



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT  
DEPUTY PRESIDENT CLANCY  
COMMISSIONER MATHESON**

**AM2022/35**

**s.158 - Application to vary or revoke a modern award**

**Application by Woolworths Group Limited  
(AM2022/35)**

**General Retail Industry Award 2020**

**Sydney**

**11.00 AM, THURSDAY, 3 AUGUST 2023**

PN1

JUSTICE HATCHER: I will take the appearances. Mr Gotting, you appear for the applicant?

PN2

MR A GOTTING: I do, your Honour, thank you.

PN3

JUSTICE HATCHER: Mr Taylor and Mr Guy, you appear for the SDA?

PN4

MR A GUY: Yes, if it please, thank you.

PN5

JUSTICE HATCHER: Mr Gibian and Mr Boncardo, you appear for the TWU?

PN6

MR M GIBIAN: May it please.

PN7

JUSTICE HATCHER: Mr Saunders, you appear for the UWU?

PN8

MR L SAUNDERS: Yes.

PN9

JUSTICE HATCHER: Ms Bhatt, you appear for the Australian Industry Group?

PN10

MS R BHATT: Yes, your Honour.

PN11

JUSTICE HATCHER: Mr Izzo, you appear for Australian Business Industrial and Business New South Wales?

PN12

MR L IZZO: Yes, your Honour.

PN13

JUSTICE HATCHER: To the extent that we haven't done so already, we grant permission for legal representing. Mr Gotting.

PN14

MR GOTTING: Thank you. I think, strictly, we are not required to obtain permission because of the rules.

PN15

JUSTICE HATCHER: Perhaps that's right.

PN16

MR GOTTING: In any event to the extent that it is necessary, thank you for granting it.

PN17

Members of the Full Bench, this is an application to clarify the operation of the General Retail Industry Award 2020. It is confined in its nature because it only seeks to deal with online supermarket sale fulfilment facilities and, in that sense, it is not seeking to address a wider question about online orders in the retail industry more generally. Its purpose is to avoid future disputes over the coverage clause of the award.

PN18

I think it is plain that the applicant is an employer and, in part of its business, it operates in the general retail industry. The applicant has traditionally operated, and continues to operate, a well-known chain of supermarkets and smaller stores by which it sells goods and services to customers, who are the end users or ultimate consumers of those goods and services. Traditionally and currently, the customers have entered a physical store, selected items from shelves or racks and paid for the items at a checkout, and it is clear and not in dispute that the physical store is a retail establishment for the purposes of the award.

PN19

In recent times, though, the applicant has begun to sell goods and services not in a physical store but online, and those online sales are made using a website or an application, otherwise known as an app. In a small number of cases, some sales are made by telephone.

PN20

When it comes to filling those online sales, they are filled in one of three ways. First, the online sales are filled in a supermarket or a smaller store and, in that scenario, the items are picked by employees, known as personal shoppers, from the shelves or racks of the store, they are placed in shopping bags inside a customer tote, they are transported in trolleys to an assembly area and then they are assembled for delivery directly to the customer.

PN21

The second way that the online sales are filled is in a facility which the applicant describes as a customer fulfilment facility, a CFC, and, of course, the Commission participated in an inspection of one such facility this morning. Currently, the applicant has seven such CFCs: four in New South Wales at Brookvale, Lidcombe, Mascot and Caringbah; two in Victoria at Footscray and Notting Hill, and one in Queensland at Rochedale.

PN22

JUSTICE HATCHER: I arranged to distribute to the parties just before we started an article from the Financial Review dated May 11 2023, which raises some issues which the parties can address in due course, but one of the things it says is that Woolworths is building an automated online fulfilment centre at Auburn - is that right - using robots?

PN23

MR GOTTING: Can I get some instructions on that issue? I don't think it's the subject of evidence at the moment.

PN24

JUSTICE HATCHER: That's the point. I mean, if that is factually correct, it would be odd that the case doesn't mention it because it seems to me to be an online fulfilment centre, if it's true, but of a radically different nature.

PN25

MR GOTTING: Yes. Can I just indicate, of course, to your Honour, and I will come to this in due course, that apart from the CFC, there is an eStore. That's the third way in which the online orders are filled, and an eStore has two aspects. The first aspect is the supermarket in the traditional form and the second is what's called an eCom floor, and that has that automated function which is referenced in the article. So, in part, the evidence does deal with that eStore scenario, but I will get some further instructions and address that in due course, if that's convenient to the Commission.

PN26

JUSTICE HATCHER: Yes. Well, I haven't got a clear picture in my head how these eStores work, but no doubt someone will tell us in due course.

PN27

MR GOTTING: Yes. In terms of the CFCs, though, their purpose and their function is to fill online orders, and each of the CFCs has a layout which is similar to a supermarket or a smaller store. Each of the CFCs is divided into aisles or zones and they have items which are placed on shelves or racks in those aisles or zones and the items are generally placed individually rather than in bulk.

PN28

The items in the CFCs are picked by employees known as online personal shoppers and they are picked from the shelves or racks, they are then placed in shopping bags, placed in the customer totes, transported in trolleys to an assembly area and then assembled for delivery directly to the customer. Now, there are two instances where customers may collect the delivery themselves from a CFC using a direct-to-boot option and that's where an employee of the applicant places the packed items into the boot of the car of the customer.

PN29

The work that's performed in the CFC is the same work that is performed by online shoppers in a supermarket or a small store, that is, there is the picking of items from shelves or racks, there's the placement of items in bags and customer totes, there is the transport of the items and bags to an assembly area and then the collation of the bags for delivery.

PN30

The CFC, though, is not used to store items in bulk before they are transported to another supermarket or a smaller store and, equally, the CFC is not used to sort or break down or rearrange items before they are transported to a supermarket or smaller store.

PN31

JUSTICE HATCHER: You are describing what Woolworths does, but obviously this application is an industry application affecting, effectively, a common law award.

PN32

MR GOTTING: Yes.

PN33

JUSTICE HATCHER: How do we know whether other supermarkets do it the same way? For example, the point you just made about storage of goods, I noticed on the return trip home, there seems to be another Coles online fulfilment centre in O'Riordan Street. We don't know whether it does that or does not do that.

PN34

MR GOTTING: I accept that that is the case. There is no evidence that relates to that, but my submission is that the Commission should proceed on the material before it and it indicates the way in which Woolworths conducts its operations and I rely upon that evidence to ground what I have just put. I can't put it any higher, your Honour.

PN35

Until recently, the CFCs were not open to members of the general public, but the CFCs are now open twice a week to workers and their families and friends so that they might conduct their shopping in the aisles or zones, pick items from the shelves or racks, place them in trolleys and then transport them to the self-service checkouts which are located in the team shop area of the CFCs.

PN36

JUSTICE HATCHER: Is that Woolworths workers generally or just those employed at the CFC?

PN37

MR GOTTING: It's not confined to the CFC, it also extends to some of the people that work in the customer hub area, which is adjacent to the CFC, but if your Honour is asking me about an employee that works in, say, a supermarket or a metro store, it doesn't extend that far.

PN38

The position of the applicant is that the CFC is distinguishable from a warehouse and is distinguishable from a distribution centre.

PN39

The third way that the online orders are filled is at an eStore. An eStore is a traditional supermarket and an electronic storage and picking facility under the one roof, and there is in the eStore component a high degree of electronics in the picking and packing of some of the items for the order for the customer. Some of those items in an eStore are picked electronically using automation and then they are placed onto a shuttle for transport to an employee that then assembles them with other items.

PN40

JUSTICE HATCHER: When you say they are picked automatically - how? What are we talking about?

PN41

MR GOTTING: There is, effectively, a tower that comprises of totes that stores the items either individually or in boxes, the items are then brought down to a worker to remove from the tote and then those items are combined with other items to constitute the order of the customer.

PN42

JUSTICE HATCHER: So there's still a worker putting goods in a basket?

PN43

MR GOTTING: That is so, but there's not the worker going to an individual shelf or a rack and removing the item directly. It involves the use of the automation of a tote that gets transported electronically from its storage location to the location of the worker.

PN44

JUSTICE HATCHER: How is it transported?

PN45

MR GOTTING: There's a track, in effect, that guides the tote from its storage location to the worker's location. There is some evidence about that and I can take the Commission to it in due course, but that's often known as a goods-to-person area, GTP area.

PN46

Other items in an eStore, though, are picked directly from the supermarket because it's both a supermarket and an eCom store under the one roof.

PN47

Currently, the applicant operate two eStore, one at Carrum Downs and one at Maroochydore and, like the CFC, the eStore has as its purpose and its function the filling of online orders and, like the CFC, the eStore is not used to store items in bulk before they are transported to a supermarket or a smaller store, and the eStore is not used to sort or break down or arrange items before they are transported to a supermarket or a smaller store.

PN48

The employees that are working in an eStore may move from the eCom floor component to the supermarket component to pick items that are not kept in the eCom floor and, equally, employees that are working in an eStore may sometimes move from the eCom floor to a BWS store to pick alcohol or related items. There is some evidence that indicates that approximately 80 per cent of the items that are picked from an eStore come from the eCom floor and about 20 per cent are picked from the supermarket.

PN49

The applicant accepts, of course, that it has a separate part of its business relating to storage and distribution centres. It operates a number of distribution centres throughout the country, but the applicant is not seeking to have its employees in the distribution centres covered by the General Retail Industry Award. The applicant would expect that those employee will continue to be covered by the Storage Services and Wholesale Award.

PN50

JUSTICE HATCHER: What industrial instrument does Woolworths currently apply in respect of the online fulfilment centres?

PN51

MR GOTTING: It applies two enterprise agreements. The first enterprise agreement is known as the Woolworths Supermarkets Enterprise Agreement.

PN52

JUSTICE HATCHER: That's the 2018 agreement?

PN53

MR GOTTING: That's so. I can hand up a copy in due course and take the Commission through it, if it's convenient. Additionally, there is a separate enterprise agreement known as the Jack Butler and Staff Enterprise Agreement, and that continues to apply. Because of the transfer of business provisions that operate under the Fair Work Act, the employer has actually become the Woolworths Group Limited, but the instrument was not the subject of a transfer order or anything of that kind and so it continues to operate in respect of the employees that were initially engaged under it. Does that answer your Honour's question?

PN54

JUSTICE HATCHER: Yes. So the employing entity of the CFCs is the same as of the supermarkets?

PN55

MR GOTTING: It is, Woolworths Group Limited. Can I then just indicate the nature of the roles that are performed by employees working at the CFCs and the eStores. There are effectively six types of roles. The first is the online personal shoppers who fill the online orders; the second are employees such as bakers, deli attendants and seafood staff that make or prepare items for the online orders; the third are the employees that accept and unload deliveries on pallets or crates from distribution centres; the fourth are employees known as the replenishment team members, who replenish items on shelves or on racks or in other areas; the fifth are the team members that collate and consolidate in the staging area the items that have been picked, and those employees are sometimes referred to as dispatch team members; and, finally, there are other employees that move the packed items onto the back of a delivery truck to go to the customer, and those team members are also known as dispatch team members.

PN56

The applicant, though, does not employ drivers to deliver items from the CFCs or the eCom stores. The delivery is performed by contractors or people that are known as partner delivery persons, such as Sherpa or Uber or 1300CABS.

PN57

JUSTICE HATCHER: All those little Woolworths trucks we saw?

PN58

MR GOTTING: They are actually operated by - the delivery trucks as opposed to the incoming trucks?

PN59

JUSTICE HATCHER: Yes.

PN60

MR GOTTING: Are operated by Linfox pursuant to a contract with Woolworths, even though they are badged as a Woolworths truck.

PN61

JUSTICE HATCHER: All right.

PN62

MR GOTTING: The Commission will readily appreciate that there's a dispute between some of us at the Bar table as to the appropriate industrial instrument that covers the employees that work at the CFCs and the eStores. The position of the UWU seems to be that much of the work which is done in a CFC is the same as work which is done in a warehouse or distribution centre and, therefore, that similarity or sameness of work should determine the appropriate award that applies.

PN63

Can I just indicate, though, that the work which is done in a CFC or an eStore is, of course, the same work which is done in a supermarket or a smaller store for the filling of an online order and, additionally, not all of the tasks which are performed in a CFC are undertaken in a warehouse or a distribution centre. In particular, the food preparation work is not completed in a warehouse or distribution centre and the stock replenishment work, at least insofar as involving the placement of individual items on shelves, is not completed in a warehouse or a distribution centre.

PN64

In any event, the position of the applicant is that it is also necessary to consider the environment in which the work is performed and the purpose of the facility in which the work is performed, and that environment obviously extends to the layout of the relevant facility.

PN65

The members of the Commission will appreciate that the applicant is relying upon an amended application which was filed on 18 April 2023. Relevantly, there's an amended schedule which contains the proposed variations that are sought by the



applicant. I was just going to ask members of the Commission just to open annexure A to the amended application so that I can highlight a couple of matters.

PN66

The first variation which is proposed is to insert a definition into the General Retail Industry Award and that definition is the phrase 'Online supermarket sales fulfilment facility'. I wanted to emphasise three aspects of that definition.

PN67

The first aspect is that it contains a purposive element and that purposive element is that the facility is to fill orders for retail sales, and that purposive element means that a facility that is a warehouse will not meet the definition because a warehouse is not for the purpose of filling orders for retail sales. Equally, that purposive element will mean that a facility that is a distribution centre will not meet the definition because a distribution centre is not for the purpose of filling orders for retail sale.

PN68

JUSTICE HATCHER: What if you operated an online only supermarket business, that is, a business which doesn't have publicly open supermarkets, it's an entirely online business?

PN69

MR GOTTING: Yes.

PN70

JUSTICE HATCHER: Would that be covered by the definition?

PN71

MR GOTTING: It would be covered by the definition.

PN72

JUSTICE HATCHER: If Amazon - I don't know what Amazon sells, but if they moved into supermarket goods, that opens up a whole new world, doesn't it?

PN73

MR GOTTING: It does. If there needs to be a refinement to address that circumstance - I should indicate it's not the intention to deal with purely online supermarket fulfilment facilities, the intention of the applicant is that there needs to be physical stores also operated by the supermarket, but, purely as a matter of grammar, I accept what your Honour has put to me.

PN74

The second matter that I wanted to emphasise in the definition is the reference to 'operated by or for a supermarket'. That second matter is a matter of limitation and it means that there's various other retail stores, such as department stores, or home entertainment stores, clothing stores and the like, that would not be covered by the definition.

PN75

JUSTICE HATCHER: Why are the words 'or for' in there?

PN76

MR GOTTING: It's designed to address, your Honour, a circumstance where an agent operates the facility on behalf of a supermarket.

PN77

JUSTICE HATCHER: An agent?

PN78

MR GOTTING: Yes, it might be a related body corporate that actually conducts the facility.

PN79

JUSTICE HATCHER: But it might be a contractor.

PN80

MR GOTTING: It could be a contractor.

PN81

JUSTICE HATCHER: But, in that case, wouldn't the contractor be in a different industry? I mean, if you got Linfox to run the CFC as well as the trucks, then that's something of an entirely different character, isn't it?

PN82

MR GOTTING: I accept that in some circumstances the part of the business of Linfox is in road transport and distribution, but in terms of operating a facility which is for the purpose of filling customer online orders, that would, in my submission, be part of the general retail industry, and so that part of the business of Linfox would be covered by the award.

PN83

JUSTICE HATCHER: But why do you need those words?

PN84

MR GOTTING: Well, it's designed to deal with the circumstance that the supermarket itself may not conduct the facility.

PN85

JUSTICE HATCHER: But, in Woolworths' interests, why are those words necessary?

PN86

MR GOTTING: The sole reason that it's necessary is to deal with a potential change in the way in which one of the facilities might be operated in the future whereby it was done by a related body corporate of Woolworths the supermarket operator rather than Woolworths itself. It's a possibility.

PN87

JUSTICE HATCHER: Is this theoretically or something - - -

PN88

MR GOTTING: It's more theoretical, your Honour, I accept that.

PN89

The third matter that I wanted to emphasise in the definition is that the retail sale must be placed by a customer online and, of course, that matter is also a matter of limitation.

PN90

In my submission, the first matter that I emphasised, the purposive element, is a strong reason for the proposed variation not altering traditional award coverage because the first matter will ensure that a warehouse remains covered by the Storage Services and Warehouse Award and the distribution centre remains covered by that same award or by the Road Transport and Distribution Award.

PN91

Members of the Full Bench, those are the matters that I wanted to emphasise by way of opening. If it's convenient, I might then tender some of the statements upon which the applicant relies.

PN92

JUSTICE HATCHER: As I understand the position to this point, the only cross-examination required is by the TWU of three of the four Woolworths witnesses; is that correct?

PN93

MR GOTTING: That's so, your Honour, yes.

PN94

JUSTICE HATCHER: All right. Sorry, just remind me, who is the witness not required for cross-examination?

PN95

MR GOTTING: Mr Acton, I'm sorry.

PN96

JUSTICE HATCHER: Yes, all right. So, if there's no objection, we can mark that statement now and then we'll just call the other witnesses?

PN97

MR GOTTING: Yes. That's the statement of Dale Alfred Acton dated 11 July 2023. It comprises 84 paragraphs and 34 annexures.

PN98

JUSTICE HATCHER: All right. The witness statement of Dale Alfred Acton dated 11 July 2023 will be marked exhibit 1.

### **EXHIBIT #1 WITNESS STATEMENT OF DALE ALFRED ACTON**

PN99

And I just think we'll proceed to call the remaining witnesses.

PN100

MR GOTTING: Yes. The first witness that I call is Christopher James Hall. For the benefit of the Commission, he has prepared three statements for the purposes

of these proceedings. The first is dated 20 December 2022; the second is dated 20 February 23, and the third is dated 12 July 2023. If it is convenient, Mr Hall is available to be sworn.

PN101

JUSTICE HATCHER: That's convenient.

PN102

THE ASSOCIATE: Mr Hall, can you please state your full name and address for the record.

PN103

MR HALL: Yes, it's Christopher James Hall, (address supplied).

**<CHRISTOPHER JAMES HALL, SWORN [11.39 AM]**

**EXAMINATION-IN-CHIEF BY MR GOTTING [11.39 AM]**

PN104

I realise you have just stated your name for the purposes of the oath, but could you please state again your full name?---Yes, it's Christopher James Hall.

PN105

Could you please identify a working address?---My working address is 407 Elizabeth Street, Surry Hills in New South Wales.

PN106

Who is your current employer?---WooliesX.

PN107

Is that part of the Woolworths Group Limited, a division of Woolworths Group Limited?---Yes, it is.

PN108

Have you prepared some statements for the purposes of these proceedings?---Yes, I have.

PN109

Do you have your first statement with you dated 20 December 2022?---Yes, I do.

PN110

There's just two small matters to deal with by way of amendment, your Honour.

PN111

Could I draw your attention to paragraph 21 of your first statement. At the end of paragraph 21, you refer to employees working in direct-to-boot in the Rochedale CFC. Is there some amendment that you wish to make to that portion of paragraph 21?---Yes, please. Could we change that to the Carrum Vale CFC.

\*\*\* CHRISTOPHER JAMES HALL

XN MR GOTTING

PN112

Thank you. So we remove the word 'Rochedale' and insert the word 'Carrum Vale'? Is that so, Mr Hall?---Yes, please.

PN113

Then could I draw your attention to paragraph 35 of the first statement. Is there some change that you wish to make to that paragraph?---Yes, there is. That can be removed because we have removed the vertical storage unit from that site.

PN114

Your Honour, in that circumstance, I do not read paragraph 35 of the statement.

PN115

JUSTICE HATCHER: All right.

PN116

MR GOTTING: Subject to those two matters, your Honour, I tender the first statement dated 20 December 2022, comprising 57 paragraphs with 11 annexures.

PN117

JUSTICE HATCHER: All right. The witness statement of Christopher James Hall dated 20 December 2022 is marked exhibit 2.

**EXHIBIT #2 WITNESS STATEMENT OF CHRISTOPHER JAMES HALL DATED 20/12/2022**

PN118

MR GOTTING: Mr Hall, do you have a copy of your supplementary statement with you dated 20 February 2023?---Yes, I do.

PN119

JUSTICE HATCHER: I think it's 22 February, isn't it?

PN120

MR GOTTING: I'm sorry, that's my fault. Yes, it is 22 February 2023. I apologise, your Honour. Your Honour, I tender that supplementary statement.

