**BEFORE THE FAIR WORK COMMISSION**

AG2022/5615

Application by Justin Gusset - Application to terminate the *Apple Retail Enterprise Agreement 2014*

## Mr GUSSET'S OUTLINE OF WRITTEN SUBMISSIONS

1. Mr Justin Gusset seeks to terminate the Apple Retail Enterprise **Agreement** 2014, which expired on 7 July 2018, and will continue until it is either terminated by the Commission, or a new agreement is approved and replaces it.

2. Mr Gusset's position can be stated simply. Firstly, it would be unfair to allow him and his colleagues to work under the terms of Agreement, because the conditions afforded in the relevant Modern Award, the General Retail Industry **Award** 2020, are superior to the terms in the Agreement. The Act clearly contemplates that Modern Awards should provide the minimum safety net for national system employees, and that workers covered by enterprise agreements be better off overall than if they were covered by their relevant Award.

3. This aspect of the case is straightforward and involves a comparison between the Award and the Agreement. On its face, the Agreement is inferior to the Award in many respects, particularly for Apple's lowest paid workers, and in its approach to rostering permanent workers. This is addressed in Parts 3 - 6 below.

4. Secondly, it would be unfair to allow part-time employees who do not have guaranteed ordinary hours to continue to work under the Agreement, as it denies them certainty of their maximum weekly hours and their right to refuse any unreasonable additional hours under s 62 of the National Employment Standards. This is addressed in Part 7 below.

5. Thirdly, this termination application occurs in the backdrop of ongoing bargaining for a replacement to the Agreement. The **Proposed Agreement** remains far from being finalised. In these circumstances, termination will not adversely affect employees of the Proposed Agreement, but will likely advantage them, and that it

is appropriate in all the circumstances to terminate the Agreement. This is addressed in Parts 8, 9 and 10 below.

## Part 1 - Facts and Background

6. **Apple** Pty Ltd, a national system employer,[1] operates 22 retail stores selling its own, and a limited of other suppliers', mobile phone, computer, other technological products, services, and accessories across Australia. Apple's products, particularly its iPhones, are ubiquitous in the Australian market.

7. The Agreement applies to Apple, and to its covered employees.[2] There are no registered organisations covered by the Agreement. The Agreement came into effect on 7 July 2014 and applies to Apple and Mr Gusset, and the witnesses Ms Fong, Ms Fell, Ms Harris, Ms Lowe, and Ms Barley**.**

8. Mr Gusset is a member of the Retail and Fast Food Workers Union and is a national system employee who works full time at Apple's Brisbane store.[3]

9. The Agreement expired on 7 July 2018. Bargaining for the Proposed Agreement began on 4 August 2022.[4] On 31 October 2022, an agreement proposed by Apple was voted down by a 68% majority of voting employees,[5] and the parties did not meet to bargain again until 27 February 2023.[6]

10. On 23 December 2022, Mr Gusset filed the termination pursuant to section 225 of the Fair Work Act 2009 (Cth) (**FW Act**).

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[1] See Fair Work Act, s 14.
[2] The *Apple Pty Ltd Collective Agreement 2008,* which covers other operational staff, also applies to Apple and will be replaced by the Proposed Agreement.
[3] Statement of Justin Gusset.
[4] Statement of Joshua James Cullinan [10].
[5] Ibid [19].
[6] Ibid [35].

**Part 2 - The *Fair Work Act 2009* (Cth)**

11. Section 225 of the FW Act provides that an application may be made to terminate an enterprise agreement that has passed its nominal expiry date by one or more employers covered by the agreement, an employee covered by the agreement, or an employee organisation covered by the agreement.

