

[2023] FWCFB 139

The attached document replaces the document previously issued with the above code on 11 August 2023.

Cross-referencing errors appearing at paragraphs [25] and [31] of the decision have been corrected.

Pay Equity and Awards Team

Dated 11 August 2023



DECISION

Fair Work Act 2009

s.158—Application to vary or revoke a modern award

Application by Woolworths Group Limited

(AM2022/35)

GENERAL RETAIL INDUSTRY AWARD 2020

[MA000004]

Retail industry

JUSTICE HATCHER, PRESIDENT

DEPUTY PRESIDENT CLANCY

COMMISSIONER MATHESON

SYDNEY, 11 AUGUST 2023

Application to vary the General Retail Industry Award 2020.

Introduction

[1] Woolworths Group Limited (Woolworths) has made an application pursuant to s 158(1) of the *Fair Work Act 2009* (Cth) (FW Act) to vary the *General Retail Industry Award 2020* (Retail Award) for the purpose of making clear that the award covers an ‘online fulfilment facility’. In its application, as amended, Woolworths seeks three variations to the Retail Award. First, it seeks to add the following new definition to clause 2, *Definitions*:

Online supermarket sales fulfilment facility means a facility operated by or for a supermarket to fill orders for retail sales placed by a customer online.

[2] Second, it seeks to vary clause 4, *Coverage* by adding the following words to the end of clause 4.1(b):

including employees employed in an online supermarket sales fulfilment facility.

[3] Third, Woolworths seeks the deletion from Schedule A, *Classification Definitions* of the phrase ‘at a retail establishment’ as it appears in each classification and its replacement by the phrase ‘in the general retail industry’.

[4] There is no dispute that Woolworths is an employer that is covered by the Retail Award and is thus competent to make an application to vary that award pursuant to s 158(1) of the FW Act. Under s 157(1)(a), the Commission may make a determination varying a modern award, other than with respect to minimum wages or a default superannuation fund term, if it is

satisfied that making the determination is necessary to achieve the modern awards objective. The modern awards objective is set out in s 134(1), and provides that the Commission ‘must ensure that modern awards, together with the National Employment Standards, provide a fair and minimum safety net of terms and conditions’ taking into account the matters specified in paragraphs (a) to (h) of the subsection.

[5] Woolworths’ application is supported, either wholly or with qualifications, by the Shop, Distributive and Allied Employees’ Association (SDA), Australian Business Industrial and Business NSW (ABI), the Australian Industry Group (Ai Group) and Coles Supermarkets Australia Pty Ltd (Coles). The application is opposed by the Transport Workers’ Union of Australia (TWU), which contends that the *Road Transport and Distribution Award 2020* (Road Transport Award) currently covers online fulfilment centres and that this position should not be disturbed by any award variation. The application is also opposed by the United Workers’ Union (UWU), which contends that the *Storage Services and Wholesale Award 2020* (Storage Services Award) covers online fulfilment centres and that this position should not be altered.

Outline of Woolworths’ case

[6] As we later explain, the basis upon which Woolworths advances its case is significant for the determination of its application. In its written submissions filed on 27 April 2023, Woolworths put forward three positions in respect of its application. Its primary position is that employees working at *its* online fulfilment facilities (consisting of ‘customer fulfilment centres’ (CFCs) and eStores) are covered only by the Retail Award and not the Road Transport Award or the Storage Services Award. Its secondary position is that if *its* employees working at its CFCs and eStores are covered by the Retail Award and another award (either the Road Transport Award or the Storage Services Award), then (pursuant to clause 4.5 of the Retail Award and either clause 4.7 of the Road Transport Award or clause 4.7 of the Storage Services Award), the most appropriate classifications to cover its employees are those in the Retail Award. Its third position is that if *its* employees working at *its* CFCs and eStores are covered by a modern award other than the Retail Award, the Retail Award should be varied so that it covers those employees to the exclusion of any other modern award. In respect of the modern awards objective, Woolworths contends that the considerations in paragraphs (f) and (g) of s 134(1) favour the grant of its application because the variations sought ‘will provide clarity’ as to the application of the Retail Award, and that the other considerations in s 134(1) are irrelevant and therefore have neutral weight.