PN121

JUSTICE HATCHER: Are you going to get the witness to confirm it's true and correct?

PN122

MR GOTTING: Certainly.

PN123

Mr Hall, is the supplementary statement true and correct to the best of your knowledge and belief?---Yes, it is.

PN124

I tender that.

\*\*\* CHRISTOPHER JAMES HALL

XN MR GOTTING

PN125

JUSTICE HATCHER: All right. The supplementary witness statement of Christopher James Hall dated 22 February 2023 is marked exhibit 3.

**EXHIBIT #3 SUPPLEMENTARY WITNESS STATEMENT OF  
CHRISTOPHER JAMES HALL DATED 22/02/2023**

PN126

MR GOTTING: Mr Hall, do you have a copy of a further supplementary statement prepared by you on 12 July 2023?---Yes, I do.

PN127

Can I draw your attention to paragraph 12. In the second line, you refer to:

PN128

*A Distribution Centre delivery truck delivers stock in 'low carrier units'.*

PN129

Is there some change that you wish to make to that second sentence?---Yes, please. It should be 'load carrier units' not 'low'.

PN130

Your Honour, in that circumstance, I ask that the word 'low' be struck and replaced with 'load'.

PN131

JUSTICE HATCHER: So it's 'load carrier units'?---Correct, yes.

PN132

All right.

PN133

MR GOTTING: Subject to that change, Mr Hall, is the further supplementary statement true and correct to the best of your knowledge and belief?---Yes.

PN134

Your Honour, I tender that.

PN135

JUSTICE HATCHER: All right. The further supplementary witness statement of Christopher James Hall dated 12 July 2023 will be marked exhibit 4.

**EXHIBIT #4 FURTHER SUPPLEMENTARY WITNESS  
STATEMENT OF CHRISTOPHER JAMES HALL DATED  
12/07/2023**

PN136

MR GOTTING: Thank you. That constitutes the evidence-in-chief.

\*\*\* CHRISTOPHER JAMES HALL

XN MR GOTTING

PN137

JUSTICE HATCHER: Thank you. Mr Gibian, or Mr Boncardo?

PN138

MR GIBIAN: Mr Boncardo is cross-examining.

PN139

JUSTICE HATCHER: All right.

PN140

MR BONCARDO: Thank you, your Honour.

**CROSS-EXAMINATION BY MR BONCARDO**

**[11.44 AM]**

PN141

Mr Hall, Woolworths is currently constructing a customer fulfilment centre in Auburn, isn't it?---Yes, it is.

PN142

That construction commenced in about December 2021?---I'm not sure of the exact date.

PN143

That customer fulfilment centre is being constructed with Vaughan Constructions; is that right?---That's my understanding, yes.

PN144

It is to be equipped with Knapp automation technology?---Correct, yes.

PN145

So we take from that, do we, that a number of the operations and functions currently performed by human beings will be performed by robots or other technology?---Can you ask that question again?

PN146

Robots and other pieces of technology are going to perform some of the functions that human beings currently perform at Woolworths' other CFCs at the Auburn CFC?---There will be automation and robotics performing some, yes.

PN147

What functions?---So it is - there is a Pick-It-Easy robot that will do a portion of picking of products that are eligible to be picked by that robot.

PN148

What kind of products will be eligible to be picked by that robot?---I'm not sure. It needs to be taught into the system.

PN149

Are these robots currently in existence or are they being developed?---The robots for us are being developed, but it's my understanding they are in existence in other retailers across (audio malfunction).

\*\*\* CHRISTOPHER JAMES HALL

XXN MR BONCARDO

PN150

Those robots are going to be utilised at the Auburn CFC when it's functioning?---Yes.

PN151

Is it commencing functioning or scheduled to commence functioning next year?---Proposed, yes.

PN152

Those robots are able to operate at CFCs additional to Auburn?---Not at this stage, no.

PN153

Is it planned that they may be?---Not in any of the remaining CFCs that we have, no.

PN154

Is it possible that they may be in the future used at the currently existing CFCs?---No.

PN155

Has Woolworths done any planning in respect to the use of these robots or any investigation in respect to the use of these robots at other CFCs?---For proposed future CFCs?

PN156

Yes?---Yes.

PN157

And current CFCs?---No.

PN158

You have mentioned a robot. Is that a robot that is a sole piece of automation technology that's going to be used at the Auburn CFC or are there others?---No, there's others.

PN159

What are they?---So there is a Pick-It-Easy robot, there is the goods-to-person station.

PN160

Can we just stop there. A goods-to-person station involves what?---So it has a series of conveyors that feed source totes, which is totes that have products coming from the OSR, which is the order storage and retrieval unit. It will bring source totes to where a team member will be standing. It will then have another conveyor line with customer totes. The team members will then be directed with a screen to take products out of a source tote and guided to where they should put it in the customer tote.

\*\*\* CHRISTOPHER JAMES HALL

XXN MR BONCARDO

PN161



So we have the robot pick and carry technology, the goods-to-person stage; what else?---There is an autobag that works in conjunction with manual bagging stations, so both automatic and manual. There is an autolabeller. That's all I can recall for now.

PN162

It's possible that there are more items of technology; you are just not sure?---Yes, potentially, yes.

PN163

In respect to the autobagger, that does what I suppose it is described to do, which is bag items?---Yes, it bags only one type of bag, and so with our customers, they can opt for paper, plastic, et cetera, but the autobagger can only do one specific type.

PN164

Which is what?---At this stage, I believe it's paper.

PN165

Is there planning or investigation as to whether or not the autobagger could do bags that are plastic or something else?---Not that I believe because the way the autobagger works, it has to have a fold to keep the bag upright and then that's why we have the manual bagging station where team members will do the plastic bagging.

PN166

The autolabeller puts labels on what?---The customer tote.

PN167

In the Auburn CFC, what particular work will human beings have to do in light of the use of the robot pick and carry, the goods to person station and autobag and autolabel?---Yes. So the robot is only planned to do 5 per cent of the order (indistinct). We will still have team members - if we look at the fulfilment side first, so there will still be team members that do personal shopping, so walking up and down a specific area to pick goods; we will still have your production departments, so deli, bakery, fruit and veg, seafood; we will still have team members completing inventory functions; we will still have, in the traditional sense, replenishment team members filling shelves and filling the OSR unit, and there will be various leadership positions as well.

PN168

I might have missed your evidence earlier. Is it the case that Woolworths future CFCs are intended to be automated in whole or in part?---It will be both. Given that some products can't go into automation - like a big broom wouldn't go through the automation process because it would just jam the conveyors, so we will have to have a manual component. There's also restrictions on what can go into the automated areas. So, dangerous goods, oils, flammable goods, we wouldn't want to put that into the automation, so there's still a manual component.

\*\*\* CHRISTOPHER JAMES HALL

XXN MR BONCARDO

PN169

Perhaps I wasn't as clear in my question as I should have been. Is Woolworths planning, moving forward, to construct and run CFCs that are automated in whole or in part?---I'm not sure I understand the question.

PN170

I'm sorry?---Sorry.

PN171

Are you planning new CFCs which are going to be automated, completely or partly?---Yes, we are planning in a similar concept to Auburn where they will have automation and they will have manual.

PN172

And all future CFCs are going to be subject to the automation technology; is that right?---I'm not sure about all future.

PN173

Is that Woolworths' preference?---I don't know. I'm not privy to that.

PN174

Who makes those kind of decisions, sir?---I would assume people far above my pay grade. Senior leadership team.

PN175

Are you aware or do you have any knowledge about whether there are any further investigations or planning underway in respect to further tasks of CFCs being automated in addition to the ones that you've told us about?---I could only speculate. So we look at manual handling impacts for the team and how we can reduce the manual handling impacts to provide a safe environment for the team and, if automation solves that, we would potentially look at it.

PN176

You would agree, wouldn't you, as a general proposition, that a customer-facing supermarket of the conventional kind involves the display of goods and other items for sale directly to the customer?---Yes.

PN177

An important component of the role of all employees who work at a customer-facing supermarket is to display goods for sale directly to the customer?---That would be a part of it, yes.

PN178

For example, in the bakery section of a Woolworths supermarket, baked goods are displayed by the bakery staff for sale directly to the customer?---Yes.

PN179

The same applies in respect to the delicatessen and seafood area, that is, goods are displayed for sale directly to a customer?---Yes.

\*\*\* CHRISTOPHER JAMES HALL

XXN MR BONCARDIO

PN180

As a general proposition, your employees who work at your customer-facing supermarkets come across customers, obviously, in the course of their work?---In the supermarket or in the CFCs?

PN181

In the supermarkets?---Yes.

PN182

They interact with those customers?---Yes.

PN183

And they are expected to, and indeed obliged to, answer any questions those customers may ask to the best of their ability?---Yes.

PN184

Do price checks, if asked?---Yes.

PN185

Provide information, advice, assistance and whatever help they can to customers about the goods that might be displayed for sale?---Yes.

PN186

Encourage customers, to the extent possible, to purchase goods at the store?---Yes.

PN187

And just generally provide customer service to those customers?---Yes, amongst other things, yes.

PN188

That would apply to employees working at one of your conventional supermarkets who work at the deli?---Yes.

PN189

And at the bakery?---Correct, yes.

PN190

And, indeed, on night fill?---Depending on the shift structure.

PN191

But if the shift structure, if we can call it the shift, is one which occurs at a time when a customer is in the store, a night fill employee would be expected, amongst other things, to assist customers?---Yes.

PN192

With price checks?---It would be part of their role in totality, but it would be infrequent for the night fill team to do a price check.

\*\*\* CHRISTOPHER JAMES HALL

XXN MR BONCARDO

PN193

If they were requested, that would be something that they would do?---Yes, specifically, yes.

PN194

And also assist customers on dealing with any questions that they might have?---Yes.

PN195

You would also accept, wouldn't you, that your employees in your customer-facing supermarkets are required to engage in loss prevention activities?---Define the activity.

PN196

Well, they are required, aren't they, to ensure, to the extent possible, that the goods that are displayed for sale are not stolen?---So can I provide some context on where my thought process is?

PN197

Or you can answer the question?---Yes, so - - -

PN198

But, if what you are about to do answers the question, Mr Hall - - -?---Yes, so things like putting trolleys in between unmanned registers is a loss prevention activity and they do that, yes. Do they apprehend thieves? No, it's heavily encouraged that they do not apprehend thieves.

PN199

But if, for instance, they see someone involved in perhaps stealing one of your products, that is something that they need to report and attend to?---No, they would report it to a manager on duty.

PN200

Yes?---And that would be the extent of that.

PN201

Your CFCs and eCom floors are purpose-built to service online customers, aren't they?---Yes.

PN202

You would agree that your employees at those stores, because there are no customers, do not provide any customer service to anyone?---I would define that anybody shopping in the site is a customer, so team members are customers and they do help them.

PN203

So the extent of the customer assistance you say they provide is to help each other shop; is that right?---Yes, correct, yes.

\*\*\* CHRISTOPHER JAMES HALL

XXN MR BONCARDO

PN204

Can I just ask you about team members shopping. This application was filed, as you understand it, on 22 December last year, or perhaps you can just accept that from me for a moment?---Yes.

PN205

Your first statement is dated 20 December last year; yes?---Correct.

PN206

Your first statement does not refer to team members and their friends and families engaging in shopping at the team shop or at the CFC?---No, it did not.

PN207

That is because the capacity for team members and their family and friends to shop at the team shop or at the CFC more generally was something that was instituted after 22 December?---Official communications went out about it. I was the CFC manager up until February 22. I invited family and friends during seasonal trade, so things like Christmas and Easter where the CFC would close for a period of time, we would invite, for example, in the West Footscray Business Part, we'd invite the surrounding warehouses to come and shop at the team shop to reduce the amount of waste if we didn't sell the product, and then I became aware of the family and friends' time post writing my first statement.

PN208

Can I suggest to you, sir, that the family and friends' time which you have referred to was something that was instituted after this application was filed in the Commission?---I'm not sure when they instituted the family and friends, which is post me working in the CFCs.

PN209

In your second statement at paragraph 14, you refer to the CFC operating standards prepared by Woolworths and distributed to team members?---Mm-hm.

PN210

Those operating standards are what governs what people can and can't do in the team shop; is that right?---Correct, yes.

PN211

And they govern what family and friends can and can't do when they are shopping at the CFC?---I don't know if it specifies what the family and friends are allowed to do. It's more products in the team shop because of operation.

PN212

Well, these were guidelines, weren't they, that were instituted, you say at paragraph 14, in late December 2022?---Correct.

PN213

They were guidelines instituted in the context of enabling family and friends of team members to shop in the CFC?---Yes.

\*\*\* CHRISTOPHER JAMES HALL

XXN MR BONCARDIO

PN214

You say 'late December 2022' at paragraph 14. Can I ask you, is that after 22 December?---I'm not sure.

PN215

Is it the case, sir, that the practice or the ability of family and friends of team members to shop at the CFC was something that was introduced by Woolworths with this application in mind?---No, I wouldn't suggest that. I would suggest that this was lodged in December because that's the lead-up to Christmas and they - at that time, they'd recently got a new national manager, Cameron Bridges, and so he was implementing and streamlining a lot of policies.

PN216

Can I suggest to you, sir, that the reason that there is no mention to family and friends of team members at the CFCs being permitted to shop at a CFC in your 20 December statement is because this policy was instituted some time after the application was filed to assist Woolworths in progressing this application?---I don't believe that's the case, but that's just my perspective.

PN217

You just don't know?---No, I don't know.

PN218

Now the trucks that deliver products that are provided from a CFC are owned by Woolworths, aren't they?---It's my understanding that they own some of them.

PN219

They own all of them, don't they?---No, not all, because the volume, obviously, is variable, so sometimes they hire trucks.

PN220

Woolworths hire trucks?---I'm not sure who - I'm not sure who hires them.

PN221

And the employees of the trucks or who drive the trucks are employed by Linfox; that's right, isn't it?---It's my understanding that they are a subcontractor to Linfox.

PN222

I see?---Yes.

PN223

So Woolworths contracts with Linfox to provide people to drive the trucks?---Mm-hm.

PN224

And then Linfox will engage those people either as employees or as subcontractors?---It's my understanding they're subcontractors, yes.

\*\*\* CHRISTOPHER JAMES HALL

XXN MR BONCARDO

PN225

And all of the trucks that are used to deliver products from the stores are emblazoned with Woolworths' colours, aren't they?---The majority, yes, unless, like I said, they hire them.

PN226

Certainly. But leaving to one side the trucks that are hired, all of the trucks that are used to deliver goods or products from a CFC are readily identifiable as Woolworths' trucks?---Yes.

PN227

And that is important for Woolworths, isn't it, because it advertises to customers that Woolworths provides a delivery service?---I would assume so, yes.

PN228

A delivery service for its products; correct?---Yes.

PN229

You are aware, aren't you, that Woolworths charges online shoppers a delivery fee?---Yes.

PN230

And the workers who drive the trucks wear Woolworths uniforms?---I think they wear Linfox uniforms.

PN231

You say you think; you're not sure?---So when I was working in a CFC, the uniform that the drivers wore was a fluoro jumper and it had a Linfox patch on the shoulder. I can't recall - I'm fairly confident they didn't have any Woolworths' branding on them, but I could be wrong.

PN232

And you last worked at a CFC when, sir?---February 22.

PN233

Thank you. Finally, in terms of - I'll ask you this question: do you have any knowledge about how the work the drivers performing delivery of goods they collect from the CFC is allocated?---No, sorry.

PN234

You don't know, for instance, how a driver is told they have to go to place X or place Y?---No, that's down to the subcontractor, I believe.

PN235

Thank you.

PN236

JUSTICE HATCHER: Any re-examination, Mr Gotting?

PN237

MR GOTTING: Can I just have a moment, your Honour?

\*\*\* CHRISTOPHER JAMES HALL

XXN MR BONCARDIO

PN238

JUSTICE HATCHER: Yes.

PN239

MR GOTTING: Thank you, there's no re-examination.

PN240

JUSTICE HATCHER: Thank you for your evidence, Mr Hall, you are excused and you may leave the witness box?---Thank you, your Honour.

**<THE WITNESS WITHDREW**

**[12.05 PM]**

PN241

JUSTICE HATCHER: Who is next?

PN242

MR GOTTING: Your Honour, can I just make one observation. I am just getting some instructions, but it might be that some of the answers that were given are regarded by Woolworths as commercial in-confidence and it may be that I need to make an application that part of the answers given to the start of that cross-examination be the subject of a suppression or a non-disclosure order.

PN243

Your Honour, the next witness is Christopher Peters. He has two statements, the first dated 21 December 2022 and the second dated 12 July 2023.

PN244

JUSTICE HATCHER: All right.

PN245

THE ASSOCIATE: Please state your full name and address.

PN246

MR PETERS: It's Christopher Peters, (address supplied).

**<CHRISTOPHER PETERS, SWORN**

**[12.07 PM]**

**EXAMINATION-IN-CHIEF BY MR GOTTING**

**[12.07 PM]**

PN247

I appreciate that you have just stated your name for the purposes of the oath, but could you please state your full name to the Commission?---Christopher Peters.

PN248

Would you please identify a work address?---407 Elizabeth Street, Surry Hills.

PN249

Can you please identify who your employer is?---Woolworths Group.

\*\*\* CHRISTOPHER PETERS

XN MR GOTTING

PN250



Have you prepared two statements for use in these proceedings?---Yes.

PN251

Do you have copies of those statements with you in the witness box?---I do.

PN252

Could I ask you to look at the first statement, which is dated 21 December 2022. To the best of your knowledge and belief, is that statement true and correct?---Yes.

PN253

Your Honour, I tender that statement.

PN254

JUSTICE HATCHER: All right. The witness statement of Christopher Peters dated 21 December 2022 will be marked exhibit 5.

**EXHIBIT #5 WITNESS STATEMENT OF CHRISTOPHER PETERS  
DATED 21/12/2022**

PN255

MR GOTTING: Did you also prepare a supplementary statement dated 12 July 2023?---Yes.

PN256

To the best of your knowledge and belief, is that statement true and correct?---Yes, it is.

PN257

Your Honour, I tender that statement.

PN258

JUSTICE HATCHER: All right. The supplementary witness statement of Christopher Peters dated 12 July 2023 will be marked exhibit 6.

**EXHIBIT #6 SUPPLEMENTARY WITNESS STATEMENT OF  
CHRISTOPHER PETERS DATED 12/07/2023**

PN259

MR GOTTING: Thank you, your Honour, that constitutes the evidence-in-chief.

PN260

JUSTICE HATCHER: Mr Boncardo.

PN261

MR BONCARDO: Thank you, your Honour.

**CROSS-EXAMINATION BY MR BONCARDO**

**[12.08 PM]**

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDO

PN262

Mr Peters, as the general manager for eCom store operations for Woolworths Group Limited, you are aware, aren't you, that Woolworths are currently constructing a CFC in Auburn in New South Wales?---I am aware.

PN263

You understand, don't you, that that CFC is going to use automated technology?---I'm aware of that.

PN264

And that that automated technology extends to the use of robots?---Yes.

PN265

It extends to the use of robots for the purposes of picking orders?---Yes.

PN266

Can you tell the Commission what other functions or work the robots that are to be used at the CFC are going to include?---All I'm aware of in this project is that robots will be used for the fulfilment of online orders.

PN267

Who in Woolworths would have knowledge or oversight of the use of automated technology at the CFC?---That would be in our future network area.

PN268

You are aware that Mr Leonard and Mr Acton are giving, or have given, evidence in this case. Would either of them have any knowledge or oversight of those matters?---I wouldn't know for sure.

PN269

Do you know, sir, whether Woolworths has any plans to use automated technology to perform packing and other functions at CFCs that it intends to construct moving forward?---I'm only aware of the Auburn site at this point.

PN270

Are you aware as to whether or not Woolworths has any plans to use automated technology at its existing CFCs?---I'm not aware of any firm plans on automation in existing.

PN271

You used the phrase 'firm plans'. Does that mean that there are proposals or discussions about the use of automated technology?---I haven't seen any proposals on automation in manual CFCs.

PN272

Is that something that you would know about in your position or is it something that the persons in the business unit or the area of Woolworths that you mentioned previously would know about?---It would be something that I would know if it was going to be executed in a manual CFC, yes.

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDIO

PN273

But you wouldn't know whether it was being planned or investigated?---I would know if - I wouldn't know if it's been planned. I'd only know once it hit execution stage.