12. Section 226 provides the necessary grounds and considerations the Commission must take into account when determining an application under s 225, and provides relevantly:

> (1) If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:
>
> (a) the FWC is satisfied that the continued operation of the agreement would be unfair for the employees covered by the agreement; or
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> …
>
> (1A) However, the FWC must terminate the enterprise agreement under subsection (1) only if the FWC is satisfied that it is appropriate in all the circumstances to do so.
>
> …
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> (3) In deciding whether to terminate the agreement, the FWC must consider the views of the following covered by the agreement:
>
> (a) the employees (unless there are no employees covered by the agreement);
>
> (b) each employer;
>
> (c) each employee organisation (if any).
>
> (4) In deciding whether to terminate the agreement (the existing agreement), the FWC must have regard to:
>
> (a) whether the application was made at or after the notification time for a proposed enterprise agreement that will cover the same, or substantially the same, group of employees as the existing agreement; and
>
> (b) whether bargaining for the proposed enterprise agreement is occurring; and

(c) whether the termination of the existing agreement would adversely affect the bargaining position of the employees that will be covered by the proposed enterprise agreement.

(5) In deciding whether to terminate the agreement, the FWC may also have regard to any other relevant matter.[7]

13. Section 226(1)-(1A) provides that the Commission *must* terminate the agreement if it is satisfied that the continued operation of the agreement is unfair for the employees covered by the Agreement, and only if it is satisfied that it is appropriate in the circumstances to do so.

14. Unsurprisingly, given the passage of the amending Act introducing the section in December 2022, there is limited consideration as to the meaning of "unfair" in this context.[8]

15. To determine the meaning, it is first necessary to begin by reference to the text in context and with regard to its legislative purpose, using context in a wide sense including the legislative history and extrinsic material.[9]

16. Secondly, the meaning of the provision must be determined by reference to language of the statute viewed as a whole.[10] The statute must be construed "*on the prima facie basis that its provisions are intended to give effect to harmonious goals*".[11]

17. Thirdly, the interpretation that would best achieve the legislative purpose is to be preferred to any other interpretation, though the rule may be of less use where a provision is intended to "*strike a balance between competing interests".*[12]

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[7] Parts of the section relating to termination where the agreement does not cover any employees, or where the agreement poses a threat to the viability of a business of the employer, have been omitted for brevity.
[8] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth).
[9] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [4], applying *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2.
[10] *Acts Interpretation Act 1901* (Cth), s 15AA.
[11] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]–[70].
[12] *Carr v The State of Western Australia* (2007) 232 CLR 138 at [5].

***Part 2a. The text, context and purpose***

18. Section 226(1)(a) is plainly directed to the protection of employees and their interests, and while regard must be had to the views of the employer, it is the welfare and interests of workers that the section squarely puts first. An application under s 225 can only be granted where employees would either unfairly impacted if the agreement remained in place, or where there are no employees to be affected by the agreement at all.[13] In this sense, the section is not intended to strike a balance between employees and employer, but to clearly favour the interests of employees.

19. This intention is supported by the contextual considerations in the *Explanatory Memorandum*, where the amendment of the existing section was said to:

> stop the practice of employers applying unilaterally to the FWC for termination of a nominally expired enterprise agreement, where termination would result in reducing employees' entitlements other than in prescribed circumstances. That includes situations where the threat of termination may disrupt bargaining for a new enterprise agreement. [14]

and further at 645:

> This would require the FWC to consider the effect that terminating an enterprise agreement may have on the affected employees' bargaining position during negotiations for a new enterprise agreement. It is intended to prevent an enterprise agreement being terminated as a bargaining tactic, which would be unfair for the employees covered by the agreement (particularly in terms of their bargaining position).

20. Before the amendments to the Act in December 2022, there was a different test that required the Commission to be satisfied that termination was not contrary to the public interest, taking in all the circumstances including the views of

[13] Section 226(1)(c) provides termination may occur where the ongoing operation of an enterprise agreement threatens the viability of a business of an employer covered by the agreement, and that termination would likely reduce job terminations. Section 226(1)(b) provides termination may occur where the agreement does not, and is unlikely to, cover any employees.
[14] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) 634.

employees, employee organisations, and the employer.[15] Unfairness, or not, to employees was not a determinative factor. Applications by employers were granted amidst protracted bargaining, where the motivating factor was the employer's desire to pursue changes to its operations and financial situation, and involved the potential devolution of employee entitlements .[16]

21. The object of the FW Act is to "*provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians*".[17] That object is to be achieved, in part by;[18]

    (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

    (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

    …

    (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements;

    …

    (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;…

22. The objects of the Act show that it is intended to provide fairness, flexibility, certainty and stability for employers and their employees. In ***Mondelez*** *Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29 at [4], Kiefel CJ, Nettle and Gordon JJ said that fairness in this context "*necessarily has a number of aspects: fairness to employees,*

[15] Fair Work Act 2009 (Cth), s 226 as at 6 December 2022.
[16] See for example *Re Aurizon* [2015] FWCFB 540 at [23], and *Re Murdoch University* [2017] FWCFB 4472 at [80] – [81], and [405].
[17] *FW Act,* s 3.
[18] Ibid.

