the enterprise bargaining process. The examples given in the *Explanatory Memorandum to the Fair Work Bill 2008* illustrate this, and include:

- failing to recognise bargaining representatives,
- refusing to permit employees who are bargaining representatives to attend meetings or discuss matters relating to the proposed agreement,
- dismissing or engaging in detrimental conduct towards an employee because the employee is a bargaining representative or is participating in bargaining, or
- preventing an employee appointing their own bargaining representative.

[59] Capcoal submits that in the present case, the evidence demonstrates that the dismissal of any employee will not be because that employee is engaging in bargaining.

[60] Capcoal further submits that conduct is 'capricious' if it is 'unpredictable' or 'irregular'[47] or 'impulsive, fanciful or whimsical'.[48] It may involve a 'sudden change of mind without apparent or adequate motive'.[49] It is conduct which falls short of that in which a person acting reasonably could engage,[50] or conduct engaged in for improper or illogical reasons.[51] The evidence demonstrates that Capcoal's conduct is the product of a considered business decision that was made, and then adopted and implemented, for sound commercial reasons. Conduct of that kind is not capricious. Conduct is "unfair" if it is "not fair, biased or partial; not just or equitable; unjust".[52] In essence, unfair conduct is conduct that falls short of expected standards of "fairness" or "justice". It is an evaluative concept which is hard to define in the abstract. In practice however, it is usually easier to identify which side of the line a particular course of conduct falls on.

[61] The concept of unfairness takes its content from the context in which it is used. What is fair in a given situation depends upon the circumstances.[53] That standard is not prescribed by the Act. However, it must necessarily be understood against the framework for enterprise agreement negotiation which is established by the Act and the broader rules of engagement for industrial disputation, including in relation to enterprise bargaining.[54]

[62] In determining what is 'unfair' therefore, the real question is what standard of conduct is expected in the particular context and, and whether the conduct in question falls short of that standard. The role of the particular actor whose conduct is being assessed is also critical. For an employer's conduct to be 'unfair' it must constitute a significant (in the sense of not being insignificant) departure from the standard of conduct reasonably expected of an employer dealing with industrial associations and their members (freedom of association) or an employer as a participant in collective bargaining.

[63] The relevant context in which the notion of unfairness arises in s.228(1)(e) is collective bargaining and industrial disputation. Industrial disputes are frequently hard fought. Demonstrating that conduct is 'unfair' in such a context is a high threshold, bearing in mind the observation of the Australian Industrial Relations Commission in *CFMEU v Coal & Allied Operations Pty Ltd.*[55]

> *"The adage "all is fair in love and war" is, we think, as much applicable to industrial warfare as to any other type."*[56]

[64] That statement 'points to a tolerance of relative ethical flexibility in the conduct of bargaining periods and protected action'.[57] Similarly, it is not a breach of the good faith bargaining requirements for participants in industrial disputes or enterprise bargaining to act according to their own interests.[58] Conduct that is alleged to be 'capricious' or 'unfair' must be assessed objectively. Simply because one party feels that the conduct is 'unfair' does not necessarily make it so.[59] It is also not enough that the CFMEU opposes the conduct[60] or that the conduct is unilateral and subject to objection.[61] The asserted unfairness or capriciousness of the relevant conduct must be ascertained by reference to the circumstances of the particular case.[62]

[65] Restructures and significant (or major) changes that occur, or upon which decisions are made do not constitute a failure to meet the good faith bargaining requirements in and of themselves, just because they are made while enterprise bargaining or protected industrial action is occurring. The Commission has consistently recognised the right of employers to operate their business by making changes which are well thought out and supported by legitimate commercial justifications, **[63]** and that right is not suspended or lost simply because enterprise bargaining or protected industrial action is under way. Where such decisions are made, the Commission does not seek to stand in the shoes of the owner of the business to evaluate, or second guess, the correctness or otherwise of that decision.[64]

[66] Capcoal further submits that to 'undermine', means 'to affect injuriously or weaken by secret or underhand means' or 'to weaken insidiously; destroy gradually'.[65] It is necessary to show that the alleged conduct in fact injuriously affected, or weakened by secret or underhand means, a person's freedom to join or be represented by an industrial association, or to participate in lawful industrial activities,[66] or the process of collective bargaining.

[67] The Commission must positively be satisfied that freedom of association or collective bargaining are actually being undermined by Capcoal's capricious or unfair conduct. It is not enough that they might or are likely to be undermined. In the present case, the factual matrix as evidenced by the decision maker Mr Heaton, establishes that:

- He decided to adopt the proposal to park the Shovel and implement the restructure because of the significant commercial advantages of the Proposal for the Mine as identified in the Briefing Note provided to him, and for no other reason.[67]
- Two options were modelled in the Briefing Note - Option 9A involving parking the Shovel indefinitely and implementing a restructure and Option 9B involving bringing the Shovel back into operation in April 2017 and not implementing a restructure.[68]
- Option 9A which was adopted would deliver free cash flow of $1 million in 2017 and negative $14 million over three years and would save the business approximately $40 million.[69]
- Option 9B which was not adopted, would deliver free cash flow of negative $30 million in 2017 and negative $54 million over three years.
- Option 9A is consistent with strategic planning and business decisions involving giving greater weight to free cash flow rather than to long term equity given that Anglocoal is about to commence a divestment process for the Mine.[70]
- An earlier decision to continue to operate both the Shovel and the Dragline taken as part of the business planning commenced in July 2016 was premised on the Shovel continuing to operate and be operated as planned notwithstanding that the free cashflow was slightly more unfavourable in the first year.[71]

- Protected industrial action involving approximately 140 employees commenced on about 19 August 2016 and has continued.[72]
- The major excavating equipment on the Mine has experienced significant utilisation reductions as a result of the lack of available manpower and have not been operated to the extent intended during the protected industrial action.
- While the protected industrial action continued, the Mine was put in a position where it necessarily had to prioritise mining coal and uncovering coal with draglines so that it could deliver on committed contracts and protect and maintain cashflow as well as its commercial reputation.[73]
- This meant that, although some Shovel operators attended for work, there were insufficient personnel to operate the Shovel and associated fleet as well as continuing coal mining and coal uncovering.[74]
- In about early September, Mr Heaton was informed that in the foreseeable future there would be a "point of no return" when the Shovel would not be able to stay in front of the draglines and that when this occurred the business plan that had previously been proposed would cease to be viable.[75]
- At the point of no return, there would no longer be sufficient time for the Shovel to pre-strip the next dragline strip and it would be a number of months until it could pre-strip another dragline strip.[76]
- This meant that the Shovel would not be required for the short to medium term and would need to be parked up, at least for a number of months which would in turn impact upon the assumption built into the business plan for 2017-2019.[77]
- This circumstance was what has from time to time been described as an 'unplanned delay' – it was a 'delay' because it entailed a delay in the planned work schedule that was predicated on continued use of the Shovel and 'unplanned' because industrial action had not been foreseen.[78]
- Because of the unplanned delay, in or about mid-September 2016, Mr Heaton directed that an option be analysed involving permanently parking the Shovel, on the basis that analysis of options as part of the original business plan in June/July 2016 provided an outcome that was only marginally in favour of continuing to operate the shovel[79] and Mr Heaton wanted to know whether the relative financial outcomes of the two options had changed.[80]
- Mr Heaton had assumed that the forecasts for bringing back the Shovel at some point in the near future would continue to be more favourable than the forecasts for parking the Shovel, just as it had been in about July 2016 when he was working on the then proposed business plan.[81]
- However, when presented with a document showing the commercial advantages associated with Options 9A (broadly, parking the Shovel and restructuring) and 9B (broadly, bringing the Shovel back into operation), it clearly appeared that Option 9A had significant financial advantages over Option 9B. At that point in time (23 September 2016) Option 9A would deliver a free cash flow benefit of $25 million in 2017, and $36 million over the three years.[82]