PN274

When a customer orders goods online via the Woolworths website or the application, they first have to sign up, don't they?---Yes, to a website, yes.

PN275

They establish an account; correct?---That's correct.

PN276

And they are required to indicate that they are bound by certain terms and conditions?---That's correct.

PN277

There are two sets of terms and conditions, aren't there? There are terms and conditions that apply to people who are called business customers?---That's right.

PN278

And people who are non-business customers?---That's right.

PN279

Can I show you a document. Can I ask you to look at that for a moment and just familiarise yourself with it. I don't mean to hurry you, Mr Peters, but I'm not asking you to read it. Do you recognise that document as the terms and conditions applicable for non-business customers?---Yes, I do.

PN280

This is a document that is, as you understand it, available on the Woolworths website?---As I understand it, as I see it, yes.

PN281

It is a document with which you are familiar?---I couldn't say I'm overly familiar with this document.

PN282

Can I just take you to some aspects of it. If you turn to what is the fourth page, you will see a subheading 'Ordering Products'. Do you see that?---Yes, I can.

PN283

That's clause 2.1, I think. Clause 2.1(b) sets out that an order placed through the site for a product is an offer to purchase the particular product for the price notified?---Yes.

PN284

You will see in clause 2.1(e) that certain minimum amounts are specified for orders to be placed through the site?---Yes.

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDO

PN285

There's a minimum amount of \$50 for Delivery Woolworths orders, excluding delivery fee, bag fee and crate service fee?---Yes.

PN286

Are you aware whether or not that amount fluctuates or is liable to change?---No, I'm not aware.

PN287

But presently the minimum order to have - or to have an order delivered is \$50?---That's right.

PN288

Can I ask you, sir, to look at clause 2.3 down the bottom of page 4, which is entitled 'Fees and Charges'. I'm sorry, you might have a different - - -

PN289

JUSTICE HATCHER: Page 5.

PN290

MR BONCARDO: Page 5. Thank you, your Honour.

PN291

You will see, amongst other things, sir, that certain fees and charges are agreed by the customer to be paid in clause 2.3(a) and, under (iv), a delivery or service fee is payable?---Yes.

PN292

Can you tell the Commission whether or not the current delivery fee is \$15 for a non-business customer?---Yes, that is - that is correct, yes.

PN293

That is a flat fee for every delivery?---It's not a flat fee for every delivery. It does vary.

PN294

How does it vary?---It depends on how big the order is, so orders over a certain amount there'll be free delivery.

PN295

There is capacity, I think, to make what are called bulk orders; is that right?---Not a bulk order, just a large order.

PN296

I see. What is a large order?---An order possibly over \$200 for a family.

PN297

And there is an additional amount as a delivery fee for such an order that Woolworths charges?---No.

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDO

PN298

You said the delivery fee fluctuated. Is there a higher delivery fee for some - - - ?---No, there's not a higher delivery fee than \$15. There could be a lower fee or it could be free for a larger order.

PN299

I see. Thank you. May I ask you to, sir, look at clause 3.1, which is on page 6 and is entitled 'Acceptance or rejection of a Woolworths Order'. You will see at clause 3.1(a) that Woolworths is able to accept or reject an order placed by a customer?---Yes.

PN300

Are you aware, sir, whether that is communicated to the customer online, that is, on the website or via the application?---I'm only aware of it in this document.

PN301

I will perhaps ask the question in a different way. Are you aware whether a customer is told via the website or via the application that their order has been accepted or rejected?---I'd be aware that the order has been accepted by us receiving the payment for that order.

PN302

Your understanding is that someone will place an order online, they will then pay for it online? You answered 'Yes' for the record to that?---Yes.

PN303

That's 'Yes' to both those questions?---Yes.

PN304

And that payment will indicate, so far as you are aware, acceptance by Woolworths of the order?---That's right.

PN305

If you look at 3.1(b), you will see that it sets out that if the order is accepted, a separate binding agreement is entered into for the supply by Woolworths of the relevant products, subject to the terms and conditions?---Yes.

PN306

If I can ask you to turn the page and look at clause 3.4, which is entitled 'Delivery of Woolworths Products'?---Yes.

PN307

3.4(a), sir, sets out that products ordered through this site are delivered to or able to be delivered to locations where Woolworths provides delivery services?---Yes.

PN308

Do we take it from that, sir, that there are areas where Woolworths does not provide delivery services to?---What I'm aware of is that we deliver to around 97 per cent of Australia.

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDIO

PN309

So unless you're in that unlucky 3 per cent, you are able to receive your groceries via a delivery service from Woolworths?---Yes.

PN310

Sir, if you look at clause 3.4(b), that sets out that there might be information on the site about delivery time frames and 'how we will deliver your Woolworths products to you' and there's also, in the second sentence, reference to you being able to select your products and being given a time frame for delivery. Can I ask you, is one of the services that Woolworths provides in delivering products the ability to deliver those products very quickly?---Yes.

PN311

There's a special kind of delivery, is there, for products that need to be delivered say within two hours?---Yes.

PN312

That is called Delivery Now; is that right?---That's correct.

PN313

Does Woolworths indicate to its customers what a time frame will be in respect to which the products will be delivered?---If you use Delivery Now, they will be delivered within two hours.

PN314

Can I ask you, sir, about the sale of alcohol. The alcohol business is run by Endeavour Group Ltd; is that right?---That's right.

PN315

So far as you're aware, Woolworths acts as the agent for Endeavour Group in selling alcohol?---I'm aware of that, yes.

PN316

When a customer orders alcohol online through the Woolworths website or the application, that order is directed to Endeavour via Woolworths; is that right?---That's right.

PN317

And Woolworths does the picking and the packing of the alcohol and its delivery; is that correct?---Woolworths just hand the order over to the driver or to a customer.

PN318

So Woolworths performs the delivery service in respect to that particular order?---That's correct.

PN319

And it does so on behalf of Endeavour Group Ltd?---That's correct.

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDO

PN320

Can I ask you, sir, to turn to clause 3.7, which is on page 9. That clause is entitled 'Bulk Woolworths Orders' and provides, amongst other thing, for circumstances where an order will be classified as a bulk order. If you look at 3.7(a)(ii), it sets out that:

PN321

*Orders that total over 250 kg will be subject to a bulk delivery fee, as they require special handling and transport allocation.*

PN322

Can I ask you, sir, can we take from that that Woolworths charges an additional fee for a bulk order and that fee is, in part, calculated upon the delivery cost?--- Yes, I'm not aware of those commercial details.

PN323

Finally, sir, can I direct your attention to clause 3.9, which commences on page 10, entitled 'Risk and title'. If you look to clause 3.9(c), you will see that it sets out that, 'Title to the product passes to you' - a reference to the customer - on the later of the date and time of payment for the products, delivery of the products to the delivery address and, where Woolworths orders are picked up, where those products are collected. Can I just ask you in respect to that, payment for the products occurs entirely online; is that right?---That's correct.

PN324

So it would be a rare and unusual circumstance for products to be delivered to a customer later than when the customer has paid for them?---Yes, to my knowledge, yes.

PN325

The way the system is set up, that just wouldn't happen - is that right - that is that you couldn't not pay for your products, have them delivered and then pay?---No, the system is set up to pay when you order.

PN326

I tender that document.

PN327

JUSTICE HATCHER: The document titled 'Woolworths Online and Everyday Market from Woolworths Terms and Conditions' will be marked exhibit 7.

**EXHIBIT #7 DOCUMENT TITLED 'WOOLWORTHS ONLINE AND EVERYDAY MARKET FROM WOOLWORTHS TERMS AND CONDITIONS'**

PN328

MR BONCARDO: Can I show you another document, sir. Can I ask you to look at that, please, and just familiarise yourself with it. Do you recognise that, sir, as the terms and conditions that apply to Woolworths' business customers who shop online?---Yes, I do.

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDO

PN329

This is a document, sir, which is also published on and available from Woolworths' website?---I believe so.

PN330

I tender that document, your Honour.

PN331

JUSTICE HATCHER: All right. The document titled 'Woolworths At Work Terms and Conditions' will be marked exhibit 8.

**EXHIBIT #8 DOCUMENT TITLED 'WOOLWORTHS AT WORK TERMS AND CONDITIONS'**

PN332

MR BONCARDO: Mr Peters, at paragraph 30 of your reply statement, you make reference to Woolworths purchasing trucks and subleasing them to a fleet management organisation. What I wanted to understand is the fleet management organisation you are referring to is Linfox?---No, I don't believe so. I believe it's an organisation that helps administrate registrations and repairs.

PN333

I see. Which organisation is that?---I'm not aware of the organisation.

PN334

JUSTICE HATCHER: Mr Boncardo, where are we?

PN335

MR BONCARDO: Paragraph 30 of the reply statement, I'm sorry, your Honour.

PN336

JUSTICE HATCHER: Thank you.

PN337

MR BONCARDO: So far as you are aware, Woolworths retains ownership of all the vehicles that it uses to transport products from CFCs?---Look, what I'm aware of is that we sublease to the fleet organisation and also to Linfox our vehicles.

PN338

Woolworths regulates, doesn't it, the conduct of delivery of products by delivery drivers by, amongst other things, allocating drivers to particular runs?---No, that's - that task's done by Linfox on our behalf.

PN339

It requires those drivers, though, doesn't it, to wear Woolworths uniforms?---I'm not aware of what the arrangements are with Linfox.

PN340

Are you aware of what attire a driver of a Woolworths-owned truck performing deliveries from a CFC is?---All I am aware of is that I see the drivers in hi-vis.

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDO



PN341

You don't see them wearing the Woolworths green shirts?---No, I can't - I can't recall that I have.

PN342

Woolworths' name is fairly prominently displayed on these vehicles that transport products from CFCs, isn't it?---Yes, it is.

PN343

Woolworths' emblem is displayed on those vehicles?---Yes, it is.

PN344

Those vehicles are readily identifiable as associated with Woolworths?---Yes, it is.

PN345

And the purpose of having Woolworths' name and emblem on those vehicles is to advertise to customers that Woolworths provides a delivery service?---That's what I'm aware of, yes.

PN346

The vehicles are in part of what Woolworths describes as its home delivery fleet?---Yes.

PN347

They are described as being part of Woolworths' home delivery fleet because, so far as Woolworths is concerned, it wants to promote to customers and potential customers online sales and delivery by Woolworths of those online sales?---That's the way I understand, yes.

PN348

Do you know, sir, whether Woolworths is now providing a toy delivery brick truck that represents a Woolworths delivery truck?---I have seen that product, yes.

PN349

Can I show you some documents, sir. I won't show you the brick truck just yet. Those are photographs, aren't they, of trucks that Woolworths uses to deliver products from CFCs and eStores?---Yes, that's right.

PN350

I tender those documents, your Honour.

PN351

JUSTICE HATCHER: All right. We will call it a bundle of photos of Woolworths trucks. It will be marked exhibit 9.

**EXHIBIT #9 BUNDLE OF PHOTOGRAPHS OF WOOLWORTHS TRUCKS**

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDO

PN352

MR GOTTING: Are there three photos in the bundle?

PN353

JUSTICE HATCHER: Yes.

PN354

MR GOTTING: Thank you.

PN355

MR BONCARDO: Finally, sir, can I show you a photograph of the brick truck. Sorry, it's not perhaps a photograph, it's a printout of the brick truck. Is that the brick truck, sir?---I believe it is, yes.

PN356

It's a toy truck that Woolworths is selling at the moment advertising Woolworths' delivery business; is that right?---I understand it's a product that we have sold. I'm not sure if it's currently on sale.

PN357

I tender the printout of the online delivery truck.

PN358

JUSTICE HATCHER: Printout of Woolworths brick delivery truck. Each will be marked exhibit 10.

**EXHIBIT #10 PRINTOUT OF WOOLWORTHS BRICK DELIVERY TRUCK**

PN359

MR BONCARDO: Finally, in respect to trucks, sir, Woolworths describes the drivers who perform deliveries from CFCs as its drivers in its advertisements and publications?---Sorry, can you repeat the question.

PN360

Woolworths describes the drivers who perform the delivery work from CFCs and eStores in its advertising and publications as its drivers?---I'm not - I'm not aware of that.

PN361

It describes the drivers who perform deliveries from CFCs as its 'friendly drivers'?---I understand that term may have been used.

PN362

Well, it's a term that's used in Woolworths' publications and advertising, isn't it?---I'm not aware.

PN363

Just bear with me a moment, sir. Sir, you make reference in your reply statement to the company results and the full group year results for 2021 and 2022?---Yes.

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDO

PN364

You understand that those are documents that are published on and for the Australian Stock Exchange?---I do.

PN365

They are public documents?---I do.

PN366

They are important documents for Woolworths?---That's correct.

PN367

They are documents that Woolworths ensures, or attempts to ensure so far as possible, are accurate?---Yes.

PN368

And those documents, so far as you are aware, accurately describe Woolworths' operations?---To the best of my knowledge, yes.

PN369

You know, don't you, that they describe customer fulfilment centres as online distribution centres?---That's my understanding.

PN370

You would agree with me, wouldn't you, that that is a fair description of a customer fulfilment centre?---I don't agree with the way it's been described in that document.

PN371

The document is wrong; is that right?---I believe it's been misinterpreted from the writer.

PN372

Can I suggest to you, sir, that your evidence in that regard and your evidence in your reply statement about an online distribution centre being misdescribed in Woolworths' announcement, or announcements, in publications on the ASX is wrong and (audio malfunction)?---I believe that that is being used as an umbrella term for the way we describe these facilities.

PN373

Can I suggest to you that one of the ways you describe - that is 'you' being Woolworths - the facilities is as online distribution centres?---I can confirm that's the way it's been described in that document, yes.

PN374

They are also described as 'warehouses', aren't they?---Not to my knowledge.

PN375

Thank you, your Honour, that's the cross-examination.

\*\*\* CHRISTOPHER PETERS

XXN MR BONCARDIO

PN376

JUSTICE HATCHER: Any re-examination, Mr Gotting?

PN377

MR GOTTING: No re-examination, thank you.

PN378

JUSTICE HATCHER: Thank you for your evidence, Mr Peters, you are excused and you are free to leave?---Thank you.

<THE WITNESS WITHDREW

[12.36 PM]

PN379

JUSTICE HATCHER: All right, this will be the next witness and then we will take lunch.

PN380

MR GOTTING: Yes. The next witness is Thomas James Leonard. He has prepared a statement dated 21 December 2022.

PN381

THE ASSOCIATE: Please state your full name and address.

PN382

MR LEONARD: Thomas James Leonard, (address supplied).

<THOMAS JAMES LEONARD, SWORN

[12.37 PM]

EXAMINATION-IN-CHIEF BY MR GOTTING

[12.37 PM]

PN383

Could you please state for the court your full name?---Thomas James Leonard.

PN384

Could you please state a work address?---1 Woolworths Way, Bella Vista.

PN385

Can you please identify your current employer?---Woolworths.

PN386

Have you prepared a statement for use in these proceedings?---I have.

PN387

Do you have a copy of that statement with you?---I do.

PN388

Could I ask you to look at paragraph 10 of that statement?---Yes.

\*\*\* THOMAS JAMES LEONARD

XN MR GOTTING

PN389

Is there anything you wish to change in that paragraph?---I do. Upon reviewing this document, there is a typo, so that number of Woolworths supermarkets is

incorrect. I believe the number is circa 1000 Woolworths supermarkets and circa 90 metro stores.

PN390

JUSTICE HATCHER: Circa what - 90?---Ninety metro stores, to the best of my knowledge.

PN391

MR GOTTING: So if we delete the figure that's recorded, '1998', and replace it with 'circa 1000'; is that what you are proposing?---Yes, please.

PN392

And then do we delete the figure 91 and insert 'circa 90'?---Yes, please, yes.

PN393

Subject to those matters - - -?---To the best of my knowledge, yes.

PN394

- - - is the statement true and correct to the best of your knowledge and belief?---Yes.

PN395

Your Honour, I tender the document.

PN396

JUSTICE HATCHER: The witness statement of Thomas James Leonard dated 21 December 2022 will be marked exhibit 11.

**EXHIBIT #11 WITNESS STATEMENT OF THOMAS JAMES  
LEONARD DATED 21/12/2022**

PN397

Mr Boncardo.

PN398

MR BONCARDO: Thank you, your Honour.

**CROSS-EXAMINATION BY MR BONCARDO**

**[12.39 PM]**

PN399

Mr Leonard, you are the head of the Smart Growth for Woolworths; is that right?---Correct.

PN400

That involves, doesn't it, identifying and delivering change in Woolworths' business?---As part of my role, yes.

PN401

And, specifically, as part of Woolworths' e-commerce business?---Correct.

\*\*\* THOMAS JAMES LEONARD

XXN MR BONCARDO

PN402

That involves, doesn't it, customer fulfilment facilities?---Can you repeat the question?

PN403

Part of your role involves identifying change and identifying programs for change in respect to Woolworths' operations of CFCs?---Correct.

PN404

You are aware, aren't you, that Woolworths is currently constructing an automated CFC in Auburn in New South Wales?---I am.

PN405

That CFC commenced being constructed in about December 2021?---I'm unsure of the exact construction date.

PN406

But it is due to open next year?---Open next year, yes.

PN407

You are aware that automated technology is to be used at that CFC?---I am aware.

PN408

You are aware that robots are to be used?---I don't know the exact definition of what would be considered robots, but automated technology, correct.

PN409

Do you have any awareness of what particular automated technology is to be used at the Auburn CFC?---I am aware of the third party that will be providing some of the automation, but, no, I'm not aware of the exact technology that's used. I'm not close to this - I'm not close to this program as part of my role.

PN410

I see. The third party is Knapp?---Correct.

PN411

Are you aware of whether or not they have provided automated technology to other retailers, such as Coles?---I am not aware of the other retailers' names in particular. I am aware they have provided these services to other companies around the globe.

PN412

Are you aware, by reason of your position as the head of Smart Growth, about any further plans that Woolworths has to use automated technology at CFCs (audio malfunction)?---I'm not close to that program of work.

PN413

Can you, sir, shed any light at all on whether or not Woolworths is planning to construct further CFCs that will utilise automated technology?---Can you repeat the first part of that question?

\*\*\* THOMAS JAMES LEONARD

XXN MR BONCARDIO

PN414

Are you aware of Woolworths having any plans to construct new CFCs, apart from Auburn, where automated technology will be used?---To my knowledge, I believe there would be future plans, but I'm really not close to the level of detail, location, or type of technology that would be used if any such facilities were going on in the future. It's not - I'm not part of that or close to my role.

PN415

All right. And if you can't answer this, please say so. Do you know, sir, whether or not Woolworths intends to construct or create CFCs that do not use any automated technology within it?---I'm not aware.

PN416

Can I ask you, sir, about the home delivery service that Woolworths provides. Woolworths provides that using vehicles that it owns, so far as you know?---Can you repeat?

PN417

Woolworths provides the home delivery service from CFCs and its stores using vehicles that it owns?---Correct.

PN418

The drivers of those vehicles are arranged by Linfox; is that right?---To my knowledge, yes.

PN419

And Woolworths publicises those drivers as being its drivers?---As being?

PN420

Its drivers?---I'm not aware that they advertise it in such a manner.

PN421

So you're not aware of publications on Woolworths' website, including a job advertisement, which refer to the drivers of those vehicles as Woolworths' drivers?---No. As part of my role, it's more involved in the technology and solutions rather than the corrections in that sense.

PN422

It is the case, isn't it, that, presently, all items that are packed at a customer fulfilment centre are collected by vehicles or trucks that are owned by Woolworths but in respect to which the driver is provided by Linfox?---To my knowledge, yes.

PN423

Thank you, that's the cross-examination.

PN424

JUSTICE HATCHER: Any re-examination?

\*\*\* THOMAS JAMES LEONARD

XXN MR BONCARDO

PN425

MR GOTTING: No re-examination, thank you, your Honour.

PN426

JUSTICE HATCHER: I'm sorry, I just wanted to clarify one thing, Mr Leonard. In paragraph 28 of your statement, it's talking about ordering to Uber Eats. Just for more of an abundance of caution, where you refer to the online personal shopper picking and packing the order, that is, of course, a Woolworths' employee?---Yes, that would be, correct.

PN427

Yes, all right.

PN428

MR BONCARDO: Your Honour, can I clarify one matter arising from that?

PN429

JUSTICE HATCHER: Yes.

PN430

MR BONCARDO: Uber Eats deliveries are provided only from conventional Woolworths supermarkets, not from CFCs; correct?---I'm not - I'm not certain on that point. I wouldn't be able to answer with confidence.