*fairness between employees, fairness to employers, fairness between employers, and fairness between employees and employers*."

23. The Commission is required to ensure that modern awards, together with the National Employment Standards in Chapter 2 Part 2-2 of the FW Act, provide a "*fair and relevant minimum safety net of terms and conditions*" for national systems employees.[19] Further, in ensuring those minimum standards are upheld, the Commission must be satisfied that enterprise agreements leave each employee "better off overall" than the relevant modern award.[20]

24. Fairness to employees dictates that those workers in similar circumstances, such as those working in the same award covered industries or occupations, have the same enforceable minimum standards apply to them. The Commission is required to be satisfied that agreement covered employees will be better off than in comparison to the award, and it is unfair to permit them to remain on any agreement that leaves them worse off than if they were covered by an award.

**Part 3 - Application of the *General Retail Industry Award 2020***

25. It is highly likely that should the Agreement be terminated, Apple and its retail employees will have the General Retail Industry Award 2020 apply to them, and they will be required to abide by those terms until an enterprise agreement is approved that applies to those workers.

26. The Agreement is expressed to apply to employees employed within its retail establishments and excludes those Apple employees who are covered by the *Apple Collective Workplace Agreement 2008*, which is still in force, or any Apple employee engaged to work outside of a retail establishment.[21] The modern award for employers and employees in the general retail industry is the General Retail Industry Award 2020, where, relevantly, the general retail industry means;

[19] FW Act s 134(1).
[20] Ibid s 186(2)(d).
[21] Agreement cl 1.2

the retail sale or hire of goods or services for personal, household or business consumption including (d) personal and recreational goods and…(f) the provision of repair services for household equipment and…(h) the provision of customer information or assistance at retail complexes.

27. Apple and the employees covered by the Agreement who are engaged in their retail premises are covered by the Award. It is appropriate to consider, therefore, whether it would be unfair for covered employees to whom the Agreement applies to continue on the Agreement, in circumstances where if the Agreement was terminated, the Award would apply to them.

**Part 3 –Apple's lowest paid employees are paid less than the Award**

28. There is a real risk that some Apple workers are paid below the Award. In these circumstances it is appropriate that Agreement be terminated.

29. Annexure 'KM-4' to the Declaration of Kane Murtagh prepared at 12 October 2022 discloses the lowest salaries and hourly rates paid to workers pursuant to their Agreement classification. The lowest paid workers, who fall within the Level 1 Agreement classification, receive $24.50 per hour.

30. Whether those workers would be properly classified as Levels 1, 2 or 3 workers under the Award, they are paid less than the Award between 6am - 7am and 6pm - 10pm on week days, and 6pm and 10pm on weekends.[22] This is because, unlike the Agreement, the Award provides that penalty rates apply to work before 7am and after 5pm on weekdays at 125%,[23] and pays overtime for hours worked past 6pm on weekends.[24]

31. Concerningly, workers receiving an ordinary rate of $24.50, and who might be properly classified under Level 4 of the Award could paid less than the Award

[22] Annexure JJC-10 Chart 3.
[23] Award cl 22.1
[24] Award 21.2

throughout the week, including by up to $6.45 between 6pm and 9pm on weekdays, but by at least by $0.26 during an ordinary hour of work.[25]

32. Clearly, if some workers are worse off monetarily under the Agreement than the Award, continuing to require workers to continue under that Agreement is unfair.

