DECISION

Fair Work Act 2009
s.739—Dispute resolution

Linda Hart & Laura Rafiqi
v
Woolworths Group Ltd T/A Woolworths
(C2021/8447; C2021/8448)

COMMISSIONER HUNT BRISBANE, 1 SEPTEMBER 2022

Alleged dispute, including about any matters arising under the enterprise agreement and the NES; [s186(6)] – BIGW Stores Agreement 2019 – removal of anti-fatigue matting in-store – was consultation required.

[1] On 13 December 2021, Ms Linda Hart and Ms Laura Rafiqi (collectively referred to as the Applicants) made an application to the Fair Work Commission (the Commission) under s.739 of the *Fair Work Act 2009* (the Act) to deal with a dispute in accordance with clause 20 of the *BIGW Stores Agreement 2019* (the Agreement). Woolworths Group Ltd T/A Woolworths is the Respondent to this application (the Respondent).

Background

[2] The Applicants are employed by the Respondent at the Big W Noosa store in Noosa Civic in Noosaville, Queensland. The Applicants advised that for many years, the Respondent has had anti-fatigue safety matting at the self-serve checkout area and door entry area (the Door Greeter Area) of the store.

[3] The Applicants explained that the anti-fatigue matting is an important tool and piece of equipment used by workplaces to maintain comfort for workers and reduce the incidence of injury to workers. The *Managing the work environment and facilities, Code of Practice 2021* published by Worksafe Queensland states:

> "Workers who undertake static standing work should be protected from discomfort and the jarring effects of direct contact with concrete, masonry or steel floors, for example by providing carpet, cushion-backed vinyl, shock-absorbent underlay, anti-fatigue matting, grates or duckboards."

[4] The Applicants stated that the flooring at the Noosa store is made of a hard, non-cushioned vinyl tile attached to concrete. In 2021, the Noosa store changed the name of its Self Serve Check Out (SCO) area to Assisted Check Outs (ACO or ACOs). In June 2021, the Area Manager and State Manager for the Respondent attended the store and directed that management remove the anti-fatigue safety matting from the ACO area and Door Greeter area. The Applicants stated that management removed the matting immediately with no consultation,

discussion or other engagement with employees who may be required to work in the ACO area or Door Greeter area.

[5] Ms Rafiqi is a delegate for the Retail and Fast Food Workers Union Incorporated (the RAFFWU) for the Noosa store. In Ms Rafiqi's statement, she advised that on arrival at work, she was approached by workers concerned with the removal. Ms Rafiqi raised those concerns with the Store Manager, who refused to restore the matting, claiming it was a trip hazard. Ms Hart also raised a complaint with the Store Manager.

[6] Ms Rafiqi discussed the issues with other employees affected by the removal of the matting and conducted a petition of employees where thirty-five employees signed the petition. The Applicants explained that the petition called for the restoration of the mats and expressed concern at the failure of the employer to consult with workers (the petitioners). The RAFFWU submitted the dispute and petition on behalf of the Applicants.

[7] The Applicants are of the view that this change, made without consultation, affected Ms Hart's health and safety as the anti-fatigue mats are a safety health control which relieve pain in her feet and legs after standing for long periods of time. Ms Rafiqi largely works in the audio/technical area of the store where matting is provided behind the counter. She is concerned the Respondent could take the same action in the area in which she works, and she holds a general concern in respect of the members she represents.

The Agreement

[8] Clause 20 of the Agreement sets out the dispute resolution procedure for disputes under the Agreement. The clause is as follows:

> "**20 Resolving disputes**
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> **20.1 Parties to discuss**
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> 20.1.1 A dispute between a team member (or team members) and BIG W, including a dispute in relation to
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> (a) a matter arising under the Agreement; or
>
> (b) the NES;
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> should be discussed, in the first instance, at the workplace level between the team member (or members) and their relevant supervisors or management.
>
> 20.1.2 At any stage, BIG W and a team member or team members may appoint another person to accompany and/or represent them for the purposes of this clause, including a trade union listed in clause 1.3.
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> 20.1.3 If the dispute remains unresolved, the dispute may be referred to BIG W Employee Services for it to be escalated to an appropriate representative of BIG W to assist in resolving the dispute, which may be a more senior member of management or a representative from the BIG W Culture & People team.

20.1.4 If, following escalation under clause 20.1.3, the dispute remains unresolved, the matter may be referred to a senior representative of BIG W (such as the relevant Employee Relations Manager, Head of Workplace Relations or General Manager) for further discussion.

20.2 Referral to FWC

20.2.1 If the dispute still remains unresolved, either party may refer the dispute to the FWC for resolution.

20.2.2 The FWC may deal with a dispute in two stages:

(a) the FWC will first attempt to resolve the dispute through conciliation;

(b) where the matter cannot be resolved by conciliation, at the request of one or both parties, the FWC may arbitrate the dispute.

20.2.3 In any proceedings before the FWC pursuant to this clause, the FWC may take any or all of the following actions in order to resolve the dispute:

(a) Convene conciliation conferences of the parties or their representatives at which the FWC is present;

(b) Require the parties or their representatives to confer among themselves at conferences at which the FWC is not present;

(c) Request, but not compel, a person to attend and/or give evidence at proceedings;

(d) Request, but not compel, a person to produce documents; and/or

(e) Where either party requests, make recommendations about particular aspects of a matter about which they are unable to reach agreement.

20.2.4 Any determination by the FWC, following an arbitration, must be in writing and must give reasons for the determination.

20.2.5 In the exercise of its functions under this clause, the FWC must not issue interim orders, 'status quo' orders or interim determinations.

20.2.6 If FWC permits, the parties are entitled to be represented, including by legal representatives, in any proceedings under this clause.

20.2.7 If the FWC arbitrates a dispute, any determination made by the FWC is a decision for the purposes of Division 3 of Part 5.1 of the Fair Work Act and can be appealed.

20.3 Continuation of work

20.3.1 While the dispute resolution procedure is engaged, work will continue as normal and as before the dispute arose, in accordance with this Agreement, unless a team member has a reasonable concern about an imminent risk to their health and safety."

[9] The Applicants assert that the dispute is in relation to a matter arising under the Agreement, namely the following clause:

> "**2 BIG W policies**
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> **2.1 What are BIG W's standards and policies?**
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> 2.1.1 BIG W aspires to be a great place to work and a great place to shop. We are all responsible for contributing to an environment where everyone at BIG W is treated with dignity, courtesy and respect. To ensure we do the right thing by our teams, our customers and our communities, BIG W has standards and policies that we expect our team members to follow at all times.
>
> 2.1.2 All team members at BIG W are required to read, understand and follow the Code of Conduct and all applicable BIG W policies. However, such policies are not incorporated into this Agreement or any team member's contract of employment. The Code of Conduct and all policies are available on the BIG W intranet, and may be updated from time to time.
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> 2.1.3 BIG W policies cover matters including (but not limited to) work health and safety, personal appearance, bullying, harassment, discrimination, workplace behaviours, diversity and inclusion, team member benefits and leave.
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> 2.1.4 Any team member who has a question about any BIG W policy can speak to their manager or contact BIG W Employee Services.
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> **2.2 About work health and safety**
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> 2.2.1 BIG W and its team members are committed to achieving and maintaining healthy and safe working conditions in all BIG W workplaces by abiding by all relevant Occupational Health and Safety legislation.
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> (a) This commitment will have the following objectives:
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> (i) To control workplace hazards at their source.
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> (ii) To reduce the incidence and costs of occupational injury and disease.
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> (iii) To provide an occupational rehabilitation system for workers affected by operational injury or illness.
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> (b) BIG W and the SDA are committed to enabling all team members to receive appropriate OH&S Training. Occupational Safety representatives will be given paid leave to attend appropriate OH&S training courses as stipulated in the relevant state legislation.
>
> (b) BIG W shall establish a consultative process for the Occupational Rehabilitation of team members affected by Occupational Injury and Illness. This process shall include the SDA where requested by the team member. This process aims to return these team members to their pre-injury status within the community, their families and their employment.

(c) Where any proposed changes to equipment, substances or work practices may reasonably be expected to affect team members' health and safety, or when a decision is made to renovate a store, BIG W will consult with the team members concerned, the Health and Safety representatives, the Store Safety Committee and the SDA. This consultation will aim to identify and resolve potential health and safety problems.

(e) Nothing in clause 2.2 operates to remove, lessen, diminish or otherwise affect, in any way whatsoever, the operation and application of applicable Occupational Health and Safety, and Workers' Compensation, laws.

2.3 Team member safety and security

2.3.1 Where practicable, BIG W will provide:

(a) lockers for team members to store their belongings. Lockers will be maintained and in good working order.

(b) dining accommodation with adequate seating and sufficient supply of hot water for team members.

2.3.2 If a team member has a safety concern when leaving the store after dark, the team member can request, and BIG W will provide, a safe escort to their mode of transport. In addition, where practicable, team members will be permitted to move their vehicle closer to the store entrance before dark.

2.4 Respectful workplace

2.4.1 BIG W encourages a workplace culture where people are treated with respect. All team members are expected to follow BIG W policies in relation to expected workplace behaviour. BIG W expects our team members to treat fellow team members, customers and others with dignity, courtesy and respect.

2.4.2 Behaviours such as harassment (including sexual harassment), workplace bullying, violence and unlawful discrimination are unacceptable and will not be tolerated at BIG W. Any instances of inappropriate workplace behaviour should be reported to BIG W - team members are encouraged to speak up if something is not right. BIG W will take complaints seriously and handle them in accordance with our policies and procedures. This may include an investigation and the taking of disciplinary action.

2.5 Diversity and inclusion

2.5.1 BIG W values diversity and inclusion, and we want to ensure that team members feel valued, respected and empowered. BIG W is committed to providing equal employment opportunities to team members.

2.6 Reporting an issue

2.6.1 Team members should always feel free to ask questions, provide feedback and speak up when they feel that something isn't right. Team members can speak to their manager, contact BIG W Employee Services or consult the Code or Conduct for more reporting options. Team members may also contact their trade union or chosen representative if they need support."

Questions for arbitration

[10] The Applicants posed the following questions for arbitration:

- *Question 1: Does the removal of anti-fatigue matting from the ACO area and Door Greeter area create a reasonable expectation that employee health and safety is affected?*

- *Question 2: Did Woolworths Group consult (as required by the Agreement) affected employees over changes to the anti-fatigue matting equipment in the ACO area and Door Greeter area?*

- *Question 3: Is Woolworths Group maintaining healthy and safe working conditions by removing the anti-fatigue matting from the ACO area and Door Greeter area?*

- *Question 4: Is it unjust or unreasonable for Woolworths Group to remove the anti-fatigue matting from the ACO area or Door Greeter area?*

[11] For the sake of clarity, the dispute involves the Applicants and the Respondent at the Noosa store only. Interestingly, following day one of the hearing, the Respondent immediately removed anti-fatigue matting at a multitude of stores where it was on notice the mats were being used.

Hearing

[12] The matter was heard by way of video hearing on 4 and 6 April 2022. The Applicants were represented by Mr Josh Cullinan, Secretary, RAFFWU. The Respondent was granted leave to be represented by Mr Pawel Zielinski of Counsel, instructed by Mr Doug Johnson, Lawyer, of Ashurst.

[13] The following people gave evidence:

- Ms Linda Hart, Retail Employee
- Ms Laura Rafiqi, Home and Entertainment Associate
- Mr Daniel Mielnik, Store Manager
- Ms Kenei-Amanda Henwood, Second in Charge
- Mr Robert McFarland, Program Manager
- Ms Tanya Atkinson, State Manager (QLD, NT, NSW)
- Mr Brett Bartlett, Area Operations Manager

[14] I was dissatisfied that the Respondent did not call Ms Atkinson and Mr Bartlett to give evidence in this matter. Accordingly, at the commencement of the hearing I requested they both give evidence. I noted clause 20.2.3(c) does not permit the Commission to compel a witness to give evidence. It was agreed Ms Atkinson and Mr Bartlett would give evidence on a second hearing date, which occurred on 6 April 2022.

Summary of Applicants' submissions and evidence

Evidence of Ms Hart

[15] Ms Hart has been employed as a Retail Employee by the Respondent since 19 August 2006 and has been a member of RAFFWU since 21 May 2021. Ms Hart advised she works as a "check out operator" or "register operator" for 34.5 hours per week.

[16] She is predominantly rostered to work at the Respondent's manned registers where she makes use of an anti-fatigue mat due to the stationary nature of the work. She has been directed to occasionally work in the ACO area, and for a period of time she was regularly required to work almost every shift for approximately two hours from around 4:00pm to relieve the ACO worker to perform other duties.

[17] Ms Hart explained that she has relieved in the ACO area for approximately eight years. There are typically five checkouts open, however in busy times there will be eight checkouts open, with a second employee assisting.

[18] The employees in the ACO area stand throughout their duties and at no time do they sit down. Ms Hart explained that she stands in the middle of the general area around the ACOs in order to survey what is going on at all of the ACOs. She looks to see that the customers are able to use the ACOs without issue, assist them as needed with transactions, as well as checking for anyone who is stealing. Sometimes it is necessary to open up a checkout if there is a significant error. Employees are expected to regularly clean the area including the screens, floors and other main areas of the ACO as well as restock bags.

[19] Ms Hart said that there have always been anti-fatigue mats in this area ever since she started working in this area. The mats are black and made of rubber with big nodules on them. They are approximately 60cm in length and 30cm in width. Ms Hart described them to be big and soft, and the mat very much assists in taking the weight off her legs after having worked on concrete floors. Ms Hart said that the mat was always located in a corner of the area where employees go to stand for some time. There used to be a computer in the corner but it is no longer required. A counter is still in use and employees, at times, need to go to the counter for relevant information. I also understand that security tags are removed from purchased items at this spot.

[20] Ms Hart stated that this is not a corner the public would go to and at all the time she has worked in the area, she has not seen a customer or staff member trip over the mat. Her evidence is that employees working in the ACO area would stand on the mat when they get sore from standing for so long. In particular, she understands that older, female employees would obtain relief from occasionally standing on the mat for irregular intervals.

[21] Ms Hart said that she and some other workers have cysts at the back of their knees and varicose veins so standing on the mat takes the pressure off their knees, ankles and legs generally. Ms Hart experienced less pain and swelling on her legs by using the mat.

[22] Ms Hart further stated that she and others are not on the mats for very long, however she experiences immediate relief. She stated she may only have the opportunity to stand on the

mats in the ACO area for approximately two-three minutes per hour but that will depend on what is happening. Sometimes employees will go a few hours without standing on the mats if it is busy.

[23] Ms Hart advised that she also works as a Door Greeter. In this role, the main duties include greeting customers as they enter the store, smile, ask them how they are and ask if they need a hand with anything. This is also primarily a standing role, with the shift usually for a period of five hours.

