Apple's Outline of Submissions

No. AG2022/5615

Fair Work Commission

Justin Gusset

Applicant

Apple Pty Limited

Employer

A. Introduction

1. On 23 December 2022, Mr Justin Gusset (**Applicant**), an employee of Apple Pty Ltd (**Apple**), with the assistance of the Retail and Fast Food Workers Union (**RAFFWU**), made an application to terminate the *Apple Retail Enterprise Agreement 2014* (**Agreement**), pursuant to s 225 to 227 of the *Fair Work Act 2009* (Cth) (**FW Act**).

2. Apple opposes the application. It is also noted that an unknown employee has indicated their opposition to the termination of the Agreement.[1]

3. Apple rejects RAFFWU's contentions that the continuing operation of the Agreement would be unfair for the employees covered by the Agreement, and further submits that the Applicant has filed no evidence upon which the Commission could be so satisfied.

4. Having regard to the material filed in support of the application:

   (a) no employee has alleged, nor demonstrated, financial unfairness compared to the *General Retail Industry Award 2020* (**Award**); and

   (b) no employee has demonstrated scheduling concerns that could not be addressed within the current scheduling system once raised, nor unfair rostering principles.

5. In the event that, contrary to these submissions, the Commission is satisfied that the continued operation of the Agreement would be unfair, the Commission cannot be satisfied that it is appropriate to terminate the Agreement in all the circumstances. The application before the Commission was filed after the notification time for a proposed

[1] On 9 February 2023, Deputy President Gostencnik confirmed that an unknown employee at Apple communicated to the Deputy President's associate they opposed the application.

enterprise agreement that will replace the Agreement, bargaining having commenced in August 2022, with a vote on the replacement agreement imminent.

6. The application ought be dismissed.

B. Material before the Commission

7. The Applicant has filed the following material in support of the application:

   (a) witness statement of Josh Cullinan with annexures JC1-11 (**Cullinan Statement**)

   (b) witness statement of the Applicant with annexure JG-1 (**Gusset Statement**);

   (c) witness statement of Wilda Fong with annexures WF1 to WF-3 (**Fong Statement**);

   (d) witness statement of Liska Fell with annexure LF-1 (**Fell Statement**);

   (e) witness statement of Brenda Harris (**Harris Statement**);

   (f) witness statement of Amy Lowe (**Lowe Statement**);

   (g) witness statement of Dani Barley (**Barley Statement**); and

   (h) an outline of submissions (**AS**).

8. On 17 January 2023, an Apple employee Mr Kane Murtagh filed a declaration in response to the application which did not formally oppose the application but highlighted a number of issues and concerns with it.

9. On 8 June 2023, in accordance with the latest directions, Apple filed and served:

   (a) witness statement of David Mottek dated 7 June 2023 (**Mottek Statement**);

   (b) witness statement of Reshaad Badar dated 8 June 2023 (**Badar Statement**);

   (c) witness statement of Paul Larsen dated 8 June 2023 (**Larsen Statement**);

   (d) witness statement of Monica Gyenge dated 8 June 2023 (**Gyenge Statement**);

   (e) witness statement of Kyle Manis dated 8 June 2023 (**Manis Statement**);

   (f) witness statement of Gretchen Kohler dated 8 June 2023 (**Kohler Statement**);

   (g) witness statement of Bernard Ryan dated 8 June 2023 (**Ryan Statement**); and

   (h) witness statement of Inger Adamson dated 8 June 2023 (**Adamson Statement**).

C. Background

10. Apple is covered by two enterprise agreements, including the Agreement.

11. The Agreement replaced a 2008 collective agreement and was overwhelmingly approved by employees in 2014.[2] It passed its nominal expiry date in July 2018.

12. Apple does not currently employ casual employees. This means that every employee at Apple has the benefit of accruing paid leave entitlements, an entitlement to notice of termination and redundancy pay, amongst other benefits of secure employment.

13. In its Australian retail operations, contrary to AS[37], Apple employs 2,788 employees in the following cohorts:[3]

    (a) 1,958 employees in the most common positions[4] (being 70.23% of the total), comprised of 712 (36.36%) full-time employees and 1,246 (63.63%) part-time employees;

    (b) 621 employees in the next most common positions[5] (being 22.28% of the total), comprised of 481 (77.46%) full-time employees and 140 (22.54%) part-time employees; and

    (c) 209 employees in management positions[6] (being 7.50% of the total), comprised of 194 (92.82%) full-time employees and 15 (7.17%) part-time employees.

14. From the total 2,788 employees, 1387 (or 49.75%) are employed on a full-time basis and 1401 (or 50.25%) are employed on a part-time basis.