***3a. That workers are paid higher than EA rates is of no consequence***

33. It has been noted that Apple can elect to pay workers more than these rates by way of an annual "pay review", where factors such the workers' performance and Apple's business performance may be taken into account.[26] It is alleged that these are persuasive and relevant factors that should be taken into account when determining the application.[27]

34. The relevance of the amounts Apple elects to give workers out of the pay review system for the purposes of this application is dubious. Those rates are a matter of contract between the employer and each employee alone. The Agreement specifically provides that there is *nothing* obliging Apple to pay a worker any rate higher than the Base Rates provided for in Schedule A.[28] That an individual employee and Apple could agree to a different rate of pay provided for in the Agreement are the same circumstances as any other worker and employer covered by an enterprise agreement or award. It is unremarkable, at best a neutral factor, and wholly irrelevant to whether it would be unfair for employees to continue under the Agreement.

35. In any event, if workers were covered by the Award, rather than an Agreement, Apple would not be entitled to start paying workers less than what they had been receiving without their consent, including the payment of junior rates. In this respect, Apple has indicated that it shares this view.[29] A unilateral variation to pay rates would likely give rise to a repudiation of the worker's contract of

[25] Annexure JJC-10 Chart 6.
[26] Agreement cl 3.6.
[27] Form 24D Declaration of Kane Murtagh in these proceedings dated 17 January 2023.
[28] Agreement cll 3.2 and 3.6.
[29] JJC-6 Consolidated Claims "Apple Response" to claim 37 (RAFFWU).

employment.[30] Circumstances depending, this could create rights to access the unfair dismissal jurisdiction,[31] or entitlements to redundancy payments.[32]

**Part 4 – Entitlements under the Award superior for majority of employees**

36. In any event, most workers are entitled to more money under the Award than what they are entitled to receive under the Agreement, because the Level 1 Agreement hourly rate is the same as the Award by operation of s 206 of the FW Act, but those workers are not entitled to laundry allowance and annual leave loading.

37. The Agreement covers 2963 employees, 1693 of them are classified as "Level 1" workers – 57% of the total cohort.[33]

38. The Agreement provides that Level 1 employees receive $21.41 per hour. By virtue of s 206 of the FW Act, Agreement Level 1 employees are entitled to at least $23.38 per hour, and perhaps up to $24.76 per hour if they are doing the work of Level 4 Award employees.

39. However,

    (a) Award covered employees receive an allowance of $1.25 per shift for part-time or casual employees, and $6.25 for full time employees for laundering any uniforms or other special clothing they need to wear to work.[34] For many part-time and full employees, this could be worth between $200 and $350 per year.

    (b) Award covered employees on annual leave also receive the greater of a 17.5% loading for their ordinary hours, or their ordinary rate inclusive of penalty rates.[35]

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[30] *Charlton v Eastern Australian Airlines Pty Limited* (2006) 154 IR 239.
[31] *NSW Trains v James* [2022] FWCFB 55 at [45].
[32] *Broadlex Services Pty Ltd v United Workers' Union* [2020] FCA 867.
[33] Annexure KM-5 to the Declaration of Kane Christopher Murtagh filed in this proceeding on 17 February 2023.
[34] Award cl 19.3(c).
[35] Award cl 28.3.

40. On an assumed basis, Level 1 Agreement workers are entitled to $0.66 less on their ordinary hours than they would be under the Award, when the value of annual leave loading and laundry allowance is factored in.

41. As outlined in Part 5b below, Level 2 and Level 3 workers are paid less under the Agreement than the Award in relation to weekend work.

42. It is unfair that more than half of Apple's Agreement covered employees are entitled to less money under the Agreement than under the Award.

**Part 5 - Rostering and certainty is superior under the Award**

43. The rostering rights and obligations in the Agreement are inferior to the Award, and it would be unfair to continue to allow Apple employees to continue to work without the benefit of those rights.

44. Under the Agreement, workers can be rostered to start an hour earlier, and finish an hour later than under the Award.[36] Workers aren't entitled to any breaks between shifts, nor do they attract penalty payments if they are rostered to work without them.[37] Unlike the Award,[38] there is no limit on the number of hours an employee can work in a day.

45. Under the Agreement, Apple has unfettered right to roster permanently employed workers however it wishes. Clause 6 provides:

> 6. Rosters
>
> 6.1 Apple will determine rosters of work for Team Members on the basis of a fortnightly roster. The roster will be prepared and may be varied by Apple at any time in its discretion. There may be frequent variations to rosters from one fortnightly cycle to another.

