FEDERAL CIRCUIT COURT OF AUSTRALIA

TRANSPORT WORKERS' UNION OF AUSTRALIA v COLES SUPERMARKETS AUSTRALIA PTY LTD [2014] FCCA 4

Catchwords:
INDUSTRIAL LAW – Fair work – claim of underpayments – liability – question of coverage of relevant industrial instrument – three possible applicable instruments – consideration of principles relevant to the determination of which is the applicable instrument.

Legislation:
Acts Interpretation Act 1901 (Cth), ss.15AB, 46
Evidence Act 1995 (Cth), s.140
Fair Work Act 2009 (Cth), ss.12, 43, 45, 46, 47, 48, 51, 52, 53, 57, 132, 143A, 172, 181, 182, 187, 188, 189, 190, 206, 546
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Workplace Relations Act 1996 (Cth), ss.143, 328, 333, 347, 351, 567, 576N
Workplace Relations Amendment (Transition To Forward With Fairness) Act 2008

Cases cited:
Amcor Ltd v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241
AMWU v Ardmona Foods Ltd (2006) 155 IR 211
AMWU v Qantas Airways (2001) 106 IR 307
Australian Rail, Tram and Bus Industry Union v Rail Corporation New South Wales (2009) 187 IR 453
Australian Timber Workers Union v Monaro Sawmills Pty Ltd (1980) 42 FLR 369
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Skilled Engineering Ltd [2003] FCA 260
AWU v Coffey Information Pty Ltd [2013] FWCFB 2894
BP Australia Pty Ltd v Nyran Pty Ltd (2003) 198 ALR 442
Cape Australia Holdings Pty Ltd v CFMEU [2012] FWAFB 3994
Carpenter v Carona Manufacturing Pty Ltd (2002) 122 IR 387
CFMEU v Dyno Nobel Asia Pacific Limited [2005] AIRC 622
CFMEU v John Holland Pty Ltd (2010) 186 FCR 88
City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union (2006) 153 IR 426
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337
Cohns Industries Pty Ltd v Deputy Federal Commissioner of Taxation (1979)

24 ALR 658
Coles v TWU [2012] FWA 8772
Dilworth v Commissioner of Stamps [1899] AC 99
Dyno Nobel Asia Pacific Limited v Construction, Forestry, Mining and Energy Union (AIRCFB, PR956868, 14 July 2005)
Endeavour Coal Pty Ltd v Construction, Forestry, Mining and Energy Union (2007) 161 IR 96
George A Bond & Co Ltd (in liq) v McKenzie [1929] AR 498
Hepples v Commissioner of Taxation (1990) 22 FCR 1
Hockey v WIN Corporation Pty Ltd [2013] FCA 772
Joyce v Christoffersen (1990) 26 FCR 261
Kingmill Australia Pty Ltd (t/a Thrifty Car Rental) v Federated Clerks' Union (NSW) (2001) 106 IR 217
Kucks v CSR Ltd (1996) 66 IR 182
Layton v North Goonyella Coal Mines Pty Ltd (2007) 166 IR 394
LHMU v Arnotts Biscuits Ltd (2010) 188 FCR 221
Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd (2006) 156 FCR 1
Logan v Otis Elevator Company Pty Ltd [1997] IRCA 200
McMenemy v Thomas Duryea Consulting (2012) 223 IR 125
Merchant Service Guild of Australia v J Fenwick & Co Pty Ltd (1973) 150 CAR 99
Nornews Pty Ltd v Everett (1998) 81 IR 76
Oceanic Coal Australia Pty Ltd v Parker [2010] FCA 1018
Prichard v Krantz (1983) 5 IR 437
Re G.J.E Pty Ltd [2013] FWCFB 1705
Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corp Pty Ltd (1993) 178 CLR 379
Re Porter; Re TWU (1989) 34 IR 179
Re Request from the Minister for Employment and Industrial Relations – 28 March 2008 (2009) 181 IR 19; [2008] AIRCFB 345
Re State Rail Authority Firefighters Award 2001 (2002) 122 IR 13
Re TCFUA and Solaris Paper Enterprise Agreement 2010 (2011) 202 IR 256
Short v FW Hercus Pty Ltd (1993) 40 FCR 511
Softplay Pty Ltd v Department of Industrial Relations (1999) 94 IR 175
The Federated Clerks' Union of Australian Industrial Union of Workers (WA) Branch v Cary (1977) WAIG 585
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165
Tucker v Digital Diagnostic Imaging Pty Ltd [2011] FWA 1767
TWU v Coles [2013] FWCFB 276
TWU v Toll Dnata Airport Services [2012] FWA 5606
United Firefighters Union of Australia v Metropolitan Fire and Emergency Services Board (2006) 152 FCR 18
Ware v O'Donnell Griffin (Television Services) Pty Ltd [1971] AR (NSW) 18
Western Export Services, Inc v Jireh International Pty Ltd (2011) 282 ALR 604
Wills v Hartland [1917] AR (NSW) 410
YZ Finance Co Pty Ltd v Cummings (1964) 109 CLR 395

Applicant:	TRANSPORT WORKERS' UNION OF AUSTRALIA
Respondent:	COLES SUPERMARKETS AUSTRALIA PTY LTD (ACN 004 189 708)
File Numbers:	SYG 432 of 2012 SYG 433 of 2012
Judgment of:	Judge Driver
Hearing dates:	31 July, 1-2 August, 12-13 September 2013
Delivered at:	Sydney
Delivered on:	28 February 2014

REPRESENTATION

Counsel for the Applicant:	Mr M Gibian
Solicitors for the Applicant:	Maurice Blackburn
Counsel for the Respondent:	Mr S Wood SC, with Mr M Felman
Solicitors for the Respondent:	Herbert Smith Freehills

ORDERS

(1) The applications filed on 28 February 2012 are dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 432 of 2012
SYG 433 of 2012

TRANSPORT WORKERS' UNION OF AUSTRALIA
Applicant

And

COLES SUPERMARKETS AUSTRALIA PTY LTD
(ACN 004 189 708)
Respondent

REASONS FOR JUDGMENT

Introduction and background

1. By two applications filed on 28 February 2012, the Transport Workers Union of Australia (TWU) commenced proceedings pursuant to the *Fair Work Act 2009* (Cth) (Fair Work Act) in which it alleges that two of its members, Mr Stevan Gajdobranski and Mr Cory Michael have been underpaid by the respondent (Coles) by reference to various provisions of the *Road Transport and Distribution Award 2010* (Road Transport Award) in contravention of s.45 of the Fair Work Act. The alleged contraventions concern a failure to pay wages and other entitlements such as overtime, allowances and penalty rates. The proceedings were dealt with concurrently.

2. By agreement between the parties and the Court, this judgment deals with the liability of Coles and not quantum. It is not in dispute that Mr Gajdobranski and Mr Michael were not paid in accordance with the Road Transport Award whilst employed by Coles.[1]

[1] Mr Gajdobranski remains an employee of Coles and Mr Michael is now employed by the TWU.

3. The key issue to resolve is whether the employment of Mr Gajdobranski and Mr Michael was regulated by the Road Transport Award or by the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd Retail Agreement 2008* (2008 EBA) or the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd Retail Agreement 2011* (2011 EBA). There is a further question whether the relevant industrial instrument applicable to Mr Gajdobranski and Mr Michael was the *General Retail Industry Award 2010* (Retail Award).

4. The parties agree that the TWU can only succeed in its action if the Court finds that the relevant industrial instrument is the Road Transport Award.

5. The procedural history of this matter is somewhat complex. On 28 March 2012 Coles applied for the TWU proceedings to be stayed permanently, or alternatively until related proceedings in the Fair Work Commission (FWC) were determined.[2] I listed that Application in a Case for hearing on 15 May 2012 but, by agreement with the parties, the proceedings were stood over generally several times in the expectation that the related proceedings before the FWC might resolve the issue of award coverage. In the event, that expectation was not met because, although Coles was apparently partially successful before Vice President Watson,[3] on appeal the Full Bench found (in disallowing the appeal on what appears to have been a technicality) that Vice President Watson's decision was made without jurisdiction.[4]

6. Undaunted, Coles then sought the summary dismissal or permanent stay of the TWU proceedings in this Court based upon the findings made by Vice President Watson concerning the application of the 2008 and 2011 EBAs, on the basis that those findings (whilst made without jurisdiction) had not been set aside by the Full Bench. Coles' assertion was that the findings by Vice President Watson caused an issue estoppel or alternatively, the TWU proceedings were an abuse of process. I heard argument on that issue on 25 March 2013 and, in a short oral judgment, I dismissed Coles' application. In short, I rejected the proposition that an issue estoppel arose from observations made by an administrative tribunal acting in excess of its jurisdiction. I further

[2] Fair Work Australia proceedings C2012/2384; DR2012/171 and C2012/2841.
[3] *Coles v TWU* [2012] FWA 8772.
[4] *TWU v Coles* [2013] FWCFB 276.

rejected the proposition that an issue estoppel could arise from observations by an administrative tribunal that are not essential to a finding by the tribunal of a want of jurisdiction. I also rejected the proposition that the TWU proceedings were an abuse of process. Indeed, both Vice President Watson and the Full Bench recognised, at various points in their decisions, the appropriateness of the issue between the parties being resolved by the Court.

The pleadings and evidence

7. The TWU relies upon its statement of claim filed on 28 February 2012, while Coles relies upon its defence filed on 10 May 2013. The TWU filed a reply to that defence on 24 May 2013. The parties also rely upon the following affidavits:

   a) three affidavits by Cory Phillip Michael made on 19 December 2012, 23 January 2013 and 12 July 2013;

   b) three affidavits by Stevan Gajdobranski made on 4 January 2013, 15 February 2013 and 23 July 2013;

   c) an affidavit of Michael Doherty filed in court by leave on 1 August 2013;

   d) two affidavits by Martin Adrian Lord made on 21 June 2013 and 17 July 2013;

   e) an affidavit by Sarah Mulder made on 20 June 2013;

   f) an affidavit by Phillip Dobbins made on 20 June 2013;

   g) an affidavit by Gary Arabian made on 21 June 2013;

   h) an affidavit by Basil van Greunen made on 21 June 2013; and

   i) two affidavits by Therese Walton made on 13 February 2013, received over the objections of counsel for Coles.

8. All of the deponents except for Mr Doherty and Ms Walton were cross-examined on their affidavits. I also received the following exhibits:

   a) A1 - Letter from TWU to Fair Work Australia dated 27/03/2012;

b) A2 - Safe Driving DVD;

c) A3 - Employer Injury Claim;

d) R1 - Applicant's supplementary submissions (Fair Work proceedings);

e) R2 - Map of Coles storage room;

f) R3 - Colour coded map of Coles storage room;

g) R4 – Induction DVD;

h) R5 – Manual Handling DVD

9. The parties also made extensive written and oral submissions.

Consideration

10. I am most grateful for the assistance provided by the submissions of counsel for both parties in this matter. The issue of the relevant and applicable industrial instrument is an important one because it impacts significantly on the online business of Coles.

11. The Court must address one or more of the following three questions and not necessarily in the order listed.

12. First, did either the 2008 EBA[5] or the 2011 EBA[6] apply to Messrs Michael and/or Gajdobranski during the period in which it is alleged that Coles breached the Road Transport Award (Relevant Period)? If the Court determines that these instruments at all times applied to Messrs Michael and/or Gajdobranski during the Relevant Period, the TWU's claim cannot succeed. This is because Item 28(1) of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act) (in relation to the 2008 EBA) and sub-sections 57(1), 206(1) and 206(2) of the Fair Work Act (in relation to the 2011 EBA) excludes the application of modern awards such as the Road Transport Award to an employee (other than their

[5] See Tab 3 of the TWU's Tender Bundle.
[6] See Tab 4 of the TWU's Tender Bundle.

base rates of pay) while an enterprise agreement (such as the 2008 EBA or the 2011 EBA) applies to that employee.[7]

13. Coles submits that both the 2008 EBA and the 2011 EBA applied to Mr Michael and Mr Gajdobranski during the Relevant Periods.

14. Secondly, did or does the Road Transport Award in fact cover the employment of Mr Michael and Mr Gajdobranski? If the Road Transport Award does not cover Mr Michael's or Mr Gajdobranski's employment, then even if the 2008 EBA or 2011 EBA did not apply to them, the TWU's claim cannot succeed. This is because the TWU's claim is premised on Messrs Michael and/or Gajdobranski's employment being covered by the Road Transport Award. Coles submits that the Road Transport Award does not cover it (and hence did not cover Messrs Michael and/or Gajdobranski during the Relevant Periods).

15. Thirdly, if the Road Transport Award does cover Mr Michael and Mr Gajdobranski, does a different modern award, the Retail Award[8] also cover Mr Michael and Mr Gajdobranski. If the Retail Award does cover Mr Michael and Mr Gajdobranski, is this coverage to the exclusion of the Road Transport Award (such that the Road Transport Award does not apply to their employment)? This may require the Court to determine whether the Retail Employee Level 1 classification within the Retail Award or the Transport Worker Grade 2 classification within the Road Transport Award most appropriately applies to the work performed by Mr Michael and Mr Gajdobranski and the environment in which that work was normally performed. If the Court determines that a Retail Employee classification within the Retail Award most appropriately applies to Mr Michael and Mr Gajdobranski, again the TWU's claim cannot succeed as the Road Transport Award will not apply to them (and hence no obligations would be imposed on Coles in respect of Mr Michael and Mr Gajdobranski).[9] Coles submits that the relevant classification in the Retail Award covers Mr Michael and Mr Gajdobranski and the Retail Employee Level 1 classification more appropriately applies to Mr Michael and Mr Gajdobranski.

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[7] Mr Michael and Mr Gajdobranski were at all times paid above the base rate in the Road Transport Award. There is no alleged breach of this Award in relation to the base rate of pay.
[8] See Tab 2 of the TWU's Tender Bundle.
[9] See Fair Work Act, s. 46.

16. The onus of proof of the elements of the contravention alleged in these proceedings is on the TWU.[10] The burden of proof on the TWU is on the balance of probabilities.[11] In dealing with the allegations against Coles on the balance of probabilities, I must take into account the nature of the cause of action, the nature of the subject matter of the proceeding and the gravity of the matters alleged.[12] Having regard to the fact that the contravention of the Road Transport Award is a civil penalty provision, the allegations against Coles in this respect are of a highly serious nature. For this reason, any evidence that establishes the contravention by Coles of the Road Transport Award must be cogent and not produced by "inexact proofs, indefinite testimony or indirect references".[13]

17. This case involves the operation of various industrial instruments (that is, two modern awards and two enterprise agreements) made under two versions of federal industrial legislation. The two modern awards are the Road Transport Award and the Retail Award. The two enterprise agreements are the 2008 EBA and the 2011 EBA. It is useful to set out some legislative background and context to these industrial instruments.

Modern awards

18. In March 2008, following a formal request from the Minister for Employment and Workplace Relations under Part 10A of the *Workplace Relations Act 1996* (Cth) (Workplace Relations Act) (a new Part introduced under the 2008 amendments to the Workplace Relations Act), the Australian Industrial Relations Commission (AIRC) began a process of rationalising over 1500 national and state-based awards with 122 industry or occupational awards. This process was known as the Award Modernisation process. The terms of modern awards were required to be consistent with any directions specified in the Minister's Award Modernisation request.[14] Amongst other things,

[10] *Australian Timber Workers Union v Monaro Sawmills Pty Ltd* (1980) 42 FLR 369 at 371 (Sweeney and Evatt JJ). Note that the TWU expressly pleaded in both proceedings that neither Mr Michael nor Mr Gajdobranski's employment was covered by either the 2008 EBA or the 2011 EBA: see [11] of each statement of claim.
[11] See *Evidence Act 1995* (Cth) (Evidence Act), s.140(1).
[12] See Evidence Act, s.140(2).
[13] See *LHMU v Arnotts Biscuits Ltd* (2010) 188 FCR 221 at [13] (Logan J).
[14] See Workplace Relations Act, s.576N(2).

the Award Modernisation request directed that modern awards not disadvantage employees.[15]

19. A "modern award" is defined in s.12 of the Fair Work Act to mean a modern award made under Part 2-3 of the Fair Work Act. A modern award is made by the FWC (the body previously known as the AIRC)[16]. Modern awards provide for terms of employment for employees who are covered, with their employer, by the award, and to whom the award applies at the relevant time.[17] Part 2-3, Division 3, Subdivisions B and C of the Fair Work Act set out the terms that may and must be included in a modern award.

20. A modern award must include coverage terms[18] – that is, terms that set out the enterprises to which the modern award relates and the employers, employees and organisations that are covered by the award. Coverage terms extend on their face to numerous employers and their employees, usually within a particular industry or calling.

21. Section 45 of the Fair Work Act, which is a civil remedy provision, prohibits a person from contravening a term of a modern award. This means that a contravention of the award can incur a pecuniary penalty,[19] which is what the TWU seeks, in part, in these proceedings.[20]

Enterprise agreements

22. An "enterprise agreement" is defined in s.12 of the Fair Work Act as either a single enterprise or multi-enterprise agreement. Enterprise agreements are dealt with in Part 2-4 of the Fair Work Act.

23. A single enterprise agreement is an agreement between an employer and its employees, or some of its employees, or an organisation of employees, that effectively provides for terms of employment for

[15] See *Request from the Minister for Employment and Workplace Relations* dated 28 March 2008 at clause 2(c).
[16] Fair Work Act, s.132.
[17] See Fair Work Act, s. 46.
[18] See Fair Work Act, s.143A.
[19] See Fair Work Act, s.546.
[20] See [27] of the Statement of Claim.

employees who are covered by that agreement.[21] Part 2-4, Division 5 sets out mandatory terms to be included in an enterprise agreement.

24. These agreements are made by the employer and employees who are employed at the time and who will be covered by the agreement by negotiation.[22] Employees vote on whether to approve the agreement.[23] The agreement must be subsequently approved by the FWC.[24] The agreement is not, however, *made* by the FWC. The 2011 EBA is an enterprise agreement made under Part 2-4 of the Fair Work Act.

25. Enterprise agreements that were made under the former Part 8 Division 2 of the Workplace Relations Act[25] (known then as collective agreements, of which the 2008 EBA is one) remain in force by operation of Item 2 of Schedule 3 of the Transitional Act until replaced,[26] or otherwise terminated by agreement[27] or by the FWC.[28] Union collective agreements (a type of collective agreement, of which the 2008 EBA is one) under the Workplace Relations Act were made by an employer and one or more employee organisations (that is, unions) which had at least one member whose employment in a single business (or part of a single business) of the employer was subject to the agreement, and whom that organisation was entitled to represent.[29] The collective agreement was required, in effect, to be assessed by the then Workplace Authority against the no-disadvantage test. If the collective agreement passed this test, it came into operation.[30] Once in operation, the collective agreement "bound" the employer; all persons whose employment was, at any time when the agreement was in operation, subject to the agreement; and, if the collective agreement was (amongst others) a union collective agreement, the union(s) with whom the employer made the agreement.[31]

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[21] See Fair Work Act, s.172.
[22] See generally Fair Work Act, Part 2-4 Div 3.
[23] See Fair Work Act, s.182.
[24] See generally Fair Work Act, Part 2-4 Div 4.
[25] See Workplace Relations Act, Part 8. Note that under Part 8 of the Workplace Relations Act, enterprise agreements were known as workplace agreements.
[26] Transitional Act, Item 30(2) Schedule 3.
[27] Transitional Act, Item 15 Schedule 3.
[28] Transitional Act, Item 16 Schedule 3.
[29] See Workplace Relations Act, ss.328 and 333.
[30] See Workplace Relations Act, s.347.
[31] See Workplace Relations Act, s.351.