[68] Mr Heaton's evidence was that he engaged in extensive consultation with unions and employees over a number of weeks. Details of the thoughts, ideas, proposals and suggestions made and Capcoal's response to them are set out at pages 108-213 of Mr Heaton's statement. Ultimately, Mr Heaton decided that the Shovel should be parked up indefinitely, and that the restructure should proceed, with some modifications that were the product of the process of consultation.[83]

[69] Capcoal submits that the proposal to park up the Shovel indefinitely and implement a restructure was not capricious. It was developed over a number of months with particular operational concerns and the strategic business considerations of the Mine in mind. The only consideration taken into account by Mr Heaton in making the decision was the fact that the proposal would deliver a stronger free cash flow in 2017 and over three years than an alternative which involved continuing to operate the Shovel. This was consistent with the strategy of the business, bearing in mind the intended divestment of the Mine. There is nothing 'unpredictable' or 'irregular' or 'impulsive, fanciful or whimsical' about Mr Heaton's decision or the reasons for it. On the contrary, it is a considered and rational decision that accords with ordinary common business sense.

[70] The decision was also not unfair. It did not directly affect the bargaining process and was not actuated by a purpose to do so. The only relevance of the protected action to the decision was as expressed in the evidence of Mr Heaton, as follows:

> *I knew that one of the circumstances that gave rise to the commercial advantages of implementing the Proposal was that we had not used the Shovel for such a period of time that we had reached and then passed the point of "no return", that one of the reasons why we had had to stop using the Shovel was that we did not have enough labour to do so while continuing to extract enough coal ... and that one of the reasons why we did not have enough labour was that some employees were taking protected industrial action.*[84]

[71] Mr Heaton also decisively rejected reliance on any matter other than the commercial advantage, received a written advice from Ashurst about matters he should not take into account and applied that advice when making the decision.[85] That written advice is before the Commission.[86] Mr Heaton is not involved in enterprise bargaining at the Mine and is only aware of what is going on in the process "at a high level".[87] He has no idea as to who the employees taking protected industrial action are or, other than in the most general terms, what positions they fill.[88] It is also impossible at present, and for the foreseeable future, to know whether any, and if so which, employees who are affected by enterprise bargaining or who have participated or are participating in protected industrial action will actually be made redundant.[89] This is because redundancies will be based upon an assessment process and selection criteria which will be applied fairly and consistently to all contractors, labour hire workers and employees in positions which may be made redundant.[90]

[72] Having regard to the above matters, it is submitted that the Commission would not find that there was any connection (other than the one explained by Mr Heaton above) between the decision and the enterprise bargaining to which the good faith bargaining requirements are directed. Accordingly, the conduct could not be 'unfair' in the sense contemplated by the Act.

[73] In relation to the CFMEU's case, Capcoal submits that it is erroneous to consider whether objective or subjective considerations are required. Conduct is either capricious or unfair or it is not. The test to be applied depends on the words of the statute, not the construction that a party seeks to give to those words in circumstances where neither the words 'objective' nor 'subjective' appear.[91]

[74] Further, the CFMEU's case rests on the remotest hearsay, amounting to no more than rumour. In most cases Mr Scales omits the source of his information entirely, such that it is

effectively impossible to verify, answer or test. Such evidence has no probative value[92], and is not a proper basis upon which to find that Capcoal has not met the good faith bargaining requirements.

[75] The CFMEU's case on Alternative 1 is no better than this: enterprise bargaining is on foot; the union has been taking protected industrial action for nearly two months; the employer is refusing to capitulate to their demands; the employer is now restructuring; and the restructure is for that reason *ipso facto* both unfair and undermining of freedom of association or collective bargaining. The CFMEU also asks the Commission to draw some kind of adverse inference from the fact that Chris Gentle is not called as a witness.[93] There is no room for such an inference where the sole decision maker himself gives evidence and the substance of that evidence was he was persuaded by the business case for Option 9A and only the business case.[94]

[76] The CFMEU appears to rely upon two further matters to justify the inference it asks the Commission to draw:

(a) the temporal coincidence of the decision to restructure with bargaining and protected industrial action; and
(b) the explanation given for the unplanned delay.

[77] Two points can be made in response. *First*, the fact that the decision was made at a time when protected industrial action was occurring is explained by the facts set out in Mr Heaton's evidence. *Second*, Capcoal's explanation for the unplanned delay, as put in correspondence to the CFMEU on 21 October 2016, was that insufficient manning required scheduling changes at the Mine. Those scheduling changes have had flow-on effects, to which Capcoal has responded in a rational and considered way. That explanation is consistent with the evidence before the Commission.[95] Having regard to the foregoing, the Commission could not be satisfied that the decision was 'unfair' based upon Alternative 1.

[78] Alternative 2 is indistinguishable from Alternative 1 except insofar as it:

- asserts that the restructure is motivated by and/or is being conducted in response to reasons including the bargaining position of the CFMEU and its members and/or the protected industrial action taken by the CFMEU and its members;[96]
- asserts that Chris Gentle conducted himself in a manner indicative of a consciousness of guilt;[97] and
- relies on the recruitment of contractors and labour hire engaged on the basis of 'ongoing work'.[98]

[79] The assertion that the motivation for the decision was the bargaining position adopted by the CFMEU and its members or the protected industrial action is dealt with by the direct evidence of the decision-maker to the contrary. The basis of the suggestion that Mr Gentle conducted himself in a way which indicated a consciousness of guilt is Mr Gentle's reliance upon the terminology of 'unplanned delay'. That 'unplanned delay' has been explained by Mr Gentle to the CFMEU in correspondence and by Mr Heaton in evidence. The submission has no basis.

[80] Finally, on the question of contractors, the Mine has general approval to recruit labour hire workers and contractors whilst the protected industrial action continues.[99] However, the

purpose of that recruitment is to ensure that operations at the Mine can continue during the protected industrial action[100], it is not to fill roles that will be made redundant by reason of the restructure.[101] To that end, no labour hire workers or contractors are being recruited to operate the Shovel. They are being recruited to support the work of the other excavation equipment and to provide associated support.[102] Indeed, those labour hire workers will likely be removed as soon as reasonably practicable should the protected industrial action cease.[103] Capcoal submits that having regard to the foregoing, the Commission could not be satisfied that the decision was 'unfair' based upon Alternative 2.

