Major Australian supermarket chains face $1 billion wage theft bill

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On September 5, the Federal Court of Australia found that the country's two major supermarket chains had failed to keep accurate employment records, leading to the systematic underpayment of more than 27,000 workers. The two companies, Coles and Woolworths, estimate the total cost of remediation could be between $1–1.5 billion.

The protracted legal proceedings dealt with wage theft that occurred between 2013 and 2019, meaning some of these workers have been out of pocket for more than a decade.

The methods that produced this wage theft are widely used by employers. Woolworths told investors the decision would mean "significant and widespread changes to accepted retail practice," while experts in workplace law have warned the ruling could have ramifications reaching far beyond the supermarket industry.

Horrified by the prospect of changes that would result in workers being properly paid, representatives of big business have seized on the ruling to step-up their calls for industrial awards to be "simplified"—transparent code for the evisceration of workers' entitlements.

The workers in question were full- and part-time department (e.g., dairy, produce, etc.) or store managers, paid annual salaries, but still entitled under Australian industrial relations law to overtime and other penalties.

Four separate legal actions—one each against Coles and Woolworths by the Fair Work Ombudsman (FWO), and an independent class action against each of the supermarkets—were brought, with the first started in 2019. Due to their substantial similarity, the cases were heard in parallel.

The court found in each case that the companies' failure to accurately record workers' hours and therefore overtime and other penalty rate entitlements led to them paying less than the legal minimum rates set by national industrial awards.

The employers claimed that they were not required to pay overtime and other penalty rates in the (fortnightly or monthly) pay periods in which they were incurred, because these underpayments would be "set-off" in the long term by regular salary payments, which were above the award rate.

Judge Perram found this practice impermissible, because the awards require that workers be paid "in full" for each pay period, and that it is the responsibility of employers to maintain detailed timesheets to track overtime and other entitlements.

Both companies have previously made back-payments to these workers at earlier stages in the cases, but this ruling is expected to substantially increase the sums owing. The supermarkets may still appeal, and in any event the final decision on compensation will not be made for months at least. But the companies have indicated to their shareholders that they are setting aside funds for an eventual payment.

Woolworths, which employed more than 19,000 of the workers, has previously repaid some $486 million but expects to pay as much as another $530 million because of the ruling, inclusive of superannuation and payroll tax. A component of this is that the decision also impacts the company's continued use of "set-off" arrangements from 2019–2025.

Coles, which has only repaid $31 million to its more than 8,000 affected workers, anticipates a further cost of between $150 and $250 million. But the lawyer who led the class action against the supermarket noted that "employers frequently underestimate the ultimate cost of remediation programs," and estimated Coles' total bill could reach $500 million.

Australian Business Lawyers workplace managing director Luis Izzo told the *Australian Financial Review* the decision "will have a huge impact on liability Australia-wide" and that "record keeping is an almost universal problem among employers."

He continued: "Employers don't want a clock-on, clock-off culture—they want a workforce that's based on trust and where, as long as they remunerate fairly, employees will put in discretionary effort."

Izzo's comments expose the reality behind big-business calls for "modernisation" or "simplification" of the awards and broader industrial relations law. They are seeking to eviscerate longstanding basic entitlements like overtime, enabling corporations to impose ever-greater workloads without any additional compensation—effectively demanding that full-time staff work for free once their rostered hours are complete.

Among those denouncing the ruling was Australian Retailers Association (ARA) chief executive Chris Rodwell, who complained in a media statement that the retail industry award, containing "994 different pay rates across almost 100 pages," was "incredibly difficult for employers to understand."

It is worth noting that, for a full-time worker during ordinary hours, the highest of these rates is just $32.45 per hour—almost 20 percent less than the national median wage. The retail award also allows businesses to pay workers younger than 16 as little as $11.95 per hour, less than half the national minimum wage for adults. Major retailers including the supermarket chains have demonstrated for years that they have no trouble comprehending and profiting handsomely from these almost Dickensian child-labour provisions.

Adopting a phoney veil of concern for workers, Rodwell claimed the ruling meant: "salaried team members who are paid above $90,000 per year must be treated in the same way as a more junior worker who is paid hourly. This will likely push retailers of all sizes to stop preferencing salaried arrangements, which undermines secure employment and career choices for retail workers."

The clear implication is that the sole, or at least primary, reason Coles, Woolworths and other corporations employ these workers under individual salary arrangements is to circumvent their obligation to pay overtime and other penalty rates.

Rodwell continued: "These outcomes move in the opposite direction to Australia's recent efforts to lift productivity, creating a heavier regulatory burden for businesses."

Rodwell also referred to a separate matter on foot in the Fair Work Commission (FWC), in which the ARA is seeking to "clarify, simplify and modernise" the retail award, that is, to eliminate penalty rates, overtime and other entitlements, slash mandatory breaks during and between shifts and remove limitations on the number of consecutive days on which a part-time employee can be rostered to work.

Under the ARA proposal, backed by major retailers including Coles, Woolworths, K-Mart and 7-Eleven, these and other workplace rights would be stripped from workers in exchange for a meagre 25–35 percent pay loading.

While the Shop, Distributive & Allied Employees Association (SDA), the country's main retail union, and the Australian Council of Trade Unions (ACTU) have publicly denounced the ARA's FWC case, they are ensuring that retail workers' opposition to the attack on their conditions is kept within the framework of plaintive appeals to the industrial tribunal and the Labor government.

This is in line with the role played by the SDA for decades, preventing strikes and industrial action by retail workers, ramming through one sell-out enterprise agreement after another—some so regressive they were themselves responsible for wage theft and later torn up by the FWC—and enforcing the dire wages and conditions contained in the existing retail award.

To the extent that the SDA and other unions have mounted any challenge to the scourge of systematic underpayment, it has been through legal manoeuvres and plaintive appeals to governments and the industrial courts. This includes the Retail and Fast Food Workers Union (RAFFWU), a small newer union which pitches itself as a militant "left" alternative, but which really serves to keep opposition to the SDA contained within the union framework.

Over the past four decades, and especially since the 2008 introduction of the draconian Fair Work Act by the union-backed federal Labor government, the union apparatus has become ever more entrenched in the industrial courts. The purpose is to deepen the suppression of strikes and the class struggle as a whole.

The reliance on the pro-business courts to address wage theft and other attacks inevitably means cases drag on for years. Vast legal bills are racked up on both sides, while workers wait years for (often token) compensation, if they receive anything at all.

A stark recent example was the Transport Workers Union (TWU) case against Qantas over the illegal sacking of 1,800 baggage handlers in 2020. After five years, workers have received less than a years' pay in compensation, while the TWU has pocketed at least $40 million after legal costs.

The Federal Court ruling, while vindicating the legitimate grievances of the 27,000 workers involved, is no cause for celebration. The response of big business shows that it plans to deepen the attack on workers' pay and conditions as part of a broader drive to increase "productivity"—that is, exploitation and profit—spearheaded by the Labor government and backed by the unions.

To fight back, workers, at the supermarket chains and across every industry, will have to build new organisations of struggle, democratically run by workers and politically independent of the unions, Labor and the courts. Through such rank-and-file committees, workers can ensure that any attempt by management to deny overtime, penalty rates and other entitlements, slash jobs and attack wages and conditions, is met with an industrial fight, including strikes, not legal notices.

What is required is a political fight against the capitalist system itself, and for a socialist perspective. This includes placing major industries, including the supermarkets, under democratic workers' control and ownership.