[24] Employees use the anti-fatigue mats in this area as well. Ms Hart used to do this role up until last year, however, the Respondent took away the mats in this area in the first half of 2021. Ms Hart did a few shifts without the mat, and she noticed her feet were getting very sore. She raised this issue with management and requested to not be required to perform this role because of the pain she was experiencing, and the fact that she did not enjoy the role. Ms Hart recalled explaining to Mr Mielnik the following:

> "I'm in my 50s and I can't be standing on concrete all day, you know how I feel about being here anyway. I don't want you to roster me here."

[25] Based on this conversation, Ms Hart was not rostered as door greeter going forward. Later, when the mat was removed from the ACO area, Ms Hart raised the issue with Mr Mielnik again and asked why the mat was removed. Mr Mielnik responded, words to the effect, *"It is a directive from head office"* and *"the mats are a trip hazard"*. Ms Hart responded to Mr Mielnik, words to the effect, *"This is a load of crap"* and *"head office need to speak to workers"*.

[26] Ms Hart stated that there was no consultation on the issue at all. She had previously seen the representative from Head Office, named "Brett", came to the store and he never asked the staff what they want but just implemented decisions. Ms Hart said she talked to other workers impacted by this decision, and all were very unhappy.

[27] In a reply witness statement, Ms Hart stated that the mat in the ACO well pre-dated the computer being used in the area. She has worked in the store since it opened in 2006.

[28] Ms Hart accepted that at the time the mat in the ACO was removed, she was not 'rostered' to work in the ACO, yet she would relieve in there most afternoons from approximately 4:15pm to 6:00pm. She would also relieve the supervisor when they took breaks. At the time of the hearing, Ms Hart stated she was working in the ACO area for approximately one hour at a time when she was required to relieve other workers.

[29] Ms Hart agrees that employees in the ACO area are constantly moving and assisting customers. However, when it is quiet, and any cleaning has been performed, she does not consider it unreasonable to be allowed to return to where the mat was to obtain some relief from the hard floor. She considers the expectation to not obtain any relief is unrealistic and unfair. She said that she would have explained to Mr Mielnik any medical concerns she had if she had been consulted with respect to the removal of the mat.

[30] In oral evidence given during the hearing, Ms Hart stated that the work performed in the ACO area is busy, and when she is working there, she is always on the move. When all eight checkouts are open, she tends to stand in the middle of the eight. If, however, it is less busy,

and only five checkouts are open, she would typically have stood on the mat if not providing assistance to customers. She stated that it is not unusual for the ACO area to be extremely quiet.

[31] If an item required a security tag to be removed, she used to stand on the mat at that time and remove the security tag while at the counter.

[32] Ms Hart reiterated in oral evidence that she typically works in the ACO area between 4:15pm and 6:00pm when at work.

[33] I inquired of Ms Hart what kind of shoes she wears. She stated that she wears boots and has expensive inner soles in them. She explained that she was suffering from plantar fasciitis, and wearing expensive shoes assists in providing some relief from the condition. At the time of giving evidence, she had experienced three months' relief from the condition. She is 54 years old and has varicose veins.

[34] Having the benefit of a photograph, I inquired why the checkout closest to the counter and where the mat used to be placed is not typically open. She replied that a trolley is usually placed there to assist with returns. It is also best not to have that particular checkout open unless it is very busy as it is more difficult to detect theft from customers if the ACO employee is assisting at other checkouts. Accordingly, she considers there is even less risk of a customer tripping over a mat considering its former placement.

Evidence of Ms Rafiqi

[35] Ms Rafiqi has been employed by the Respondent as a Retail Employee at the Noosa store since February 2009. She understood the store is a medium sized store within BIG W's classifications. She is a permanent part-time employee contracted to work 28 hours a week.

[36] Ms Rafiqi is currently rostered to work in the Tech and Photolab area, where she provides customers with service and advice relating to home entertainment products such as DVD and Blu-Ray players, video games, and televisions. She has been rostered in that area for at least five years. Prior to that time, Ms Rafiqi was rostered in the Home Entertainment and Photolab (which has since merged into "Tech"), and the layby area.

[37] Ms Rafiqi said that the Tech area has one counter, which has checkout functions. She is trained in using BIG W's checkouts. She said she would occasionally have to assist in the main checkout area and the ACO area when the area is very busy. She observed that others in the store are also trained in how to use checkouts and will also assist in these areas when they are asked to do so.

[38] Ms Rafiqi has been a member of the RAFFWU since 23 October 2018. On 2 May 2021, she was elected as a RAFFWU delegate. Prior to this time, Ms Rafiqi was an elected shop steward for the Shop Distributive and Allied Employees Association.

[39] In her role as a RAFFWU delegate, Ms Rafiqi represents her colleagues' interests to BIG W's management, including any of their concerns about work practices, workplace culture, and health and safety. Ms Rafiqi said her colleagues will often approach her to assist to resolve

issues that arise in the store. Ms Rafiqi takes this responsibility seriously and will often assist her colleagues to advocate for their interests. For example, she recently assisted a colleague to resolve an issue relating to casual conversion rights. Ms Rafiqi has the impression that the store manager respects her role as he will discuss issues with her. Sometimes they are able to resolve issues without any further escalation.

[40] Ms Rafiqi represents the interests of all RAFFWU members at the Noosa store, including those members who work in the ACO area of the store.

[41] Ms Rafiqi explained that cushioned anti-fatigue mats are distributed throughout the Noosa store where workers will often be required to stand for longer periods of time. The mats are black rubber mats approximately 1 metre by 80 centimetres long. They have bevelled edges, which mean the edge to the floor is thinner than the centre of the mat, which is thick and cushioned. Ms Rafiqi stated that the mats are relatively weighty and slip resistant; they do not slide around easily. She could not, for example, move a mat very easily without picking it up.

[42] Ms Rafiqi stated that there are five mats in the Tech area, which are behind the counter. She uses them whenever possible because standing in the store without it would be difficult, because it would make her feet and body sore. Ms Rafiqi has muscular dystrophy which makes mobility more difficult for her.

[43] Ms Rafiqi advised that in addition to the regular registers, the Noosa store has a checkout area where customers can use ACOs to complete their own transactions without the direct service by a staff member. The ACO area is located at the front of the store. Ms Rafiqi walks past the ACO area to get to the Tech area.

[44] There are eight ACOs in the ACO area. Ms Rafiqi explained that there is usually one person allocated to the ACO at one time, who she understood it to usually be a supervisor. Oftentimes, there will be an issue with one of the checkouts, requiring the employee to use their authorisation to override an error that has occurred with the checkout process. When an employee stationed in the ACO is not helping a customer, they will usually do spot cleaning in the area, or otherwise observe customers completing their transactions.

[45] Ms Rafiqi said that there is a small counter in the corner of the ACO area with a phone and a cupboard. The counter is near the exit of the ACO area but set back from the security scanners at the exit, which monitor whether items being taken through that area have not yet had their security tags removed. There is a security tag tool at the counter to remove security tags from items after customers have purchased them. The employee will stand at the counter when they are undertaking this task.

[46] Until June 2021, there was an anti-fatigue mat at the counter in the ACO area that an employee would stand on if they were standing at or near the counter. Ms Rafiqi provided a coloured photograph of the area. As far as Ms Rafiqi could remember, there was a mat in this area for more than 10 years.

[47] Ms Rafiqi understood that employees in the ACO area often spend at least a few hours there at a time. Generally speaking, Ms Rafiqi understood that a shift would be about five hours

in length. In peak periods or under some circumstances, these ACO area shifts could be up to 8 to 10 hours.

[48] Ms Rafiqi stated that there are Door Greeters stationed at the entrance of the Noosa store who are responsible for greeting customers and assisting them with any queries the customer may have about the store or its products. Until June 2021, there was a mat as described that a Door Greeter would often stand on. After the mat had been removed without consultation, it was returned around August 2021. Ms Rafiqi described the removal and return of the mat below.

[49] On a day in June 2021, Ms Rafiqi attended for work and upon arrival, she spoke with another colleague who informed her that the mats at the Door Greeter area and the ACO area had been removed by management.

[50] Later that day, Mr Mielnik approached Ms Rafiqi's counter in the Tech area where they had a conversation to the following effect:

Ms Rafiqi: Hi Dan. Several staff told me someone took the mats from the Door Greeter area and the ACO. Why was that done? Their feet and legs are going to hurt if they have to stand all day without them.

Mr Mielnik: They were a trip hazard. That's why they were removed, they're not supposed to be there.

Ms Rafiqi: Has there been a risk assessment done? Did you speak to the staff down there and ask them if their feet would hurt or not?

Mr Mielnik: No, I haven't done so yet.

Ms Rafiqi: Well, you need to. Can you please give me the risk assessment that says it's a trip hazard?

Mr Mielnik: I'll have to get back to you on that.

Ms Rafiqi: This is going to be a real problem for the older staff and women that work there, they might have to put a Workcover claim in if they get hurt standing there all day getting sore without those mats.

Mr Mielnik: Well, if that happens, they might be found incapable of doing their job.

[51] Ms Rafiqi was shocked when Mr Mielnik said that the workers might be found incapable of doing their jobs if they complained about sore feet or legs because they did not have mats. The conversation ended.

[52] Throughout Ms Rafiqi's employment, BIG W has placed an emphasis on employees treating each other and the company like family. Ms Rafiqi found BIG W's actions and Mr Mielnik's attitude to the concerns of workers at the door and the ACO to be dismissive and insensitive, and not anything like how one would treat a family member. Ms Rafiqi was not

consulted by BIG W about whether the mats should be removed. She has spoken to many employees who have told her that they were not consulted at all about the removal of the mats.

[53] Ms Rafiqi has spoken to other workers in the store who have told her they were worried about the mats being removed from their areas. Ms Rafiqi said she shared that concern. Around the time the mats were removed, one worker in another area told her that she did not think she could work without a mat if it was removed.

[54] Ms Rafiqi recalled that around this time, she had a conversation with Ms Toni Dunstan, who is a Shift Supervisor at the Noosa store and primarily works in the ACO area. She told Ms Rafiqi that the mats were important to her as they provide immediate relief to her feet and legs, particularly after standing on the concrete linoleum at the store all day. She told Ms Rafiqi that the mat is well placed at the supervisor counter because she can stand on it when she is answering the phone at the counter or removing a security tag. Ms Rafiqi said she agreed with Ms Dunstan. Ms Rafiqi found the mats to be very useful to relieve any pain or stress in her body after standing on the hard floor in the store. In particular, they are useful to complete the exercises that BIG W has trained them to do to relieve feet and leg pain.

[55] In Ms Rafiqi's experience, completing those exercises on the hard linoleum floor is much less effective than completing them on the mats because the floor has a much higher impact than the mats on her feet and legs.

[56] Around the beginning of August 2021, with the assistance of the RAFFWU, Ms Rafiqi began collecting signatures from her colleagues for a petition calling on BIG W to immediately restore the matting at the door, the ACO area, as well as ensure the mats are not removed from the Party Area and the Home Entertainment area. The 35 petitioners noted the matting was removed without notice or consultation.

[57] On 10 September 2021, RAFFWU notified BIG W of a dispute relating to the mats pursuant to the Agreement and attached the petition with names redacted. The notice of dispute is extracted below:

> "Dear Dan Mielnik,
>
> **NOTICE OF DISPUTE**
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> We write on behalf of our member and Union delegate Ms Laura Rafiqi and our member Linda Hart ("our members") employed at Big W Noosa.
>
> Our members notify a dispute under clause 20 of the Big W Stores Agreement 2019 ("the Agreement").
>
> Our members and their co-workers are entitled to a healthy and safe workplace, including in relation to having anti-fatigue matting in their work areas where they may be required to stand.
>
> Our members and their co-workers hold genuine safety concerns that the safety of the work environment has been undermined by the decision to remove and not maintain anti-fatigue matting.

> The dispute relates to the failure by Woolworths Group to properly apply clause 2 including clauses 2.1, 2.2, 2.4, 2.5 and 2.6 of the Agreement. The dispute also relates to the broader issues of the removal of the safety devices, the failure to consult over that removal, the failure to conduct risk assessments, the imposed risk and the statements made by representatives of Woolworths Group. Those statements include words to the effect that workers who experience pain or discomfort in their work following the removal of the anti-fatigue matting "will be found not capable of doing their job."
>
> To the extent these issues do not relate to clauses of the agreement (which is not conceded) we note clause 20 does not limit the resolution of disputes to only matters arising under the Agreement.
>
> Our members and their co-workers demand the anti-fatigue matting be restored immediately. Their petition to that effect is attached to this dispute notice and is confidential to the employer.
>
> Clause 20 of the Agreement requires that we meet with you and attempt to resolve the matters in dispute. Please advise times you are available to meet by phone to discuss this dispute. I can be contacted on [number] or [email]. To avoid doubt, dispute discussions will be held by RAFFWU as representative of our members and without our members being physically present.
>
> All rights are reserved by our members and the union. This issue has created serious industrial disputation in the workplace and the attached petition of dozens of workers affected by these issues highlights the importance of dealing with this matter expeditiously.
>
> We note the protections afforded RAFFWU, all our members and all workers, including petitioners, under the General Protections of the Fair Work Act.
>
> Kind regards
>
> Josh Cullinan
> SECRETARY"

[58] Attached to the Notice of Dispute was the redacted petition, with the precis of the petition stating as follows:

> "We the undersigned call on Big W to reverse changes that negatively impact on the health and safety of workers at our store.
>
> We know that anti-fatigue matting is essential to help provide a safe workplace. In July it was removed without notice or consultation.
>
> We call on Big W to immediately restore and maintain the matting – including at the door, the self-serve station, in Party Shop and in the Home Entertainment/Technology sections."

[59] On 21 September 2021, the Respondent provided a response to the dispute, which is extracted below.

> "Dear Mr Cullinan,
>
> **Notification of Dispute | Anti Fatigue Matting**

I refer to your letter of 10 September 2021 in which you notify a dispute pertaining to the removal of Anti-Fatigue Matting (the **Dispute**) at BIG W Noosa (the **Store**) in accordance with clause 20 of the *BIG W Stores Agreement 2019* (the **Agreement**).

I understand the Dispute specifically relates to assertions that BIG W has failed to properly apply clauses 2.1, 2.2, 2.4, 2.5 and 2.6 of the Agreement. Furthermore, in your letter you state that BIG W failed to consult over the removal of Anti-Fatigue Matting and to conduct risk assessments prior to the removal of the mats. Lastly there is a claim that a statement was made to team members who experienced pain or discomfort in their work following the removal of the Anti-Fatigue Matting and that they "*will be found not capable of doing their job*".

Firstly, it is important to note that the removal of Anti-Fatigue Matting from the front entry of the Store and in the Assisted Checkout (the ACO) area is not a major workplace change, nor is their removal expected to affect a team members' health and safety. On the contrary, the Anti-Fatigue Matting should never have been in place and can be a trip hazard, particularly in the ACO area and can impact team members where they remain stationary for extended periods of time rather than moving and staying active. Accordingly, and as it was never intended to be used in this area, there is no requirement under the Agreement to consult with team members with regard to removing the Anti-Fatigue Matting.