[36] Agreement clause 7.1, Award clause
[37] See Award clause 16.6, which provides that workers must have a minimum break of 12 hours between when they finish work on one day and start the next, and attract a 200% penalty until they get that break.
[38] Award cl 15.4 and 15.5.

> 6.2 All Team Members, regardless of classification, may be rostered to work on weekends and on Public Holidays. Whilst you are expected to be available to be rostered to work at any time across seven days of the week, Monday to Sunday, Apple appreciates that there will be occasions where you may not be available to work. In these circumstances, Apple may agree to alternative rostering arrangements as reasonably requested in writing, having regard to the operational needs of the business and your individual circumstances, including any risk to your health and safety.

46. Unlike the Award,[39] Agreement covered workers, both full time and part time, have no rights to consecutive days off, or any limits on the numbers of days they can be rostered to work, or the number of Sundays they can work in a row.

47. Witnesses have explained the impact the Agreement rostering conditions have on them. Mr Gusset has given up on his hobbies and has trouble sleeping. He can't help his parents out as much as he wants. Ms Fell finds herself exhausted and run down without more than one day off in a row, and hasn't been able to see her ailing grandpa more than once every few months because she hasn't known when she'll get enough time off to do it.

48. Agreement conditions are also inferior for part-time workers when contrasted to the Award. Part-time workers under the Award have reasonably predictable hours of work,[40] agree to their regular pattern of work,[41] and their guaranteed hours cannot be changed without agreement.[42] They have rights to review their guaranteed hours, which can be subject to dispute resolution.[43] Part-time Apple workers currently get *none* of these benefits. In truth, their rostering conditions make them essentially casualised, with none of the flexibility usually afforded to casual workers, such as the right to decline shifts or attract additional loadings to reflect their precarity.

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[39] Award cl 15.7 and an additional protection for full time workers from working ordinary hours more than 19 days in a month at cl 15.6(h)(i).
[40] Ibid cl 10.1.
[41] Ibid cl 10.5.
[42] Ibid cl 10.6.
[43] Ibid cl 10.11.

49. Ms Fong and Ms Harris' experiences reflect these issues starkly. They have experienced deep cut to the hours they were used to receiving per week without any notice or consultation, and now struggle to pick up shifts amongst other competing workers experiencing the same changes. Had they had the benefit of the Award, they would have been assured of their guaranteed hours per week.

50. If Apple workers were on the Award, they could:

    (a) Agree how much they wanted to work each week;
    (b) Have the rights to weekly or fortnightly consecutive days off;
    (c) Limit the number of consecutive days they work;
    (d) Get additional time off if they regularly work on Sundays; and,
    (e) Get 12 hours off between shifts, and overtime until their next break if they didn't.

51. These are the simple minimum expectations of many Australian retail workers, but for Apple employees they are aspirational conditions that could allow them to see their families and friends, pick back up hobbies and passions, and control their lives more easily. It is unfair to permit them to continue to work under an Agreement that would see these life altering rights out of reach, when Award covered workers get them by right.

**Part 6 - Other monetary payments generally inferior to the Award**

52. The Award contains many other superior terms compared to the Agreement that outweigh the better terms in the Agreement, such as overtime and penalty rates. There are only a small handful of terms in the Agreement that are better than the Award.

***Part 6a – Overtime and meal allowances***

53. Part-time Award covered workers attract overtime when they work hours additional to any ordinary hours. From Monday to Saturday, they receive 150% for the first three additional hours, and 200% for any work thereafter.[44]

54. In contrast, part-time Agreement covered workers can't receive overtime unless they work more than 76 hours in a fortnight. Undoubtedly, under the Award, part-time workers are much more likely to earn overtime than under the Agreement.

55. Under the Award, the overtime meal allowance of $20.01 is also more likely to be payable than the $17 provided under the Agreement.[45] The payments both arise where a worker must work more than one hour of overtime after they ordinarily finish without 24 hours' notice, but under the Agreement that cannot happen unless a worker has already completed 76 hours of work in a fortnight.

