From: Grace Morgan-Cocks [gmorgancocks@raffwu.org.au]
Sent: Tuesday, 17 January 2023 3:53 PM
To: Chambers - Gostencnik DP [Chambers.Gostencnik.DP@fwc.gov.au]
CC: Gus Gusset [Justingusset@gmail.com]; Josh Cullinan [jcullinan@raffwu.org.au]; Amber Sharp [asharp@mccullough.com.au]; Kerry O'Brien [kobrien@mccullough.com.au]; Kane Murtagh [kanemurtagh@icloud.com]
Subject: AG2022/5615 Application by Gusset - Applicant submissions on adjournment
Attachments: 230117 Submissions on adjournment AG2022-5615.pdf

Dear Associate

We refer to the directions hearing listed for 2pm Wednesday 18 January 2023 in the above matter, and the orders sought by Mr Murtagh with consent of Apple to seek an adjournment of the matter for 6 months.

Please find a short set of written submissions on this point **enclosed** for the Deputy President's consideration ahead of tomorrow's listing.

We have copied the employer's representatives and Mr Murtagh to this email.

Kind regards

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AG2022/5615 – Application by Gusset

Application for termination of the Apple Retail Enterprise Agreement 2014

1. These submissions concern the directions hearing in the application by Mr Justin Gusset (**the Applicant**) to terminate the Apple Retail Enterprise Agreement 2014 (**the Agreement**). The Retail and Fast Food Workers Union (**RAFFWU**) is representing Mr Gusset as his bargaining representative for the purposes of these proceedings.

2. For contextual purposes, the employer Apple is currently bargaining for a proposed enterprise agreement to replace the Agreement. Apple issued the notice of employee representational rights on 2 August 2022. Apple put bargaining for the new agreement on hiatus in the middle of December 2022 and intends to recommence bargaining in the end of January 2023.

3. The Applicant understands an independent bargaining representative, Mr Kane Murtagh, supports the application for termination of the Agreement, but also seeks that the matter be adjourned for six months.

4. These submissions will briefly summarise the Applicant's position that the application should be dealt with expeditiously, and not subject to any adjournment.

5. In *Gangell v* ***Lobethal Abattoirs*** [2018] FWCFB 4344, which concerned an appeal of a decision to delay the arbitration of an employee's application to terminate a collective-agreement based transitional instrument pursuant to s 225 of the Act, the Full Bench held that the Deputy President had made an appealable error in adjourning the hearing of the application 'by at least two months'.

6. The first instance decision in [2018] FWC 3136 occurred in the context of the employer Lobethal Abattoir seeking a delay of six months in order to recommence bargaining for a new agreement,[1] which the Deputy President found to be unreasonable.[2]

7. The Full Bench held at [18] that the Deputy President, in delaying arbitration, had erred by giving determinative weight to the object in section 171 of the Act concerning the facilitation of good faith bargaining, rather than the Commission's obligation to perform its functions and exercise its powers in a manner that '*is quick, informal and avoids necessary technicalities'* pursuant to s 577(b) of the Act.

8. Further, at [18]-[19] in applying *Aurizon Operations Limited* [2015] FWCFB 540, the Full Bench held that to the extent it was the case, the Deputy President erred by departing from the principles set down at [151] of that decision that *'…there is nothing inherently inconsistent with the termination of an enterprise agreement that has passed its nominal expiry date and collective bargaining in good faith. There is nothing incompatible with the termination of such an agreement and the continuation of collective*

[1] [2018] FWC 3136 at [11].
[2] At [16].

bargaining that has commenced in good faith at an enterprise level for an enterprise agreement that delivers productivity benefits.'.

9. Finally, at [23] – [25] the Full Bench observed that *'the need to deal with an application expeditiously is particularly important in cases where, as here, there are assertions that employees to whom the agreement applies are at times earning less than under the relevant modern award.'* The Full Bench held that, in taking into account the objects of the Act pursuant to s 578, which include ensuring the guaranteed safety net of fair, relevant and enforceable minimum terms set out in, among other things, modern awards,[3] and subject to application of relevant considerations, it would be '*prima facie contrary to the object of the Act to permit an Agreement that has passed nominal expiry date to continue to operate in circumstances where its provisions as a whole are less beneficial than those provided by the relevant modern award.'*

10. The Applicant has highlighted his concern that workers covered by the Agreement have inferior conditions, particularly regarding the right for permanent workers to have guaranteed hours and set the times of their work, compared to the *General Retail Industry Award 2020*.[4]

11. If the Applicant is correct about the Agreement, Apple employees have slipped below the guaranteed safety net and the matter should be dealt with without delay. It is the Applicant's submission that the Full Bench's observations in *Lobethal Abattoirs* are apposite to the present application, and that a delay of six months, and indeed any delay at all, would be in error.

Retail and Fast Food Workers Union
On behalf of Mr Gusset
17 January 2023

[3] Section 3(b).
[4] Form 24C Declaration 2.1.