



DECISION

Fair Work Act 2009
s 229—Bargaining Order

Anthony Gilbert Hicks
(B2023/1343)

Retail and Fast Food Workers Union Incorporated
(B2024/78)

COMMISSIONER LIM

PERTH, 10 MAY 2024

Application for bargaining order – employer did not meet good faith bargaining requirements – failure to disclose relevant information.

1. Background

[1] This decision concerns the negotiations for the proposed *Woolworths Supermarkets Agreement 2023 (Agreement)* and two applications made pursuant to s 229 of the *Fair Work Act 2009 (Act)* for bargaining orders. The relevant bargaining parties are:

- Mr Anthony Hicks, an independent bargaining representative and applicant for matter B2023/1343 (**Hicks Application**);
- The Retail and Fast Food Workers Union Incorporated (**RAFFWU**), the applicant for matter B2024/78 (**RAFFWU Application**);
- Woolworths Group Limited and Woolworths (South Australia) Pty Ltd (collectively, **Woolworths**), the respondent for both matters;
- The Shop, Distributive and Allied Employees' Association (**SDA**);
- The Australian Workers' Union (**AWU**); and
- The Australasian Meat Industry Employees' Union (**AMIEU**).

[2] The Hicks and RAFFWU Applications arise from the same set of facts and seek similar orders. All parties consented to the two applications being dealt with together.

[3] Following two conferences for the Hicks Application on 12 January 2024 and 24 January 2024, and one conference for the RAFFWU Application on 6 February 2024, I issued directions and programmed the applications for hearing on 19 March 2024.

[4] For the hearing, permission was granted to Mr Matthew Minucci of counsel to represent Woolworths and Mr Warren Friend KC of counsel to represent the SDA.¹

[5] Prior to the hearing, a paginated court book was compiled by my chambers and provided to the parties. References to written evidence and material is by way of the court book.

[6] Having considered the evidence and submissions of the parties I have found that Woolworths did not meet the good faith bargaining requirements when it did not share certain types of documentation with Mr Hicks and RAFFWU. I am satisfied that it is reasonable to make one of the orders sought by RAFFWU.

[7] The detailed reasons for my decision follow.

2. The orders sought

[8] The orders sought by Mr Hicks and RAFFWU are as follows:

Hicks	RAFFWU
<p>That Woolworths:</p> <p>(1) Allow all bargaining representatives to observe, but not participate in the meetings they hold with other representatives (Observation Order);</p> <p>(2) PROVIDE A SUMMARY OF EACH BARGAINING MEETING TO EACH OTHER BARGAINING REPRESENTATIVE FOR THE AGREEMENT, TO OCCUR WITHIN THREE WORKING DAYS OF EACH MEETING OR WITHIN FIVE WORKING DAYS OF ANY ORDER OF THE COMMISSION (WHICHEVER IS THE LATER).</p> <p>a. EACH SUMMARY IS TO INCLUDE THE CURRENT STATUS OF ALL CLAIMS MADE BY WOOLWORTHS AND THE RELEVANT BARGAINING REPRESENTATIVE(S), AS WELL AS ANY PROPOSED</p>	<p>That Woolworths:</p> <p>(1) Invite RAFFWU to observe all bargaining meetings for the Agreement (Observation Order);</p> <p>(2) share with RAFFWU all substantive documents related to bargaining held by Woolworths including all:</p> <p>a. claims;</p> <p>b. proposed drafts of any clauses or agreements; or</p> <p>c. explanatory documents (which explain a claim or position being discussed in bargaining)</p>

¹ [2024] FWC 592.

<p>DRAFTING FOR THE AGREEMENT.</p> <p>b. THE SUMMARIES ARE TO OTHERWISE BE DESCRIBED IN WOOLWORTHS' EMAIL OF 18 JANUARY 2024 TO MR HICKS, EXCEPT THAT THE 'POSITION' COLUMN MUST ALSO DETAIL THE BARGAINING REPRESENTATIVES' REASONS FOR THEIR POSITION ON EACH CLAIM ITEM.</p> <p>(3) send Ms Jannifer Kerr to attend all bargaining meetings with Mr Hicks.</p>	<p>(3) until such time as an agreement is made, share with RAFFWU all future substantive documents related to bargaining received or issued by Woolworths including all claims, all proposed drafts of any clauses or agreements and all explanatory documents (which explain a claim or position being discussed in bargaining) shared with or from any other bargaining representative, within 1 working day of those documents being received or issued by Woolworths to or from any bargaining representative; and</p> <p>(4) refrain from putting any draft or final agreement to employees for consideration until no less than 21 days have passed since the draft or final agreement was provided to RAFFWU (Ballot Order).</p>
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[9] I note the following regarding the orders sought by Mr Hicks and RAFFWU:

- (a) Mr Hicks introduced his claim for an order regarding Ms Kerr's attendance at his bargaining meetings during his responsive material, which limited Woolworths' capacity to respond to this claim; and
- (b) up until the day of the hearing, RAFFWU sought an order that RAFFWU be allowed to participate in the meetings with other bargaining representatives. On the day of the

hearing, RAFFWU amended their position to mirror Mr Hicks' regarding an Observation Order.

3. Evidence

[10] The parties largely agree as to the facts of this matter, though they differ as to the significance to be attributed to various events. Mr Hicks gave evidence in support of his application; Mr Joshua Reinecker, RAFFWU member and Woolworths' employee, gave evidence in support of RAFFWU's application; and Ms Jannifer Kerr, Head of, and Chapter Lead of Woolworths' Workplace Relations, gave evidence in support of Woolworths' case.

[11] The general background of the bargaining so far is as follows:

- (a) In December 2022, Woolworths notified its employees that they were commencing the process of negotiating a new agreement to replace both the *Woolworths Supermarkets Agreement 2018 (2018 Agreement)* and the *Jack Butler and Staff Pty Ltd Enterprise Agreement 2017 (JB&S Agreement)*.² Woolworths' notice of employee representational rights identified the replacement agreement as the *Woolworths Supermarkets Agreement 2023*.
- (b) The 2018 Agreement and the JB&S Agreement currently cover approximately 132,000 employees who perform work in Woolworths Supermarket and Metro stores and online retail sales fulfilment facilities across Australia. The two agreements do not cover employees in salaried positions.³
- (c) The SDA, the AWU and AMIEU are default bargaining representatives for the proposed Agreement pursuant to s 176(1)(b) of the Act. Based on union payroll deductions, approximately 42% of employees covered by the 2018 Agreement or the JB&S Agreement are members of either the SDA or AWU. The AMIEU have not sought to participate in bargaining so far and does not intend to pursue its own log of claims in negotiations.⁴
- (d) RAFFWU has been nominated as a bargaining representative by approximately 460 employees.⁵ Mr Hicks is a Woolworths' employees based at the Woolworths Victoria Park supermarket in Western Australia. Mr Hicks appointed himself as a bargaining representative and has also been nominated as a bargaining representative by 20 other employees at the Victoria Park supermarket.⁶
- (e) RAFFWU presented its log of claims to Woolworths on 3 March 2023.⁷ The SDA and AWU presented a joint log of claims on 8 November 2023.⁸ The SDA and AWU log of

² Digital Court Book (DCB), page 122, [9]; page 206, [7] – [8].

³ Ibid, page 206, [11].

⁴ Ibid, page 206, [13], [16].

⁵ Ibid, page 207, [14].

⁶ Ibid, page 72, [5] – [6]; Transcript PN86.

⁷ Ibid, page 215, [58].