Furthermore, the task analysis for the Customer Champion and Self Serve Team Member roles, clearly define the tools required for the role and neither require the Anti-Fatigue Matting as it is not a designated or required "tool" to perform the inherent requirements of their respective duties and should not have been used by the Store team. BIG W takes their health and safety obligations seriously and always strives to ensure our duty of care for all our team and customers. The removal of the mats aligns with this and is consistent with other stores within our organisation.

Notwithstanding the fact that Anti-Fatigue Matting is not designated or required to be used while a team member is performing the Customer Champion (door greeter) role, we have decided to allow team members who would like to use the mats whilst performing the Customer Champion role at the Store, to do so. To be clear, the Anti-Fatigue Matting cannot be used in the ACO area and the decision to remove them from the ACO remains unchanged.

Separately, we have become aware that certain team members have been using paid company time to prepare the petition against the removal of the Anti-Fatigue Matting and have been approaching colleagues in their paid work time also. It is imperative that any such activity only occurs in a team member's own time i.e. outside the time they are paid to work and/or during their breaks.

In light of the above, we trust that we have addressed the matters raised in your letter. Should you wish to discuss this matter further, please do not hesitate to contact me on [number] or via email at [email].

Yours sincerely,

Daniel Mielnik
Store Manager
BIG W Noosa"

[60] Shortly after Mr Mielnik's letter of 21 September 2021 was received, Ms Rafiqi noted that the mat was provided for the Door Greeter area. Although the mat is situated close to the

door area where people move in and out frequently, Ms Rafiqi has not been made aware of issues in relation to customers or workers tripping on the mat. Ms Rafiqi remained concerned that the mat may be removed from the Door Greeter area, and other areas in the store in the future.

[61] Ms Rafiqi is of the view that if the Respondent is genuinely concerned about the prospective trip hazards of the mat in the ACO area, it could order a much smaller mat with yellow edges to put in the ACO area so that the size is reduced and it is more visible to people in the area. Ms Rafiqi would have suggested this to BIG W if Ms Rafiqi had been consulted on the change. She considers that her colleagues may have many other responses if they were consulted on the change.

[62] Based on Ms Rafiqi's conversations with her colleagues and her own experiences using the mat throughout her employment, she disagreed with the Respondent's statement in the letter of 21 September 2021 that the absence of a mat will not or has not affected team members' health and safety. Ms Rafiqi is of the view that the mat is an important health and safety control to mitigate fatigue after standing for long periods. Despite requesting it from Mr Mielnik, a risk assessment has never been provided to her regarding the mat in the ACO area. She is not aware of any risk assessment that has been provided to any of her colleagues either.

[63] Ms Rafiqi stated that employees in the store rely on her to raise issues for them, which is an ordinary part of the role of a delegate of a union. Some casual workers who are very concerned about the removal of the matting have told Ms Rafiqi that they are too scared to raise it themselves other than through the petition.

[64] Following a telephone conference before me on 7 January 2022, on 17 February 2022, Mr Cullinan sent Ms Rafiqi an email with an attachment including photos of other Big W stores throughout several states. The email is extracted below:

> "Dear Laura
>
> Last year the HR representatives at Big W told us that stores did not have anti-fatigue matting at the Assisted Check Outs. At the time I was assisting a member at Big W Ballarat who told me they did in fact have matting at their ACO.
>
> I told Big W HR representatives that stores did have matting in at least some Assisted Check Outs.
>
> I am surprised that Big W would submit to Commissioner Hunt that no stores have anti-fatigue matting at Assisted Check Outs.
>
> While we have not undertaken a comprehensive assessment of all stores, I have had RAFFWU organisers visit some local stores in the course of their work. They have taken photos of the antifatigue matting in place at some of those stores in the Assisted Check Out (and Door Greeter positions.) Attached is a set of those photos with the location and date of photo. This clearly shows more than a dozen stores in Queensland, Victoria and New South Wales with the matting in place just from this cursory assessment.
>
> Kind regards

Josh Cullinan
Secretary
Retail and Fast Food Workers Union"

[65] Attached to the email include several photographs of the placement of the anti-fatigue mat at ACOs and Door Greeter at other BIG W stores in Capalaba, Carindale, Chermside, Northlakes, Taigum, Macquarie, Campsie, Waverly, Southland, Parkmore, Doncaster, Epping, and Craigieburn. All of the photographs are said to have been taken in February 2022.

[66] In a reply witness statement, Ms Rafiqi recalled Ms Dunstan stating that she had told Ms Henwood that because of the removal of the mats, she "will have to put her inserts back" into her shoes as the mats made a real difference. Ms Rafiqi asked Ms Dunstan why she hadn't raised her concerns with management. Ms Dunstan replied to the effect, *"There's no use complaining because they won't do anything about it. Removing the mats without consultation is just another [thing] they do."* Ms Rafiqi understood Ms Dunstan suffered a loss in her family around this time and she has not wanted to press Ms Dunstan to make a further complaint. Ms Rafiqi considered it important that she be allowed to represent Ms Dunstan's concerns.

[67] In response to Ms Henwood's evidence that Ms Rafiqi has never spoken to Ms Henwood about the mats, Ms Rafiqi did not consider that she needed to. She has already raised her concerns with Mr Mielnik and he is a more senior manager. Ms Rafiqi considered that the buck stops with him. She stated that she feels comfortable raising this issue with him, and in any event, she considered Ms Henwood to be abrupt and not approachable.

[68] Ms Rafiqi considers that the supervisor can often take over an hour to undertake their various duties at the end of the day, requiring their post at the ACO to be covered by others, including Ms Hart.

[69] With respect to training, where Ms Henwood asserted that she trained the four supervisors in July 2021, Ms Rafiqi has spoken with Ms Budgen and Ms Edwards who have stated that they have not seen the training documents before and do not recall ever attending a training session.

[70] Ms Budgen has informed Ms Rafiqi that she wanted the mats to be returned as her feet hurt more now than when the mats were in place. Ms Budgen is hesitant to be involved in the dispute.

[71] Ms Rafiqi asked Ms Edwards if she had seen the training documents or attended the training that Ms Henwood states that she has. Ms Edwards was shown the documents by Ms Rafiqi and informed Ms Rafiqi that she could not recall having seen them or attending training.

[72] Ms Rafiqi also asked Ms Edwards how she felt about the mats having been removed. She replied that she wanted the mats back. While Ms Edwards physically feels comfortable working without the mats, she understood that other employees appreciate being able to stand on the mat for a while during quiet periods to take the edge off any pain or soreness they were feeling.

[73] Ms Rafiqi stated that she did not attend the store huddle referred to by Ms Henwood as they are almost always held during the morning and not in the afternoon when she works.

[74] In reply to Mr Mielnik's statement, Ms Rafiqi disagreed that Mr Mielnik is always catering for her medical condition and requests. As an example, the security locks which prevent high risk and expensive items being stolen are lower to the ground. Ms Rafiqi and other employees are required to crouch to unlock the cabinets. Ms Rafiqi has requested, without success, to have the locks moved higher. Notwithstanding this issue, she stated she and Mr Mielnik have a good working relationship.

[75] Ms Rafiqi sent the following email to Mr Mielnik on 30 July 2021. He did not respond to her:

> "Hi Dan,
>
> As per our conversation yesterday, I requested the risk assessment for the impact mats that have been removed from around the store.
>
> Thank you for providing the task analysis, however that isn't a risk assessment and will not suffice.
>
> The risk assessment should have been carried out prior to the removal of any the impact mats.
>
> This document backs up any company claims about the impact mats.
>
> Can you please email me back with a copy. The company WHS team would have it already.
>
> Thank you for your assistance.
>
> Kind regards,
> Laura Rafiqi"

[76] Ms Rafiqi conceded that she has not been rostered to work in the ACO area, however stated that she will occasionally relieve staff in that area, when requested.

[77] In oral evidence given during the hearing, Ms Rafiqi conceded that she had only ever worked in the ACO area for a few minutes every few months. This might be if she had discovered it unmanned.

Summary of the Applicants' submissions

[78] The Applicants submitted that the Respondent was required to consult with affected workers prior to the removal of the anti-fatigue mats and argued that the evidence demonstrates it did not consult workers, as required by clause 2.2 of the Agreement. Subsequent to the removal of the mats, the Respondent has directed affected workers to work without them. In summary, it is the Applicants' position that:

- the mats must be returned, because the Respondent failed to consult any workers about their removal pursuant to clause 2.2(d) of the Agreement; and

- a failure to provide a mat in circumstances where the mat had existed before would be a failure to achieve and maintain healthy and safety conditions, as per clause 2.2.1 of the Agreement.

[79] The Applicants referred to a decision of Madgwick J in *Kucks v CSR Limited*,[1] where it was stated that:

> "It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.
>
> But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. **So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning**." (emphasis added by the Applicants)

[80] The Applicants thereby submitted that the ordinary and well-understood words of the Agreement are to be accorded their ordinary or usual meaning.

Question 1: Does the removal of anti-fatigue matting from the ACO area and Door Greeter area create a reasonable expectation that employee health and safety is affected?

[81] The Applicants submitted that it is indisputable that anti-fatigue matting is an important safety device used in many thousands of workplaces across Australia. The Applicants noted that the BIG W Noosa store maintained such matting at all its non-ACO checkouts and in various other areas of the store.

[82] The Applicants referred to clause 2.2.1(d) of the Agreement, which states:

> "(d) Where **any proposed changes to equipment**, substances **or work practices may reasonable be expected to affect team members' health and safety**, or when a decision is made to renovate a store, **BIG W will consult with the team members concerned**, the Health and Safety representatives, the Store Safety Committee and the SDA. **This consultation will aim to identify and resolve potential health and safety problems**." (emphasis added by the Applicants)

[83] The Applicants considered that the removal of a safety device, or the imposition of a new work practice which purports to eliminate the requirement for a safety device, present as an obvious expectation of affecting the health or safety of workers. The Applicants refuted the Respondent's retort that the workers installed the matting without permission, stating that this

is untrue and disingenuous. The Applicants advised that the matting was in situ for over a decade. Many other stores maintain the matting. The Applicants argued that the Respondent would have the Commission believe there is a broad conspiracy of workers to purchase or steal safety matting to install in a similar location across Australia.

[84] The Applicants argued that the illogical defence is a construct of a Human Resources department detached from the lived reality of working in BIG W stores. The Respondent had asserted that the matting presents a tripping hazard but has not conducted a risk assessment nor identified a single incident across its network of stores. The Applicants submitted that the mats' location in the ACO area is set back from a trafficked area beside a counter with no obvious thoroughfare for employees or customers. It is a commonly used area in other stores. The mat's location in the Door Greeter area is a commonly used area and easily visible to any employee or customer.

[85] The Applicants further submitted that the experience of workers is that the matting provides immediate and important relief. The mat's purpose is a health and safety device. While the *scale* of effect may be debated, the removal *affects* the health and safety of workers. The Applicants argued that it was, and is, manifestly reasonable to expect such an effect. Therefore, the Applicant submitted that the answer to question 1 must be "Yes".

Question 2: Did Woolworths Group consult (as required by the Agreement) affected employees over changes to the anti-fatigue matting equipment in the ACO area and Door Greeter area?

[86] The Agreement provides at clause 2.2.1(d):

> "Where any proposed changes to equipment, substances or work practices may reasonably be expected to affect team members' health and safety, or when a decision is made to renovate a store, **BIG W will consult with the team members concerned**, the Health and Safety representatives, the Store Safety Committee and the SDA. **This consultation will aim to identify and resolve potential health and safety problems**." (emphasis added by the Applicants).

[87] The Applicants noted that consultation is not perfunctory nor of little import. The Applicants referred to the recent decision of the Full Bench in *CFMMEU & Anor v Mt Arthur Coal*,[2] stating it is apposite. The Full Bench in this matter conducted an analysis of decisions on the issue of consultation, in the context of a health and safety matter, summarising propositions from those cases at [108]:

> "**[108]** The following propositions may be drawn from these cases about what constitutes consultation:
>
> - the content of any specific requirement to consult is necessarily dictated by the precise terms in which such a requirement is expressed; the nature of the factual or legal issues the subject of the requirement; and the factual context in which the requirement is exercised, including the particular circumstances of the persons with whom there must be consultation
>
> - a responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they may be taken into account

- the consultation needs to be real; it must not be a merely formal or perfunctory exercise

- even though management retained the right to make the final decision, it is not to be assumed that the required consultation was to be a formality. Management has no monopoly of knowledge and understanding of how a business operates, or of the wisdom to make the right decisions about it. The process of consultation is designed to assist management, by giving it access to ideas from employees, as well as to assist employees to point out aspects of a proposal that will produce negative consequences and suggest ways to eliminate or alleviate those consequences

- the party to be consulted [must] be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon

- while the word 'consultation' always carries with it a consequential requirement for the affording of a meaningful opportunity to the party being consulted to present those views, what will constitute such an opportunity will vary according [to] the nature and circumstances of the case. In other words, what will amount to 'consultation' has about it an inherent flexibility

- a right to be consulted, though a valuable right, is not a right of veto

- the consultation obligation is not concerned with a likelihood of success of the process, only to ensure that it occurs before a decision is made to implement a proposal

- an ordinary understanding of the word "consult" would suggest that the obligation to consult does not carry with it any obligation either to seek or to reach agreement on the subject for consultation. Consultation is not an exercise in collaborative decision making. All that is necessary is that a genuine opportunity to be heard about the nominated subjects be extended to those required to be consulted before any final decision is made

- the requirement to consult affected workers would … not be satisfied by providing the employees with a mere opportunity to be heard; the requirement involves both extending to affected workers an opportunity to be heard and an entitlement to have their views taken into account when a decision is made

- genuine consultation would generally take place where a process of decision-making is still at a formative stage

- the opportunity to consult must be a real opportunity not simply an after thought

- consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal

- there is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, 'this is what is going to be done' and saying to that person 'I'm thinking of doing this; what have you got to say about that?'. Only in the latter case is there 'consultation'

- it is implicit in the obligation to consult that a genuine opportunity be provided for the affected party to attempt to persuade the decision-maker to adopt a different course of action. If a change has already been implemented or if the employer has already made a definite or irrevocable decision to implement a change then subsequent 'consultation' is robbed of this essential characteristic

- any offer to consult in relation to the matter was in the context that the respondent had already made an irrevocable decision, then the party had not, to use his Honour's words, consulted about the decision in any meaningful way."

[88] The Applicants noted that the Full Bench went on to say:[3]

> "**[109]** The list set out above does not purport to be an exhaustive statement of the elements underpinning the content of an obligation to consult. We also observe that some industrial instruments and the model consultation term provide that the trigger for an obligation to consult is the making of a definite decision. As we note below, the specific requirement to consult is determined by the context."

