BEFORE THE FAIR WORK COMMISSION

B2024/78

Application by Retail and Fast Food Workers Union - Application for good faith bargaining orders

RAFFWU's OUTLINE OF SUBMISSIONS

1. The Retail and Fast Food Workers Union (**RAFFWU**) seeks orders against Woolworths Group that will require it to bargain with RAFFWU in line with the good faith bargaining requirements (**GFBR**) in section 228 of the *Fair Work Act 2009* (Cth) (**FW Act**).

2. Section 228 of the Fair Work Act 2009 (Cth) sets out that bargaining representatives must meet the GFBR, which includes:

> (a) attending, and participating in, meetings at reasonable times;
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> (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
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> (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
>
> (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
>
> (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
>
> (f) recognising and bargaining with the other bargaining representatives for the agreement.

3. On 25 January 2024, RAFFWU notified[1] good faith bargaining concerns to Woolworths Group Limited in relation to negotiation of a new agreement to cover employees in supermarkets, metros and CFCs. The concerns included the failure to meet the GFBR in relation to:

> (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

[1] See JR-7

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

4. On 1 February 2024, RAFFWU applied to the Fair Work Commission for orders.

Status of Bargaining Concerns

5. Over the period to 16 February 2024, Woolworths Group has made a series of undertakings to RAFFWU which have narrowed the matters in dispute.

6. These include promises from Woolworths Group to:

   a. provide "iterative drafts" of the proposed agreement to all bargaining representatives (that is, any draft provided by Woolworths to one bargaining representative will be provided to all bargaining representatives);

   b. provide all bargaining representatives with further written updates on bargaining meetings held with the SDA/AWU as soon as reasonably practicable after each meeting;

   c. undertake its best endeavours to provide the written updates within 3 working days (of any meeting);

   d. provide written updates in the same format, and with the same level of detail, used for the updates provided on 23 January 2024 and 5 February 2024.

   e. provide to all bargaining representatives as soon as reasonably practicable (again, with best endeavours to do so within three working days), any new claim made by Woolworths or the SDA/AWU in writing or otherwise;

   f. note in the written updates where an existing claim is modified by Woolworths or the SDA/AWU;

g. have provided (but not to provide) any documents shared with or from the SDA/AWU which explain a claim or position being discussed in bargaining for the proposed Australian Food Group enterprise agreement or which might arguably do so.

7. Woolworths Group has refused to hold bargaining meetings which involve all bargaining representatives. Woolworths Group refused for months to disclose relevant information, being the documents shared with it by SDA in bargaining. Woolworths Group also refused for months to provide other relevant information such as a presentation shared with SDA in November 2023 basing its claims and positions in bargaining.

8. Woolworths Group has refused to commit to disclosing relevant information, being documents shared with it by SDA in bargaining, in the future. In relation to explanatory material, Woolworths Group has not responded to a request from RAFFWU to commit to providing explanatory material on a prospective basis.

9. In this context, matters outstanding include disclosing relevant information in a timely manner, recognising and bargaining with RAFFWU, and refraining from capricious or unfair conduct that undermines collective bargaining or freedom of association.

Precedent

10. RAFFWU relies on the witness statement of Joshua Reinecker dated 20 February 2024.

11. In *Ferguson, Glenn v Keolis Downer T/A Path Transit Pty Ltd* [2021] FWCFB 1663 the Full Bench found (despite not finding a breach of the GFB requirements) that:

> *[11] A bargaining representative does not contravene the good faith bargaining requirements simply by conducting separate bargaining meetings with different bargaining representatives.* ***Whether the requirements have been met depends on all of the circumstances.*** *In the present case, Path Transit has engaged in meaningful negotiations with Mr Ferguson. Mr Ferguson was invited to meetings at reasonable times and was given information about what occurred at other meetings. There is simply no indication in the materials before us of any conduct contrary to the good faith bargaining requirements.*

12. We acknowledge *Path Transit* found separate bargaining is not inherently a breach of the GFBR. However, the Full Bench made clear whether or not such an approach to bargaining meetings offends the GFBR will be dependent on the circumstances.