⁸ Ibid, [19].

claims includes 48 claims, many of them with multiple parts. The RAFFWU log of claims includes 99 claims, again, many of them with multiple parts.⁹

- (f) Since the commencement of bargaining, the following meetings have occurred:
- (i) Four meetings between RAFFWU and Woolworths, conducted via Google Meet on 28 September 2023; 14 November 2023; 5 December 2023 and 25 January 2024.¹⁰
 - (ii) Two meetings between Mr Hicks and Woolworths, conducted via Google Meet on 23 November 2023; and 13 December 2023.¹¹
 - (iii) Six meetings between the SDA, the AWU and Woolworths, conducted in person on 8 November 2023; 15 November 2023; 16 November 2023; 17 November 2023; 28 November 2023; and 31 January 2024.¹²
- (g) Ms Kerr has attended all the bargaining meetings except for the meetings with Mr Hicks. Ms Mooy, Woolworths Workplace Relations Manager, has attended the meetings with Mr Hicks.¹³

3.1 Concerns over bargaining

Mr Hicks

[12] In the lead up to Mr Hicks's first bargaining meeting on 23 November 2023, Mr Hicks asked Woolworths whether other bargaining representatives would be present. Woolworths informed him that the meeting would only be with him. At the meeting on 23 November 2023, Mr Hicks informed Woolworths of his view that Woolworths was not meeting its good faith bargaining obligation. Mr Hicks followed this up with a letter that same day setting out his concerns regarding bargaining (**Hicks Concerns Notice**).¹⁴

[13] The Hicks Concerns Notice relevantly provides:¹⁵

- (a) Woolworths has failed to disclose to him what is occurring in the meetings it holds with other bargaining representatives.
- (b) A request that this concern be addressed by providing Mr Hicks with information on the bargaining meetings of other parties; the attendees; detailed minutes; the log of claims of other parties; and any and all relevant details.

⁹ Ibid, page 210, [27(a)].

¹⁰ Ibid, page 207, [18(a)].

¹¹ Ibid, page 207, [18(b)].

¹² Ibid, page 208, [18(c)].

¹³ Ibid, [20].

¹⁴ Ibid, page 24, [2] – [5].

¹⁵ Ibid, pages 26 – 27.

- (c) That if Woolworths refuses to disclose the requested information, then Mr Hicks would consider it unfair conduct.
- (d) A further request that Mr Hicks be allowed to observe the bargaining meetings with other bargaining representatives. In the alternative, that Mr Hicks be provided with recordings of the meetings he does not attend.

[14] On 5 December 2023, Woolworths sent a response to Mr Hicks's letter (**Woolworths' Hicks Response**) denying that Woolworths is not meeting good faith bargaining requirements. Woolworths' response included the following information:¹⁶

- (a) The contact details of the other bargaining representatives;
- (b) Dates of meetings that have been held with other bargaining representatives;
- (c) The names of the Woolworths' bargaining team that have attended meetings;
- (d) That the claims of other bargaining representatives relate to confidential matters raised on behalf of their members and are shared with Woolworths in confidence;
- (e) That the SDA and AWU had not consented to Woolworths sharing their log of claims and the AMIEU have not provided a log of claims; and
- (f) The log of claims of Ms Perinetti, another individual bargaining representative;

[15] The RAFFWU log of claims was not provided as Woolworths' understanding was that Mr Hicks already had a copy.

[16] Woolworths' Hicks Response also committed to providing Mr Hicks with relevant information about bargaining with other bargaining representatives. This included Woolworths' draft clauses or clauses that were agreed to in principle between Woolworths and another bargaining representative. With the response, Woolworths provided a copy of the draft classifications clause that had been provided by Woolworths to the SDA.

[17] Woolworths' Hicks Response outlined Woolworths' view that separate bargaining meetings ensure bargaining proceeds fairly and efficiently. However, Woolworths would consider any requests from bargaining representatives to conduct joint meetings, where the bargaining representatives consented. Woolworths denied Mr Hicks' request that he be allowed to observe the meetings with other bargaining representatives on the basis that the meetings involved the disclosure of confidential matters. Further, that Woolworths does not record bargaining meetings as that may inhibit full and frank discussions that naturally occur as part of the bargaining process.

[18] On 6 December 2023, Mr Hicks lodged his application pursuant to s 229 of the Act. On 19 December 2023, Woolworths provided Mr Hicks with the SDA and AWU's joint log of

¹⁶ Ibid, pages 28 – 30.

claims. On 12 January 2024 all the bargaining parties attended a conference I convened for the Hicks Application.

[19] On 18 January 2024, Woolworths sent the below email to Mr Hicks and the other bargaining representatives:¹⁷

“Dear Mr Hicks

We refer to your application for bargaining orders (being FWC matter B2023/1343) and the conference before Commissioner Lim on 12 January 2024.

Further to the discussions at that conference, and without admission that it is required to do so in order to comply with its obligations under s 228 of the *Fair Work Act* or otherwise, Woolworths is prepared to provide you with a consolidated summary of bargaining to date between Woolworths and the SDA/AWU and further ongoing written updates. Woolworths proposes to circulate any such written summaries to all bargaining representatives.

Woolworths is prepared to do so on the condition that you will withdraw your application for bargaining orders as soon as possible.

Woolworths has set out below a number of claims that have been made to date (as set out in the written logs of claims that have been prepared by Woolworths and the SDA/AWU respectively) in order to provide an example of the summary it is proposing to provide.

As you would appreciate, bargaining is a dynamic process and Woolworths has sought to articulate the position of other bargaining representatives to the best of its knowledge.

It is also important to note that generally Woolworths would not consider any individual claim “agreed” until such time as an overall package has been agreed. Subject to that qualification, Woolworths has sought to indicate where claims may have been agreed in-principle or where it understands that a particular claim is no longer contested.

Claim	Description	Position	Drafting provided	Claim status
SDA#1	A suitable wage increase based upon a minimum of 8% for each year of the Agreement, for all team members together with additional pay rises as may be appropriate based upon the nature of the changes proposed by the company	Wages will be determined as an overall offer, Woolworths does not accept SDA’s position, however given that the parties remain apart on a number of substantial cost impacting claims, we are not yet in a position to make a wage offer	No	Open
SDA#10	Those eligible for a supported wage to be paid the full rate of pay for their classification.	Agreed in-principle - subject to overall agreement.	No	Pending

¹⁷ Ibid, pages 240 – 241.

SDA#19	Breaks: a. Increase paid rest breaks to 20 minutes duration. b. Clarify when working between 5- 6 hours an employee may elect (and will not unreasonably be refused) an “early mark” by taking their break at the end of the shift on either an ad hoc basis or on an ongoing basis.	(a) Withdrawn by SDA (b) Agreed in-principle (links to Woolworths claim #10).	(a) n/a (b) No	(a) withdrawn (b) pending
WW#9	Align unpaid meal breaks minimum default to GRIA minimum 30 or 60 minutes by agreement	Parties agree in-principle that the default will be 30 minutes unless agreed otherwise.	No	Pending
WW#20	Split shifts and multiple engagements	The SDA/AWU does not agree to this claim. The claim remains pressed by Woolworths.	No	Open
WW#25	Ability for part time team members to take annual leave in line with rostered flex up hours, whilst ensuring they maintain a balance in accordance with NES	Agreed in-principle (links to SDA claim #29).	No	Pending

We would be grateful if you could review the examples above and let us know if a summary in this form would address your concerns. Further to your email of 17 January 2024, Woolworths is also willing to meet with you to discuss once you have had a chance to review.

In the event that you require further time, Woolworths does not object if you provide the Commission with a brief update to that effect.

Assuming the examples provide sufficient detail to address your concerns, and once your application has been withdrawn, Woolworths proposes to provide an update as soon as reasonably practicable after the next scheduled bargaining meeting with the SDA and AWU on 23 January 2024. For clarity, some claims have not yet been the subject of substantive discussion so it will not be possible for Woolworths to provide any substantive detail in relation to those claims (unless this occurs as part of the next bargaining meeting).

Woolworths also expects that the information provided in those written summaries will be treated as confidential and will not be distributed to anyone other than the individuals for whom you have been appointed as a bargaining representative. Please let us know if you are not prepared to accept the provision of information on that basis.

We trust that Woolworths has continued to demonstrate its commitment to bargaining with you in good faith and we look forward to your response in due course.