[89] The Applicants submitted that the Respondent failed to comply with any of the above requirements. There has been no consultation. Despite this, in correspondence to RAFFWU on 15 February 2022, the Respondent purported to have met any such obligation through purported discussions during the dispute resolution process. The Applicants argued that this is trite and not conceded. In any event, the RAFFWU has never held out to the Respondent that it holds as readily available the collective wisdom of its members, or all employees affected by the changes.

[90] The Applicants noted, again, that in *CFMMEU & Anor v Mt Arthur Coal* is helpful and apposite. At [192], the Full Bench noted the employer argued:

> "…there is no basis in the evidence to conclude that any further consultation might have resulted in a decision not to direct compliance with the Site Access Requirement."

[91] The Full Bench went on from [193]:

> "[193] The gravamen of the submission put is that any failure by Mt Arthur to comply with its consultation obligations is not determinative of the objective reasonableness of the direction given because there is no basis to conclude that any further consultation might have resulted in a decision not to direct compliance with the Site Access Requirement.
>
> [194] The submission put is misconceived for 2 reasons.
>
> [195] **First, the outcome of any further consultation is not to be simply viewed through a binary prism**; that is, whether or not Mt Arthur would direct compliance with the Site Access Requirement. The terms of the Site Access Requirement itself and the consequences of any failure to comply with it are also matters which may be the subject of amendment, following further consultation. **As mentioned earlier, the responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they can be taken into account; it is not a mere perfunctory exercise.**

[196] Second, **the relevance of a failure to consult to the assessment of the reasonableness of a direction is not determined by the likelihood of the success of further consultation, it is sufficient if the failure to consult denied the Employees the possibility of a different outcome**. As the High Court held in Stead v State Government Insurance Commission, in the context of a denial of natural justice:

> '… if the Full Court is properly to be understood as saying no more than that a new trial would probably make no difference to the result, their Honours failed to apply the correct criterion. **All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome**. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result.'

[197] In QR Ltd v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia (QR Ltd) the Full Federal Court considered the consequences of a failure by QR Ltd to consult with employees as required by clause 36 of the QR Limited Traincrew Union Collective Workplace Agreement 2009 (the QR Agreement). The requirement to consult arose from an announcement by the Queensland Premier that the group of government-owned rail corporations would be partially privatised. Clause 36.2 of the QR Agreement provided, relevantly, that 'The Company will consult with affected employees and, at the employees' election, their nominated representatives, over any proposed changes that will have an impact on employees' terms and conditions of employment'. The proceedings in the Federal Court sought the imposition of pecuniary penalties under s.546 of the FW Act for contravention of the obligation to consult. The primary judge upheld the claim. On appeal Keane CJ and Marshall J held:

> '… the exigencies of implementing that [privatisation] decision necessarily gave rise to matters for decision by the appellants which fell within the scope of the consultation obligation …
>
> **the employees were entitled to an opportunity to urge a different approach to the implementation of the privatisation decision. There may have been little likelihood that the QR employers would be persuaded to take a different position, given the attitude of their shareholders, but cl 36.2 is not concerned with the likelihood of success of the consultative process. It is concerned simply to ensure that consultation occurs, before a decision is made to implement a proposal**.'

[198] **Their Honours went on to observe that a requirement to consult employees 'constitutes an intrusion upon the managerial prerogative of employers; but the legitimacy of such intrusion and the importance attached to such provisions has long been recognised'**, citing Murphy J in Federated Clerks' Union (Aust) v Victorian Employers' Federation, where his Honour said:

> 'During this generation, there has been an accelerating trend towards concentration of economic power in fewer and fewer persons. The growth of the great national corporations, their mergers and expansion into transnationals have transformed the methods of production, distribution and exchange. The power of the greatest corporations transcends that of most governments. **A reaction to the submergence of the individual worker is the demand by organized workers for some share in deciding what work is to be done, by whom and when, where, and how it is to be done. The thrust of the demand is not merely the improvement in existing pay and conditions. It extends to the protection of jobs, for themselves treated as more than**

> **wage-hands — to be treated as men and women who should be informed about decisions which might materially affect their future, and to be consulted on them. It is a demand to be emancipated from the industrial serfdom which will otherwise be produced by the domination of the corporations; a demand to be treated with respect and dignity**.'
>
> [199] Mt Arthur's **failure to meaningfully consult with the Employees denied the Employees the opportunity to influence the Respondent in its decision-making process and the possibility of a different outcome**. We are not persuaded that further consultation could not possibly have produced a different result.
>
> [200] Further, unlike the situation in QR Ltd, the decision to introduce the Site Access Requirement was not imposed on the Respondent by an external decision-maker through a public health order but was made by the Respondent (in association with BHP) as part of BHP's organisation-wide response to the COVID-19 pandemic." (emphasis added by the Applicants) (footnotes omitted).

[92] The Applicants contended that the Respondent has not consulted (at all) about the removal of the matting from the ACO area and the Door Greeter area, nor any change to work practice which would purportedly remove the need for matting in the ACO area. The Applicants' position is that it is manifestly clear that consultation might possibly arrive at a different outcome. This is clearly so given the temporary return of the Door Greeter matting and the use of ACO area matting in many other stores. The Applicants argued that there may be other solutions or arrangements which could have been identified through proper and meaningful consultation. Accordingly, the Applicants submitted that the answer to question 2 must be "no".

Question 3: Is Woolworths Group maintaining healthy and safe working conditions by removing the anti-fatigue matting from the ACO area and Door Greeter area?

Question 4: Is it unjust or unreasonable for Woolworths Group to remove the anti-fatigue matting from the ACO area or Door Greeter area?

[93] The Applicants noted that BIG W states it aspires to be a great place to work, and it holds responsibility for contributing to an environment where everyone at BIG W is treated with dignity, courtesy and respect. This is reflected as a term in cl 2.1 of the Agreement.

[94] The Applicant referred to clause 2.2 of the Agreement, which states:

> "2.2.1 BIG W and its team members are committed to achieving and maintaining healthy and safe working conditions in all BIG W workplaces by abiding by all relevant Occupational Health and Safety legislation.
>
> (a) This commitment will have the following objectives:
>
> (i) To control workplace hazards at their source.
>
> (ii) To reduce the incidence and costs of occupational injury and disease.

(iii) To provide an occupational rehabilitation system for workers affected by operational injury or illness."

[95] The Applicants noted in the decision of *NTEU v University of Sydney*,[4] Alsop CJ in the majority, in discussing an 'aspirational' statement of commitment by the parties to the 'protection and promotion of intellectual freedom', found that:[5]

> "…The freedom and rights are not so uncertain or indefinable as to be incapable of legal characterisation or as to make an assessment of a contravention or not of the commitment impossible. A breach of an express undertaking to do something, the boundaries of which are unclear may be hard to prove, but it does not follow that the undertaking is legally unenforceable or lacking in enforceable content: see for example, in the context of an express obligation to negotiate the resolution of contractual differences in good faith, *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177; 74 NSWLR 618 at 639 [74]."

[96] The Applicants argued that clause 2.1 of the Agreement is a firm commitment by the parties to achieve and maintain healthy and safe work conditions, with particularised objectives. Though those commitments are broad and the action the parties are to undertake to uphold that commitment are not defined, the Applicants contended that they are of wide import and clearly amount to an enforceable obligation on behalf of BIG W and its employees in the vein of the Full Court's decision in *NTEU v University of Sydney*.

[97] In making the Agreement with its employees, the Applicants stated that BIG W undertook to achieve and maintain a safe workplace. It submitted that it is clear that removing a safety control, without more, is a failure to maintain the safety qualities imbued by those controls. As such, BIG W's removal of the mats is, according to the Applicants, not permitted by the Agreement and it is required to return the mats to its original place in the ACO area. Further, the Applicants argued that it will be required to keep a mat in other places in the store because the mats are, in combination with supportive shoes, appropriate exercise and stretching, and sufficient breaks, inimitably useful in maintaining BIG W's health and safety culture in the Noosa store.

[98] The Applicants argued that anti-fatigue safety matting is an essential component of the safety equipment in a BIG W store. It has been used successfully in the ACO area/self-service area of BIG W Noosa for over a decade. It is used in the ACO area and Door Greeter area of other Big W stores across the country. The experience of workers is that matting relieves pain and discomfort. The Applicants stated that research shows matting relieves pain and discomfort and also reduces adverse physiological events such as injury and illness. By removing the matting, the Applicants submitted that the Respondent is not maintaining a healthy and safe working environment.

[99] To the extent that requirement is read down to be through compliance with OHS laws, the Applicants submitted that the duty of care in legislation is only met by the provision of such matting. Further, the removal of matting has a disproportionate and negative impact on older workers, women and shorter workers. In reference to clauses 2.4 and 2.5 of the Agreement, the Applicants submitted that this is contrary to the commitment at clause 2.1 that everyone will be treated with dignity, courtesy and respect. The Applicants argued that workers do not feel valued, respected and empowered (as required under clause 2.5.1). The removal, and statements by the Store Manager, manifest as inappropriate workplace behaviours.

[100] The Applicants argued that the failures by the Respondent are occasioned by its removal of the matting. Fundamentally, it has not maintained a healthy and safe working environment despite its commitment. For these reasons, the Applicants argued that the answer to question 3 must be "no".

[101] In addition, including in the alternative, the Applicants submitted the impost by the employer of a work environment without the matting (by its removal) is an unreasonable and unjust impost on workers. The Applicants argued that workers have an entitlement to attend work and not have their health and safety unreasonably impacted. The matting does not create a genuine hazard and specifically alleviates pain and discomfort. The Applicants submitted the true rationale for the removal is in plain sight. It is not a trip hazard. The Applicant contended that the Respondent's statement that the matting is "a magnet for workers", provides no basis for the elimination of important safety equipment. It may be a matter for training or even disciplinary counselling.

[102] The Applicants argued that the matting itself played a crucial role in pain and discomfort relief, and in injury or illness prevention. It plays that role temporarily at the Door Greeter area in BIG W Noosa. It plays that role in many ACO areas and Door Greeter areas at BIG W stores across Australia. Thereby, the Applicants submitted that the answer to question 4 must be "yes".

Applicants' reply submissions

[103] I consider it appropriate to summarise the Applicants' reply submissions towards the end of the Respondent's material, to provide better understanding.

Summary of the Respondent's submissions and evidence

Evidence of Mr Mielnik

[104] Mr Mielnik is employed by the Respondent as the BIG W Noosa Store Manager. He has been in the role since February 2016. There are approximately 85 employees at the store, most working part-time.

[105] Mr Mielnik reports to Mr Brett Bartlett, North Region 3 Manager. Mr Bartlett reports to Ms Tanya Atkinson, State Manager.

[106] Mr Mielnik agreed that anti-fatigue mats were present at the self-service checkout area when he first commenced working at the Noosa store in 2016.

[107] On 9 June 2021, Mr Bartlett and Ms Atkinson did a walk-through the Noosa store while on a visit. A walk-through consists of a tour of the store (front and back), generally on a monthly basis, where business activities are discussed, together with store improvement opportunities and miscellaneous issues.

[108] During the visit, Mr Bartlett and Ms Atkinson informed Mr Mielnik of upcoming changes to the self-service checkout area following a pilot trial at some other Big W stores. The changes were to create a better customer experience. The key goal of the change was to

enable team members to be more actively involved with customers, rather than reactive in responding to customer issues.

[109] As part of the change, Mr Bartlett and Ms Atkinson explained that the computer terminal would be removed. Mr Mielnik explained that this had already occurred in May 2021 as the computer had been required elsewhere.

[110] Mr Mielnik's evidence is that both Mr Bartlett and Ms Atkinson directed him to remove the anti-fatigue mats from the self-service checkout area and the door greeter area. They both informed him that in their view, the mats encouraged team members to stand still at the location of the mat. They stated that the team members should be actively engaging with customers, not stationary at one location.

[111] Mr Mielnik stated that Mr Bartlett's and Ms Atkinson's observations of staff behaviours when the mats were in place were consistent with his own observations. He did not state in this part of his evidence what his observations were, however, I assume it is the effect that he did not want employees returning to the mats and wanted them to be mobile.

[112] According to Mr Mielnik, both Mr Bartlett and Ms Atkinson concluded that because the computer was no longer there and not required, the mat did not need to be there anymore. They both explained that the mat could become a trip hazard to employees and customers.

[113] Following the meeting, Mr Mielnik sent an email to his line managers as follows:

> "Remove Rubber Mats from SCO & Customer Greeter. Mats encourage team to stand in one place, they are required to be mobile due to safety and not standing in one place for periods of time."

[114] To the best of his knowledge, the mats were removed from the two areas by Ms Henwood on or around 10 June 2021.

[115] Mr Mielnik produced records of when Ms Hart was rostered to work in the self-service area, later knows as the ACO area. He stated that it accounted for approximately 4% of her rostered time. He accepted that Ms Hart often relieves staff in the ACO area. He does not recall seeing Ms Hart work more than 45 minutes daily in the ACO area.

[116] Ms Hart approached Mr Mielnik in mid-June 2021, asking why the mats had been removed. Mr Mielnik responded:

- The mats encouraged team members to stand still at the location of the mat and team members should be actively engaging with customers and not stationary in one location;
- The computer had been removed and as a result the mat didn't need to be there anymore; and
- The mat could be a trip hazard to team members and customers.

[117] He recalled Ms Hart responded, *"It is good to stand still for five minutes. I would prefer to have the mat."*

[118] Ms Rafiqi later approached Mr Mielnik to discuss the issue. He considered that he has a good working relationship with Ms Rafiqi and understood why she would want to represent RAFFWU members in discussing the issue.

[119] Mr Mielnik does not recall suggesting to Ms Rafiqi that if employees could not work without the mats, they might be found to be incapable of doing their job. He does not consider that as something he would say as he always tries to accommodate employees' medical conditions.

[120] Mr Mielnik cannot recall which other staff members he discussed the removal of the mats with, but if he did, it was after the mats had been removed. He considered that he provided a consistent message.

[121] In July 2021, Mr Mielnik received a training package associated with the changes Mr Bartlett and Ms Atkinson had foreshadowed. Mr Mielnik delegated the training to Ms Henwood, directing her to lead the initiative, consult with team members and implement the changes.

[122] Mr Mielnik recalled that he conducted a store huddle in July 2021. He does not think he would go off-script. His statement included the following relevant material which he considered he delivered to the team. There does not appear to be any reference to removal of mats:

> **"EXPLAIN** the changes happening for the service team and what that means for your team
> ● We are changing from **Self** Checkouts to **Assisted** Checkouts
> ● Service team need to always be actively serving customers at the ACO to give our customers a great experience
> ● The service team may need us to help so they can focus on serving customers
>
> *As you all know our service team members make sure that every customer has a great experience at the checkouts, and to really give our customers their full attention, things can get a little busy, or they might need some extra help or expertise. This might be lending them a hand by helping service on the checkouts when it's busy, or bringing essential items down to the checkouts for them or our customers, or simply helping to explain something about a product or service a customer is asking about.*
>
> *It is very important that we are there to help them in any way we can, because that's what showing real care for our team and customers is all about.*
>
> **ASK** *What are some ways you might be able to serve the service team?*
>
> Look for answers such as quickly attending service calls, bringing down extra bags or drinks for the fridges, offering to help when they see it is busy at the checkouts.
>
> *What are some of the tools we can use to make it easier?*
>
> Look for answers such as using Push-To-Talk and RF units.
>
> **EXPLAIN** how to use push to talk and give them some tips on appropriate use.