13. In *Australian Municipal, Administrative, Clerical and Services Union v Commonwealth of Australia as represented by Australian Taxation Office* [2015] FWC 7692, in finding that the ATO had complied with the GFBR, the Commission stated at [58] that:[2]

> *"The context of the requirement in s.228(1)(b), to disclose relevant information (other than confidential or commercially sensitive information) in a timely manner, is an expression in broad terms, but with some connection between the information sought and the matters being bargained for;*
>
> > *... Subject to the information not being confidential or commercially sensitive and being relevant to the bargaining for the proposal enterprise agreement, bargaining representatives are required to disclose the information in bargaining in a timely manner.*
> >
> > *This will generally, but not always, involve "the disclosure of information ... to allow the other bargaining representative(s) to give consideration to the bargaining representative's position". It may be, however, depending on the circumstances, the subsection imposes an obligation on a bargaining representative to disclose information which is relevant to a position advanced by the other bargaining representatives, thereby facilitating bargaining in accordance with the objects of Pt 2-4 and Object s 3(f) of the Act."*

14. In *Retail and Fast Food Workers Union (RAFFWU) v Woolworths Group Limited T/A Big W* [2023] FWC 3006, in finding that Woolworths Group had not complied with the GFBR the Commission stated at [67]-[70]:

> **[67]** I accept Ms De Marchi's evidence that if RAFFWU had made proposals in relation to the proposed agreement before the commencement of the access period these would have been considered by Woolworths, **but I do not accept that they would have been genuinely considered.** This is because the consideration of logistical steps required to change the proposed agreement would inevitably influence the attitude of the decision maker in relation to any changes and reduce the likelihood that such changes are regarded with an open mind.
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> **[68]** Furthermore, if Woolworths was open to genuinely considering RAFFWU's views about the terms that had not been previously communicated to RAFFWU, it would not have taken the steps it did to 'lock in' the terms of

[2] See [32] – [33], [42] also.

> the proposed agreement and voting date, by printing copies of, and developing material explaining the terms of the proposed agreement. It is unlikely that the current timeframe for voting on the proposed agreement would have been disturbed if Woolworths had shared the new terms with RAFFWU after the SDA's delegates endorsed the in-principle agreement on 20 October 2023 or before the proposed agreement was sent to the printer on 24 October 2023. Woolworths has not provided any reasons as to why it did not advise RAFFWU of the proposed agreement until 27 October 2023.
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> **[69] I find that Woolworths's actions in delaying the provision of the new terms in the proposed agreement to RAFFWU until 27 October 2023 amounts to unfair conduct that undermines collective bargaining. I also find that this is inconsistent with Woolworths' obligation to recognise and bargain with the other bargaining representatives for the agreement.** Given that the SDA and AWU represent approximately 54% of the employees covered by the Agreement, I accept that negotiations have reached a stage that Woolworths is entitled to put its proposal to a ballot in order to see if progress can be made. However, RAFFWU should have first been provided with been a reasonable opportunity to discuss Woolworths's proposal before this was presented to employees on 28 October 2023 as an agreement in principle which they would be asked to vote on.
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> **[70]** I find that the new terms of the proposed agreement which had not been previously shared with RAFFWU is 'relevant information' for the purposes of s.228(1)(a) of the FW Act. This is self-evident as it is difficult to contemplate a more critical piece of information relevant to bargaining as the terms of a proposed agreement. I believe that it would have been reasonable for Woolworths to provide the new terms in the proposed agreement to RAFFWU between the period from 20-24 October 2023. **That it did not do so resulted in RAFFWU not receiving the information on a 'timely manner' as required by s.228(1)(a).**

Historical Context

15. There is a historical context to bargaining for the enterprise agreement at Woolworths Group.

16. It is notorious that Woolworths Group negotiated a series of agreements covering supermarkets workers with SDA that left many workers worse off than if an award would have applied to them.

17. This has occurred since the first opportunity to negotiate agreements replacing or supplementing awards was available to Woolworths and SDA in the 1990s. Neatly

summarised in *Management Employment Relations Strategy: The Case of Retailing* by Mortimer, D[3]*:*

