



STATEMENT AND RECOMMENDATIONS

Fair Work Act 2009

s.240 - Application to deal with a bargaining dispute

Australian Municipal, Administrative, Clerical and Services Union

v

Apple Pty Ltd T/A Apple

(B2023/274)

Shop, Distributive and Allied Employees Association

v

Apple Pty Ltd T/A Apple

(B2023/278)

DEPUTY PRESIDENT HAMPTON

ADELAIDE, 3 MAY 2023

Application to deal with a bargaining dispute – conference conducted – recommendations made – matter allocated to a Member to assist the parties conduct further negotiations.

[1] The Australian Municipal, Administrative, Clerical and Services Union (**ASU**) and the Shop, Distributive and Allied Employees Association (**SDA**) have each lodged a s.240 application under the *Fair Work Act 2009* (**Act**) seeking the Commission's assistance to deal with a bargaining dispute. The context for the applications is that the ASU and SDA, and other bargaining representatives, are currently bargaining with Apple Pty Ltd T/A Apple (**Apple**) seeking to reach a new enterprise agreement. The proposed enterprise agreement would, in effect, apply to a substantial portion of Apple's Australian operations and replace two existing nominally expired agreements. The Retail and Fast Food Workers Union (**RAFFWU**) also seeks to participate in these applications having been appointed as bargaining representative for in the order of 125 employees. In addition, there are well over 100 Individual Bargaining Representatives (**IBRs**) seeking to have their views considered. I observe that some of these IBRs are also members of the ASU, SDA or RAFFWU.

[2] The bargaining has been underway since August 2022 and there have been over 30 meetings. Although progress has been made, particularly in recent weeks, there are many issues and claims that have not been thoroughly explored and there is no substantial agreement between Apple and most of the bargaining representatives on some major matters. I observe that although there are different views as to how the present difficulties with the bargaining have arisen, it is common ground that the existing process is not effective or efficient.

[3] Amongst the factors influencing the process, is the number of IBRs. The IBRs have nominated themselves in accordance with the requirements of the Act and they have a legitimate role to play in the process. This dynamic does create some logistical issues both in terms of

conducting meetings and the number of claims that have been made. Apple recently consolidated the various proposals, and these comprise approximately 500 claims. Many of these have similar themes; however, the volume of claims is also a factor influencing the present process.

[4] Given the logistical issues, I conducted an initial conference in these matters on 1 May 2023 to explore the general positions of the Industrial Parties and sought views on how the bargaining process could be advanced whilst ensuring the views of all bargaining parties are considered. The initial conference involved only the ASU, SDA, RAFFWU and the Apple Bargaining Team and its representatives. I took 2 additional steps in recognition of the nature of representation at the initial conference. Firstly, the conference did not deal with the substance of the salary and conditions issues in dispute. Secondly, in advance of the initial conference the IBRs were given an opportunity to contribute to the process by way of written submissions. These contributions were then summarised, and that summary was provided in advance by the Commission to the IBRs and to those participating in the conference.

[5] The questions posed by the Commission to the IBRs, and to the conference more generally, were as follows:

- What technology/approaches might be utilised to facilitate the involvement of all of the bargaining representatives in the negotiations?
- Is there any capacity for the individual bargaining representatives to nominate a smaller group of representatives on a regional/location/occupational or other basis?
- Comments on the progress of negotiations to this point.
- Other procedural matters that the parties wish to raise.

[6] Various suggestions were made by the IBRs including those going to the better use of technology to facilitate participation, rationalisation of the number or time given to the IBRs or alternatively the time given to the Union representatives within the meetings, having better support for the IBRs in their role, the provision of information from Apple with a greater lead time before the bargaining meetings, and ensuring that Apple has the decision-makers more directly involved in the process.

[7] Very constructive discussions were held during the initial conference and the matters canvassed included:

- The general processes that had been adopted during the bargaining and the status of negotiations on the various major claims;
- Proposals to advance the negotiations made by the ASU, SDA and RAFFWU and the response and suggestions made by Apple;
- The perspectives and proposals advanced by the IBRs;
- The wages and salaries proposal recently made by Apple which has the benefit of providing an important element of the context in which the employee organisations and bargaining representatives might assess other proposals that are being made by the various interests;

- The fact that Apple had recently provided the consolidated logs of claims including its responses to date; and
- The various potential modes of conducting bargaining meetings, including fully on-line, meeting in person at alternating locations and various hybrid models. This also included the potential to facilitate and support bargaining representatives in their roles where appropriate.