Interaction between modern awards and enterprise agreements

26. It is quite common for an employee's terms and conditions of employment to be covered by both a modern award and an enterprise agreement. Crucial to the interaction of these instruments are the Fair Work Act concepts of "coverage" and "application" of modern awards and enterprise agreements:

    a) a modern award "covers" an employee, employer, organisation or outworker entity if the award is expressed to cover the employee, employer, organisation or outworker entity;[32]

    b) a modern award "applies to" an employee, employer, organisation or outworker entity if the modern award covers them; is in operation; and no other provision of the Fair Work Act provides or has the effect that the modern award does not apply to them;[33]

    c) an enterprise agreement made under the Fair Work Act "covers" an employee or employer if the agreement is expressed to cover (however described) the employee or the employer. An enterprise agreement "covers" an employee organisation (that is, a union) if the organisation gives notice under s.183(1) that it wishes to be covered by the agreement and the FWC notes in its decision to approve the agreement that the agreement covers the organisation;[34]

    d) a collective agreement made under the Workplace Relations Act (as a transitional instrument under the Transitional Act) "covers" the same employees, employers and other persons that it would have covered (however described in the agreement or the Workplace Relations Act) if the Workplace Relations Act had continued in operation.[35] The Workplace Relations Act did not use the terminology of "coverage" – rather, it referred to employees who would be "subject" to an agreement;[36]

[32] See Fair Work Act, s. 48(1)
[33] See Fair Work Act, s. 47(1).
[34] See Fair Work Act s. 53(2)
[35] See Transitional Act Item 3(1) of Schedule 3.
[36] See, for example, Workplace Relations Act s. 328(a).

e) an enterprise agreement made under the Fair Work Act "applies to" an employee, employer or employee organisation if the agreement is in operation; and the agreement covers them; and no other provision of the Fair Work Act provides or has the effect that the agreement does not apply to them;[37]

f) a collective agreement made under the Workplace Relations Act (as a transitional instrument under the Transitional Act) "applies to" the same employees, employers and other persons the agreement covers as would, if the Workplace Relations Act had continued in operation, have been required by the Workplace Relations Act to comply with the terms of the instrument or entitled under the Workplace Relations Act to enforce terms of the instrument.[38] Similarly, the Workplace Relations Act did not use the terminology of "application" – rather, it referred to employees, employers and unions "bound by" an agreement.[39]

27. Importantly, neither a modern award nor an enterprise agreement can:

a) impose obligations upon a person, and a person cannot contravene its terms, unless the award or agreement "applies to" the person;[40] nor

b) give a person an entitlement unless the award or agreement "applies to" the person.[41]

28. There are rules in the Transitional Act and the Fair Work Act governing the interaction between these two types of industrial instruments:

a) in relation to enterprise agreements made under the Workplace Relations Act (that is, the 2008 EBA) - Item 28(1) of Schedule 3 of the Transitional Act excludes the application of modern awards to an employee (other than their base rate of pay) while an enterprise agreement (made under the Workplace Relations Act) applies to that employee (although the modern award will continue to "cover" them);

[37] See Fair Work Act, s. 52(1).
[38] See Transitional Act, Item 3(2) of Schedule 3.
[39] See Workplace Relations Act, s.351.
[40] See Fair Work Act, ss.46(1), 51(1).
[41] See Fair Work Act, ss.46(2), 51(2).

b) in relation to enterprise agreements made under the Fair Work Act (that is, the 2011 EBA) - ss.57(1), 206(1) and 206(2) of the Fair Work Act exclude the application of modern awards to an employee (other than their base rates of pay) while an enterprise agreement (made under the Fair Work Act) applies to that employee (although the modern award will continue to "cover" them).

Coles Online business

29. Coles Online is in the business of providing "an online shopping service allowing customers to place orders and receive delivery of fresh, ambient (or room temperature) and frozen groceries direct from the store via the Coles Online website".[42]

30. The overall organisation and operation of the Coles Online business is described in some detail in the evidence of the Head of Operations – Coles Online, Mr Lord in his second affidavit[43] at [7]–[18] and in material from the Coles Online website annexed to the affidavit of Mr Doherty.[44] In essence, a customer purchases products through a website, the purchase order is communicated electronically to a handheld device used by staff at a store proximate to the customer's point of delivery, the products are collected or "picked"[45] from the shelves by Coles' employees known as "personal shoppers", prepared and packed in crates in the "Online Room" at the relevant store,[46] and loaded onto a truck and delivered by Coles employees currently designated as Customer Service Agents (CSAs).

31. The Coles Online business appears to have been developed in or around 1999 and evolved over time.[47] Prior to 2010, Coles contracted out the delivery element of the Coles Online business to Linfox[48] (and subsequently some other transport businesses).[49] Coles started to employ delivery drivers, the "Coles Delivery" model, from

[42] Lord 21/6/2013 at [7].
[43] Lord 21/6/2013.
[44] Doherty 1/8/13, annexure MD1-MD4.
[45] Lord 21/6/2013 at [22].
[46] Lord 21/6/2013 at [26].
[47] Lord 21/6/2013 at [35].
[48] Lord 21/6/2013 at [36]; Walton 18/2/2013 at [8].
[49] Lord 21/6/2013 at [37].

approximately February 2010,[50] and engaged some of the delivery drivers formerly employed by those transport companies (including Linfox),[51] such as Mr Gajdobranski.[52]

The reasoning behind the Coles Delivery insourced model

32. I observed during the hearing that it is important to understand the insourcing model.[53] In introducing Coles' Delivery insourced model:

a) Coles was primarily motivated by a desire to provide improved customer service to its Online customers.[54] When Mr Lord commenced his position within Coles Online in 2006, the Online business was not profitable, was not sustainable, was using third party operators for both warehousing the goods to be delivered and also for transporting these goods to the customer. The Online service offered a small, restricted range of products to customers and provided "disappointing at best, appalling at times customer service".[55] In this respect, in responding to a question from me about whether the objective was to bring the store to the customer, Mr Lord said, "Very much indeed. We are trying – trying, we are succeeding in giving customers who do not want to or don't have the time to shop at one of our shops, to have that service done for them."[56] The use of Coles employees trained by Coles to provide outstanding customer service (set against the backdrop of Coles' expectation that a customer should not be able to differentiate between the overall in-store service proposition and that offered by the store's Online Department)[57] has seen significant growth in customer compliments since the move away from third party logistics providers.[58]

b) Coles was also motivated by a desire to improve flexibility across the Online Department and more broadly across other

[50] Walton 18/2/2013 at [8]; Lord 27/3/2012 at [8]; Lord 21/6/2012 at [38].
[51] Walton 18/2/2013 at [8].
[52] Gajdobranski at [1]–[5].
[53] Transcript (T)30.42.
[54] Lord 2 at [39] and Annexure ML-29 (page 342).
[55] T138.29-.33.
[56] T139.19-.22.
[57] Mulder at [14]; van Greunen at [8]; Arabian at [16].
[58] Lord 2 at [39]-[40].

departments in stores. By training CSAs in general in-store tasks (like all other store team members), and in personal shopping duties (like all other Online team members), Coles can allocate CSAs to perform shifts in the store as required. This gives Coles greater flexibility to meet and deal with additional customer demands, while at the same time giving CSAs a greater understanding of other departments of the store[59] (which assists in the performance of their duties).[60] Coles did not consider that this could be achieved with some employees working for Coles and others for third party operators.[61]

33. The performance of personal shopping duties by CSAs where possible was implemented in tandem with the rollout of the Coles Delivery model.[62] This was a significant departure from the duties performed by third party operators prior to Coles' insourcing of the Delivery Function, and was communicated to Coles' online customers by way of, amongst other ways, responses to online customer feedback. For example, a representative of Coles Online posted the following statement on the Coles Online website on 28 September 2011 in response to a Coles Online customer querying the change from third party operators to CSAs:[63]

> *Thanks Dee, You might like to know that for each new van we put into our operation we recruit four new team members to meet customers [sic] needs. All of the contractors are invited to re apply [sic] for a Customer Service Agent role within our team. Some do stay on to join us other choose to stay with their current employers or try new opportunities.*
>
> ***The role of a CSA with Coles is very different to what the contractors were previously asked to do, the CSA's that now work in your vans also shop your groceries. They have a far greater involvement in the end to end process and service of your order.*** (emphasis added)

34. The background to the employment by Coles of the CSAs lends support to the appropriate award classification being one that can cater

[59] Lord 2 at [42].
[60] Dobbins at [41]; Mulder at [11].
[61] Lord 2 at [41].
[62] van Greunen at [10]; Arabian at [39]; Lord 2 at [43].
[63] Michael 1 at Annexure CM2 (page 17).

to a flexible role encompassing a range of duties both in the store and at the customer's premises which is fundamentally customer-service focused. Coles contends that the Retail Employee Level 1 classification meets those requirements, while the Transport Worker Grade 2 classification does not.

35. For its part, the TWU emphasises the driving role of CSAs. There are two delivery windows Monday to Saturday, and one on Sunday[64] "structured to maximize Coles' ability to meet the diverse delivery needs of its customers … and hence are a critical part of Coles' ability to retain customers in a competitive market".[65] As Mr Lord observes, "the activities of the Online Department are time critical throughout",[66] and "on time delivery is our core customer measure".[67]

36. There are two core positions dedicated to the Coles Online business: Personal Shoppers, who are employed to undertake personal shopping ("the task of picking the items from the supermarket shelves that have been ordered by the customer"),[68] and the delivery personnel, such as Mr Michael and Mr Gajdobranski. The CSA position was created, in the words of Mr Lord, to take over the delivery function formerly being undertaken by Linfox and other transport operators,[69] however there has developed some overlap between the two functions.

Work of Customer Service Agents

37. Mr Michael and Mr Gajdobranski each gave evidence that they were told at the time of employment that they were to be employed as a "driver". Mr Michael gives uncontested evidence that it was made clear to him that the position was one of a driver[70] and of having been informed at his final interview that:[71]

> *... we have decided to employ you as a driver.*

[64] Lord 21/6/2013 at [16].
[65] Lord 21/6/2013 at [16].
[66] Lord 21/6/2013 at [15].
[67] Lord 21/6/2013 at [13].
[68] Lord 21/6/2013 at [22].
[69] T146.29-33.
[70] Michael 12/7/13 at [22].
[71] Michael 19/12/12 at [2].

38. Mr Gajdobranski's evidence was that when he was working as a driver with Linfox[72] making deliveries for customers who had ordered groceries from Coles Online, he was asked to take up what he describes as a "driver" position with Coles.[73] Mr Gajdobranski's oral evidence was that he was told by the Online Manager, Suzie Mason, that he would be employed as a "truck driver".[74]

39. The TWU also referred to evidence that CSA positions are advertised as a "driver" position. Mr Dobbins, for example, gives evidence of having learned of a vacant CSA position via an advertisement on seek.com.au that "described the roles as a Coles Online delivery driver performing home deliveries to Coles Online customers."[75] The oral evidence of Mr Dobbins was that he understood he was applying for a position as a delivery driver.[76]

40. The TWU also pointed to various documents produced by Coles itself which describe the role of the CSA as being that of a "driver". For example, the Customer Agreement required to be entered into by a Coles Online customer and the Frequently Asked Questions page on the website inform members of the public goods could be returned with the "driver" if the customer was not satisfied with the quality of the goods.[77]

41. By way of summary, a driving shift involves a CSA doing the following:

    a) the completion of "pre-delivery tasks", including the performance of a check on the safety aspects of the truck[78] (a 4.5 tonne gross vehicle mass rigid truck),[79] and loading the truck with crates[80] (Mr Gajdobranski's evidence was the crates are "already loaded and sealed"[81] at that time – Mr Michael's evidence was "each

[72] Gajdobranski at [1]–[5].
[73] Gajdobranski at [5].
[74] T101.35.
[75] Dobbins 20/6/13 at [7].
[76] T216.4.
[77] Doherty 1/8/13, annexure MD3 page 6 and MD4 page 9.
[78] Gajdobranski at [30]–[31]; Michael at [25]; Lord 21/6/2013 at [19(h)].
[79] Lord 21/6/2013 at [19(b)].
[80] Lord 21/6/2013 at [19(b)].
[81] Gajdobranski at [32]; Lord 21/6/2013 at [26].

customer's order was filled by a personal shopper")[82] and cool storage items obtained from a dedicated cool room;[83]

b) if there is time, the CSA will assist the other CSAs to load their truck;[84]

c) performing the deliveries to customers and engaging with them as required[85] (for example checking identification if the sales involve alcohol or tobacco products,[86] completing sales using a mobile EFTPOS machine),[87] noting they do not accept cash;[88]

d) the CSA's role is solely to deliver the goods that have been ordered by the customer on the Coles Online website and is not able to sell any additional products to the customer at point of delivery;[89]

e) returning the emptied crate to the truck and continuing with the remaining deliveries until the daily deliveries are complete;[90]

f) the CSA remains out on the road until all deliveries have been completed and then returns to the store, refueling the truck, unloading the empty crates, returning the keys, equipment (such as the GPS) and paperwork.[91]

42. The driving shifts for CSAs are broken into two shifts: morning, which commences at 5.00am, and afternoon, which commences at 2.00pm,[92] consistent with the delivery windows available to customers.

43. Mr Gajdobranski's evidence was that he was working as a driver with Linfox[93] prior to taking up what he describes as a "Driver" position with Coles on 1 February 2011.[94] He stated that he performed the same

[82] Michael 19/12/2012 at [22]–[23].
[83] Gajdobranski at [32]–[33]; Michael at [23].
[84] Gajdobranski at [33]; Michael at [24]; Lord 21/6/2013 at [27].
[85] Lord 21/6/2013 at [28]-[31].
[86] Gajdobranski at [36]; Lord 21/6/2013 at [29].
[87] Gajdobranski at [36]; Lord 21/6/2013 at [31].
[88] Lord 21/6/2013 at [31].
[89] T167.19-25.
[90] Gajdobranski at [36]-[37]; Michael [31].
[91] Gajdobranski at [38]; Michael at [32]; Lord 21/6/2013 at [33].
[92] Gajdobranski at [8]; see also Lord 21/6/2013 at [16].
[93] Gajdobranski at [1]–[5].
[94] Gajdobranski at [5].

duties with Linfox as he does with Coles[95]. Mr Gajdobranski continues to perform driving work for Linfox, making deliveries to customers of Woolworths/Safeway who have ordered groceries online. His evidence is that there is no difference between the work as a CSA and the work for Linfox[96].

44. CSAs are also required to perform instore duties on "shopping shifts". There does not appear to be any real dispute that in a practical sense this has only recently (and notably after these proceedings were commenced) become a feature of the work of a CSA[97]. The performance of shopping shifts is highly variable. For example, at the Coles Endeavour Hills store, no CSA performed regular personal shopping shifts as of August 2011 and only six of 222 CSAs performed a rostered personal shopping shift as of June 2012.[98] The "Coles Delivery" model was adopted more than three years ago. As at mid June 2013 "approximately 62% of CSAs nationally complete at least one[99]" four hour "shopping shift" per week.

45. Mr Michael gave evidence that he never performed shopping duties prior to leaving his employment with Coles in July 2011 (except for in initial training) other than on one occasion.[100] Mr Gajdobranski's evidence is that he started to perform a shopping shift between July and November 2012. The period prior to that "was all related to delivering to customers. I did not do a shopping shift",[101] and "Until July 2012, apart from when I was in training, I did not perform any work as a personal shopper".[102] Mr Michael's evidence was to a similar effect.[103]

46. When rostered on a shopping shift, the workers commence at 7.00am.[104] The work is "labour intensive",[105] loading and stacking crates,[106] as Mr Lord described it "consolidating customer orders in the

[95] Gajdobranski at [2].
[96] Gajdobranski 23/7/2013 at [3]-[6].
[97] Lord 21/6/2013 at [43]-[45].
[98] Arabian 21/6/13 at [40].
[99] Lord 21/6/2013 at [44].
[100] Michael 19/12/2012 at [22].
[101] Gajdobranski at [10].
[102] Gajdobranski at [14].
[103] Michael 19/12/2012 at [6].
[104] Gajdobranski at [40].
[105] Gajdobranski at [40].
[106] Gajdobranski at [40].

Online Room within the physical store in preparation for delivery".[107] Mr Gajdobranski's evidence was that on these shifts "I may be required to physically enter the store and select stock and use the gun to scan the barcodes and pack the stock"[108] (emphasis added). In Mr Gajdobranski's experience, the "shopping shift" does *not* involve using a point of sale cash register, or engaging in customer service in the store.[109]

47. The TWU contends that the transport functions of packing, loading and delivering the products purchased by Coles Online customers is the primary and central function of a CSA: as Mr Lord described it, the "Delivery Function" "constitutes the primary duties of a CSA". On his evidence *"*the duties*"* of CSAs are the consolidating and delivery of orders:[110] the shopping and other in-store functions are the *"*additional duties*"* associated with the operation of the Online Department.

48. The CSA job descriptions, both dated September 2009 and June 2012 describe the "Primary Function" of the CSA role in this way:[111]

- to provide an outstanding home delivery service to all customers;
- to ensure the accurate and timely delivery of Coles Online orders;
- to work together with the store team to maximise customer satisfaction.

49. The TWU contends that Mr Lord accepted in his oral evidence that the "Delivery Function" constituted the "primary", "highest priority", "most important" and "main feature" of the job of a CSA.[112] Mr Lord properly accepted that, to the extent that additional duties are performed by CSAs, those duties are lesser in priority to the delivery functions and would only arise if all delivery duties had been performed. Mr Lord adopted the phrase:[113]

> *Online work first, non-online work second ...*

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[107] Lord 21/6/2013 at [19(a)].
[108] Gajdobranski at [41].
[109] Gajdobranski at [43].
[110] at [19(a) – (h)], the "Delivery Function".
[111] Lord 21/6/13, annexure ML15 and ML16.
[112] T161.20-30 and 170.19-30.
[113] T172.10-41.

50. That is in reality ambiguous, as the personal shopper role is itself critical to the online business.

51. Evidence to the effect that the delivery function was given priority in the work of CSAs was also given by Mr van Greunen and Mr Arabian.[114] Similarly, Ms Mulder, former Online Department Manager at Endeavour Hills observed:[115]

> *I prioritised delivery duties (as delivering customer orders and providing customer service was the most important aspect of the CSA role).*

52. Even where CSAs (unlike Mr Michael and Mr Gajdobranski) are rostered to work one "shopping shift" per week, that work constitutes only four hours out of their working time for the week. Furthermore, the stated rationale for rostering CSAs to perform a "shopping shift" is to improve the performance of the delivery function by assisting the drivers to become familiar with products.[116]

53. I received in evidence a Workers Compensation report made with respect to an injury sustained by Mr Dobbins whilst working as a CSA which described Mr Dobbins' position as "Online customer service agent (Delivery Driver)" and the main tasks performed by Mr Dobbins described as follows:[117]

> *Truck Driving; Delivering goods to customers for Coles Online.*

54. Mr Lord described "on time delivery [as] our core customer measure" and that "it is critically important to the Coles Online business that the scheduling of these customer orders ensure that they arrive within their requested delivery window".[118] His evidence over [14]-[16] of his second affidavit demonstrates that the entire delivery time structure, and consequently the rostering structure of the CSAs, "are structured to maximise Coles' ability to meet the diverse delivery needs of its customers (who may require deliveries early in the morning or late at night to fit within their schedules), and hence are a critical part of Coles' ability to retain customers in a competitive market".

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[114] Cross-examination on 12 September 2013.
[115] Mulder 20/6/13 at [19].
[116] Mulder 20/6/13 at [11]; T174.15-16.
[117] Exhibit A3.
[118] at [13].

55. The Coles Endeavour Hills store did not have an "Online" department prior to January 2011.[119] When advertised, the CSA positions were described as "a Coles Online delivery driver performing home deliveries to Coles Online customers".[120] Consistent with this position and the critical role of the CSA within the business model, CSA performance is assessed, in part, on "their on-time delivery rate".[121] Clearly, for the business of Coles, the timely and appropriate performance of the delivery duties of CSAs is the central feature of the Coles Online business.

The recruitment, training and performance management procedures applied to CSAs

56. The TWU submits that the training and induction provided to CSAs places emphasis upon the delivery function and driving tasks of the position within a general framework of customer service. The training provided at the time Mr Michael and Mr Gajdobranski commenced employment provided for six days of training and on-the-job assessment, five of which were specifically dedicated to the driving and delivery functions of the CSA.[122] The only part of the training dedicated to other duties involved training in "personal shopping" on the final day which Mr Lord described as being able to be delivered in 45 minutes.[123]

57. Coles submits that its recruitment processes illustrates a strong focus on customer service in the selection of appropriately qualified prospective CSAs, as follows:

    a) advertisements for the CSA role refer to CSAs "caring passionately" about customer service;[124]

    b) presentations delivered to prospective CSAs at group interviews:

        i) focus on CSAs providing "outstanding customer service" and being "the face of Coles Online"; and that a CSA

[119] van Greunen at [6].
[120] Dobbins at [7].
[121] Van Greunen at [32].
[122] Lord 21/6/13, annexure ML27.
[123] T183.20-31.
[124] van Greunen at [20].