[7] In support of the positions described above, Woolworths adduced evidence from four of its employees:

- Dale Acton, Director – DC Operations & Store Delivery for Primary Connect, a division of Woolworths;
- Christopher Peters, the General Manager for eCom Store Operations for WooliesX, a division of Woolworths;
- Christopher Hall, the ‘eCom Operation Model Lead and Hatted Chapter Lead for the Future Network Operations Chapter for Woolworths’; and

- Thomas Leonard, the Head of Smart Growth for Woolworths.

[8] In general terms, these witnesses described the operation of, and work performed by employees at, Woolworths' CFCs and eStores, and sought to draw similarities between these and Woolworths' traditional supermarkets, and differences between these and Woolworths' distribution centres.

[9] Two observations may be made at the outset about Woolworths' case:

- (1) Woolworths does not contend that, prior to its application in this matter, there has ever been any dispute about award coverage at its CFCs or eStores.
- (2) Despite applying for variations to the Retail Award with general application to any 'online supermarket sales fulfilment centres', Woolworths' evidence and submissions are concerned entirely with its own operations, both factually and in respect of the question of award coverage. It adduces no evidence concerning any other employer's 'online supermarket sales fulfilment centres', nor does it advance any submission about award coverage with respect to any other employer.

Woolworths' CFCs and eStores

[10] The facts concerning Woolworths' CFCs and eStores were not the subject of any significant dispute and may firmly be established on the basis of the evidence of Mr Peters, Mr Hall and Mr Leonard. Although the evidence descended into considerable detail concerning the operations of, and the work performed at, the CFCs and eStores, only a broad outline of the relevant facts is necessary for the determination of Woolworths' application.

[11] In addition to its traditional business of selling goods to customers attending its supermarkets, Woolworths has developed the capacity for customers to order and pay for goods online and have the goods delivered to their residence or other location. To a large extent, such orders are met by Woolworths employees, known as 'personal shoppers', who pick the items from the shelves or racks in a traditional supermarket, bag them and place them in a customer tote. The totes are taken to an assembly area in the supermarket, and the orders are assembled for delivery by road to the customer's identified location. In all States and Territories except Tasmania, the road transport function is performed by employees of its 'delivery partner', Linfox, or by other contractors. In Tasmania only, the road transport function may be performed by Woolworths employees driving directly from a Woolworths supermarket.

[12] Instead of home delivery, customers may utilise the 'direct to boot' option, whereby they order their goods online and pick up the goods themselves, at a large number of Woolworths supermarkets. Woolworths have also entered into an arrangement with Uber Eats whereby customers can order a limited number of items through the Uber Eats website or app. The app communicates with Woolworths to allow the order to be picked by a personal shopper at a Woolworths supermarket, and the delivery is then made by an Uber Eats driver.

[13] CFCs and eStores represent two alternative means by which Woolworths fulfils online customer orders, except that they are not currently used to fill orders made through Uber Eats.

CFCs

[14] CFCs are independent locations where orders are picked and assembled for delivery which, unlike supermarkets, are not open to the general public. Woolworths operates seven CFCs: at Brookvale, Lidcombe, Mascot and Caringbah in Sydney, at Footscray and Notting Hill in Melbourne and at Rochedale in Brisbane. As at February 2023, in excess of 4,200 employees worked at these CFCs. The CFCs are located in large warehouse-type structures with receipt and delivery docks or areas. As with the supermarkets, goods are delivered to the CFCs by road from Woolworths distribution centres or third-party logistics storage facilities. The deliveries to the CFCs appear to be undertaken by third-party road transport/logistics businesses, principally Linfox. There is no suggestion in the evidence that Woolworths employees perform the function of delivering goods by road to the CFCs.

[15] Goods, once delivered to the CFCs, are not stored in bulk as in a warehouse. Much like as in a supermarket, the goods once received are taken from the dock to specific item locations in the CFC so that they may subsequently be picked for the purpose of meeting online orders. Many items are placed on shelves or racks as they would be in a supermarket, but some bulkier items remain on pallets. This work is performed by Woolworths employees known as 'replenishment team members' at the CFC, and is similar to shelf replenishment work performed in supermarkets.

