BEFORE THE FAIR WORK COMMISSION

AG2022/5615

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

MR GUSSET'S SUBMISSIONS IN REPLY

1. These submissions are in reply to Apple's submissions filed in these proceedings on 8 June 2023 (**RS**). The Applicant continues to rely on its outline of submissions filed in these proceedings on 22 March 2023.

2. At RS [24], Apple has misunderstood the Applicant's submissions about what is required to be satisfied under s 226(1)(a) that '*the continued operation of an enterprise agreement would be unfair for the employees covered by the agreement*'.

3. It is correct that the test in s 226(1)(a) is not a de facto '*better off overall test'*. Conceivably, there could be situations where an enterprise agreement leaves employees better off overall, but its continued operation may be unfair to them. However, for the reasons explained in the AS, it is also the case that the continued operation of an enterprise agreement, such as the Agreement, that does not leave employees better off overall when compared to the Award is also unfair to employees. In this sense a comparison to the Award is required.

4. At AS [28], Apple asserts that the test in s 226(1)(a) of the FW Act requires looking at the Agreements '*continued operation*' in practice, including '*the actual systems of work and practices of the employer'*. What is actually urged however, is the erroneous consideration of conditions, policies, and practices that sit wholly outside of the Agreement. Apple invites the Commission to not only consider the additional amounts it elects to pay workers above the Agreement (at RS [63]), but also statutory superannuation, leave conditions, and other financial benefits that exist only in policy and are subject to Apple's discretion (at RS [65]). There are several issues with these submissions.

5. Firstly, the word '*operation*' in s 226(1)(a) refers to the period of time in which an agreement begins and ceases to operate, and consequently the time in which is in force and applies to covered employees, pursuant to ss 52 and 54 of the FW Act. It does not refer to how the enterprise operates inclusive of and also separately from a relevant enterprise agreement, as Apple appears to contend (RS [24]).

6. Secondly, the test in s 226(1)(a) is concerned with an assessment of the *'continued operation of* ***the agreement***' (emphasis). That is, whether the terms of the Agreement, if they continued to operate, would be unfair for the employees in the enterprise it covers. It does not require consideration of, as Apple appears to contend, the continued operation of the totality of the enterprise's conditions as it relates to its employees.

7. This plain reading demonstrates that words '*the continued operation of the agreement'* in s 226 do not require consideration of all of the conditions technically available to employees, including those that exist beyond the scope of the agreement. Rather, they require careful analysis as to whether the actual terms of *the agreement*, in continuing to apply to covered employees, would be unfair.

8. Apple's assertions at RS [67] – [70] that the way it rosters workers, as permitted by clause 6 of the Agreement, is fair is not supported by the evidence. For example, and contrary to the Manis Statement at [26] – [34], full time employees do not have the capacity to make themselves unavailable on any day of the week. At best, they can make themselves 'preferred unavailable', which will not ensure time off.[1] By way of further example, although Apple alleges workers can enter requests not to be rostered on particular days or times, this can and has been rejected by management without cause.[2] The evidence demonstrates that although covered Apple employees are full time or part-time employees, they have very little certainty and limited control over when they will and will not work.

9. Further, contrary to RS [71] the capacity to sincerely address this unfairness and increase employee control over availability is not possible under the current

[1] See for example the Reply Gusset Statement RJG-1 and paras [3] – [7].
[2] Reply Lowe Statement [19] – [20].

Agreement. The terms of clause 6 of the Agreement are the clearest statement of the real situation in Apple's retail stores – until the Agreement is terminated, Apple can prepare and vary rosters at any time in its discretion, without fetter. This situation will continue to persist until the Agreement is terminated.

10. Further, at RS [74] and [77] Apple misstates that the Applicant insists that enterprise agreements must reflect the minimum terms of the relevant Award. That is plainly not the case. Rather, the Applicant submits that an enterprise agreement that does not leave covered employees 'better off overall' when compared to the relevant award is, when read in conjunction with the objects of the FW Act, unfair. The comparison to recently approved retail agreements with flexible scheduling is apt. Unlike the Agreement, they all mandate the payment of minimum rates above the Award, leaving them 'better off'. In contrast, the Agreement provides minimum rates Level 1 employees at the Award level only by operation of s 206 of the FW Act, without the benefit of annual leave allowances, laundry allowances to wash their uniforms, and provides inferior scheduling conditions.

11. Apple has not established any reason why the Agreement should not be terminated. Pursuant to s 226(1)(a), the Agreement should be terminated and the employees should be returned to the Award.

Reply Submissions of Mr Gusset
23 June 2023