Remember you have them, many of us have worked for years by walking through the shop to ask someone something. It's a new habit to use push-to-talk to get an answer quickly for a customer or another team member. To help, here are some tips on how we can get better at using push-to-talk.

When using push-to-talk, keep the communication short and succinct - remember everyone is sharing the same channel, and there may be a customer waiting for the answer, don't take too long explaining what you need.

It's great when team can share updates through the day - eg "If anyone is asking, we've just moved the toy item on page 6 of the catalogue to the front of the aisle next to the teddy bears "

Avoid taking them into the bathrooms. If you need to pass it onto someone else, ensure it's cleaned beforehand.

ASK *What are some things that might get in the way of you serving your teammates?*

Answers might include - busy with a customer myself, I have a full load to fill, I need to finish this online order before I go home, I am on a break...

EXPLAIN how you will support your team to always do the right thing to support their fellow team members

Sometimes being called for help might make you feel under pressure or overwhelmed about being taken away from what you are doing.

I'm here to tell you that it's absolutely ok by me if you need to stop what you are doing and help your teammates when they need you, in the same way that it's ok to stop and help a customer. If that means that you don't get to finish your work, that's ok too. Just let me know so I can make sure I can plan for a team member to pick up where you left off.

Remember to use the push-to-talk if you need to communicate with someone if you are with a customer and cannot go to help straight away. Also please always make sure that if you need to leave what you are doing that the area is safe and tidy before you go.

ASK *What are you going to do now to serve your teammates?*

Do you have any questions about anything we have discussed?

EXPLAIN that they can come to you any time with questions.

Thank the team for participating and encourage them to continue thinking of ways they can show real care for their teammates and support each other."

[123] Following the correspondence sent from the RAFFWU raising the removal of the mats as an issue, Mr Mielnik sent his correspondence to the RAFFWU in September 2021. His correspondence included there having been an assessment that the mats constituted a trip hazard and they should never have been placed there. He considered that removal of the mats did not require consultation. Mr Mielnik discussed the RAFFWU's concerns with the Respondent's employee relations manager, and it was decided that the store greeter mat could be returned.

[124] Since the dispute has escalated, Mr Mielnik has not instigated discussions with affected staff members. Where team members have asked about the removal of the mat, he explained that the mats have been removed for the reasons given at [116].

[125] In response to witness statements of Ms Hart and Ms Rafiqi, Mr Mielnik agreed that shifts in the ACO are typically of five hours and can be up to eight hours in length.

[126] Mr Mielnik stated that he did not consult with Ms Rafiqi about the removal of the mats because she does not work in the ACO area. He did not consult more broadly as he considered that the earlier removal of the computer in the ACO area correlated with the mat no longer being required. He considered that Ms Henwood consulted with affected staff members.

[127] Mr Mielnik considered that there is no reason for any mat of any size to be in the ACO area. Further, he stated that the only items on the counter within the ACO is the roster and the security detagger. He considered that reviewing the roster or using the detagger for removing a security tag should not take longer than one minute.

[128] Mr Mielnik disagreed with Ms Hart's evidence that when in the ACO area, employees might only use the mats for 2-3 minutes over a shift. Mr Mielnik stated that he had observed some team members treating the mat as their allocated standing position and they would only attend to customers when customers actively sought assistance, before returning to the mat. Mr Mielnik was not able to say which employees he had observed engaging in a practice he was not comfortable with.

[129] In oral evidence given during the hearing, Mr Mielnik stated that store huddles occur at 8:30am. The ACO team members who would have participated in the store huddles would have been Ms Dunstan, Ms Budgen, Ms Edwards and Ms Dally.

[130] He accepted that Ms Hart would sign out of her usual stationary register to later assist in the ACO area, and this would not have been rostered. He has not run a report on how many hours per day Ms Hart works in the ACO area, despite not being rostered to the area. He does not think she would work 1 hour and 45 minutes per day in the ACO area.

[131] Mr Mielnik stated that he was given a directive to remove the mats by Mr Bartlett and Ms Atkinson. When asked why he has not returned the mat to the ACO area, he responded, *"I could be putting myself at risk if I returned it."*

[132] Mr Mielnik agreed that the mat is equipment. He is not aware of any safety reports where it has been alleged or determined that an employee or customer has tripped over a mat.

[133] Mr Mielnik stated that he understood the training pack came out on 28 July 2021. This is a period of approximately seven weeks following the removal of the mats. Ms Farjardo, Employee Relations Manager said that he could return the door greeter mat, so he did.

[134] Mr Mielnik stated that he feels frustrated by the issue. He accepted that Ms Hart gets relief from standing on the mat, even if only for a few moments. He said that he respects the views of Ms Hart and Ms Rafiqi.

[135] In closing, Mr Mielnik stated he thought it was okay to remove the mats. He didn't see it as a major workplace change. He also repeated that he was directed to do so.

Evidence of Ms Henwood

[136] Ms Henwood is employed as Second in Charge at the Big W Noosa store. She has worked in various Big W stores since 2003. She has been in her current role since November 2020.

[137] The ACO has eight checkouts, but only five are used except in busy periods such as Christmas. Ms Henwood explained that prior to June/July 2021, the area was known as Self Checkouts or SCO. The team member working in the area was primarily responsible for assisting customers but would also perform minor administrative tasks on the computer. When using the computer, the staff member would have their back to customers. The administrative tasks were not onerous, with Ms Henwood estimating they might take approximately 25 minutes per day.

[138] Ms Henwood observed that staff members would return to the mat, and she thought the staff might think it was their allocated position.

[139] Ms Henwood recalled learning of a trial within stores where the non-customer facing roles were being removed from the SCO area. She recalled learning in around June 2021 of the proposed change to call the area ACO area and being offered greater assistance by staff members. Ms Henwood had always considered it important the staff members move around in the area and not be stationary.

[140] Separately, in May 2021 the computer in the SCO area had been removed and was being put to better use elsewhere.

[141] On 9 June 2021, Ms Henwood received an email from Mr Mielnik, including the direction to remove the mats at [113]. Ms Henwood removed the mats from the two areas the next day. Over the course of that day and the following days, Ms Henwood had discussions with Ms Dunstan, Ms Budgen, Ms Edwards and Ms Dally, the supervisors who predominantly work in the ACO area. She explained to them that a decision had been made to remove the mats because:

- they encouraged team members to be stationary in one location and on account of the computer having been removed there was no need to be stationary in the ACO area;
- the ACO Supervisor role was required to be more customer facing and proactive;
- ty being more actively involved with customers there would be a decrease in theft;
- the ACO area would be like working elsewhere in the store, moving around; and
- the mat was a potential trip hazard to customers.

[142] Ms Henwood recalled Ms Dunstan saying, *"I guess I'll have to put my inserts back in."*

[143] Ms Henwood disagreed with Ms Hart's estimate of the time she spends in the ACO area. She estimated she might spend 30 minutes there covering breaks and around 45 minutes when the tills are being counted.

[144] Ms Henwood recalled receiving training information in July 2021. She recalled providing information at the front of the store and leaving the material for Ms Dunstan, Ms Budgen, Ms Edwards and Ms Dally, suggesting they could read it. At a store huddle held in July 2021, with Mr Mielnik leading, Ms Henwood cannot recall any person complaining about the removal of the mat.

[145] The material referred to by Ms Henwood and stated by Mr Mielnik in his oral evidence to have been provided on 28 July 2021, makes reference to how employees might feel with the move from SCO to ACO. The material acknowledged that employees might feel anger towards the changes, they might wish to bargain, and they should, according to a graph, accept the changes.

[146] The material states that the change is Big W-wide and has been developed by the Simpler for Stores Team. The changes include:

> "➔Renaming to Assisted Checkout (ACO)
> ➔ Rebalancing non-customer facing tasks to enable team at ACO to focus on serving our customers
> ➔ Introducing a flexible service model at ACO with a 5 to 1 ratio
> ➔ Providing role clarity and training to our service team members
> ➔ Empowering everyone to work end to end as one team to serve our customers"

[147] The training material goes on to say:

> "The specific changes include (talk through key examples):
>
> ● Fatigue Mat Removal
> ○ Service model requires team to be active in the space
> ○ Safety identified mat's were a trip hazard
> ○ Removal of PC no longer requires team to stand in one location
>
> ……
> ……
>
> **Next steps**
> Training will take place for all Service Team Members on the new ACO service model on (insert dates).
>
> **Questions**
> ● How are you feeling about the changes?
> ● Is there any further training that you require?
> ● Do you have any further questions?"

[148] A separate document, a PowerPoint slide in Ms Henwood's material makes no reference to the removal of the mat in the ACO area. The Facilitator's Guide to the PowerPoint presentation made no reference to the removal of the mat in the ACO area.

[149] In oral evidence given during the hearing, Ms Henwood recalled discussing the removal of the mats on 10 June 2021 with Ms Dunstan and Ms Budgen. By the time Ms Dally arrived she said that she knew.

[150] In Ms Henwood's view, employees in the ACO area should 'always' be moving around. She said, *"There's always stuff to do."*

[151] Ms Henwood accepted that she only spoke with the four ACO area Supervisors. She agreed Ms Dunstan made the comment about her now needing to use inserts in her shoes. She could not recall Ms Dunstan adding, *"because the mats make a real difference."*

[152] Ms Henwood conceded that she is not aware of any person tripping on a mat in the ACO area. She understood that there has not been a risk assessment performed.

[153] With respect to the training presentation, she said she went through it with Ms Dunstan and Ms Dally. She thinks Ms Budgen might have been around. During the store huddle facilitated by Mr Mielnik, she spoke to the facilitator's guide. She accepted that the mat had already been removed.

[154] Ms Henwood has now asked Ms Dally how long it takes for her to do the daily count and received an answer of up to 45 minutes. She stated that Ms Dally is good at the task. Ms Henwood stated that in addition to the four ACO area Supervisors, another four or so employees can work in the ACO area when relieving over the day.

Evidence of Robert McFarland

[155] Mr McFarland is employed by the Respondent as a Program Manager for its Simpler for Stores program. The Simpler for Stores team is responsible for process improvements across the Big W network. Mr McFarland is responsible for the planning and execution of programs and projects that deliver new business processes, systems and infrastructure.

[156] It was determined that improvement could be made to the self-service checkout area. If a team member provided more assistance to customers it would improve customer satisfaction and also prevent theft. The Respondent is aiming for a 15% reduction in theft year on year.

[157] Mr McFarland and other members of the team visited other retailers and observed their self-service checkouts. The team observed that none of the other stores had a counter or computer located in the self-service checkout area, nor did they have anti-fatigue mats. The team members appeared to Mr McFarland to be more engaged with customers than Big W team members are.

[158] The Simpler for Stores team undertook a "proof of concept", involving a comprehensive review to see if some activities in the self-service area could be reallocated. The aim was to reduce the number of non-customer activities.

[159] It was determined to change the name from SCO to ACO, as self-service implied to Mr McFarland that customers are not being served in the self-service checkout. The Respondent's customer satisfaction analysis informed them that only 20% of customers rate a positive experience in the self-checkout area. In stores where a pilot change to ACO's had occurred, 80% rated a positive experience.

[160] Mr McFarland stated in his evidence that his team determined that the anti-fatigue mat should be removed for the following reasons:

- The mat was no longer required because the computer within the ACOs was to be removed. Once the computer was removed there was no longer any need to have the anti-fatigue mat as the mat was only necessary in locations where team members would be stationary for extended periods of time; and

- The mat tended to act as a signpost or indicator for where team members should be standing. The purpose of the move from SCO to ACO was to encourage team members to be active in the space rather than be reactive and waiting for customers to request assistance.

[161] Store-specific communications were prepared to assist Big W managers understand the change and explain it to staff members. A Store Huddle Communication, Discussion Points, Training Presentation and Facilitators Guide were all prepared.

[162] Mr McFarland's evidence was that the Discussion Points document complemented the Store Huddle Communication, providing discussion points for the Store Manager and Second in Charge for their consultation with Service Supervisors and Self-Checkout team members.

[163] Mr McFarland stated that the transition from SCOs to ACOs commenced in Queensland in mid-2021. He said that the national rollout occurred by November 2021. He stated that he wasn't aware of any complaints of removal of the anti-fatigue mat from any store other than Noosa.

[164] It should be noted that Ms Rafiqi's first witness statement attaching pictures of many stores across many states having the anti-fatigue mat present in the ACO area was not addressed by Mr McFarland in his witness statement. Ms Rafiqi's witness statement attached photos taken in early February 2022 and her statement is dated 18 February 2022. Mr McFarland's statement is dated 11 March 2022. There is no explanation as to why Mr McFarland stated that the national rollout occurred by November 2021 when mats were still present in many stores in February 2022.

[165] In oral evidence given the during the hearing, Mr McFarland was asked questions with respect to the document titled, *"Assisted (Self) Checkout Changes".* He agreed that the document discussed 'consultation' however affected employees in the Noosa store were informed of the change that had already occurred. He said that the 'Safety Team' had said the mat was a trip hazard. He holds no OH&S qualifications.

[166] Mr McFarland was asked what was investigated at other stores such as Kmart, Coles etc. He replied that he put the information together and team he manages does the work. There is no report of what the team discovered at competitor's stores. Mr McFarland visited a couple of stores.

[167] When asked what a 'proof of concept' meant, he stated that he didn't have anything to do with it.

[168] During questioning of Mr McFarland, it became apparent a document he thought he had included in his witness statement was not included. I permitted it to be filed and shared with the parties. The document is titled, *"Customer Led Rostering for Checkouts"*. It is dated July 2021. It is a PowerPoint slide, and it documents the change from SCO to ACO. It includes the change curve, earlier referred to where employees can be expected to resist change, perhaps being in denial, angry and depressed, until they bargain and then accept the change. Bargaining is said to include:

- Struggle to find meaning
- Reaching out to others
- Telling their own story

[169] The document planned a week-by-week progression of the initiative. Week 6 would see an update, week 8 would see an acceleration of the use of push to talk tool across the store and would also see the ACO introduced to the store with training of the service team. Week 9 would see the anti-fatigue mat in the ACO area removed. I understand the weeks to reset each July.

[170] Below is exactly what the PowerPoint document, prepared in July 2021 and shared between senior management states:

What is changing?	**Why is it changing?**	**What is our new way of working?**	**What do we need to do?**	**When does the change take place?**	**Resources**
Anti-fatigue mats at the ACO are will be removed	To encourage active service and mobility in the ACO area	Team to move around the area and interact with customers	Remove anti-fatigue mats at ACO only, roll up and store in stock room. All other anti-fatigue mats must stay in place.	Week 9	Consultation pack

[171] In evidence given during the hearing, Mr McFarland stated that week 9 occurs in late August.

