Article Information

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Service: Defence Against Employee Class Actions, Employment & Labour, Employment Disputes & Litigation, Industrial Relations

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Grocery giants' pay practices don't check-out: Lessons from the recent Woolworths and Coles decision

The Federal Court's decision[1] relating to Coles and Woolworths provides importance guidance for all employers who use annualised salaries to compensate employees covered by an industrial instrument. Below we examine some of the key findings of the Court that may cause many employers to re-think their use of annualised salaries, or at least put in place stricter measures to ensure legal compliance.

Background

The decision arose out of one of the largest underpayment scandals in Australian history.

In 2019, Woolworths self-reported widespread underpayments to salaried managers across its supermarkets, with Coles later identifying similar issues. The discrepancies stemmed from reliance on annualised "all-inclusive" salaries, which were intended to absorb entitlements such as overtime, penalty rates and allowances under the *General Retail Industry Award* (**'the Award'**), relating to store managers and managers of particular sections of the store. In practice, however, these arrangements failed to reflect the actual hours worked by many employees.

In 2021, the Fair Work Ombudsman (FWO) commenced proceedings against both companies, while class actions brought by employees ran in parallel.

On 5 September 2025, Justice Perram delivered a judgment on some of the key legal issues raised in this litigation. In what follows we examine some of the more important aspects of his decision relating to the Award and its interrelationship with the *Fair Work Act 2009* (Cth) (**'the Act**').

To what extent can employers "set-off" annual salaries against Award entitlements?

A central issue was whether Coles and Woolworths could use contractual provisions to "set-off" the salary paid to managers, against any and all entitlements due under the relevant Award.

The concept of a "set-off" clause is uncontroversial and something many employers utilise in their contractual arrangements with both salaried and non-salaried staff. Such provisions indicate that remuneration paid to employees is intended to satisfy any minimum entitlement specified in an award or enterprise agreement.

However what was more controversial in this case, was the employers' attempt to set-off these entitlements over an extensive period. In Woolworths' case, they sought to rely on a contractual provision to set-off remuneration over a 26 week period. Justice Perram held that Woolworths' contractual provision did not have the effect of allowing this, given the way in which it was drafted. But he went on to express doubt as to whether it was ever permissible for a contract of employment to set-off remuneration paid to an employee in one pay period, against Award entitlements due in a *different pay period*.

In this case, the employers paid employees fortnightly. What this meant for each employer was that remuneration paid in the fortnightly pay period could only be used to discharge Award obligations due in that fortnightly pay period but could not be used to offset future or past underpayments outside of that fortnightly pay period.

If I pay employees an annual salary, do I still need to keep records of penalties, overtime and other Award entitlements?

The Court also addressed whether Woolworths and Coles had met their record-keeping obligations under regulations 3.33 and 3.34 of the *Fair Work Regulations* ('the **Regulations'**). These provisions require records of incentive payments, loadings, allowances and overtime hours actually worked.

Both employers in this case sought to rely upon rosters and clocking data to demonstrate compliance, but did not specifically record whether a penalty, allowance or overtime was payable under the Award.

Justice Perram held this approach to be insufficient, indicating that rosters merely show scheduled hours and do not constitute records of actual hours worked.

The judgment further confirmed that paying staff on an annualised "all-inclusive" basis does not relieve employers of their statutory duty to keep detailed records. The requirement in the Regulations to record the prescribed details "*is enlivened by the employee's entitlement*", and it is irrelevant whether they received an all-inclusive salary that was not broken down into specific penalties, allowances, loadings or overtime.

The effect of record keeping non-compliance also resulted in particular evidentiary consequences for each employer, given the effect of section 557C of the Act. This provision reverses the evidentiary burden in underpayment disputes where an employer has failed to keep records. In practice, it means the Court will presume an employee's allegations as to their hours worked are correct unless the employer can disprove them.

What were some other key parts of Justice Perram's decision?

Justice Perram also made a number of interesting findings on the interpretation of the Award, including on when an employer is deemed to "require" overtime in a way that triggers an overtime payment.

The Court observed that whether overtime is "required" depends on the circumstances. If an employee chooses to stay back for personal reasons, those hours may not attract overtime. However, if workloads are structured so that employees cannot reasonably complete their duties within rostered hours, the additional time is effectively "required" by the employer and must be compensated. This was particularly the case where employees had contracts of employment that required them to work reasonable additional hours.

The Court also made some interesting observations concerning what constitutes an "agreement" for the purposes of Award clauses that allow variation by consent (for example, where agreement is required to alter the minimum break between shifts). Justice Perram held that where an employee would forego a right or entitlement conferred by an Award, there must be genuine mutual consent, not mere silence or passive acceptance. Employers carry the onus of proving that an agreement exists. To meet this burden, employers should be able to produce evidence, ideally written, that employees expressly agreed to the arrangement, and also, that they understood the effect of what they were agreeing to forego.

What does this all mean for employers?

This decision should be a wake-up call for employers who use annual salaries to compensate award or enterprise agreement covered employees.

Those employers adopting a "set and forget" mentality risk underpaying employees, and falling short of the record keeping requirements under the Act.

The decision may also cause employers to reconsider whether they will continue the use of annualised salaries and instead revert to paying employees hourly rates of pay, plus relevant allowances and penalties on an as-needs basis. The effect on real wages for employees may be drastic, particularly where employers traditionally pay significant salaries above minimum entitlements.

Alternatively, employers may give more thought to use of the annualised salary provisions contained in many modern awards, which expressly allow employers to set-off remuneration over an annual period. However, these will need to be approached with caution, as they are far more prescriptive than contractual set-off clauses, and may result in the creation of restrictions that were never intended.

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[1] *Fair Work Ombudsman v Woolworths Group Limited; Fair Work Ombudsman v Coles Supermarkets Australia Pty Ltd; Baker v Woolworths Group Limited; Pabalan v Coles Supermarkets Australia Pty Ltd* [2025] FCA 1092