***Part 6b - Penalty Rates***

56. Award covered workers receive 125% on their ordinary hours after 6pm on Monday to Friday, and on Saturday. They get 150% on Sunday.[46]

57. Level 1 Agreement covered workers get 150% on their ordinary rate between 10pm and 6am.[47] They get 125% on Saturdays, and 150% on Sundays. Level 2 Agreement workers don't receive any penalty rates for Saturday work.[48] Level 3 workers don't receive penalties for weekend work at all.

58. Clearly, Award covered workers stand to earn more during weekends. While the impact for Level 1 workers would be minimal in this respect, the largest change would be felt by Level 2 and 3 workers who comprise approximately 43% of the Apple retail employee cohort.[49]

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[44] Award cl 21.2.
[45] Award cl 19.2, and Agreement cl 8.1.
[46] Award cl 22.1.
[47] Agreement cl 10.
[48] Ibid cl 9.
[49] KM5.

***Part 6c – Public Holidays***

59. It is conceded that generally Agreement covered employees receive more favourable conditions for working on public holidays than in comparison to the Award. Level 1 and Level 2 Agreement covered workers who work on public holidays receive 250% loading on ordinary hours and between 3.8 and 7.6 hours of time off in lieu. Level 3 workers also receive time off in lieu, but not penalty rates. The Award provides that workers receive 225% loading for working on public holidays.

60. It should be noted however, that while clause 13.1 of the Agreement provides that permanent employees may be paid for their rostered hours if they are absent on a public holiday, it remains open for Apple to simply not roster part-time workers on that day for those workers to lose that benefit. Part time workers are not entitled to set rosters under the Agreement. If part-time workers had the Award apply to them and they were ordinarily rostered to work on a public holiday, they would be paid for it.[50]

***Part 6d - Most other conditions superior in the Award***

61. There are many entitlements in the Award that are not provided for in the Agreement, such as:

a. Higher Duties payments;[51]
b. Excess Travelling Costs;[52]
c. Travelling Time reimbursement[53]
d. Motor vehicle reimbursement
e. Special clothing allowance
f. Moving expenses;[54]
g. Transport reimbursement; and,[55]
h. Recall allowance.[56]

[50] FW Act s 116.
[51] Award cl 17.5.
[52] Ibid cl 19.4.
[53] Ibid cl 19.5.
[54] Ibid cl.6.
[55] Ibid cl 19.8.

62. It is noted however, that the Agreement provides $29 per fortnight first aid allowance to those it appoints to perform those duties,[57] and that the Award provides a weekly allowance of $12.23.[58]

**Part 7 - NES rights unclear for part-time workers**

63. Ms Fong, Ms Harris, Ms Lowe, Ms Fell, and until recently, Mr Lako, are all part-time employees who have no agreed guaranteed ordinary hours of work. The Agreement creates an almost unfettered right for Apple to roster part-time workers as much, or as little as it wishes without the agreement of those rostered employees. Because of these factors, part-time workers at Apple who do not have any guaranteed ordinary hours cannot know if their required shifts are reasonable for the purposes of s 62 of the Act, which is unfair to them. If they were on the Award, part-time workers would be able to make this assessment because they would have guaranteed ordinary hours.

64. Section 62 of the FW Act sits within Chapter 2 Part 2-2 Division 3 of the NES, and prohibits an employer requesting or requiring an employee to work more than the maximum permissible weekly hours of work unless they are reasonable. It provides:

> (1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
>
> (a) for a full-time employee—38 hours; or
>
> (b) for an employee who is not a full-time employee—the lesser of:
>
> i. 38 hours; and
>
> ii. the employee's ordinary hours of work in a week.
>
> (2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.

[56] Ibid cl 19.11.
[57] Agreement cl 5.3.
[58] Award cl 19.10.

65. Section 62(3) goes on to describe the process for determining whether additional hours are reasonable, including any risks to employee health and safety from working additional hours, the employee's personal circumstances, and the needs of the workplace.

66. In an instance where an Agreement covered part-time worker without any guaranteed ordinary hours is rostered to work a shift at ordinary rates, they cannot know if Apple is requiring them to work more than their maximum weekly hours of work as provided in section 62. Following this, they cannot judge if the request or requirement to work is reasonable pursuant to the considerations in section 62(3), and whether they are entitled to refuse the work.