[16] CFCs are divided into different areas for different types of items. For example, the Lidcombe CFC has an ambient (room temperature) Area 1 for bulkier items, an ambient Area 2 for smaller items, a temperature-controlled area for chocolate and some fruit and vegetables, a freezer area (containing frozen items in freezer chests and shelves the same as those seen in a supermarket), and a chiller area (with chiller shelves and fridges similar to those in a supermarket). In addition, the CFC has a delicatessen and seafood area, where delicatessen and seafood functions (such as slicing smallgoods) are carried out as in a supermarket, and a bakery where fresh bread and similar items are prepared and packed. All these areas broadly correspond with the item areas in a typical Woolworths supermarket. In addition, there is a controlled items area, enclosed in a metal cage, containing cigarettes and alcohol. The alcohol items correspond to those sold in BWS liquor stores operated by Endeavour Group Limited, an alcohol retail and hotel business which was spun off from Woolworths in 2021.

[17] Orders received electronically at a CFC are divided in accordance with the different areas of the CFC, with an employee known as an 'online personal shopper' picking a particular part of a number of orders simultaneously within their assigned area of the CFC. They use a hand-held electronic device to direct them to the required items, and then bag them and place them in a customer tote for each order. The customer totes are moved around the CFC in a small trolley. Once an online personal shopper has picked the items for their orders, they take their trolley to the staging area.

[18] In the staging area, 'despatch team members' then assemble the orders from the items picked from each area into delivery containers, group containers that will be part of the same delivery truck run, take the containers to the delivery area, and load them onto a delivery truck.

[19] The delivery trucks have been purchased by Woolworths from a manufacturer and then leased to external fleet management organisations for a 48-month lease term. These

organisations register the vehicles, approve scheduled and non-scheduled servicing at repair centres, and finance them. The vehicles are subleased to Linfox, which organises insurance for the vehicles and manages the arrangements for the use of these vehicles to make the required deliveries. The trucks are painted in Woolworths colours and bear Woolworths signage. They do not appear, on the evidence before us, to contain any visible Linfox signage. However, the drivers wear high-visibility uniforms with Linfox insignia on them. The drivers are not Woolworths' employees and we assume that they are wholly or substantially employees of Linfox. Woolworths charges its online customers an additional fee for delivery, which is usually a flat amount. These arrangements are the same as those applying for deliveries of online orders from Woolworths' supermarkets. The 'direct to boot' option is only available at the Rochedale CFC.

[20] Employees at the CFCs may purchase food and drink items, and short-dated items, at a designated 'team shop' area within the CFC. In addition, the CFCs are open at designated times each week to allow employees and their families and friends to undertake personal shopping in the CFC.

eStores

[21] Woolworths currently operates two eStores, at Carrum Downs in Victoria and Maroochydore in Queensland. The eStores incorporate a traditional supermarket and an 'eCom floor'. The eCom floor, unlike the supermarket, is not open to the public and is used to fill online orders. There are differences between the eCom floors at Carrum Downs and Maroochydore but, in broad terms, they contain an automated and computer-operated 'Order Storage Retrieval system' (OSR system). The OSR system stores grocery items vertically in 'source totes'. When required to do so to meet online orders, the OSR system retrieves source totes and shuttles them to an online personal shopper at the 'Goods to Person' station for the purpose of them picking and placing in a customer tote. An 'autonomous mobile robot' then transports the customer tote to the 'Last Mile' or despatch area. Other items are not stored in the OSR system and have to be picked by online personal shoppers from shelves and racking located in either the eCom floor or the supermarket. Once their orders are picked in customer totes, they are taken to the despatch area and the orders are assembled for delivery. The arrangements for receipt of deliveries, replenishment, loading and delivery are essentially the same as for the CFCs except that both eStores allow for the 'direct to boot' option.

[22] There are almost 400 employees in the two eStores. Employees may work across both the supermarket section and the eCom floor, and may sometimes do so in the same shift.

Applicable instruments

[23] Woolworths currently applies the *Woolworths Supermarkets Agreement 2018* to non-salaried employees at its supermarkets, CFCs and eStores. When it initially established its online business, it did so through a subsidiary, Jack Butler and Staff Pty Ltd. This entity entered into a greenfields enterprise agreement with the SDA, the *Jack Butler and Staff Pty Ltd Enterprise Agreement 2017*, to apply to this business. In approving both these agreements, the Commission applied the better off overall test by reference to the Retail Award only.

Award coverage

[24] We have earlier outlined the case advanced by Woolworths. Consideration of that case requires us to form an opinion about which award covers Woolworths' employees at its CFCs and eStores. For the reasons which follow, our view is that the Retail Award covers those employees and the Road Transport Award and the Storage Services Award do not.