[81] Alternative 3 is indistinguishable from Alternative 2, except insofar as it:

(i) asserts that the decision was 'capricious' rather than 'unfair';[104] and

(ii) contends that 'Capcoal did not have an adequate motive to make that disproportionate change arising from any negative productivity impact'.[105]

[82] With respect to the CFMEU's reliance upon a characterisation of the decision as 'capricious', Capcoal maintains that the decision could not be characterised in this way. In relation to the submission that Capcoal's response to the industrial action has not been proportionate (apparently based on the statement in the *Explanatory Memorandum to the Fair Work Bill* that employers have the right to a 'proportionate response' to protected industrial action) Capcoal submits that this submission is based on the misconception that the Act in some way curtails the manner and extent of an employer's permitted response to the commercial position in which it finds itself as a result of protected industrial action, irrespective of the form that action may take. The implicit premise is that, if employees are allowed to hurt their employer's business, then the employer has to submit to the pain, and cannot do anything to alleviate or respond to it.

[83] The Act provides for 'protected industrial action' in certain circumstances. Protected industrial action' can be taken by employers or employees (s.408). The effect of industrial action being 'protected', is that the participants enjoy a limited statutory immunity for industrial action (s.415) which would otherwise be actionable (for example, as a nuisance or a breach of contract) and employers may refuse to pay employees during employer response action (for example, lockouts) in circumstances where they would be contractually required to pay those employees. (s.416).

[84] Were it open to find that the decision was a 'response' to industrial action, and the decision itself was 'industrial action', then that 'response' would be governed by the Act and the concept of proportionality may have some role to play. A decision to restructure does not fall within the definition of 'industrial action' in s.19 of the Act. Accordingly, the concept of proportionality is irrelevant for present purposes.

[85] In any event, it is not open to find that the decision was such a 'response'. No evidence of any probative force led by the CFMEU supports anything but the mildest of suggestions that the decision to restructure could be so characterised. In relation to three other matters purported to be relied on by the CFMEU in its Form F32:

- the decision to implement the restructure by way of forced redundancies when previously voluntary redundancies have been offered;
- the asserted 'subjectivity' of the proposed (but not yet settled) selection criteria; and

- the asserted unfairness in ranking employees with longstanding performance histories with recently-engaged labour hire workers and contractors;

[86] The CFMEU's Submissions do not address these matters, nor are they canvassed in any detail or at all in the evidence and Capcoal assumes that those contentions have been abandoned.

[87] Capcoal also submits that the conduct is not conduct 'that undermines freedom of association or collective bargaining' and asserts that the CFMEU's submissions are addressed to how the conduct achieves that effect or the manner in which that effect manifests. The fact that conduct is indirectly a response to a bargaining position or to the operational and commercial circumstances created by protected industrial action is not sufficient to demonstrate either that the conduct is unfair or capricious or that it undermines freedom of association or collective bargaining. It is also submitted that conduct and the motivation for it are two different things and the effect of conduct cannot be proved by simply proving (or asserting) a motivation for the conduct.

[88] Capcoal also submits that an employer could quite permissibly take action that was of a capricious or unfair character with the express purpose of retaliating against protected industrial action or enterprise bargaining (subject to the other restrictions in the Act) if it did not have the effect of undermining freedom of association or collective bargaining. For example, it could stop giving employees a discretionary Christmas bonus every year in response to a demand in bargaining that it agree to a 10% pay increase. Even if that course of action were found to be capricious and unfair, and a deliberate retaliation to that bargaining position, it would not be sufficient to show that the employer was not meeting the good faith bargaining requirement in s.228(1)(e). However, if that conduct were found to be unfair or capricious and somehow sufficient to reasonably make an employee capitulate on their bargaining position, the conduct could then be classed as conduct which undermines freedom of association or collective bargaining.

[89] It has also been accepted that unfair or capricious conduct need not be intentional for it to undermine freedom of association or collective bargaining.[106] Applying the correct approach to s.228(1)(e), and having regard to the evidence before it, the Commission could not be satisfied that any conduct of Capcoal 'undermines freedom of association or collective bargaining'.

[90] Even if establishing a motivation were enough, and that a mere intention to respond to a position taken in enterprise bargaining were sufficient to demonstrate that the conduct 'undermines freedom of association or collective bargaining', the CFMEU must nonetheless fail on two fronts:

(a) *First*, the lack of any direct or persuasive evidence of the asserted motivation.
(b) *Second*, the direct evidence of the decision maker, Mr Heaton (that neither the enterprise bargaining or the protected industrial action actuated the decision) is plausible, credible and belies a common sense approach to running the business. This evidence should be accepted.

[91] Capcoal also submitted that even if the Commission were satisfied that Capcoal had not met, or was not meeting, the good faith bargaining requirements, that fact alone would not

support a bargaining order being made. It is necessary that the Commission be satisfied, *inter alia*, that it is reasonable in the circumstances to make a bargaining order before it has power to make such an order.: [107] It is submitted that, even if the Commission could be satisfied that the conduct was unfair or capricious, and that such conduct undermined freedom of association or collective bargaining, that it could not be satisfied that it was reasonable in all of the circumstances to make a bargaining order. That is so for three reasons.

(1) The application is premature. No employee will be made redundant unless and until the proposed selection process has taken place. There are a number of employees who are not union members, or who have not participated in protected industrial action, who may be made redundant as a result of this process,[108] and there are employees who would be covered by the proposed new enterprise agreements, or who have participated in protected industrial action, who will not be made redundant. Capcoal has also committed to treating labour hire workers and employees equally as a part of the process[109] and the Commission could not be satisfied, on the state of evidence before it, that there was at present any need to make a bargaining order.
(2) Capcoal is clearly committed to the enterprise bargaining process and the process has been ongoing, including 24 bargaining meetings have taken place,[110] and a number of drafts being put to employees and the CFMEU for consideration.
(3) Capcoal is aware of, and meeting, its commitments under the existing enterprise agreement and the Act on the basis that:

    - Prior to deciding to adopt the Proposal, Capcoal engaged in a lengthy consultation process with employees, employee representatives and trade unions under both Agreements despite the fact that the Agreements do not require consultation prior to a decision being made, and has extended the deadline for proposals from employees and the CFMEU.[111]
    - Capcoal has taken legal advice on the Proposal which is in evidence before the Commission and sets out the matters which Mr Heaton was not permitted to take into account in deciding whether to adopt the proposal.[112]
    - The selection process and employment status-blind approach proposed to be taken by Capcoal to select workers for redundancy removes any capacity for criticism of the motivations or intentions of Capcoal. There is no way of knowing until that process has taken place what proportion of those identified for redundancy will be employees or labour hire workers.[113] The rigour of this process would make it positively unreasonable in the circumstances to make a bargaining order.

[92] Capcoal submits that it has met and is meeting, the good faith bargaining requirements, including s.228(1)(e). The decision to park the Shovel and implement a restructure is based entirely upon commercial considerations. It is not capricious or unfair conduct and it is not conduct that undermines freedom of association or collective bargaining. Even if (contrary to the foregoing submissions) Capcoal were not meeting the good faith bargaining requirements, it would nonetheless not be reasonable to make a bargaining order.