> **The company's approach to the SDA** was that the Agreement would consolidate the SDA as the "principal" union in the industry and relegate the rest to "other" or at best "significant" status. Staff covered by these unions would be eligible to join the SDA. **In addition, the company would actively encourage staff to join the SDA and would give all staff an application form at the point of engagement**, as well as supporting the role of SDA job delegates. **The alternative put to the SDA National Secretary was that the company would have to consider a non-union Agreement. In the company's view, faced with possible decimation of its membership on the one hand, and the possibilities offered as the potentially sole union in the company, the SDA agreed** (ACTU 1991; Griffin, 1992; interview: J. De Gabrielle, May 1999).
>
> **Woolworths contends that the SDA has done well out of the Agreement. Union membership in Woolworths is around 60 per cent**, well above the national average of around 30 per cent, and the SDA remains the largest union in Australia. **The Agreement also provides for payroll deductions for union fees, formal recognition of accredited union delegates as well as time off to attend to union business and access to telephone and storage facilities, paid trade union training leave for union delegates and provision for one paid meeting of union members every six months** (Enterprise Agreement, 1999: 59-60; interview: J. De Gabrielle, May 1999).
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> **The relationship developed with the SDA together with the associated enterprise bargaining negotiations, allowed the company to pursue strategies aimed at responding to the changes outlined above.** A major objective was to end demarcation issues involving specialist workers and move to a common set of employment conditions. An example of this was the situation of bread-makers (who made bread products) and pastry-cooks (who made specialist cakes and pastries). Bread-makers worked overnight, finishing at 6 am, while the pastry-cooks used the same facilities during the day until 3 pm. Although the work was similar, demarcation prevented each from doing the other's work. This had arguably resulted in some overstaffing and reduced career possibilities, and with the shift in trading patterns to the evenings, it also meant that bread baked no later than 6 am was being sold at 8 pm or later as fresh. Pastry-cooks were prevented from baking fresh bread during the day shift, and nothing was baked from 3 pm to 11 pm, which included the new peak trading period. The company strategy here was to develop a new "Retail In Store Bakery" Award with the SDA, rather than the Bread-makers or Pastry-cooks Unions as respondents. This Award, using precedents established in other states, combined the two trades into a new multi-skilled trade of "Baker". The company successfully lobbied the State Government and TAFE in New South Wales to introduce a new apprenticeship course for this, which involves 800 hours of study, compared to 500 each for the old trades. This course is now established as the major qualification for organisations throughout the state, with very few students still undertaking the old courses. The new Award placed these workers on the same hours and conditions of other retail workers, and all of the bread-makers and all except about fifty of the pastry-cooks left their respective unions and joined the SDA. This had an added advantage for the company in that the Pastry-cooks' Union was about to amalgamate with the left-wing Miscellaneous Workers' Union (Retail In House Bakers Award (NSW); TAFE statistics; interview: J. De Gabrielle, 1999).
>
> The other notable example in the push for common employment conditions involved butchers. These workers were members of the Amalgamated Meat Employees Union and worked from 6 am to 3 pm. After these hours, shop assistants stocked shelves with trays of prepacked meat, but could not cut meat to customer specifications, which the company regarded as a matter for concern as data had shown that this was an issue for a significant number of customers. It wanted to use butchers on a shift basis over an 18-hour day. Initial discussions with the meatworkers union on changing the situation met with strong resistance. The company developed a strategy of bringing the butchers into the general Enterprise Agreement, with the SDA as respondent. The meatworkers union refused to join the single bargaining unit and so is not a party to the Agreement. In an effort to isolate the meatworkers union, the company's industrial staff visited all butchers in its New South Wales stores to explain the new terms and conditions. These were accepted without any industrial action and the company argues that

[3] Dennis Mortimer, 'Management Employment Relations Strategy: The Case of Retailing', (2001) Vol. 7, No. 1, *International Employment Relations Review,* 81-93

now the meatworkers union has only about 180 members in its New South Wales stores, compared to about 1,200 previously. Most of these have joined the SDA. It is also interesting to note that one of Woolworths' competitors, Coles Myer, used individual contracts (Australian Workplace Agreements) to reduce the role of the meatworkers union (interview: J. De Gabrielle, 1999; Woolworths Enterprise Agreement).

As a result of these strategic victories for the company, it was able to negotiate a new set of unified and simple job classifications with the SDA which are incorporated into the Agreement. The new system is that of Retail Employee, Grades 1 to 6, with each classification including a basic description of skills and activities required. General shop assistants come within Levels 1 to 3, while those with trade qualifications fit within Levels 4 to 6 (Woolworths Enterprise Agreement, 1999, Clause 4: 7-10).