"builds positive relationships with their customers so they come back to us again and again";[125] and

ii) note that Coles looks for prospective CSAs with (amongst other things) "a passion for customer service", "personality", "team work", "clear, concise communication", "professional presentation", "confidence and independence", "physical fitness", and "driving experience and confidence" (but not transport industry experience);[126]

c) the activities which prospective CSAs are required to perform during group interviews focus on customer service scenarios including personal shopping tasks performed in the store;[127]

d) the factors used by store management to assess a candidate's suitability for the CSA role relate to their communication skills and customer service aptitude;[128] and

e) the Coles Interview Guide (used by store management in conducting one-on-one interviews) asks questions focusing on the candidate's experiences of customer service.[129]

58. Further, store management (at the Endeavour Hills store, and more broadly across Coles Online)[130] look primarily for customer service aptitude in recruiting CSAs. While basic driving confidence is required, transport industry experience is not considered by Coles to be essential for the role.[131]

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[125] Annexure PD-1 (p.7). Mr Michael admitted in cross-examination that at the group interview he saw a presentation similar to Annexure PD-1, although he did not recall specifically the reference to a passion for customer service or CSAs being the professional presentation as the face of Coles (T51.9-.32). Mr Gajdobranski also admitted at the group interview that he saw some of the material contained in Annexure PD-1 (T102.1-103.26).
[126] Annexure PD-1 (pages 10-11).
[127] Dobbins at [13]-[15] and Annexure PD-2, Arabian at [14], van Greunen at [24]. Mr Gajdobranski conceded in cross-examination that he completed the activities contained in Annexure PD-2 (T103.36-.42).
[128] Arabian at [14], van Greunen at [24].
[129] Annexure BVG-1. See also van Greunen at T296.32 – 297.24.
[130] Dobbins at [32]-[36]; Arabian at [14]-[16]; Lord 2 at [40], [50]-[53]; Mulder at [14], [23]; van Greunen at [20]-[27].
[131] Dobbins at [36]; Arabian at [17].

59. The training requirements which Coles provides to CSAs show a similar retail and customer service focus, as follows.

a) all CSAs are given the same basic induction and training as any other store team member. They are trained in safe work practices that apply in the store, and are trained on the safe use of equipment in the store;

b) the workbooks which CSAs are required to complete during their general in-store training pose questions around a range of customer service topics including knowledge of the various Coles branded products; customer interaction and engagement; fresh produce quality; filling and rotating stock; and food safety;[132]

c) the Online Department-specific workbook which applied when Mr Michael and Mr Gajdobranski were recruited and first trained expressly states that working in-store is a "fundamental part of the role of a Customer Service Agent".[133] The current Online Department-specific workbook (in which Mr Gajdobranski has been retrained)[134] similarly notes that working in store is a fundamental part of the CSA role, and notes also that performance of at least one dedicated personal shopping shift per week is compulsory for CSAs.[135]

60. Similarly, the relevant indicators used by Coles Online in its performance management of CSAs bear out the importance of customer service for the CSA role. CSA performance at Endeavour Hills is measured by way of delivery observation (assessing how the CSA deals with the customer, and whether the CSA provides the level of customer service which the customer would receive in-store);[136] and customer experience surveys.[137] While delivery KPIs form part of each Online Department's overall performance assessment,[138] CSAs are not

[132] Arabian at [19]-[24]. Mr Arabian gave evidence in cross-examination that he had observed inductions by "popping in" for 10, 15 or 20 minutes at any point in time in the induction process (T260.20 – 261.20). See also Lord 2 at [56] and Annexures ML-21 and ML-22.
[133] Annexure ML-27, p.331.
[134] Arabian at [26(e)].
[135] Annexure GA-3 p.29. Note that Coles is unable to strictly enforce this requirement across all stores due to recruitment challenges as described above.
[136] Mulder at [23(a)].
[137] Mulder at [23(b)]; van Greunen at [32]; Arabian at [55]; Lord 2 at [69] and Annexure ML-30.
[138] Lord 2 at [66]-[70].

disciplined for not meeting delivery windows where the reason relates to customer service, safety or is otherwise outside of the CSA's control.[139]

61. By reason of the above, it is clear that customer service is a critical element to the role of the CSAs, such as Mr Michael and Mr Gajdobranski. The work performed by Mr Michael and Mr Gajdobranski, that is, the Delivery Function and, in the case of Mr Gajdobranski, shopping and other in-store duties, is done in an environment in which customer service is a critical factor. In this context, Coles submits that a classification which specifically sets out the performance and functions at a "retail establishment", all of which relate to the ultimate sale of retail goods to a customer, is significantly more appropriate than a classification in the Road Transport Award, which is restricted simply to "driving".

62. Driving is nevertheless essential to the CSA role. The CSAs are, unsurprisingly, required to undertake specific training and assessment in relation to their driving tasks, including watching a Safe Driving DVD, completing a written assessment and undertaking a "CSA driving practice assessment".[140] The Safe Driving DVD is a training tool specifically for and addressed to "professional drivers". The CSAs are the only staff employed at the Endeavour Hills site who drive a vehicle as a part of their duties and, in consequence, are subject to drug and alcohol testing.[141]

63. Some of Coles' witnesses, particularly Mr Lord,[142] attempted to suggest that Coles does not require truck driving experience for recruitment as a CSA. Mr Lord accepted, however, that he did not know the criteria in fact applied as he is not directly involved in recruitment.[143] The assertion made by Mr Lord is inconsistent with the position description applicable until June 2012 which required "previous truck driving experience".[144] That has since been removed. The powerpoint presentation given at the interviews for CSA positions indicated that Coles was looking for people with "driving experience

[139] Mulder at [23(c)]; van Greunen at [32]; Arabian at [55].
[140] Lord 21/6/13 at [55].
[141] Van Greunen at [33].
[142] Lord 21/6/13 at [19].
[143] T159.1-15.
[144] Lord 21/6/13, annexure ML16.

and confidence".[145] In any event, Mr Lord, Mr Arabian and Mr van Greunen accepted that, no matter how good their customer service skills, Coles would not employ a person unless it was confident the person could safely and competently drive the truck.[146]

64. For these reasons, the TWU contends that the evidence demonstrates that the major and substantial and principal purpose of the employment of Mr Michael and Mr Gajdobranski (and CSAs generally) is as a truck driver loading and unloading and delivering goods ordered by customers through the Coles Online website.

65. Coles stresses that Mr Michael and Mr Gajdobranski were engaged during the relevant period as "Service Assistants" (a position now known as "Store Team Member") performing the role of a CSA.[147] They were not engaged as "drivers". The contracts of employment signed by both Mr Michael and Mr Gajdobranski noted that their employment conditions were set out in the 2008 EBA.[148] Their contracts of employment also stated "You may be requested to perform other duties/positions in line with your skills and competencies as requested by Coles Supermarkets". Mr Michael gave evidence in cross-examination that he signed his contract of employment and that this, and the fact that Mr Michael's employment conditions were set out in the 2008 EBA, were the basis upon which he accepted employment.[149] Mr Gajdobranski gave evidence that he signed the contract of employment and that he read and agreed to the conditions contained within that contract.[150] Mr van Greunen, when offering Mr Michael the CSA role, told him that the role involved shopping in the store.[151]

[145] Dobbins 20/6/13, annexure PD1 page 11.
[146] T179.28-41; Cross-examination on 12 September 2013.
[147] Arabian at [57] and Annexure GA-5, and [61] and Annexure GA-7; Dobbins 20/6/13 at [42] and [46], Mulder at [25] and [29]; van Greunen at [28]-[31].
[148] Arabian at [57] and annexure GA-5, and [61] and annexure GA-7.
[149] T49.9-.35.
[150] T99.35-.46.
[151] van Greunen at [29]. This evidence was not disturbed in cross-examination of van Greunen (T298.25 – 299.30)

Use of CSAs in other departments and promotion of CSAs

66. Coles emphasises that it intends for CSAs to be flexible and be able to perform a range of duties in the store as illustrated by the number of CSAs who perform tasks in other in-store departments, or have been promoted to management roles both within the Online Department and other in-store departments.[152] That CSAs are given the same opportunity to participate in Coles' Retail Leaders program (which prepares team members for management roles within the store), and in fact take up this opportunity, lends further support to that view.[153] Again, Coles submits that this points to an environment which is more appropriately covered by the Retail Employee Level 1 classification.

67. One example of this was Mr Dobbins, who moved from a CSA role into a stock hand role, and was subsequently promoted to the role of Online Duty Manager.[154]

68. CSAs perform duties falling within three separate (albeit related) categories:

    a) consolidation of customer orders in the store, delivery of Coles products picked from the store shelves to customers who have ordered those products through Coles Online and providing customer service at the customer's premises (together, the Delivery Function);

    b) personal shopping duties in the store (including providing customer service as required);

    c) other general duties in the store.

69. Each of the duties falling within these categories is set out in detail below. As will be apparent, all of the above duties involve the CSA providing customer service and are associated with the operation of the particular Coles store at which the CSA is employed.

70. However, Coles accepts that the primary purpose, or primary function, for which the CSAs are employed is to perform the Delivery Function.

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[152] Lord 2 at [71]-[73] and Annexure ML-32 (pages 451-459).
[153] Lord 2 at [74] and Annexure ML-32 (pages 451-459).
[154] T262.9 – 32.

It is this function which is to be closely examined to determine if Mr Michael and Mr Gajdobranski perform duties "associated with the operation of the store".

71. That the Delivery Function is the principal purpose of the CSA role – that is, that it involves the provision of customer service by way of delivery of goods and customer assistance at the customer's premises – is supported by an analysis of the factors set out in *Tucker v Digital Diagnostic Imaging Pty Ltd*[155] as follows:

a) the contents of any job description, position description or job advertisement;

b) both the current job description applicable to CSAs (dated 6 June 2012) and the previous iteration (dated 21 September 2009) describe the primary function of the CSA role as "to provide an outstanding home delivery service to all customers; to ensure the accurate and timely delivery of Coles Online Orders; and to work together with the store team to maximise customer satisfaction".[156] These position descriptions were available on Coles' internal intranet and were made available to store teams on request.[157] Mr Lord gave evidence that it was intended that the position description would reflect the actual duties performed by the CSAs.[158] Mr Lord was cross-examined on the primary function of the CSA role as outlined in the position description and his evidence was not disturbed in this respect;[159]

c) possession or absence of particular qualifications and whether such qualifications are necessary to the exercise of the primary functions that are performed;

d) the current CSA position description provides that customer service experience is essential, while previous delivery experience is non-essential.[160] While an earlier iteration of the position description notes that both previous truck driving

[155] [2011] FWA 1767.
[156] Annexures ML-15 (page 4) and ML-16 (page 6).
[157] T159.30-.33 (ML).
[158] T160.6-.27.
[159] T162.1-.32.
[160] Annexure ML-15 (page 4).

experience and a previous customer service role are required to meet the position objectives,[161] truck driving experience has never been required by Coles Online in practice.[162] Merely a standard automatic drivers licence and driving confidence are required from a driving experience standpoint.[163] Moreover, Coles bases its CSA recruitment decisions on customer service aptitude rather than transport industry experience (and did so during the time Mr Michael and Mr Gajdobranski were recruited).[164] That is, Coles will recruit a prospective candidate with no transport industry or delivery experience if they show strong customer service aptitude. Conversely, Coles will not recruit a prospective candidate with strong transport industry experience if they do not possess the requisite level of customer service aptitude.[165] Mr Lord gave evidence that, provided the CSA could competently drive the truck safely and passed a criminal records check, this would satisfy Coles.[166] Further, Mr Mulder gave evidence that when interviewing and recruiting for CSAs, she did not ask about the potential CSA's driving experience.[167] Further, Mr Arabian gave evidence that he would, in the interview, gain an "idea of their background, their history, and…their demeanour".[168] Mr Arabian says that the initial interview process is to make sure CSAs "have customer service skills first".[169] Further, Mr van Greunen gave evidence that he did not ask applicants about their vehicle driving experience;[170]

e) the level of importance and relevance of particular duties in the context of the employing organisation's overall purpose;

f) Coles' overall purpose is that of retail and customer service. This was admitted by Mr Michael.[171] Coles considers CSAs to be an

[161] Annexure ML-16 (page 6).
[162] Dobbins at [7], [36]; van Greunen at [20]-[21], [24]; Arabian at [10], [17]; Lord 21/6/13 (Lord 2) at [19].
[163] Dobbins at [7]; van Greunen at [21]; Arabian at [10], [17]; Lord 2 at [28].
[164] Dobbins at [34]-[36]; van Greunen at [21]-[27]; Arabian at [14]-[16]; Lord 2 at [40], [50]-[52].
[165] Dobbins at [36]; Arabian at [17].
[166] T178.40-179.5.
[167] T195.29-.30.
[168] T256.3 – 6.
[169] T259.30.
[170] T275.16.
[171] T46.30.35.

extension of the store – that is, the face of Coles to that store's online customers – and expects CSAs to provide the same level of customer service at the customer's premises as would be provided by another store team member to a customer within the store.[172] As Mr Lord said in examination in chief, "The CSAs are the face of our business. They're technically the only person that makes physical contact with our customers."[173] That is, CSAs are considered in the same manner as any other store team member from a customer service standpoint.[174] In this regard, a CSA is the modern incarnation of the home delivery service provided by milkmen, butchers, bakers and grocers in years past.[175] This customer service focus is a key point of difference from other delivery models[176] and a key driver of Coles' move away from a third party transport provider to the in-house model.[177]

The Delivery Function

72. The Delivery Function encompasses the following tasks:

a) the CSA reports for work at the store;[178]

b) the CSA is given a physical manifest, or a digital equivalent, which effectively contains the orders to be delivered in a particular delivery run. These orders are stored in either the Online room, the chilled room or the freezer room, depending on

[172] Dobbins at [10] and Annexure PD-1 (page 7); Mulder at [14]; Arabian at [16].
[173] T158.1-.4.
[174] van Greunen at [8].
[175] Lord 2 at [51].
[176] Dobbins at [34].
[177] Lord 2 at [39]-[40].
[178] Dobbins at [27]; Mulder at [7]; Arabian at [28], Lord 2 at [27]. Note that Mr Lord, although in a senior management position, is able to give evidence on the tasks that are encompassed by the Delivery Function. Mr Lord gave evidence that he attends the stores, certainly at peak trading periods, and "we roll our sleeves up and do the work". Further, Mr Lord says that he would probably be in stores 1½ to 2 days a week and gives an example of a week where he will be in stores for 4½ days and will undertake two van accompaniments on Tuesday and Wednesday next week. Mr Lord says, "That's not uncommon for me" (T143.19-.36). Similarly, Ms Mulder, although also in a management role, gave evidence that she had assisted in the deliveries on ten occasions or more (T197.31-.43). Mr Arabian went out on the road with a CSA as part of his training (T262.41 – 263.10). Mr van Greunen accompanied a CSA on a single occasion sometime in January 2011 (T287.11 – 26).

the particular goods contained within the order. All of these rooms are located at the store;[179]

c) the CSA will then walk into the store car park, locate their allocated van and perform safety checks;[180]

d) CSAs then consolidate (that is, gather together the goods comprising the orders from the various temperature zones) and load the orders into the vans in conjunction with other Store Team Members. CSAs are expected to assist other CSAs in loading their vans.[181] Mr Michael admitted in cross-examination that the consolidation task occurred in the online area of the store, which was within the store premises. Mr Arabian identified the online area in the store on the map comprised of Exhibit GA-1 to Mr Arabian's statement[182] and this evidence was not disturbed in cross-examination.[183] Mr Lord also gave evidence in chief that the consolidation task occurred in the store. Further, there were requirements for the online team to work together to ensure that all the ambient goods were placed together, the chilled goods were placed on top and the frozen goods were put with the right orders on the right van ready to go. Mr Lord gave evidence that there were "cold chain compliance issues" and that it was important for the team to work together to ensure that chilled products are not at an ambient temperature for more than 20 minutes before they are put in the back of the single chilled temperature van;[184]

e) the CSA arrives at the delivery address and takes the order at least to the door of the home of the customer, unloading the order at the kitchen bench or another location if the customer requests (such as a pantry or fridge).[185] Mr Michael conceded in cross-examination that the delivery of goods to the premises could involve taking the goods into the house. If the customer asked

[179] Dobbins at [27]; Mulder at [7]; Arabian at [28], Lord 2 at [27] and see also Exhibit GA-1 to Arabian.
[180] Dobbins at [27]; Mulder at [8]; Arabian at [28], Lord 2 at [19(h)].
[181] Dobbins at [27]-[28]; Mulder at [8]; Arabian at [28]-[29] and T250.1 – 43, Lord 2 at [19(b)].
[182] see Exhibit R-3.
[183] T244.25 – 249.46.
[184] T162.44-163.6.
[185] Dobbins at [29]-[30]; Mulder at [10]; Arabian at [31], Lord 2 at [30].

the CSA to take the goods to their kitchen or just inside the door, then the CSA would do that. Mr Michael also conceded in cross-examination that there might be occasions where it would be necessary for the CSA to put the orders away for a customer in their pantry or fridge, for example, if a customer is extremely elderly or disabled.[186] Further, Mr Arabian gave evidence that if it is the customer's first delivery, the CSA is expected to go through the invoice with the customer;[187]

f) if necessary, the CSA performs identification checks for any alcohol or tobacco included in the order.[188] This was admitted by Mr Michael in cross-examination;[189]

g) if necessary, the CSA processes the transaction using a mobile EFTPOS machine;[190]

h) the CSA explains the invoice to the customer and answers any questions that the customer might have regarding their order.[191] One of the questions that may be asked by the customer is in relation to substitute groups. This occurs where the goods the customer had ordered were not available and a substitute for those goods was provided for the customer. Mr Michael conceded in cross-examination that if a customer asked about this, he would venture to help the customer in relation to their enquiry where he could;[192]

i) the CSA then returns the trolley and crates to the van, records the van refrigerator temperature and time, and drives to the next address;[193]

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[186] T76.7-.35.
[187] T265.27 – 34.
[188] Dobbins at [30]; Mulder at [10]; Arabian at [30], Lord 2 at [29].
[189] T76.37-.41.
[190] Dobbins at [30]; Mulder at [10]; Arabian at [30], Lord 2 at [31]. While Mr Lord gave evidence that approximately 25 per cent of customers pay using the MEFTPOS terminal at the point of delivery, Mr Michael stated in cross-examination that this only happened 15 per cent of the time. However, Mr Michael concedes that it is possible that he under-estimated how often customers paid using MEFTPOS (T77.33-78.33). See also Lord 2 at [31].
[191] Mulder at [11]; Arabian at [31]-[32]; Lord 2 at [32].
[192] T79.20-.30.
[193] Dobbins at [31]; Arabian at [33].

j) once all of the deliveries are completed, the CSA returns to the store and reports for further in-store duties as required and if time allows.[194]

73. Coles submits that these duties, that is, the Delivery Function, are duties associated with the operation of the Coles store. The reasons for this are as follows:

a) the CSA starts and finishes the shift at the store;

b) the vans, crates, mobile equipment and paperwork are collected from and returned to the store;

c) the CSA delivers goods that are sourced and collected from the store;

d) the consolidation and packing duties performed by the CSAs are physically performed at the store itself; and

e) the sales made through Coles Online are attributed to the particular store from which the goods are sourced and collected.[195] Further, the tax invoice provided to the customer includes the actual physical store from which the goods were obtained.[196]

74. By reason of the matters referred to above, Coles contends that the duties encompassed by the Delivery Function performed by Mr Michael and Mr Gajdobranski, taken as a whole, were "duties associated with the operation of the store".