CONSIDERATION

Construction of legislative provisions

[93] The parties have advanced competing arguments about the proper construction of s. 228(1)(e) and related provisions of the Act. Essentially the differences between the parties relate to the test that the Commission should apply in determining whether or not conduct constitutes failure on the part of a bargaining representative to comply with good faith bargaining requirements. The questions raised by the parties are whether the test for failure to comply with the good faith bargaining requirement in s. 228(1)(e) of the Act is objective or subjective; whether it is sufficient to establish failure to comply with that provision that conduct relates to or was caused by the fact that employees were taking protected industrial action at the time the Proposal was advanced; and whether a breach requires intent on the part of the person or persons who directed the conduct said to have given rise to the breach.

[94] Further, the submissions of the parties raise the question of whether it is necessary to determine whether an actual effect of the kind described in s. 228(1)(e) is required in order to trigger the discretion of the Commission to make a bargaining order or whether it is sufficient that the Commission be satisfied that such an effect is probable or likely. In order to determine the present application it is necessary to construe the relevant provisions of the Act.

[95] The proper approach to construction of a statute is well established. The task necessarily begins with the ordinary and grammatical meaning of the words used.[114] These words must be read in context by reference to the language of the Act as a whole and to the legislative purpose.[115] Section 578(a) of the FW Act also directs attention to the objects of the FW Act. The purpose or policy of the Act is to be ascertained by consideration of all of the relevant provisions of the Act.[116]

[96] Section 15AA of the *Acts Interpretation Act* 1901 requires that a construction that would promote the purpose or object of the Act is to be preferred to one that would not promote that purpose or object. The purpose or object of the Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the Act, and another does, the latter interpretation is to be preferred. However the s.15AA requires that the Act be construed in the light of its purpose, not that it is rewritten.[117]

[97] It is clear from their terms that the provisions in Sub-division A of Part 2-4 Division 8 of the Act, are directed to the procedural rather than the substantive aspects of bargaining: attending meetings; disclosing information; responding to and considering proposals; and recognising other bargaining representatives. This is reinforced by s. 228(2) which excludes substantive matters – making concessions and agreeing to terms that are to be included in an agreement – from the good faith bargaining requirements. Section 228(1)(2)(e) must be read in this context as being directed to the process of bargaining. Accordingly, that section does not encompass conduct that may be capricious and unfair, but which is not directed to the bargaining process or which does not (or is unlikely to have) an impact on the bargaining process. This is regardless of whether the conduct is capricious or unfair on an objective or a subjective basis.

[98] That good faith bargaining requirements are procedural or process based is also apparent from the terms of s. 230 and s. 231 in relation to bargaining orders. A bargaining order under s. 230 must be "*in relation to a proposed enterprise agreement*" and be directed at conduct that does not meet the requirements in s. 228(1). Further, by virtue of s. 231 a bargaining order must specify actions to be taken or that must not be taken to ensure conduct that is consistent with the good faith bargaining requirements.

[99] There is no requirement that conduct that is not meeting the good faith bargaining requirements is actually occurring. The requirements listed in s. 228(1) of the Act are preceded by a statement that they are requirements a bargaining representative must meet. The requirements are not limited to present or existing circumstances. The expressions "attending", "participating", "disclosing", "responding", "giving", "refraining", "recognising" and "bargaining" are expressed in continuous progressive tense. Each of the terms can include conduct that has occurred, is occurring or will occur. It is not necessary that conduct has actually occurred and had an effect for a finding to be made that a good faith bargaining requirement has not been met. It is sufficient that conduct is threatened or proposed, and that the Commission is satisfied that the conduct is capricious or unfair and that it has or will likely have the effect of undermining freedom of association or collective bargaining. The mere fact of making a proposal or a threat to engage in conduct that comes within the terms of s. 228(1)(e) or any of the other provisions setting out good faith bargaining requirements, may attract an order.

[100] That conduct is not required to actually be occurring or having an effect before it can be found that it does not meet good faith bargaining requirements, is also apparent from the terms of s. 230 and s. 231 of the Act which deal with orders that the Commission may make. Those orders include that a bargaining representative not take action that will undermine freedom of association or collective bargaining. Such an order could be directed at action which is proposed and is a further indicator that conduct caught by the good faith bargaining requirements does not need to have actually had an effect before an order can issue.

[101] The good faith bargaining requirement in s. 228(1)(e) has two limbs as is apparent from the use of the term "that" as a conjunction between the terms "capricious or unfair conduct" and "undermines freedom of association or collective bargaining". An allegation that an employer as a bargaining representative has breached such a requirement by deciding to dismiss 83 employees is serious and requires cogent proof, although the standard of proof is the balance of probabilities. A bargaining order, particularly of the kind sought by the CFMEU in the present case requires a proper evidentiary basis and the Commission must be satisfied on the balance of probabilities that the conduct of the relevant bargaining representative was capricious or unfair conduct that undermines freedom of association or collective bargaining.

[102] In order to find that there has been a breach of the good faith bargaining requirement in s. 228(1)(e), the Commission must be positively satisfied of two distinct but related objective facts.

- the bargaining representative has not refrained from conduct which is capricious or unfair or that the bargaining representative has engaged in conduct that is capricious or unfair;[118] and
- that conduct undermines freedom or association or collective bargaining or both.

[103] It is not sufficient for the purposes of s. 228(1)(e) that conduct is simply unfair or capricious. The conduct must also have the effect or likely effect of undermining collective bargaining. The concept of capricious conduct is well understood. It is conduct that is unaccountable, whimsical, irregular or unpredictable. To borrow from the analysis that is usually applied in the context of considering whether a dismissal is unfair on the basis that it is for an invalid reason, the antithesis of capricious conduct is conduct that is not valid, defensible or well founded.[119] Conduct that is unfair is conduct that is not equitable or honest or not impartial or according to the rules.

[104] As previously noted, that conduct is capricious or unfair will not, of itself, constitute a breach of or failure to meet the good faith bargaining requirements. It is also necessary that the unfair or capricious conduct "undermine" collective bargaining or freedom of association. The term "undermine" means to injure or damage by secret or insidious means. In my view the terms "capricious", "unfair" and "undermine" take their colour from each other and must be read in that light. It does not follow that because conduct adversely impacts on the position of a bargaining representative it will be conduct that undermines that position.

[105] Conduct or proposed conduct that meets this description will breach good faith bargaining requirements regardless of whether the employer intended to undermine collective bargaining or freedom of association. In my view intent may be relevant to whether there has been a breach of a good faith bargaining requirement but it is not determinative and there is no requirement to establish intent in order to find that there has been a breach and that a good faith bargaining order should be made.

[106] It is notable that s. 228(1)(e) is expressed in negative terms – refraining from conduct – rather than the positive terms in which the other good faith bargaining requirements set out in s. 228(1) are expressed. This is because s. 228(1)(e) is not directed at conduct *simpliciter* – attending meetings, responding to proposals, recognising bargaining representatives. Rather s.228(1)(e) of the Act is directed at conduct which is capricious or unfair and has the additional effect of undermining collective bargaining or freedom of association. The unique nature of the bargaining requirement in s. 228(1)(e) as distinct from the other good faith bargaining requirements in s. 228(1) are apparent from the terms of s. 231(2)(c) and (d) which empower the Commission to order that an employee not be dismissed or that a dismissed employee be reinstated, where the termination constitutes or relates to a failure to meet the good faith bargaining requirement in s. 228(1)(e) of the Act.