PN431

Thank you.

PN432

JUSTICE HATCHER: Anything arising from that, Mr Gotting?

PN433

MR GOTTING: Nothing arising, thank you.

PN434

JUSTICE HATCHER: Thanks for your evidence, Mr Leonard, you are excused and you are free to go?---Thank you very much, your Honours.

**<THE WITNESS WITHDREW**

**[12.45 PM]**

PN435

JUSTICE HATCHER: So that's all your evidence, Mr Gotting?

PN436

MR GOTTING: Yes. There is some ABS data that has been updated in an annexure to a submission that was filed by Woolworths, and we circulated this updated data to the other parties yesterday. Could I hand up three copies of the updated data.

\*\*\* THOMAS JAMES LEONARD

XXN MR BONCARDO

PN437

The members of the Commission may recall, but the second set of submissions that were filed by the applicant annexed a version of the ABS data. That was as at



April 2023. There has been further data available on the ABS website since that time, and if your Honours look at page 2b, particularly lines 117, 118 and 119, your Honours will see entries from March 2023, April 2023 and May 2023. It is that material which is the updated material, and then, equally, on page 4b at lines 117 to 119.

PN438

JUSTICE HATCHER: All right, I will mark that. Australian Bureau of Statistics, Retail Trade Australia, Catalogue 8501.1, to May 2023 will be marked exhibit 12.

**EXHIBIT #12 AUSTRALIAN BUREAU OF STATISTICS, RETAIL TRADE AUSTRALIA, CATALOGUE 8501.0, TO MAY 2023**

PN439

All right, so that's all the applicant's evidence. For the TWU, you tender the witness statement of Angharad Owens-Strauss?

PN440

MR GIBIAN: I do, thank you, your Honour.

PN441

JUSTICE HATCHER: All right. That statement, which is dated 8 June 2023, will be marked exhibit 13.

**EXHIBIT #13 WITNESS STATEMENT OF ANGHARAD OWENS-STRAUSS DATED 08/06/2023**

PN442

MR GIBIAN: May it please.

PN443

JUSTICE HATCHER: Mr Saunders, you tender the four statements that have been filed?

PN444

MR SAUNDERS: Yes, your Honour.

PN445

JUSTICE HATCHER: All right, I will go through those. The affidavit of Aaron Behmer dated 7 June 2023 will be marked exhibit 14.

**EXHIBIT #14 WITNESS STATEMENT OF AARON BEHMER DATED 07/06/2023**

PN446

The witness statement of Andrew Giles filed on 7 June 2023 will be marked exhibit 15.

**EXHIBIT #15 WITNESS STATEMENT OF ANDREW GILES FILED ON 07/06/2023**

PN447

You will have to help me with the next name, Mr Saunders.

PN448

MR SAUNDERS: There are two which are a little tricky: Ben Hadziahmetovic, 7 June.

PN449

JUSTICE HATCHER: Hadziahmetovic. So the witness statement of Benjamin Hadziahmetovic dated 7 June 2023 will be marked exhibit 16.

**EXHIBIT #16 WITNESS STATEMENT OF BENJAMIN HADZIAHMETOVIC DATED 07/06/2023**

PN450

The witness statement of John Grobbelaar dated 7 June 2023 will be marked exhibit 17.

**EXHIBIT #17 WITNESS STATEMENT OF JOHN GROBBELAAR DATED 07/06/2023**

PN451

All right. Is that all the evidence?

PN452

MR TAYLOR: If it please the Commission, we provided to the Commission in the last couple of days a bundle of six documents, which are three enterprise agreements and three decisions of this Commission approving those enterprise agreements, being the three agreements and approvals that we refer to in our reply submissions. On one view, they don't need to be formally tendered, but we thought it was convenient for the Commission to have access to them in a single PDF.

PN453

JUSTICE HATCHER: All right.

PN454

MR TAYLOR: We are more than content, of course, for that to be received formally into evidence.

PN455

JUSTICE HATCHER: All right, well, that's noted. I don't think we need to mark that.

PN456

MR TAYLOR: The only other thing that the Commission may want to do is mark for identification the document the Commission handed us when we commenced this morning.

PN457

JUSTICE HATCHER: I was going to ask the parties about that after lunch when they've had a better chance to peruse it. I was going to ask whether there's any

objection to it being marked as a self-initiated exhibit, but the parties don't have to answer that right away, they can answer that after lunch.

PN458

MR GIBIAN: Can I just identify on that point - it doesn't provide any description, but there is a reference in an annexure to Ms Owens-Strauss' statement to the Auburn facility. It's annexure AOS17, which is the group financial statements for 2021-22, I think, and it's page 11 of that document. There is a photo and a reference to it, the facility, having commenced construction in December 2021 and expected to open in 2024. It's under the heading 'Good progress on Primary Connect transformation despite various disruptions' and contains photos of six distribution centres at various locations around Australia, three that are operational and three facilities that are in development, including the Auburn automated CFC.

PN459

JUSTICE HATCHER: All right, that is noted. While you are on your feet, Mr Gibian, these truck photos don't show the rear of the truck. From past experience, trucks operated by Linfox usually have that 'Passing Another Fox' sticker on the back. Can someone find out whether these trucks have one of those.

PN460

MR GIBIAN: Mr Boncardo says they don't, but we will - - -

PN461

JUSTICE HATCHER: Do you agree with that, Mr Gotting?

PN462

MR GOTTING: I agree with your Honour's general observation, but as to - - -

PN463

JUSTICE HATCHER: Well, can you get instructions about it over lunch.

PN464

MR GOTTING: I will do that over the luncheon adjournment.

PN465

JUSTICE HATCHER: All right. Subject to those matters, we will adjourn now and start receiving submissions at 2 o'clock.

**LUNCHEON ADJOURNMENT** [12.51 PM]

**RESUMED** [2.02 PM]

PN466

JUSTICE HATCHER: All right. Mr Gotting?

PN467

MR GOTTING: Yes. Your Honour, before the luncheon adjournment you asked me about the article that was handed down from the Full Bench as a self-instigated exhibit. There's no opposition to that document being accepted into evidence.

PN468

JUSTICE HATCHER: Does anyone else oppose that being admitted into evidence? No. All right.

PN469

MR GOTTING: There's silence at the Bar table, your Honour.

PN470

JUSTICE HATCHER: And I will mark it.

**EXHIBIT #18 ARTICLE FROM THE AUSTRALIAN FINANCIAL  
REVIEW ENTITLED 'REFERRING TO COLES OCADO PROJECT'  
DATED 11/05/2023**

PN471

MR GOTTING: And your Honour posed some questions when you handed the document down about whether Woolworths is building the Auburn CFC facility which is referenced on page 5 of exhibit 18. Your Honour, the answer is yes, and your Honour would have heard some of the evidence in cross-examination of Mr Hall about the way in which the Auburn CFC is intended to operate in the future.

PN472

According to my notes the effect of the evidence was that about 5 per cent of the work in the Auburn CFC facility will be subject to the automated technology, and there would still be the need for employees to perform the balance of the work in that CFC. And you will recall that Mr Hall indicated that there would be still the personal shoppers completing the picking and packing, and there would still be the production team of deli workers, bakers, fruit and veg staff and seafood staff that would be producing and preparing food as part of the order. There will also be the inventory work, and additionally there would be the replenishment of the shelves by employees as well.

PN473

So my submission is that the evidence reveals that whilst there will be some limited automation anticipated to occur at the Auburn CFC it will be largely a human-based activity.

PN474

JUSTICE HATCHER: Yes. But it's not just your client, it's also Coles.

PN475

MR GOTTING: I accept as much, and I obviously have a limitation as to what I can say about the position of Coles. But obviously the percentage of automation that might be used between Woolworths on the one hand and say Coles on the other hand may vary and it might vary over time, but there will still be the need for employees to work in the CFCs or the eStores to perform the tasks of filling the online orders.

PN476

Your Honour also asked me about the back of the trucks which are used for the deliveries and were the subject of exhibit 9. We're still undertaking those enquiries, and so we're not in a position to provide an answer at this point in time.

PN477

Your Honour, the applicant relies on its written submissions. There's three sets of submissions. The first are dated 27 April 2023. The second are dated 15 May 2023, and the third, which is in reply, is dated 12 July 2023, and I rely upon all of those submissions without reading them to the Commission this afternoon.

PN478

Can I clarify two factual matters at the outset. The first is the issue of drivers being employed by the applicant. For the avoidance of doubt the applicant does not employ any drivers to work at its CFCs or its eStores, and it engages a third party contractor Linfox to supply drivers to make the deliveries from its CFCs, the eStores, to its customers.

PN479

Can I just give some evidentiary references without taking the Commission to the relevant passages. The first is a statement of Mr Peters in paragraph 30. The second is the supplementary statement of Mr Peters in paragraphs 24, 25, 27 and 29. And the third is the statement of Mr Leonard at paragraph 24(c).

PN480

The applicant also engages partner to partner carriages such as Uber and Sherpa or 1300 CABS to make deliveries from the direct to boot facility, and that occurs at two CFCs, and the relevant evidentiary references are the supplementary statement of Mr Peters at paragraphs 47, 49 and 50. Your Honours will appreciate, or members of the Commission will appreciate that insofar as the application concerns Woolworths it's not seeking to address the position of the drivers because it does not employ people in those roles.

PN481

The second matter that I wanted to address was the issue of the time that Family and Friends was introduced at the CFCs. That issue is dealt with by Mr Hall in his second statement, and it is clear that the Family and Friends was first introduced prior to the institution of these proceedings. The Family and Friends scheme was used initially during quiet periods, particularly Christmas and Easter periods, and that's addressed in his statement and it was confirmed in cross-examination.

PN482

Your Honours, I wanted to deal with at the outset the contents of the General Retail Industry Award 2020. I have copies to hand up if that's convenient.

PN483

JUSTICE HATCHER: I have access to it.

PN484

MR GOTTING: If it's not necessary I won't burden the tribunal.

PN485

JUSTICE HATCHER: No.

PN486

MR GOTTING: Could I ask members of the tribunal to access the GRIA 2020, and there was just some passages or some clauses that I wanted to emphasise. The first was in clause 2, a definition of a phrase 'Shop departments or sections.' That appears on page 6 I think of the current version of the award. You will see that there's a reference there to shop, and that's to be contrasted of course to a retail establishment, which is the subject of these proceedings.

PN487

The second matter that I wanted to emphasise was in the same clause, but it's the definition of video shop, and that appears on page 7 of the award, and it means a business. So it's not confined to a shop, but it means a business.

PN488

The third matter that I wanted to emphasise was clause 4.1, and that deals with of course the coverage clause. First it deals in 4.1(a) with the employees in the general retail industry. And secondly 4.1(b) deals with employees in the defined classifications. As the Commission will readily appreciate a single employer may be involved in multiple industries concurrently, and that's the position of course with the applicant.

PN489

Can I then emphasise clause 4.2. It contains the definition of general retail industry, and relevantly it means a retail sale of goods or services and for personal household or business consumption, and I rely on all three of those elements. The members will see immediately that it includes specified sales, including in (b) food, and in (d) personal goods. It also includes (h) which is the delivery of newspapers, and the only reason that I emphasise (h) is because to address an argument that's put by the TWU that the sale needs to occur inside a physical store, and obviously the delivery of a newspaper will not be occurring inside a physical store.

PN490

Can I then emphasise the exclusions that appear in paragraph 4.2, particularly the exclusion in (i). (iii) has hair and beauty establishments. It's not confined to shops. And then (iv) has standalone butcher shops in contrast. And then (vi) has establishments in two places.

PN491

JUSTICE HATCHER: What's the distinction you're seeking to make there?

PN492

MR GOTTING: That it's not limited to shops as is set out in (iv), but it can be expanded and contrasted to the establishments. I am just seeking to emphasise that a retail establishment is not confined to a shop, and I am trying to anticipate an argument that is put against us by the TWU. For completeness can I emphasise clause 4.5, which appears on page 9. That obviously deals with a secondary

argument that is relied upon by the applicant if there's more than award that covers the employer.

PN493

Can I then emphasise schedule A in the GRIA, which starts on page 54 of the award, and it contains a list of classification definitions. The first which will apply to most of the employees that are working at the CFCs and the eStores there's a retail employee Level 1, and the Commission members of course will see that it requires the performance of functions, and it's at a retail establishment. And it's the phrase there 'retail establishment' which is really the source of the dispute between the parties.

PN494

There is obviously a series of functions that are then listed in (a) through (p). I emphasise (a), (b), (c), (g) and (p).

PN495

JUSTICE HATCHER: It just says reference to retail establishment. I don't know that we can place much emphasis on the word 'establishment'. It's the word 'retail' which gets us into character. What does retail mean?

PN496

MR GOTTING: Well, can I turn to that, your Honour. We have referred to that in our submissions by reference first to the ordinary meaning of the word 'retail', and in accordance with the dictionary definitions that we have referenced it's the sale of goods and services to consumers or end users. That's what we say is meant by the word 'retail'. I think just for completeness establishment seems to be common ground that it's a place of business. And so we would say that considering only the ordinary meanings of those words the phrase 'retail establishment' means a place of business that's involved in the sale of goods and services to consumers or end users. And that relevantly includes a place of business that's involved in picking and packing orders for sale to consumers and end users that have been ordered online, and we say that in those circumstances the applicant satisfies insofar as the CFCs and the eStores exist that the functions at a CFC are occurring at a retail establishment.

PN497

Now, I emphasise the ordinary meaning of the two words that make up the phrase 'retail establishment', but I also just wanted to emphasise some of the language that is inherent or associated with the phrase 'retail establishment'. First, the language is obviously general. Secondly, it's of wide import. Thirdly, it's not the subject of express limitation in the award. Fourthly, it's not the subject of implied limitation in the award either. Fifth, as a matter of language it's not confined to a shop. Sixthly, it's not confined to a physical place that is actually selling goods and services. Seventhly - - -

PN498

JUSTICE HATCHER: So does establishment connote in effect a bricks and mortar place of work?

PN499

MR GOTTING: It includes a bricks and mortar place of work, yes.

PN500

JUSTICE HATCHER: Does it connote that?

PN501

MR GOTTING: In its ordinary meaning, yes.

PN502

JUSTICE HATCHER: I'm just trying to relate this to ecommerce. The definition you seek to give to retail establishment would come up in an Amazon type facility, because it's selling, it's doing a final sale to the customer?

PN503

MR GOTTING: Well, I'm just focusing on the phrase 'retail establishment' for the moment and just examining its ordinary meaning, and it would extend to a place of business that fills an online order, and in that sense it would extend to an Amazon type circumstance. But we are not seeking to say that the award should operate in that way. We are seeking to confine the clarification to only deal with a defined circumstance that we have said in our amended variation.

PN504

I did want to emphasise that the language of retail establishment is not confined to a place that's open to the public, and it's not confined to the circumstances of achieving retail sales at the time that the award was made or precludes adaption of changes that have occurred since the award was made.

PN505

In our submissions we have emphasised some principles of construction, including that the Commission should not adopt a narrow or a pedantic approach to the meaning of the phrase, and that the phrase should not be divorced from industrial realities and we maintain those submissions.

PN506

The other thing that I would emphasise, your Honour, is of course the context of that phrase 'retail establishment', and that context includes the terms and phrases in the GRIA itself, and relevantly that includes in clause 2 the definition of shop with a department or section. It includes in clause 2 video shop, which isn't confined to a shop but extends to a business.

PN507

It includes clause 4.2, which is the general definition of the industry in terms of a retail sale of goods and services for personal household or business consumption. And it includes some of those examples, including the examples of a delivery of a newspaper, which obviously doesn't occur in a shop or a physical place.

PN508

The context also extends of course to the name of the award, the General Retail Industry Award. It's not a shop award or the stores award, and of course the



classifications themselves also provide the context retail employee Level 1 or retail employee Level 2.

PN509

Another contextual matter is of course that the purpose of the award as well as the Storage Services and Wholesale A

PN510

ward are to be industry-based awards, and it was obviously intended that the GRIA would operate where the customer is going to be a retail consumer, and the Storage Services Award was intended to apply where the customer is a wholesaler or another retailer.

PN511

Can I just indicate why the applicant says that the CFCs satisfy the ordinary meaning of the phrase 'retail establishment', and there's two bases to it, members of the Commission. The first is that they meet the definition of retail establishment as I indicated is reflective of the ordinary meaning in its context, and that's because the CFCs are establishments or places of business that pick and pack goods for consumers and end users.

PN512

The second basis though is that the CFCs are establishments that actually sell goods to consumers, and that's the portion of the CFCs that constitute the team shops, and it also includes the practice of permitting the twice weekly family and friend sale periods where there are actual sales occurring within the CFCs at the check outs.

PN513

JUSTICE HATCHER: Just remind me, so customers can or can't (indistinct) from the CFC?

PN514

MR GOTTING: They can, in two circumstances. The first circumstance is at the team shop, and that would be at any period of time. It tends to be confined to the workers that are working at the CFC. The second is the workers themselves as well as their family and friends, and it's - - -

PN515

JUSTICE HATCHER: But not by the general public?

PN516

MR GOTTING: Not by the general public, I accept that, but with respect, the requirement of retail establishment does not, in my submission, require it to be open to the public or that the sales be conducted by or involving the general public. So there's two bases, in my submission, that the CFCs should be treated as a retail establishment in accordance with that definition.

PN517

Additionally there are two bases upon which the eStores satisfy that ordinary meaning of retail establishment in its context, and the first basis is that they are

establishments or places of business that pick and pack goods for retail sale in much the same way as the CFCs do. And then the second basis is that the eStores themselves actually sell goods to consumers and end users, because half of the eStore is a supermarket under the one roof of the eStore, and that supermarket obviously has check outs and sales of goods occur through those check outs.

PN518

JUSTICE HATCHER: So a supermarket with an eStore if I want to order online and collect is that one done in the supermarket or the eStore?

PN519

MR GOTTING: The picking and the packing of the order might be done on the eCom floor of the eStore, and the collection would be the supermarket side. Does that answer your Honour?

PN520

JUSTICE HATCHER: But that's a case where in effect the eStore is selling direct to the customer in the sense that there's no intermediary, they order online.

PN521

MR GOTTING: And they do pick it up.

PN522

JUSTICE HATCHER: The eStore organises the order and then the customer picks it up straight from the premises.

PN523

MR GOTTING: That's one way in which the sale can occur. Another way is of course for it to be delivered to the home or workplace of the customer. In terms of that character of the CFCs and the eStores being retail establishments can I emphasise three other matters. The first is the purpose of the CFCs and the eStores, which is obviously to fill the online orders. The second is the identity of the customers, which is the consumers and end users that receive the goods from the CFCs and the eStores. And the third is the structure and layout of the CFCs and the eStores.

PN524

Members of the Commission are obviously familiar from the inspection this morning about that structure and layout, but can I just emphasise that as photos that are annexed to Mr Peters' statement from annexure CP1 and following, there is the comparison of the layout of a CFC on the one hand and the layout of a supermarket on the other.

PN525

Can I then deal with some arguments that are put against us, in particular by the UWU relating to the Storage Services and Wholesale Award, and in that respect could I ask the members of the Commission to go to that award. There's a couple of passages that I wanted to emphasise within it. The first is in clause 2 and there's a definition of 'Wholesale', and that means the sale of commodities in large quantities other than to final consumers, and that of course might be contrasted immediately to retail.

PN526

Secondly, the coverage clause is contained in 4.1. It deals with of course employees in the specified industry, as well as the employees and the classifications. Clause 4.2 specifies the industry, and significantly clause 4.3 says that the Storage Services and Wholesale Award does not cover employees to the extent that the employee is covered by another modern award that contains classifications relating to the functions.

PN527

JUSTICE HATCHER: Sorry, where is that?

PN528

MR GOTTING: It's clause 4.3(a). And that means, in my submission, that the GRIA trumps, as it were, the SSW Award if the employee was covered by the GRIA and the classifications relate to the same functions.

PN529

Once again there is a more appropriate classification clause, which is in clause 4.7. And then could I ask members of the tribunal to go to schedule A to the Storage Services and Wholesale Award, and this contains the classification definitions for the purposes of the award.