[25] The coverage of the Retail Award is described in clause 4, which relevantly provides:

4. Coverage

4.1 This industry award covers, to the exclusion of any other modern award:

- (a) employers in the general retail industry throughout Australia; and
- (b) employees (within a classification defined in Schedule A—Classification Definitions) of employers mentioned in clause 4.1(a).

4.2 **general retail industry** means the retail sale or hire of goods or services for personal, household or business consumption including:

- (a) clothing; and
- (b) food; and
- (c) furniture and household goods; and
- (d) personal and recreational goods; and
- (e) bakery shops at which the predominant activity is baking products for sale on the premises; and
- (f) the provision of repair services for household equipment; and
- (g) the provision of customer information or assistance at retail complexes; and
- (h) the delivery of newspapers by employees of a newsagent,

but excluding the following that are covered by other awards:

- (i) the retail sale or hire of goods or services by any of the following:
 - (i) community pharmacies; or
 - (ii) pharmacies in hospitals or other institutions providing an in-patient service; or
 - (iii) hair and beauty establishments; or
 - (iv) stand-alone butcher shops; or
 - (v) stand-alone nurseries; or
 - (vi) manufacturing or processing establishments other than seafood processing establishments; and
- (j) hair and beauty work undertaken in the theatrical, amusement or entertainment industries; and
- (k) clerical functions performed away from a retail establishment; and
- (l) warehousing and distribution; and
- (m) motor vehicle retailing and motor vehicle fuel and parts retailing; and
- (n) restaurants, cafes, hotels, motels or fast food operations; and
- (o) building, construction, installation, repair or maintenance contractors engaged to perform work at a retail establishment.

4.3 ...

4.4 ...

4.5 If an employer is covered by more than one award, an employee of that employer is covered by the award containing the classification that is most appropriate to the work performed by the employee and the industry in which they work.

[26] Under clause 4.1, two conditions must be satisfied for the Retail Award to cover an employment relationship: first, the employer must be in the ‘general retail industry’, as defined in clause 4.2 and, second, the relevant employee must fall within the classifications in Schedule A.

[27] On the basis of the factual findings we have earlier made, we consider that Woolworths operates in the general retail industry at its CFCs and eStores. In the chapeau to clause 4.2, the key requirement of the industry definition is for ‘retail’ sales or hire of goods or services. On its ordinary meaning, ‘retail’ means the sale of commodities to household or ultimate consumers, usually in small quantities (opposed to wholesale).¹ It is clear that the function and purpose of CFCs and eStores is to effect retail sales of goods where the customer makes the order online. There is no requirement in the concept of a retail sale that the customer must be physically present to effect the sale or receive the relevant goods. The goods sold from CFCs and eStores are principally in the categories identified in paragraphs (b), (c), (d) and (e) of clause 4.2.

[28] The definition of ‘general retail industry’ in clause 4.2 operates subject to the exclusions in paragraphs (i) to (o). Paragraph (l), which excludes ‘warehousing and distribution’, is of potential relevance, although neither the TWU nor the UWU positively contended that this exclusion applied to the CFCs and eStores. In any event, our view is that the exclusion does not apply. ‘Warehousing and distribution’ is a compound expression which refers to a single type of business operation which engages in the functions of warehousing and distribution. A warehouse, according to its ordinary meaning, is ‘a storehouse for wares or goods’, or ‘the building in which a wholesale dealer’s stock of merchandise is kept’.² Woolworths’ CFCs and eStores do not have as their purpose the storage of goods; as earlier stated, goods which are delivered to CFCs and eStores are not stored in bulk but are rather immediately disaggregated for the purpose of picking to meet online orders. Nor does Woolworths act as a wholesaler in its conduct of the CFCs and eStores. The function of a wholesale business is the ‘sale of commodities in large quantities, as to retailers and jobbers rather than to consumers directly (distinguished from *retail*)’.³ The CFCs and eStores undertake the retail function of effecting sales to consumers, not a wholesale function.

[29] As to the second requirement for coverage in clause 4.1 of the Retail Award, the functions performed by employees at CFCs and eStores are plainly encompassed by the classifications defined in Schedule A. It is sufficient to point to the classifications of ‘Retail Employee Level 1’, which includes the functions of ‘pre-packing, packing, weighing, assembling, pricing or preparing goods, provisions or produce for sale’, ‘displaying, filling shelves, replenishing or any other method of exposing or presenting goods for sale’, ‘selling ... goods by any means’ and ‘...packing goods for despatch or despatching goods’, and ‘Retail Employee Level 4’ which includes the function of ‘baking’. However, the TWU and the UWU submit, notwithstanding this, that the classifications do not cover the employees at the CFCs and eStores because each classification definition requires the relevant functions to be performed at a ‘retail establishment’. They contend that the expression ‘retail establishment’

connotes a shop at which members of the public may attend for the purpose of buying goods, and that the CFCs and eStores are not premises of this nature.