[172] Mr McFarland conceded that the anti-fatigue matting is equipment.

Evidence of Ms Atkinson

[173] Ms Atkinson's witness statement was made on 5 April 2022 following the first day of hearing. She attended and gave oral evidence on 6 April 2022.

[174] Ms Atkinson is employed by the Respondent as State Manager (QLD, NT and NSW). She oversees 55 stores and commenced in the role in November 2018.

[175] Ms Atkinson stated that she is aware of the dispute involving the removal of the anti-fatigue mat in the ACO in the Noosa store, but she does not have any specific recollection of the circumstances as to why it was removed. That is, I note, despite it being at her direction.

[176] She stated that she expected the anti-fatigue mat was removed from the Noosa store as part of a number of changes that were being rolled out across all Big W stores nationally in 2021. Again, not having any recollection of the removal of the mat, she stated that her usual practice would be to explain the reasons for making any directions to store management.

[177] Ms Atkinson said that an anti-fatigue mat is no longer permitted in any ACOs because:

- The role of the team member is not a stationary one. The mats are designed for prolonged periods of stationary standing. Team members in the ACO area should be constantly moving and not stationary.
- The mat may be a trip hazard in the ACOs due to the high volume of foot traffic and the number of trolleys that pass through the area; and
- The computer was removed.

[178] Ms Atkinson stated that she regularly visits stores. She said it's not always possible to see if there is an anti-fatigue mat in the ACO area unless she walks through it. She said if she were to see an anti-fatigue mat in one of her stores, she would direct that the mat be removed.

[179] Having seen Ms Rafiqi's witness statement with photographs of numerous stores under Ms Atkinson's control, with anti-fatigue matting in the ACO in February 2022, Ms Atkinson directed that all of the mats be removed. I understand this direction to have been given on 5 April 2022, following the first day of hearing on 4 April 2022.

[180] With respect to the Big W stores at Carindale and Capalaba, she was informed that those stores did not remove the matting as part of the roll-out in 2021. She stated that this was contrary to directions given. With respect to the Chermside and Taigum stores, the respective store managers have received medical advice to the effect that an anti-fatigue mat is required for two team members who have a back injury and knee injury, respectively. The anti-fatigue mat is used only for those team members' shifts but is otherwise then put away.

[181] In oral evidence given during the hearing, Ms Atkinson confirmed that she does not hold any OH&S qualifications.

[182] Ms Atkinson agreed that at the time the mat was removed from the Noosa store in June 2021, no consultation had taken place with affected employees. Further, no risk assessment with respect to the mat being in the ACO area had occurred. She accepted that the anti-fatigue mat can be an important safety equipment.

[183] She accepted that it would require an individual assessment to determine if a mat was a trip hazard. She accepted that she did not know if the mat in the ACO area at the Noosa store was a trip hazard.

[184] In oral evidence she confirmed that on 5 April 2022 she directed matting be removed from stores where matting was in place unless there were extenuating circumstances.

[185] Ms Atkinson stated that when holding discussions with store managers on 5 April 2022, she mentioned that there was a training pack detailing consultation with employees. She did not inquire of the store managers if they had consulted with employees as per the training pack.

[186] She accepted that if there are extenuating circumstances, an employee may use a mat in the ACO. She agreed that she did not ask if extenuating circumstances existed at the Noosa store.

[187] With respect to the PowerPoint presentation available for staff, she accepted that it did not reference removal of the mat in the ACO area. Further, with respect to the document at [122], she accepted that it does not make any reference to tripping as being a reason for the removal of the mat in the ACO area.

Evidence of Mr Bartlett

[188] Mr Bartlett's witness statement was made on 5 April 2022 following the first day of hearing. He attended and gave oral evidence on 6 April 2022.

[189] Mr Bartlett is employed by the Respondent as an Area Operations Manager. He oversees 14 stores in Queensland. He stated that in the second half of 2021, changes were made across the stores nationally, including removing anti-fatigue mats in ACOs. He noted that he was not responsible for the decision to make the changes nationally, however he was responsible for implementing the changes in the stores he managed.

[190] Mr Bartlett understood that there were three reasons for removing the mat in the ACO areas of stores:

- The staff computer had been removed;
- There was a drive to encourage better customer service in the ACO areas due to customer feedback and the removal of the mat encouraged mobility and active service of customers; and
- The mat had the potential (at least in some stores and depending on the layout of particular ACO) to present a trip hazard given the ACOs is a high traffic area.

[191] Mr Bartlett cannot recall the circumstances of when the direction was given to remove the mat from the ACO area at the Noosa store. That is, I note, despite it being at his direction in concert with Ms Atkinson. He has reviewed his records and notes that he travelled in the area around 9 June 2021, so accepts it would have been at that time.

[192] In oral evidence given during the hearing, Mr Bartlett confirmed that he does not hold any OH&S qualifications. He accepts that he did not consult with employees when the direction was given to remove the mat in early June 2021.

[193] He does not consider anti-fatigue matting to be important safety equipment.

[194] He cannot recall any discussion regarding returning the anti-fatigue mat to the door greeter area in the Noosa store.

Respondent's submissions

[195] The Respondent noted that it is the Applicants' allegation that Big W has failed to meet various safety, consultation and equal opportunity obligations that apply to it under the Agreement, or otherwise acted unreasonably. Those allegations relate to the Respondent's removal of an anti-fatigue mat located within the area housing self-checkout registers at its Noosa store.

[196] The Respondent explained that the anti-fatigue mats are a work health and safety control measure that reduce risks associated with stationary and prolonged standing. However, the role of self-checkout attendees was never intended to be a stationary one. Rather, the Respondent submitted that the important operational and customer service considerations demand that staff be actively engaged with customers when supervising their use of self-checkout registers. The Respondent determined that the removal of the anti-fatigue mat from the self-checkout area was entirely appropriate.

[197] Although framed as a general enterprise agreement dispute, the Respondent asserted that the Applicants' probative evidence is limited to pressing their complaints by reference to their own immediate interests. However, those immediate interests were not materially affected by Big W's removal of the anti-fatigue mats. The Respondent thereby submitted that there is no basis, and no utility, for the Commission to now intervene. That is not least because the Applicants have not particularised the relief that they seek, and which cannot extend in any event beyond the Noosa store.

[198] The Respondent advised that anti-fatigue mats remain in place across the Big W network in areas where staff are expected to stand in a static way for extended periods of time. There is no risk of their removal from those areas. If any such removals ever occur, they are matters that can be dealt with as part of a fresh dispute process.

[199] The Respondent contended that self-checkouts that are a feature of large retailers across Australia are an important means of reducing labour costs and ensuring that those retailers maintain competitiveness in a changing market. However, they were also identified by Big W as a financial risk. The Respondent stated that inattention by staff assigned to them was assessed as materially contributing to a significant stock loss across the Big W business (in the form of

customers stealing products or deliberately mis-scanning expensive items as less expensive ones). It was also apparent to Big W that its customers were dissatisfied with their experience in using the self-checkout terminals. So much was clear from feedback that Big W was collecting directly from its customers when they used the checkouts.

[200] Having inspected how self-checkouts operated in Kmart, Target, Bunnings, IKEA, Coles and Woolworths, it was apparent to Big W management that the staff within those stores were far more engaged with their customers, and available to support them with the various technical difficulties that might arise when processing a purchase through self-checkout terminals. Big W management assessed that there were two likely explanations for that greater engagement:

- The staff responsible for self-checkouts at the other retailers were required to *only* focus on the customer. There was no distraction from that, including in the form of additional administrative work of the kind undertaken by Big W staff.

- None of the stores operated by Big W's competitors had anti-fatigue mats in the self-checkout areas. Having regard to their own observations of Big W staff, Big W managers assessed that the anti-fatigue mats located within the self-checkout areas acted as a "signpost or indicator for where team members should be standing" and discouraged their active engagement with customers.

[201] The Respondent explained that that assessment led Big W to permanently withdraw staff computers from the self-checkout areas, and to remove the anti-fatigue mats that were located there. The administrative tasks previously undertaken by self-checkout staff were taken over by staff in roles that were not customer-facing. Big W never intended for staff assigned to the self-checkouts to be predominantly static or stationary. Rather, and as was the case across the retail industry, the Respondent were expecting Big W staff to monitor and be actively engaged with those customers who were using self-checkout terminals, and to frequently move between those terminals. The renewed emphasis placed on that as part of the shift from the 'self-checkout' to the ACO was intended to result in a better customer experience and contribute to the loss prevention objective that was the key driver for the review that Big W had undertaken.

[202] In other words, unlike in areas of Big W where staff are expected or required to be stationary for long periods, the Respondent submitted that anti-fatigue mats never had a genuine safety role to play in the self-checkout area. To the extent that they did have such a role, it ended with the removal of the staff computer, and the greater emphasis placed by Big W on checkout staff constantly moving around the ACO area.

[203] The Respondent argued that the extent to which the Applicants seek to rely on the general consultation term in clause 19 of the Big W Agreement is unclear. Even taking the Applicants' evidence at its highest, it cannot be said that the changes described above met the threshold of a **major change** in production, program, organisation, structure or technology that was likely to have a **significant effect** on team members. Rather, the Applicants principally rely on clause 2.2.1(d) of the Big W EA:

> "Where any proposed changes to equipment, substances or work practices may reasonably be expected to affect team members' health and safety, or when a decision

> is made to renovate a store, BIG W will consult with the team members concerned, the Health and Safety representatives, the Store Safety Committee and the SDA. This consultation will aim to identify and resolve potential health and safety problems."

[204] The Respondent noted that the Applicants also rely on clause 2.1.1, which is in the following terms:

> "BIG W aspires to be a great place to work and a great place to shop. We are all responsible for contributing to an environment where everyone at BIG W is treated with dignity, courtesy and respect. To ensure we do the right thing by our teams, our customers and our communities, BIG W has standards and policies that we expect our team members to follow at all times."

[205] The Respondent submitted that the basis for any alleged breach of that clause (if the clause can be said to be enforceable) is not apparent in the Applicants' materials.

[206] The next clause that the applicants seek to rely on is the introductory words of clause 2.2.1:

> "BIG W and its team members are committed to achieving and maintaining healthy and safe working conditions in all BIG W workplaces by abiding by all relevant Occupational Health and Safety legislation."

[207] The Respondent contended that the comparison drawn by the Applicants between that clause and the academic freedom clause in *NTEU v University of Sydney* is inapt. Unlike academic freedoms, the relevant work health and safety obligations referred to in clause 2.2.1 have independent statutory force. There is an insufficient basis to find that the parties to the agreement objectively intended that those statutes, in effect, be incorporated by the Big W Agreement. In any event, and except in the most general terms, the Respondent asserted that the Applicants have not particularised how the removal of mats can be said to have contravened Big W's statutory health and safety obligations.

[208] Finally, the Respondent noted the Applicants rely on clauses 2.4 and 2.5, which, in broad terms, mandate standards of behaviour in respect of diversity and inclusion. The removal of the mats is said to disproportionately impact older workers, women and workers of a short stature.

Assessing the Applicants' evidence

[209] In seeking a binding arbitral determination as to future rights, the Applicants invite a finding that Big W has breached its consultation, safety and equal opportunity obligations under the Agreement. The Respondent considers that to be a serious matter, and therefore requires the Commission to assess the whole of the evidence having regard to the principles in *Briginshaw v Briginshaw*.[6] In other words:

> "The standard of proof remains the balance of probabilities but 'the nature of the issue necessarily affects the process by which reasonable satisfaction is attained' and such satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences' or 'by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion'."[7]

No dispute beyond the narrow interests of the Applicants

[210] The Respondent submitted that in the course of creating substantive rights in a private arbitration under s.739 of the Act, the Commission may only confer such rights on persons covered by the Agreement under which the dispute is brought. That follows from the fact that an enterprise agreement does not impose obligations and is not capable of being contravened other than by a person to whom it applies.[8]

[211] The Respondent advised that the RAFFWU is not a registered organisation, and it is not covered by the Agreement. Its role in this dispute is therefore limited to being a representative of the Applicants only.

[212] The Respondent argued that this dispute is analogous to decisions of the Full Bench that have dealt with disputes brought by employees whose employment has ended. In both *Simplot Australia AMWU*[9] and *Vendrig v Ausgrid Pty Ltd*,[10] the Full Bench held that the Commission does not continue to have jurisdiction to deal with a dispute relating to a former employee once that employee's engagement had ended, unless there remains an extant dispute of general application as between existing parties to the agreement. The Full Bench in *Simplot* held that this is so "particularly where the application is brought by a union and the agreement confers rights on the union to raise a dispute and have it arbitrated by the Commission".[11] The Respondent asserted that no such dispute is brought here. Both Full Benches left open the possibility that continuing employees could agitate general disputes, even where their *immediate* interest might not be directly impacted by the dispute.

[213] I note that the Respondent's submissions were made at a time when *Simplot* was the leading authority on that issue. It no longer is.[12]

[214] The Respondent contended that these cases are important because the Applicants' claim is predominantly based on dissatisfaction said to have been communicated to Ms Rafiqi by other Big W staff. However, that evidence is hearsay (and most of it is unattributed). The Respondent submitted that there is an insufficient evidentiary basis to find that there is *any* dispute that is broader than the particular interests of the two Applicants. For the reasons dealt with below, those narrow interests were not materially affected by Big W's decision to remove the mats.

Application of the Facts to the Relevant Provisions

[215] The Applicants' submissions reference the '*Managing the Work Environment and Facilities, Code of Practice 2021*', which relevantly provides that:

> "Workers who undertake static standing work should be protected from discomfort and the jarring effects of direct contact with concrete, masonry or steel floors, for example by providing carpet, cushionbacked vinyl, shock-absorbent underlay, anti-fatigue matting, grates or duckboards."

[216] The Respondent noted it is not in contest that anti-fatigue mats have a role to play in relieving pain or stress associated with prolonged periods of standing on a hard floor surface. However, even on the Applicants' evidence, the Respondent argued that the role of the staff members assigned to the ACO is a dynamic one. Oftentimes ACO staff will be required to

engage with customers to override errors that have occurred with the check-out process. When they are not helping customers, ACO attendees will usually do spot cleaning in the area.

The Applicants' direct interests were not impacted by the mat's removal

[217] The Respondent noted that Ms Rafiqi explained in her evidence why she finds the anti-fatigue mats to be of great assistance in completing her role. However, her substantive position is predominantly a stationary one. She has been assigned to the Tech and Photolab because she has difficulties with movement, and precisely so that she may have access to the anti-fatigue mat that is located there.