67. In contrast, the Award provides for agreement as to the guaranteed ordinary hours of work, times that work will be performed, and when meal breaks will be taken. Assent is required where an employer requests that a part-time employee vary their regular pattern of work by working additional ordinary hours, or the performance of overtime. In these circumstances, a part-time worker can easily determine if these requests are reasonable by looking at their guaranteed ordinary hours, and making an assessment pursuant to s 62(3).

68. The NES are the minimum terms that apply to Apple employees' employment, and a modern award or enterprise agreement cannot exclude any terms of the NES.[59] Their purpose is to provide a fair and relevant minimum safety net of terms and conditions to all national systems employees and employers. It is clearly unfair to the covered part-time employees if, while under the Agreement, they cannot apply the NES to their own situation, understand their right to accept or refuse work, and exercise those rights. Requiring part-time workers to continue to work under the Agreement would plainly be unfair in circumstances where determining their rights under s 62 of the NES is not possible.

[59] Ss 61 and 55.

**Part 8 - Employee bargaining position not adversely impacted**

69. Terminating the Agreement and bringing employees onto the Award would not adversely impact employee's bargaining position, and would either improve on their current position under the Agreement and bring them more closely in line with their logs of claims, or match Apple's already agreed positions.

70. Plainly, improving employees' overall entitlements would not adversely impact their bargaining position in circumstances where they are trying to improve their conditions.

71. There are approximately 100 bargaining representatives involved negotiating for the Proposed Agreement. Three of them are industrial associations – the Retail and Fast Food Workers Union (**RAFFWU**), the Shop, Distributive and Allied Employees' Association (**SDAEA**), and the Australian Services Union (**ASU**). There are no employee organisations covered by the current Agreement.

72. The position of the employees who have nominated those industrial associations as their bargaining representatives would improve in relation to, among other claims:

    (a) When overtime would be payable;[60]
    (b) Application of weekend penalty rates to all employees;[61]
    (c) Rostering rights;[62]
    (d) Annual leave loading;[63]
    (e) Higher duties;[64]
    (f) Laundry allowance; and,[65]
    (g) Classifications.[66]

[60] JC-6, see consolidated claim 58 -59 (RAFFWU), 61-62 (ASU), 82 -101 (SDAEA).
[61] Ibid claim 80 (ASU).
[62] Ibid claims 125 – 131.
[63] Ibid claims 149 and 152.
[64] Ibid claims 272 -272
[65] Ibid claim 301.
[66] Ibid claim 36.

73. If the Agreement is terminated and workers move to the Award, the employees' bargaining position in many respects would remain neutral because Apple's positions for the Proposed Agreement either reflect, or are closer to the Award and the FW Act than in the current Agreement:

**(a) Same as Award or NES**

i. Part-time workers receive guaranteed hours;
ii. Part-time accrual on ordinary hours worked;
iii. Payment for any training at direction of Apple;
iv. Dispute resolution procedure;
v. Annual leave;
vi. Personal carer's leave;
vii. Family and Domestic violence leave;
viii. Individual Flexibility Arrangements;
ix. Consultation on major change or changes to rosters;
x. 12 hour break between shifts;
xi. Overtime rate percentages;
xii. Paid rest breaks and unpaid meal breaks; and,
xiii. Highest payable penalty rate applies to work.[67]

**(b) Closer to Award**

**i.** Full time and part-time rostering provisions;[68]
**ii.** Recall allowance;[69]

74. In the circumstances, the Commission can be satisfied that termination of the Agreement would not adversely affect the employee's bargaining position.

**Part 9 - Any other relevant matter**

75. By employing workers on an Agreement which is inferior to the Award, Apple retains an advantage over its competitors who employ workers on the Award,

[67] See JJC-7 Apple "State of Play".
[68] JJC-9.
[69] JJC-7.

which is contrary to the objects of the FW Act. Further, in circumstances where a finalised Proposed Agreement is unforeseeable at this stage, workers may remain on the inferior current Agreement indefinitely unless the Commission terminates it.

