



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT**

**AG2022/5615**

**s.225 - Application for termination of an enterprise agreement after its nominal expiry date**

**Application by Gusset  
(AG2022/5615)**

**Apple Retail Enterprise Agreement 2014**

**Sydney**

**1.30 PM, MONDAY, 14 AUGUST 2023**

**Continued from 26/06/2023**

PN215

JUSTICE HATCHER: I'll take appearances. Ms Morgan-Cocks, you appear for the applicant.

PN216

MS MORGAN-COCKS: Yes, your Honour.

PN217

JUSTICE HATCHER: Mr O'Brien, you appear for Apple? Your microphone's off, Mr O'Brien.

PN218

MR O'BRIEN: I apologise, your Honour. Yes, I appear for Apple.

PN219

JUSTICE HATCHER: And Mr Bliss, you appear for the SDA?

PN220

MR BLISS: Thank you, your Honour.

PN221

JUSTICE HATCHER: I've called the matter on to deal with some procedural matters. I'm advised that the ballot was effectively postponed, so we won't know the result until next Monday, the 21st. Is that the position, Mr O'Brien?

PN222

MR O'BRIEN: Yes, that's right. The voting period will end essentially Sunday afternoon, so we'll know Sunday evening or first thing Monday and can advise the Commission then.

PN223

JUSTICE HATCHER: Is there any opposition to the proposition that if the agreement is approved by employees, the dates set for hearing should be vacated pending the determination of an approval application? Ms Morgan-Cocks?

PN224

MS MORGAN-COCKS: I think that's the prudent course, your Honour. It's certainly what we would suggest.

PN225

JUSTICE HATCHER: Does anybody disagree with that?

PN226

MR O'BRIEN: No, your Honour.

PN227

JUSTICE HATCHER: So what I propose to do is, if Apple sends me as soon as it knows the outcome of the ballot, I will, without any further requirement for a hearing, vacate the hearing dates and adjourn the matter sine die, if the agreement is approved.

PN228

The second thing is, I've set aside, on Apple's application, the directions to enable employees' views about the matter to be obtained prior to the hearing.

PN229

There's two matters I want to say about that. Firstly, again, I'm not inclined to renew that direction or make that direction until the result of the ballot is known. That is, I'm not keen on the idea that employees should be distracted about this during the ballot period.

PN230

Secondly, that I should make a direction automatically next Monday in the event that the agreement is not approved.

PN231

Does anybody have a contrary view to that course of action? It's a bit tight, but it should be doable.

PN232

MS MORGAN-COCKS: Your Honour, if I may ask, what is the time period that you are contemplating for the seeking of those views?

PN233

JUSTICE HATCHER: I think it will need to be seven days. So if Apple can give a clear indication that it can expeditiously make the necessary communication to employees to maximise the time for response, it would be seven days, and that would at least allow a short period for the material to be assessed prior to the commencement of the hearing.

PN234

MR O'BRIEN: We can make that indication.

PN235

JUSTICE HATCHER: Yes.

PN236

MS MORGAN-COCKS: Your Honour, we agree with that time period. Our only suggestion would be the time period for Apple putting out the documents to employees be by 12 pm rather than 4 pm, just to give a little bit more leeway. I understand those materials could be prepared ahead of time.

PN237

JUSTICE HATCHER: Yes, all right. I think that's a reasonable suggestion, so can I ask Apple to at least place itself in a position so that if necessary it can send out the email to employees by midday on Monday the 21st?

PN238

MR O'BRIEN: Yes, we can do that, your Honour. Thank you.

PN239

JUSTICE HATCHER: The third thing is, and obviously this in the event that the hearing goes ahead, the matter has three days' hearing reserved, which is quite a

long hearing. I think I should begin by asking the parties which witnesses are required for cross-examination. The applicant, as I understand it, has filed statements of seven witnesses. Is that right?

PN240

MS MORGAN-COCKS: That's right, your Honour.

PN241

JUSTICE HATCHER: Mr O'Brien, which of those are required for cross-examination?

PN242

MR O'BRIEN: Our counsel informs me that all seven will be required for cross-examination on their statements and reply statements, but the estimate of time that I have been able to share with my friend is it will only take about 30 minutes or so maximum for each of those witnesses. So although all are required, it's quite short compass in terms of the questioning.

PN243

JUSTICE HATCHER: Then Apple has, I think, statements from nine witnesses, if I've counted them correctly. Ms Morgan-Cocks, are they all required for cross-examination?

PN244

MS MORGAN-COCKS: No, they're not, your Honour. At this stage we confirm that we would seek to cross-examine at least five of the witnesses, namely the store managers who are giving evidence in response to the employee witnesses. So Mr Dave Mottek, Dakar Manis, Monica Gyenge, Paul Larsen and Rashad Bada.