Kind regards
Natalie Mooy
Workplace Relations Partner”

[20] Mr Hicks did not respond to this email.

[21] On 23 January 2024, Woolworths emailed Mr Hicks and the other bargaining representatives a consolidated summary of bargaining to date between Woolworths and the SDA and the AWU in the manner outlined in their email of 18 January 2024 (**Consolidated Bargaining Summary**).¹⁸ The email states:

“Dear Mr Hicks

Further to its commitment to bargaining with you in good faith, Woolworths has decided to provide you with a consolidated summary of bargaining to date between Woolworths and the SDA/AWU.

Although it is regrettable that we have been as yet unable to resolve the underlying dispute, Woolworths understands the nature of your concerns and wishes to allow all bargaining representatives the opportunity to re-focus on the substantive bargaining process.

As noted in our emails of 18 January and 19 January 2024, Woolworths does not concede that the provision of this information is required in order for Woolworths to comply with its obligations under s 228 of the *Fair Work Act* or otherwise. We also re-iterate the other points made in those emails that:

- bargaining is a dynamic process and Woolworths has sought to articulate the position of other bargaining representatives to the best of its knowledge;
- Woolworths expects that the information below will be treated as confidential and will not be distributed to anyone other than the individuals for whom you have been appointed as a bargaining representative; and
- generally Woolworths would not consider any individual claim “agreed” until such time as an overall package has been agreed. Subject to that qualification, Woolworths has sought to indicate where claims may have been agreed in-principle or where it understands that a particular claim is no longer contested.

Yours sincerely,
Natalie Mooy”

[22] The attached Consolidated Bargaining Summary traverses approximately 162 claims between the SDA, AWU and Woolworths and is set out in the fashion outlined in Woolworths’ 18 January 2024 email. It is not necessary to reproduce it in this decision.

[23] On 24 January 2024, I conducted a second conference for the Hicks Application. At this conference, Woolworths committed to providing ongoing bargaining updates as soon as reasonably practicable following each bargaining meeting with the SDA and the AWU, with the intention of doing so within three working days of each bargaining meeting.¹⁹

[24] On 1 February 2024, Woolworths provided Mr Hicks with:

¹⁸ Ibid, pages 243 – 257.

¹⁹ Ibid, page 214, [46] – [47].

- proposed drafting in relation to a number of Woolworths' claims, which was shared with the SDA and AWU on 31 January 2024;²⁰ and
- draft clauses proposed by the SDA and AWU.²¹

[25] On 5 February 2024, Woolworths provided an updated Consolidated Bargaining Summary (**Updated Consolidated Bargaining Summary**) following the bargaining meeting between Woolworths, the SDA and AWU on 31 January 2024.²²

[26] On 9 February 2024, Ms Mooy forwarded to all bargaining representatives an email previously sent to the SDA which attached a presentation (**Woolworths Business Update**) that was shared with the SDA and the AWU during their first bargaining meeting on 8 November 2023.²³ The Woolworths Business Update is an 11-page document that outlines the following:

- (a) Woolworths' three key priorities in approaching the negotiations for the Agreement;
- (b) an overview of the demographics of the employees covered by the Agreement;
- (c) information regarding Woolworths' aspirations for its services;
- (d) statistics regarding turnover, recruitment and hours worked by employees.

[27] On 13 February 2024, Ms Mooy forwarded to all bargaining representatives an email previously sent by the SDA to Woolworths on 31 January 2024. This email provided the SDA's initial comments on drafting provided by Woolworths (as outlined in [24]).²⁴

RAFFWU

[28] Ms Kerr's provided comprehensive and uncontested evidence regarding the timeline of bargaining between Woolworths and RAFFWU. I note the relevant parts below.

[29] On 26 July 2023, RAFFWU filed an application for a protected action ballot order (**PABO**) in relation to bargaining for the Agreement. The order was granted on 27 July 2023.²⁵ On 9 August 2023, the parties attended a compulsory conference in the Commission pursuant to s 448A of the Act. During this conference, Woolworths and RAFFWU discussed RAFFWU's bargaining claims.²⁶

²⁰ Ibid, page 214, [48]

²¹ Ibid, [49].

²² Ibid, page 24, [7] – [10]; page 214, [50].

²³ Ibid, page 215, [56].

²⁴ Ibid, page 215, [57].

²⁵ Ibid, page 215, [59] – [60].

²⁶ Ibid, [61].

[30] On 24 August 2023, Woolworths sent a without prejudice email to RAFFWU (with the other bargaining parties copied in) setting out preliminary and indicative commentary on RAFFWU’s claims.²⁷

[31] On 30 August 2023, the parties attended a further conference in the Commission in relation to RAFFWU’s PABO application. There was further discussion regarding RAFFWU’s claims.²⁸

[32] On 14 November 2023, prior to the bargaining meeting scheduled between Woolworths and RAFFWU that day, Woolworths sent an email to RAFFWU outlining Woolworths’ proposals for the Agreement.²⁹

[33] On 24 November 2023, Woolworths provided further clarification regarding ten of Woolworths’ proposals. Further dates for the next bargaining meeting were also raised.³⁰

[34] On 4 December 2023, Woolworths sent to RAFFWU a document detailing Woolworths’ proposed classification structure.³¹

[35] On 5 December 2023, at a bargaining meeting between Woolworths and RAFFWU, RAFFWU raised concerns regarding Woolworths not bargaining in good faith due to Woolworths holding separate meetings with bargaining representatives.³²

[36] RAFFWU participated in the Commission conferences in relation to Mr Hicks’ application.

[37] On 24 January 2024, Mr Cullinan emailed Woolworths, the SDA and the AWU in which he acknowledged receipt of the Consolidated Bargaining Summary. Mr Cullinan requested “a copy of all drafting provided by any party to you or by you that is related to the bargaining of the agreement”.³³

[38] On 25 January 2024, at a bargaining meeting between Woolworths and RAFFWU, Mr Cullinan raised good faith bargaining concerns and advised that he would write to Woolworths about those concerns. During this meeting, Woolworths committed to:

- (a) provide all bargaining representatives with a copy of a draft Agreement once an in-principle agreement was reached (including iterative drafts of any such agreement);
- (b) provide all bargaining representative with a ‘reasonable opportunity’ to review and provide feedback on any final draft of a proposed Agreement; and

²⁷ Ibid, [62].

²⁸ Ibid, page 216, [63].

²⁹ Ibid, page 216, [64].

³⁰ Ibid, page 216, [65].

³¹ Ibid, page 216, [66].

³² Ibid, page 216, [67].

³³ Ibid, page 216, [71].

- (c) provide a written response by 9 February 2024 in relation to some drafting previously provided by RAFFWU in September 2023 which was discussed in subsequent bargaining meetings.³⁴

[39] On 25 January 2024, Mr Cullinan wrote to Ms Kerr outlining RAFFWU’s concerns (**RAFFWU Concerns Notice**).³⁵ The letter alleges that Woolworths have failed to meet the good faith bargaining requirements of the Act by:

- (a) refusing to hold all bargaining meetings with all bargaining representatives;
- (b) convening bargaining meetings which only involve the SDA and/or the AWU;
- (c) not publishing to RAFFWU accurate and detailed records of the discussions held in the bargaining meetings which exclude RAFFWU;
- (d) not providing documents exchanged with the SDA/AWU to RAFFWU; and
- (e) the known conduct of Woolworths, including in its dealings with the SDA/AWU, as exposed in the matter of *RAFFWU v Woolworths Group Limited T/A Big W*³⁶ (**Big W**).

[40] The RAFFWU Concerns Notice also asked Woolworths to respond by 1 February 2024 and commit to:

- (a) inviting RAFFWU to all bargaining meetings for the Agreement; and
- (b) share with RAFFWU all “substantive documents relating to bargaining that Woolworths holds, including all claims, proposed drafts of any clauses or agreements and all explanatory documents shared with or from any other bargaining representative.”