[218] The Respondent pointed out that Ms Rafiqi further gave evidence that she occasionally assists in the ACO when the area is very busy. However, that is directly contradicted by Big W's records. The Respondent submitted that the records show conclusively that Ms Rafiqi has not worked in the ACO area in the past 12 months. Similarly, Ms Hart's evidence was that, although her substantive role is to staff one of the manned check outs (where she stands on an anti-fatigue mat), she is directed to work at the ACO almost every shift for two hours per engagement as part of relief work. However, Big W's evidence shows that Ms Hart has been rostered to work in the ACO area for no more than 53.75 hours of the 1279 hours that she has been rostered on since 1 March 2021. Similarly, Ms Henwood stated that the relief work undertaken by Ms Hart is only ever of short duration (of a maximum of 45 minutes) for the purposes of relieving staff during breaks and when staff are required to undertake other short-term duties (e.g. register count). The Respondent submitted that that evidence is supported by the Noosa Store Manager, Mr Mielnik.

[219] In addition, Ms Hart gave evidence that the 'main duties' of the ACO role is to stand in the middle of the general area around the ACO terminals and to attend to customers so as to provide them with such assistance and supervision of the ACO as is necessary. Ms Hart then gave evidence that the anti-fatigue mat was always located in a different area, being in the corner where a staff computer terminal was located. That evidence is not contested. However, the Respondent argued that the point made by Ms Hart meant that the anti-fatigue mat was never located in the area that is most often used by ACO attendees. That a mat was not placed in the middle of the ACO terminals is, of course, not surprising having regard to the foot traffic in that area, and the trip hazard that it would present there. In other words, Ms Hart's evidence was that the anti-fatigue mat that was in place could only ever properly have been used by her for very short periods of time.

[220] In those circumstances and turning back to the terms of clause 2.2.1(d) of the Big W Agreement, the Respondent submitted the Commission cannot be satisfied that the removal of the anti-fatigue mat from the Noosa ACO had *any* capacity to impact Ms Rafiqi's health and safety. Nor can it be said, in light of Ms Hart's limited work in the ACO area, that Big W's actions could reasonably be expected to have affected her health and safety. That is particularly so in circumstances where she may obtain the relief that she says anti-fatigue mats provide once she finishes any short relieving period and returns to her substantive position. It cannot therefore be said that the consultation obligations were triggered in respect of either Ms Rafiqi or Ms Hart.

No basis for a claim that there is an ongoing general dispute

[221] Otherwise, the Respondent argued that the safety case pressed by Ms Rafiqi is made by reference to what others have said to her. However, the only person named by her in that regard is Ms Dunstan, and there is no apparent reason why Ms Dunstan was not called by Ms Rafiqi to give evidence on behalf of the Applicants.

[222] The Respondent further submitted that there is no evidence as to the circumstances in which the petition relied upon by Ms Rafiqi was created. The persons who are said to have signed the petition have not been identified (and nor is it clear which store/s they work at). The Applicants' evidence and submissions otherwise do not grapple with the fact that the ACO role is not, and was never intended to be, a static one. Nor do they take account of the fact that staff are no longer required to undertake any administrative work at the computer that was previously located in the ACO area, which removes the fundamental reason for why staff used the anti-fatigue mat previously located there.

Other alleged breaches

[223] The Respondent noted that the Applicants further allege that Big W has not complied with its general statutory work health and safety obligations. The Respondent however argued that it cannot be said that the return of the mats is a reasonably practicable work health and safety measure. If any inconvenience is experienced by Ms Hart during her relieving shifts, it is extremely limited, and does not outweigh the important operational bases that motivated Big W to remove the mat. There is similarly no evidence to support a finding that the 'respectful workplace' provisions in clauses 2.4.1 and 2.4.2 have not been met.

Discretionary considerations

Further consultation

[224] Even if the Commission is satisfied that the applications raise matters of general application, having regard to the points referred to above and how the Applicants have run their case, the Respondent submitted that any such dispute can only realistically relate to a failure by Big W to consult with staff at the Noosa store prior to the removal of the mats.

[225] The Respondent noted that through their material, the Applicants have put forward various suggestions as to why or how Big W should take a different course. The matter has also been the subject of a conciliation. The Applicants claim that this subsequent consultation was not sufficient. That is said to be on the basis that the '*RAFFWU has never held out to Woolworths Group that it holds as readily available the collective wisdom of our members or all employees affected by the changes*'. The Respondent submitted that the difficulty with that proposition is that no persons other than the Applicants challenge Big W's compliance with its consultation requirements or claim that their interests have been adversely affected by any consultation breach. Rather, the evidence discloses that Big W managers engaged constructively with the Noosa workforce about the changes referred to above. That was particularly so in respect of the group of employees who would routinely staff the ACOs. The Respondent argued that the evidence also demonstrate that they raised concerns about one aspect of the change communicated to them, which was unrelated to the removal of the mats. In all the circumstances, and having regard to the time that has passed since the removal of the

mats, the Respondent is of the view that there is no utility in any further consultation taking place.

Insufficient basis for intervention

[226] Even if the Commission is satisfied that there is an arguable basis for an alleged noncompliance by Big W with the terms of the Agreement, which form a basis for an arbitral order, the Respondent submitted it is appropriate that the Commission to exercise its discretion[13] to decline to deal further with the claim. That follows from the limited scope of this dispute, the weak state of the Applicants' evidence, the lack of prejudice suffered by them and the fact that there is no utility in further consultation taking place. The Respondent contended that it is also appropriate in circumstances where the Applicants have not particularised the relief that they seek.

Applicants' reply submissions

[227] The Applicants noted that in its submissions, the Respondent does not grapple with the questions for determination posed by the Applicants. This is so because the answers to those questions are as submitted by the Applicants and ought guide the parties in resolution of the dispute. That resolution is to achieve industrial harmony in the workplace.

[228] The Applicants further noted that the Respondent purports to complain the Applicants have not "particularised the relief" sought. The Applicants contend that the answers to the questions will enable the parties to discuss whether any Order of the Commission is appropriate. The Applicants submitted that the Respondent's complaint underpins the true position of the Respondent that it simply did not consult despite the terms of the Agreement.

[229] In an effort to justify the unilateral removal of matting, the Respondent described *why* it implemented changes to the ACO area. However, the Applicants purported that nothing is put about the purported safety risk of having matting in the ACO area. No risk assessment or similar analysis exists. It was requested on multiple occasions. The Applicants submitted that the area where matting was in place for over a decade is not a thoroughfare. It is simply not a safety risk and no evidence has been adduced by the Respondent as to how it is a safety risk.

[230] The Applicants described the Respondent's argument at [203] being a straw man. The Applicants have not put, yet, that the change was a major change and therefore to be dealt with in accordance with clause 19 of the Agreement. It is the Respondent which describes a nationwide structural change which was never consulted over nor discussed with employees. Despite this, the Respondent does nothing to address the evidence which shows matting in the ACO area of very many other Big W stores in February 2022.

[231] The Applicants argued that the true case put by the Respondent is laid bare as seen at paragraph [210]. The Applicants noted that the Respondent wants the Commission to move on the basis the applicants aren't affected - arguing the dispute should not be determined.

[232] The Applicants submitted that this dispute is simply not analogous to disputes where disputants are no longer employed as posited by the Respondent. The dispute term sets who

may bring a dispute. It is any team member (or team members) who have a dispute with the employer. There is no fetter, and it is impermissible to apply a fetter which does not exist.

[233] The Applicants further asserted that the Respondent mischaracterised the dispute. The Applicants have a genuine and ongoing interest in the matter not just because they work in the area but also because they rely on the safety device in their other employment with the Respondent. A failure by the Respondent to consult over the removal of the safety device, as it has admitted, and failure to maintain a safety device is of grave concern to any employee that relies on other safety devices – including matting. Past conduct is indicative of future conduct.

[234] Further, Ms Rafiqi is a RAFFWU delegate, a recognised representative of co-workers. The Applicants advised that she has openly and repeatedly referred to her role in the dispute process as *including* that of being a delegate and spokesperson of her colleagues. The Applicants submitted that there is no requirement in the dispute term or legislation which requires an employee to only pursue disputes about a genuine concern in their workplace where they are directly and personally affected for a significant proportion of their own daily duties. To the contrary, any "team member" may pursue a dispute about any matter. Every employee has a genuine interest in their employer properly adhering to the industrial bargain made and documented as an enterprise agreement.

[235] The Applicants argued that the evidence shows Ms Hart worked for around two hours per shift in the ACO area at the time of the unannounced removal of the mats. She continues to work in the ACO area. Neither Ms Hart nor Ms Rafiqi was consulted. They want the matting restored.

[236] The Applicants submitted that the Respondent attempts to narrow the matter to the safety consequences for the Applicants to avoid its fundamental failure to consult over the matting removal and failure to maintain the matting in accordance with the Agreement.

[237] In reference to the Respondent's complaint as to the lack of evidence of Ms Dunstan, the Applicants submitted that the evidence shows Ms Dunstan was bereaving at the time, was not consulted, felt management would not change their behaviour and that Ms Dunstan told management "the mats make a real difference".

[238] Further, the Applicants submitted that other workers *identified* by the Respondent as *impacted* want the matting returned. Ms Budgen and Ms Edwards have told Ms Rafiqi they want the matting returned. Ms Budgen and Ms Edwards were not consulted about the matting, had not seen the purported training materials and do not recall attending any training session.

[239] The Applicants described the Respondent's complaint about the petition as contrived. Mr Mielnik cautioned RAFFWU members about the conduct of the petition. In any event, the petition in its unredacted form has since been shared with the Respondent and also filed in evidence. The petition was of employees of the Respondent at the Noosa store and identifies the industrial disharmony created by the conduct of the Respondent.

[240] The Applicants referred to the Respondent submissions, where it sought to connect the computer to the matting in the ACO area. The Applicants submitted that the evidence shows this is a furphy; the matting was in place many years before the computer was installed.

[241] The Applicants asserted that the Respondent seeks to downplay the safety device in the ACO area. In truth, the Applicants submitted that the case of the Respondent is that the removal of the device is ***designed*** to punish workers for pausing *movement* in their work. Employees, including the Applicants and petitioners, conduct themselves professionally in their work. The Respondent did not want to consult workers about the matting removal; the Respondent chose not to consult workers about the matting removal and the Respondent wants to maintain its *new* system of work without matting.

[242] The Applicants argued that the Respondent misconceived the importance of disputed elements. In circumstances where unilateral changes to safety devices *result* in workers no longer being able to continue their work because of their age, their disability or other attributes, the relevant provisions including clause 2.4 are of import. The evidence shows the lack of respect was a response of the Respondent at the time.

[243] The Applicants asserted that the Respondent ignored the petition of 35 employees; around half the employees of the Noosa store at the time. Further, the evidence shows the Applicants are joined by others (such as Ms Edwards and Ms Budgen) who were not consulted, and it is accepted that Ms Rafiqi acts as delegate.

[244] Further in their submissions, the Respondent purported to have constructively engaged with employees. The Applicants submitted this is nonsense. The matting was removed unilaterally and without discussion and this was admitted. Workers raised concerns, created a petition and launched a dispute. However, at no time was the ACO area matting restored.

[245] The Applicants contended that the evidence shows workers were not trained at all or about the removal of matting. Of course, telling someone the matting is removed is nonsensical when the matting is removed weeks earlier and there is no opportunity to consult over the removal. The Respondent has been given every opportunity to restore the matting and consult over the relevant matters. However, it has refused at every stage. The Applicants submitted that it ought not be permitted to revel in its non-compliance and benefit from its disregard.

[246] The Applicants noted that the Respondent has not dealt with the Door Greeter area *at all* in its submissions.

[247] In conclusion, the Applicants submitted that the determination of the questions will enable the parties to identify if any order or further action is appropriate. Noting the approach of the Respondent in not addressing the questions, the Applicants otherwise seek to be heard on an appropriate order.

[248] In oral closing submissions made on 6 April 2022, the Applicants noted that several Respondent witnesses had conceded that anti-fatigue matting is an equipment. Further, witnesses have accepted that consultation was required.

[249] It was submitted that removing the anti-fatigue mat from the ACO area is to stop employees spending too much time on the mat, instead of moving around the area. It was submitted that the idea that the mat is a trip hazard is simply not true and is a concoction of the

Respondent. Not a single report has made that the Respondent can rely upon, whether by way of an employee or customer. There hasn't been a risk analysis performed on the mat.

[250] It was submitted that nobody had explained to Ms Hart why numerous other Big W stores were permitted to retain a mat in the ACO area up until 5 April 2022. Nobody had informed Ms Hart why she was denied the ability to have a mat in the ACO area, noting her protestations.

[251] It was noted that Mr Mielnik could have obtained data with respect to how much time Ms Hart spends in the ACO area, after having closed her register down. Simply, he did not do so and Ms Hart's account of spending typically 1 hour and 45 minutes per day in the ACO area should be preferred.

[252] With respect to Ms Rafiqi, she is a delegate of members, and it is her evidence that she works with Mr Mielnik to get issues resolved. Further, Ms Rafiqi is concerned her own area may have anti-fatigue mats removed without consultation as is the case here.

[253] The Applicants noted Mr Mielnik's evidence that he is frustrated by the issue, particularly when regard is had to other stores with matting present right up until 5 April 2022.

[254] It was submitted that the removal of the anti-fatigue mat in the ACO area is a way to punish workers who occasionally prefer to go back to where the counter is and obtain some momentary relief. It is noted that 70% of employees covered by the enterprise bargaining agreement are women, and there is a large group of employees aged 45+ per the material filed the Respondent in its Form F17 for approval of the enterprise agreement.

[255] The Applicants submitted that there is no evidence of employees having been disciplined for returning too often to the counter area and not being active enough. It is submitted that it could easily form a matter of training and then, if necessary, a disciplinary issue for employees.

[256] The Applicants noted that pursuant to the training material prepared in July 2021, removal of the matting in the ACO area was a step the documents said would require consultation with employees. This was planned to occur in late August 2021. Instead, the mat was removed early June 2021.

[257] The Applicants urged the Commission to make a recommendation that the mats be returned.

Consideration

[258] I consider it interesting that the Respondent elected against addressing the four questions posed by the Applicants for consideration. The application is the Applicants to make. I consider the four questions posed by the Applicants to fall within the dispute between the parties. Accordingly, I will answer all four questions.

[259] Much has been made by the Respondent about the ability of Ms Hart and Ms Rafiqi to bring the applications before the Commission. Putting Ms Rafiqi aside, I accept that Ms Hart

typically works between one hour and one hour, 45 minutes in the ACO area when she does attend for work. She is a 55 year old woman who has suffered from plantar fasciitis, has varicose veins and cysts behind her knees. Any person who has experienced plantar fasciitis will know that it may reoccur, particularly with age. It is a condition a person must keep on top of, typically by regularly wearing good footwear. Walking on hard surfaces such as concrete without good footwear can aggravate the condition.

[260] When at her usual register, Ms Hart stands on an anti-fatigue mat as her work is stationary. When she works in the ACO area, she is faced with standing essentially on concrete with a thin layer of vinyl covering. It is simply no wonder Ms Hart would attempt, on irregular occasions when it is quiet, or when she is required to attend the counter in the ACO area, to obtain instant relief from the mat. Mr Mielnik agreed in cross-examination that Ms Hart obtains relief on the occasions she stands on the mat.