15. Apple pays high rates of pay to its employees which far exceed the minimum rates of pay under the Award.[7] Employees are paid individual rates of pay reflective of their performance and productivity. It is of some importance that:

    (a) the rates set out in the Agreement is clearly expressed to be a minimum: cl 3.2;

    (b) the rates set out in the Agreement were so set in 2014, with increases included in the Agreement until 2017: Schedule A. These rates were well in excess of the Award minimums at that time;

[2] [2014] FWCA 3747, [2].
[3] Adamson Statement, [43].
[4] Specialist, Ops Specialist, Store Admin Specialist, Technical Specialist, Business Expert, Creative, Genius Admin, Operations Expert, People Operations Planner, Programming Expert, Technical Expert, Expert.
[5] Business Pro, Creative Pro, Genius, Pro, Tech and Merch Pro, Lead, Lead Creative, Lead Genius, Operations Lead.
[6] Manager, Senior Manager, Store Leader.
[7] Adamson Statement, [13].

(c) the evidence before the Commission is the employees are paid well in excess of the minimums provided under the Agreement;

(d) the above-Agreement pay is unsurprising given that the Agreement provides for annual salary reviews: cl 3.6;

(e) the current rates paid to employees, though not specified in the Agreement, are rates which have as their source in part the respective employee's contracts of employment but also in part the derivative force of the obligation under the Agreement for the conduct of annual salary reviews as indicated in the preceding paragraph;

(f) as such, it is not correct for Mr Gusset to contend (as he does) that the rates payable, and, in fact, paid, to the employees are not relevant to the evaluative assessment before the Commission.

16. In August 2022, Apple proactively commenced bargaining for a replacement agreement that would cover the majority of its Australian employees.[8] Apple had planned to initiate bargaining at an earlier point in time but did not do so because of pandemic related delays.

17. The Fair Work Commission has assisted Apple and bargaining representatives to make bargaining meetings more efficient and progress bargaining towards a vote. resolve bargaining disputes.[9]

18. As at the date of these submissions, Apple considers a replacement enterprise agreement to be imminent and intends to put a proposed agreement to the vote in July 2023.[10]

D. Section 226 of the FW Act

19. On 6 December 2022, the FW Act was amended to fundamentally alter s 226.

20. A number of matters are immediately apparent from the new provision:

(a) ***First***, in order to terminate an agreement, the Commission (relevantly to this application) must reach a state of satisfaction that the "continued operation of the agreement" would be unfair to the employees;

(b) ***Second***, given the use of the terms "**continued *operation*** of the agreement" (emphasis and additional emphasis added), the Commission must look to how the agreement operates in practice, rather than simply comparing the agreement to an

[8] Adamson Statement, [17].
[9] [2023] FWC 1023.
[10] Adamson Statement, [26]-[28].

underlying award as if it was undertaking a task akin to a better of overall analysis; and

(c) ***Third***, the Commission must separately reach a state of satisfaction that the termination of the agreement is appropriate in all the circumstances: see s 226(1A).

21. Contrary to what is said at AS[18], this section is not intended to favour the interests of employees. Such a contention is contrary to the plain reading of the provision and to the purpose of the provision, having regard to the objects of the FW Act.

22. The section as a whole requires a balanced approach, seeking employer and employee views, prohibits a termination order being made unless it is appropriate in all the circumstances and for any other relevant factor to be taken into account.

23. This section was introduced to prevent threats during bargaining to "tear up" agreements.[11] As such, the purpose of the new s 226 is an extension, in principle, of good faith bargaining obligations. The references RAFFWU makes to the Explanatory Memorandum at AS[19] support this position. Apple has not made any such threats.

24. Contrary to what is stated in the AS, the test of "fairness" in s 226 is plainly not a de facto better off overall test. If the legislature intended this to be the test, it would have expressed this in such terms. Rather, the Parliament intentionally used the phrase "**continued operation** of the agreement" (emphasis added). As noted above, the words are plainly directed to the "operation" and, indeed, to the "continued operation" of the Agreement. This requires an examination of the way in which the Agreement has been implemented and is operating, in practice, as opposed to a theoretical examination of how the Agreement may be implemented.

25. What has been omitted from AS[21] is that the Act's objects include (emphasis added):

> *(f) 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; and*

26. Further, s 171 of the FW Act provides that the objects of Part 3-3 include (our emphasis):

> *(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for **enterprise agreements that deliver productivity benefits**;…*

[11] AS[19].

27. The Agreement is a bespoke document that provides Apple with productivity and flexibility gains, and has served Apple and its employees well through above-Award salary and flexibility, shaping Apple's internal system, workplace culture and incorporates aspects of Apple's practices across countries as a global business.