[41] On 1 February 2024, RAFFWU filed its application for bargaining orders with the Commission.

[42] On 2 February 2024, Ms Kerr responded to RAFFWU’s Concerns Notice.³⁷ The letter relevantly provides:

- (a) Woolworths’ preference was to meet with and consider the claims of bargaining representatives separately. This is to ensure that bargaining proceeds fairly and efficiently; the interests of each bargaining representative can be given appropriate time and attention; and bargaining representatives are not tied up in considering matters that are not relevant to their members.

³⁴Ibid, page 217, [73].

³⁵ Ibid, page 175.

³⁶ [2023] FWC 3006.

³⁷ DCB, page 277.

- (b) Woolworths had committed to providing relevant information such as draft clauses provided by Woolworths or clauses agreed to in principle between Woolworths and another bargaining representative.
- (c) Woolworths had provided to RAFFWU all draft clauses that they had provided to other bargaining representatives.
- (d) Woolworths had committed to provide all bargaining representatives with further written updates on bargaining meetings held with the SDA and the AWU as soon as reasonably practicable after each meeting.
- (e) Woolworths had sought and obtained the consent of the SDA to provide the SDA's proposed drafting (in support of SDA claims) to all bargaining representatives. Further, Woolworths committed to seeking the consent of other parties to share drafting in the future.

[43] On 5 February 2024, Mr Cullinan sent an email to Woolworths clarifying that the explanatory documents that RAFFWU seeks are any “documents which are shared by any bargaining representative (including Woolworths) which explain a claim or position being discussed in bargaining”.³⁸

[44] On 6 February 2024, I convened a conference for the RAFFWU Application.

[45] On 8 February 2024, Mr Cullinan wrote to Woolworths (JTK-11). Ms Kerr wrote to Mr Cullinan on 12 February and asked him to confirm what items or other issues he would like to discuss. Mr Cullinan did not respond.³⁹

[46] On 14 February 2024, Ms Kerr wrote to Mr Cullinan again in response to his email of 8 February 2024 (**Woolworths 14 February Email**). In this email, Woolworths made the following commitments:

- (a) Woolworths would provide iterative drafts of the proposed agreement to all bargaining representatives;
- (b) Woolworths would provide all bargaining representatives with further written updates on bargaining meetings held with the SDA and the AWU as soon as reasonably practicable after each meeting and would undertake to provide such updates within three working days. These updates would be in the same format, and with the same level of detail in the Consolidated Bargaining Summary and Updated Bargaining Summary;
- (c) Where Woolworths, the SDA or the AWU made a new claim in writing (or otherwise), the claim will be provided to all bargaining representatives as soon as reasonably practicable (again, within three working days);

³⁸ Ibid, page 219, [80].

³⁹ Ibid, page 219, [88].

- (d) Where an existing claim is modified by Woolworths, the SDA or the AWU, this will be noted in the written updates; and
- (e) Woolworths would provide the following materials as soon as reasonably practicable (and would undertake best endeavours to do so within three working days):
 - (i) Relevant information about bargaining with other bargaining representatives, including, for example, where draft clauses are provided by Woolworths or particular clauses are agreed to in principle between Woolworths and another bargaining representative;
 - (ii) Any final draft of a proposed Agreement; and
 - (iii) Written logs of claims of all bargaining representatives and any additional claims made as part of the ongoing written updates referred to above.

[47] In the Woolworths 8 February Email, Ms Kerr also stated that Woolworths had undertaken a review of documents shared with or from the SDA and the AWU which explain a claim or position being discussed in bargaining or which might arguably do so (**Explanatory Documents**). Ms Kerr confirmed that Woolworths had provided all bargaining representatives with the Explanatory Documents it had identified. Further, Ms Kerr stated that Woolworths proposes to continue providing Explanatory Documents, unless such documents are confidential or commercially sensitive.

[48] Mr Reinecker provided limited evidence regarding the negotiations. Mr Reinecker states that during one of the RAFFWU bargaining meetings in 2023, Ms Kerr informed the RAFFWU bargaining team that the SDA had provided documents to Woolworths. Mr Cullinan asked Ms Kerr for a copy of the documents. Ms Kerr said words to the effect that the SDA considered the documents confidential, and it was not for Woolworths to share them.⁴⁰

4. Relevant legislation

[49] The good faith bargaining requirements are set out in s 228 of the Act as follows:

“228 Bargaining representatives must meet the good faith bargaining requirements

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

⁴⁰ Ibid, page 123, [12] – [13].

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

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

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

[50] Where a bargaining representative is concerned that one or more of the bargaining representatives for an agreement have not met, or are not meeting, the good faith bargaining requirements, they may apply to the Commission for a bargaining order pursuant to s 229 of the Act. Section 229 provides:

“229 Applications for bargaining orders

Persons who may apply for a bargaining order

- (1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for an order (a **bargaining order**) under section 230 in relation to the agreement.

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

Multi-enterprise agreements

- (2) An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the agreement.

Timing of applications

- (3) The application may only be made at whichever of the following times applies:
 - (a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:
 - (i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or
 - (ii) after an employer that will be covered by the proposed enterprise agreement has requested under subsection 181(1) that employees approve the agreement, but before the agreement is so approved;
 - (b) otherwise—at any time.

Note: An employer that is required to give a notice of employee representational rights under subsection 173(1) cannot request employees to approve the agreement under subsection 181(1) until 21 days after the last notice is given.

Prerequisites for making an application

- (4) The bargaining representative may only apply for the bargaining order if the bargaining representative:
 - (a) has concerns that:

- (i) one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or
 - (ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and
- (b) has given a written notice setting out those concerns to the relevant bargaining representatives; and
- (c) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and
- (d) considers that the relevant bargaining representatives have not responded appropriately to those concerns.

Non-compliance with notice requirements may be permitted

- (5) The FWC may consider the application even if it does not comply with paragraph (4)(b) or (c) if the FWC is satisfied that it is appropriate in all the circumstances to do so.

[51] Section 230 sets out the requirements that the Commission must have regard to before making a bargaining order and provides:

“230 When the FWC may make a bargaining order

Bargaining orders

- (1) The FWC may make a bargaining order under this section in relation to a proposed enterprise agreement if:
- (a) an application for the order has been made; and
 - (b) the requirements of this section are met in relation to the agreement; and
 - (c) the FWC is satisfied that it is reasonable in all the circumstances to make the order.

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

Agreement to bargain or certain instruments in operation

- (2) The FWC must be satisfied in all cases that one of the following applies:
- (a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;
 - (aa) the employer or employers have received a request to bargain under subsection 173(2A) in relation to the agreement;
 - (b) a majority support determination in relation to the agreement is in operation;
 - (c) a scope order in relation to the agreement is in operation;
 - (d) all of the employers are specified in a supported bargaining authorisation that is in operation in relation to the agreement;
 - (e) all of the employers are specified in a single interest employer authorisation that is in operation in relation to the agreement.

Good faith bargaining requirements not met

- (3) The FWC must in all cases be satisfied:
- (a) that:
 - (i) one or more of the relevant bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

- (ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and
- (b) that the applicant has complied with the requirements of subsection 229(4) (which deals with notifying relevant bargaining representatives of concerns), unless subsection 229(5) permitted the applicant to make the application without complying with those requirements.

Bargaining order must be in accordance with section 231

- (4) The bargaining order must be in accordance with section 231 (which deals with what a bargaining order must specify)."

5. Submissions

5.1 Hicks

[52] Mr Hicks' position is that Woolworths have not met, and/or are not meeting the requirements in ss 228(b) and (e) of the Act. Mr Hicks relies on the following in support of his position:⁴¹

- (a) Woolworths has refused to allow him to observe the bargaining meetings held with other bargaining representatives;
- (b) Woolworths has not disclosed what has occurred in the vast majority of meetings held with the SDA and AWU, and all of the meetings held with RAFFWU;
- (c) the summary of bargaining with the SDA and AWU Woolworths has provided to him is inadequate and devoid of detail;
- (d) Woolworths has indicated that they will only disclose documentation that is provided by another bargaining representative when that representative consents to such sharing; and
- (e) Woolworths did not disclose the SDA and AWU's log of claims, and Woolworths' initial response to those claims, in a timely manner.