Along with the new classification system, **the company was able to use the Enterprise Agreement negotiations to eliminate what it regarded as the rigid and inflexible roster system which specified set hours and shifts.** Instead, the new Agreement simply specified that employees shall be notified of their roster which indicates the number of hours, the days of work and start and finish times. Everything else is left open (Woolworths Enterprise Agreement, Clause 15.2: 29). Woolworth's management wanted store and department managers to develop rostering arrangements to suit their own particular workflow requirements. To this end, company industrial staff held detailed briefing sessions with all store managers explaining the possibilities under the Agreement. **There was also a training course on rostering, which started with store managers being provided with a detailed printout of dollar spending per hour in their store with the aim of developing the best roster to have staff available at peak periods.** A principal objective was to get store managers to take responsibility for the rosters, in a context where the senior company staff believed that their line managers had retreated from being proactive due to the hard line taken by unions in the past.

An integral part of the new rostering flexibility was the replacement of penalty rates with a new system of loadings for defined "ordinary hours", a system adapted from a New Zealand example. This system provides for no loadings for hours until midnight Monday to Friday, 9 pm on Saturdays and all day Sundays. Loadings range from 25 per cent to 100 per cent, but the key peak trading hours of 5 pm to 8 pm are not subject to loadings (Woolworths Enterprise Agreement, Clause 16: 32).

As well as the rostering system, another example of the devolution of responsibility to line managers is in the new grievance procedures and job performance clauses. Whereas the Grace Bros procedures in the 1970s formalised the process by taking these matters from line management to specialised personnel staff, the new Woolworths procedures emphasise the role of store and department managers and the union delegate. In the case of job performance issues, no provision is made for the involvement of personnel staff (Woolworths Enterprise Agreement, Clause 39: 58-59). Advice for line managers is provided instead in a detailed Industrial Handbook.

The use of an Enterprise Agreement by Woolworths was not a straightforward choice. Senior management had become disenchanted with any agreements which opted out of the Award system following a poor experience when Saturday afternoon trading was introduced. Woolworths joined other larger companies in reaching an agreement with the SDA to pay staff time and one-half. However when the NSW Award was handed down, it provided only time and one-quarter. **As a result, before a decision was made to move to an Enterprise Agreement in 1993, costing models were developed by accountants and engineers and discussed by a management team consisting of some store managers, area managers and staffing managers, which recommended in favour of moving to the Enterprise Agreement.** This represented an increase in the standing of the Human Resources area, and this was reconfirmed when the General Manager in NSW (one of the area managers on the original management team) **asked the company's auditors to conduct a review of the cost to the company of paying staff under the Enterprise Agreement compared to the State Award. The auditors found an annual saving of 8 per cent of the company's wages bill was obtained by using the Agreement (about $450 million)** (interview: J. De Gabrielle, 1999).
…

In the case of Woolworths, recognition of the SDA as the industry union in negotiations for the Enterprise Agreement was the basis for the company to achieve its objectives in areas such as job

> **classifications, flexible rosters and the elimination of penalty rates.** It was also able to use the SDA's principal union status as an integral part of its strategy to end demarcations and reduce the influence of several unions with a small, though strategically significant membership in the company. As a result, even the unions which the company regarded as difficult did not significantly hamper the company's strategy.

18. Subsequent to the initial agreements in 1993, further agreements were made at a state level and then at a national level.
19. Each maintained the approach of negotiating terms which reduced conditions below minimum Award conditions. In 2012, a new national agreement was made which Woolworths knew to leave some workers worse off.[4] This was not notified to the Fair Work Commission and the agreement was approved.

20. Those circumstances are the subject of detailed analysis by RAFFWU.[5]

21. In exposing the 2012 actions of Woolworths Group and SDA, Ben Schneiders in *Hard Labour: Wage Theft In The Age Of Inequality*[6] wrote:

> The same rosters – backed by statutory declarations of both the employer and the union – focused heavily on people working on weekdays, which were periods that attracted no penalty rates or loadings. At Woolworths, the sample rosters showed a full-time employee working thirty-two hours during weekdays, with a single shorter shift on Saturday. A part-time sample roster showed weekday hours – again, avoiding most of the penalty rates. The sample rosters purported to show that workers were always paid a little better than the award, often by $20 or $30 a week, but trade was often busiest on weekends or nights, and so much of the work was done at those times. If many of those workers had been paid the minimum wage outlined in the award – with its much higher penalty rates – they would have been better off, sometimes considerably, than they were under the agreement struck by their employer and the SDA. Among those most affected were mothers working part-time at night, and younger workers.
>
> The sample rosters did not reflect the hours people actually worked, and all this crucial detail was being hidden from the Fair Work Commission.