28. While some comparison between the Award and the Agreement cannot be avoided where there is an admission or evidence that the Agreement's terms and conditions have in fact fallen below the minimum terms of the Award,[12] a hypothetical comparison between the bare terms of each industrial instrument does not assist the Commission because it ignores the reality of work for Apple's retail employees. Although the AS speak about alleged unfairness in a vacuum, s 226 requires the Commission to enquire into the Agreement's "*continued operation*" in practice, on the ground and in actual reality. The Commission may also have regard to relevant matters,[13] which would clearly encompass actual systems of work and practices of the employer.

E. The continued operation of the Agreement is not unfair to employees

29. The Applicant alleges, in broad terms, that the continued operation of the Agreement would be unfair to Apple's employees. Apple rejects that contention.

30. As noted above, in determining the application, the Commission is required to assess the lived reality of Apple workers, based on the evidence before it. The Applicant has not adduced any clear or persuasive evidence before the Commission to establish that the continued operation of the Agreement results in unfairness to any identified Apple employee. Having regard to the witness statements of Apple employees filed in these proceedings in support of the application:

    (a) no employee has alleged, nor demonstrated, financial unfairness compared to the Award; and

    (b) no employee has demonstrated scheduling concerns that could not be addressed within the current schedules system once raised, nor unfair rostering principles.

31. The new s 226 requires the Commission to determine whether the continuing operation of the Agreement would be unfair to employees. There is no statutory definition of "*unfairness*" for the purposes of the section; contrary to AS, there is no sound basis to conclude that the task of the Commission is to conduct a line-by-line comparison between

[12] *Timothy Mcerlane* [2023] FWC 1033 at [10]; *Securecorp Vic Pty Ltd* [2023] FWCA 1167 at [4]; *Application by Glen Mathew McBlane* [2023] FWCA 1033 at [15]; *Certis Security Australia (WA) Pty Limited* [2023] at [15]; *Shop, Distributive and Allied Employees' Association* [2023] at [14]-[15]. Note that the employer in each case was either the Applicant, or did not oppose the application.
[13] FW Act, s 226(5).

an enterprise agreement and a modern award in a vacuum and without reference to the actual patterns of hours, actual rates of pay, actual scheduling systems and actual conditions of employment of the Agreement covered employees.

32. Apple submits that, in view of the primary question of unfairness as well as the various mandatory considerations the Full Bench must take into account, the Commission cannot be satisfied that any factors favour termination of the Agreement.

<u>The minimum rates under the Award are far below the rates paid to Apple employees pursuant to the Agreement</u>

33. There is no evidence to support the submission repeatedly made by RAFFWU that there is "*real risk*" that Apple's employees are paid less than Award rates. This risk is unexplained, unsubstantiated and unsupported by the evidence before the Commission.

34. Mr Cullinan outlines a comparison between current Award rates and the rates of pay in the Agreement.

35. As noted above, those rates are historical and are subject to annual wage reviews (and resultant increases) in accordance with the terms of the Agreement.

36. What the Adamson Statement makes clear is that employees are paid base rates of pay far in excess of the minimum hourly rates in the Award.[14]

37. The reference to 'almost' all hours of work takes account of the different span of ordinary hours between the Award and the Agreement. For example, under the Award,[15] employees are entitled to penalty rates after 6 pm whereas under the Agreement, penalties do not apply until 10 pm.

38. However, this line-by-line comparison between the Agreement and the Award can provide no assistance to the Commission in considering unfairness in the continued operation of the Agreement for the following reasons (and as discussed further by reference to the evidence below):

    (a) it would be rare for most employees to work the applicable outside-of-Award span of hours;[16] and

[14] Adamson Statement, [13].
[15] Adamson Statement, [9].
[16] See, for instance, the Larson Statement at [8]-[9] which indicates that these hours would only be worked by employees employed at the Apple Charlestown store on Thursday evenings during late night trading and at no other time in the week; the Mottek Statement, at [9]-[10], indicates the same position for employees employed at the Booragoon store; the Gyenge Statement, at [8]-[9] indicates that employees employed at the Apple Broadway store may work some hours across weekdays after 6 pm plus Thursday late night trading; the Bader Statement, at [13]-[14], indicates that employees employed at the Apple Brisbane store may work some hours across weekdays after 6 pm plus Friday late night trading.

(b) the accumulation of the higher rate paid for each and every ordinary hour of work performed by the employee results in the employee receiving more than the Award for the relevant shift and in every pay period.

39. By way of illustration, the evidence before the Commission shows that:

(a) Ms Fell works at Apple's Charlestown store, which only rosters employees after 6 pm one night of late night trading each week to a maximum of 3.5 hours. If Ms Fell is scheduled to work those hours, she is paid her usual minimum hourly rate of $28.58 (or $1.78 less than the Award) for evening hours, but $4.29 higher for any other ordinary time worked that does not attract a penalty rate; and

(b) Ms Barley works at Apple's Broadway store. For evening hours, if Ms Barley is scheduled to work them, she is paid her usual minimum hourly rate of $30.00 (or $0.36 less than the Award) for evening hours, but $5.71 higher per hour for any other ordinary time worked that does not attract a penalty.