PN530

A store worker Grade 1 the Commission will see in clause A.1.2(f) some indicative tasks, and relevantly it refers in (i) to storing and packing, and in (iii) allocating and retrieving, but those indicative tasks would not extend to the production tasks that occur in CFC, that is the preparation and the making of bread and the deli items and the seafood and some of the fruit and vegetables. And it would also not extend to the replenishment tasks that are occurring within a CFC or an eStore where individual items are placed on a shelf or rack for later picking and packing.

PN531

JUSTICE HATCHER: So could you identify in the retail award what classification covers the production tasks?

PN532

MR GOTTING: Yes. It's retail employee Level 1, and on page 54, clause A.1.1(b), packing, weighing, assembly, preparing goods for sale.

PN533

JUSTICE HATCHER: So how does that cover baking bread?

PN534

MR GOTTING: That is preparing goods for sale, preparing bread for sale insofar as it - - -

PN535

JUSTICE HATCHER: I think Jeff Kennett had something to say about this. They bake pre frozen pastry products, they don't make the dough, do they?

PN536

MR GOTTING: I think that was a past practice, your Honour. I don't think that's the position. I think they start from - - -

PN537

JUSTICE HATCHER: I think that was Coles actually, wasn't it?

PN538

MR GOTTING: I think they start with the flour and the milk and eggs and what have you from scratch inside the CFC, or if it's an eStore they do it inside the supermarket side of the eStore, and that, with respect, is preparing goods for sale. And in terms of a deli weighing, assembling and preparing goods for sale, and also packing goods for sale. And could I just also indicate that it might extend to retail employee Level 4, which is on page 57, and you will see that at clause A.4.3 some indicative job titles include (b) butcher, baker, pastry cook.

PN539

JUSTICE HATCHER: That's a bit clearer. Okay.

PN540

MR GOTTING: So in my submission it does extend to the relevant classifications. There's also in the Storage Services and Wholesale Award higher grades, but they require effectively licenced operation and material handling equipment, which is not the position of the CFCs or the eStores, or various maintenance functions or store layout functions which is not performed by relevant employees at the CFCs or the eStores.

PN541

Additionally there is of course a wholesale stream that appears in the Storage Services and Wholesale Award. That stream starts at page 42 of the award, and it's necessary for the relevant employee to be performing functions at a wholesale establishment, and that obviously picks up the definition of wholesale in clause 2 of that award, and in my submission none of the employees that are working at a CFC or an eStore are working in a wholesale establishment.

PN542

So if we just pause to summarise the position of the applicant in terms of the employees working within CFCs and eStores the Storage Services and Wholesale Award does not apply for at least three reasons. The first is the applicant is not involved in storage services and wholesale industry in this part of its business. Rather it's involved in the sale of goods and services to end users and not the storage and wholesale industry.

PN543

The second is that they are not performing functions in a warehouse establishment. And the third is that they are otherwise covered by the GRIA, and because of clause 4.3(a) of the Storage Services Award and the employer being involved in the general retail industry the Storage Services and Wholesale Award will not apply.

PN544

Could I then turn to the Road Transport and Distribution Award that's relied upon by the TWU. Once again there's certain clauses that I wanted to emphasise. The first is in clause 2 there's a definition of distribution facility, and that appears at page 5 of the award, and members of the Commission will see that it's a facility from which goods are distributed by road which is operated by an employer as part of or in connection with a road transport business of that employer. And the short point is that the applicant does not operate such a road transport business. There's also a definition - - -

PN545

JUSTICE HATCHER: Because it engages Linfox to perform the transport.

PN546

MR GOTTING: Yes, and also the nature of its business is really a retail business rather than a road transport business.

PN547

JUSTICE HATCHER: It seems to me on the authority of the Full Court decision in the Coles case that if Woolworths did employ the drivers it would be in the road transport industry. That's what the court said.

PN548

MR GOTTING: That might be the case, your Honour.

PN549

JUSTICE HATCHER: It seems to me speaking for myself the decisive consideration in your favour on this point is that it has engaged Linfox to undertake the road transport.

PN550

MR GOTTING: Yes. The only thing that I would emphasise, your Honour, in relation to the Coles decision is of course employers may be involved in two industries concurrently, and then when it comes to the most appropriate classification it may be relevant to determine that the GRIA is the applicable instrument, even if it might be otherwise regarded as the road transport industry.

PN551

JUSTICE HATCHER: In Coles I think the critical appropriateness consideration was that the drivers also did the picking and packing, so they would pack their own orders and then deliver them.

PN552

MR GOTTING: And obviously at some times of the day they would be covered by the GRIA in that context and at other times of the day they might be covered by the Road Transport Award and that would obviously be a factor against the appropriateness of the road transport. And we rely on similar appropriateness considerations in this case, because we say that some functions should not be covered by one award when some functions are being performed in a different award when other functions are being performed.

PN553

Just by way of example employees that are working in the eStore are sometimes working in the supermarket side and they are obviously covered by the GRIA when they're doing such work. At other times they're working the eCom floor side and it would be inappropriate for them to be covered by the eCom floor for some of the time and just switch over to the GRIA for the other time and back and forth.

PN554

But just before I leave the Road Transport and Distribution Award can I emphasise on page 6 the definition of loader, and it's a definitive statement that it's a person engaged in loading or unloading of any goods. Can I then emphasise clause 4.1, which is the general coverage clause, and then clause 4.2, which is the definition of the industry clause. The first aspect that I wanted to highlight in clause 4.2 was in (a), it's got to be a transport by road of goods, and it's obviously connected to the business of the employer.

PN555

The second matter was to emphasise in 4.2(b) that it's the receiving, handling or storing of goods, but in a distribution facility, and as I earlier indicated that's not satisfied in the circumstances. So there's at least four reasons, members of the Commission, why the Road Transport and Distribution Award would not cover the employees working at the CFCs and the eStores.

PN556

JUSTICE HATCHER: Of Woolworths?

PN557

MR GOTTING: Of Woolworths. Yes, I accept that limitation, your Honour. The first ground is because it's not involved in the industry. The second is because it does not operate a distribution facility. The third is that many of the employees that work in the CFCs and the eStores do not perform the work that's in the classifications, and that's because they're not performing a loader function as defined in clause 2, and of course that extends to the bakers, the deli attendants and the seafood staff. It extends to the online shopping staff, it extends to the replenishment staff.

PN558

If the Commission is against the applicant in terms of its primary position that the employees - - -

PN559

JUSTICE HATCHER: If we're for you on the primary position why do you succeed? Your case, as I understand it, it's fairly clear that your client's CFCs are covered by the retail award.

PN560

MR GOTTING: Yes.

PN561

JUSTICE HATCHER: There's no evidence of any pre-existing dispute about that. Mind you the application is created rather than being caused by a dispute.

PN562

MR GOTTING: I think it was likely to arise at one point - - -

PN563

JUSTICE HATCHER: All right.

PN564

MR GOTTING: - - - (indistinct), your Honour, and we - - -

PN565

JUSTICE HATCHER: I don't know where the evidence for that is, but - - -

PN566

MR GOTTING: Well, it's amply demonstrated, but obviously whilst we're here now it's plain, with respect.

PN567

JUSTICE HATCHER: But if we found in favour of your primary case why would we need to - in relation to your client's CFCs why would we proceed to vary the award that might have implications for other employers about which we haven't heard anything, and we don't know whether they operate in the same way as your client does or not.

PN568

MR GOTTING: I can really only emphasise that we're trying to avoid future disputes about the operation of the GRIA, and we're seeking to avoid that in advance.

PN569

JUSTICE HATCHER: Yes, for your client, but the variation goes well beyond your client and - - -

PN570

MR GOTTING: I accept that.

PN571

JUSTICE HATCHER: - - - affect other employers about which we have heard nothing.

PN572

MR GOTTING: I can't be heard any further on that issue. There is a limitation in the evidence. We accept that is so. The purpose of the variation as I said is to remove future disputes on this issue. Your Honour has appreciated that we have a second - - -

PN573

JUSTICE HATCHER: Perhaps we move on from that. You'd have to persuade us that it's necessary to meet the modern awards objective to make the variation.

PN574

MR GOTTING: I accept that.

PN575

JUSTICE HATCHER: And beyond your client's situation we don't really have an evidentiary basis to do that, do we, make a finding - - -

PN576

MR GOTTING: The only ground that I could rely upon, your Honour, is 134(1)(g), but I can't put it any higher than that.

PN577

JUSTICE HATCHER: The difficulty with the variation is that because of a lack of evidence even though on your argument you're already covered by the Retail Award it might actually drag in some employer who is not currently covered through inadvertence and cause a result that we didn't intend.

PN578

MR GOTTING: We obviously want to avoid that as an outcome. If our drafting leaves that possibility open, and we will obviously seek to address it, and we have indicated in writing that if the Commission was against us about the form of the variation that we seek then we would welcome an opportunity to make some further submissions in light of the views expressed in reasons for judgment.

PN579

JUSTICE HATCHER: All right.

PN580

MR GOTTING: Your Honour has appreciated that we have secondary and tertiary positions. I maintain those positions. We have emphasised that in writing. I am not sure there's any benefit in me repeating those matters. The grounds that I relied upon, the primary position, also flows through to the secondary tertiary position, the justifications are the same. Otherwise we rely on the material in writing.

PN581

JUSTICE HATCHER: All right. So I think we should hear next from the parties who are more or less aligned with the position of the applicant. So is that you next, Mr Taylor?

PN582

MR TAYLOR: Yes, if it please. If it please the Commission we filed two sets of written submissions, the first on 3 May this year and the second on 12 July of this year, which we titled our reply submissions, and we rely on them. And in light of them and in light of what Mr Gotting has said I won't detain the Commission too long. I do want to make a number of short points, and then I need to add to a couple of aspects of detail of our reply submissions to make sure - in one case it's a correction and the other case it's clarification, lest the Commission misunderstand the position.

PN583

The short point as is clear to the Commission it is that my client supports the application by Woolworths. It supports the notion that modern awards ought to be kept modern by being updated to reflect the way work is changing or changed, in



this particular case by the way the supermarkets operate. The Commission has heard from Mr Gotting, and we endorse, that this is an application with a limited scope. It is a limited scope confined to facilities by which a supermarket fills online orders for retail customers. It doesn't include the word, a definition of the word 'supermarket', but his Honour the president's question as to whether Amazon would be caught is one we say the answer would be 'No'. Amazon would not be a supermarket merely because it sold groceries.

PN584

A supermarket is something that is understood and in its common language to mean an operation of the sort that Coles, Woolworths, IGA and Aldi do; that is they are places, that they are businesses which operate, bricks and mortar places where people go and buy their groceries. They also though have evolved in the way that this case has identified.

PN585

The president has raised questions as to the absence of evidence from others. We of course, as Mr Gotting has done, acknowledged the limitations of the evidence. We do say this though; firstly of course Coles has filed submissions in this matter in which they also support the application, and at paragraphs 2.3 and 2.4 of those submissions - I accept not evidence, but submissions - they identify that they too operate in the same manner.

PN586

Exhibit 18, the AFR article, confirms it, and we have still to be heard oral submissions, but certainly written submissions from employer organisations, which also support the application, and what the Commission has is silence from any person suggesting by way of other operators that there is some suggestion of the application having some unexpected application. But to the extent to which that might arise we respectfully suggest it could be dealt with by examining the text in a way that I think the UWU has suggested some changes. Mr Gotting's client has responded to those by some further drafting notes, and it may well be that the application in its current form can be refined in a way that would minimise the risk of such inadvertent application.

PN587

The TWU of course has an interest in drivers, and the mere fact that Woolworths itself doesn't employ drivers is not the be-all and end-all, but there's nothing we say in this amendment that would affect the capacity of the Road Transport Award to cover drivers. It doesn't speak to drivers, and to the extent to which there is a contest in any particular operation that is not something this application would affect.

PN588

You will see in our reply submissions that there's one thing the Commission would have appreciated from reading the submissions is the fact that it would be of utility, we certainly suggest it would be, for there to be some clarification. You have before you now at least three sets of submissions that say in very firm terms that in each case a different award is the applicable award. And given the modern award objective contained in subsection (1)(g) of section 134, the need to ensure a simple, easy to understand award, it does, we would think, make sense for the

Commission to take this opportunity to clarify the question of award coverage of these particular employees.

PN589

JUSTICE HATCHER: Can't we do that simply by expressing an opinion in relation to the applicant's operations?

PN590

MR TAYLOR: I can't remember if it was Mr Saunders or Mr Gibian's submissions that said something to that effect. When I read that I thought, with great respect, that it may well overstate the legal research capacities of retail workers who may in fact want to be able to ascertain whether they're covered by an award by reading it rather than having to go on to the Commission website and do a research.

PN591

We think it would be of utility, but certainly I accept the proposition that if this Commission made that determination that would clearly assist both future Benches or single members who are applying the BOOT test, and no doubt assist any Federal Court judge or judges that had to consider any application for underpayments and the like. But it would obviously be clearer if the award were, if the Commission were to come to a particular view, to be amended to simply reflect that view.

PN592

Woolworths puts it on the course of three bases. The first is the one which the president was just asking about in effect or implicitly that the GRIA award already applies. We rely on our written submissions. We say this as to the meaning of retail. It's one of those words whose meaning can perhaps be best understood by another word to which it is unusually contrasted, and that is wholesale. This is not a wholesale operation, it is in contrast a retail operation.

PN593

One of the things you will have seen from our written submissions is at the end of our first set of submissions we set out the classifications under the Storage Services Award and the GRIA award, and you will see how many of them are drafted in very, very similar terms, and that leads us to identifying two things. One, the difference, the reason why one award applies and not the other, is the nature of the customer to whom the work is being performed. The retail award applies where the end customer, the end point, is a retail customer to be contrasted to the Storage and Services Award where you are dealing with warehouses where the end point is a retailer who then in turn will be selling to an end customer.

PN594

But the second aspect or the second point that that table tends to emphasise is the potential importance if this Commission were to accept Mr Gotting's second basis for the contention, as in his written submissions, the second basis for the contention that the GRIA award applies, and that is that the employer in this case in respect of the CFCs is in both industries and you look at the most appropriate classification. But the point where the classifications are in many respects very,

very similar, that is not a very useful exercise for any person to be able to do, and it means even more important that the Commission considers an amendment to clarify which applies.

PN595

JUSTICE HATCHER: Mr Taylor, do these dark stores predate the most recent enterprise agreement?

PN596

MR TAYLOR: I think there's a reference to it in Coles, *TWU v Coles*.

PN597

JUSTICE HATCHER: I had the idea that the dark stores didn't exist at - - -

PN598

MR GIBIAN: The Jack Butler one was a greenfields agreement. That is they had not - to apply to an operation obviously which had not been established at that point in time (audio malfunction).

PN599

MR TAYLOR: I thank Mr Gibian because he was confusing me, because he was shaking his head. In effect the answer to your Honour's question was 'No', the enterprise agreements postdate the operations, and I was thinking the JB&S enterprise agreement is specifically made for these operations. And it turns out we're both right, because it's a greenfields operation and it was specifically made, and I will come to our reply submissions which deal with the enterprise agreements, and I need to say something about what was said there, but that enterprise agreement was made by reference to the GRIA award. The third - - -

PN600

JUSTICE HATCHER: The point of this is it seems to me that for the purpose of the better off overall test the retail award was applied by the Commission uncontroversially to the approval of those agreements.

PN601

MR TAYLOR: Yes. Let me come to that now. We deal with this - if the Commission would not mind going to our reply submissions we deal with three enterprise agreements; two Woolworths agreements and one Coles agreement from paragraph 8 and following. And without asking the Commission to reread this material in detail can I just endorse the president's summation that each of these agreements was made by reference to the GRIA, but that leads me to need to correct something, two things really. And if the Commission has firstly paragraph 25 of our reply submissions in front of it, in this paragraph we're dealing with the Jack Butler & Staff agreement 2017, and in paragraph 25 it states, 'In making the JB&S agreement the Commission applied the BOOT to both the GRIA and the SSWA.'

PN602

It was brought to my attention over the last couple of days that that statement is, it would appear, incorrect, and I need therefore to correct it. The SSWA does not appear to have been referred to any point in those proceedings. The relevant

award is not directly referred to in the decision, but I understand and reliably informed that the declarations made, the usual declarations made by the parties referred to the GRIA and not the SSWA.

PN603

The second thing I needed to deal with by way of clarification, or actually more correctly addition, is paragraph 28, which makes the point that neither the TWU nor the UWU sought to be covered by that agreement. That is the case. And also it says there was no dispute over the award coverage of employees working at JB&S. That is also the case, but it's not complete. At first instance there was no such dispute.

PN604

I am informed that the TWU following the approval filed an appeal, one ground of which was that the Commission had erred in satisfying itself that the GRIA was the appropriate award. That appeal though was withdrawn upon it being understood that no drivers were in fact employed by JB&S, and that is as far as in effect it went. So 28 is correct, but incomplete and we wanted to make sure we completed the record.

PN605

MR GIBIAN: Can I just say in relation to that issue without being critical, I'm not sure what my learned friend has just said is entirely a fulsome account of what happened. There was - and I don't want to provide myself a fulsome account off the top of my head, but there was an appeal. It was resolved on the basis of certain understandings in relation - not merely to coverage, but in terms of wages and conditions. I don't think I can really say more than that, but I think it ought to be clear. Any concession involving - - -

PN606

MR TAYLOR: No, I'd certainly wouldn't want to imply any concession, but I simply wanted to make clear that wherein we said there was no dispute over the award coverage that this information only came to my attention. I did want to make sure that we didn't in any way mislead the Commission by failing to note that there was such an appeal, but it was in fact withdrawn without there ultimately therefore being any decision reached.

PN607

Ultimately if the Commission needs to consider Mr Gotting's third basis, that is determine positively which is the more appropriate award can I just say this. As we put in our written submissions it does, we think, make sense that if you have an employer - there's no reason why an employer can't be covered by more than one award, but all things being equal if an employer is employing employees to do the same work it ordinarily would make sense that you reduce the complexity that will arise from two awards applying.

PN608

And as for them doing the same work the Commission will have noted that one of the things that the AFR article said was that Woolworths were doing - 80 per cent on their online orders were being filled by personal shoppers picking in stores, not in these CFCs. It's obviously an important part of their business, but the same

work is being done in the same manner, and it would make sense we say that the same award applied if the Commission were going to the extent to determining what is in fact the appropriate award, having otherwise rejected the submissions that have been put. Otherwise we are content to rely on our written submissions, if it please.

PN609

JUSTICE HATCHER: Ms Bhatt, do you want to go next?

PN610

MS BHATT: Thank you, your Honour, members of the Bench. Very briefly, we support the application that's being made by Woolworths in principle. However, we have identified some concerns that arise from the terms of the variations that have been proposed, and they're dealt with in particular in our written submission of 3 May, which we continue to rely on.

PN611

The particular concern arises from the proposed deletion of the term 'retail establishment' throughout the classification structure. In short we say that they are words of limitation. They require that an employee works at a particular type of premises or facility in order to be covered by the award, and that their removal would in effect remove one of the key gateways that determine award coverage. We also have a concern that that variation may have the effect of disturbing some existing arrangements.

PN612

We of course understand that these proceedings, if nothing else, have brought to light some controversy as to whether Woolworths online fulfilment centres constitute retail establishments.

PN613

JUSTICE HATCHER: Brought to light a controversy or established or created one?

PN614

MS BHATT: One way or another, your Honour. In our submission, but same submission of 3 May, at paragraph 17 we've proposed an alternate way of dealing with the issue, which I think is somewhat similar to what the UWU has proposed, although (audio malfunction), a position that we proposed in the alternate or (indistinct) to the applicant's variation, which is to simply make clear that a retail establishment includes an online fulfilment centre, however that is defined for the purposes of this award variation. Without removing the term and without seeking to define it exhaustively - - -

PN615

JUSTICE HATCHER: Ms Bhatt, just remind me, doesn't the organisation have on foot some application relevant to this term?

PN616

MS BHATT: Your Honour, it's a separate issue that arises from the span of hours provisions. It is a term of the award that prior to the plain language redrafting

process referred to retailers. That was the term that was used in the relevant provision. We say that in that context a retailer is an employer covered by the award. That term was subsequently substituted with the word 'establishment', which we say means a substantially different thing to retailer.

PN617

We did consider prior to these proceedings whether there's any interplay between the issues in these proceedings and that other issue that we have raised with your Honour. We don't believe that there is.

