

# A VISION IN THE WORKPLACE

## Our June edition of Vision includes:

- Update: WorkPac launches a High Court challenge to overturn the landmark Rossato decision.
- Update: Woolworth's 'wage theft' scandal blows out to \$390 million.
- We farewell Angharad Owens-Strauss and welcome Bernard Cheng!
- FWC stand down decision keeps cruise company afloat during the COVID-19 pandemic.



## Update: WorkPac seek leave to take Rossato to High Court

Labour hire firm WorkPac has launched a High Court challenge seeking to overturn last month's Full Federal Court ruling of [WorkPac Pty Ltd v Rossato](#) (The WorkPac Decision).

As reported in our May edition of Vision, the landmark ruling on casual employment sent shockwaves amongst employers after opening the way for casual employees who work regular and predictable shifts to be paid leave

and other entitlements despite receiving a 25% casual loading rate in lieu of such entitlements. It has been estimated that the WorkPac Decision could expose employers to over \$14 billion in back-pay.

## What should employers do?

WorkPac's appeal to the High Court, as well as IR Minister Christian Porter's recent confirmation that the Government would also intervene in the WorkPac Decision, has in some sense pressed "paused" in terms of any immediate action employers may need to take due to the WorkPac Decision. We suggest waiting for further developments before seeking advice on how the WorkPac Decision may impact your business. We will keep you informed of all developments in this important matter.



## Update: Woolworths 'wage theft' blow out to almost \$400M

Whilst Woolworths Limited informed investors on Tuesday, 23 June 2020, that sales figures have remained strong despite consumers easing up on Covid-19

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stockpiling, the announcement was tainted by a development in the Company's wage underpayment scandal.

A further \$75 million in staff underpayments has been identified, blowing out the potential total of the underpayments to an estimated \$390 million. This is the second time Woolworths have increased their estimated underpayment liability and the news has weighed down the otherwise positive performance of the company.

Woolworths has now reviewed 70% of their employment records, meaning the final underpayment liability could still increase further from their current estimate of \$390 million.

This development highlights the need for employers to ensure their employment contracts take into account the onerous requirements of modern awards and enterprise agreements. If you would like more information and/or require assistance with matters involving potential wage underpayments, please do not hesitate to contact [Nick Stevens](#), [Jane Murray](#) or [Bernard Cheng](#).

## Farewell Angharad & Welcome Bernard!

Angharad Owen Strauss's time at Stevens & Associates sadly came to an end last week, as she has left to pursue a different path of working for the Transport Workers Union.

We would like to thank Angharad for her hard work and diligent assistance with all client matters whilst at

Stevens & Associates over the past two years. We wish her the very best for her future endeavours.

This means Stevens & Associates is also thrilled to officially welcome a new addition to our team, Bernard Cheng! Bernard was selected from a large pool of candidates and commenced with the firm on Monday, 22 June 2020.

Bernard will no doubt add to the breadth of employment law knowledge and services we offer at Stevens & Associates and is looking forward to getting to know all our clients.



## Stand Down Decision Keeps Cruise Company Afloat

A recent Fair Work Commission (FWC) [decision](#) has provided employers with more clarity regarding the circumstances in which they can lawfully "stand down" employees. The decision has provided guidance for employers on the application of the stand down provisions in the *Fair Work Act 2009* (Cth) (**the Act**) in light of the COVID19 pandemic.

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Stand down provisions are designed to relieve employers of the obligation to pay wages to employees who cannot be usefully employed in certain circumstances, such as a stoppage of work.

## The Circumstances – A COVID Stand Down

In this case, a Marine Superintendent (**the Employee**) worked for cruise line company Coral Expeditions (**the Company**). The employee was one of more than 100 employees who were stood down when the Government-mandated COVID-19 restrictions halted all of the Company's cruising operations.

The Employee argued that as there was still work he could do, and that some of his ordinary duties were now being performed by others, the stand down had not satisfied the requirements of the Act. The Employee sought reinstatement.

Deputy President Lake of the FWC observed that three "primary criteria" must be satisfied for a stand down to be lawful under s524(1) of the Act. The Deputy President stated the relevant criteria:

1. "First, the employee must be stood down during a time in which they cannot be usefully employed.
2. Second, one of the three sub-criteria must be present\* . . . In the present case, s524(1)(c) has been argued: a stoppage of work for which the employer cannot be held responsible.
3. The third criteria dictates that the employee cannot be usefully employed because of the stoppage."

Let's unpack the decision in more detail...

## Cannot Be Usefully Employed

Deputy President Lake found it to be a question of fact whether an employee "cannot usefully be employed" and that the "economic consequences" for the employer are relevant.

The decision provides a two-tier test for employers to consider when assessing whether the relevant employees can be "usefully employed".

Firstly, an employer must consider the work available, and how many employees are required to complete the work. In this instance, while there was administrative work available, it was limited and could be effectively redistributed to employees who were not stood down. The employee therefore could not be "usefully employed".

Secondly, an employer should ensure that its decision reflects "notions of good faith and fairness". The FWC found that the Companies decision to stand down nearly 50% of its workforce was a "business necessity" which was "not done maliciously, but in good faith, when contemplating the economic strain on the employer."

Deputy President Lake observed that the decision by the Company to stand down its employees was a result of the necessity to navigate the crushing impact of COVID-19 on its business.

The Company was accordingly entitled to maintain some administrative roles but still lawfully stand down other employees.

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## Stoppage of Work

Turning to the question of “stoppage of work”, the FWC rejected the notion that a “mere reduction” in work satisfies the requirement. The FWC held that the question of whether there is a “stoppage of work” refers to a cessation of the “core activity” of the business, rather than a mere reduction in general or incidental business activity.

The FWC held that the Company’s “work” was the carriage of passengers on various recreational cruise holidays. In that regard, the FWC reasoned that even though incidental and general business activity continued, as the core activity had entirely halted due to COVID-19, this left the Company with no choice but to suspend its operations.

## How Does This Decision Affect Employers?

This decision directly addresses one key question that has arisen throughout the COVID-19 pandemic – can an employer stand down employees when a business has ceased its usual operations, but some limited functions still exist for a small number of employees to perform?

According to this decision, the answer, in short, is YES provided the relevant criteria is met, including that the core “work” or “activity” of the employer has “entirely halted”. This decision may offer a lifeline to some struggling employers whose businesses are under significant economic stress.

If you have any questions relating to the stand down provisions of the Act and how they may apply to your business during the COVID-19 pandemic, please do not hesitate to contact [Nick Stevens](#), [Jane Murray](#) or [Bernard Cheng](#).

[Michael Marson v Coral Princess Cruises](#)

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