"Secret meetings"

[53] Mr Hicks contends that Woolworths' refusal to allow Mr Hicks to observe the meetings with other bargaining representatives is conduct which is plainly not valid, defensible, well-founded or able to be accounted for.⁴² Mr Hicks says it is capricious conduct and that Woolworths do not have a cogent or justifiable rationale for their position – their vague concern about efficiency is not substantiated.

[54] Mr Hicks contends that the real reason why Woolworths will not allow him to observe the meetings with other bargaining representatives is because they do not want him or other

⁴¹ Ibid, page 19.

⁴² See: Construction, Forestry, Mining and Energy Union v Oaky Creek Coal Pty Ltd [2017] FWC 5380, [165].

bargaining representatives to see first-hand what is discussed. This is not equitable or honest and curtails the disclosure of relevant information.

[55] This conduct has undermined collective bargaining because it has denied certain bargaining representatives a fair bargaining process and has marred the negotiations with “unwarranted secrecy”.⁴³ Further, that Woolworths have intentionally marginalised some bargaining representatives in favour of the SDA and AWU. Mr Hicks says this will result in a deal being concluded exclusively between Woolworths, the SDA and the AWU as a “*fait accompli*”.⁴⁴

[56] Mr Hicks submits that what is discussed in bargaining meetings is information that would assist him as a bargaining representative to give consideration to the claims in bargaining being made between Woolworths and the other bargaining representatives.

Inadequate disclosure of information

[57] Mr Hicks submits that most, if not all, of what is discussed in bargaining meetings is relevant information that must be disclosed to other bargaining representatives in a timely manner. Woolworths have not disclosed this relevant information in the following ways:

- (a) Woolworths have not made any effort to disclose what occurred in any of the bargaining meetings with RAFFWU.
- (b) Woolworths’ summary of bargaining with the SDA and AWU is superficial and unsatisfactory. This is because the summary does little more than indicate whether a claim has been agreed to or not. It does not disclose what was actually discussed in each of the meetings.

[58] Mr Hicks further submits that a bargaining summary cannot satisfy s 228(1)(b). Bargaining meetings are “rich” with information about the parties’ positions and their reasons for advancing those positions.

[59] In any case, the disclosure of information regarding the bargaining meetings cannot be said to have occurred in a timely manner. Mr Hicks points to the fact that the first meeting between Woolworths, the SDA and the AWU was held on 8 November 2023, but he was not provided with the bargaining summary until 23 January 2024.

Restricting the disclosure of information

[60] Mr Hicks submits that Woolworths cannot rely on the SDA and the AWU’s lack of consent to sharing their bargaining documentation (such as claims or draft clauses). This information is highly relevant and plainly not confidential.

Ms Kerr’s attendance (or lack thereof) at Mr Hicks’ bargaining meetings

⁴³ DCB, page 21, [11].

⁴⁴ *Retail and Fast Food Workers Union (RAFFWU) v Woolworths Group Ltd T/A Big W* [2023] FWC 3006 (*Big W*).

[61] In Mr Hicks' reply submissions, he raised for the first time that he considered Ms Kerr's non-attendance at his bargaining meetings to be in breach of s 228(1)(e) of the Act. Mr Hicks says this conduct shows that Woolworths is not giving genuine consideration to his proposals.

[62] Mr Hicks further submits that it is unfair and capricious for Ms Kerr, the Woolworths bargaining lead, to attend all the meetings with other bargaining representatives but none of the meetings with him. This shows that Woolworths have no real intention of reaching an agreement with him and are merely going through the motions of bargaining. In Mr Hicks' words, Woolworths has "palmed [him] off to someone just to tick the box that they're supposedly meeting that requirement".

5.2 RAFFWU

[63] RAFFWU submits that over the period to 16 February 2024, Woolworths has made a series of undertakings to RAFFWU which have narrowed the issues in dispute.

[64] The issues that remain in dispute are:

- (a) Disclosing information in a timely manner;
- (b) Recognising and bargaining with RAFFWU; and
- (c) Refraining from capricious or unfair conduct that undermines collective bargaining or freedom of association.

History between the parties

[65] Much of RAFFWU's written submissions focused on industrial history between Woolworths and the SDA. In particular, RAFFWU submits that it is notorious that Woolworths negotiated a series of agreements covering workers with the SDA that left many workers worse off than if an award would have applied to them.

[66] In support of RAFFWU's concerns over bargaining for the Agreement in this matter, RAFFWU points to the historical context between Woolworths and the SDA, and recent bargaining between Woolworths at Big W and the SDA. Specifically, RAFFWU relies on the recent decision in *Big W*. RAFFWU submits that in *Big W*, Woolworths was having private discussions in negotiations, with the exchange of 'secret documents' and refusing to allow RAFFWU to attend meetings with other bargaining representatives or to share the 'secret documents'.

Concerns in bargaining

[67] RAFFWU submits that Woolworths has not disclosed relevant information in a timely manner. This includes materials which explain the position of Woolworths and the SDA's draft clauses. Further, Woolworths has not provided an unqualified agreement to provide these in the future. By not providing relevant information in a timely manner, Woolworths has failed to meet the requirement in s 228(1)(b) of the Act.

[68] RAFFWU points to the following:

- (a) On 1 February 2024, Woolworths provided RAFFWU with a set of SDA draft clauses dated 23 November 2023;
- (b) On 9 February 2024, Woolworths provided RAFFWU a copy of the Woolworths Business Update dated 8 November 2023 which had been given to the SDA and the AWU on 14 November 2023.

[69] RAFFWU submits that these documents are clearly relevant to bargaining and were not provided in a timely manner. RAFFWU contends that if Woolworths had permitted them into the bargaining meetings where the above documents were presented, RAFFWU would know the relevant information.

[70] RAFFWU further submits that by only providing the Woolworths Business Update to the SDA and the AWU and by not sharing the SDA's draft clauses, Woolworths acted capriciously and unfairly undermined RAFFWU's role in bargaining, as well as its employees' rights to freedom of association contrary to s 228(1)(e) of the Act.

[71] RAFFWU contends that because Woolworths denied RAFFWU the opportunity to consider the terms proposed and the information behind Woolworths' position, Woolworths has failed to recognise and bargain with RAFFWU. In deciding the relevant information would not be shared with RAFFWU, Woolworths formed a view that it would not genuinely bargain with RAFFWU.

[72] As per *Ferguson v Keolis Downer T/A Path Transit Pty Ltd (Path Transit)*,⁴⁵ the bargaining between RAFFWU and Woolworths has not been meaningful due to Woolworths' failure to comply with good faith bargaining requirements. As per *Australian Municipal, Administrative, Clerical and Services Union v Commonwealth of Australia as represented by Australian Taxation Office (ASU v ATO)*,⁴⁶ and *Big W*,⁴⁷ relevant information has not been disclosed in a timely manner.

[73] Regarding the SDA's submissions in this matter, RAFFWU contends that they are unsupported by evidence and should therefore be given no weight.

5.3 Woolworths

The Hicks Application

Disclosure of information

[74] Woolworths relies on the evidence of Ms Kerr, which they say shows that Woolworths has provided Mr Hicks with relevant information, including draft proposals and responses to

⁴⁵ [2021] FWCFB 1663.

⁴⁶ [2015] FWC 7692.

⁴⁷ [2023] FWC 3006.

his claims.⁴⁸ This includes information from Woolworths' discussions with RAFFWU. Further, Woolworths has committed to providing Mr Hicks with a consolidated summary of bargaining to date between Woolworths and RAFFWU, with ongoing written updates.