75. Satisfying this criterion is, in Coles' submission, itself sufficient to establish the application of each of the 2008 and 2011 EBAs at the relevant times. Further, having regard to the list of indicative duties included in the "Service Assistant" and "Store Team Member" classifications within the 2008 and 2011 EBAs respectively,[197] Mr Michael and Mr Gajdobranski performed (or could reasonably have

[194] Dobbins at [32]-[33]; Mulder at [12]-[13]; Arabian at [34]; Lord 2 at [33].
[195] Lord 2 at [48].
[196] T154.15-.19 (ML).
[197] Note that the above duties supplement, but do not limit, the meaning of "duties associated with the operation of a store".

been directed to perform) the following duties as part of the Delivery Function:

a) "Customer service and assistance". Mr Michael and Mr Gajdobranski regularly performed these duties at customer premises when performing delivery tasks; and

b) "Operation of 'point of sale' terminals". Mr Michael and Mr Gajdobranski regularly performed these duties when processing mobile EFTPOS sales.[198]

c) "Point of sale duties". Mr Michael and Mr Gajdobranski regularly performed these duties at customer premises when performing delivery tasks, given that under the Customer Agreement, title to the goods passes "upon delivery (or upon collection) and payment of the goods to the Delivery Address …".[199] Sub-section 22(1) of the *Goods Act 1958* (Vic) provides that "where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred". Therefore, in accordance with the Customer Agreement, the title in the goods is transferred at the point of delivery.[200]

Personal shopping and other instore duties

76. Although the Delivery Function is the primary purpose of the CSA role, it is important to identify personal shopping and other additional in-store duties (both for the sake of completeness, and because it is relevant to the issue of which Award applies should it be necessary for the Court to determine that issue). These in-store duties are an

[198] Dobbins at [30]; Mulder at [10]; Arabian at [30]; Lord 2 at [31]; Michael 19/12/12 (Michael 1) at [39]; Gajdobranski 1 at [36].
[199] Michael John Doherty 01/08/2013 at Annexure MD-3 (page 5). See also T155.26-.44, where Mr Lord gave evidence that the customer must accept the Customer Agreement in order to place an order. See also clause 6 of the Customer Agreement, which provides that credit for the value of any goods sent back with the driver or Coles' team member is applied to the customer's next order. This is in circumstances where a customer is unhappy with the goods and sends the goods back with the driver who must return it to the store (T156.33-157.46).
[200] The same principle applies in New South Wales: see *Sale of Goods Act 1923* (NSW), s.22(1).

important part of the CSA role.[201] This is initially reflected in the training and induction provided by Coles to CSAs (including Mr Michael and Mr Gajdobranski) on commencement of their employment.[202] In addition to the specific delivery training given to CSAs, this training also included:

a) the same initial training and general induction given to all Coles store employees;[203] and

b) training on the use of equipment that is used in the store and training for duties that are performed in the store.[204] Mr Michael conceded in cross-examination that he was trained in shopping duties.[205] Mr Michael conceded in cross-examination that the initial training "was all basically in-store based".[206] Mr Michael also conceded in cross-examination that the modules of his training as set out in Annexures GA-2 to Mr Arabian's statement at page 12 related to in-store activities.[207] Mr Gajdobranski also conceded in cross-examination that he completed his basic initial training.[208]

c) refresher training, which also included training for duties that are performed in the store.[209]

77. This approach mirrors the way in which Coles trains its Store Team Members working in other departments within the store. All Store Team Members (including CSAs) are given the same basic in-store training and general induction, and are then trained in practices and procedures specific to their departments.[210] Evidence was led of the

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[201] Dobbins at [44], Mulder at [27] and [29], van Greunen at [29]; Lord 2 at Annexure ML-27 (page 331).
[202] Lord 2 at [54]-[65] and Annexures ML-21 to ML-29; Dobbins at [17]-[21] and Annexure PD-3; Arabian at [19]-[26] and Annexures GA-2 and GA-3.
[203] Arabian at [20]-[26].
[204] Lord 2 at [55]-[56] and Annexures ML-21 and ML-22; Dobbins at [17]; Arabian at [20], [23]-[26] and Annexures GA-2 and GA-3. See also the training DVDs "Welcome to Coles" (MFI "R-4") and "Manual Handling" (MFI "R-5"). These DVDs cover the same material as those DVDs referred to at GA-2 (on page 2) (T278.31 – 35, 280.1 – 8).
[205] T52.34-.38.
[206] T59.43-60.6.
[207] T68.10-.20.
[208] T106.4-.12.
[209] In relation to Mr Michael, see Annexure GA-2 to Arabian's affidavit at pp.11-13. See also T67.32-68.20. In relation to Mr Gajdobranski, see Annexure GA-2 to Arabian's affidavit at pp.22-24, Annexure GA-3 to Arabian's affidavit at pages 25-83 and T109.16-.28.
[210] Dobbins at [17]-[18]; Arabian at [20]-[21]; Lord 2 at [42], [54]-[65].

written materials contained in this training at Annexure ML-27 to Lord 2. At page 331 to this exhibit, the materials state: "Working in store is a fundamental part of being a Customer Service Agent. The CSA will be placed in store to learn the general shopping process." In cross-examination, Mr Michael conceded that he engaged in training for one day (with a buddy) in-store to learn the general shopping process.[211]

78. The training materials in Annexure ML-27 detail,[212] the tasks that were trained in on each day of the training induction. Each of these days comprised training "in store", training in "vehicle loading", training in "delivering" and training again in "in store" (in relation to duties after the deliveries had been undertaken). The materials also illustrate that there was a store tour on day 1 of the training.[213]

79. Coles communicates the importance of in-store duties to the CSA role to prospective CSAs prior to the commencement of their employment, as follows:

a) the presentation delivered to prospective CSAs during group interviews, which notes that the CSA role involves assisting Personal Shoppers in selecting and packing items in the store for Coles Online customers;[214]

b) the letters of offer issued to CSAs, which include a term to the effect that, "You may be requested to perform other duties/positions in line with your skills and competencies as requested by Coles Supermarkets".[215] As discussed above at [65], in the case of Mr Michael and Mr Gajdobranski, these letters of offer were read, signed and accepted;[216]

[211] T61.10-.23.
[212] at pages 339 to 358.
[213] at pages 335 to 336 of Annexure ML-27. Note that Mr Michael conceded in cross-examination that he had been trained in the materials at ML-27, particularly in relation to pages 334 and 336 (T62.20-.46), in the materials at pages 339-343 (T63.6-.15), in the materials at pages 347-349 (T65.25-66.32) and in the materials at page 357 (T66.43-67.4). Mr Gajdobranski also admitted in cross-examination that Annexure ML-27 was a fair summary of the training he first undertook (T108.5-.46).
[214] Dobbins at [10] and Annexure PD-1 (page 7).
[215] Lord 2 at [53] and Annexure ML-20 (page 13).
[216] Arabian at [57] and Annexure GA-5 (pages 86-91), and [61] and Annexure GA-7 (pages 97-102).

c) at least in the case of Mr Michael, the requirement to perform in-store tasks was further communicated at the point that the job offer was made.[217]

80. Personal shopping duties encompass the following tasks:[218]

a) the CSA enters the Online Room of the store and takes their allocated personal data terminal (PDT) which contains the details of the orders which the CSA will pick during that shift, and the corresponding "licence plates" (which attach to the crates in which the items will be placed and which identify those items as being part of a particular customer order);

b) the CSA takes a trolley and crates, walks out into the main body of the store and begins picking customer orders from the shelves. The CSA can pick up to eight orders at any given time. They will not pick the entire order, rather, they pick those items which fall within their allocated area of the store. Mr Michael conceded in cross-examination that this was part of the shopping duties and that it was in the public area of the store where other customers are choosing their goods;[219]

c) when the CSA finishes those orders, they return to the Online Room, place the crates in the Online Room in preparation for consolidation and delivery, take a new batch of licence plates and repeat the process. Mr Michael conceded in cross-examination that this was part of the shopping duties;[220]

d) if a CSA is approached by a customer whilst performing shopping duties and asked a question about the location of a product, they are expected to take the customer to the particular product (in the same way that any other Coles employee is expected to respond). Mr Michael conceded in cross-examination that this was part of the shopping duties.[221]

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[217] van Greunen at [29].
[218] Dobbins at [21] & [33], Mulder at [16]-[17], Arabian at [37]-[38], Lord 2 at [21]-[26].
[219] T82.4-.17.
[220] T82.11-.13.
[221] T82.23-.31.

81. A CSA performs the duties described above in the same manner as other Online Department team members (that is, Personal Shoppers). Coles' expectations of a CSA's customer service performance in the store is the same as those it holds of other Online Department team members, and Store Team Members in other departments of the store.[222]

82. All CSAs are trained to perform personal shopping duties, and can be required to perform them as part of the CSA role as required.[223] Both Mr Michael and Mr Gajdobranski admit that they performed personal shopping duties during their training.[224] Mr Gajdobranski performed personal shopping duties:

    a) on an ad hoc basis on a number of occasions from as early as October 2011;[225] and

    b) on a weekly rostered basis since July 2012.[226] The reason why Mr Gajdobranski and the other CSAs at Endeavour Hills began performing personal shopping duties on a weekly rostered basis was that around this time, there was an increasing number of CSAs in the Online Department (which was not the case prior to mid-2012).[227]

83. While there are some CSAs who do not perform personal shopping duties (such as Mr Michael), a significant proportion of CSAs do perform personal shopping duties (whether on a rostered or ad hoc basis). As already noted, at 18 June 2013, 62 per cent of CSAs performed personal shopping duties at least once per week on a rostered basis.[228] Where CSAs do not perform personal shopping

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[222] Dobbins at [17]-[19], [37], [39]; Mulder at [15]-[17]; Arabian at [20]-[21], [36]-[38], [48]-[54]; Lord 2 at [42], [45], [54].
[223] Mulder at [27], [29]; Arabian at [59], [62].
[224] Arabian at [23]-[24] and Annexure GA-2, and [25]-[26] and Annexure GA-3; Michael 1 at [6], [18]; Gajdobranski 1 at [14].
[225] Mulder at [26]. Mr Dobbins was also rostered on shopping shifts while he was a CSA on an ad hoc basis from September 2011, and then on a regular basis in December 2011 (T219.4-.38). Mr Arabian gave evidence that Mr Gajdobranski asked for additional shifts "anywhere else" in the store (T228.6 – 14).
[226] Dobbins at [47]; van Greunen at [13]; Arabian at [47], [59].
[227] T2267.25 – 33.
[228] Lord 2 at [44] and Annexure ML-18. Mr Dobbins also gave evidence that over the last eight months (prior to the date of him swearing his affidavit) in his opinion 50 per cent of CSAs were doing rostered shopping shifts at least once a week (T220.26-.39). See also Dobbins at [24].

duties, this is not because those duties do not form part of the CSA role. Rather, it is due to other factors including:

a) a shortage of CSAs;[229]

b) as in Mr Michael's case, the CSA having particularly strong customer service skills and hence being utilised for duties with a greater degree of customer interaction.[230] In this respect, I observed during the hearing that "Coles makes an effort to ensure, as far as practicable, that all customer service agents do some in-store work, including as in-store – as personal shoppers. But they do, as a practical matter, permit a degree of specialisation."[231]

c) the CSA's existing roster being incompatible with a rostered shopping shift, and the CSA being unwilling to alter that roster;[232] or

d) a particular manager's willingness to assign a CSA to alternative in-store duties (such as assembling crates) based on that CSA's preferences.[233] This was the case, for example, with Mr Michael.

84. In addition to delivery duties and personal shopping duties, some CSAs (including Mr Gajdobranski) also perform general duties in the stores. These duties may include stacking collapsible crates in the Online Room of the store;[234] consolidating orders in the Online Room;[235] loading "dollies" with consolidated orders in the Online Room of the store in preparation for the next delivery run;[236] looking for missing items in the back store room;[237] general cleaning in the store room or other areas of the store;[238] preparing paperwork in advance of the next delivery run;[239] washing vans;[240] returning groceries back to store shelves;[241] putting away shopped orders into the various temperature

[229] Mulder at [19]-[20]; van Greunen at [10]-[12]; Arabian at [43]-[44]; Lord 2 at [44].
[230] Arabian at [62].
[231] T122.8-.11.
[232] Mulder at [21(b)].
[233] Arabian at [48].
[234] Arabian at [48].
[235] Dobbins at [48].
[236] Dobbins at [27]-[28]; Mulder at [8]; Arabian at [28]-[29]; Lord 2 at [19(b)].
[237] Mulder at [13].
[238] Ibid.
[239] Ibid.
[240] Ibid.
[241] Arabian at [52].

controlled zones within the store;[242] shelf restocking;[243] and trolley collection.[244] CSAs also assisted in stocktake duties performed every six months. These duties involved counting the stock on shelves, marking stock and entering information onto a computer.[245]

85. The general duties Mr Gajdobranski has actually performed (other than in the context of his personal shopping duties) include consolidating orders in the Online Room of the store in advance of the next delivery shift;[246] stacking collapsible crates in the Online Room of the store;[247] and stacking shelves.[248] However, both Mr Michael and Mr Gajdobranski could have been required to perform any of the tasks detailed above at any stage.[249] There is no doubt that deliveries constituted the dominant part of their duties but their duties included those in store tasks detailed above. I now address the questions identified at [12]-[15] above in the light of the established facts.

Identification of the applicable Industrial Instrument

86. Section 43 of the Fair Work Act relevantly provides:

> *The main terms and conditions of employment of an employee that are provided under this Act are those set out in:*
>
> *(a) the National Employment Standards (see Part 2-2); and*
>
> *(b) a modern award (see Part 2-3), an enterprise agreement (see Part 2-4) or a workplace determination (see Part 2-5) that applies to the employee.*

87. The TWU's central contention is that Coles has contravened the terms of a modern award, namely the Road Transport Award, and as such contravened s.45 of the Fair Work Act. The Road Transport Award will not have imposed obligations on Coles and Coles will not have

[242] Dobbins at [40].
[243] Lord 2 at [19(n)], [33].
[244] Lord 2 at [19(p)].
[245] T271.40 – 272.7.
[246] Dobbins at [48].
[247] Mulder at [25].
[248] van Greunen at [13]; Arabian at [60].
[249] Dobbins at [44], [48]; Mulder at [27], [29].

contravened the Road Transport Award, unless the Road Transport Award applied to Mr Michael and Mr Gajdobranski[250].

88. Sections 47 and 48 of the Fair Work Act respectively define when a modern award covers an employer or employee, and applies to an employer or employee, noting a modern award must be in operation and cover a particular employment before it can apply (there can be no doubt that the Road Transport Award was operative at all relevant times).[251]

89. Section 48 relevantly provides:

> *A modern award* ***covers*** *an employee, employer, organisation or outworker entity if the award is expressed to cover the employee, employer, organisation or outworker entity.*

90. A modern award will "apply" to an employee, employer, organisation or outworker entity if:[252]

> *(a) the modern award covers the employee, employer, organisation or outworker entity; and*
>
> *(b) the modern award is in operation; and*
>
> *(c) no other provision of this Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.*

91. An enterprise agreement will apply to an employee, employer or employee organisation if it "is in operation … covers the employee, employer or organisation, and ..." does not apply by virtue of some other provision of the Act.[253] An enterprise agreement will cover an employee or employer "if the agreement is expressed to cover (however described) the employee or the employer."[254] Section 57(1) provides that:

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[250] Fair Work Act, s.46(1).
[251] as described below it was made by way of decision of the Full Bench of the then AIRC on 3 April 2009: see *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2009) 181 IR 19; [2008] AIRCFB 345.
[252] Section 47(1).
[253] Fair Work Act, s 52(1).
[254] Fair Work Act, s.53(1).

> *A modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.*

92. The TWU submits that, given the TWU's case is reliant upon the Road Transport Award, the first question is whether the Road Transport Award covered the employment of Mr Michael and Mr Gajdobranski. If it did not, it can never have applied to the employment of Mr Michael and Mr Gajdobranski and the potential interaction with the 2008 EBA, the 2011 EBA or the Retail Award does not arise. However, in my view, the task is a more complex one in circumstances where, as here, multiple industrial instruments may, in their terms, apply.

Principles governing interpretation of industrial instruments

93. There are well established principles used in interpreting awards (such as the Retail and Road Transport Awards).

94. These principles were clearly set out by Justice French (as he then was) in the Federal Court of Australia in *City of Wanneroo v ASU*,[255] where his Honour said:[256]

> *The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to '... the entire document of which it is a part or to other documents with which there is an association'. It may also include '... ideas that gave rise to an expression in a document from which it has been taken'* - Short v FW Hercus Pty Ltd *(1993) 40 FCR 511 at 518 (Burchett J);* Australian Municipal, Clerical and Services Union v Treasurer of the Commonwealth of Australia *(1998) 80 IR 345 (Marshall J).*

95. His Honour then said:[257]

[255] (2006) 153 IR 426.
[256] at [53].

> *It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities* - City of Wanneroo v Holmes *(1989) 30 IR 362 at 378-379 and cases there cited. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned - see eg* Geo A Bond and Co Ltd (in liq) v McKenzie *[1929] AR 499 at 503-4 (Street J). It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in* City of Wanneroo v Holmes *(at 380):*
>
> > Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties.

96. In *Kucks v CSR Limited*,[258] Madgwick J stated:[259]

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

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[257] at [57].
[258] (1996) 66 IR 182.
[259] at 184.

> *of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.*

Principles governing the interpretation of enterprise agreements

97. In *Amcor v CFMEU*,[260] the High Court was required to interpret a clause in an enterprise agreement. The majority set out the approach to be adopted in interpreting such a clause:[261]

> *Clause 55.1.1 must be read in context. It is necessary, therefore, to have regard not only to the text of clause 55.1.1, but also to a number of other matters: first, the other provisions made by clause 55; secondly, the text and operation of the Agreement both as a whole and by reference to other particular provisions made by it; and, thirdly, the legislative background against which the Agreement was made and in which it was to operate.*

98. In addition, two of the judges in *Amcor* adopted the passage in *Kucks* described above in relation to interpreting an enterprise agreement.[262]

Is extrinsic evidence relevant to construction of an industrial instrument?

99. Industrial instruments, including awards, have generally been interpreted in accordance with principles of interpretation of legislative instruments, but somewhat more flexibly. Notwithstanding the generous approach outlined above, Coles contends that enterprise agreements are subject to contractual interpretation principles regarding the admissibility of extrinsic evidence. This principle was set out in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*,[263] where Mason J stated that:[264]

> *The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the*

[260] (2005)222 CLR 241.
[261] at [30].
[262] see Kirby J at [96] and Callinan J at [129]-[130]. See also *AMWU v Ardmona Foods Ltd* (2006) 155 IR 211 at [26]-[27] (Ryan J) and *CFMEU v John Holland Pty Ltd* (2010) 186 FCR 88 at [90] (Logan J).
[263] (1982) 149 CLR 337.
[264] at 352.

> *language is ambiguous or susceptible of more than one meaning.* ***But it is not admissible to contradict the language of the contract when it has a plain meaning.*** *Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.* (emphasis added)

100. The principles set out in *Codelfa* have been applied in the context of interpreting an enterprise agreement in *AMWU v Qantas Airways*,[265] the Full Federal Court in *CFMEU v John Holland*[266] and in *Oceanic Coal Australia Pty Ltd v Parker*.[267] In *Oceanic Coal*, Cowdroy J, after reviewing the authorities on interpreting industrial instruments and common law contracts, said:[268]

> *Applying such interpretation, an interpretation that identifies no ambiguity in the relevant clause, there is no occasion to have regard to the history and subject matter of the award (see* Pickard v John Heine & Son Limited *[1924] HCA 38; (1924) 35 CLR 1 at 9 per Isaacs ACJ).*

101. While His Honour used the term "award" in the above passage, the industrial instrument before him was a collective agreement.[269]

102. I note that Logan J in *John Holland* refers[270] to an earlier Full Court decision of *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd*[271] in support of a proposition that ambiguity is not required before regard may be had to extrinsic evidence. The High Court has subsequently reaffirmed the *Codelfa* requirement for ambiguity in interpreting contracts in strong terms in *Western Export Services, Inc v Jireh International Pty Ltd*.[272]

103. I accept that the Court, faced with construing the terms of an industrial instrument, should generally find ambiguity in the meaning or application of a term before having regard to extrinsic evidence.