22. The lost wages inflicted on workers was enormous. Examples of the loss in 2018 are $71.59 per week[7]. A different roster in 2012 was $32.90 per week[8]. When this was described to workers they were shocked, disgusted and felt betrayed[9]. The impact of the lost wages was significant. Such as not being able to afford basic things such as internet, quality food,

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[4] See Statement of Joshua Reinecker dated 20 February 2024 at JR-5 [103}-[123]
[5] See Statement of Joshua Reinecker dated 20 February 2024 at JR-5
[6] B. Schneiders, *Hard Labour: Wage Theft In The Age Of Inequality* (Scribe, 2022) at p.112
[7] See Statement of Joshua Reinecker dated 20 February 2024 at JR-3
[8] See Statement of Joshua Reinecker dated 20 February 2024 at JR-4
[9] See Statement of Joshua Reinecker dated 20 February 2024 at [21]

clothing, extracurricular activities, social activities and holidays[10]. The lost opportunity is almost unquantifiably large.

23. This historical context informs the concerns of those RAFFWU represents in bargaining[11]. Discussions kept secret, with secret exchanges of documents, have cost workers and their families a fortune[12].

Big W Context

24. In addition to the historical context, recent bargaining between SDA and Woolworths Group at Big W is relevant to the context which informs the concerns of RAFFWU (and those it represents.)[13]

25. As above, the Fair Work Commission found Woolworths Group had failed to meet the GFBR in November 2023. That is, at the same time as Woolworths Group was having private discussions in Woolworths supermarkets negotiations, with the exchange of secret documents and refusing to either allow RAFFWU to attend the meetings or share the secret documents, Woolworths Group was found to have failed to meet the GFBR at Big W.

26. In Big W, Woolworths and SDA negotiated changes to clauses without ever detailing their desire, plans, drafts or outcomes to RAFFWU.

27. Those changes included the rights of workers who were not represented by SDA in undertaking disputes. The changes meant that workers not represented by SDA would not have current status quo benefits in disputes, and would no longer be able to compel arbitration without Woolworths' consent. Woolworths did not raise these changes until after the Agreement was distributed to workers and a vote announced. Woolworths told RAFFWU that the changes were insisted on by SDA and not by Woolworths.[14]

[10] See Statement of Joshua Reinecker dated 20 February 2024 at [24]
[11] See Statement of Joshua Reinecker dated 20 February 2024 at [25]
[12] See Statement of Joshua Reinecker dated 20 February 2024 at [25]
[13] See Statement of Joshua Reinecker dated 20 February 2024 at [27]-[32]
[14] See Statement of Joshua Reinecker dated 20 February 2024 at [28]

28. Those changes cause serious concern for RAFFWU and those we represent.[15] Not least of which because our members have disputes[16], are not represented by SDA and wish to pursue arbitration and status quo rights.

29. Those dispute rights, and the decision by Woolworths Group to breach the adverse action provisions of the Fair Work Act in targeting RAFFWU members, is notorious.[17] In *Retail and Fast Food Workers Union Incorporated v Woolworths Group Limited* [2022] FedCFamC2G 578, Mercuri DCJ found:

> [20] I note that the respondent is a large organisation with a very large workforce, whose conduct it is conceded is in breach of section 340(2) **and engaged in with the involvement of senior members of staff at the store level and with senior human resources involvement**. It was conceded by the respondent that this should not have happened, and that if the HR personnel involved were not aware of the organisation's obligations, they ought to have and could have easily informed themselves of their obligation and the obligation on the organisation.
>
> [21] Having said that, the respondent has demonstrated contrition. It has issued an apology to the employee in writing. It has paid the employee compensation in the sum of $3,000. Evidence has also been given of the changes implemented both at a structural level within the respondent's business and also by way of additional training to those involved in the human resource management within the organisation about freedom of association rights and principles.
>
> [22] In addition, the respondent has acknowledged its wrongdoing in this matter and has cooperated with the applicant, avoiding the need for a contested hearing, which would, among other things have required Ms Dyer to give evidence and be cross examined, potentially adding to her distress.
> …
> [24] **As stated, in this case, the contravention arose in response to Ms Dyer raising a concern about employee safety, a concern which the respondent took sufficiently seriously to address promptly. The seriousness of the contravention was added to by the fact that it was facilitated by and enabled through advice from employees within the human resources function of the respondent. Employees who, as rightly conceded by the respondent, should have known better.**

30. In light of the findings of the court, it is instructive that SDA "convinced" Woolworths Group to diminish the rights of workers in dispute resolution at Big W.