[107] For the purposes of s. 231(2)(c) and (d) of the Act, the question of whether a dismissal relates to any particular circumstance does not arise unless and until the Commission is satisfied that there has been a failure on the part of the employer to meet the good faith bargaining requirement in s. 228(1)(e). This means that where it is alleged that a dismissal or a threat to dismiss an employee or employees constitutes a failure to meet the good faith bargaining requirements in s. 228(1)(e) of the Act, the dismissal or threat to dismiss must be because of, rather than simply relate to, bargaining activities such as:

- The employee or employees taking or threatening to take protected industrial action;
- The employee or employees pressing a particular bargaining position or refusing to agree to a position proposed by the employer;
- The employer seeking to pressure employees to accept a bargaining position it has proposed.

[108] The example posited by Capcoal illustrates this point. If an employer subjected to protected industrial action causing loss and damage, decides to refuse to pay employees a discretionary bonus that would otherwise have been paid to those employees, would that employer breach the good faith bargaining requirement in s. 228(1(e)? I think not. The reason for the employer refusing to pay the bonus might include the loss and damage caused by the industrial action. The refusal to pay the bonus may cause employees to rethink their strategy with respect to taking protected action and would certainly adversely impact employees who were counting on the bonus.

[109] However, the refusal could not objectively be viewed as unfair or capricious in those circumstances. There is no rule of bargaining that requires an employer to pay a discretionary bonus to employees in circumstances where the employer has suffered loss or damage as a result of protected industrial action. A decision not to pay a bonus that is within the discretion of the employer is not capricious given that it would likely be decided not to pay the bonus in the event of loss or damage regardless of the cause of the loss or damage. Further, the decision would not necessarily undermine collective bargaining or freedom of association. Employees can choose to continue to take industrial action or not regardless of whether they are paid a bonus and the refusal by the employer to pay the bonus may harden rather than soften the employees' position.

[110] Similarly, if an employer suffers loss and damage because of protected industrial action – such as losing a contract – and undertakes restructuring because of that circumstance, the employer will have valid business and operational grounds for restructuring. An employer facing a reduction in its production requirements due to a loss of a contract is not required to continue to employ persons who are surplus to its requirements, regardless of whether or not those persons are taking protected industrial action. Where a restructuring is based on valid business grounds, resulting dismissals will not be capricious or unfair simply because employees are taking protected industrial action or have notified their intention to do so. That the taking of protected industrial action may have created circumstances which led to the employer deciding to restructure, does not make the decision to do so capricious or unfair.

[111] Conversely, if an employer decided to restructure its business by dismissing employees taking protected industrial action on the grounds of redundancy, in circumstances where there was no valid business reason for the restructuring or it was illusory, such conduct could breach s. 228(1)(e) of the Act. A restructuring leading to dismissals on the ground of redundancy could be illusory if the employer could not demonstrate to the reasonable satisfaction of the Commission that the restructuring was based on legitimate business grounds or if employees dismissed were replaced with other employees or contractors to perform exactly the same work without any change in the operations of the business or if a reduction in production or some operation was only temporary.

[112] In such a case, a finding that the restructuring was unfair or capricious would be open and this would then establish a basis for a finding that the dismissals would likely undermine freedom of association and collective bargaining, on the basis that the dismissals were carried out or threatened because employees were engaging in protected industrial action or had adopted a particular bargaining position.

[113] If the construction of the s. 228(1)(e) that I have adopted is wrong, then it is still necessary to find that conduct within the description in s. 228(1)(e) has occurred or is likely to occur – ie. capricious or unfair conduct that undermines freedom of association or collective

bargaining – before the Commission considers whether an order should be made. This is so whether the conduct relates to or is because employees were engaging in protected industrial action or other bargaining activities.

[114] The Commission is an expert Tribunal with considerable experience in assessing the validity of business decisions and whether or not they are based on genuine operational requirements. The Commission is required to undertake consideration of such matters in carrying out its functions and exercising jurisdiction under a range of provisions in the Act. The construction of the good faith bargaining provisions in the Act I have adopted and the role of the Commission in their application is consistent with the manner in which the Commission operates with respect to other provisions of the Act where similar concepts are provided for.

[115] The construction of the good faith bargaining provisions that I favour is also consistent with the objects of the Act relating to enterprise bargaining. The objects of Part 2-4 of the Act which deals with enterprise bargaining include the provision of a simple, fair and flexible framework that enables collective bargaining in good faith and the Commission to facilitate collective bargaining. Fairness cuts two ways and the interests of employers and employees must be balanced. That the good faith bargaining requirements include bargaining representatives refraining from unfair or capricious conduct that undermines freedom of association and collective bargaining, does not require that an employer can take no action to protect its interests or to advance its position while bargaining is underway. What the employer must not do is to engage in conduct that is capricious or unfair and that undermines freedom of association or collective bargaining.

[116] The construction of the legislation that I have adopted is also consistent with the context in which the good faith bargaining provisions operate. Disputes in relation to enterprise bargaining are often hard fought. In *CFMEU v Coal and Allied Operations*[120] a Full Bench of the Commission was deciding whether to exercise arbitration powers under s. 170MX of the former *Workplace Relations Act* in the face of an enterprise bargaining process which was variously described as "*industrial warfare*"[121] and "*a battle between titans in which the stakes are considered to be high and in which there is a determination on both sides to be seen to win*."[122]

[117] In describing the state the dispute had reached, the Full Bench observed that the Union asserted that the Company had unfairly and unilaterally implemented changed work practices, reneged on previously agreed matters, not complied with recommendations of the Commission and reorganised its operations by removing permanent shifts which had reduced take home pay. The Company was said to have stated that it had responded to the state of industrial warfare by fighting fire with fire and had done nothing unlawful. The Full Bench observed:

> "*We do not however, think that actions of any party during the battle can be characterised as unfair. The adage 'all is fair in love and war' is, we think, as much applicable to industrial warfare as to any other type*."[123]

[118] The Full Bench went on to observe that the Unions chose to engage in warfare and the Company chose to fight back and that neither party should be criticised for their conduct.[124] It is also relevant that in the *Explanatory Memorandum to the Fair Work Bill 2008* states in relation to the requirement that bargaining representatives refrain from capricious or unfair

conduct that undermines freedom of association or collective bargaining, that the requirement is intended to cover a broad range of conduct and states:

> "*For example, conduct may be capricious or unfair conduct if an employer…dismisses an employee or engages in detrimental conduct towards an employee because the employee is a bargaining representative or is participating in bargaining.*"[125]

[119] If the Legislature had intended that conduct which relates to participation in bargaining by taking protected industrial action is caught by the requirements of s. 228(1)(e) then it could have included a provision in similar terms to that in s. 360 of the Act which provides in relation to adverse action, that where there are multiple reasons for action a person takes, the action is taken for a particular reason if the reason for the action includes that reason. The Legislature did not enact such a provision. In my view this favours a construction where the connection between the conduct caught by s. 228(1)(e) and the fact that employees are engaging in bargaining activities is stronger than simply that the two matters are related. As previously noted, if I am wrong in this respect it is still necessary to find that the conduct was capricious or unfair and that it undermines freedom of association or collective bargaining before it is caught by s. 228(1)(e) at all.