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[265] (2001) 106 IR 307 at 313 (North J)
[266] (2010) 186 FCR 88 at [91]-[92] (Logan J)
[267] [2010] FCA 1018
[268] at [48].
[269] see *Oceanic Coal* at [1].
[270] at [96].
[271] (2006) 156 FCR 1
[272] (2011) 282 ALR 604. See also *Hockey v WIN Corporation Pty Ltd* [2013] FCA 772 at [50].

104. There is, in my view, ambiguity in the meaning of the relevant provision in the industrial instruments the subject of these proceedings (that is, the coverage clauses in the 2008 EBA, the 2011 EBA the Road Transport Award and the Retail Award). The issue in these proceedings, as discussed below, is whether Mr Michael and Mr Gajdobranski performed duties such that they fell within the coverage clause of one or other of these instruments. There must be dispute or ambiguity as to the meaning of the words in these coverage clauses in circumstances where any one or more of them can apply. If it were simply a case of looking at the words in the coverage clauses of one or other of these instruments, the outcome would be determined by which instrument was considered first, which would be ridiculous.

105. As there is ambiguity, it is open to me, as a matter of legal principle, to look at extrinsic material in the making of the industrial instruments. For this reason, the evidence of Ms Walton,[273] is relevant to determining the question of whether the 2008 EBA and/or the 2011 EBA apply to Messrs Michael and/or Gajdobranski. Coles raised objections to Ms Walton's evidence in this regard during the course of the hearing on 31 July 2013, which the parties agreed to address by way of submissions.[274] I have decided to receive that evidence.

106. While Ms Walton's evidence is admissible, it is of limited assistance. Ms Walton's evidence goes to the intention of Coles and the Shop, Distributive & Allied Employees' Association (SDA) in respect of the 2011 EBA. As will appear, the application of the 2011 EBA is dependent upon the application of the 2008 EBA, which was essentially continued in operation pursuant to the later agreement.

Application of the *Acts Interpretation Act 1901* (Cth) to the interpretation of industrial instruments

107. There is a line of authority to the effect that the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) applies to the interpretation of awards. In *City of Wanneroo*, French J said:[275]

[273] in her affidavit sworn 13 February 2013, at [9]-[19] (and the exhibits referred to therein).
[274] See T34.25 – 37.45.
[275] at [52].

The interpretation of legislative instruments is dealt with in the Legislative Instruments Act 2003 *(Cth). Awards and agreements made under the Act are declared, by s 7(1) of the* Legislative Instruments Act*, not to be legislative instruments – see Item 18 in the table set out in s 7(1). This leaves such awards and agreements within s 46 of the* Acts Interpretation Act 1901 *(Cth) which provides, inter alia:*

> *(1) If a provision confers on an authority the power to make an instrument that is neither a legislative instrument within the meaning of the Legislative Instruments Act 2003 nor a rule of court, then, unless the contrary intention appears:*
>
> *(a) this Act applies to any instrument so made as if it were an Act and as if each provision of the instrument were a section of an Act; and*
>
> *(b) expressions used in any instrument so made have the same meaning as in the enabling legislation; and*
>
> *(c) any instrument so made is to be read and construed subject to the enabling legislation, and so as not to exceed the power of the authority.'*

An award is an instrument made by an authority, in this case the Australian Industrial Relations Commission, and so attracts the application of the Acts Interpretation Act for the purposes of its interpretation.

108. On French J's analysis, this would bring into operation s.15AB of the Acts Interpretation Act, which allows, in effect, recourse to extrinsic material in certain circumstances.[276]

109. Coles seeks to distinguish the decision in *City of Wanneroo* from this case. In *City of Wanneroo*, his Honour said that "an **award** is an instrument made by an authority, in this case the Australian Industrial Relations Commission, and so attracts the application of the Acts Interpretation Act for the purposes of its interpretation." (emphasis added)

110. The award the subject of the dispute in *City of Wanneroo* was an award made by the then AIRC under the Workplace Relations Act. As is the

[276] See *City of Wanneroo* at [55] (French J).

case under the Fair Work Act, s.143(1) of the Workplace Relations Act provided that it was the AIRC itself that made awards.[277]

111. However, an enterprise agreement, unlike the award in *City of Wanneroo,* is not "made" by the FWC or any other authority. Rather, enterprise agreements are made by the parties to the enterprise agreement itself. Section 172(2) of the Fair Work Act relevantly provides that an employer may ***make*** an enterprise agreement, with either employees who are employed at the time the agreement was made and who will be covered by the agreement or a relevant employee organisation. Section 182(1) of the Fair Work Act provides that if the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement, have been asked to approve the agreement under s.181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve the agreement.[278]

112. The FWC's role is not to make the enterprise agreement, rather, its role is to "approve" the agreement.[279] This approval process serves a protective function. In this respect, paragraph 654 to 656 of the Explanatory Memorandum to the Fair Work Bill 2009 states:

> *654. An enterprise agreement that is not a greenfields agreement is* ***made when it is approved by the employees of the employer*** *or employers that will be covered by the agreement. A greenfields agreement is made when it is signed by each employer and each relevant employee organisation.*
>
> *655. After an enterprise agreement has been made, a bargaining representative for that agreement must apply to FWA for approval of the agreement.* ***FWA can approve an enterprise agreement if it is satisfied that all approval requirements are met. Among other things, the approval requirements will ensure that enterprise agreements do not undermine the guaranteed safety net of minimum terms and conditions set out in the NES and in modern awards.*** *An*

[277] Note that s.143(1) of the Workplace Relations Act was replaced by s.567 of the Workplace Relations Act in 2006, although its effect was the same.
[278] Note that s.181 of the Fair Work Act provides that employers may request employees to approve a proposed enterprise agreement by voting for that agreement.
[279] see ss.187 to 190 of the Fair Work Act.

enterprise agreement will only come into operation after it has been approved by FWA.

656. Employers and employees can agree to vary or terminate an enterprise agreement at any time. A variation or termination will come into operation when it is approved by FWA. (emphasis added)

113. Coles submits that by reason of the above, it can be seen that the 2011 EBA was not "made" by the FWC or any other authority. On that view, the 2011 EBA does not fall within s.46 of the Acts Interpretation Act. The Acts Interpretation Act therefore would have no application to the interpretation of the 2011 EBA.

114. I note that two decisions of the FWC have in fact applied the Acts Interpretation Act to interpreting enterprise agreements.[280] In neither of these decisions is there any analysis of whether an enterprise agreement is an instrument "made" by the FWC or any other authority for the purposes of s.46 of the Acts Interpretation Act. I consider that those decisions represent a commonsense approach that s.46 of the Acts Interpretation Act applies to all industrial instruments, regardless of the technicalities of their making or approval. That is the view I take in the absence of binding authority to the contrary.

115. I reject Coles' submission about the non application of the Acts Interpretation Act to the interpretation of the 2011 EBA. Section 15AB of that Act allows the Court to have regard to extrinsic material in the following circumstances:

a) to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of that provision taking into account its context in the Act and the purpose or object underlying the Act (s.15AB(1)(a));

b) to determine the meaning of the provision when the provision is ambiguous or obscure (s.15AB(1)(b)(i)); or

c) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object

[280] *Cape Australia Holdings Pty Ltd v CFMEU* [2012] FWAFB 3994 at [5]-[6] and *TWU v Toll Dnata Airport Services* [2012] FWA 5605 at [46].

underlying the Act leads to a result that is manifestly absurd or is unreasonable (s.15AB(1)(b)(ii)).

116. For the purposes of s.15AB(1)(b)(i), ambiguity may emerge from consideration of the context of a document. In *Short v Hercus*,[281] for example, Burchett J sitting as a member of the Full Court of the Federal Court said:[282]

> ***But even if the language, read alone, appeared pellucidly clear, the tendency of recent decisions — and this is the other answer to the argument put — would seem to require the court to look at the full context. Only then will all the nuances of the language be perceived****. The judgment of Mason J (with which Stephen and Wilson JJ expressed agreement) in* Codelfa Construction Pty Ltd v State Rail Authority (NSW) *(1982) 149 CLR 337 at 347-353 contains an extended discussion of the principles upon which a court may take account, when construing a contract, of the circumstances surrounding the agreement of the parties upon those particular terms. In the course of that discussion, Mason J suggested (at 350) that "perhaps ... the difference ... is more apparent than real" between the view that evidence is admissible only to resolve an ambiguity, not to raise it, and the view that extrinsic evidence is receivable both to raise and to resolve an ambiguity. He concluded (at 352):*
>
> > The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although ... if the facts are notorious knowledge of them will be presumed.
>
> The fact is that words are frequently susceptible of more than one meaning. Paradoxically, ambiguity may be born of the reader's clarity of thought which perceives a potentiality for an alternative meaning. But in many cases only evidence of extrinsic facts can show that the potentiality has substance. *The old case* Macdonald v Longbottom *(1859) 1 El & El 977; 120 ER 1177, to which Mason J referred, is an example, since there is nothing*

[281] (1993) 40 FCR 511.
[282] at 518-519.

> *necessarily ambiguous in the expression "your wool" (indeed Erle J at 986; 1180 described it as "most explicit") — only evidence that at the time the vendor had both wool of his own growing, and also wool which he had bought in from others, could raise an ambiguity, while at the same time solving it once the other party was shown to have known the facts.*
>
> *See also* City of Wanneroo v Austrailan Municipal, Administrative, Clerical and Services Union *(2006) 153 FCR 426 at [56]-[57]*. (emphasis added)

117. In this matter, evidence of the historical background to the relevant award provisions is relevant and admissible as is evidence as to the objective background facts known to the parties at the time of the making of the 2008 EBA and the 2011 EBA.

Coverage and its context

118. Each modern award has a "coverage" clause that determines whether "the award is expressed to cover the employee, employer, organisation or outworker entity". Whether a particular employment falls within the "coverage" clause of a modern award is ultimately a question of construction.

119. The principles to be applied in the interpretation of an award are well settled. The interpretation of an industrial agreement turns on its language, but the language used must be understood in the light of its industrial context and purpose.[283]

120. An overly strict or literal approach to construction of industrial awards is rarely appropriate. It is justifiable to read awards and industrial agreements so as to give effect to their evident purposes despite mere inconsistencies or infelicities of expression which might tend to some

[283] *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR 498 at 503-504; *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518; *Kingmill Australia Pty Ltd (t/a Thrifty Car Rental) v Federated Clerks' Union (NSW)* (2001) 106 IR 217 at [67]; *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [2] and [96].

other reading.[284] Meanings which "avoid inconvenience or injustice may reasonably be strained for".[285]

121. Awards are, obviously enough, properly to be seen as beneficial instruments and there is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned.[286] Where ambiguity exists, it should be resolved in favour of affording a more generous entitlement rather than depriving employees of a benefit that is reasonably open in the words used in the award.

122. Context is of particular significance in the interpretation of industrial instruments. In *Short v Hercus*, Burchett J emphasised the need to have regard to relevant industrial context in another well known and often cited passage:[287]

> *The context of an expression may thus be much more than the words that are its immediate neighbours. Context may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not be just assumed, in the case of an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used.*

123. The construction of an instrument depends upon an assessment of the objective intentions of the parties and not the subjective beliefs or understandings of the parties.[288] The intentions of the parties may be

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[284] *Kucks v CSR Ltd* (1996) 66 IR 182 at 184; *United Firefighters Union of Australia v Metropolitan Fire and Emergency Services Board* (2006) 152 FCR 18 at [51]-[52].
[285] *Kucks v CSR Ltd* (1996) 66 IR 182 at 184; *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [96].
[286] *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-50; *Re State Rail Authority Firefighters Award 2001* (2002) 122 IR 13 at [22]-[24]; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at [57]; *Endeavour Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2007) 161 IR 96 at [44].
[287] at 518.
[288] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]; *Australian Rail, Tram and Bus Industry Union v Rail Corporation New South Wales* (2009) 187 IR 453 at [14].

manifest from not only the words used but from words considered in light of the circumstances surrounding the transaction.[289]

124. The context includes first the whole of the text of the document.[290] However, the context in which the words used in any agreement (particularly an industrial agreement) must be understood includes the circumstances in which the agreement was made.[291]

125. For example, in *Amcor Limited v CFMEU*,[292] Gleeson CJ and McHugh J described the process in this way:

> *The resolution of the issue turns upon the language of the particular agreement, understood in the light of its industrial context and purpose ...*

126. Kirby J emphasised the same point by observing:[293]

> *In the interpretation of the* Constitution *and of legislation, Australian courts have passed beyond the age of the magnifying glass. No longer do courts (or industrial tribunals) seek to give meaning to contested language considered in isolation from the context in which the words are used and the purpose for which the words were apparently chosen.* ***Nowadays, the same insistence on context, as well as text, permeates the approach to interpretation that is taken to legally binding agreements. Indeed, before this approach became normal in the courts, in the interpretation of contested instruments it was often the approach adopted for the construction of industrial texts. This was in keeping with an inclination of such tribunals towards practical, as distinct from purely verbal, constructions in that area of the law's operation.*** (emphasis added)

127. The "surrounding circumstances" in this context is to be understood to be a reference to "the objective background facts".[294] This may include evidence of prior negotiations so far as they tend to establish objective

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[289] *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [2] and [96]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Skilled Engineering Ltd* [2003] FCA 260 at [21].
[290] *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corp Pty Ltd* (1993) 178 CLR 379 at 386-387.
[291] see, for example, *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR 498 at 503-504; *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518.
[292] (2005) 222 CLR 241 at [2].
[293] at [66]-[67].
[294] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352.

background facts known to both parties and the subject matter of the contract, facts so notorious that knowledge of them is to be presumed and evidence of a matter in common contemplation and constituting a common assumption ... [and] statements and actions of the parties which reflect their mutual actual intentions.[295]

Major and substantial employment

128. Courts and industrial tribunals have developed principles to be applied to ascertain whether an employee fits within a particular classification described in an award or agreement. Where the employee performs mixed functions, the approach has been to examine the "major and substantial employment" of the employee or the "principal purpose" or "primary function" of the employee.

129. In *Logan v Otis Elevator Company Pty Ltd*,[296] for example, Moore J referred to and applied decision of Sheldon J in *Ware v O'Donnell Griffin (Television Services) Pty Ltd*[297] where his Honour observed:

> *The finding of the Chief Industrial Magistrate raises two questions: Firstly, whether this is a case to be determined on the principle of major and substantial employment; and, secondly, if it is, whether the evidence justified his finding as to what the major and substantial employment of the complainant was.*
>
> *It seems to me that this is clearly a case to which this principle is applicable. This principle is almost as old as industrial arbitration and it makes a practical approach to determining the application of awards where duties are of a mixed character and contain elements which have taken alone would be covered by more than one award. This is not an appropriate occasion on which to discuss the method by which this test should be applied except to say that it is not merely a matter of quantifying the time spent on the various elements of work performed by a complainant; the quality of the different types of work done is also a relevant consideration.*

130. The approach of examining the major and substantial employment of the employees has been applied in a range of decisions.[298]

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[295] *BP Australia Pty Ltd v Nyran Pty Ltd* (2003) 198 ALR 442 at [34].
[296] [1997] IRCA 200
[297] [1971] AR (NSW) 18

131. In other decisions, there has been an examination of the "principal purpose" or "primary function" of the employee. For example, in *Merchant Service Guild of Australia v J Fenwick & Co Pty Ltd*,[299] Ludeke J said:[300]

> *To ascertain the course of the calling of particular employees, is not enough merely to make a quantitative assessment of the time spent in carrying out the various duties. In my opinion, but only should the nature of the work done by the class of employee be examined but it is equally relevant to consider the circumstances in which they are employed to do the work; if the worker is required by his employer to carry out diverse duties, the enquiry should be directed to ascertain the principle purpose for which the worker is employed ...*

132. See also *Prichard v Krantz*;[301] *Carpenter v Corona Manufacturing Pty Ltd*.[302]

133. The task of the Court or Tribunal is to examine the major, substantial or principal aspect of the work performed by the employee. That will include consideration of the amount of time spent performing particular tasks, but also the circumstances of the employment and what the employee was employed to do. The question is one of fact to be determined by reference to the duties actually attaching to the position, rather than its title.[303]

Modern awards

134. The critical contextual factors that warrant close attention in these proceedings are (a) the process by which the Road Transport Award (and the Retail Award) came to be made in the Award Modernisation process, and (b) the history of industrial coverage of workers involved in "Mixed Industries".

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[298] *Co-operative Bulk Handling Ltd v Waterside Workers' Federation of Australia* (1980) 32 ALR 541 at 556; *Keen v Health Corporation Ltd* (2008) 179 IR 166 at [37]-[38]; *Sim v LUO Enterprise Pty Ltd (No 2)* (2009) 191 IR 401 at [126]-[128].
[299] (1973) 150 CAR 99.
[300] at 101.
[301] (1983) 5 IR 437 at 442.
[302] (2002) 122 IR 387 at [9].
[303] *City of Wanneroo v Holmes* (1989) 30 IR 362 at 379; *Joyce v Christoffersen* (1990) 26 FCR 261 at 278.

135. The relevant "industrial context" in this case begins with an understanding of the creation of the current modern awards. The Road Transport Award and the Retail Award are each the product of the Award Modernisation process carried out by the Full Bench of the AIRC and its successor the FWC over 2008 to December 2009. The Award modernization process was itself the product of Part 10A of the Workplace Relations Act,[304] and the Award Modernisation request made by the Minister for Workplace Relations, then the Hon. Ms Gillard, initially on 28 March 2008 and as subsequently amended.

136. The genesis and history of the Award Modernisation process can be traced through a series of Statements and Decisions of the Full Bench of the Commission constituted for that purpose.[305] For present purposes it is sufficient to note that the Award Modernisation process was carried out in stages (Stages 1 to 4), and that:

a) one of the key objectives of the Award Modernisation process was the rationalisation of the great many pre-reform awards[306] into a relatively small number of modern awards. The modern awards so created are necessarily the product of an amalgam of existing instruments crafted so as to meet the modern award objectives and the Minister's request;

b) the process that lead to the making of the modern awards in each of the Stages involved pre-drafting consultation, the preparation and publication of exposure drafts, further consultation on the drafts and finally the preparation and publication of the awards;[307]

c) Stage 1 resulted in the creation of some 17 "priority awards", including the Retail Award, and settling the form of some general "model" clauses (such as the initial form of the model "coverage"

[304] enacted by the *Workplace Relations Amendment (Transition To Forward With Fairness) Act* 2008 (shortly after the election of the Rudd Labor government in 2007).
[305] *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2008) 177 IR 364; [2008] AIRCFB 1000, at [12] to [33], in particular from [28].
[306] see for example *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2008) 177 IR 364; [2008] AIRCFB 1000, at [26].
[307] this is drawn from *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2008) 177 IR 364; [2008] AIRCFB 1000, at [10], but is equally applicable to the other Stages of the award modernization process: see for example *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2009) 180 IR 124; [2009] AIRCFB 50, and *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2009) 181 IR 19; [2009] AIRCFB 345, at [1].

clause) and Stage 2 resulted in the creation of a further 27 modern awards, including the Road Transport Award.

137. The genesis of the modern Retail Award and the model "coverage" clause that can be found (sometimes with minor modifications) in each modern award ultimately made, starts with the observations made by the Full Bench in its decision published on 20 June 2008.[308]

138. In that decision the Full Bench outlined the awards to be dealt with in the priority Stage 1 round. Consistent with the general industry consolidation approach adopted by the Full Bench,[309] the Full Bench accepted (with some qualifications)[310] the submission then advanced by the SDA, that the general retail award should cover "all classifications of employees within the four walls of a shop",[311] save for certain specified elements of the retail sector.

139. On 12 September 2008, the Full Bench published a decision outlining the "exposure drafts" of, among other things, the Retail Award. That decision also dealt with matters of "general relevance" at [5]-[34], and the particular priority award exposure drafts from [35] onwards. The Full Bench observed:[312]

> *[6] Each modern award will have an application clause indicating to whom it applies and on whom it is binding. Modern industry awards will be expressed, so far as practicable, to apply to an employer industry. Modern occupational awards will be expressed to apply to an employee occupation.* In each case the modern award will be confined in its application to employees in classifications in the award *and will not apply to an employee excluded from coverage by the Act. Each award will be expressed to bind employers and employees to whom it applies but will not bind an employer bound by an enterprise award in respect of an employee to whom the enterprise award applies.*

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[308] *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2008) 175 IR 120; [2008] AIRCFB 550, at [80]–[84].
[309] as to which, at that stage of the Award Modernisation process, see *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2008) 175 IR 120; [2008] AIRCFB 550, at [11] – [12]; see also (2008) 177 IR 5 at [4].
[310] at [83].
[311] at [80].
[312] at [6].