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[15] See Statement of Joshua Reinecker dated 20 February 2024 at [29]
[16] See Statement of Joshua Reinecker dated 20 February 2024 at [30], [32]
[17] See Statement of Joshua Reinecker dated 20 February 2024 at [31]

31. Similarly, in *Linda Hart & Laura Rafiqi v Woolworths Group Ltd T/A Woolworths* [2022] FWC 1622 (the ***RAFFWU & Big W Noosa Safety Matting Case***) the Fair Work Commission made significant findings about Woolworths Group:

> [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.**
> …
> [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.**
> …
>
> [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.
> …

> [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.**
> …
>
> [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.
> …
>
> [293] **I consider it to be unjust and unreasonable for the Respondent to have removed the antifatigue 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.**

32. These findings and notoriety are described in order to properly explain the value we and those we represent hold for the safety and dispute resolution terms in agreements. We and those we represent hold serious concerns that Woolworths and SDA are negotiating substantial changes to the terms and conditions of employment of workers in secret. Whether it be safety terms, dispute terms or wages terms.

33. Past conduct, including very recent conduct, clearly demonstrates the propensity for this behaviour by Woolworths Group (and SDA.)

Concerns in Bargaining

34. In bargaining at Woolworths, it is not controversial that Woolworths Group has been given materials by SDA which are clearly relevant to bargaining and chosen not to provide them to RAFFWU.

35. It is also uncontroversial that RAFFWU has been excluded from bargaining meetings with Woolworths Group and SDA.

36. Relevant information which should have been disclosed, but was not, includes materials which explain the position of Woolworths Group and the draft clauses of SDA. Woolworths Group has not agreed to provide these in the future. By not providing them in a timely way (in November 2023 or subsequently any time before they were provided to RAFFWU in February 2024 after this application was lodged), Woolworths Group failed to meet the GFBR at s 228(1)(b) of the FW Act.

37. On 1 February 2024, after months of request[18] from RAFFWU and 47 minutes after lodging this application, Woolworths Group provided RAFFWU a set of SDA draft clauses dated 23 November 2023. These are annexed to these submissions.

38. On 9 February 2024, Woolworths Group provided RAFFWU a 'business update' presentation dated 8 November 2023 which had been given to SDA on 14 November 2023 and apparently presented to SDA officials at an earlier date. The business update document is annexed to these submissions.

39. Each of these documents are clearly relevant to bargaining. They were not provided in a timely manner. The first was the subject of numerous requests and categorical refusal by Woolworths Group.[19] The latter was kept secret from RAFFWU despite the document providing a base rationale for the positions of Woolworths Group.

40. Had RAFFWU attended the meeting it was presented in, RAFFWU would know the relevant information. It would have requested the document be provided.

41. Further, by providing the document only to SDA and keeping secret draft clauses provided by SDA, Woolworths Group acted capriciously and unfairly undermining RAFFWU's role in bargaining, and its employees' rights to freedom of association contrary to s 228(1)(e) of the FW Act.

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[18] See Statement of Joshua Reinecker dated 20 February 2024 at [12]-[14]
[19] See Statement of Joshua Reinecker dated 20 February 2024 at [12]-[14]

42. Woolworths Group also failed to recognise and bargain with RAFFWU, in breach of s 228(1)(f) of the FW Act. This was because it denied RAFFWU the opportunity to consider the terms proposed and the information behind the Woolworths Group position. This was relevant to how bargaining would and could occur between Woolworths Group and RAFFWU. In deciding the relevant information would not be shared with RAFFWU, Woolworths Group formed a view that it would not bargain genuinely with RAFFWU.

43. Returning to *Path Transit*, the bargaining between RAFFWU and Woolworths Group has not been meaningful *because* of the failures identified above. In relation to *ASU v ATO* and *RAFFWU v Big W*, the timely disclosure of relevant information has not occurred.

44. This is rectified by an order requiring the information be shared with RAFFWU, including prospectively, and compelling Woolworths Group to involve RAFFWU in all bargaining meetings in the future.

45. RAFFWU does not know what other documents may exist which are relevant to bargaining and shared between SDA and Woolworths. Considering the past conduct, it is clear that orders are appropriate to put bargaining back on an even keel and remedy the failures of Woolworths to meet the GFBR.

46. Consequently, the Commission should make the order filed by RAFFWU on 7 February 2024.

RAFFWU

20 February 2024