[75] Woolworths makes the following further submissions regarding Mr Hicks' contentions that Woolworths has not disclosed relevant information in a timely manner:

- (a) There is no obligation to provide Mr Hicks with a transcript or what occurred at bargaining meetings (in any event, Woolworths does not record meetings).
- (b) Woolworths has provided Mr Hicks with summaries of bargaining that identify the substantive matters discussed, claims made, and responses to claims. There is nothing to suggest that these summaries are inaccurate or lacking in detail. Mr Hicks' distrust of the summaries does not mean that Woolworths has failed to comply with its obligations under the Act.
- (c) The SDA and the AWU log of claims are available via the SDA's website and Woolworths was not obligated to provide this to Mr Hicks or RAFFWU in those circumstances. Woolworths should not be criticised for respecting the will of bargaining representatives when they provide information and do not consent to its release.
- (d) Mr Hicks' grievance is essentially that he did not have an opportunity to negotiate in the presence of the SDA or AWU. However, that should not be regarded as an element of the good faith bargaining regime.

Capricious or unfair conduct that undermines freedom of association or collective bargaining

[76] Woolworths submits that to satisfy s 228(1)(e) of the Act any unfair conduct must undermine freedom of association and/or collective bargaining. This will at least require that the conduct is part of, connected to, or has an impact upon the bargaining process.

[77] Woolworths contends that its conduct in bargaining has not been unfair, nor has it undermined the right to freedom of association or collective bargaining. Mr Hicks has been recognised as a bargaining representative, has had the opportunity to meet with Woolworths to discuss matters relevant to the interests of the employees he represents, and to put proposals for consideration. Woolworths has otherwise continued to provide relevant information to the bargaining representatives and will continue to do so throughout the bargaining process.

[78] Woolworths further submits that it is not capricious nor unfair for them to conduct separate bargaining meetings with bargaining representatives.

The RAFFWU Application

Disclosure of information

⁴⁸ DCB, pages 212 – 215, [31], [32], [48], [49], [50], [55], [56] and [57].

[79] Woolworths submits that any allegation that it has breached s 228(1)(b) is misconceived as they have appropriately shared information with RAFFWU throughout bargaining.

Capricious or unfair conduct that undermines freedom of association or collective bargaining

[80] Woolworths adopts their submissions from the Hicks Application regarding this point.

Recognising and bargaining with the other bargaining representatives

[81] Woolworths submits that they have at all relevant times recognised and bargaining with RAFFWU.

Not reasonable to make the order sought

[82] Woolworths submits that they:

- (a) have provided information to all bargaining representatives that is sufficient to permit Mr Hicks and RAFFWU to discharge their obligations to the employees they represent and to ensure bargaining is conducted fairly;
- (b) prefer to continue bargaining separately with the parties, but are also prepared to consider any joint request from bargaining representatives to have joint bargaining meetings; and
- (c) are committed to sharing information with all bargaining representatives moving forward.

[83] In light of the above, Woolworths' submits that even if the Commission finds that Woolworths has breached the good faith bargaining requirements (which is denied), it is nevertheless not reasonable in the present circumstances to make the orders sought by Mr Hicks and RAFFWU. which means that the orders sought will have very little utility.

5.4 The SDA

Mr Hicks

[84] The SDA submits that Mr Hicks' has not made out his case. The SDA makes the following contentions:

- (a) Mr Hicks asserts that having separate bargaining meetings is conduct which is "plainly not valid, defensible, well founded or able to be accounted for. It is capricious conduct". However, Mr Hicks does not explain why this is so.
- (b) Mr Hicks has not explained why it is necessary for him to observe the SDA and the AWU's bargaining meetings. He has been given summaries of what occurs in the bargaining meetings, yet maintains the meetings are secret. If Mr Hicks has questions about any particular issue, he can ask them.

[85] Section 228(1)(b) does not require the disclosure of confidential information. The SDA considers that the proposals it makes are confidential during the course of bargaining until a point is reached where it can state a public position. This is due to the need to strategize claims and consult with delegates and members.

[86] The SDA has approximately 57,000 members employed by Woolworths. The preservation of confidentiality is necessary for the SDA to manage the wishes and expectations of a huge number of members. The SDA submits that it would hinder bargaining if the SDA were forced to limit the communications it made to Woolworths because anything said to them would be passed on to other bargaining representatives. The SDA further says that this is justified given RAFFWU's history of attacks on the SDA.

[87] With regards to Mr Hicks' arguments on s 228(1)(e), the SDA submits that there is nothing capricious in how Woolworths has dealt with Mr Hicks.

[88] The SDA says that ultimately, Mr Hicks has not made out any factual case for relief. Mr Hicks asserts that he is hampered in bargaining due to separate meetings, however Mr Hicks fails to explain what he is prevented from doing. There is no evidence of what proposals he cannot make, or why he cannot respond to proposals that he has been given notice of.

RAFFWU

[89] The SDA adopts its objections to the Hicks Application in relation to the RAFFWU Application.

[90] In relation to RAFFWU's reliance on *Big W*, the SDA says that *Big W* is not the same as the current matter and cannot affect the question of whether or not the good faith bargaining requirements have been met.

[91] With regards to Mr Reinecker's evidence and RAFFWU's submissions on the industrial history between Woolworths and the SDA, the SDA notes that they are not directed against Woolworths, the respondent in this matter, but rather the SDA. The SDA submits that RAFFWU's attack on the SDA is both false and irrelevant to the statutory task before me.

5.5 The AMIEU

[92] The AMIEU supports the Hicks and RAFFWU Applications. The AMIEU notes that though there is a scarcity of case law that would require Woolworths to hand over the precise information sought by Mr Hicks and RAFFWU, in this matter where there are multiple bargaining representatives, it is appropriate and in line with ss 228-230 of the Act to grant the orders sought.

[93] The AMIEU contends that Mr Hicks and RAFFWU are seeking information that will allow them to effectively bargain on behalf of the workers they represent. The AMIEU further submits that allowing Mr Hicks and RAFFWU to observe the meetings of other bargaining representatives would place the parties on equal footing and would not hinder or obstruct bargaining in any way. The AMIEU says that this is in compliance with the objects of the Act.

5.6 The AWU

Observation Order

[94] The AWU opposes the Observation Order sought by Mr Hicks and RAFFWU. The AWU submits that separate bargaining meetings are more likely to facilitate efficient bargaining as the AWU and the SDA represent the largest cohort of the employees who will be voting on any agreement. The interests of this membership cohort are not necessarily aligned with RAFFWU's members or the employees that Mr Hicks represents.

[95] Consistent with their statutory obligations, the AWU is prepared to consider any proposals made by Mr Hicks or RAFFWU in the course of negotiations.

[96] The AWU further submits that Mr Hicks' reliance on precedent where bargaining representatives were not recognised is misplaced as Woolworths has recognised Mr Hicks as a bargaining representative.

Ballot Order

[97] The AWU objects to the order sought by RAFFWU restraining Woolworths from putting any draft or final agreement to employees for consideration until no less than 21 days have passed since the draft or final agreement was provided to RAFFWU.

[98] The AWU submits that RAFFWU's submissions do not appear to deal with this order directly, and RAFFWU has failed to explain why 21 days is an appropriate period to delay the balloting of any proposed agreement. Further, that the Commission should reject any attempt to frustrate or delay a future agreement ballot.

Orders regarding the disclosure of information

The AWU did not make any submissions in this regard.

6. Consideration

6.1 Preliminary considerations

[99] There is no dispute, and I am satisfied that:

- (a) Woolworths has initiated bargaining for the Agreement;
- (b) Mr Hicks and RAFFWU are both bargaining representatives for the Agreement;
- (c) both applications have been made during the period prescribed by s 229(3)(a); and
- (d) Mr Hick and RAFFWU have complied with the requirements in s 229(4) of the Act.