140. After taking "written comments" and "oral submissions" from "many interested parties"[313] in relation to the exposure drafts, including as to the Retail Award, in a decision published 19 December 2008 (notably prior to the commencement of the Fair Work Act), the Full Bench resolved the form of certain model clauses, including the "paramount"[314] coverage clause, and made the Stage 1 priority modern awards, including the Retail Award.

141. In relation to the model "coverage" clause, the Full Bench emphasised the modernisation request required the rationalisation of awards,[315] noted the exposure drafts "contained a provision which [was] intended to provide a basis for deciding which award applies in the case of overlap"[316], and determined the model coverage clause would include a clause in the following terms (similar to that contained in the exposure drafts) to deal with overlapping coverage:

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

142. This model clause can be found in clause 4.8 of the Road Transport Award and 4.7 of the Retail Award. They both state as follows:

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

143. In making the model clause, the Full Bench expressly acknowledged that "the provision involves the application of judgment in relation to the adjective "appropriate" and the phrase "the environment in which work is performed".[317]

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[313] *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2008) 175 IR 120; [2008] AIRCFB 550, at [3].
[314] see *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2008) 177 IR 364; [2008] AIRCFB 1000, at [12].
[315] at [26]–[27].
[316] at [28].
[317] at [30].

Does the Road Transport Award apply?

144. The exposure drafts of the Stage 2 modern awards, including the three private transport industry awards (the Road Transport Award, the *Road Transport (Long Distance Operations) Award 2010* and the *Transport Industry (Cash in Transit) Award 2010*) were published for comment by way of a decision on 23 January 2009.[318]

145. The coverage clause in the exposure draft of the Road Transport Award was relevantly described in this way:

> *[98] The RT&D Modern Award covers the road transport and distribution industry as defined in the exposure draft. The definition is broad and is intended to incorporate the scope of the pre-reform Transport Workers Award 1998 (Transport Workers Award) and NAPSAs operating in each state as the general industry transport award. It also incorporates the transport activities previously covered by freight forwarding, petrol and petroleum products, crude oil and gas and quarried materials awards. These are a subset only of the sectors covered by the exposure draft and the parties should give close consideration to the definition of the industry.*
>
> *[99] We are aware that the definition of the industry does not reproduce the wording in each of the existing scope or incidence clauses in relevant pre-reform awards and NAPSAs. The parties should give consideration to whether there is a need to specifically identify other activities. In this respect, however, we note the breadth of paragraph 3.1(a) of the definition and it may not be necessary to specifically identify the various subcategories of those goods, wares and merchandise, etc.*
>
> *[100] The coverage of the award also extends to the transport of goods, etc. where the work performed is ancillary to the principal business, undertaking or industry of the employer. This reflects the scope of the pre-reform Transport Workers (Mixed Industries) Award 2002. That award contained a majority clause. The wording of that clause is not suitable for a modern award.* ***We have included a draft provision in cl.4.3 of the RT&D Modern Award designed to operate in circumstances where the principal business of the employer is not road transport and distribution and that employer is covered by another modern award as is the relevant employee. The intention is that, in those***

[318] see *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2009) 180 IR 124; [2008] AIRCFB 50, see in particular from [97].

circumstances, the other modern award will regulate the employee's terms and conditions. *This issue has not arisen in any significant way during the making of the priority awards and we invite the parties' submissions in relation to the wording of this clause and any related matters.* (emphasis added)

146. After again calling for comments and submissions the Full Bench published the Stage 2 modern awards, including the Road Transport Award (and the other private transport industry awards) by way of a decision on 3 April 2009.[319] The "coverage" clause of the Road Transport again featured heavily in the decision of the Full Bench as follows:

> *[168] We have previously published exposure drafts of each of the awards we now propose to make. We should make a number of comments about issues raised by the parties concerning the exposure drafts and variations of substance that have been made to the drafts. We refer first to be RT&D Modern Award. In our statement of 23 January 2009, we said that the definition of the industry should be closely considered by the parties and submissions made as to whether the description was sufficient to encompass the various sectors of the industry that were being incorporated into the award. No party submitted that any additional paragraphs needed to be added to the definition and accordingly it retains paragraphs (a) to (i) however we have made some variations to make it clear that the award relates to the transport of goods etc by road. We have also adopted the definition of a distribution facility as proposed by the Transport Workers' Union (TWU) so it is clear that they are facilities which are operated by an employer as part of its road transport business.*
>
> *[169] We have retained the reference in paragraph (a) of the definition of the road transport and distribution industry to the transport of goods etc where that work is ancillary to the principal business, undertaking or industry of the employer. In our January 2009 statement we raised this aspect of the award's coverage and, for the purposes of encouraging submissions about it, we put cl.4.3, as it then was, in the exposure draft. We also noted that this issue had not arisen before in the award modernisation process in any significant way. As it transpired few parties made submissions about this matter. AiGroup submitted that it was appropriate that the award have a majority*

[319] *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008* (2009) 181 IR 19; [2009] AIRCFB 345.

clause in terms similar to that in the Transport Workers (Mixed Industries) Award 2002 (Mixed Industries Award). We should comment on how that award, and the majority clause in it, operates. The incidence of award clause is in terms similar to paragraph (a) of the definition of the road transport and distribution industry in the RT&D Modern Award. However the Mixed Industries Award provides that it only binds an employer respondent to that award. Modern awards are not to have the equivalent of named respondent employers. The Mixed Industries Award makes it clear that it only applies where the employee of a respondent employer is required to perform work in one of the classifications in the award. In this respect we note that the classification structure is very similar to the RT&D Modern Award which in turn has been based on the pre-reform Transport Workers Award 1998 (TWU Award 1998). Clause 9 of the Mixed Industries Award provides that if employees are in a minority of employees in a respondent employer's enterprise and the majority of the employer's employees are covered by another award then certain identified provisions would apply and the balance of provisions could be those applying in an award covering the majority of the employer's employees. The identified provisions included the rates of pay, and in this respect, we note that those rates were the same as in the TWU Award 1998.

[170] ***Based on the observations we have made above we have not been persuaded to put a majority clause in the RT&D Modern Award. The manner in which the clause in the Mixed Industries Award operated cannot easily be accommodated in the modern award regime. We also note in this respect, the submission that in the absence of named employers, the manner in which a majority and a minority of relevant employees may be identified and the time when that assessment should occur was likely to give rise to some doubts about award coverage.*** (emphasis added)

[171] We also gave consideration to a number of other matters. Even though the RT&D Modern Award is an industry award it is clear that the practical effect of the various existing private transport awards it encompasses is that they operate by reference to a structure of types, models and classes of vehicle and, it follows, to the driver of those vehicles thereby having occupational coverage. We note that there are very few transport classifications in the modern awards made to date and it is likely that any transport functions of any significance are carried out by dedicated transport operators. If the transport of goods etc as defined in the RT&D Modern Award is ancillary to an employer's

business but it is carried out by an employee in one of the classifications in the award it should be covered by the award. In this respect we are not persuaded that an employer will lose the ability to have those drivers, who may be a small number only of its workforce, work hours which the employer's business requirements dictate. The RT&D Modern Award contains numerous facilitative provisions which relate to matters like hours of work, shifts and spread of hours. The award also contains the standard award flexibility clause. We will monitor the practical implications of our decision to not put a majority clause in the RT&D Modern Award, and, at an appropriate time, the parties may wish to address us further about it.

147. Clause 4 of the Road Transport Award as made relevantly provided (emphasis added):

> *4.1 This industry award covers employers throughout Australia in* ***the road transport and distribution industry*** *and their employees in the classifications listed in clause 15 – Classification and minimum wage rates to the exclusion of any other modern award.*
>
> *…*
>
> *4.8 Where an employer is covered by more than one award, an employee of that* ***employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.*** (emphasis added)
>
> *NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.*

148. The *road transport and distribution industry* is, as noted above, quite broadly defined (and defined in a manner similar to the industry definition in the *Transport Industry (Mixed Industries) Award 2002*), in clause 3 of the Road Transport Award to relevantly include:

> *road transport and distribution industry means:*
>
> *(a) the transport by road of goods, wares, merchandise, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock,* ***including where the work performed is ancillary to the principal business, undertaking or industry of the employer;*** (emphasis added)

...

149. I note that, from the commencement of that Award, the rates of pay (and some other conditions) of many transport workers whose driving activities were ancillary to the work of an employer that generally operated in another industry, such as the retail industry, were dealt with by the *Transport Workers (Mixed Industries) Award 2002*. The respondents to that award included *"Coles G.J. & Co Ltd 236 Bourke St, MELBOURNE 3000"*[320] and a range of Myers stores.

150. The intention of the Full Bench in the above extracts from its decision of April 2009, and in particular the passage at [171], is clear:

a) if the work of an employee in a business involves the performance of work in the industry defined as the *road transport and distribution industry,* including where that work is *ancillary to the principal business, undertaking or industry;* and

b) the work is covered by the classifications in the Road Transport Award;

then the Road Transport Award would *cover* the work of that employee.

151. I accept on the evidence that the Coles Online business involves "the transport by road of goods [etc]". However, it is equally obvious that the business of Coles Online is the sale of goods, in respect of which road transport is no more than ancillary either to the delivery of the goods sold or to the completion of the sale, or both. The larger question is whether the work performed by CSAs is performed in the road transport and distribution industry as defined.

152. Having regard to the evidence set out above, a major and substantial aspect of the employment of CSAs generally (and Mr Michael and Mr Gajdobranksi, in particular) is to load and unload and make deliveries as the driver of a 4.495 tonne truck. Mr Michael and Mr Gajdobranksi accordingly **potentially** fall within the classification of "Transport Worker Grade 2" for the purposes of the Road Transport Award, as the TWU contends.

[320] see Schedule A.

153. Coles acknowledges that the transport function might be ancillary to the business of Coles for the purposes of the coverage clause of the Road Transport Award (albeit not of a "substantial character") and that there is a dearth of authority about coverage clauses that include "ancillary activities" in the manner contemplated under the Road Transport Award. Nevertheless, Coles submits and I accept that the Road Transport Award does not apply.

154. The Road Transport Award covers employers throughout Australia "in the road transport and distribution industry" and their employees engaged in classifications contained in that award.[321] The definition of the "road transport and distribution industry" referred to in clause 4.1 expressly includes "the transport by road of goods … including where the work performed is ancillary to the principal business, undertaking or industry of the employer".

155. The test of whether or not the enterprise of an employer is in a particular industry for the purposes of modern award coverage is a question of fact to be determined by the "substantial character" of the enterprise in which the employer and its employees are concerned.[322] The "substantial character" is determined by reference to "the trade or business of the employer and all of its employees and requires a consideration of the business of the employer as a whole".[323] The enterprise of an employer can have more than one character and be in more than one industry. Where an enterprise has more than one character it is not necessary to decide which is predominant, but a character must be substantial before it can ground a conclusion that the enterprise is in a particular industry.[324]

156. In *CFMEU v Dyno Nobel Asia Pacific Limited*,[325] the issue was whether the employees of Dyno Nobel were engaged in or in connection with the coal and shale industries. A majority of the Full Bench (VP Lawler VP and SDP Hamberger), after summarising the relevant principles at [51], concluded at [59]:

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[321] See clause 4.1.
[322] See *Re G.J.E Pty Ltd* [2013] FWCFB 1705 (G.J.E) at [18]-[20] (SDP Acton, DP Smith, C Ryan).
[323] See *Dyno Nobel Asia Pacific Limited v Construction, Forestry, Mining and Energy Union* (AIRCFB, PR956868, 14 July 2005) at [51]. See also *AWU v Coffey Information Pty Limited* [2013] FWCFB 2894 at [27] (VP Watson, DP Sams, C Roberts).
[324] See *G.J.E.* at [18].
[325] [2005] AIRC 622 (PR956868, 14 July 2005, VP Lawler, SDP Hamberger, C Lewin)

> *The predominant purpose of the single integrated business operated by Dyno Nobel is the manufacture and supply of explosives. This confers a 'substantial character' that places the business of Dyno Nobel in the explosives industry or, more generically, the chemical industry. The issue comes down to whether, because a small number of Dyno Nobel employees perform some work that can be regarded as work in the coal industry (the back-filling of shot holes and shot firing work performed by between 8 and 14 employees and the devising of blast patterns by one technical adviser), the single integrated business of Dyno Nobel also has a 'substantial character' that places it in or in connection with the coal industry within the meaning of Rule 2D of the CFMEU rules. In our view, the fact 8 out of some 160 operational employees perform shot firing as a relatively small part of their overall work for Dyno Nobel, that a further 6 employees occasionally perform shot firing on an ad hoc or relief basis and that one technical adviser sometimes devises blast patterns for coal mining companies (which together accounts for about one quarter of one percent of Dyno Nobel's revenue) does not give the single integrated business of Dyno Nobel an additional 'substantial character' as a business in or in connection with the coal industry. When considered in the context of the business of Dyno Nobel as a whole, these activities are too minor and incidental to confer an additional character on the business of Dyno Nobel that could properly be described as 'substantial'. Rather, these activities are properly to be seen as the supply of a service to employers in one industry by an employer whose business is in another industry not unlike the laundry and hotel example given by Latham CJ: the laundering of towels and bed linen is as integral to the operation of an hotel as shot firing is to the operation of an open cut coal mine.*

157. Coles is engaged principally in the supermarket sector of the retail industry. The substantial character of its business is that it sells supermarket products to retail customers. CSAs are the only Coles employees who perform driving tasks as part of their employment,[326] and perform these driving tasks primarily in the context of delivering goods to customers and providing customer service at the customer's premises.[327] The transport functions which support Coles' general business (that is, the transport of goods from suppliers to Coles

[326] Ibid.
[327] Lord 2 at [34].

distribution centres, and from Coles distribution centres to Coles stores) are performed by third party transport operators.[328]

158. Similarly to *Dyno Nobel*, the mere fact that a relatively small number of Coles' employees deliver supermarket goods to store customers (that is, CSAs) does not give the business of Coles an additional "substantial character" as a business in the transport industry. It follows, in my view, that the Road Transport Award does not apply to Coles and, by extension, does not apply to Mr Michael and Mr Gajdobranski.

159. This conclusion is fatal to the case brought by the TWU, and is sufficient to resolve these proceedings. In case I am wrong, however, I will go on to consider the remaining questions raised at [12]-[15] above.

Do either of the EBAs apply?

160. Whether the 2008 EBA and the 2011 EBA applies to Mr Michael or Mr Gajdobranski is determined by the coverage provisions in these industrial instruments.[329] Clause 1.6.1 of the 2008 EBA provides that "this Agreement shall be binding upon [Coles] and the [SDA] in respect of all classifications in this Agreement whether members of the union or not."

161. Clause 4 of the 2008 EBA sets out the classifications in the Agreement. Coles submits that between February 2010 and 13 September 2011, the "Service Assistant" classification contained in clause 4.1.1(o) of the Agreement applied to CSAs (including Mr Michael and Mr Gajdobranski)[330].

162. A "Service Assistant" is defined as a "permanent team member engaged to perform a range of duties **associated with operation of a**

[328] Affidavit of Martin Adrian Lord affirmed 17 July 2013 (Lord 3) at [9].
[329] See Item 3, Schedule 3 of the Transitional Act in conjunction with s.347(1)(b) of the Workplace Relations Act in relation to the 2008 EBA; and ss.52-53 of the Fair Work Act in relation to the 2011 EBA.
[330] That CSAs are not called "Service Assistants" does not bear upon whether they may be classified as such under the 2008 EBA. Ultimately, it is a question of whether the duties they perform fall within the definition in clause 4.1.1(o). See, by analogy, the observations of Gray J in *Re Porter; Re TWU* (1989) 34 IR 179 at [13]: "A court will always look at all of the terms of the contract, to determine its true essence, and will not be bound by the express choice of the parties as to the label to be attached to it. As Mr. Black put it in the present case, the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck."

store, including…"[331] (emphasis added). The classification definition then sets out an inclusive, but **not** exhaustive, list of duties (this is discussed further below).

163. Similarly, clause 1.4.1 of the 2011 EBA provides that "this Agreement shall be binding upon [Coles] and the [SDA] in respect of all classifications in this Agreement whether members of the union or not." Coles submits that the "Store Team Member" classification contained in clause 4.1.1(i) of the 2011 EBA is relevantly identical to the definition of "Service Assistant" in the 2008 EBA, and therefore also applied to CSAs (including Mr Michael and Mr Gajdobranski).

164. As noted above, to be classified as a "Service Assistant" (2008 EBA) or "Store Team Member" (2011 EBA), an employee must perform a range of duties "associated with the operation of the store". The Macquarie Dictionary (4th Ed) defines "associated", relevantly as "to connect by some relation, as in thought". The Oxford English Dictionary defines "associated", relevantly, as "combined locally, circumstantially, or in classification (with); occurring in combination".[332] This is a broad construct merely requiring some form of connection between the two sets of subject matter said to be associated with each other. In this case, as will be discussed below, the requisite connection is between the duties performed by the CSA and the operation of the store.

165. The term "store" is not defined in either the 2008 EBA or 2011 EBA. On a plain reading, this must encompass the entire store and premises and not merely the aisles used by the public itself.[333] The latter definition would be an unduly narrow and impractical approach.

166. A broad interpretation of "Service Assistant" or "Store Team Member" is also supported by the objectives of the 2008 and 2011 EBAs. At clauses 1.3.1(b)(iv) of the 2008 EBA and 1.2.1(b)(iv) of the 2011 EBA, the parties recognise that "the achievement of harmonious and

[331] Although the definition of Service Assistant at clause 4.1.1(o) is in isolation confined to permanent team members, the definition of "Casual Team Member" at clause 1.4.2 expressly provides for casuals performing the Service Assistant role. Hence, a Service Assistant may be a permanent or casual employee.
[332] A court can have regard to the natural and ordinary meaning of an expression in an enterprise agreement, such as that found in a dictionary definition: see *TWU v Toll Dnata Airport Services* [2012] FWA 5606 at [53]-[54] (Sams DP).
[333] See MFI 'R3'.

productive work relationships requires team members to willingly accept **total flexibility of jobs and duties throughout the store**, subject only to training received, individual skills or abilities to perform particular tasks" (emphasis added).

The test for determining agreement coverage – the "primary function test"

167. In determining whether the duties performed by an employee fall within a classification in an industrial instrument, a range of tests have historically been used.[334] A test that is commonly used is what is referred to as the "principal purpose test". This test was set out succinctly by a Full Bench of the AIRC in *Carpenter v Carona Manufacturing Pty Ltd*.[335] In *Carpenter*, the Full Bench said:[336]

> *In determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principal purpose for which the employee is employed.*

168. The approach set out in *Carpenter* was followed by another Full Bench of the Fair Work Commission in *McMenemy v Thomas Duryea Consulting*,[337] where the Full Bench said:[338]

> *... consistent with the decision (in Carpenter), an own employee's estimation of the quantification of their workload is not determinative of the classification, if any, in an award, into which they might fall. One reason for this (and there will be more) is that* ***an employee might perform duties (where they are not closely supervised) which the employee prefers, or believes to be required, but which are not the duties the employee is necessarily directed (or employed) to perform****. This is why the Full Bench [in Carpenter] articulated the task of ascertaining the principal purpose of the employment as requiring 'an*

[334] See *Brand v APIR Systems Ltd* (unreported, AIRCFB, PR938031, 16 September 2003, Justice Giudice, SDP Marsh, C Thatcher) at [13]. These tests include whether the question should be decided by reference to the major and substantial employment of the employee, the principal purpose or purposes of the employment or whether the employees were engaged substantially in the duties of the relevant occupation.
[335] (2002) 122 IR 387.
[336] at 388-389.
[337] (2012) 223 IR 125.
[338] at 133.