PN618

I think, your Honour, for completeness I should say that we similar to Woollies oppose any contention that only a bricks and mortar shop can constitute a retail establishment. We would also note that again with the exception of the UWU there's been no proposal in these proceedings that's been advanced to define that term, and so for an abundance of caution we would submit that if as a product of these proceedings the Commission is minded to define that term in any way that we'd seek an opportunity to be heard further. We anticipate that it may have broader ramifications than with Woollies or other supermarkets. Unless there's any questions those are our submissions. Thank you, your Honour.

PN619

JUSTICE HATCHER: Mr Izzo?

PN620

MR IZZO: Thank you, your Honour. The interests of my client are limited to the current coverage clause of the GRIA and how it presently operates. So we do not make submissions, nor seek to, about whether the retail award should apply to Woolworths. As a matter of merit aligned to the modern awards objectives we're not seeking to change the coverage of the retail award. Rather our interest is in identifying whether the award as presently constituted does cover the businesses that are the subject of these proceedings. That is obviously a question of construction of the retail award. Mr Gotting has already dealt with that and I don't seek to substantially recover the ground he has covered.

PN621

Obviously clause 4.1 of the retail award directs attention at two questions when it comes to coverage. The first is whether the employer is in the retail industry, and the second is whether the employees fall within the classifications.

PN622

On the first point I think I can be very brief. We say it's uncontroversial that the employer is in the retail industry. We heard in the opening that the employer is the Woolworths Group Limited. It should be uncontroversial before this Bench that an employer may be in multiple industries. I think one of the primary decisions to that effect was Dyno Noble, but there have been many since. But the reality here is that Woolworths does operate in the retail industry. So the controversy is really in relation to the classification question.

PN623

Just closing on the industry point Mr Gotting did take your Honours to the definition of retail industry in the retail award and the definition of a wholesale industry in the Storage Services Award, and as Mr Gotting identified there is a clear distinction between who the end user is, or the end customer I should say. In the retail award at clause 4.2 it talks about the general retail industry being the sale or hire of goods for personal, household or business consumption, and that is to be contrasted with the Storage Services Award which talks about at clause 4.2 covering storage services and wholesale industry, and that is a defined term. Wholesale means the sale of commodities in large quantities other than to final consumers.

PN624

So we say the question of industry is one easily resolved. The bigger question relates to the classification structure. I think we've heard from both Mr Gotting and Mr Taylor that there's a large degree of overlap in terms of the classifications. I think if you just look at the activities there's no doubt that both storage services and retail could cover. The big controversy is whether the preamble, if I could call it that, to each retail classification where it references work in a retail establishment, whether that captures the work at the CFCs.

PN625

The word 'retail establishment' is present in each of the classification levels within the GRIA, and we have done some work in our written submissions, your Honours, to identify what those words mean. If I could just direct you to our written submissions. That is the initial submissions that are dated 3 May 2023.

PN626

At section 5.3 we identify what we say is the plain meaning of the word 'retail', and various parties have taken the Bench to dictionary definitions. They all really have the same effect. It's about the sale of commodities to ultimate consumers, households and so on, although it can be business consumer as well.

PN627

At 5.4 we take the Bench to the definition of an establishment, being a place of business or residence and anything connected with it. And combining the two terms most importantly at paragraph 5.5 we say that the natural ordinary meaning of the phrase 'retail establishment' is a place of business which carries out the selling of goods to final consumers. That's what we say retail establishment is. It's just the consequence of putting those two words together.

PN628

The very important point that we want to make is that it differs substantially from the concept of a shop. Now, this is a matter that we say the distinction is one that dates back to the award modernisation proceedings, because at paragraphs 5.8 and onwards of our submissions we identified that there was substantial debate over the scope of the retail award, and some organisations such as the NRA and ARA wanted all working connection with retail functions to be captured, and we've extracted evidence of that at 5.8 from the relevant decisions. The SDA had a different view, and that's extracted at 5.9.

PN629



But ultimately despite this being in contest we say that the Full Bench landed on the wording 'retail establishment', which itself is very significant or conspicuous, and the reason for this is if you look at the Federal awards that applied prior to AMOD, the award modernisation process, they all talked about shop.

PN630

So 5.13, the primary awards that applied in the industry level, we identified the Shop Distributive and Allied Employees Association Victorian Shops Interim Award, and this is at 5.13 of our submissions. It talks about selling goods by retail whether in a shop or elsewhere. There was an ACT award, which we've referenced there, which talks about places or buildings in which goods are sold. So there's no reference to shop there. But then you're got the Northern Territory award which talked about retail classifications in or about a shop.

PN631

So this concept of a shop was one that was prevalent before the award modernisation process, and it's one that we say was before, or was in contemplation before the Full Bench in 2009. Mr Gotting took you to some examples within the retail award itself where a distinction is drawn. If I could just take you to the classifications though. So this is at page 44 of the award starting in schedule A. The concept of a shop appears intermittently here as well.

PN632

So you will see retail employee Level 1 talks about an employee performing any of the functions at a retail establishment, and then it gives examples, and you will see at 1(a) it talks about sale or display of goods in or about a shop. But then at (b) when it talks about packing, weighing, assembling, pricing it's just about produce for sale, not necessarily in a shop.

PN633

If we get to retail Level 2 there's a focus on people such as forklift operators, ride-on equipment operators. Now we're talking about more stores functions or warehousing functions. No reference to a shop in retail Level 2. If we then go to retail Level 4 when they start talking about job titles at 4.3 there's a reference to assistants, deputies or second-in-charge shop manager of a shop. But then again at (b) and onwards when it starts talking about butchers or bakers or window dressers, et cetera, there's no references to shop. At Level 5, 5(a) there's references to tradespersons and service supervisors, but no references to shop.

PN634

And then finally I was going to take you to Level 8 where there's indicative titles of shop manager of a shop with departments or sections. But then the very next classification is clerical officer Level 5, no references to shop. And so throughout the classifications it's drawing a distinction between roles that don't need to be limited to a shop and roles that are. And what we say about that is it just reinforces the conspicuousness of this notion of a retail establishment. It is broader.

PN635

I don't want to be glib about it, your Honours, but the notion of a shop dates back thousands of years. It's a very well understood term. They had shops in ancient



Roman times. We don't need to organise a view, to all go to some ruins in Pompeii to see what a shop was then, but they had shops, and it's a well understood term.

PN636

And what has happened in the award modernisation process is there has been a distinct decision to broaden the scope to retail establishments, and what that means is in the absence of a definition this Bench should apply the natural and ordinary meaning of those words.

PN637

And we have put forward, and I have already done both in writing and now orally, what the natural and ordinary meaning of those words are. The scope of that phrase may well change as industry modernises. There is no doubt that the concept of retailing as it was even in 09 is perhaps different to today. Yes, businesses have gone online. Yes, there are people that may be conducting a business with retail activities that is no longer from a shop front. But that does not mean that they are not operating places of businesses that are not retail establishments.

PN638

And what we say this Bench needs to do is ascertain whether the place of business that's in question is one which is engaged in retail activities. One needs to look at the purpose of the activities, the functions carried out, and form a view as to whether they are retail activities or not. And our position is that in this case the functions are all clearly directed towards supplying goods to an end consumer.

PN639

Now, your Honour raised a couple of questions about an Amazon type facility. There's clearly concern about scope, and I concede there's no evidence about what Amazon do or don't do, but they would have very different considerations to think about. I mean are they just supplying to end consumers? Are there wholesale functions being performed? What's the nature of the warehousing set up? Are there people solely involved in storage functions or in other functions that aren't actually carrying out the activity of processing a good for sale to end consumer? We don't have all the answers to all those questions in the evidence today about other businesses, but we say in the case of Woolworths that is all clearly apparent. Everything that we saw this morning is directed towards processing of a sale to a person effectively, or a business. And so for those reasons we say that the CFCs, the subject of these proceedings, are covered by the retail award presently.

PN640

That then brings the question how one disposes of the application. Presently the scenario is that we have three unions who curiously all have three different views about the award that should apply to this work. That is an unsatisfactory state of affairs. As we stand today presently section 134(1)(g) would compellingly influence the Bench to try and clear that up, because it's not consistent with the simple sustainable stable modern award system, that three major - - -

PN641

JUSTICE HATCHER: There's no evidence of any dispute about this before this case started, is there?

PN642

MR IZZO: But there is dispute now, your Honour. It may have been generated by Mr Gotting or his client, but it certainly exists, and these aren't individual employees that we're talking about, they're three main unions and they all think something different. So I think that squarely engages section 134(1)(g). The question is how one resolves it. And to us there probably are two ways it's resolved. One is to make the variation sought by Woolworths, and we'd be supportive of that. The only other way is there would need to be a clear finding by this Bench about the scope of the retail establishment qualification in those classification structure and that it clearly does apply to the business of Woolworths.

PN643

I think there's significant debate between the organisations here that this isn't just a Woolworths specific issue, and so we would need some clarity on the meaning of retail establishment to put this issue to bed. And if the issue is put to bed then maybe the variation doesn't need to be made. But there does seem to be considerable conjecture between the parties on this issue, and that's what we will say about that, your Honour.

PN644

Other than that that's what we wanted to say orally. We did file two sets of submissions. One was dated 3 May 2023 and the other is 4 July 2023, and we rely on both of those sets of written submissions.

PN645

JUSTICE HATCHER: Thank you. Mr Gibian?

PN646

MR GIBIAN: Thank you, your Honour. As the Bench knows the application that's actually before the Commission is an application to vary the General Retail Industry Award in essentially three respects. One is to incorporate a definition of an online supermarket sales fulfilment facility. The second is to expressly provide for the coverage to extend to employees employed in such a facility. And the third is in reference to work at only a retail establishment, and the definitions in the classification definitions in schedule A.

PN647

The bulk of the submissions are directed at questions of existing award coverage, whether the employees at Woolworths particular facilities, the CFCs or the eStores, are or are not covered by the General Retail Award, Road Transport and Distribution Award or the storage award, and we certainly agree that it is necessary if the Commission were to consider substantively the variations sought that is sought to determine the question of existing award coverage.

PN648

That's the case for at least two reasons. The first is one can't sensibly appreciate or apply the modern award objective factors without knowing what the effect of

the variation that is sought is; that is whether (indistinct) to change award coverage of employees actually or potentially, or not.

PN649

The second in that respect is that in addition to section 157 section 163(1) is also potentially relevant at least, which applies in circumstances in which a variation would have the effect of causing employees to stop being covered by a particular modern award, and so some view would have to be formed as to whether or not that is the effect, or may be the effect of the variation that Woolworths asks the Commission to make.

PN650

The second reason is that Woolworths own case really turns upon the application of the retail award. Whilst was it described in its submissions as the tertiary position, namely that if it's wrong about the award questions then there ought be a variation, is put at the alternative position. When one comes to its submissions as to the substantive justification for the variation based upon the modern award objective considerations its only case is one of clarity, it says, either as relevant to 134(1)(f) or (g). That is it says, well the Commission should make clear that the retail award applies, but we say it already applies. And when responding to the submissions both of my client and the UWW as to the effect of the variation that's sought in altering conditions that would otherwise apply to employees if the transport award applies or the storage award applies, it says we don't think about that because that's not right, the retail award in fact applies.

PN651

So in being its substantive submissions and the merits of the variation are in fact dependent on its success of the argument goes to the present award coverage, it appears to us. Having said that there is a question as to whether or not it's necessary for the Commission to enter into any of this, because it seems to us, with respect, that there isn't any appropriate material before the Commission which would properly provide the basis for it to even consider whether to vary the award as is sought in the general way, in an appropriate way, or to form proper views in relation to the modern award objective considerations, or indeed 163(1) if that's necessary.

PN652

In that respect, and some of this has been addressed in argument already, obviously enough the evidence is limited to one single employer, Woolworths here. That evidence indicates in important ways that its operations in this respect are somewhat influx, that is there is automation coming or in part ongoing, which raises the question as to whether this is an appropriate case or vehicle or time to decide some question of substantive - in the substantive appropriateness of the application being a particular award.

PN653

The third consideration in that respect is that Woolworths says all the relevant employees are covered by enterprise agreements in any event; that is there is no direct application, and there has been no suggestion of some BOOT issue on any award at present as we understand it. And finally in that respect there is a real

issue as to the Commission deciding the variation that is sought based purely upon Woolworths' evidence.

PN654

And seeking to isolate out one part of online delivery work, as it were, that is supermarket online delivery facilities, there are of course - and Amazon has been raised in argument - but no doubt in clothing or huge range of different types of products are now able to be ordered online and are delivered from facilities which no doubt have a variety of different characteristics and operation, but are common in the sense that they facilitate the delivery ordinarily by road of goods directly to consumers from a facility which is not a retail facility in the traditional sense of which people attend a facility and browse and purchase products.

PN655

And no argument or no basis has been suggested to why retail supermarkets that operate an online delivery facility ought have some different regulation (audio malfunction) operating or an online delivery facility that deals with any other type of product. And there seemed to be may be bigger questions that couldn't possibly be decided in this case on the basis of the very limited (indistinct) for it. And so that might be a basis really upon which it's not necessary to go into any of these issues, because we don't think on any view that the variation that is sought (indistinct) on the evidence and material before the Commission.

PN656

Having said that I need to respond to the issues in relation to the present award coverage issues. Just before I do that there were three matters that I wanted to raise in relation to evidence of emphasis, and I can do that probably without going to it directly in too much detail by reference.

PN657

Obviously enough in some respects the broad nature of the operations and the evidence in that respect is not greatly in dispute, and in a broad sense how these things work is relatively apparent; that is a customer can go on the app or on website and order products and select delivery. They are then picked and packed from either a CFC, an eStore or a conventional actual supermarket and delivered on trucks which have Woolworths written on the side to people's homes and businesses.

PN658

The three aspects of it that I wanted to emphasise; the first is that the consequence of that, the manner in which Woolworths has set up operations is that it operates what we regard as a road transport business. That is it contracts its customers for payment to provide a delivery service by road whereby it for reward delivers goods to its customers for a fee.

PN659

There was tendered this morning exhibits 7 and 8, which contained the terms and conditions of online services, which include the payment of a delivery fee by the customer to Woolworths in return for which Woolworths undertakes contractually the task of delivering the product to the customer. That's also referred to in annexures ASO20 and 21 to Mr Owens-Strauss' affidavit.

PN660

Now for the purposes of fulfilling that contractual obligation that Woolworths has taken upon itself it has purchased and owns and fitted out its own fleet of trucks that undertake that delivery.

PN661

Can I just make clear, and this is referred to in Mr Leonard's witness statement at paragraph 24 that that is done it appears somewhat differently depending upon where the delivery job is from and to. At paragraph 24(a) Mr Leonard indicates that Woolworths – sorry, paragraph 24 Mr Leonard indicates that Woolworths delivers the packed items and arranges for the packed items to be collected. And there's three ways that it identified. (a) and (c) are irrelevant.

PN662

So subparagraph (a), Mr Leonard indicates that where the items are picked and packed at the store, that is an actual supermarket, Woolworths arranges for the delivery either by Woolworths team member delivery partner or contractor of the packed items to the customers.

PN663

So some of the deliveries are made by Woolworths employed drivers. They say where they are delivered from an actual store and other times they are contracted out. They are contractor drivers they should say. In all instances they are Woolworths trucks. That is Woolworths owned and branded trucks. I'm sorry, I've forgotten which witness it was, whether it was Mr Peters or Mr Paul – I think it was the second witness, Mr Peters.

PN664

JUSTICE HATCHER: I thought so. I can read what 24(a) says but I thought one of the witnesses said something contrary to that.

PN665

MR GIBIAN: I think the confusion may be what's referred to at (c) over the page. That is, it is said there, and it was said today that where the deliveries are from an e-store or a customer fulfilment centre; (b) the Woolworths arranges the contractor, which is Linfox as we understand it, to deliver the packed items. Again as is made clear in Mr Peters' reply evidence in a Woolworths owned and branded vehicle.

PN666

I was just going to acknowledge that there was a qualification by either Mr Paul or Mr Peters and sorry I've forgotten which one it was now, that there are occasions where because of volume or something they hire out some additional trucks to fulfil delivery I think. But I don't think that was suggested to be more than (indistinct) occasion.

PN667

Can I just note also Mr Peters' reply statement and he's asked about this in cross-examination. At paragraph 30 he explained this point. That is, at paragraph 30 he says aware that for online deliveries Woolworths sources and purchases trucks from the manufacture, through its own procurement processes and then subleases

them to external fleet management organisations which registered the vehicles. And then, in the final sentence of that paragraph, 'Woolworths X' – 'Woollies X' – sorry, I should say, subleases these vehicles to Linfox who then organise insurance and directly manage the arrangement for these vehicles to make deliveries.

PN668

JUSTICE HATCHER: So this last part of your sentence explain the reference to Woolworths team members in Mr Leonard's statement. That is it's discrete to Tasmania?

PN669

MR GIBIAN: No. Well, that's not my understanding at least. As I understand it is this way. Woolworths undertakes the delivery functions with Woolworths on its trucks. When the deliveries are made from stores, that is the actual supermarkets, they are, in part, Woolworths own – Woolworths employed drivers and in part contractor drivers – where they are from CFC's or eStores. They are contractor drivers through Linfox, as I understand it – as I understand the evidence – with the exception of Tasmania where from the CFCs and – well, there's no eStore in Tasmania. From the CFC in Tasmania.

PN670

JUSTICE HATCHER: There's no CFC in Tasmania.

PN671

MR GIBIAN: There's no CFC in Tasmania. Well, I'm not sure I can explain the reference then to Tasmania.

PN672

JUSTICE HATCHER: Because this paragraph says with online deliveries generally. It's not confined to CFCs.

PN673

MR GIBIAN: I think there's not clarity then. I think there's not clarity in the evidence in that respect. I had read Mr – and we would have clarified this with Mr Leonard if he thought it was – the issue was solely Tasmania. I had understood Mr Leonard's evidence at 24(a) to be deliveries from actual stores. There was a mixture of employed drivers and contractor drivers. I didn't understand that to be an issue about that.

PN674

At the end of the day, in our submission, though not much would turn upon it because – sorry, I'll just go on just to complete the evidence in that respect. But Mr Boncardo cross-examined both the witnesses today and it's apparent from the documents annexed to Mr Owens-Strauss' witness statement and the photos, Exhibit 9, as well that the – both common form, that is, they're the same trucks which are branded in the same way to make the deliveries is an important part of Woolworths delivery service that is both to advertise it and to demonstrate that to customers that is Woolworths is making the deliveries of orders of the Woolworths products pursuant to their contractual obligation then entered into and in force with the terms and conditions of sale.

PN675

JUSTICE HATCHER: That's hardly uncommon, isn't it?

PN676

MR GIBIAN: I'm sorry.

PN677

JUSTICE HATCHER: That's not uncommon. That is, transport contractors all the time have their trucks painted in the colours of their client.

PN678

MR GIBIAN: I agree with that. Well, I don't know the extent to which that is the case. The point that we make here, though, is that Woolworths is operating – Woolworths business to the extent it engages in on the online business is an essential part of that business is the delivery service. That is, it's not purely the branding and advertising. It is contracting for the payment of a fee to delivery to undertake a road delivery task to deliver the products to the customer. To acquit that contractual obligation it has established a delivery service, whereby it has purchased identical vehicles to undertake that work, which are branded with its name and colours and logo and that is a road transport business – a road transport operation as it's understood from the RTB Award as I will come to, irrespective of whether it directly employs the drivers of which it does some. Or whether there are contractor drivers in place to perform the physical work of driving trucks.

PN679

JUSTICE HATCHER: But on that logic, for example, all the oil companies would be in the transport industry because they engage transport companies to carry around their fuel and they provide the tankers I think. And they're all painted in the oil companies' colours and this is fairly common in the transport industry. It's not unique.

PN680

MR GIBIAN: Well, they may well be and that be of no great moment because there is not, so far as the oil and gas industry is concerned, there's not a specific arrangement in the Road Transport Award for that type of facility to be covered. Now, there's no issue of the company to the drivers, so far as they drive oil and gas oil tankers and that's specifically provided for in the Road Transport Award in any event. But when I come to the Road Transport Award there is obviously specific coverage of distribution facilities which are facilities at which – from which – goods and products are delivered, which is precisely what these facilities are, as part of a road transport business of the employer. Which is what – as the Full Court said in Coles – is what Woolworths is doing here. It has a road delivery business which it is contracting with in the public, its customers, to make deliveries by road.

PN681

JUSTICE HATCHER: Well, in Coles, it was in the transport industry because it employed the drivers doing the deliveries.