[100] Mr Hicks and RAFFWU contend that Woolworths have breached multiple parts of the good faith bargaining requirements due to the following:

- (a) failing to disclose documents (information) in a timely manner;
- (b) refusing to allow Mr Hicks and RAFFWU to observe Woolworths' meetings with other bargaining representatives; and
- (c) Ms Kerr's non-attendance at Woolworths' meetings with Mr Hicks.

6.2 Has Woolworths met the good faith bargaining requirements?

[101] I now turn to consider whether Woolworths has not met, or is not meeting, the good faith bargaining requirements with regards to Mr Hicks and RAFFWU, and if not, whether it is reasonable in all the circumstances to make the orders sought.

Section 228(1)(b): Has Woolworths disclosed relevant information (other than confidential or commercially sensitive information) in a timely manner?

[102] The obligation in s 228(1)(b) is to allow other bargaining representatives to give consideration to the positions of the bargaining representative.⁴⁹ In *ASU v ATO*, in finding that the ATO had complied with the good faith bargaining requirements, the Commission noted at [58]:

“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 matter 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.”

[103] It is helpful to set out the information that Woolworths has disclosed to Mr Hicks and RAFFWU that is the subject of the applicants' contentions:

Information	Date it was requested	Date it was disclosed
SDA and AWU log of claims, presented to	23 November 2023 in the Hicks Concerns Notice. ⁵⁰	19 December 2023.

⁴⁹ *NUW v Linfox* [2013] FWC 8428, citing *NUW v Defries Industries Pty Ltd* [2009] FWC 88.

⁵⁰ DCB, page 26.

Woolworths on 8 November 2023		
Consolidated Bargaining Summary of the SDA and the AWU meetings to date.	23 November 2023 in the Hicks Concerns Notice. ⁵¹	23 January 2024
SDA draft clauses dated 23 November 2023	25 January 2023 in the RAFFWU Concerns Notice. ⁵²	1 February 2024
Updated Consolidated Bargaining Summary		5 February 2024
Woolworths Business Update dated 8 November 2023	25 January 2023 in the RAFFWU Concerns Notice. ⁵³	9 February 2024

[104] For completeness, I note that Mr Hicks and RAFFWU do not appear to cavil over Woolworths’ disclosure of the draft clauses that Woolworths has provided in the bargaining process.

[105] I also note that Mr Hicks contends that the bargaining summaries are inadequate. His position is that though the summaries detail the parties’ positions on claims in bargaining, they do not explain *why* the parties have advanced those positions. Mr Hicks also contends that Woolworths have also breached s 228(1)(b) by not allowing him to observe the SDA/AWU bargaining meetings.⁵⁴

Is the information relevant?

[106] With regards to the log of claims and bargaining summaries as provided by Woolworths, I find that they are all relevant information to the bargaining process for Mr Hicks and RAFFWU. I agree with Commissioner Roe’s observations in *NUW v Linfox*⁵⁵ regarding the critical nature of bargaining proposals to the bargaining process, as well as the responses to those proposals.⁵⁶ As the Commissioner noted, bargaining is a process that is concluded by a collective decision of the employees who will be covered by the agreement. The decision made by those employees is informed by the bargaining process. What the parties’ positions are and what agreement (or disagreement) is reached throughout that process is therefore critical to bargaining.

[107] Turning to Mr Hicks’ contention that the bargaining summaries are “superficial and unsatisfactory”,⁵⁷ I do not agree. The bargaining summaries identify what the claim is; who is pressing the claim; what the position of the other party is in relation to the claim; whether

⁵¹ Ibid.

⁵² Ibid, pages 174 – 175.

⁵³ Ibid.

⁵⁴ Ibid, page 21 [9].

⁵⁵ [2013] FWC 8428.

⁵⁶ Ibid, [30].

⁵⁷ DCB, page 22, [16].

drafting has been provided; and whether the status remains open, not pressed or pending. It also identifies where a claim has been agreed to in-principle, subject to overall agreement.

[108] Mr Hicks says that “there is very little information [from a bargaining meeting] that might appropriately remain undisclosed”, and that it is the “unaltered content of the meeting (that is, what is actually said and shared) which is the relevant information”.⁵⁸ I agree that it is important for parties to know each other’s positions. However, I am not persuaded in this case that by not mapping out their every rationale and every reason of the SDA and the AWU that Woolworths has breached s 228(1)(b).

[109] Why a party may or may not agree with a claim is generally part of an overall bargaining strategy. Bargaining representatives need to make decisions based on the interests of the group they represent. This means that there will be give and take during negotiations. The good faith bargaining requirements do not require a party to disclose their bargaining strategy. I also note that Woolworths asked Mr Hicks to raise any issues he had with the format of the Consolidated Bargaining Summary, which he did not do at the time.

[110] Dealing with Mr Hicks’ contention that by not allowing him to observe the AWU/SDA meetings there has been a failure to disclose information, I make similar findings as per [107] and [108]. I am satisfied that Mr Hicks should know the bargaining positions of other representatives. I am not satisfied this means he must know every word that is uttered.

[111] With regards to the SDA draft clauses, I find that they are relevant information to bargaining. Positions on wording are just as, if not sometimes more, important as the initial claims.

[112] With regards to the Woolworths Business Update, there was some contention during Ms Kerr’s cross-examination as to its relevance. The Woolworths Business Update was discussed with the SDA in a bargaining meeting but was not shared with RAFFWU or Mr Hicks. It was put to Ms Kerr that the Woolworths Business Update was important context for what Woolworths wants to achieve in bargaining, which she denied. Ms Kerr’s view is that the information in the Woolworths Business Update is background context, and that it was articulated to the other bargaining representatives verbally.⁵⁹ No details on this were provided and it was not raised in re-examination.

[113] I find that the Woolworths Business Update is relevant information to the bargaining process. It details Woolworths’ priorities and claims for the Agreement. It is hard to see how it is not relevant.

Is the information confidential or commercially sensitive?

[114] Woolworths claims that the log of claims from the SDA and the AWU and the SDA draft clauses are confidential on the basis the SDA and the AWU communicated them in confidence. A document in the context of bargaining is not confidential simply because a party

⁵⁸ Ibid, page 22, [17] – [18].

⁵⁹ Transcript, PN232 – PN239.

or certain parties say that it is confidential.⁶⁰ As noted by the Full Bench in *Endeavour Coal Pty Ltd v APESMA (Endeavour Coal)*,⁶¹ what is confidential or commercially sensitive will involve a decision on a question of fact in each case where that quality is asserted.⁶²

[115] The extent of Woolworths' evidence on this point is that the log of claims and SDA draft clauses are confidential because the SDA says they are. The SDA made submissions that how they approach their claims is confidential as it is tied to their industrial strategy. Further, that confidentiality is required as the SDA must manage the expectations of a huge number of members and negotiate in order to achieve the best outcome for them. The SDA says it would hinder bargaining if the SDA had to limit its communications to Woolworths because anything said to Woolworths would be passed onto other bargaining representatives.⁶³ However, the SDA did not lead any evidence to this effect, and so these submissions lack weight.

[116] Though each case will turn on its own facts, I agree with Commissioner Roe's findings in *NUW v Linfox* at [37] where he stated:

“...Regard has to be had for the nature of the document including its purpose and its content. The purpose of an initial log of claims is to set out the objective sought by a party in bargaining. By its very nature this is a document which must be available to the bargaining parties otherwise it cannot be properly used for its purpose which is to facilitate collective bargaining. It may be reasonable to put some conditions on the distribution or publication of the document or parts of it but it is not reasonable to impose a restriction which prevents other bargaining representatives from being aware of the essential nature of the claims being made and the response to them.”

[117] Having perused the SDA and AWU log of claims in this matter, there is nothing in there to persuade me that the log of claims contains confidential information. This is supported by the fact the log of claims was made publicly available on the SDA website by 19 December 2023 at the latest.

[118] I similarly find that the draft clauses provided by the SDA thus far in bargaining do not contain confidential information.