[30] We disagree. The compound expression ‘retail establishment’, both as a matter of its ordinary meaning and industrial usage, is not to be so narrowly construed. An ‘establishment’ is, relevantly, ‘a place of business ... and everything connected to it (as furniture, fixtures, grounds, employees)’,⁴ so that a ‘retail establishment’ is simply a place of business at which retailing — that is, the sale of goods to consumers or end-users — is conducted. The ordinary meaning does not have as a requisite element that the sale be conducted in person. As the SDA submits, even the most traditional notion of a ‘shop’ did not necessarily require in-person sales, with it being common before, and even after, the evolution of the modern supermarket for shops to receive orders by telephone or by means of a written list and to fill such orders for the purpose of collection by the customer or delivery to the customer. As a matter of industrial usage, ‘retail establishment’ has often been used in contradistinction to ‘wholesale establishment’.⁵ This is apparent in the classification definitions in the Retail Award and the Storage Services Award, in that the defined functions of the classifications of Retail Employee Level 1, 2, 3, and 4 in the former award closely correspond to those of the classifications of Wholesale Employee Levels 1, 2, 3 and 4 in the latter award respectively, except that the former must perform the functions in a ‘retail establishment’ and the latter in a ‘wholesale establishment’. Neither the TWU nor the UWU has identified any instance where the expression has been used in decisions or awards of industrial tribunals with a meaning confined to in-person retail sales. We therefore conclude that the employees at Woolworths’ CFCs and eStores fall within the classifications in Schedule A of the Retail Award.

[31] We now turn to the Road Transport Award. Clause 4, *Coverage* of the Road Transport Award relevantly provides:

4. Coverage

4.1 This industry award covers employers throughout Australia in the road transport and distribution industry and their employees in the classifications listed in Schedule A— Classification Definitions for Distribution Facility Employees and Schedule B— Classification Structure to the exclusion of any other modern award.

4.2 The **road transport and distribution industry** means:

- (a) the transport by road of goods, wares, merchandise, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock, including where the work performed is ancillary to the principal business, undertaking or industry of the employer;
- (b) the receiving, handling or storing of goods, wares, merchandise, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise in a distribution facility;

...
4.3 ...

4.4 ...

4.5 ...

4.6 ...

4.7 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

[32] The expression ‘distribution facility’ in clause 4.2(b) is defined in clause 2 as follows:

distribution facility means a facility from which goods are distributed by road (and at which such goods may be stored for the purposes of subsequent distribution) which is operated by an employer as part of or in connection with a road transport business of that employer.

[33] We do not consider that, in its conduct of its CFCs and eStores, Woolworths operates in the ‘road transport and distribution industry’ as defined in clause 4.2. Clause 4.2(a) does not apply because Woolworths does not engage as an employer in the road transport of goods delivered from its CFCs and eStores to customers. As earlier stated, the road transport function is conducted by Linfox and other independent businesses. In respect of clause 4.2(b), CFCs and eStores are not ‘distribution facilities’ as defined in clause 2 because they are not operated ‘as part of or in connection with a road transport business’ of Woolworths. For the reason just stated, Woolworths does not conduct a road transport business in relation to its CFCs or eStores. The position in this respect may be contrasted with that dealt with by a Full Court of the Federal Court in *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd*.⁶ That decision concerned the award coverage of delivery drivers employed by Coles to deliver groceries ordered online from its supermarkets to customers. The Court determined that the ‘employment in question fell comfortably within the road transport and distribution industry as defined’ and was therefore covered by the Road Transport Award⁷ (although the Court went on to find that the employment was also covered by the Retail Award and that, pursuant to what are now clauses 4.5 of the Retail Award and clause 4.7 of the Road Transport Award, the classifications in the Retail Award were the most appropriate and therefore covered the employees in question). The Court’s conclusion as to coverage by the Road Transport Award was plainly a result of the fact that the matter before it concerned truck drivers who were employed by Coles. That is not the situation before us.