[120] I do not accept that in responding to protected industrial action, an employer is restricted to responding in a manner provided for in the Act such as by lockout or other response action or by making an application under s. 423 of the Act for the termination of the industrial action. The CFMEU – correctly in my view – did not press the assertion implicit in its submissions, that an employer is precluded from changing its operations in any way that is detrimental to employees while bargaining is proceeding.

[121] There is nothing in the legislation to preclude an employer from making changes to its operations while protected industrial action is taking place or in response to that action provided that the employer does not do so for reasons or in a manner that is inconsistent with the good faith bargaining requirements or in breach of other legislative provisions such as those relating to the taking of adverse action. The immunity granted to employees engaging in protected industrial action is limited to the matters set out in s. 415. There is no blanket protection from any conduct engaged in by an employer on the basis that it may have a detrimental effect on the bargaining position of employees.

[122] In the face of protected industrial action causing loss or damage to its business, an employer is not limited to responding by toughing it out or conceding its position. An employer is not limited to responses provided for in the Act, such as lockout or termination of protected industrial action. For present purposes (where there is no claim of adverse action or breach of general protections) the only limitation on the response that Capcoal could properly make to the protected industrial action taken by its employees, was that it comply with good faith bargaining requirements and not respond in a manner that constituted a failure to meet those requirements. I am of the view that Capcoal has not failed to meet the good faith bargaining requirement in s. 228(1)(e) of the Act.

CONCLUSIONS

[123] For the reasons set out above, I accept and adopt the construction of the relevant legislative provisions advanced by Capcoal, with one exception. I do not accept that to make a bargaining Order in relation to conduct that falls within the description in s. 228(1)(e) the

Commission must be positively satisfied that freedom of association or collective bargaining are actually being undermined. In my view it is sufficient that the Commission is reasonably satisfied that freedom of association or collective bargaining will likely be undermined by capricious or unfair conduct.

[124] I do not accept the construction advanced by the CFMEU and in particular I do not accept the submissions with respect to causal connection. In my view that construction inverts the inquiry the Commission is required to undertake in order to be satisfied to the required standard of proof, that the good faith bargaining requirement in s. 228(1)(e) of the Act has not been met. The terms of s. 231(2)(c) of the Act do not operate unless and until the Commission is positively satisfied to the required standard of proof that a bargaining representative is not complying with the good faith bargaining requirements in s. 228(1)(e).

[125] Section 228(1)(e) of the Act is directed at conduct which includes dismissing an employee because the employee is a bargaining representative or is participating in bargaining. Participating in bargaining would necessarily involve taking, or notifying an intention to take, protected industrial action. The dismissal of an employee because of such a reason would be capricious and unfair and undermine (or likely undermine) freedom of association and collective bargaining. The dismissal of (or a proposal to dismiss) CFMEU members because they were taking or intended to take protected industrial action would be conduct directed at the bargaining process and establish the required basis for the Commission to make a bargaining order of the kind specified in s. 231(2)(c) or (d) of the Act. In the present case I am unable to be reasonably satisfied that Capcoal has failed to meet the good faith bargaining requirement in s. 228(1)(e) of the Act or that the Company has breached those requirements.

[126] I accept that the Proposal and the resulting decision by Capcoal to dismiss employees by way of redundancy relates to protected industrial action that was taken by employees, who are members of the CFMEU, some of whom will be selected for redundancy or will likely be selected. I also accept that there is a causal connection between the protected industrial action and the dismissals. It is conceded by Capcoal that the reason for the unplanned delay which led to the decision to park up the shovel was the protected industrial action. Mr Heaton went so far as to concede that the unplanned delay was the industrial action. However, whether the protected industrial action is the reason for the delay or actually constitutes the delay is not a basis for the Commission to find that the dismissal of employees by reason of redundancy is because they were taking protected industrial action. Further, the causal connection is not a sufficient basis for such a finding.

[127] I do not accept that the Proposal and the resulting decision to dismiss employees by way of redundancy was because they had taken or were intending to take protected industrial action. This is the case notwithstanding the likelihood that some of the employees who were actually selected for redundancy and dismissed on that basis, will be members of the CFMEU who have taken and intend to continue to take protected industrial action.

[128] The evidence of Mr Heaton, which I accept, establishes that there is a connection between the protected industrial action and the Proposal and the decision to implement the Proposal. However, the connection is that the protected industrial action created an environment in which management of Capcoal had to prioritise mining coal on the one hand and uncovering coal on the other hand. There are two methods of uncovering coal – using

draglines or the Shovel. Where both methods are used in conjunction, the Shovel must work ahead of the dragline.

[129] The evidence further establishes that because of the industrial action there were insufficient operators attending for work to operate both the draglines and the Shovel and its associated fleet. The dragline is more cost effective to operate than the Shovel because it uses electricity and does not require a substantial fleet of other equipment to work in conjunction with it (although it requires some ancillary equipment). The Company opted to focus its available labour resources on the operation of the dragline. As a result, the Shovel fell behind the dragline and reached a point of no return where it could not operate for several months and was required to be parked up for at least that period. In those circumstances, Capcoal management revisited an earlier plan where it had considered parking up the shovel on a temporary basis and decided to implement this outcome on a permanent basis. I am satisfied that this decision was taken for legitimate and valid operational reasons including a significant cost saving to the Company in the order of approximately $40 million.

[130] The result of deciding to park up the shovel permanently was that there was a surplus of employees and it was decided to address that surplus by making a number of positions redundant with the result that employees would be dismissed. The fact that the lack of operators at the relevant time was due to them taking protected industrial action, does not lead to a conclusion that the proposal to dismiss a number of those operators was advanced and is to be implemented because they were taking industrial action or because they intend to do so in the future.

[131] The proposal and the decision to implement it was not capricious. To the contrary, the evidence establishes that Mr Heaton decided to adopt the proposal to park up the shovel and restructure the workforce because of significant commercial advantages for the mine including a saving of approximately $40 million over three years. It was also the case that the Shovel had reached the point of no return and would be required to be parked up for a number of months. It was this which caused Mr Heaton to revisit an earlier analysis to determine whether his previous conclusion that the Shovel remain in operation, continued to be the best option in terms of planning and financial considerations.

[132] Mr Heaton's change of position with respect to parking up the Shovel was not capricious but was based on valid and legitimate business and operational grounds. Further the decision to permanently park up the Shovel is consistent with the strategy of the business given the intended divestment of the mine. In short, the genesis of the decision which will result in the redundancies was before the protected industrial action commenced, and although related to the protected industrial action, was not made because of the protected industrial action.

[133] There is insufficient evidence upon which I could be reasonably satisfied that the contended basis for the redundancies has been contrived or fabricated, or that the parking up of the Shovel is a temporary measure or a ruse to effect a reduction in the number of Union members employed at the mine. It is highly improbable that Capcoal would park up a significant piece of mining equipment for the purposes of contriving a situation where the Company could dismiss CFMEU members because they are taking protected industrial action. The evidence of the planning and consideration behind the proposal is comprehensive. That evidence establishes, on the balance of probabilities, that the proposal is a legitimate business

decision and is validly and soundly based. There is nothing about the proposal that is capricious.

