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FWA has declined to make a recommendation in a dispute over which of two awards covers a group of Coles supermarkets workers, holding that despite the tribunal being the awards' "effective author", the matter was also before the Federal Magistrates Court and a judicial determination was "more authoritative".



The decision is the latest in the long-running dispute over whether the modern retail award (as argued by Coles and the SDA) or the road transport award (as contended by the TWU) covers customer service agents (CSAs) the supermarket employs to deliver groceries bought online (see [Related Article](#)).

Coles had earlier sought arbitration of the matter, but the TWU didn't consent and in a decision delivered on transcript on August 13, FWA Vice President Graeme Watson determined that without all parties agreeing, the tribunal didn't have jurisdiction to arbitrate.

Coles, supported by the SDA but again opposed by the TWU, subsequently requested that FWA make a recommendation or express an opinion on the issue.

In a decision delivered last week, however, Vice President Watson said the question was a legal one, and "legal questions can never be determined in a final sense by Fair Work Australia".

He said that the coverage dispute had had a detrimental effect on bargaining at Coles and there was a "clear utility" in making a recommendation.

Which award applied was also likely to be relevant to the BOOT, should an agreement be reached, while a preliminary determination of the issue "may not only assist the parties in finalising the agreement, but make the approval process more straight forward".

"As the effective author of both awards, Fair Work Australia is in a good position to determine the scope of the instruments it created," he said.

However, he continued that the TWU had commenced proceedings in the Federal Magistrates Court to decide substantially the same question, and a judicial determination would be "more authoritative and will constitute a binding determination on the parties to the matter".

"At the very least it will be a decision to which Fair Work Australia will need to have regard in relation to future application of the BOOT to an agreement covering the CSAs."

He said the Federal Magistrates Court proceedings were "well under way", and "I do not consider that it is desirable that I engage in an overlapping or prior process".

"In the exercise of my discretion I will refrain from hearing from the parties on the award coverage question and making a recommendation as to my view on the matter.

"I emphasise that this is because of the anticipated early determination of the same question by the Federal Magistrates Court. If the assumption I have made about an early determination changes then the parties are free to seek a reconsideration of this decision."

Coles has been employing the CSAs under its 2008 retail agreement, and the TWU, in its Federal Magistrates Court application on behalf of two of the drivers, argued that the deal never applied to them or if it did, they were underpaid as its base pay rate was less than that under the road transport award.

[Coles Supermarkets Australia Pty Ltd v TWU, SDA \[2012\] FWA 7986 \(14 September 2012\)](#)

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