PN682



MR GIBIAN: I don't think there was any – there was no particular suggestion that it was because they employed them. Now, they did, in fact, employ them in that instance and the issue was in Coles that it was said by Coles, albeit somewhat faintly, but nonetheless accepted at first instance that they were not in the road transport industry because they were a retailer in the retail industry which was for somewhat – which was to overlook entirely the coverage of the road transport award in clause 4.2(a), that it extends to the road transport distribution industry extends to the transport by road of goods, et cetera, including where performed – where the work performed is hence the link to the principal business undertaken or industry of the employer. That is a provision which operates obviously enough upon the industry of the employer. It's not dependent upon employees as such.

PN683

It's a question as to whether the employer is engaged in the transport by road of goods, including where the work is performed instead of for business which Coles was, because it was running trucks. It owned and operated trucks that delivered goods of its supermarkets to people's homes.

PN684

Woolworths is in exactly the same position, regardless of whether they're contractor drivers or employed drivers actually drive the trucks. It contracts for the delivery tasks and provides the trucks to undertake that task.

PN685

To the extent the Full Court dealt with it, it was really at paragraph 22 and 23 and I don't think it really descends to an analysis of the fact of employment being determinative. It was the fact it engaged in those operations.

PN686

JUSTICE HATCHER: All right.

PN687

MR GIBIAN: The second aspect of the evidence I just wanted to refer to briefly was the nature of the work involved. Woolworths relies, very substantially, and its submissions upon an assertion of the similarity of perhaps, particularly, the persons dropping the work between how it's performed in an actual supermarket and how it's performed with the customer (indistinct) with less force to be used or (indistinct).

PN688

The first observation about this in that respect is, as was said in the UWU's submissions that perhaps that doesn't take the matter very far in the sense that I think everyone and I think Mr Taylor just acknowledges. Well, the work involved and covered by the classifications in the Road Transport Award in so far as – at least in so far as they applied in distribution facilities and in the Storage Award and in the Retail Award to the extent that work is done at a retail establishment are very similar.

PN689

So to say that the work is similar doesn't – it somewhat overlooks the fact that the delineation between the awards are to be placed upon it. But either the nature of



the operations or the nature of the (indistinct) formed. So it doesn't advance the argument terribly much.

PN690

But we did just want to emphasise briefly that what does distinguish the CFC – the customer fulfilment centres – from the work when it's performed at an actual supermarket is obviously, it is deprived of or it is separate from all of the work involved in actually providing customer service to customers – or work which is involved in equivalent work where it's done in a natural supermarket. If you take the replenishment work, for example – if that's done at a supermarket – obviously it as to be displayed in a manner which is attractive to customers which is obviously not submitted in the customer fulfilment centres.

PN691

JUSTICE HATCHER: They just put it on the shelves, don't they?

PN692

MR GIBIAN: They do. If you look at the deli products and seafood products and the like. They are displayed in an actual supermarket, in the cabinet, so that people can see them. Presumably, some work is done to try and make them look attractive to endeavour to sell those products. That's obviously not relevant (indistinct). There was cross-examination today in relation to the obligation of all of those workers when they are physically in an actual supermarket with customers to answer questions, to direct persons to the – provide (indistinct) or whatever it might be.

PN693

All of that work is not part of the work in these (indistinct) and that's apparent, obviously from common sense. It's also apparent from the job descriptions which are from annexure AOS6 and following in Mr Owens-Strauss' statement which made clear that these jobs at the customer fulfilment centres are directed at the expeditious packing and loading of the product. That's what those jobs are directed at.

PN694

The third observation in relation to the evidence is that these facilities are not facilities at which the public is present or can attend and browse and purchase products. Sales don't occur at these locations. The purchasers are online and title is transferred upon delivery.

PN695

The exception to which Mr Gotting places some attention is the fear the team shop or the friends and family type arrangements which seems to be recently entered into. We would observe that there's no evidence as to the extent to which that actually occurs, that is, big bulk sort of purchases or whether friends or family actually attend to any significant degree at any of the locations.

PN696

But the fundamental submission is we say that that's a matter that would be disregard and you would need to characterise those institutions – those facilities – that is, even if some special arrangement – persons who are employed to work at

those locations can make certain purchases. That does not characterise what the facility is and for those (indistinct) established for the purposes of fulfilling online orders and the (indistinct) delivery of those online orders to persons who don't purchase those products at the facility and cannot do so.

PN697

Can I turn then to the Award issues? I will deal first with the Retail Award. Obviously enough we accept that in a general sense Woolworths is in the general retail industry in relation to its conventional supermarkets. But that the locations or work performed at the customer fulfilment centres or the eStores are not covered by the award.

PN698

The principal issue as has been observed is whether that work is able to be characterised as work undertaken at a retail establishment so as to fall within classifications in the award. Mr Gotting took the Full Bench to the provisions at Schedule A – clause A.1.1 – dealing, first of all, with Retail Employee Level 1 which makes clear that the classifications are limited, very deliberately to the performance of certain functions at a retail establishment.

PN699

The reference to a retail establishment in our submission refers to a place where persons attend for the purposes of browsing and purchasing products or services in a retail for a retail purpose, that is, as an end-user.

PN700

It is not sufficient that they be places which are and which is ultimately the submission that's made by Woolworths involved in some vague and undescribed and uncertain way involved in a retail sale.

PN701

There's three matters which principally support that proposition. The first is in the words which are used in the classification descriptions themselves. It's sufficient to refer to the Retail Employee Level 1 at Schedule A clause A.1.1. where, as I have said, it makes clear that the classification means an employee performing a series of functions at a retail establishment.

PN702

The ordinary meaning of that expression can only be understood to refer to a place where retail sales occur. Relevantly, leaving retail to one side for the moment, the words 'at' and 'establishment' demonstrates what is being referred to is a physical location.

PN703

The type of physical location, that is, it's not a reference to a type of transaction or a type of process with a reference to work at a particular location. The type of location is one which is a retail location. Retail meaning – I think everyone agrees – the sale or hire of goods or services for personal household or business consumption to the end user.

PN704

Now that's both consistent with the ordinary meanings to which we have referred and to the industry definition – sorry, to the coverage definition at clause 4.2. When one reads the words at retail and establishment together the ordinary meaning of those expressions refers to a place where retail sales occur. That is sales to its users occur at that location.

PN705

The CFCs and the eStores are not such places. The sales occur online and the deliveries are subsequently packed. What occurs at those locations is obviously the collation picking – sorry, the picking and collation and despatch of the products which have, already in a sense – already been purchased – in the sense that moneys already changed hands by way of ordinarily a credit card transaction and, at least, according to the contractual documents title passes upon the subsequent delivery of the products.

PN706

Perhaps I don't have to go to it. I think we did provide some authorities but we do refer, in that respect, to Deputy Gostencnik's decision in ePharmacy - NUW, at 16 – where the same proposition was made with respect to an online delivery facility. That is, that sales don't occur at those locations and they are not engaged in retail sales.

PN707

As I say, the Woolworths' reply submissions, at paragraph nine suggest and I think Mr Gotting said the same thing today that a retail establishment is any place of business involved in a retail sale. We don't think either that that proposition is consistent with the ordinary meaning of the words as a retail establishment. It would also extend the operation or meaning that the Retail Award extended very broadly way beyond what was contemplated by the Award or potentially (indistinct). It's not clear what involved in a retail sale might mean. But I think there was acceptance that it would extend to any of Amazon's or Amazon-like processes.

PN708

And I note, in that respect, that Mr Gotting said – when asked about the variation – that it was not his client's intention that that type of operation would be brought into the general Retail Award. Yet he earlier – 10 minutes earlier – had advanced an argument on the interpretation that the General Retail Industry Award already applies to any such operation if his very broad and a textual interpretation of the concept of a retail establishment is extending to any place involved in a retail sale was concerned.

PN709

We don't even know where that would end. I mean it would potentially extend to a distribution centre operated by Woolworths or the like as well. Because generally it's involved in the retail sale in some respects – at least it's indeterminate in terms of its potential operation.

PN710

The second matter, in this respect, is that there are various contextual considerations in the Award which, contrary to the submissions that have been

advanced support the proposition that the focus of the award is intended to be on a place at which retail sales occur.

PN711

Could I ask the Full Bench to go back to clause 4 which deals with coverage, which you've already been taken to, at least by Mr Gotting. But can I refer to some additional aspects of it? 4.2 – as the Full Bench has been taken to – refers to the - - -

PN712

COMMISSIONER MATHESON: Are we in the Retail Award there?

PN713

MR GIBIAN: Yes. Sorry, in the Retail Award. So the general retail industry as meaning the retail sale involved – goods and services for personal and household or business consumption – and there's including a number of subparagraphs. Can I note some different ones? Firstly, (e) refers to bakery shops which the predominant activity is baking products for sale on the premises. The limitation in that respect to where there is sales on the premises.

PN714

Now, again, at least so far as the bakery parts of the CFCs are concerned was suggested here by Woolworths, is that although the sales don't occur at the premises, that those operations would fall within the Retail Award.

PN715

At (g), there's a reference to the provision of customer information and assistance at retail complexes. Again, a focus upon the location of the work as being retail. (k) over the page – sorry, there are then after (h). I'll come back to the delivery of newspapers by employees of newsagents in a moment.

PN716

There is then after (h), exclusions of various operations covered by other awards. (i) excludes various types of establishments at which retail transactions occur that would otherwise be covered but are not, because they're covered elsewhere.

PN717

Can I note (k) refers to clerical functions performed away from a retail establishment? So, again, where clerical functions are performed at a retail establishment they can be covered but not in or a way – again the focus upon the location of work being performed.

PN718

And then (l) refers to warehousing distributions. So even where it is involved in the retail sale and hire of goods and services for personal households or business consumption, if it involves warehousing and distribution it is intended to be excluded from the general retail industry, again consistent with the view that involvement in, as the reply submissions put it, by Woolworths in a retail sale is not sufficient. That is, warehousing distribution may be essential part of the retail

sale but (indistinct) covered are workers within the relevant classifications who work at the place where the retail sales occur.

PN719

The only arguments against that really are in context of other provisions of the Award which are said to be against the submissions that we advance. Or perhaps there was an additional one that was raised today that in certain parts – the word 'shop' appears – but the classification definitions refer to a retail establishment. I think Mr Gotting said that and Mr Izzo.

PN720

With respect, we don't think anything is inconsistent in that proposition. They are substantially synonymous. To the extent there is any difference it is a recognition that there are retail establishments, at which retail transactions occur – perhaps such as hairdressers – (indistinct). It's certainly not inconsistent with the proposition that the expression 'at a retail establishment' is directed at a place where customers can attend and at which a retail transaction in relation to a good or service in fact occurs, rather than at a place at which a retail transaction which has occurred elsewhere are perhaps – and dispatched (indistinct).

PN721

The only aspect that I just wanted to respond to briefly was going to the classification descriptions at Schedule A. And this was a matter that was referred to in Coles decisions as well.

PN722

At retail employee Level 1 Clause A.1.3 there is a list of indicative job titles. Some of those we accept contemplate that some of the actual duties may be performed away from the workplace. Particularly (f) refers to a driver and (q) to a door to door sales person.

PN723

Woolworths submissions all in reply also refer to (p) that refers to telephone order sales persons. But all of those persons are – all of those – sorry, indicative job titles are limited to persons who are employed to work at a retail establishment.

PN724

The Full Court in Coles at paragraph 30 – I perhaps don't – I don't need to take the Full Bench to it but I note at paragraph 30 at the Full Court of Coles it explained the difference or the significance of that, that is that the persons contemplated by those provisions had a base or location of employment at a retail establishment in that case and actual supermarket at which customers (indistinct) purchase products. So those indicative job titles are not inconsistent with the reading that we give to the expression 'at a retail establishment'.

PN725

The third aspect which, in our submissions, are consistent with or supports the interpretation of retail establishments that were advanced is the historical context.

PN726

I won't go to it but can I refer the Full Bench to our written submissions of the 8 June, at paragraphs 25 and 26, where we have referred to the Award Modernisation decisions. The first of those is Re A request by the Minister – et cetera – 175, Industrial Courts 120 – and the relevant passages are from paragraph 80 to 83.

PN727

As we have set out in paragraph 25 of the written submissions the basal submission that was advanced by the SDA at paragraph 80 of the Full Bench decision was that the Award should be made as an industry award to cover all classifications of employees within the (indistinct) of a shop. And we've then set out paragraph 26 at the top of page seven of the written submissions that that was the solution advanced by the – accepted, I should say, by the Full Bench.

PN728

There is then in the remainder of that paragraph indication that there was some debate as to whether certain types of shops should be excluded. Not that it should come as something else but that there were certain types of shops, such as community pharmacies, fast food outlets, hairdressing services and the like. Certain types of retail establishments where retail transactions occur which should be covered by a different award (indistinct) arrangements.

PN729

And we have then noted at paragraph 27 that that decision was put into effect by a subsequent decision of the Full Bench. Again, Re A Request from the Minister – et cetera – this time 177 Minister Reports 334.

PN730

Mr Izzo, in his submissions, extracts a degree of that and we report to it today to suggest that there was some evolution in that that is that there was some deliberate decisions and used the expression 'retail establishments' rather than a 'shop'.

PN731

I don't need to read it but with the greatest respect paragraphs 279 to 286 of that second Full Bench decision don't suggest that there is any intention at all to depart from the understanding of the four walls of the shop has been put into effect by the limitation and the application to classifications to a retail establishment. Rather, they resolve the issues that were foreshadowed in the first decision as to whether certain types of shops should be excluded from the General Retail Award because they're (indistinct) to apply to those types of retail establishments.

PN732

The context shows a very deliberate attempt by or a decision by the Full Bench to limit the application of general Retail Award to colloquial terms 'shops'. In general terms retail establishments, that is places at which retail transactions occur. As I say the CFCs and eStores are not retail establishments so as to enable the employees to be covered by the general Retail Award because they are not places (indistinct) executing retail transactions.

PN733

Unless there's anything further on that proposition? I notice the time. I'm happy to continue. I will do so. If anyone stops me - - -

PN734

JUSTICE HATCHER: Happy to bat on? Yes. We'll bat on.

PN735

MR GIBIAN: Thank you. Can I turn then to the Road Transport Award? I perhaps already foreshadowed certain aspects of what I could say about the Road Transport Award. Can I just go to clause 4.2? Obviously now 4.1 of the Award provides that the Award applies to employees in the Road Transport and Distribution Industry and their employees in relevant classifications.

PN736

There's then two relevant parts of the Road Transport and Distribution Industry as defined in clause 4.2. Firstly, I note (a) which provides that that expression means transport of goods et cetera by road and I should say 'goods' et cetera or indeed anything whatsoever. And can I emphasise, including where the work is performed is ancillary to the principle (indistinct) employer and obviously that was the relevant aspect for the purposes of the Coles proceedings concerning their online delivery operations.

PN737

As I have described awards, in our submission, conducts a transport business by contracting with customers to provide delivery services for a fee and for (indistinct) vehicles for that and arranging for those operations to occur. In paragraphs 24 - 23 and 24 I should say for the Coles say as much.

PN738

In addition at clause 4.2(b) provides the Road Transport Distribution Industry means the receiving, handling or storing of goods whereas merchandise material or anything whatsoever, whether in all state or natural state wholly or partially manufactured – et cetera – in a distribution facility.

PN739

Mr Gotting went to the definition of a distribution facility in clause 2, I think on page five of the Award. That expression being defined to mean a facility from which goods are distributed by road and at which such goods may be stored for the purposes of distribution which is operated by an employer as a part of, or in connection with a road transport business of that employer.

PN740

The customer fulfilment centres and eStores unquestionably are facilities from which goods are distributed by road and at which goods are stored for the purposes of subsequent distribution. It seems the storage is limited to the period of time they are on the shelves awaiting to be picked but it's not a question – a degree of time. Undoubtedly, those facilities match that description.

PN741

The only potential area for debate is whether they are operated by Woolworths as an employer as part of or in connection with a road transport business of



Woolworths. As I say Woolworths undertakes through its online business a road transport business as that expression can properly be understood in the context of clause 4.2(a), that is the transport by road of goods, whether or not ancillary to the principle of business by, as I say, contracting for a fee to undertake a delivery service to its clients.

PN742

It cannot be doubted that the customer fulfilment centres and eStores are part of or, at least, in connection with that road transport operation. That is, indeed, their very purpose or at least a very substantial part of their purpose. That is they are established for that purpose of collating and despatching by way of delivery – substantially by road – albeit there's some (indistinct) of those products. That is sufficient to bring those operations within the definition of distribution facility.

PN743

If we come then to the classifications in Schedule A to the Road Transport and Distribution Award, Mr Gotting's submissions wells upon whether the worker were loaders for the purposes of Schedule B in the classification structure which, at least, the despatch workers perhaps would be. However, it appeared the submissions overlooked Schedule A which are classifications for this distribution facility employees and that's on the version I've got at least, page 54 of the Award, Schedule A being the classifications for definitions for distribution facility employees at A.1 – there is distribution facility employer level 1, and A.1.1 refers to various skills and duties under that classification.

PN744

A to E contains general descriptions of the skills and then F indicates that those employees must be (indistinct) tasks and duties. The work at least of the vast bulk of employees would seem to cover all of in at least (i) storing and packing goods and materials in accordance with appropriate procedures and regulations. Documentation is maybe done electronically these days but certainly part of the role. And then (iii) allocating and retrieving goods from specific warehouse areas (indistinct) either replenishment or the picking work would fit within that for those classifications.

PN745

The only area where there may be difficulty so far as the classification is concerned is perhaps the deli employees or the bakery employees who are engaged there. There are other awards for that purpose, particularly, the Food Beverage and Tobacco Manufacturing Award (indistinct) and it contains this classification for that purpose. That's what I propose to say about the Road Transport Award.

PN746

Finally, the Storage Award I can deal with very briefly. Mr Gotting went to clause 4.3 of (a) of the Storage Award which provides that that award doesn't apply to employees to the extent the employees are covered by another Modern Award (indistinct) classifications relating to the functions, included with the definition of the Storage Award.

PN747



(b) then says, 'Or the Road Transport and Distribution Award'. So if we're right about the Road Transport and Distribution Award then the Storage Award is excluded. The UWU's reply submissions, we have replied to the TWU's submissions to place some reliance upon the introductory words in clause 4.3 is referring to the extent that an employer is covered by the Road Transport Distribution Award.

PN748

If we're right that these facilities are properly understood to be distribution facilities then to the extent that is entirely sufficient (indistinct) operation and nothing further needs to be said about the Storage Award.

PN749

To the extent that there's any submissions about appropriate classifications it's difficult, that is, the interaction provisions of the Award. I think it's 4.5 of the Road Transport Award 4.7 of the Retail Award (indistinct) I'm referring to. It's difficult to see a permutation in which that really arises. Perhaps if these are retail establishments but also distribution facilities. That's perhaps the only permutation in which the appropriate classification assessment really comes up. So really, though, that is a lot less - - -

PN750

JUSTICE HATCHER: It also might be in the Full Court Coles proceedings they were only concerned with online deliveries from supermarkets.

PN751

MR GIBIAN: Yes.

PN752

JUSTICE HATCHER: Not from – whatever you call these things – 'dark stores'?

PN753

MR GIBIAN: I don't think there were dark stores at that time, at least, by supermarket phrases. And the reasoning so far as appropriate classification is concerned in relation to the Coles drivers was really centred on the submission that they worked at an actual supermarket at which customers attended and performed the work, at least, on occasion and performed work at the actual supermarket in the retail part of the supermarket at which customers of Coles were in attendance. And for that reason the classifications in the Retail Award were more comprehensive of their duties.

PN754

I think, finally, can I just say something briefly about the proposed variation? Obviously enough the Commission would have to be satisfied that (indistinct) and potentially 163(1) is satisfied as well. With respect there isn't really a substantive case, as we understand it, beyond an appeal to clarity which is advanced as to why the Retail Award should be the award to apply to these particular institutions.

PN755

As I have mentioned, there's a certain inconsistency in Woolworths submissions. At the commencement of their submissions they describe the variation as their tertiary submission, namely, if they are wrong about the Award issues or the present Award coverage issues then there should be a variation. But when they come to address their variation all they have to say about it is that it should be done for clarity because the Retail Award already applies and they responded to both our submissions and (indistinct) submissions that there would be undesirable consequences if work was moved from either the Road Transport Distribution Award to or the Storage Award to the Retail Award by way of productions and alterations and conditions, by saying, 'Well, that doesn't arise because they're already covered by the Retail Award.'