40. Given the higher weekly wages earned by employees as a result of the accumulation of actual hourly rates paid, there is no "*real risk*" that Apple workers are paid less than the Award minimum rates of pay which would otherwise provide the enforceable minimum rates of pay for employees.

41. Critically, none of the Apple employees who have provided statements in support of the application have given any evidence that they are financially worse off. It is not clear from any of the RAFFWU submissions or evidence how different cohorts of employees, across different Agreement levels, and pay points, would financially benefit from the Award applying to their employment.

42. This is further discussed by reference to the evidence filed below.

Gusset

43. The Applicant is paid an hourly rate of $37.05.[17]

44. The Applicant is a full-time employee and works from the Apple Brisbane store.

45. As a Genius level employee, the Applicant would otherwise be classified as a Retail Employee Level 5 employee under the Award.[18] This means that for the ordinary hours that the Applicant works, he is currently paid:

(a) $11.27 more per hour than the Award's minimum hourly rate of pay of $25.78;

[17] Bader Statement, [35].
[18] Adamson Statement, [52].

(b) $37.05 for work on Saturdays and work between 6 pm and 10 pm, which is $4.82 more per hour than the Award's Saturday and evening penalty rates of $32.23;

(c) $55.58 for work on Sundays, which is $16.91 more per hour than the Award's Sunday penalty rate of $38.67;

(d) $37.05 for work between 6 pm and 10 pm, which is $4.82 more per hour than the Award's evening penalty rates of $32.23; and

(e) $92.63 for work on public holidays where he performs work, which is $34.62 more per hour than the Award's public holiday penalty rate of $58.00.

46. Apple pays the Applicant significantly above the Award rates for all ordinary hours of work other than Sundays. However, the Applicant rarely works Sundays and he is paid $11.71 higher per hour than any other ordinary time worked that does not attract a penalty.

Fong

47. Ms Fong is paid an hourly rate of $31.85 and also works from the Apple Brisbane store. Ms Fong is a part-time employee.[19]

48. As a Technical Specialist level employee, Ms Fong would otherwise be classified as a Retail Employee Level 3 employee under the Award.[20] This means that for the ordinary hours that Ms Fong works, she is currently paid:

(a) $7.56 more per hour than the Award's minimum hourly rate of pay of $24.29;

(b) $39.81 for work on Saturdays and work between 6 pm and 10 pm, which is $9.45 more per hour than the Award's Saturday penalty rate of $30.36; and

(c) $47.78 for work on Sundays, which is $11.34 more per hour than the Award's Sunday penalty rate of $36.44;

(d) $31.85 for work between 6 pm and 10 pm, which is $1.49 more per hour than the Award's evening penalty rates of $30.36; and

(e) $79.63 for work on public holidays where he performs work, which is $24.98 more per hour than the Award's public holiday penalty rate of $54.65.

49. Apple pays Ms Fong significantly above the Award for all ordinary hours of work.

[19] Bader Statement, [82].
[20] Adamson Statement, [52].

Harris

50. Ms Harris is paid an hourly rate of $31.62 and works from the Apple Brisbane store too. Ms Harris is a part-time employee.[21]

51. As a Technical Specialist level employee, Ms Harris would otherwise be classified as a Retail Employee Level 3 employee under the Award.[22] This means that for the ordinary hours that Ms Harris works, she is currently paid:

    (a) $7.33 more per hour than the Award's minimum hourly rate of pay of $24.29;

    (b) $39.53 for work on Saturdays, which is $9.17 more per hour than the Award's Saturday penalty rate of $30.36;

    (c) $47.43 for work on Sundays, which is $10.99 more per hour than the Award's Sunday penalty rate of $36.44;

    (d) $31.62 for work between 6 pm and 10 pm, which is $1.26 more per hour than the Award's evening penalty rates of $30.36; and

    (e) $79.05 for work on public holidays where he performs work, which is $24.40 more per hour than the Award's public holiday penalty rate of $54.65.

52. Apple pays Ms Harris significantly above the Award for all ordinary hours of work.

Lowe

53. Ms Lowe is paid an hourly rate of $32.21.[23]

54. Ms Lowe is a part-time employee at Apple's Booragoon store.

55. As a Technical Expert level employee, Ms Lowe would otherwise be classified as a Retail Employee Level 4 employee under the Award.[24] This means that for the ordinary hours that Ms Lowe works, she is currently paid:

    (a) $7.45 more per hour than the Award's minimum hourly rate of pay of $24.76;

    (b) $40.26 for work on Saturdays, which is $9.31 more per hour than the Award's Saturday penalty rate of $30.95;

    (c) $48.32 for work on Sundays, which is $11.18 more per hour than the Award's Sunday penalty rate of $37.14;

[21] Bader Statement, [65]-[66].
[22] Adamson Statement, [52].
[23] Mottek Statement, [13].
[24] Adamson Statement, [52].