***Part 9a. – Apple receives commercial advantage over competitors***

76. By employing workers on conditions that are inferior to the Award, Apple retains a commercial advantage over its competitors who employ workers covered by the Award. As discussed in paragraph 22 above, the High Court in *Mondelez* held that the pursuit of fairness in the objects of the FW Act necessarily involves fairness between employers. It would be contrary to the objects of the FW Act if compliance with the Award disadvantaged Apple's competitors against Apple.

***9b. Proposed Agreement is far off completion***

77. To the extent it is relevant, if the current Agreement is not terminated, it is highly likely that Apple employees will remain on it for the foreseeable future because finalisation of the Proposed Agreement is far from completion. Apple employees face waiting on inferior conditions on the Agreement indefinitely unless the current Agreement is terminated.

78. Bargaining representatives have had 23 meetings.[70] The first 21 of those were in relation to the first iteration of the Proposed Agreement which was voted down by employees on 31 October 2022. The 22nd meeting, held on 27 and 28 February 2023, dealt with the issue of how of what 'Level' in the Proposed Agreement a particular job role should be assigned and was attended by over 100 bargaining representatives.[71] It resulted in no change in either Apple's position, and to their extent of the Applicant's knowledge, no concessions were made by any bargaining representatives.

[70] Statement of Joshua Cullinan [43].
[71] Ibid [39].

79. A further meeting was held on 21 March 2023 to discuss a number of issues relating to rostering of employees, overtime, and guaranteed hours of for part-time workers. There was no substantive bargaining.

80. Apple itself acknowledged it is possible it may need until 12 July 2023 to meet with bargaining representatives.[72] On this time frame alone, it seems unlikely that without the Commission's intervention, Apple employees will remain on the Agreement until at least August 2023. However, given the paucity of meaningful bargaining between the parties, there is no basis at this stage to indicate that a finalised agreement will be reached by July 2023.

**Part 10 – It is appropriate to terminate the Agreement**

81. In circumstances where there is a real risk that workers are being paid below the Award and will continue to experience disadvantage in their personal lives while the Agreement remains in place, it is appropriate that the Agreement be terminated. The Commission will need to be satisfied of the views of the covered employees and Apple in making its decision.

82. The Full Bench in *Re Aurizon* [2015] FWCFB 540 held that in determining whether it is appropriate to terminate an agreement, "*all of the circumstances need to be taken into account*". Although this was held in relation to an application under the previous iteration of s 226, its views in the respect remain relevant regarding the requirement in s 226(1A). It said further:

> In particular the views of employers and employees covered by the agreement, their circumstances, and the impact of termination need to be taken into account. The requirement in s. 226(b) to take into account all of the circumstances including those set out in s. 226(b)(i) and (ii) is a requirement to take the matters into account and to give them due weight in assessing whether it is appropriate to terminate an enterprise agreement. In assessing appropriateness by taking into account all of the circumstances, we approached the task by reference to the construction of s. 226

[72] Statement of Joshua Cullinan at [51].

and the contextual matters that bear upon that construction dealt with earlier as well as giving specific consideration to the matters identified in s. 226(b)(i) and (ii).

83. As discussed in Part 2a above, the purpose of section 226 is to squarely meet the interests of employees. In circumstances where employees are worse off under the Agreement than in comparison to the Award, it is clearly appropriate that the Agreement be terminated. Further, given that employees' bargaining positions in their pursuit for a replacement Agreement will not be adversely impacted by termination, which remains likely far off from completion in any event, termination in the circumstances is appropriate and will meet the purpose of the section.

84. At this stage, it is unclear what the views of the employer and the employees covered by the Agreement are. With the exception of Mr Murtagh, who has filed an application in support of the termination application, there has been no further indication from the covered parties. The Commission will need to satisfy itself in this respect in its deliberations.

**Part 11 – Disposition**

85. The Commission should ascertain the views of the covered employees and Apple without haste. Pursuant to s 226(1)(a) of the FW Act, the Commission should be satisfied that the continued operation of the Agreement is unfair to the employees covered by the Agreement, and grant the termination application.

**Submissions of Mr Gusset**

**23 March 2023**