[8] A number of immediate initiatives were also agreed; being:

- If possible, the appointment of an independent chair to conduct the bargaining meetings;
- A drafting committee should be formed, however there were different views as to its composition; and
- Apple would provide to all bargaining representatives the names, position and work emails of the IBRs. This, along with the group email also recently established by Apple, will assist all bargaining representatives to meet their respective good faith bargaining obligations.

[9] I observe that the parties subsequently explored whether a particular (agreed) person was available to undertake the task as independent chair, however that person was not available. Given this development, I will arrange for a Member of the Commission to assist the parties with the conduct of the bargaining meetings.

[10] I also observe that Apple has also now provided the agreed information concerning the IBRs.

[11] As requested by the parties, I consider that it would be helpful to summarise several observations that I made near to the conclusion of the conference and to issue some recommendations to assist the process.

[12] In so doing, it is important to have regard to the good faith bargaining requirements (the **requirements**) created by s.228 of the Act:

“228 Bargaining representatives must meet the good faith bargaining requirements

- (1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:
 - (a) attending, and participating in, meetings at reasonable times;
 - (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
 - (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
 - (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals;

- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
- (f) recognising and bargaining with the other bargaining representatives for the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

- (2) The good faith bargaining requirements do not require:
 - (a) a bargaining representative to make concessions during bargaining for the agreement; or
 - (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.”

[13] I observe that provided the requirements are met, including that all bargaining representatives ultimately have their proposals genuinely considered and reasons for any response provided, there is an opportunity for the parties here to prioritise the outstanding issues. This might involve initially concentrating on what would be considered to be the most common elements of an enterprise agreement and those claims that have apparent broad support from employee representatives.

[14] I also observe that the requirements as applied by the Commission¹ allow for different parallel processes for dealing with issues that impact only upon a section of the entire employee group or business, provided the overall proposals are considered in some form by the full bargaining committee.

[15] There is a level of support being provided by Apple to the IBRs. This includes paid time off to participate in what is a full schedule of bargaining committee meetings. It would be reasonable for the IBRs involved to, as far as is possible, coordinate their contributions and to liaise out of session about positions that might be advanced.

[16] As far as possible, Apple and all other bargaining representatives, should provide information and responses in advance of bargaining meetings to enable the meetings to deal with the actual negotiation of the issues. Further, whilst recognising the multinational nature of the employer here, Apple should seek to have relevant decision-makers readily available to ensure prompt responses and to have those attending the bargaining meetings authorised to make in principle agreements within instructions.

[17] The concept of a drafting committee is sound and should be adopted. The purpose of the drafting committee would be to draft agreed outcomes of the bargaining process (or outcomes that are likely to form the basis of a proposed agreements that have the support of at least some of the other bargaining representatives) for inclusion into a consolidated proposed enterprise agreement. It is important that the drafting committee not become a de facto bargaining committee and whilst its membership should recognise the nature and scope of the bargaining committee, it should comprise individuals that have the requisite drafting skills. I do accept that there is a role for those from the workplace to ensure that the final wording reflects the intended outcome and is likely to be understood and applied in that manner. I suggest that this is best accommodated by ensuring that some of the IBRs and workplace representatives of the unions are released from duty at critical stages to enable them to review

and provide feedback to the drafting committee. The arrangements should be considered and resolved at an early future bargaining committee meeting.

[18] Given the reallocation of these matters to another Member of the Commission, I will leave the mode of the future bargaining committee meetings to that Member to work through with the committee. I observe that it would appear to be desirable that at least some of the meetings be conducted with those attending largely in person, with the use of an appropriate on-line platform to enable others to attend.

RECOMMENDATIONS

1. THAT the parties consider the observations in this Statement and assess their positions accordingly.
2. THAT the bargaining committee, with the assistance of the Commission Member allocated to this matter, prioritise and then work through the outstanding claims with a view to achieving as much consensus amongst the bargaining committee as possible.
3. THAT the parties keep the Commission advised of developments and progress.

[19] As indicated above, these matters will now be allocated to another Member of the Commission to assist the parties within the framework of these Recommendations.

[20] General liberty has also been granted, including to seek the relisting of these applications before the Commission.

The image shows a handwritten signature in black ink on the left, and a circular official seal of the Fair Work Commission of Australia on the right. The seal features the text 'THE SEAL OF THE FAIR WORK COMMISSION' around the perimeter and 'AUSTRALIA' at the bottom. In the center of the seal is the Australian coat of arms, which includes a kangaroo and an emu flanking a shield, topped with a seven-pointed star.

DEPUTY PRESIDENT

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<PR761520>

¹ See *AWU v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFCB 1476.