(d) $32.21 for work between 6 pm and 10 pm, which is $1.26 more per hour than the Award's evening penalty rates of $30.95; and

(e) $80.53 for work on public holidays where he performs work, which is $24.79 more per hour than the Award's public holiday penalty rate of $55.74.

56. Apple pays Ms Lowe significantly above the Award for all ordinary hours of work.

Barley

57. Ms Barley is paid an hourly rate of $30.00 and is a full-time employee.[25]

58. As a Specialist level employee, Ms Barley would otherwise be classified as a Retail Employee Level 3 employee under the Award.[26] This means that for the ordinary hours that Ms Barley works, she is currently paid:

(a) $5.71 more per hour than the Award's minimum hourly rate of pay of $24.29;

(b) $37.50 for work on Saturdays, which is $7.14 more per hour than the Award's Saturday penalty rate of $30.36;

(c) $45.00 for work on Sundays, which is $8.56 more per hour than the Award's Sunday penalty rate of $36.44;

(d) $30.00 for work between 6 pm and 10 pm, which is $0.36 less per hour than the Award's evening penalty rates of $30.36; and

(e) $75.00 for work on public holidays where he performs work, which is $20.35 more per hour than the Award's public holiday penalty rate of $54.65.

59. Apple pays the Ms Barley significantly above the Award rates for all ordinary hours of work and almost all penalty rates except for hours between 6 to 10 pm.[27] However, Ms Barley earns between $5.71 and $8.56 more per hour on weekends and other ordinary hours that does not attract a penalty and so is paid well in excess of the Award minimum rates.

Fell

60. Ms Fell is paid an hourly rate of $28.58 and is a part-time employee.[28] Ms Fell works at the Apple Charlestown store.

[25] Gyenge Statement, [12].
[26] Adamson Statement, [52].
[27] See paragraph 39(b).
[28] Larsen Statement, [13].

61. As a Specialist level employee, the Ms Fell would otherwise be classified as a Retail Employee Level 3 employee under the Award.[29] This means that for the ordinary hours that Ms Fell works, she is currently paid:

(a) $4.29 more per hour than the Award's minimum hourly rate of pay of $24.29;

(b) $35.73 for work on Saturdays, which is $5.37 more per hour than the Award's Saturday penalty rate of $30.36; and

(c) $42.87 for work on Sundays, which is $6.43 more per hour than the Award's Sunday penalty rate of $36.44;

(d) $28.58 for work between 6 pm and 10 pm, which is $1.78 less per hour than the Award's evening penalty rates of $30.36; and

(e) $71.45 for work on public holidays where he performs work, which is $16.80 more per hour than the Award's public holiday penalty rate of $54.65.

62. Apple pays the Ms Fell significantly above the Award rates for all ordinary hours of work and almost all penalty rates except for hours between 6 to 10 pm.[30] However, Ms Fell earns between $4.29 and $6.43 more per hour on weekends and other ordinary hours that does not attract a penalty and so is paid well in excess of the Award minimum rates.

The appropriate counterfactual

63. As can be seen, the rates of pay under the Agreement far exceed the minimum rates of pay in the Award. To the extent that the evaluative judgment to be made is about the Agreement's continued operation as unfair or otherwise, the above rates are the true counterfactual for employees' wages.

64. The Applicant submits, at AS[33]-[35], that the actual rates paid to employees are irrelevant and at best a neutral factor. This has meant that the Applicant has not undertaken any credible analysis of the employee's actual pay packets when compared to Award minimums, nor how different cohorts of employees from Level 1 to Level 3 would be paid as against Award minimum rates. The Applicant's approach ought be rejected.

Additional financial benefits

65. In addition to the rates for these ordinary hours of pay, we note the following:

(a) all Agreement-covered employees receive a commensurate benefit in the statutory superannuation contributions that are paid by calculation of a percentage of

[29] Adamson Statement, [52].
[30] See paragraph 39(a).

ordinary time wages under the Agreement than would be paid on the minimum rates in the Award;[31]

(b) the Agreement provides for additional financial benefits to its employees which do not appear in the National Employment Standards or the Award:

i. time off in lieu if a rostered day off falls on a public holiday: cl 13.3;

ii. paid blood donation leave up to 8 hours per year: cl 12.23-25;

iii. first aid allowance: cl 5.3;[32]

iv. jury service leave for the entire period of jury service: cl 12.18-21; and

v. up to 20 weeks redundancy pay after 6 years of service, with higher redundancy pay than the National Employment Standards between 1 and 5 years of service: cl 16.