[34] The TWU submitted that because Woolworths contracts for and facilitates the delivery of goods from its CFCs and eStores to its online customers, charges its customers for delivery, supplies the trucks by which the deliveries are made through a subleasing arrangement, and appears to publicly characterise the delivery drivers as its own drivers, it thereby conducts a transport business. We do not accept this. Clause 4.1 applies to businesses in their capacity as employers, so that for a business to be ‘in’ the road transport and distribution industry, it must be an employer of persons in that industry as defined in clause 4.2. It is not sufficient that it employs persons *in connection with* the road transport and distribution industry. In respect of the definition of ‘distribution facility’ in clause 2, the facility must be operated as part of or in connection with a road transport business of the relevant employer. However, for the reasons stated, Woolworths does not operate any road transport business in relation to its CFCs and eStores. The relevant road transport business is operated by Linfox and other contractors in the

sense that they are the entities which actually employ persons to perform the requisite road transport deliveries and manage those employees.

[35] Finally, we deal with the Storage Services Award. That award does not cover employees at the CFCs and eStores because of clause 4.3(a), which provides:

4.3 This award does not cover employees to the extent that the employer is covered by:

- (a) another modern award that contains classifications relating to functions included within the definition of the storage services and wholesale industry with respect to any employee who is covered by that award;...

[36] The definition of the ‘storage serves and wholesale industry’ referred to in clause 4.3(a) is contained in clause 4.2. The expression means ‘the receiving, handling, storing, freezing, refrigerating, bottling, packing, preparation for sale, sorting, loading, dispatch, delivery, or sale by wholesale, of produce, goods or merchandise as well as activities and processes connected, incidental or ancillary’. Even if this definition is capable of application to Woolworths’ CFCs and eStores — a matter of some doubt having regard in particular to the reference to ‘sale by wholesale’ in the definition — the exclusion in clause 4.3(a) applies because, as earlier explained, the functions of the definitions of the Retail Employee classifications in the Retail Award are largely the same as the functions of the Wholesale Employee classifications in the Storage Services Award. We note that the UJU conceded, properly in our view, that if the Retail Award covers employees at the CFCs and eStores, the Storage Services Award does not cover them by reason of clause 4.3(a) of the latter award.

Should the proposed variation be made?

[37] Having stated our opinion that the Retail Award covers Woolworths and its employees at its CFCs and eStores (and that the Road Transport and Storage Services Awards do not), it is necessary next to determine whether it is necessary to vary the Retail Award as proposed by Woolworths in order to achieve the modern awards objective. For the reasons which follow, we are not satisfied that this is the case.

[38] *First*, as stated at the outset, Woolworths seeks the variation of the Retail Award pursuant to s 157(1) of the FW Act. It has not advanced its application under s 160(1), pursuant to which the Commission may vary a modern award in order to remove an ambiguity or uncertainty or to correct an error. It does not contend that the coverage provisions of the Retail Award are ambiguous or give rise to uncertainty such as to require amendment. To the contrary, its primary case is that the coverage provisions of the Retail Award (and the Road Transport and Storage Services Awards) are clear in their application to its CFCs and eStores. We have agreed with that primary case insofar as it is advanced in relation to the way in which Woolworths currently operates its CFCs and eStores. Our conclusion in this respect significantly vitiates Woolworths’ contention that its proposed variation is necessary in order to ‘clarify’ the coverage provisions of the Retail Award. There is no evidence that there was any pre-existent dispute about award coverage at Woolworths’ CFCs and eStores and, as earlier stated, previous enterprise agreements applicable to those work locations were approved on the premise that the Retail Award covered those locations. Woolworths contended that the different

positions of the parties as to award coverage advanced in these proceedings evidenced a dispute about coverage which required resolution. However, it appears to us that the TWU and the UWU deployed their contentions as to award coverage for the primary purpose of defeating Woolworths' application for an award variation with wider ramifications and, in any event, we have rejected those contentions. It is not apparent to us why any further step is required.