PN756

Now, if they're wrong about that – about the Retail Award coverage – then they would have to actually indicate substantively as to why it is appropriate for that change to occur.

PN757

And that there is, frankly, evidence or submissions which supports such a proposition. And for the reasons that I perhaps contemplate that that's foreshadowed at the commencement of the submissions there isn't material before the Commission which would provide a basis to – leaving aside an appeal to clarity – to decide that the Retail Award is more appropriate as a matter of merit, having regard to the Modern Award objective considerations.

PN758

There is evidence as limited to Woolworths. There's no evidence at all about hours of work, pay or conditions of the employees at these facilities which would allow one to assess whether or not the spread of hours and penalties and the type of arrangements and that there is – in one or other Award is appropriate or otherwise.

PN759

There is no evidence or even assertion of inconvenience or incompatibility between the operations of any of these facilities and the provisions in the Road Transport Award, or indeed, in the Storage Award. They are not appropriate for any particular reason to this type of work. At most it is said that it is in some general sense a desirable that one award apply to a single employer.

PN760

JUSTICE HATCHER: Yes.

PN761

MR GIBIAN: It's certainly the case that Woolworths is covered by a myriad of awards in relation to its various operations already (indistinct) and it's not like this is some small operation. We're talking about (indistinct) employees who are employed in these particular centres. So it wouldn't be surprising or particularly unusual for there to be a different Award in relation to this different part of Woolworths operations.

PN762

And as I say, in any event, there's no particular – no evidence at all in relation to any difficulty or inconvenience that would, as a consequence, in Woolworths operations and particularly and for those reasons we don't think leaving aside and hopefully for clarity – if they are wrong in relation to the Award coverage (indistinct) any basis at all has been established as a matter of substance for the variation sought. And nor does the Full Bench have sufficient material before it to determine that question.

PN763

There are also some questions, obviously enough, as to the terms of the variations sought if some variation is to be made. The definition of online supermarkets (indistinct) simply refers to a facility operated by or for a supermarket to fill orders for retail sales placed by a customer online. It's not limited to facilities which are solely for that purpose, that is, there could be facilities which are part warehouses, part distribution centres, but also are facilities from which retail sales are filled.

PN764

There is no definition of what a supermarket is and it's not clear whether a person would be required to or a company would be required to also operate a conventional physical supermarket in order to fit within that definition. I think Mr Gotting said no and Mr Taylor said yes and by or for raises some difficulties.

PN765

The other difficulty is the removal of the reference to a retail establishment and its replacement in the classifications and proposed replacements with the words in the general retail industry would seem to have ramifications well beyond what is sought to be raised in these proceedings in a range of other circumstances. And it's unclear how far it would extend.

PN766

I think AIG has raised that (indistinct) and those words should certainly not be (indistinct). Unless there's anything further those are our submissions.

PN767

JUSTICE HATCHER: Thank you. Mr Saunders?

PN768

MR SAUNDERS: Thank you, your Honour. I think I will be half an hour to an hour (indistinct).

PN769

JUSTICE HATCHER: I am going to take a short break and so we'll come back in about 10 minutes.

**SHORT ADJOURNMENT**

**[4.24 PM]**

**RESUMED**

**[4.36 PM]**

PN770

JUSTICE HATCHER: Mr Saunders?

PN771

MR SAUNDERS: Thank you, your Honour. I'll try and speed this up by or not repeating what Mr Gibian has had to say of those substantial (indistinct).

PN772

There is, of course, a fundamental difficulty of application as a concept. There is just simply no basis upon which the Commission could be satisfied that the variation is necessary (indistinct).

PN773

The best case for the applicant is to establish that Woolworths particular CFCs and eStores would for the enterprise agreement be covered by the Retail Award. It's not even determining what industrial instrument applies to them. There's no controversy there. Its argument, fundamentally, turns on the nature of those operations described at a headline level and in terms of how it's currently operating.

PN774

This is no possible basis to conclude that other businesses structure in the same way, in respect of how they organise the stores, how they deal with transport of goods and who, particularly, is employed there. Or there is no certainty that Woolworths would continue to operate these key areas in the same way.

PN775

There is evidence that it's – on its evidence, really several of the key indicators, including the degree of business to business wholesale work have been dynamic over even the last 12 months.

PN776

Mr Izzo is right. Fundamentally, this is an application – a construction argument. It is an application for a declaration. It's not really suited to a request that the Commission exercises for the variation hours and it should be dismissed on that basis, not turning the rule here.

PN777

Failing that the first question is to determine whether the General Retail Award applies to these various types of sites. As I have said there's a degree of overlap between myself and Mr Gibian. I adopt the TWU's oral submissions today in respect of the meaning of retail establishment and to the extent there's a minor difference that's set out in the written submissions.

PN778

The fundamental point, though, is that the applicant advances two apparently different interpretations of the phrase, 'retail establishment'. It either means any place where a sale of a good to a person could happen. That's the team shop argument and that means that a swimming pool where you can buy a towel is suddenly a retail establishment. It stretches into – it's very difficult to find an operating business that you couldn't do that.

PN779

The alternative, even broader construction, is involved in some way in the sale of goods to a person. Again, it's far too broad. It touches anything connected, rather than the particular work that's being performed at a particular site. It gives establishment nothing to do. It reads it as business which the word is just fundamentally not capable of (indistinct).

PN780

Aside from the constructional argument the case for Woolworths, in respect of its retail award coverage and from my client's point of view, it is the first question because, as has been said, it excludes the possibility of the Storage Service Award applying to those workers.

PN781

The case for Woolworths distils to the way it currently organises and structures these sites. The work it undertakes there. The way the work – the fact that the work performed by the workers is that the UWU is concerned with, is also performed in supermarkets, and the existence of site shop.

PN782

The first is, obviously, superficial. Some aspects look similar to a supermarket in that they're organised similarly, aisles and the same logos and signage, presumably, because it was available. Others don't. The pallets are unwrapped. Soft drink, for example, the cooler area is a classic cold store. You don't see in a supermarket a room that's 10 to 15 degrees below the rest of the shop. The fruit section was unexpectedly quite different. The photographs in Woolworths evidence focus on the fact that the container, the bucket in which the watermelons are stored looks the same but the way they're arrayed in that room looks very, very different to the way one would present them in the supermarket. So it's cosmetic and it's not even complete.

PN783

It's also plainly driven about organisational efficiency. One of the useful aspects of the view which, at least, I didn't fully apprehend on the evidence was the description of the way that work is organised by an algorithm. It's all designed to minimise the amount of steps a worker has to take to complete the orders about efficiency in that way.

PN784

That is fundamentally different to a supermarket which classically is designed to keep you wandering around for as long as possible so you buy things. It points to the different nature, the different purposes of the enterprises themselves. And it's a more important factor than the fact that there's an aisle marked aisle one on those.

PN785

It's also transient. It looks like it is now. It won't look the same when even five per cent of these robot attendants are there. We don't know what it will possibly look like but automation necessarily drives alteration. At least the possibility of alteration in the way that work is structurally organised because robots have to travel.

PN786

It does contain one critical difference as a work environment. It's the absence of customers. The absence of unconnected customer access, I should say. The view that's been taken by Woolworths, it appears, is that anyone – an employee by someone transitions into a customer relationship. They might have a transaction in there presumably, shifts back to being an employee. It's not really the point. The point is general access.

PN787

The nature of the goods is something that in some way it's also been put on. To a degree they're small items with a vast turnaround. The Commission has been given no information as to what that turnaround looks like, what the replenishment rate actually is from the view if you could see that some items were arranged in small numbers and some in the liquor area had been there long enough to accumulate dust. So it's difficult to extrapolate what that looks like in practise. But it's important. In this sense, it's not actually inconsistent with stores work. It just depends on the nature of the store that is being operated.

PN788

The evidence is clear that at these CFCs, business to business sale has happened historically. It may happen in the future. Wholesale, large orders happens – is happening. It continues to happen. Questions of volume vary. It's difficult to see how with Mr Peters, for example, sets out that one of the CFCs its orders over six pallets of goods. Five pallets is still a lot for an individual's grocery shopping if there is a degree of bulk order there.

PN789

And again, there was no explanation for why that change has happened. It's just part of the dynamism of this industry that makes these different to supermarkets.

PN790

The nature of the work is of course picking, packing, and storing of goods is fundamentally the same. When I say 'storing' I mean replenishment. The argument was advanced today that nothing in the Storage Award covers replenishment, i.e. putting things on shelves. That is what storing goods means in that classification structure. That's just a different way of describing it.

PN791

It doesn't really matter. It's fundamentally misconceived. The fact that these tasks are performed in a supermarket doesn't mean that this is now a retail establishment or covered by the Retail Award. It just reflects a longstanding recognition in the award system, the agreement making system that stores work habits in supermarkets is a necessary ancillary part of the primary function of a supermarket business record of what happens in a large retail establishment.

PN792

I'm almost reluctant to do this but in the time but I will. It's not novel. It has a long history as a delineation. If I could hand up – not quite a decision – but it's a memorandum of agreement which is recorded in – it's the memorandum of agreement between the Seed Merchants Association of Victoria and the Federated Storeman and Packers Union of Australia recorded in 1948 Commonwealth

Arbitration Reports, Volume 60, Part 2. And we see there it's a general agreement between my client's predecessor – one of them – and a broad industry association covering a range of people who sell seeds.

PN793

The clause of interest is at page 1735 – the third in the printed document headed 'Hours'. It does two things. It just demonstrates that there is that delineation between this work does and the stores work does happen in retail establishments. And, secondly, there is a necessary – because of the nature of retail establishments conditions change and it's the same fundamental condition change that we see between the Modern Retail Award and the Modern Warehousing Award and expanded span of hours. We recognise the fact that customers are there.

PN794

JUSTICE HATCHER: I think on my brief look at the history suggests that retail establishment was a phrase used to distinguish from wholesale establishments that is - - -

PN795

MR SAUNDERS: That is so but this is not limited to simply sales of seed. It's anyone that has it. We see that on the first page. But I don't suggest that retail encompasses wholesale work. Important that it doesn't because these sites do have that wholesale aspect which one simply doesn't see.

PN796

JUSTICE HATCHER: So the supplier can see from the intro that as this applies to seed establishments.

PN797

MR SAUNDERS: That's right.

PN798

JUSTICE HATCHER: And stores.

PN799

MR SAUNDERS: Yes. Difficult to tell from the context whether 'stores' means warehouses or shops. So it's of limited assistance because of some minor historical interest.

PN800

JUSTICE HATCHER: No, no.

PN801

MR SAUNDERS: The question has been raised about the – effectively the non-maintenance trade qualified workers that are employed, at least, in some of these CFCs. The bakers, the butchers – this one – I think I only noticed for the first time today seafood processing. A few things to say about that. A very small subset of the workforce. Their presence there does not turn this into a retail establishment from something that is dealing with stores work. It's the same situation and must apply (indistinct) a butcher or too in the supermarket. Their



presence in the Retail Award reflects an industrial acceptance that in these shops they have presence. They are performing an ancillary role to the primary purpose of the establishment. They have a different work environment and different conditions are necessary.

PN802

It's a broad theme throughout the Award system. The same example comes up in the meat industry delineation between processing, manufacturing and retail. And what it reflects is again that importance of looking at the particular site, not the employer's operation as a whole, not the industry goal or focus as one might, for example, drag into coverage rules. It's about the work that is performed and the conditions that are appropriate there.

PN803

I mean in respect to bakery, for what it's worth, at the view today one could see mixers and baking flour and pallets. So they are doing that trade work it appears. To a degree the question of what this site is characterised is one of common sense. The view today is instructed in that respect. That was, in no way, a work site that was customer facing or anyone would consider a shop or a supermarket. It's dedicated to – not something that's dedicated to direct sale to someone at the full completion of a transaction as to where sale is completed and finalised elsewhere are actioned in a way.

PN804

What happened is we walked into a largely unmarked building, through a single secured door, past the staff lockers. The door has got a sign on it saying, 'Forklifts in use and warning yellow'. You then sign in at a table under another sign with a picture of a person – and a hooded figure with a face obscured – reminding workers to be cautious of members of the general public. Do you know this person? Words to that effect. It's unusual for a member of the public to enter. The friends and family program is one thing but this is a back of house operation, not a front-facing retail establishment.

PN805

You are then confronted by a cavernous room with some but not all of the decorative trappings of a supermarket and then people performing (indistinct) stores workers performing stores work using the same tools that anyone in a warehouse – small volume warehouse that doesn't require the reaching equipment. Uses the automatic hand tracks.

PN806

The site shop which is taking increasing importance in the Woolworths case – we've all seen it now – it's two self checkout machines that Woolworths has already (indistinct). It's clearly ancillary and to be the most popular use, according to our guide was purchasing goods for people to use to eat on their break. It's not inherently surprising that that would be so. It's sort of a cultural – it's a perk, rather than a part of the operation. It's the cultural equivalent of the discount ice cream available to Streets employees, or the occasional ability to do fine orders at the UGL Railyards. That access to product or service doesn't turn those sites into a retail establishment and it doesn't here.



PN807

And importantly it doesn't involve any work. It's the thing is employees do on their break and things – depending on how interested one's friends would be they can let them into shop but it's not part of the actual operation.

PN808

Obviously, the sites are connected in an industrial and a practical sense with Woolworths' retail operations but that's for the reasons Mr Gibian has set out, not the question. It's what's done there and how it is done.

PN809

And what is disclosed – the evidence discloses as well – is that these sites operate functionally identically to other sites dedicated to filling online orders unconnected with supermarkets, which the general industry practise which for at least in (indistinct) the extent of it exists with this application is important. They're sites that are uncontroversially covered by the Storage Award. They are performing stores work. Big W at Foxton Park is the key example. The request for a view is (indistinct) not pressed but I have spoken to Mr Gotting and I can make this submission as the UWU's evidence shows what we would have seen is a site where people are performing functionally the same work at slightly different organisation to factor in the slightly different products and if a party specifically dedicated to business or business orders in exactly the same way is used to, until recently, exists at the Mascot CFC. The same work.

PN810

Everything I have just said is about the CFCs. eStores are different in that a shop is attached. There's very little actually known about the various – what each of them look like – and importantly, the nature of the separation between the supermarket and the eStore is generally just a large back room attached to it. It's in the problem of that high level evidence it seems likely from it that some workers will cross-work/cross-skill – in the same way that it is possible – that in the same way as the Coles decision, they could be described as starting from a retail shop in that way. But it's difficult to draw any sensible conclusion about the eStores from the material that's available to the Commission.

PN811

It returns to the major problem with Woolworths' case. It's really asking the Commission, and to be fair, Mr Gibian and I are doing the same thing, to draw a conclusion about a wide-range of sites with clear variances in the nature of their operation in matters of detail, but they can matter, based on this fairly general description of how they currently operate.

PN812

The answer to that general question are Woolworths eStores, dark stores, CFCs covered by any award could really only be 'maybe'. The guidance that could be offered by any decision is accordingly limited and it is guidance, rather than anything that would directly resolve any dispute that might – because the idea has been planted in various people's heads I think is the suggestion – might in future arise.

PN813

There's no suggestion of any actual industrial disputation having happened, notwithstanding the fact that it is also fairly clear on the evidence that at Mascot, at least, their – well, on the evidence – that there is and has been a UWU membership presence, and there was an SDA sign in the lunchroom as we walked past. So it can be inferred there's some penetration there. If a dispute was likely to kick up it would have happened.

PN814

JUSTICE HATCHER: Well, obviously, we're not dealing with union coverage here.

PN815

MR SAUNDERS: No. On the material the point is that the Commission couldn't be satisfied that these are retail establishments are properly understood. But that's actually the end of the case. Woolworths' claim is entirely predicated on it and it simply hasn't made it out.

PN816

On one view there is no actual need to go further to determine what award does or could apply. It might, to a degree of assistance, provide a degree of assistance in confirming the lack of retail coverage but that's pretty speculative given the – probably not right – given the critical nature of it being a retail establishment to coverage of the employees by that award.

PN817

The residual contest to the extent that it matters has been reduced to is it a distribution facility or is it a warehouse? We have the same problem. There is limited amounts of evidence about one employer, even if the TWU is right about this company or right about the Mascot CFC, it's the wrong case for it. One simply couldn't make an industry-wide determination, particularly when it's critical of how it is transported and by who.

PN818

There's no utility in providing a view about Woolworths given the application has already failed. And so one wonders about the utility of proceeding. That said, alternatively, it's not a distribution facility. This is different to the question of is it a warehouse? The coverage of the Road Transport Award depends on this site being classified as a distribution facility. It is preoccupied for these purposes with the nature of the establishment in a way that the Warehousing Award isn't necessarily.

PN819

And I can say that with some ease because the workers the UWU is concerned about do no driving in any function of this operation. I think that was clear enough in the reply submissions that it should be taken that I am only talking about the people (indistinct) store – et cetera.

PN820

The distribution facility is a defined term within the Retail Award. Importantly, it requires it to be operated by an employer as part of or in connection with the road transport business of that employer. The evidence – it could be clearer – but it

does appear to position that the Commission's being asked to accept is that Woolworths does not do that in respect of these operations. It does elsewhere. It doesn't matter. These operations are not in connection with that.

PN821

It's outsourced that function entirely. It appears a complete separation. The road transport business that Woolworths is operating is accordingly not in connection in the necessary sense with these sites. They can't be distribution facilities that goes to the award.

PN822

But all manufacturers need their goods transported somewhere. A number of them outsource that. The approach to the Road Transport Award that's been advanced today, if accepted, goes beyond this application and would widely destabilise coverage across several sectors which is a strong indicator that it's wrong.

PN823

In respect to the Coles decision, employment by Coles directly was important. The conception the Bench used was it brought that employment within the road transport industry, rather than just the fact that something was being driven around. And it is also critical in that decision that these workers started and finished at actual supermarkets – the actual retail establishments. That was 12 years ago.

PN824

We don't really know what Coles is doing. We know it's doing this in some way. People are moving into drone delivery which removes the Road Transport Award entirely. The answer with Coles remains we just don't know. And, again, that variation can't be made on that basis.

PN825

The Storage Service Award, once those two awards are out it doesn't appear to be controversial but the Storage Service Award is left, at least in respect of those employees that fall within its classifications. The tasks are, of course, encompassed by both awards. The stores work is working in an aspect that the Coles business where the sole work is stores based. The stores classifications are appropriate in that sense, as set out, and so the 4.7 – our clause 4.7 issue points to it being the Storage Services Award.

PN826

There is nothing unusual or unexpected or anomalous about that outcome. The way designation is not determinative. It's of some use but this is a common sense exercise. That site being considered a warehouse is not something that would shock anyone. We have all seen it now. And, indeed, when Mr Gibian arrived on site and asked to be directed to the car park the security guard asked him if he was heading to the call centre or the warehouse. It's not determinative but it does point to just being a common sense outcome. Unless there was anything further those are the submissions.

PN827

JUSTICE HATCHER: Thank you. Anything in reply, Mr Gotting? Perhaps at your own convenience can you address this question about where Woolworths employees truck drivers to do the deliveries?

PN828

MR GOTTING: Yes. And that was really the question that I was going to deal with in reply because there's obviously a joinder issue. I am not going to repeat the submissions that I have put.

PN829

We dispute the characterisation of the business by both the TWU and the UWU. I rely upon my written submissions and the submissions that I put earlier. But can I deal with the question of the drivers? There's only Woolworths' employees that drive in Tasmania and only from a supermarket, not from a CFC or an eStore. And members of the Full Bench may appreciate that there are no CFCs or eStores in Tasmania.

PN830

And the material that supports that position is in two places. First, in paragraph 30 of Mr Peters' statement and secondly in paragraphs 24, 25, 27 and 29 of Mr Peters' supplementary statement.

PN831

JUSTICE HATCHER: So, 24, 25 - - -

PN832

MR GOTTING: Twenty-seven and 29. So that deals with that factual query and we've obviously outlined in our written submissions in paragraph 45 by we say, despite the presence of an enterprise agreement there is still utility in determining the issue of the award coverage. Particularly, going forwards, and we rely upon that matter. Otherwise we join issue with the submissions that have been put by the TWU and we rely on our (indistinct) - - -

PN833

JUSTICE HATCHER: All right. We thank the parties for their submissions. We propose to reserve our decision. We'll now adjourn.

**ADJOURNED INDEFINITELY**

**[5.01 PM]**

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