(c) Apple otherwise provides for additional financial benefits to its employees which do not appear in the Agreement, the National Employment Standards or the Award:[33]

i. paid special sick leave related to COVID-19 infections, which will expire on 1 August 2023;

ii. paid parental leave and superannuation contributions on 16 weeks primary carer leave or 6 weeks non-primary carer leave;

iii. 4 weeks paid family care for serious illness of family or household members, adoption or surrogacy activities;

iv. 14 days paid military leave per year for eligible employees;

v. short and long-term salary continuance;

vi. Special Time Away, which gives team members 3 paid days off to rest, recharge and spend time with loved ones.

66. RAFFWU also points to other entitlements under the Award, in isolation. While it can be accepted that employees would receive some entitlements such as laundry allowance, higher duties allowance and annual leave loading if they worked at a business applying the Award's terms (putting to one side the business would potentially also be paying the employee at the Award minimum rates of pay), there is simply no evidence to demonstrate

[31] Agreement, cl 4.
[32] This is the only Agreement-based entitlement identified, and conceded as prima facie, beneficial: AS[62].
[33] Adamson Statement, [67].

that the balance of the Award entitlements at AS[55] or AS[62] would be enlivened at Apple by reference to any particular employee. There is no correlation between the bundle of Award clauses referred to in any of the employee's evidence would ever become relevant to them and, it follows, there is no real world relevance to these proceedings.

Apple's scheduling practices are not unfair

67. The primary evidence relied upon by the Applicant relates to scheduling practices.

68. Under the Agreement's terms, Apple deploys a sophisticated scheduling system built to meet customer traffic demands and employee availability.[34] This system is conspicuous in recruitment to Apple, and employees are trained to use this scheduling system at the commencement of their employment.[35]

69. The scheduling (or 'rostering') process begins with employee's own expressed availability and preferences, which employees select and vary at their election on commencement and throughout employment.

70. Apple employees inform Apple about their availability and preferences in a number of ways:

    (a) part-time employees generally select up to 2 weekdays each week that they are unavailable to work (for example, Monday and Tuesday), and full-time employees generally select up to 1 weekday each week that they are unavailable. Additional unavailable days including on weekends can also be approved. "*Unavailable*" means that the employee is never scheduled by Apple to work on these days;

    (b) employees can enter preferred time off on other days of the week where the employee identifies particular hours of work or days that they do not prefer to work (for example, after 4 pm on a Wednesday, or not before 10 am on weekdays);

    (c) employees can enter leave or request a "*rostered day off*" to ensure that they are not scheduled to work on a day that they would otherwise be available to work;

    (d) a roster is published 2 weeks in advance. The roster takes into account employee availability, leave, any specific scheduling requirements built-in for employees including flexible working arrangements, and seasonal or peak demands. Apple does not add shifts to an employee's schedule after publication, other than in rare circumstances and after first consulting the employee, so this roster provides clarity

[34] Manis Statement, [26]-[34].
[35] Manis Statement, [13]. See an example in Gyenge Statement, [14]-[20]; see also Larsen Statement, [16] and Bader Statement, [31]-[32].

and certainty of when an employee is rostered to work within their established availability;

(e) if, after a roster is published, employees are scheduled to work on a day that becomes inconvenient to them, the employee can then "*shift swap*" or "*shift release*" if they are scheduled to work. This means the employee can change their shifts, including giving the shift away to a peer. As in any retail context, this is typically achieved through collaborating with colleagues and managers to ensure the operational needs of the business are met and balanced with employees' needs; and

(f) employees can elect to "*shift pick up*" if they would like to work additional hours of work. Subject to compliance rules about scheduling, such as minimum time between shifts, employees are able to automatically pick up available shifts as they wish. This relates to part-time employees who may want to increase their usual scheduled hours. Other than these additional shifts employees pick up, part-time employees generally have very consistent average weekly hours of work.

71. This simple, flexible and fair scheduling system is a specific enterprise-level system designed to meet customer needs and achieve productivity benefits in Apple's retail context. Employees at Apple are in control of their availability and participate in a strong culture of collaboration[36] to ensure that time away and time off is a matter for employees to choose as part of their availability and preferences, and otherwise structure with their local store leadership.