[39] *Second*, as already observed, although Woolworths' application seeks a variation concerning 'online supermarket sales fulfilment facilities' generally, the only evidence advanced in support of this application concerns only Woolworths' own operations. There is no evidence before us concerning any other online supermarket sales fulfilment facility which may exist. Coles has lodged a written submission in this matter in which it states that it established CFCs (described within its business as 'dark stores') in 2017, but gives no detail as to how it operates these CFCs. Coles did not adduce any evidence before us nor did it appear at the hearing. If Coles still directly employs its delivery drivers as it did at the time of the 2014 Full Court decision, it may be the case that its CFCs fall within the 'distribution facility' definition in the Road Transport Award, in which case difficult considerations not currently applicable to Woolworths might arise. We have no material before us pertaining to any other supermarket employer. Accordingly, there is simply an insufficient factual basis for us to be satisfied that the award variation sought, which has industry-wide implications, is necessary to meet the modern awards objective. This illustrates the deficiency in an approach whereby a single employer or employee seeks an industry-wide variation to an industry award by reference only to their own circumstances and interests.⁸

[40] *Third*, it appears that the way in which supermarkets operate CFCs is in a state of flux. A detailed analysis of the online supermarket sector published in the Australian Financial Review on 11 May 2023⁹ describes a shift from e-commerce to q-commerce (quick commerce) and discloses that Coles is currently in the process of constructing automated CFCs in Sydney and Melbourne which will utilise robot technology to a high degree, while Woolworths is also currently constructing an automated CFC in Auburn in Sydney. The evidence before us suggested that Woolworths is planning new CFCs in addition to the one at Auburn that will likely be automated to some extent. The analysis also refers to Coles having entered into a 'partnership' with the Uber Eats business whereby Uber Eats drivers 'will pick and pack products from shelves in 500 supermarkets — doing work previously performed by Coles' personal shoppers — and deliver online orders within 60 minutes.' The future automation and 'uberisation' of online supermarket shopping in response to growing consumer preference for what has been described as 'extreme convenience'¹⁰ raise potentially complex considerations concerning award coverage that are not addressed in the evidence or submissions before us.

[41] *Fourth*, the variations sought by Woolworths, if granted, would have wider implications which are simply not addressed by anything in its case:

- (1) The proposed definition of 'online supermarket sales fulfilment facility' includes a situation where such a facility is operated 'for' as well as 'by' a supermarket. This would encompass a situation whereby the operation of a CFC is contracted out to an employer operating in an industry other than the retail industry. If, for example, Woolworths contracted out the operation of its CFCs to a transport and logistics business such as Linfox, as it already has in respect of the delivery function, this would result in a business that is in the road

transport and distribution industry being covered by the Retail Award. Woolworths has advanced no justification for such an outcome.

- (2) The proposed deletion of the requirement for the functions of each classification in Schedule A to be performed ‘at a retail establishment’, and its replacement with a requirement that the functions simply be performed ‘in the general retail industry’, would likely have consequences that range far beyond the circumstances of this case. It would appear to remove any requirement for employees to work at a ‘bricks and mortar’ retail establishment and might thereby extend the coverage of the Retail Award to entirely online e-commerce businesses and employees working entirely from home, with results that are indeterminable on the material before us.

[42] For the above reasons, we cannot conclude that any of the considerations in s 134(1) of the FW Act favour the grant of Woolworths’ application, nor can we be satisfied that the proposed variations are necessary to achieve a fair and relevant minimum safety net of terms and conditions.

Conclusion

[43] We order that the application is dismissed.



PRESIDENT

Appearances:

A Gotting, counsel, for Woolworths Group Limited.

I Taylor SC with A Guy, counsel, for the Shop, Distributive and Allied Employees Association.

M Gibian SC with P Boncardo, counsel, for the Transport Workers’ Union of Australia.

L Saunders, counsel, for the United Workers’ Union.

R Bhatt for The Australian Industry Group.

L Izzo for Australian Business Industrial and Business NSW.

Hearing details:

2023.

Sydney:

August 3.

Printed by authority of the Commonwealth Government Printer

<MA000004 PR765127>

¹ Macquarie Online Dictionary.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ See e.g. *Wholesale Soft Goods Employees Federation* [1956] CthArbRp 19, 83 CAR 905 at 910; *Shop Assistants and Warehouse Employees Federation of Australia v The Australian Capital Territory Employers Federation & Anor* [1968] CthArbRp 818, 125 CAR 855 at 855.

⁶ [2014] FCAFC 148, 245 IR 449.

⁷ Ibid at [23].

⁸ See *Application by Treves* [2023] FWCFB 98.

⁹ ‘Coles’ Ocado project in the spotlight as customers get impatient’ (Exhibit 18).

¹⁰ Ibid.