PN245

We do not need to cross-examine Gretchen Kohler. I'm seeking instructions; I can get them to you as early as Wednesday, if need be, regarding Ms Inga Adamson and Mr Bernard Ryan.

PN246

JUSTICE HATCHER: All right. Do you have an estimate of time?

PN247

MS MORGAN-COCKS: Similarly, we wouldn't expect to be more than half an hour with any witness, and we would think about half a day would be the maximum.

PN248

JUSTICE HATCHER: I thank the parties for those indications. On the basis of that, I'm inclined to vacate one of the days and reduce the hearing to two days. Is there any opposition to that?

PN249

MR O'BRIEN: I might say, your Honour, I was hoping for the three days, and to set out why that is, there are a number of witnesses, and just given the pure

volume, my experience is that needing to move witnesses around - some of them are across the country. One of our witnesses for Apple is in London and so there might need to be some accommodations made for those witnesses.

PN250

It's also my understanding that that is the first, or at least one of the first, section 226 applications that has been opposed and has been before the Full Bench. We have put on quite detailed submissions. The applicant's representatives have done the same. We've also had a declaration from Mr Murtagh, one of Apple's employees, and the SDA and Mr Bliss have put on detailed submissions.

PN251

So there's a bit of evidence to get through, there might be some submissions to get through, and to assist the Full Bench. So it might be best to leave the three days, even if we only end up taking two or two and a half. Although I hear what you have said and I am respectful of the Full Bench's time, I worry that if it is two days and we end up needing more, it might be better to plan for the reverse.

PN252

JUSTICE HATCHER: Can we do this at this stage, that in the event that a hearing is required say by close of business on Wednesday next week, the parties supply me with an agreed witness program, just giving an indication of when it's anticipated that, roughly speaking, each witness will be available to give evidence, and that needs to include some sort of accommodation for the London witness, and perhaps we'll reconsider the position once we've seen that.

PN253

Is it agreed that on the basis that the hearing is in Sydney, the Sydney witnesses will all appear in person and other witnesses remotely? Is that the arrangement?

PN254

MS MORGAN-COCKS: There is one witness located in Sydney, Ms Dani Barley, and she will be able to attend in person. Mr Joshua Cullinan, who is not located in Sydney, will also attend in person as an employee of RAFFWU. The other witnesses, who are located across the country, we've previously raised an application to have their evidence be given remotely, but that's our intention, at least for the people who are located in Sydney.

PN255

JUSTICE HATCHER: Do you agree with that, Mr O'Brien?

PN256

MR O'BRIEN: Yes, I do. We have two witnesses of our own that are in Sydney that are able to attend in person, but we would make the application, and have no problem with what my friend has said about her witnesses, that they attend by AVL.

PN257

JUSTICE HATCHER: All right. We'll communicate with the parties. I'm broadly content with that approach, but there's some technological issues which I just need to check before I confirm all that.

PN258

MR O'BRIEN: Your Honour, if it assists, with the witness program that you've asked the parties to prepare, Ms Morgan-Cocks and I can put together a suggestion in that witness list about where the witness is located, and that might also assist the Commission.

PN259

JUSTICE HATCHER: Yes. Yes, that would be useful. Thank you.

PN260

Are there any other matters procedural that I need to deal with at this stage?

PN261

MR BLISS: Your Honour, from the SDA's perspective, our intention is that we will have very limited need for cross-examination. I've instructed counsel, who's returned from leave today, and we're going to speak soon regarding which witnesses might be required, but I wouldn't indicate that any of the witnesses we've raised today, other than those indicated, are ones whom we would require to cross-examine, so we should be able to let you know - - -

PN262

JUSTICE HATCHER: Mr Bliss, just remind me, what's the SDA's position about this application?

PN263

MR BLISS: We neither support nor oppose the termination, but we do - - -

PN264

JUSTICE HATCHER: I'm having trouble understanding why you would engage in cross-examination if you're not taking a position about the matter?

PN265

MR BLISS: There may be statements which are made, particularly Apple's witnesses, where we may have some disagreement, but I haven't had an opportunity to speak to counsel regarding if there's anything there. It would be very limited if needed, your Honour.

PN266

JUSTICE HATCHER: All right. I think you'll need to advise us as soon as possible on if any witnesses are required for cross-examination. I've given my view about that.

PN267

Are there any other matters?

PN268

MS MORGAN-COCKS: Nothing from us, your Honour.

PN269

MR O'BRIEN: Not from me, your Honour. Thank you.

PN270

JUSTICE HATCHER: All right. I thank the parties for their attendance, and we'll now adjourn, which means you can simply disconnect.

PN271

MR O'BRIEN: May it please.

**ADJOURNED INDEFINITELY**

**[1.53 PM]**