72. For the employees who have given evidence in support of the Application, their evidence supports Apple's position that scheduling practices provide for fair and flexible rosters:

(a) the Applicant seeks time for recreation, to see his parents and prefers longer breaks between shifts on consecutive days. The evidence demonstrates that he is rarely ever scheduled to work on weekends, other than on a handful of occasions.[37] The hours of the Brisbane store provide for lengthy breaks between days of work, in addition to the schedule rules requiring a minimum 12 hour break between shifts;

(b) Ms Fong's evidence is that she is able to work flexibly to accommodate her secondary employment and pick up shifts to suit her variable availability. Although Ms Fong has described some issues and concerns with her scheduling practices

[36] See Larsen Statement, [25]; Bader Statement, [18] and [72]; Mottek Statement, [22] and [31].
[37] Bader Statement, [44]; 8 Saturday shifts and 4 Sunday shifts.

in the past, these have not been known to store management, and have been remedied once voiced;

(c) Ms Harris is scheduled in a manner that allows her to care for her son with consistent, consecutive days off. Ms Harris does not directly allege that the operation of the Agreement is unfair to her and has never suggested this to the local leadership team;

(d) Ms Fell's evidence is that she is able to work the hours that suit her, particularly once she re-confirmed her unavailable days into Apple's scheduling system (which, we note for completeness, forms part of the recruitment, induction and training practices at Apple for all retail employees);

(e) Ms Barley's evidence is that she is managing various personal circumstances that make her attendance at work as a full-time employee difficult to organise at times. The evidence of store management is that Ms Barley has received significant support. In particular, Ms Barley has been offered to make a flexible working arrangement request despite her short period of service so that Apple can ensure the days and hours of work she has, and the duties required, are balanced with any accommodations that Apple can provide in accordance with guidance from medical advisors; and

(f) Ms Lowe's evidence indicates that, through consecutive days off she selects, she is able to provide care and support for her brother.

73. There is nothing in Apple's current scheduling practices generally, and certainly nothing in the evidence before the Commission, that demonstrates unfairness in a rostering sense.

The Award is no true comparison on scheduling practices

74. RAFFWU submits that Apple's employees strive for Award conditions, and that this is a universal expectation of employees in the retail industry.

75. This submission completely ignores the effect of enterprise agreements. Employees covered by the same industry or occupation award do not have the same enforceable minimum standards. This is not the legislative scheme in the FW Act. The legislative scheme creates awards (which themselves contain individual flexibility provisions) but encourages the creation of enforceable enterprise agreements through collective bargaining. The Applicant, at AS[23]-[25], misunderstands the law and his submissions cannot be accepted.

76. In fact, the General Manager of the Fair Work Commission's reports into developments in making enterprise agreements under the FW Act disclose that in the latest reporting period from 2018 to 2021, the retail industry had the largest average number of employees covered by an enterprise agreement, almost double the next highest industry being financial and insurance services.[38] Further, the retail industry (at 13.9 percent coverage) was described as having a relatively high proportion of the total number of employees covered by an enterprise agreement.[39]

77. Because there is no requirement for enterprise agreements to mirror or substantially reflect the terms and conditions of an underlying modern award in order to be approved (given the test is that the proposed enterprise agreement is better off overall), there is huge variability in the contents of enterprise agreements approved by the Fair Work Commission. This includes variable models for structuring ordinary hours of work.

78. For example:

(a) the *Super Retail Group Supply Chain Enterprise Agreement 2022* allows the employer to nominate "Part-time Core Hours" under clause 21 and advise prospective part-time employees. Core Hours, as defined, are guaranteed number of hours over a 4 week averaged period, and are regular and systematic but the days are variable and may be changed at any time by mutual agreement, exceeded if the employee agrees to work additional hours (which are paid as ordinary time) and reduced by the employee on request if there is no interference with operational requirements;

(b) the *Optus Employment Partnership Agreement (2022)* defines a part-time employee as a person who works less than 38 hours per week, or 76 hours per fortnight, where the number and configuration of hours to be worked by such employees may vary from week to week as determined on engagement or subsequently agreed, and where overtime is only payable after the total weekly or fortnightly hours are exhausted;

(c) the *Romeo's Retail Group Enterprise Agreement 2022* provides that a part-time employee will agree days of work and start and finish times on engagement, but these can be varied in writing (not by agreement) to form a standard roster, and can work additional hours up to a maximum of 38 hours in any week without the payment of overtime if they choose; and

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[38] *General Manager's report into developments in making enterprise agreements under the Fair Work Act 2009 (Cth): 2018-2021*, published pursuant to s 653(1) of the FW Act, p 38-39. Accessible here: https://www.fwc.gov.au/about-us/reporting-and-publications/general-managers-reports/reports

[39] *General Manager's report into developments in making enterprise agreements under the Fair Work Act 2009 (Cth): 2018-2021*, published pursuant to s 653(1) of the FW Act, p 37. Accessible here: https://www.fwc.gov.au/about-us/reporting-and-publications/general-managers-reports/reports

(d) the *Telstra Retail Stores Agreement 2022-2024* contains no concept of guaranteed hours of work for part-time employees. Instead, the agreement pays 10.38% to 31.97% above the Award together with a range of enterprise specific entitlements, and contains flexible rostering practices. This agreement was approved over challenges from an employee organisation that the agreement was less beneficial than the Award because the "*more beneficial terms of the Agreement outweigh the detriments that might accrue to employees in the range of circumstances identified above, including for part-time employees*."[40]

79. Section 226 does not import the better off overall test in s 193 of the FW Act, and nothing in the text, context or purpose of the provision calls for the term "unfairness" to be viewed as importing this test. In any event, it is telling that each of the four enterprise agreements above passed the better off overall test in full view of the requirements of clause 10.5 of the Award as currently framed. For Telstra, it did so with rates of pay and other financial benefits aligned with Apple's current remuneration frameworks.