[134] I accept that the communication about the proposal from Mr Gentle to employees was at best disingenuous and at worst untruthful. However, I do not accept that this is an indication that Mr Gentle is guilty of contriving or participating in a plan to dismiss CFMEU members because they engaged in, or proposed to continue to engage in, protected industrial action. It is equally probable that Mr Gentle was motivated to respond to questions in the manner that he did, by the belief that the proposal would be the subject of a number of actions by the CFMEU in the Commission or the Court. Even if Mr Gentle was untruthful about this matter, that factor does not outweigh the evidence that establishes the validity of and legitimate business case for the proposal, and the decision to implement it. While the state of mind of a person who engages in conduct may be relevant to its characterisation as a failure to meet good faith bargaining requirements, it is not determinative.

[135] The proposal and its implementation is not unfair. Fairness in a given situation depends on the circumstances and the context in which it is assessed. In the present case, the circumstances and the context involve the taking of what is described as sustained and on-going protected industrial action. As the CFMEU points out, it is expected that protected industrial action will cause loss and damage to an employer which will result in the employer changing or compromising its bargaining position. That is the purpose of taking protected industrial action.

[136] In my view, sustained and on-going industrial action involves risk on both sides. From the employer's perspective those risks include that loss and disruption associated with industrial action will outweigh the cost of conceding its position. For employees, the risks include that protected industrial action will cause damage to the employer which result in a review of its operational requirements and consequential restructuring. Where such review and restructuring is genuine and based on valid business grounds it will not be capricious or unfair conduct.

[137] It is not unfair for an employer suffering loss and damage as a result of employees taking protected industrial action to decide, on legitimate business grounds, to restructure its business to manage or offset that loss and damage, and to decide to make employees redundant in the process. The fact that protected industrial action triggers loss and damage and related restructuring and job losses, does not necessitate a finding that the employer has breached good faith bargaining obligations or dismissed employees because they are taking or proposing to take protected industrial action.

[138] There is no requirement in the Act that prevents an employer from taking a valid and soundly based decision to restructure its operations while protected industrial action is being taken, provided that the employer does not engage in conduct that breaches a provision of the Act or does not meet the good faith bargaining requirements. Neither is there a requirement that the employer is limited to responses set out in the Act when determining how to best manage and operate its business during periods where employees are taking protected industrial action.

[139] The conduct of Capcoal is not "undermining" of collective bargaining or freedom of association. I accept that it is likely that the dismissals for reasons of redundancy will have an adverse impact on the bargaining power of CFMEU members and their ability to continue to

place pressure on Capcoal by taking protected industrial action. However, in circumstances where the conduct of Capcoal was not undertaken because employees are or are proposing to take industrial action or to hinder them in the exercise of their right to do so or their bargaining position, and the conduct of Capcoal is neither capricious or unfair, it cannot be said that the conduct undermines collective bargaining or freedom of association.

[140] In dismissing the application, I note that that there are some matters raised in the application that were not pressed. These include that the redundancies are being effected in a materially different manner than has previously been the case. Although not pressed in the CFMEU's submissions, there is evidence before the Commission that suggests that Capcoal has determined that it will not call for or consider volunteers for redundancy. This is notwithstanding that there were more volunteers than required for a previous round of redundancies in the latter part of 2015 and that some volunteers were rejected. It is also the case that Capcoal's right to accept or reject volunteers does not appear to be in issue and there is no evidence of any substantive reason for the Company's refusal to adopt that approach on this occasion.

[141] I also note that there is evidence that there are two categories of contractor/labour hire employees at the Mine. The first category is termed by Mr Scales as "embedded" in Capcoal's operational workforce. The engagement of embedded contractor/labour hire employees pre-dates the taking of protected industrial action by Capcoal employees and there is evidence that some of these contractor/labour hire employees were retained by the Company during previous redundancies. While embedded contractor/labour hire employees may have been retained in employment in past redundancy situations, there is no evidence that they have been dealt with in the same manner and using the same ranking system that was applied to decide which employees of Capcoal would be made redundant.

[142] There is also a second category of contractor/labour hire employees who were engaged at or after the time protected industrial action had commenced for the purpose of backfilling positions where Capcoal employees who ordinarily filled those positions were taking protected industrial action. There is evidence that the Company may consider retaining some of this category of employees by applying the ranking process to them on the basis that they are said to be "*outstanding*".[126] These are all matters which are not addressed in this Decision. It is open to the CFMEU to continue to press them during and after the redundancies the Company is in the process of implementing.

[143] In determining the present application, I do not rule out a future finding that in considering contractor/labour hire employees – particularly those engaged recently to fill positions while employees of the Company were taking protected industrial action – on the same basis as Capcoal employees in selecting employees for redundancy, is capricious or unfair and will likely undermine collective bargaining by reducing the number of CFMEU members who may otherwise have remained in employment.

[144] Further, I remind the parties that the Commission is available to assist to resolve disputes, including protracted disputes in relation to enterprise bargaining.

DEPUTY PRESIDENT

Appearances:

Mr B. Docking of Counsel for the Applicant.

Mr A. Neil of Senior Counsel & Mr Parken of Counsel for the Respondent

Hearing details:

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17 & 25 November.

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[1] Witness Statement of Jeff Scales – Exhibit 1 paragraphs 44-46.
[2] Witness Statement of Jeff Sales – Exhibit 1 Annexure JS-35.
[3] Second Witness Statement of Jeff Sales – Exhibit 2 Annexure JS-41.
[4] Second Witness Statement of Jeff Sales – Exhibit 2 Annexure JS-42.
[5] [2010] FWAFB 6021 at [37] – [44].
[6] Pearce and Geddes *Statutory Interpretation in Australia* 8th Edition, LexisNexis Butterworths at 459-460.
[7] Statement of Jeff Scales – Exhibit 1 paragraphs 83 to 89.
[8] Statement of Mark Heaton – Exhibit 4 at paragraphs 84 – 93.
[9] Witness Statement of Jeff Scales – Exhibit 1 paragraphs 40 – 46.
[10] Ibid paragraphs 50 – 52.
[11] Witness Statement of Mark Heaton – Exhibit 4 paragraphs 100 – 106.
[12] Witness Statement of Jeff Scales – Exhibit 1 Annexure JS-15.
[13] Ibid Annexure JS-15.
[14] Witness Statement of Mark Heaton – Exhibit 4 paragraph 131.
[15] Witness Statement of Jeff Scales – Exhibit 1 Annexure JS-16.
[16] Ibid at paragraph 57 and Annexure JS-17 Contemporaneous notes of meeting taken by Mr Scales.
[17] Ibid at paragraph 61 and Annexure JS-20 Contemporaneous notes of meeting taken by Mr Scales.
[18] Ibid at paragraphs 64 – 67 and Annexure JS-24 Contemporaneous notes of the meeting taken by Mr Scales.
[19] Ibid respectively Annexures JS-25, JS-27, JS-30 and JS-34.
[20] Ibid Annexure JS-29.
[21] Ibid Annexure JS-32.

[22] Witness statement of Mark Heaton – Exhibit 4 Annexure MH-10.