[261] It is clearly a clever and appropriate course of action for the Respondent to require its ACO area employees to be active. Nobody, including the Applicants quibble with this. Management prerogative can require the employees in the ACO area to be vigilant to customers, proactive rather than reactive, and a management directive can be sustained that employees are not to consider standing in front of the counter as their default position when customers are before them.

[262] I accept that there will be times, however, where an employee will be required to return to the counter in the ACO area, and this may be for short periods. Examples are to remove a security tag from an item and look at a roster. I imagine cleaning products used by the employees to regularly clean the checkouts are not deliberately left in view of customers. Ms Rafiqi's evidence is that there is also a phone at the counter which requires answering.

[263] If it is particularly quiet, Ms Hart's preference is to return to the area where the anti-fatigue mat was to obtain some temporary relief from standing on the hard floor. Frankly, this is not unreasonable.

[264] Despite Mr Mielnik's reservations that employees at the Noosa store sometimes treated the mat in the ACO area as a default position, he has never addressed this issue with any employee. He has never caused any employee to be subject to a warning on this issue. In more than 5.5 years he had been Store Manager at the time of the removal of the mat, his evidence is that he had done nothing at all. The Respondent's assertion that the mats have been put in place without permission is not accepted; the mats pre-date Mr Mielnik's tenure at the store by about a decade and as Store Manager, he permitted them to be there up until early June 2021.

[265] Mr Bartlett and Ms Atkinson visited the store on 9 June 2021. Neither of them can recall the visit. They instructed Mr Mielnik to remove the mats in the ACO area and the Door Greeter area. They did so without a safety assessment having been conducted. The evidence demonstrates that it was a premature direction given to Mr Mielnik in face of the efforts being made at a corporate level to undertake a national roll-out of the change from SCO to ACO, requiring consultation with affected employees.

[266] The effect of the removal of the mats was instant on the affected group of employees which includes Ms Hart. Ms Dunstan immediately remarked that she would, as a result of the

removal of the mat, have to wear inserts in her shoes. I imagine it would be disturbing for the affected employees to learn that Mr Bartlett and Ms Atkinson cannot even remember the direction given in June 2021.

[267] Where the Respondent had conducted a pilot in some stores, it set about programming how the change from SCO to ACO would roll out nationally from late August 2021 to November 2021. It seems much preparatory work was put into making PowerPoint presentations and training material in order to ensure that affected employees would eventually move along the 'change curve' from angry to accepting. The change curve even notes that a usual emotion might include bargaining, where employees might struggle to find meaning, reach out to others, and want to tell their own story.

[268] When an impact such as the removal of the anti-fatigue mat, which had been present for over 15 years in the area, is felt by employees, naturally they would want to tell their own story. They would want management to understand why, for some employees, it is an important piece of safety equipment and the effect the removal of it has on them. Some employees, it seems, have left the fight to Ms Hart and Ms Rafiqi. It is not surprising; not everybody has the will or gumption to fight a large employer over a determination that has been made without any regard for their circumstances.

[269] Prior to 9 June 2021, Mr Mielnik must not have considered the mats in the ACO area or the Door Greeter area to be a potential trip hazard or I would have expected that given his extensive experience in the retail industry, he would have had a safety analysis conducted on them. Ms Rafiqi asked Mr Mielnik in person and in an email to provide a safety analysis to support his contention that it was a trip hazard. Mr Mielnik did not reply to Ms Rafiqi's email.

[270] Mr McFarland's evidence demonstrates that the Simpler for Stores program's decision to remove the mats was not for a safety reason. His evidence at [160] makes this clear. The PowerPoint presentation at [170], prepared for managers, also makes it clear that the reason for removing the matting in the ACO area only was to encourage team members to move around. There was no mention of a potential trip hazard, and further, it was declared that mats only in the ACO area would be removed, commencing from late August 2021. Mats were not to be removed from the Door Greeter area. The removal of the mat from the Door Greeter area at the Noosa store in early June 2021 occurred on Mr Bartlett and Ms Atkinson's instigation.

[271] Mr Mielnik was informed by Mr Bartlett and Ms Atkinson on 9 June 2021 that the mats were a potential trip hazard. Neither of them has any OH&S training and neither of them had any corporate knowledge that this could be true. There is no evidence at all that the mats are a potential trip hazard.

[272] Mr Mielnik took the direction given to him as gospel, and informed disgruntled staff members that the mats are a potential trip hazard. They disagreed with him. By August 2021, due to the representations of RAFFWU, the Door Greeter mat was returned because the Respondent's Employee Relations Manager said it could be. Clearly it is not a potential trip hazard otherwise it would not have been returned. Again, no safety analysis has been undertaken on this issue.

[273] We also know the mats were still present within ACOs and Door Greeter positions throughout many stores across the country right up until 5 April 2022. On the first day of the hearing, on 4 April 2022, I expressed this very concern to the parties. Quite surprisingly, and in news that shocked me, the Respondent went about ripping the mats up from the floor of those stores on 5 April 2022, because clearly there was no consistency in its position. This was information known to it from February 2022 when Ms Rafiqi's witness statement was filed. It beggars belief that the matter before the Commission in this application involved arguments of failure to consult with employees over removal of matting, and overnight in various stores, matting was removed.

[274] Ms Atkinson's evidence that she regularly visits stores and it's not always possible to see if there is a mat in the ACO area unless she walks through it appears to me to be incredulous. When visiting a store, how would the State Manager not walk through the ACO area? Around five months had passed from when the rollout was supposedly completed in November 2021.

[275] It appears that the corporate plan was to rollout the changes and consult with employees. The document referred to at [168], on the back page states, "Next steps and timeline". By week 5, the managers needed to cascade information to store leadership teams, and plan to commence training, including store huddles in week 8. Week 6 was tasked with the following:

> "Book 1:1 consultation with every Service Supervisor and SCO (ACO) Team Member for week 7 – include team members who may work occasionally in these roles"

[276] It is clear that by late July 2021 when the information was being disseminated to senior managers, there was a plan to consult with employees about the changes to occur in weeks 7, 8 and 9, which would be mid-to-late August 2021. What is certain is that the Respondent planned for there to be several weeks of notification and consultation prior to the removal of the mats. For the employees at the Noosa store, including the Applicants, the mat had already been removed months earlier at the whim of Mr Bartlett and Ms Atkinson.

[277] Turning to the terms of the Agreement, the Respondent has criticised the Applicants for asserting that the removal of the mats constitutes 'major changes' within clause 19 of the Agreement. The Applicants have not asserted that the removal of the mats constitutes major changes in accordance with clause 19 and therefore triggering an obligation to consult in accordance with that clause. The Applicants have relied upon the provisions in clause 2 of the Agreement.

[278] Clause 2.2.1(d) of the Agreement is a long-standing clause contained in earlier Big W agreements. On review, the clause has existed in the same form (but for a differentiation between 'associates' and 'team members') since at least 2009.[14] The Respondent is well-experienced and indeed aware of its obligations to consult with employees concerned, health and safety representatives, the Store Safety Committee, and the SDA.

[279] The consultation required at clause 2.2.1(d) is triggered where there are any proposed changes to equipment which may reasonably be expected to affect team members' health and safety.

[280] If the Simpler for Stores Team knew, as per Mr McFarland's evidence that the mat in the ACO area tended to act as a signpost or indicator for where team members should be

standing, the Simpler for Stores Team ought to have reasonably known that some ACO area employees were obtaining relief from the anti-fatigue mat by virtue of standing on it more than the Respondent would like.

[281] Numerous Respondent witnesses have agreed that an anti-fatigue mat is equipment. It is, by its very nature, safety equipment. Any change to it, by removing it from use would be reasonably expected to affect team members' health and safety if they have previously had the benefit of it. This includes Ms Hart.

[282] The Respondent was put on notice by Mr Cullinan of RAFFWU as early as September 2021 that disputes may be determined pursuant to clause 20 of the Agreement which include matters arising under the Agreement, but the clause is not so limited to only matters arising under the Agreement or the NES. RAFFWU is correct; the clause refers to a dispute between a team member and Big W, *including* a matter arising under the Agreement or the NES.

[283] Accordingly, I accept that while Ms Rafiqi is not directly affected by the changes in the ACO area regarding the removal of the mat, or in the Door Greeter area, she is an employee in dispute with Big W, her employer.

Questions for arbitration

- *Question 1: Does the removal of anti-fatigue matting from the ACO area and Door Greeter area create a reasonable expectation that employee health and safety is affected?*

[284] For the reasons given above, my answer to this is Yes. In particular, the removal of the anti-fatigue matting from the Door Greeter area makes no sense whatsoever when employees are, to a large degree in the performance of their work, stationary.

[285] With respect to the removal of the mat in the ACO area, Mr Mielnik was immediately informed by several employees that they considered their health and safety to be affected by the decision made by him to have the mats removed. The affected employees directly informed him that they felt that their health and safety was being compromised by the removal of the mat. Mr Mielnik did not undertake an evaluative assessment of clause 2.2.1(d) it seems until his written correspondence of 21 September 2021.

[286] Given that my answer to Question 1 is yes, the Respondent was obligated to consult with the team members concerned, prior to the proposed changes being implemented. Further, the Respondent was required to consult with the Health and Safety representatives, the Store Safety Committee and the SDA. The consultation, if it had occurred, would have assisted the parties to identify and resolve potential health and safety problems.

[287] The outcome of the consultation is unknown. Respectfully, the Respondent's submission that having regard to the time that has passed since the removal of the mats renders any consultation of no utility is misguided and disrespectful to the individuals affected. It does not align to the Respondent's statement within the Agreement where Big W encourages a workplace culture where people are treated with respect. What it does correlate to is senior managers coming to the store and making directions where part of the reasoning offered has no

factual basis (the supposed trip hazard) and where the corporate directive had been jumped by several months. The facts are clear; consultation was meant to occur from late August 2021, prior to the removal of the mats. Regretfully, it did not occur at the Noosa store because the actions were taken in early June 2021.

- *Question 2: Did Woolworths Group consult (as required by the Agreement) affected employees over changes to the anti-fatigue matting equipment in the ACO area and Door Greeter area?*

[288] No, the Respondent did not consult (as required by the Agreement) affected employees, namely Ms Hart. It was required to, and it did not. It took the matting away without consultation and provided reasons for its decision after the matting was removed. Per the Full Bench decision in *Mt Arthur Coal*, management does not hold a monopoly of knowledge and understanding of how a business operates. Employees are entitled, in consultation, to point out aspects of a proposal that will produce negative consequences and suggest ways to eliminate or alleviate those consequences.

[289] Only after consultation has occurred may management then make a final decision on the issue before it. The consultation required pursuant to clause 2.2.1(d) is with an extensive group of stakeholders. It would be expected these groups would have some general health and safety knowledge given the identity of the stakeholders. It is not permissible to bypass the stakeholders in clause 2.2.1(d) under the banner of managerial prerogative, especially so noting that the Respondent's own material demonstrates that it had, at the corporate level, intention to consult with affected employees.

[290] If the corporate plan of consultation with affected employees in ACO areas across the country did actually occur in late 2021, and there is no evidence before the Commission on this issue, one would expect the Respondent to recognise that what happened at the Noosa store in June 2021 was not right. If consultation in each store was *de rigueur* prior to the removal of the mats, as part of the national rollout, how is it that the Respondent did not say, Noosa employees were not consulted, let's start again?

- *Question 3: Is Woolworths Group maintaining healthy and safe working conditions by removing the anti-fatigue matting from the ACO area and Door Greeter area?*

[291] The Respondent is not maintaining healthy and safe working conditions for some of its affected employees. Not all employees require the benefit of the anti-fatigue matting in the ACO area or Door Greeter area. The age and weight and particular medical conditions of an employee will have a determination as to whether the removal of anti-fatigue matting makes their workplace less healthy and less safe.

[292] The stakeholders in clause 2.2.1(d) would be able to provide views on this issue with in-store knowledge of roles, locations and general experience of working on the particular surfaces. Those views would help guide the Respondent's decision whether to remove the mats.

- *Question 4: Is it unjust or unreasonable for Woolworths Group to remove the anti-fatigue matting from the ACO area or Door Greeter area?*

[293] I consider it to be unjust and unreasonable for the Respondent to have removed the anti-fatigue matting from the ACO area and Door Greeter area at the Noosa store without consultation with affected employees and without a safety analysis being undertaken in relation to the potential trip hazard of the mats. In the absence of evidence of the mats being an actual trip hazard, the mats should be assumed, unless proven otherwise, not to be a trip hazard on account of their use for decades without incident.

[294] After consultation has occurred with relevant stakeholders pursuant to clause 2.2.1(d), depending on the decision made by the Respondent, a consideration of whether removal of the mats is unjust or unreasonable could be made.

Future determination of this application

[295] The Applicants note that s.595(3) permits the Commission to the deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the Commission is expressly authorised to do so under or in accordance with another provision of the Act. The Applicants submit that power is available pursuant to s.739(4) which provides that where the parties have agreed that the Commission may arbitrate (however described) the dispute, the Commission may do so.

[296] Clause 20.2.5 of the Agreement prohibits the Commission from making interim orders, 'status quo' orders or interim determinations. My preliminary view is that the clause permits the Commission to make final orders, having determined the matter and providing reasons for the determination.

[297] I propose to hold a video conference of this matter next week at a time convenient to the parties, where the issue of how this dispute may be finally determined, including potential orders will be discussed.

[298] In the interim, clause 20.2.3(e) provides that where a party requests, the Commission may make recommendations about particular aspects of a matter about which the parties are unable to reach agreement. Having regard to this Decision, if the Applicants propose a recommendation to be made by the Commission until the video conference is conducted some time next week, I would be open to considering making a recommendation.

COMMISSIONER

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[1] [1996] IRCA 141.

[2] [2021] FWCFB 6059.

[3] Ibid at [109].

[4] [2021] FCAFC 159.

[5] Ibid at [9].

[6] (1938) 60 CLR 336.

[7] See *Construction, Forestry, Mining and Energy Union v Mt Arthur Coal Pty Ltd* [2016] FWC 2959 where Saunders C (as he then was) held that the evidentiary standards set out in *Briginshaw* applied equally to an enterprise agreement dispute application in which the Commission was required to assess whether there had been a proper basis for a particular disciplinary outcome.

[8] *Fair Work Act 2009* (Cth) s 51.

[9] [2020] FWCFB 5054 at [34].

[10] [2021] FWCFB 370 at [40].

[11] [2020] FWCFB 5054 at [34].

[12] *CFMMEU v Falcon Mining Pty Ltd* [2022] FWCFB 93.

[13] *Australian Municipal, Administrative, Clerical and Services Union v Sydney Water Corporation t/a Sydney Water* [2011] FWA 1894 at [51].

[14] *Big W Stores Agreement 2009* [2009] FWAA 1124.