80. RAFFWU's submissions that employees expect the Award and its purportedly protective features ignore the operation of enterprise agreements validly approved under the FW Act. There is nothing inherently unfair in working under an enterprise agreement with bespoke conditions and treatment of ordinary hours, and the Agreement is not unfair because it is not a replica of the Award or fails to incorporate the Award's terms.

F. Termination of the agreement is not appropriate

81. In the event that the Commission finds, contrary to the above, that the continued operation of the Agreement would be unfair for employees covered by the Agreement, the application cannot be granted unless the Commission is satisfied that it would be appropriate in all the circumstances to terminate the Agreement. The Commission cannot be so satisfied in circumstances where the evidence discloses the imminent conclusion to Apple's extensive bargaining for a replacement agreement (rendering this application futile).

82. In August 2022, Apple proactively initiated bargaining with its employees. It was not an exercise led by employees or bargaining representatives with concerns about the operation of the Agreement, but Apple looking to update its industrial instruments and work together with its Australian business. The new enterprise agreement would replace the Agreement, and a collective agreement.

[40] [2022] FWCA 1719, [5]-[12].

83. The Adamson Statement sets out the chronology and current status of bargaining. Importantly, Apple's intention is to finalise remaining claims and topics in bargaining shortly, as well as drafting of the proposed new enterprise agreement, and put the agreement to a vote in July 2023.

84. This in itself demonstrates that it is not appropriate in the circumstances to terminate the Agreement.

85. Apple accepts that the outcome of the vote is not guaranteed, and respects its employees individual views on the new enterprise agreement. The Commission, however, can draw comfort from the areas of concern in RAFFWU's evidence that are being met in bargaining. These themes include:

(a) part-time minimum hours between 15 - 32 hours a week at the employees' election;

(b) consistent shift patterns and scheduling, and reduced minimum availability; and

(c) consecutive days off for part-time and full-time employees including weekends off.

86. The detailed proposals in evidence demonstrate further offers to employees, including higher penalties than the Award at different times, will be included in a proposed agreement.[41]

G. Other matters

87. If the Full Bench is satisfied, contrary to these submissions, that it is appropriate in all of the circumstances to terminate the Agreement, Apple submits that it would require a reasonable amount of time in order to implement the Award in its business, and estimates this period of time to be between 8 to 12 weeks.

88. In *McDonald's Australia Enterprise Agreement* [2019] FWCA 8563, Deputy President Colman said that at [77]:

> Nothing in the evidence suggests to me that the preparation time sought by the employers is unreasonable. There is nothing unusual about affording a period of time between the date of the decision to terminate an agreement and the operative date of the termination. Plainly this is what the prospectively exercisable discretion in s 227 is intended to accommodate, because it is to be expected that new conditions of employment and working arrangements will apply following the termination of an enterprise agreement, and proper preparations will need to be made in order to implement them. The Commission commonly exercises its

[41] Adamson Statement, [23].

discretion to allow a period of time between the decision and the specified date. For example, in Aurizon the Full Bench granted a period of just under four weeks. In the present matter, the period will be just over six weeks.

89. The Ryan Statement discloses a practical and efficient consultation process for Apple's agreement-covered employees and what would be required to successfully complete this transition and ensure compliance with the Award. That evidence need not be repeated here. It outlines a reasonable and rational process that would take 8 to 12 weeks to complete, noting the size, complexity and geographic spread of the employee population across Apple's retail stores.[42]

90. In addition, the Kohler Statement describes the remaining time required by Apple's project management team to ensure its payroll, workforce management and scheduling systems are ready in case the Award was the operative industrial instrument in lieu of the Agreement. The fastest period of time that this could be ready is 1 August 2023, however, this is subject to any consultation process being finalised and a further two week period to capture and record the outcome of employee consultation.[43] This additional two week period would be required following the consultation process regardless of its timing.

91. This evidence strongly supports a period of at least 12 weeks being permitted to ensure Apple is in a position to implement the Award if it must, and to ensure it complies with instrument.

H. Conclusion

92. The Commission cannot be satisfied that its power to terminate the Agreement under s 226 is enlivened.

93. The application ought be dismissed.

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8 June 2023

[42] Ryan Statement, [4].
[43] Kohler Statement, [5]-[6].