[119] Though it was not raised by Woolworths, the Woolworths Business Update contains the words “Privileged & Confidential” on the cover page. To the extent that it discloses any commercially sensitive information, I find that it was material that was appropriate to share with bargaining representatives other than the SDA and the AWU.

Was the information disclosed in a timely manner?

[120] I find that all of the information outlined in the table in [103], except for the Updated Consolidated Bargaining Summary, was not disclosed in a timely manner. I am satisfied that the information has now been disclosed, but that is a matter for consideration of whether any order is appropriate.

⁶⁰[2013] FWC 8428, [37].

⁶¹ [2012] FWA FB 1891.

⁶² Ibid, [64].

⁶³ DCB, page 323, [15] – [16].

[121] I find that Woolworths has breached the obligation in s 228(1)(b).

Section 228(1)(d): Has Woolworths given genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals?

[122] Mr Hicks also submits that Woolworths is not genuinely considering his claims by not sending Ms Kerr to his bargaining meetings.⁶⁴ Mr Hicks made submissions from the bar that he accepted that Ms Mooy may have communicated his proposals to Ms Kerr, but that he effectively didn't trust that she had done so in a way that was faithful to how he communicated them to Ms Mooy.⁶⁵

[123] It must be said that refraining from unfair conduct does not mean that a party must treat all bargaining representatives *equally*. It is impossible to treat all parties in a negotiation equally particularly in negotiations like this with a variety of bargaining representatives covering a large number of employees across the country. Mr Hicks' indignation that Ms Kerr had not attended his meetings was unsupported by evidence that Ms Mooy or Woolworths had not given his proposals due consideration. As the applicant, the onus is on him to prove this.

Section 228(1)(e): Has Woolworths engaged in capricious or unfair conduct that undermines freedom of association or collective bargaining?

[124] In *Path Transit*,⁶⁶ a Full Bench of the Commission found at [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.”

[125] As noted by Deputy President Asbury (as she was then) in *Construction, Forestry, Mining and Energy Union v Oaky Creek Coal Pty Ltd (Oaky)*,⁶⁷ section s 228(1)(e) is directed to the process of bargaining. Accordingly, it does not bar conduct that is capricious and unfair but is not directed to the bargaining process or which does not have an impact on the bargaining process.⁶⁸

[126] For the purposes of s 228(1)(e), “unfair” and “undermine” are to be given their ordinary meanings:

⁶⁴ Transcript, PN504.

⁶⁵ Ibid, PN510 – PN 511.

⁶⁶ [2021] FWCFB 1663 (*Path Transit*).

⁶⁷ [2017] FWC 5380.

⁶⁸ Ibid, [165].

- (a) “unfair” means conduct which is not fair, biased or partial; not equitable or just; not impartial or according to the rules;⁶⁹
- (b) to “undermine” means to weaken, injure or damage, including by secret or insidious means.⁷⁰

[127] Mr Hicks says that by refusing to allow him to observe the meetings with other bargaining representatives, Woolworths is in breach of s 228(1)(e). Mr Hicks also says that it has denied him a fair bargaining process.

[128] I do not find that Woolworths has engaged in capricious or unfair conduct that undermines freedom of association or collective bargaining by not permitting Mr Hicks and RAFFWU to observe their bargaining meetings with the SDA and the AWU. Woolworths has recognised and met with RAFFWU and Mr Hicks. There is no evidence that Woolworths has not given due consideration to their proposals. Woolworths has now given information about what has occurred during the SDA/AWU meetings.

[129] I am not satisfied that Woolworths has engaged in capricious or unfair conduct. Even if I were satisfied on this contention, I am not persuaded that it has undermined freedom of association or collective bargaining.

[130] Mr Hicks also submits that Woolworths has engaged in unfair and capricious conduct by not sending Ms Kerr to his bargaining meetings. Mr Hicks says that there was no explanation for this.⁷¹ This is incorrect. Ms Kerr gave evidence that she did attend the first 5-10 minutes of the first bargaining meeting with Mr Hicks, but decided to leave the meeting as there were several other Woolworths’ representatives on the call and made the assessment that she was not needed.⁷² I accept this evidence from Ms Kerr. I am not persuaded that Ms Kerr not attending the bargaining meetings with Mr Hicks is capricious or unfair conduct. Even if I had been persuaded on this point, I fail to see how it could have undermined freedom or association or collective bargaining.

Section 228(1)(f): Has Woolworths recognised and bargained with the other bargaining representatives for the agreement?

[131] RAFFWU submits that Woolworths have failed to recognise and bargain with RAFFWU on the basis Woolworths denied RAFFWU the opportunity to consider terms being proposed and the information behind Woolworths’ position.

[132] I am not persuaded by RAFFWU’s submission on this point. Woolworths has clearly recognised RAFFWU’s status as a bargaining representative and has engaged in several bargaining meetings with them. Woolworths’ failure to disclose information has already been dealt with in this decision.

⁶⁹ Anglo Coal at [103]; Oaky Creek Coal at [165].

⁷⁰ Anglo Coal at [104]; Oaky Creek Coal at [165].

⁷¹ Transcript, PN505.

⁷² Ibid, PN287.

6.2 Is it reasonable in all the circumstances to make orders?

[133] Mr Hicks and RAFFWU seek the same Observation Order, in that Woolworths must allow them to observe the meetings conducted with the SDA and the AWU. I do not find it reasonable to grant this order. There is no conduct to cure with regards to capricious or unfair conduct, and the concerns around disclosure of information are addressed by ongoing summaries of bargaining.

[134] As I have not found any wrong-doing in Ms Kerr not attending Mr Hicks' bargaining meetings, there is no basis to make an order compelling her attendance in the future.

[135] Woolworths has given commitments as to how it will proceed with bargaining going forward, as outlined in Ms Kerr's email to Mr Cullinan in the Woolworths 14 February Email. I am satisfied that these commitments, as outlined in this decision, either cure the breaches of s 228(1)(b), or substantially meet the orders sought by Mr Hicks and RAFFWU.

[136] The one clear point of difference between Woolworths' commitments and the third order sought by RAFFWU concerns draft clauses provided by the SDA or the AWU. Woolworths commits to sharing such clauses where the SDA or the AWU consents to it. RAFFWU seeks a prospective order compelling Woolworths to share any draft clauses, regardless of whether the SDA or AWU consents.

[137] As outlined above, I find that draft clauses proposed by bargaining parties in these negotiations are relevant information. They should be shared. I will accordingly issue an order requiring that until such a time that an agreement is made, Woolworths must share with all bargaining representatives draft clauses proposed by any other bargaining representative within three working days.

[138] I now turn to RAFFWU's claim for an order restraining Woolworths from putting any draft or final agreement to employees for consideration until no less than 21 days have passed since the draft or final agreement was provided to RAFFWU. I appreciate that RAFFWU relies heavily on the purported industrial history between Woolworths and the SDA, as well as *Big W*. However, every case must turn on its own facts, and RAFFWU did not lead any evidence in support of this position in this matter, nor was Ms Kerr cross-examined on it.

[139] It is thus not reasonable for me to issue the Ballot Order sought by RAFFWU. However, it is appropriate for me to make an observation. I note that Woolworths has committed to provide a draft or final agreement to the bargaining parties before it is put to employees for ballot and a reasonable opportunity for all bargaining representatives to review and provide feedback. Woolworths has not provided a commitment as to how many days would be provided. Given the significance of the Agreement, the large number of employees covered, and the large number of claims being negotiated between the parties, it seems sensible that Woolworths provide a minimum of 7 days for bargaining representatives to consider a final draft and provide feedback before balloting employees.

6.3 Order

[140] An order pursuant to this decision will issue separately.



COMMISSIONER

Appearances:

A Hicks, Applicant

J Cullinan for the RAFFWU, Applicant

B Swan for the AMIEU

G Taylor for the AWU

F Friend of Counsel for the SDA

M Minucci of Counsel for Woolworths, Respondent

Hearing details:

2024.

Perth, and via Microsoft Teams:

19 March.

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