New Federal Court Decision upends Salaried Arrangements across all Industries

On 5 September 2025, the long-awaited decision in *FWO v Woolworths Group Limited; FWO v Coles Supermarkets Australia Pty Ltd [2025]* FCA 1092 was delivered by Justice Perram.

The decision uproots the standing practice many employers have adopted in annual salary arrangements and will likely see a spate of underpayment and class action claims as lawyers feast on contractual salary arrangements that may no longer be compliant with the Fair Work Act.

Decision snapshot
The decision states that Woolworths and Coles could not pay employees an annual salary that allowed them to rely on above-award salary payments made in some pay cycles to satisfy award-payment obligations in other pay cycles where the salary paid may not have been sufficient to meet award obligations.

That is, the salary paid each pay cycle had to meet or exceed the award obligations in that same pay cycle. Other salary payments made during the year must be disregarded.

Employers accordingly need to ensure whatever weekly/fortnightly/monthly salary is set for an employee is sufficient to satisfy their award entitlements in that pay cycle, each and every time.

It is not good enough that an employee may be 'better off overall', the periodic salary payments must be enough to cover entitlements every pay cycle.

The contracts considered
Both Woolworths and Coles relied on contract clauses that indicated that the annual salary employees received was intended to satisfy all the employees' entitlements under the NES and *General Retail Industry Award 2020* **(Award)** over the course of a 26-week period.

The employers argued that this meant that over-Award payments made in some pay cycles could be relied upon to satisfy Award obligations that arose in other pay cycles. In this way, a single salary could be struck to meet the fluctuations in hours and pay entitlements that arise when employees work differing hours over the course of a year.

Such an arrangement (which is extremely common) is particularly important to address seasonal fluctuations in work. By way of example, if employees work a larger number of hours over the Christmas trading period, the 'buffer' of above-Award salary payments made over the rest of the year was intended to ensure that the employee's salary payment during the Christmas period remains Award-compliant.

'Pooling' of salary impermissible
Perram J found that this arrangement was not compliant with the *Fair Work Act 2009* **(FW Act).** He stated that 'pooling' overpayments over some pay periods to then satisfy payment obligations in a different pay period constituted an *"accounting abstraction"* which did not constitute "payment" capable of satisfying the FW Act's requirement to pay award entitlements in money and in full.

Whilst the specific Woolworths and Coles contract salary clauses failed to satisfy their obligations across different pay periods, Perram J was clear that any attempt to redraft the clause would likely also fail:

"...it is doubtful in my mind that clause 6 [the contract salary clause] could ever be redrawn to achieve a six monthly pooling. It is unlikely that payments which have occurred in past pay periods can be characterised as payments for the purposes of the Award. For the same reason, I think it unlikely that payments in the future can be characterised as payments in the present pay periods either. If this be correct, then a six monthly pooling operation for cl6 cannot be resurrected..."

This finding suggested that contractual 'set-off' across pay periods would never be possible.

Decision at odds with the Full Court?

Curiously, the Decision departs from the approach the Full Court of the Federal Court took to the same issue in April 2025.

In *Corporate Air Charter Pty Ltd v Australian Federation of Air Pilots [2025]* FCAFC 45, the Full Court found that an employer could rely on salary payments made over the course of a year to offset against Award entitlements that arose in other pay periods within the same year.

This is the very type of practice that Perram J has now described as impermissible.

There is no reference to the Air Charter decision in Perram J's judgement which suggests that the case may not have been drawn to his Honour's attention.

What now remains is an inconsistency in the caselaw which will require further clarification, possibly on appeal (if the parties appeal).

Employers need to keep records

Perram J also found Woolworths and Coles to be in breach of record keeping obligations because the employers did not keep records of every time the employees worked overtime hours under the Award, or hours that otherwise attracted separate loadings or penalty payments.

This type of record-keeping failure is very common amongst employers that engage employees on annual salaries.

He further found that the Kronos rosters Woolworths kept and its clocking data for employees could not constitute a record of overtime for the purposes of the FW Act. This is because the two sets of data needed to be reconciled in order to determine the overtime hours worked.

Perram J found that overtime records needed to be in a form readily accessible to a Fair Work inspector (as per the FW Regulations) and accordingly providing data that needed to be "interrogated" in order to work out overtime hours was not a record of overtime.

Annualised wage arrangements

In some awards, annualised wage arrangements provide a way of relying upon a yearly salary to satisfy employees' award entitlements over the course of a whole year. These arrangements have been notoriously underutilised due to difficulties employers have had in implementing all of the steps necessary to set up an award annualised wage arrangement. However, some employers might consider using these types of arrangements going forward for employees with fluctuating hours. Employers will need to ensure all the various steps outlined in the relevant award clause are complied with if they are to utilise an award annualised wage arrangement.

Where to from here?

The decision sets employers on a number of routes:

1. First and foremost, employers need to ensure that whatever periodic salary they pay an employee is sufficient to meet the hours the employee works in each and every pay cycle. A general 'buffer' of payments above the award (the 'better off overall' approach) cannot be relied upon to satisfy higher volumes of work in a particular pay cycle.

2. Employers could consider leveraging off individual flexibility arrangements to draft contractual arrangements that allow overtime and penalty rate entitlements to be pooled across pay periods. Specific advice would be required to ensure any arrangement is compliant.

3. Where salaried employees are award-covered, employers need to ensure a record is kept of overtime hours under the award or other hours that attract separate payments/loadings, in order to be compliant with FW Act record-keeping obligations.

4. The need for a holistic solution to allow employers to pay a single salary that satisfies award obligations over the course of a year is becoming more pressing. ABLA is acting for Australian Business Industrial in a claim to insert an "Exemption Rate" into the Clerks Award and Banking and Finance Industry Award, whereby a salary payment of 55% above award can satisfy up to 50 hours of work each and every week. These types of Exemption Rates may become more critical if employers wish to continue to pay a single salary without keeping records of all hours of work.

5. The likelihood of legislative reform in the space is very unlikely, having regard to the current make-up of the Government. Accordingly, award variation claims appear to be the primary vehicle available to allow employers to leverage off a buffer of over-award payments during one part of the year to offset payment obligations that might arise in other periods within the same year.