

**Confidential**

**Email**

12 February 2024

Associate to Deputy President Millhouse  
Fair Work Commission  
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Dear Associate to Deputy President Millhouse

**B2023/771 - Intractable Bargaining Application by UFU (Application)**

We refer to the above matter which is listed for a case management conference on Wednesday 14 February 2024.

We also refer to the letter from Davies Lawyers dated Friday, 9 February 2024 requesting that the case management conference be adjourned until the *Fair Work Legislation Closing Loopholes Bill (No. 2) Bill* (Cth) (**Bill**) comes into operation so that the future conduct of the case can be considered in the light of the relevant amendments.

The Minister acknowledges that the Bill contains provisions relating to intractable bargaining and that this may impact upon aspects of the matters the FWC will determine in its making of the workplace determination. The content of the Bill is anticipated to be passed shortly and noting it is back before the House of Representatives today.

Whilst the Minister is concerned about delay by the UFU and considers there would still be utility in the case management conference proceeding, the Minister does not oppose a short adjournment of the case management conference for a period of 2 weeks.

We otherwise are instructed to presently provide brief comment on one matter stated in the UFU letter about the impact of the Bill.

**Amended section 274(3) - Agreed term**

Under the Bill's proposed amended s274(3), the date for assessment of when a term is an agreed term will also include earlier dates, including the day that the application for an intractable bargaining declaration was filed. The Application was filed on 28 July 2023.

The UFU's letter contends that amended section 274(3) "*renders nugatory the decision of the Full Bench*".

This is incorrect. At paragraph [170] of the Decision, the Full Bench summarised its conclusions as to whether there were agreed terms at dates earlier than the conclusion of the post declaration negotiating period, including as at 19 June 2023 and 26 July 2023. It concluded that as at those dates there were not "any terms objectively agreed by the parties that should be included in the proposed enterprise agreement".

Associate to Deputy President Millhouse, Fair Work Commission

12 February 2024

Yours sincerely



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