[23] Witness Statement of Jeff Scales – Exhibit 1 Annexure JS-15 and Witness statement of Mark Heaton - Exhibit 4 Annexure MH-7.

[24] Witness Statement of Mark Heaton – Exhibit 4 at paragraph 118.

[25] Ibid paragraphs 119 and 189.

[26] Witness statement of Mark Heaton – Exhibit 4 paragraphs 164 – 166 and Annexure MH-9.

[27] Witness Statement of Jeff Scales – Exhibit 1 Annexure JS36.

[28] Second Witness Statement of Jeff Scales – Exhibit 2 paragraphs 4 – 8.

[29] Ibid at paragraph 8.

[30] [2013] FCA 451; (2013) 234 IR 139.

[31] Ibid at [25] – [26].

[32] [2002] QSC 62.

[33] Ibid at [6].

[34] Ibid at [17].

[35] Witness Statement of Jeff Scales – Exhibit 1 paragraph 79 and Annexure JS-37.

[36] Ibid – paragraph 80 and Annexure JS-38.

[37] Second Witness Statement of Jeff Scales – Exhibit 2 Annexure JS-44.

[38] Third Witness Statement of Jeff Scales – Exhibit 3 Paragraphs 13-15 and Annexure JS-50.

[39] [2015] FCAFC 76.

[40] Ibid at 174 – 175.

[41] *CFMEU v Tahmoor Coal* (2010) 195 IR 58 at [7]; *AWU v Woodside Energy Limited* [2012] FWA 4332 at [43], [98]; *Queensland Nurses' Union of Employees v TriCare Limited* [2010] FWA 7416 at [50]-[51])

[42] Australian Mines and Metals Association v MUA [2016] FWA 738 at [28].

[43] cf *Tricare* at [51].

[44] *United Voice* [2012] FWA 9047 at [14].

[45] *AMWU* [2011] FWA 2005 at [30].

[46] Transport Workers' Union of Australia v Transit (NSW) Services Pty Ltd (t/as Transit Systems) [2016] FWCFB 997 at [15].

[47] *Australian Mines and Metals Association v MUA* [2016] FWC 738 at [29]

[48] *Woodside* at [96].

[49] *Victoria Hospitals Industry Association v Australian Nurses Federation* [2011] FWA 9068 at [24].

[50] *cf Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [130]

[51] *cf Lo v Commissioner of State Revenue* (2013) 85 NSWLR 86 at [9].

[52] Macquarie Dictionary (3rd ed) p 2305.

[53] cf Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation (1963) 113 CLR 475, 504.

[54] cf Mobil Oil, 503-504.

[55] (1999) 93 IR 82.

[56] Ibid at [23].

[57] *Major Engineering Pty Ltd v AFMEPKIU (2001) 129 IR 123 at [35].*

[58] *Endeavour Coal Pty Ltd v APESMA* (2012) 206 FCR 576 at [34].

[59] AMWU [2011] FWA 2005 at [29].

[60] Woodside op. cit. at [94]

[61] Tahmoor Coal op. cit. at [30]; and Woodside op. cit. at [93].

[62] Tahmoor Coal at [7].

[63] *LHMU v Coca Cola Amatil (Aust) Pty Ltd* [2009] FWA 153 at [47]-[49] and Woodside [96]-[97].

[64] cf *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685 and CFMEU v Anglo Coal (Dawson Services) Pty Ltd [2013] FWC 10241 at [23].

[65] Macquarie Dictionary (3rd ed) p 2301.

[66] *AMWU v Ridders Fresh Pty Ltd T/A Tibaldi Smallgoods* [2013] FWC 1250 at [39].

[67] First Witness Statement of Mark Heaton dated 14 November 2016 – Exhibit 4para 186.

[68] Ibid Annex MH-10, p 106-107.

[69] Annex MH-10, p 106-107.

[70] Heaton Statement, Exhibit 4, paras 22-24.
[71] Heaton Statement, Exhibit 4, paras 85, 87, 91, 92, 93 and Annexure MH-10, p 106-107.
[72] Heaton Statement, Exhibit 4, paras 94-95.
[73] Ibid para 108.
[74] Ibid para 107.
[75] Ibid para 112 and 113.
[76] Ibid para 116.
[77] Ibid para 114.
[78] Ibid para 115.
[79] Ibid para 127 and 128.
[80] Ibid para 129.
[81] Ibid para 136.
[82] Ibid para 137.
[83] Ibid para 185.
[84] Ibid para 189.
[85] Ibid paras 164-167, 183, 190.
[86] Heaton Statement, Exhibit 4, Annex MH-9, pp 94-98.
[87] Heaton Statement, Exhibit 4, para 80.
[88] Ibid para 96.
[89] Ibid para 202.
[90] Ibid para 200-201.
[91] Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 500 at [126].
[92] See, eg, Scales Statement, 7.11.2016, paras 23, 24, 79, 81, 90-96; Scales Statement, 9.11.2016, para 11 and Annex JS-44.
[93] Applicant's Submissions, paras 24-25.
[94] Heaton Statement, Exhibit 4, para 186.
[95] Heaton Statement, Exhibit 4, paras 115-116 and correspondence Annex MH-10, p 189.
[96] Applicant's Submissions, p 15, para 21(a).
[97] Applicant's Submissions, p 15, para 21(b).
[98] Applicant's Submissions, p 15, para 21(c).
[99] Heaton Statement, Exhibit 4, para 122.
[100] Ibid para 207(a).
[101] Ibid para 207(c).
[102] Ibid para 207(d).
[103] Ibid para 207(b).
[104] Applicant's Submissions, p 16, para 23.
[105] Ibid para 25
[106] *TWU v Veolia Transport Queensland Pty Ltd* [2011] FWA 5691 at [62].
[107] cf *Tahmoor Coal op. cit. at [8]; Jupiters Ltd v United Voice* (2011) 215 IR 123 at [32].
[108] Heaton Statement, Exhibit 4, paras 202, 208(d).
[109] Ibid para 201.
[110] Oppermann Statement, 15.11.2016, pp 123, 153.
[111] Heaton Statement, Exhibit 4, p 103.
[112] Heaton Statement, Exhibit 4, Annex MH-9, pp 94-98.
[113] Heaton Statement, Exhibit 4, para 202.
[114] *Australian Education Union v Department of Education and Children's Services* (2012) 285 ALR 27 at [26]
[115] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]
[116] *Municipal Officers' Association of Australia v Lancaster* (1981) 37 ALR 559 at 579; *Bowling v General Motors Holden Ltd* (1980) 33 ALR 297 at 304
[117] *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson J; *R v L* (1994) 49 FCR 534 at 538
[118] *Australian Mines and Metals v MUA* [2016] FWC 738.
[119] *Selvachandran v Peteron Plastics* (1995) 62 IR 371 at 373.

[120] (1999) 93 IR 82.
[121] Ibid at 88.
[122] (197) 77 IR 269 at 285 per Boulton J.
[123] (1999) 92 IR 82 at 89.
[124] Ibid.
[125] *Fair Work Bill 2009 Explanatory Memorandum* at Page 149.
[126] Heaton Statement, Exhibit 4, para 207(b).