> *examination of the nature of the work […] the employee* ***is employed to do'*** *".* (emphasis added)[339]

169. In *Tucker v Digital Diagnostic Imaging Pty Ltd*, Commissioner Cambridge set out[340] a range of factors relevant to the principal purpose assessment, relevantly including (amongst others) the contents of any job description, person specification or job advertisement; the actual time occupied in different duties (a substantive role/function analysis); possession or absence of particular qualifications and whether such qualifications are necessary to the exercise of the primary functions that are performed; the level of importance and relevance of particular duties in the context of the employing organisation's overall purpose; and the nature and extent of any role as representative of the employing organisation to third parties.

170. A test similar to the principal purpose test was also adopted by Justice Gray in the Federal Court of Australia in *Joyce v Christofferson* in a different context. In that case, the issue was whether an employee was engaged in a clerical capacity for the purposes of determining whether that employee fell within union coverage rules. The union was permitted to cover "all persons engaged in any clerical capacity, and/or engage in the occupation of shorthand writers and typists and/or on calculating, billing or other machines designed to perform or assist in performing any clerical work whatsoever".[341] Gray J, at 271, stated that "in the case of a person exercising clerical and non-clerical functions, the question will always arise as to which of them are the **primary functions**" (emphasis added). His Honour referred to a decision of the Western Australian Industrial Appeals Court in *The Federated Clerks' Union of Australian Industrial Union of Workers (WA) Branch v Cary*,[342] and then said at 272:

> *In Prichard's case (at 78), the test applied was whether the primary functions of the person concerned were directed to the recording, processing and disseminating of information. In the case of a person exercising clerical and non-clerical functions, the question will always arise as to which of them are the primary functions. A good illustration of this problem is found in* The

[339] See also *CFMEU v Tiwest Pty Ltd* (unreported, AIRC, PR965940, 2 December 2005, SDP Harrison) at [22]-[23].
[340] at [22].
[341] see at 268-269.
[342] (1977) WAIG 585.

Federated Clerks' Union of Australia Industrial Union of Workers (WA Branch) v Cary *(1977) WAIG 585. In that case, the question was whether a person employed in a firm of real estate agents to deal with the leasing of premises was a clerk. Her principal duties were to negotiate tenancy agreements, supervise performance by tenants of those agreements, advise landlords as to the termination of tenancies and act on instructions in relation to them. Inevitably, she did a great deal of work that was essentially of a clerical nature. The Industrial Appeals Court held that she was not a clerk. Burt CJ said (at 586):*

> If in substance the worker's job is to write and the job is done when the writing has been done he is a clerk, but if in substance the writing done by the worker is but a step taken in the doing by him of something extending beyond it then he is not. The 'substance' of the work identifies the question as being one of degree and it indicates the answer to it will be, or may be, very much the product of a value judgment.

Brinsden J said (at 587):

There is no doubt, of course, that she was involved in doing a lot of work which was of a clerical nature in relation to the running of the rental department. In addition, it appears that she also at times did clerical work relating to other portions of the respondents' business. It does not appear to me, however, that the work which she did which was not of a clerical nature, was work which could be said to be or form part of general office administration. Indeed that work was the work of a land salesman as understood by the provisions of the Land Agents Act 1921 (WA) and as such she was required to be, and was in fact, registered as a land salesman under that Act. What one is left with therefore is the necessity to evaluate the evidence to determine whether her duties as a land salesman were so slight as to be outweighed by her duties of a clerical nature, so that in truth and in substance, it should be said that she acted as a clerk ...

171. While the statements of Gray J related to a different issue (union eligibility rules) from that before this Court (application of an enterprise agreement), the observations are apposite to this proceeding. Indeed, Gray J's observations in *Joyce* were adopted by a Full Bench of the former AIRC in determining whether an award applied to an

employee in *Layton v North Goonyella Coal Mines Pty Ltd*.[343] In that case, the Full Bench (Watson VP and O'Callaghan SDP) referred, at [25], to *Joyce v Christofferson* and then said:[344]

> *It is clear from both passages and the definition of 'clerk' in the Queensland Clerical NAPSA, that the task of interpretation is not a quantitative one based upon time spent performing certain types of duties. Rather, the task involves a qualitative assessment of the primary purpose of the position. Professional and managerial employees are clearly not clerks. Where the primary purpose of the role is the exercise of skills of a professional or quasi professional nature, the role will not be regarded as clerical - notwithstanding that the role involves various recording and ordinary administrative office functions ...*

172. To determine whether the 2008 EBA or 2011 EBA applied to Mr Michael and Mr Gajdobranski, the Court must therefore determine if the duties performed, or capable of being performed, by Mr Michael and Mr Gajdobranski in carrying out the principal purpose, or primary functions, of their employment are "associated with the operation of a store". This analysis is not limited to what Mr Michael and Mr Gajdobranski believed their duties were, but also those that they could be directed to perform.

173. In this case, the fact that Mr Michael and Mr Gajdobranski appear to prefer performing driving tasks over shopping tasks is not to the point.[345] Coles intended that their position – that is, Service Assistants (and later Store Team Members) performing the CSA role – be flexible and multi-skilled, and that employees performing that role would perform a range of duties in the store in addition to deliveries wherever possible.

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[343] (2007) 166 IR 394.
[344] at [26].
[345] Gajdobranski 04/01/13 (Gajdobranski 1) at [44]; Dobbins at [43], [47]. In cross-examination, Mr Michael admitted that he did not want to perform shopping duties but could have been directed to perform these duties by Coles (T80.5-.13 and T83.4-.5). Mr Michael told Mr van Greunen, when requested to perform a shopping shift, that he was a driver and not a shopper (T293.15-18). Similarly, Mr Gajdobranski gave evidence in re-examination that he saw his job as a driver and that is what he wanted to do. When he has been required to do other tasks from time to time he has complied reluctantly (T126.19-.23). This point was well put by Mr Arabian who said "there are a lot of things that I do as well that I don't want to do, but unfortunately as part of my role I need to do them as well, I don't like throwing waste in the bin, but you know what, I have to do it as well" (T269.15-19).

174. Mr Lord gave evidence about the importance of flexibility and multi-skilling of CSAs to customer service. By having employees who are able to perform different types of work at Coles on a flexible basis, Coles is more able to secure a security of supply of CSAs and the delivery of orders to customers.[346] Ms Mulder also gave evidence about the importance of flexibility: in her view it was useful for CSAs to perform shopping duties from time to time so they could know about the products and that if questions were asked at the point of delivery, the CSAs would be better able to answer those questions.[347]

175. Both Mr Michael and Mr Gajdobranski performed consolidation tasks at the store prior to each delivery run. Mr Gajdobranski has been rostered to perform shopping shifts weekly since 23 July 2012,[348] has performed in-store tasks at the conclusion of delivery runs or during additional shifts since October 2011[349] and has performed in-store shifts in other departments.[350] Mr Gajdobranski performed rostered shopping shifts on approximately ten occasions[351] Mr Gajdobranski on a number of occasions called in sick or took annual leave on the days on which he was rostered to perform a shopping shift and therefore did not actually perform that shopping shift.[352] In addition, Mr Gajdobranski admitted in cross-examination that he asked for additional shifts between October 2011 and May 2012 and that these were not just limited to driving shifts but any shifts that were available.[353] Further, on rare occasions when Mr Gajdobranski returned from his driving run early, Mr Dobbins would request that he assist with consolidating orders on very rare occasions.[354]

176. Whilst Mr Michael did not perform personal shopping tasks other than during his training, Coles trained him to perform those tasks and could

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[346] See T173.34-174.16. See also T187.35-.37.
[347] T198.44-199.2.
[348] Arabian at [58] and Annexure GA-6 (pp. 95-96). This was admitted by Mr Gajdobranski in evidence. See T97.42 and T115.30-.35.
[349] Mulder at [25]-[26] and T197.7-.25 (SM).
[350] van Greunen 21/06/13 (van Greunen) at [13]; Arabian at [60].
[351] See T115.5-.7 (SG) and T123.40-.42 (SG). Cf. the evidence of Mr Dobbins who said that Mr Gajdobranski performed a rostered shopping shift on more than ten occasions (T205.14-.32 and T223.1-.7).
[352] This was conceded by Mr Gajdobranski in cross-examination (T116.30-.32) and also in re-examination (T125.35-.43). This was confirmed by the evidence of Mr Dobbins (T205.34-.38).
[353] See T117.30-.32. See also the evidence of Ms Mulder in this respect at T195.21-.24 and the evidence of Mr van Greunen at T292.15 – 29.
[354] See T222.9-.30.

have lawfully directed him to do so at any time.[355] I accept that **potentially** both the 2008 and 2011 EBAs apply to Messrs Michael and Gajdobranski.

177. As observed above, an enterprise agreement will cover an employee or employer if the agreement is expressed to cover (however described) the employee or the employer[356], and will exclude the operation of a modern award if it applies to the particular employment.[357]

178. Whether an agreement is expressed to cover an employee or employer requires the agreement to be properly construed. Coles seeks to establish that the CSAs (whose primary function is driving and making deliveries) fit within the classification of "Store Team Member"[358] which encompasses "a team member engaged to perform a range of duties associated with the operation of a store" and refers to a list of indicative tasks which contain no reference to driving or deliveries.

179. As has been explained, the interpretation of an industrial agreement turns on the language of the particular agreement, understood in the light of its industrial context and purpose, including objective background facts known to the parties. The background circumstances are of particular significance in this instance. Even if it is necessary to establish ambiguity before regard is had to background facts, ambiguity is clearly present. The phrase "associated with the operation of a store" does not have a clear meaning.

180. The context of the 2008 EBA is critical to understanding the meaning of the words used. At the time the 2008 EBA was made, Coles did not employ any delivery drivers in its Coles Online business.[359] Prior to 2010, Coles contracted out its delivery driver functions to transport companies, such as Linfox.[360] It started to employ delivery drivers from approximately February 2010,[361] and engaged some of the delivery drivers formerly employed by those transport companies

[355] Mulder at [29]; Arabian at [62]. Mr Michael admitted this in cross-examination (T83.5).
[356] Fair Work Act, s.53.
[357] Fair Work Act, ss.52 and 57.
[358] clause 4.1.1(i).
[359] Lord 21/6/2013 at [36]-[37]; Walton 18/2/2013 at [7].
[360] Walton 18/2/2013 at [8].
[361] Walton 18/2/2013 at [8]; Lord 27/3/2012 at [8].

(including Linfox),[362] such as Mr Gajdobranski.[363] The CSA position was not in contemplation prior to February 2010.[364]

181. It is in this industrial context that it is necessary to examine the coverage provisions of the 2008 EBA to assess whether the parties intended to cover the work of CSAs within its classifications. In terms, the 2008 EBA is drafted so as to apply only to nominated classifications. It applies "in respect of all classifications in this Agreement whether members of [the SDA] or not".[365] Significantly, it did not apply to all employees of Coles. The coverage of the 2008 EBA depends upon the work performed by an employee falling within one of the classifications in the Agreement.

182. The classifications are outlined in clause 4.1, and the classification relied upon by Coles is that of "Service Assistant".[366] The key to the classification is the description of "a team member engaged to perform a range of duties associated with operation of a store", including a list of activities then set out including floor walking, stock replenishment, preparation, presentation and maintenance of floral arrangements, preparation for sale of fresh foods and merchandise, and otherwise customer service and assistance, operation of "Point of Sales" terminals, and other general store duties.

183. It strains the language of the instrument to bring the work of CSAs within the classification. While there is ambiguity, I am inclined to the view from the language used that the intention of the classification of "Service Assistant" is to capture employees performing duties within a store, not someone working outside a store undertaking deliveries. However, the primary function of CSAs is in a general sense to undertake duties "associated with the operation of a store". The primary function and major and substantial employment of CSAs is to load and drive a truck and deliver goods to customers who have placed orders through the Coles Online website. It is possible but unattractive to construe the classification of "Service Assistant" in the 2008 EBA as applying to persons subsequently employed as CSAs.

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[362] Walton 18/2/2013 at [8].
[363] Gajdobranski at [1]–[5].
[364] T146.40-46.
[365] clause 1.6.1.
[366] clause 4.1.1(o).

184. It is useful to examine the indicative tasks listed for the "Service Assistant" classification in clause 4.1.1(o) of the 2008 EBA. There is no reference to any delivery function, driving or transport function. The duties of "customer service and assistance", "operation of 'Point of Sale' terminals", "preparation for sale of fresh foods and merchandise" or "receipt and storage of stock and produce" do not describe duties performed by CSAs and are, on their ordinary meaning, referrable to work undertaken entirely within the retail store and the sale of goods to customers present in the retail store.

185. The objective background facts at the time when the 2008 EBA was negotiated were that CSAs were not employed by Coles. The delivery functions of the Coles Online business were being performed by truck drivers engaged by external contractors. In those circumstances, it is unsurprising that the indicative tasks of the classification of "Service Assistant" do not refer to the delivery or transport duties. It cannot have been the intention of the parties that the "Service Assistant" classification apply to the work of the CSAs, that is, the performance of delivery functions.

186. This is a case where the following statement by Curlewis J in *Wills v Hartland* is appropriate:[367]

> *Let us stop for a moment to consider what really takes place on the hearing of an application for an award. The applicants put before the Board a statement of the work done by the various classes for whom they desire wages and conditions fixed. The Board makes an award for the classes to which its attention is drawn.* ***I am now asked to hold that a Board must be deemed to have foreseen every contingency that can ever arise, and to have prescribed that every one who cannot be shown to be something else is to be deemed to be a journeyman. Every award is a bed of Procrustes[368], into which every employee is to be fitted, however manifest it may be that the case of such an employee could never have been considered by the Board.*** (emphasis added)

187. Assessed objectively, having regard to the words used in the 2008 EBA and the context in which the Agreement was made, I cannot accept a

[367] [1917] AR (NSW) 410 at 412 (adapted to the circumstances of enterprise bargaining).
[368] Procrustes was a mythical bandit in classical antiquity who invited passersby to spend the night and then cut off their arms and legs in order to fit then into his iron bed.

conclusion that the parties intended that the job functions of a CSA (which are primarily directed at driving and delivery work) fall within the "Service Assistant" classification.

188. The 2008 EBA was never intended to cover the work performed by CSAs and the description of the duties associated with the classification of "Service Assistant" should not be construed so as to apply to the work of CSAs. Because it never covered the work of CSAs, it can never have applied to CSAs, notwithstanding that employees such as Messrs Michael and Gajdobranski were required to sign contracts of employment which represented incorrectly that it did.

The 2011 Agreement does not "apply"

189. The position with respect to the 2011 EBA is even clearer. First, it is clear from the terms of the 2011 EBA that there was no change to the coverage of the 2008 EBA. Secondly, the employees of Coles were expressly advised in the negotiations for the 2011 EBA that it was *not intended to cover CSAs*.[369] CSAs were not given a "notice of representation rights" in relation to the Agreement and did not vote on the Agreement. Indeed, it was not until after the 2011 EBA was approved (early September 2011),[370] that Coles and the TWU (and the SDA) commenced negotiations in relation to an enterprise agreement to cover the work of CSAs. Coles then provided the requisite "notice of representation rights" to CSAs.[371]

190. The "Coverage" clause of the 2011 EBA confirms, as with the 2008 EBA, that it "shall be binding … in respect of all classifications in this Agreement whether members of [the SDA] or not". Again, the classifications are outlined in clause 4.1 and the only potentially applicable classification is the generic "Store Team Member"[372] capturing "a team member engaged to perform a range of duties associated with the operation of a store", (noting the non-exhaustive list of duties said to be within that "range"; the list is identical to the list of duties of a "Service Assistant" in the 2008 Agreement).

[369] Walton 18/2/2013 at [11], annexure TW4.
[370] Walton 18/2/2013 at [13].
[371] Walton 18/2/2013 at [15].
[372] clause 4.1.1(i).

191. Again, in the context of an Agreement that was negotiated after express representations to the workforce that CSAs were not to be covered, despite the fact that CSAs had been employed (with more employment to follow over the life of the agreement), it strains the language of the 2011 EBA to the point of incredulity to contend the parties intended to capture the sort of loading and unloading and delivery activities performed by CSAs within the words "a range of duties associated with the operation of a store", such as *customer service and assistance* or *other general store duties.*

192. The 2011 EBA was never intended to cover the work performed by CSAs, and I find, never did. Because it never covered the work of CSAs, it can never have applied to CSAs.

Does the Retail Award apply?

193. The next issue is whether the Retail Award applies to Mr Michael and Mr Gajdobranski.

194. I have found that the Road Transport Award cannot cover Coles (and hence cannot cover CSAs) because Coles is not an employer covered by the Road Transport Award. This is because Coles is not a business that operates "substantially" within the road transport and distribution industry.

195. For the reasons which follow, even if the Road Transport Award can *cover* the employment of Mr Michael and Mr Gajdobranski as CSAs, the Retail Award *applies* to their employment. This is because the Retail Award also covers their employment and contains the more appropriate classification (thus "trumping" the coverage of the Road Transport Award).

196. The Retail Award is expressed in clause 4.1 to cover "employers throughout Australia in the general retail industry and their employees" as outlined in the classifications structure.

197. Coles falls within the "general retail industry" as defined in clause 3.1 of the Retail Award as it is principally and substantially engaged in the "the sale or hire of goods or services to final consumers for personal or

household consumption including: food retailing, supermarkets, grocery stores …".

198. For a CSA to also be covered by the Retail Award, they must fall under one of the Retail Award classifications. As noted above at [15], Coles submits that CSAs fall under the Retail Employee Level 1 classification within the Retail Award.

199. Clause B.1.1 of Schedule B of the Retail Award sets out the Retail Employee Level 1 classification. This classification relevantly covers "an employee performing one or more of the following functions at a retail establishment", which functions include:[373]

a) "the pre-packing or packing, weighing, assembling, pricing or preparing of goods or provisions or produce for sale". CSAs regularly perform these functions while performing personal shopping tasks;

b) "the sale or hire of goods by any means". CSAs regularly perform this function when delivering customer orders (which completes the sale where payment has been made online), and when processing payments via mobile EFTPOS;

c) "the receiving, arranging or making payment by any means". CSAs regularly perform this function when processing sales via mobile EFTPOS;

d) "the recording by any means of a sale or sales". CSAs regularly perform this function when processing sales via mobile EFTPOS and by recording delivery of customer orders on their manifest;

e) "the wrapping or **packing of goods for despatch and the despatch of goods**" (emphasis added). CSAs regularly perform this function when consolidating orders as part of personal shopping duties, and when loading vans as part of the Delivery Function;

f) "the **delivery of goods**" (emphasis added). CSAs regularly perform this as part of the Delivery Function.

[373] Lord 3 at Annexure ML-33 (p.38).

200. Further, clause B.1.3 of the Retail Award lists indicative job titles for employee within the Retail Employee Level 1 classification. These relevantly include (amongst others):

a) **Driver**; (emphasis added)

b) Assembler; and

c) Door-to-door salesperson.

201. While Coles does not consider CSAs to be appropriately classified as door-to-door salespeople, the inclusion of this indicative job title strongly supports the view that the requirement to perform functions "at a retail establishment" is not intended to be narrowly read as requiring all functions to be performed at the "bricks and mortar" premises.

202. The TWU seeks to avoid this conclusion through a detailed analysis of the coverage provisions of the Retail Award. The "general retail industry" is defined in clause 3.1 to:

a) mean "the sale or hire of goods or services to final consumers for personal or household consumption including" various types of stores, including supermarkets";

b) include three classes of work activity not falling within that general class; and

c) excludes a list of stores that would otherwise fall within that general class.

203. In *YZ Finance Co Pty Ltd v Cummings*,[374] McTiernan J (with whom *Taylor* J and Windeyer J agreed), expressly affirmed the following passage from *Dilworth v Commissioner of Stamps*:[375]

> *The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also*

[374] (1964) 109 CLR 395.
[375] [1899] AC 99 at 105-206.

those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.

204. Courts have, from time to time, cautioned against focusing on the ordinary meaning of the word "includes" when used in a statutory definition. For example, Young CJ, Starke and Gray JJ said in *Cohns Industries Pty Ltd v Deputy Federal Commissioner of Taxation*[376] observed:

> *When the word 'includes' is used in a definition section, it is generally used to enlarge the meaning of the word it describes, that is to say, to bring within the word something that would otherwise not be within it:* Savoy Hotel Co v London County Council *[1900] 1 QB 665 at 669. The classic statement is of course to be found in the advice of the Privy Council in* Dilworth v Comr of Stamps *[1899] AC 99 at 105, which was quoted by the learned trial judge. Yet in a passage that is worth quoting, Kitto J has warned against taking that statement so literally as to reduce the inquiry to a consideration of the meaning of the word 'includes'. In* YZ Finance Co Pty Ltd v Cummings *[1964] HCA 12 ; (1964) 109 CLR 395 at 401-2; [1964] HCA 12 ; [1964] ALR 667 at 670, Kitto J said 'Unlike the verb "means", "includes" has no exclusive force of its own. It indicates that the whole of its object is within its subject, but not that its object is the whole of its subject. Whether its object is the whole of its subject is a question of the true construction of the entire provision in which the word appears. The well-known statement of Lord Watson in* Dilworth v Comr of Stamps *[1899] AC 99 at 105, 106, should not be taken so literally as to reduce the inquiry in a case like the present to an inquiry into the meaning of the word 'means and includes'. But a provision in which it appears may or may not be enacted as a complete and therefore exclusive statement of what the subject expression includes. A provision which is of that character has the same effect as if 'means' had been the verb instead of 'includes'. The question whether a particular provision is exclusive although 'includes' is the only verb employed is*

[376] (1979) 24 ALR 658 at 660.

therefore a question of the intention to be gathered from the provision as a whole.

205. But as the concluding observations of *Kitto* J in *YZ Finance* reflects, that caution arises when the word "includes" is the only verb employed.[377]

206. In the definition of *general retail industry,* the word "means" (notably here used in contradistinction to "and includes" and "but does not include" in the remainder of the definition) is intended to operate as a word of limitation, restricting the scope of the industry to "the sale or hire of goods or services to final consumers for personal or household consumption". The list of store types that follows need not be construed as an exhaustive list, the list being merely descriptive of stores that would ordinarily fall within the general class of stores engaged in "the sale or hire of goods or services to final consumers for personal or household consumption".

207. In the absence of any words of extension, the *general retail industry* would mean "the sale or hire of goods or services to final consumers for personal or household consumption" and no more: the definition would be exhaustive. That defined class involving "the sale or hire of goods or services to final consumers for personal or household consumption" is followed by the words:

and includes:

- *customer information and assistance provided by shopping centres or retail complexes;*
- *labour hire employees engaged to perform work otherwise covered by this award; and*
- *newspaper delivery drivers employed by a newsagent",*
- *but does not include: …"*

208. The word "includes" in this context is clearly intended to extend the otherwise defined class and in a limited way: it adds three limited areas not ordinarily captured within ordinary meaning of the words used to

[377] see also *Hepples v Commissioner of Taxation* (1990) 22 FCR 1 at 21.

describe the general class. None of those three additional elements of the definition are otherwise engaged by the expression "the sale or hire of goods or services to final consumers …". The definition then continues to specifically exclude (by use of the device "but does not include"), a list of stores, that would otherwise fall within the general class: namely, "the sale or hire of goods or services to final consumers for personal or household consumption".

209. The foregoing analysis does not, however, assist the TWU. Mr Michael and Mr Gajdobranski (and other CSAs) are in my view engaged in "the sale or hire of goods or services to final consumers …". The function of the CSAs is and at all material times has been the selection, consolidation and delivery of goods ordered or purchased directly by the consumer over the Coles Online website. The Coles Online business seeks to provide a seamless process of ordering, selection, consolidation and delivery of supermarket goods. CSAs are at least potentially involved in the whole process. This includes the delivery of and completion of the sale of goods (at least in the case of goods which had been ordered, but not paid for). Their work is performed in the *general retail industry* as defined and they can be covered by the Retail Award.

210. If I were wrong in my finding that the Road Transport Award does not apply, it would be necessary to reconcile the overlap between the Retail Award and the Road Transport Award. To paraphrase clause 4.8 of the Road Transport Award, the question is whether *the award classification* [in the Road Transport Award is the] *most appropriate* [classification] *to the work performed by* [the Workers] *and to the environment in which* [the Workers] *normally performs the work.* This would involve considerations akin the consideration of the "major and substantial" or "principal purpose" tests.

The test for competing award coverage

211. Clause 4.8 of the Road Transport Award and clause 4.7 of the Retail Award provide that "where an employee is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally

performs the work". There do not appear to be any cases that have applied this particular clause. Further, there is no guidance in the Fair Work Act as to how to apply a clause such as this where more than one modern award may be said to apply to the employment of a particular employee.

212. Prior to the introduction of modern awards in 2010, it was generally accepted that the "principal purpose" test was appropriately used to resolve the question of competing award coverage (that is, where classifications within two separate awards both cover the work).

213. In *Softplay Pty Ltd v Department of Industrial Relations* (Inspector McMahon),[378] the Full Bench of the NSW Industrial Relations Commission (in Court Session) considered the array of authorities on competing award application. Glynn J observed:[379]

> *To try to determine the appropriate award coverage, one looks, in context to both the purpose of the enterprise from the employer's point of view, and to the duties actually undertaken by employees in the implementation of that purpose. The purpose of the enterprise, without which purpose there would be no employment offered at all, is a pointer to, but is not necessarily determinative of, the principal duties undertaken by the employee.*

214. However, the "principal purpose" test in resolving issues of *competing* modern award coverage has been replaced by the "most appropriate award classification" test as described above. That the principal purpose test has been superseded by the modern award "most appropriate classification" clause is consistent with recent FWC Full Bench authority and ought be preferred.

215. In *Re TCFUA and Solaris Paper Enterprise Agreement 2010*,[380] the Full Bench confirmed[381] that the *Timber Award 2010* was the relevant award for the purposes of the Better Off Overall Test on the basis that its more specific coverage of tasks performed by employees was preferable to the more general coverage within the *Textile, Clothing and Footwear Award 2010*. The Full Bench also examined[382] the

[378] (1999) 94 IR 175.
[379] at 190.
[380] (2011) 202 IR 256 (Solaris Paper).
[381] at [25].
[382] at [19].

history of the making of the Award. The Full Bench did not adopt a principal purpose test.

216. Similarly, in *AWU v Coffey Information Pty Ltd*,[383] the Full Bench did not apply (or indeed refer to) the principal purpose test when considering[384] the interaction between competing modern awards. In *Coffey*, the Full Bench was required to consider whether the Commissioner at first instance had used the appropriate award for the purposes of applying the "Better Off Overall" test (a requirement for approval of enterprise agreements). In line with the approach in *Solaris Paper* (although not referring to that case), the Full Bench in *Coffey*[385] placed weight upon the more specific classifications within the technical stream of the Manufacturing Award rather than the more general classifications within the On-Site Award.

217. In the TWU's submission, the classifications in the Road Transport Award, and the Grade 2 driver in particular, *are* the most appropriate. There are said to be three reasons for that:

a) whilst the duties of a CSA may in some instances extend beyond the "Driving Function" as defined by Mr Lord in his evidence (at [19]), on any view of the evidence the Driving Function is the *primary* function of a CSA;

b) the working environment of the CSAs is, in substance, that of a driver: their core duties are the consolidation of loads for delivery, and the loading and unloading and driving of the 4.5 tonne truck; and

c) the history of industrial coverage for employees who perform work as a driver as an *ancillary to the principal business, undertaking or industry of the employer,* and notably "Coles G J & Co Ltd" itself.

218. The first two of these reasons is said to be adequately illustrated by the evidence. The third element requires a discussion of the industrial instruments that were consolidated into the Road Transport Award, and in particular the *Transport Industry (Mixed Industries) Award 2002*

[383] [2013] FWCFB 2894.
[384] at [22]-[23].
[385] at [24]-[26].

("the Mixed Industries Award"). I have already rejected it at [158] above but for the purposes of this discussion I consider it further.

219. The Mixed Industries Award can be traced through the Transport Industry (Mixed Industries) Award 1984 (1984) 294 CAR 169, the Transport Industry (Mixed Industries) Award 1970 (1970) 135 CAR 911, the Transport Workers (General) Award 1959 (1959) 91 CAR 344, the Transport Industry (General) Award 1950 (1950) 66 CAR 984, the Transport Industry (General) Award 1940 (1940) 43 CAR 913 and so on. "Coles G J & Co Ltd" was a respondent to the award prior to 1934.[386]

220. Since 1934 the classifications contemplated by the mixed industries award (and its predecessors) extended well beyond mere delivery drivers to include a "Driver-Salesman", entitling them to additional remuneration because they were required to act as salesmen of goods conveyed in the vehicle driven by them and for receiving and accounting for money.[387] As Detheridge CJ observed "I think it is reasonable that [for these reasons the Driver-Salesman] should also receive a further small addition to make his rate nearer to that of a salesman in a shop".[388]

221. I accept that truck driving is demanding and skilled work. In 1959, in what was described as the first occasion for many years of the values on which an award was based, Commissioner Austin determined a claim for a substantial marginal increase and in doing so described some of the features of the workers covered by the then *Transport Workers (General) Award 1959*. The Commissioner referred to the responsibility associated with what were then "bigger vehicles, bigger population, keeping abreast of regulations and rules, pedestrian problems etc, all of which increased responsibility",[389] the laborious[390] nature of the work associated with manual handling goods in the transport function, the driving reactions and high tension[391] associated with driving vehicles, and otherwise observed:

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[386] (1934) 33 CAR 857 at 892.
[387] (1934) 33 CAR 857 at 867.
[388] (1934) 33 CAR 857 at 867.
[389] (1950) 91 CAR 344 at 348, 351.
[390] (1950) 91 CAR 344 at 350.
[391] (1950) 91 CAR 344 at 350.

This is an industry that is dependent on individual application more so than most industries. I know of no other industry where the major part of each day, in most instances, needs the services of capable and trustworthy employees who perform the work for which they are paid without constant supervision.

There is no doubt in my mind that the responsibility briefly outlined, not overlooking many other factors that contribute, to some degree, enlarges this most valuable attribute in this industry. I might add that any deficiency on this phase of employment would result in a less successfully operated industry.

Another factor which supports the claim is the individual application, in nearly every instance, and contact with clients in reception and delivery by employees. This industry is dissimilar to other industries, chiefly due to the fact that employees have to carry out all functions of their employment singly.

One cannot lightly dismiss the value of an employee to his employer in the transport industry, notwithstanding the type of work on which he is engaged. Some make deliveries to suburban homes, others to stores and the like. Heavy haulage from wharves and manufacturing points all entails, more completely than in most other industries, intimate individual representation between the owner of the vehicle and the parties whose goods are being carried which, joined to "responsibility" herein referred to, satisfies me that on these aspects of the case there is justification for marginal increases.

222. That a CSA may be required to demonstrate customer service when delivering goods purchased through Coles Online does not of itself render the retail worker classifications more appropriate to the work of CSAs: interaction with customers, including in "suburban homes" involving *intimate individual representation* with the ultimate consumer was always a feature of the work of those delivery drivers covered by the Mixed Industries Award (and its predecessors) and engaged on delivery work ancillary to the main business of the employer.

223. The *primary function* of a CSA is that of a delivery driver. The functions of a delivery driver consume the bulk of their working time, and the environment in which they spend the bulk of their working time is the truck, the loading bay where the trucks are loaded, and the "Online Room" where the customer orders (most likely picked or

"personally shopped" by others employed specifically for that task) are consolidated. The TWU contends that the work performed by CSAs is centrally directed to the transport of goods by road as an ancillary part of the retail business conducted by Coles.

224. The TWU submits that the work of a CSA involving the loading and unloading of large volumes of produce using manual handling tools such as "dollies", generally picked and packed by others in crates, and delivered using a 4.5 tonne truck, is far more closely aligned to a warehousing and distribution type function than that of a retail worker who occasionally delivers a consumer's shopping: it is the sort of role contemplated traditionally by the Mixed Industries Award, and embraced now in that aspect of the definition of *road transport and distribution industry* involving the transportation by roads of goods etc, as an ancillary function to the business of an employer that generally operates in another industry, such as the retail industry.

225. As the earlier extracts from the Road Transport Award decision make clear, the work of employees such as the CSAs employed by Coles (the transporting of goods performed as an ancillary function of an employer's principal business), is what the Mixed Industries Award was in earlier times designed to deal with and the TWU contends something similar was what was contemplated by the Full Bench in the definition of the *road transport and distribution industry.* However, it is in my view significant that the AIRC in 2009 refused to import into the Road Transport Award the majority clause from the Mixed Industries Award. That superseded award cannot, in my view, provide any material guidance to resolve the question.

226. The TWU nevertheless submits that, for the reasons it gives, if it were necessary to so decide, the classifications in the Road Transport Award are more appropriate for the CSA work. The TWU contends Mr Michael and Mr Gajdobranski are employed to drive 4.5 tonne trucks in the performance of that work, and that type of truck is appropriately captured within the classification descriptor of a Transport Worker, Grade 2 within the Road Transport Award. On that basis, the Road Transport Award would be the most appropriate award applicable to the work of Mr Michael and Mr Gajdobranski. For the reasons which follow, however, I am unable to accept that submission.

Why the Retail Employee Level 1 classification is more appropriate to the CSA role

227. Coles submits, and I accept, that the award classification in the Retail Award that covers CSAs is the most appropriate classification to the work performed by the CSAs and the environment in which the CSAs normally performed their work (as compared with the relevant classification in the Road Transport Award). This is for the following reasons:

a) the tasks performed by CSAs are more specifically set out in the Retail Award;

b) the reasoning behind Coles' move to the Coles Delivery insourced model;

c) the recruitment, training and performance management procedures applied to CSAs;

d) the use of CSAs in other departments within the store, and the promotion of CSAs to management roles in the Online Department and other departments in the store; and

e) the background to the making of the Retail and Road Transport Awards also supports Coles' position that the Retail Award most appropriately applies.

228. I address these points in further detail below.

The tasks performed by CSAs

229. As has already been discussed, the indicative tasks and job titles within the Retail Employee Level 1 classification specifically cover the tasks of a CSA. This degree of specificity supports the Retail Award as most appropriate.[392] The fact that each CSA is a team member of a particular retail store and performs a range of tasks at their particular store provides a further important connection with the Retail Employee Level 1 classification. Even when undertaking delivery tasks, CSAs are involved in the consolidation of orders in the store with other team

[392] see *Solaris Paper* and *AWU v Coffey Information Pty Ltd* outlined above.

members and perform the customer service and transaction processing tasks which would ordinarily be performed by team members in the physical store. In short, the CSA role does not simply involve the collection and delivery of goods from a warehouse. Further, CSAs do not generally perform any driving tasks other than those performed in discharging the delivery function.[393] By way of example, CSAs do not undertake driving tasks to or from Coles' suppliers or its distribution centres.[394]

230. This analysis reflects the approach taken by the majority in *Nornews Pty Ltd v Everett*.[395] In that case, an employee of a regional newspaper whose responsibilities included preparing newspapers for delivery and effecting deliveries was held to be covered by a federal publishing industry award rather than the relevant state transport award.[396] In reaching that conclusion, the majority rejected the employee's argument that he was not engaged in publishing because the bulk of his work was that of transport and delivery. The majority gave weight to the appellant's evidence that home delivery work fell within the scope of publishing and that the respondent was engaged by the appellant's Publishing Department.[397]

231. In light of the scope of clause B.1.1 of the Retail Award, all tasks performed by CSAs described earlier, including delivery driving tasks and van loading and unloading, fall within the Retail Employee Level 1 classification. This is because the Retail Employee Level 1 classification encompasses both "delivery of goods" and "packing of goods for despatch and despatch of goods".

232. By contrast, delivery driving tasks are the only aspect of the CSA role that could fall under the Transport Worker Grade 2 classification. The Road Transport Award merely describes that classification as *Transport Worker Grade 2 – Driver of a rigid vehicle (including a motorcycle) not exceeding 4.5 tonnes gross vehicle mass*. No detail is provided around the types of tasks associated with that classification.[398]

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[393] Arabian at [35], Lord 2 at [34].
[394] Arabian at [35].
[395] (1998) 81 IR 76.
[396] see at 87.8.
[397] see at 87.6.
[398] The silence within the Transport Worker Grade 2 classification in respect of non-driving tasks is particularly notable when compared with the classifications of Distribution Facility Employee Levels 1

Moreover, the indicative job title (Driver) covers only one component of the wide range of tasks performed by CSAs. This component is in any event covered equally by the Retail Employee Level 1 classification within the Retail Award as described above.

233. Of course, it does not follow that CSAs must be paid at that level. Indeed, I would think that the truck driving skills required of CSAs, which are both central to their role and additional to the usual tasks performed in store by them and other employees, ought to be adequately and appropriately recompensed. For example, I note that a forklift operator is classified as a Level 2 retail employee and a driver selling stock falls within the Level 3 retail employee classification. This suggests that the Level 3 classification may be the most appropriate. That is, however, beyond the scope of these proceedings and the point was not argued.

The industrial background favours the Retail Award

Making of the Retail Award

234. The industrial background also favours the application of the Retail Award. The history surrounding the making of the Road Transport and Retail Awards indicates that retail roles encompassing driving functions are not intended to fall within the scope of the Road Transport Award where the Retail Award otherwise applies.

235. This is borne out by comparing the final form of each of the Retail and Road Transport Awards with the draft awards proposed by the TWU and its accompanying submissions to the FWC during the Award Modernisation process.

236. In respect of the Retail Award:

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and 2 also found within the Road Transport Award. These classifications go into some detail regarding general warehouse duties in a distribution centre in addition to driving duties. That the Transport Worker Grade 2 contains no equivalent detail around non-driving tasks suggests that the classification is intended to cover employees that are employed to provide driving services only.

a) at [2.5] of its submission to the AIRC in respect of the Retail Award dated 1 August 2008, the TWU argued that "the modern retail award should specifically exclude transport workers".[399]

b) at [2] of its submissions to the AIRC in respect of the exposure draft of the Retail Award dated 7 November 2008,[400] the TWU supported the position that a shop assistant who occasionally performs deliveries should be subject to the Retail Award, while an employee engaged to perform driving tasks on a consistent basis should fall under the Road Transport Award. In this regard, the TWU submitted[401] that the job title of "driver" should be removed from the list of indicative titles, and that the phrase "delivery of goods" should be amended to read as "occasional delivery of goods".

237. In respect of the Road Transport Award:

a) at [12] of its submissions to the AIRC in respect of the Road Transport Award dated 31 October 2008, the TWU argued that the Road Transport Award must necessarily be of a hybrid nature. The proposed draft Award included a coverage clause[402] encompassing "drivers and loaders of all power-propelled vehicles and trolleys, drays, carts and floats engaged in the carriage of goods, merchandise and the like".[403]

b) at [17] and [19] of its supplementary submissions to the AIRC in respect of the Road Transport Award dated 27 February 2009, the TWU expressed concern over the ancillary coverage provisions of the draft Road Transport Award, and proposed a coverage clause[404] extending award coverage to "drivers and loaders of all powered vehicles engaged in the transport of goods, wares, merchandise, material or anything whatsoever …".[405]

238. None of the TWU's proposed amendments are reflected in the terms of the Retail Award or the Road Transport Award. In short, the TWU

[399] Lord 3 at Annexure ML-49 (page 173).
[400] Lord 3 at Annexure ML-50 (page 174).
[401] at [5].
[402] clause 4.1.
[403] Lord 3 at Annexure ML-51 (p.195).
[404] at Annexure TWU9 to those supplementary submissions.
[405] Lord 3 at Annexure ML-52 (pp.235-236, 271).

submissions were not accepted. This supports the interpretation that the Retail Award applies to employees of retailers even though their jobs comprise a substantial degree of driving and delivery functions. Further, the Road Transport Award was not intended to be the award which necessarily covered employees who performed any form of driving duties irrespective of the circumstances.

Conclusion on the Award Questions

239. For all of the reasons above:

a) the Road Transport Award cannot cover Coles (and hence cannot cover CSAs); and

b) even if the Road Transport Award could cover CSAs, the Retail Employee Level 1 (or higher) classification is the more appropriate classification for CSAs for the purposes of clause 4.7 of the Retail Award (and hence the Road Transport Award could not apply to CSAs).

240. As the Road Transport Award does not apply to Mr Michael and Mr Gajdobranski, they are not entitled to any overtime, allowances or penalties provided by that award. The TWU's claims must therefore fail.

241. I will order that the applications be dismissed.

I certify that the preceding two hundred and forty-one (241) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 28 February 2014