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# Classification of employees under Awards

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Most Australian employers must comply with the *Fair Work Act 2009* (Cth) and provide the terms and conditions under the applicable Award (or Enterprise Agreement – which applies to the exclusion of an Award where both apply to the same employee). Failing to provide these entitlements exposes the employer to an underpayment claim or to regulatory action from the Fair Work Ombudsman. For example, in *Thompson v Arbias Limited* [2020] FCCA 2829 a drug and alcohol counsellor successfully established that he was not classified correctly under an Award and remuneration order. The employer was required to pay the employee \$28,549.65 for underpayment of wages and \$2,805.78 in superannuation. Penalties may be applied on top of any underpayment.

Further, intentional underpayment of wages is an offence under the *Fair Work Act 2009* (Cth) from 1 January 2025.

It is critical that employers correctly identify the 'classification' (i.e. level) of an employee under the relevant industrial instrument.

While this task may appear simple, it can sometimes be complex due to the way that these instruments have developed over time and how they interact.

To determine an employee's correct entitlements, the employer first needs to identify the correct Modern Award and then the correct classification under the applicable Award (assuming there is no Enterprise Agreement). Depending on the nature of the services, role and clientele, employers and employees in the social and community services sector may be covered by:

- the *Aged Care Award 2010*,
- the *Clerks—Private Sector Award 2020*,
- the *Health Professionals and Support Services Award 2020*,
- the *Nurses Award 2020*, or
- the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHADS Award**).

The SCHADS Award provides an excellent example of the complexities that can arise when determining the proper entitlements of employees. This Award sets the terms and conditions of employment for employees working within following sectors:

- crisis assistance and supported housing sector – providing crisis assistance and supported housing services
- social and community services sector – providing services like social work, welfare work, youth work and disability services in a community/residential setting (e.g. day services and respite care) and organisations that mostly engage in policy, advocacy or representation on behalf of organisations carrying out such work
- home care sector – providing personal care, domestic help or home maintenance to an older person or a person with disability in a private residence
- family day care scheme sector – providing family day care services.

The base rates of pay and entitlements (including available rostering options) for employees depend on the correct classification of an employee. For example, the availability of 24-hour care shifts (with agreement of the employee) is available only in respect of home care employees, but not other kinds of employees.

The SCHADS Award covers a wide range of related industries and their employees may not neatly fit into just 1 of these classifications. For example, an organisation might provide crisis and housing support and also provide respite care and have employees who work across both business units. Or an organisation might provide care to people with disabilities in an institutional setting (i.e. social and community services work), but also provide home care. Where dealing with mixed duties, Courts or the Fair Work Commission will look to the 'principal purpose' of the employee's role at the time of the dispute, not some earlier time. This means that an employee's classification can change over time as their role and the business changes.

A further complication is that the Fair Work Commission amended the SCHADS Award in the Aged Care Work Value Case to introduce differential rates of pay for home care employees based on whether their work predominantly involved providing care to aged or disabled persons ([Aged Care Award 2010 \(Stage 1 Decision\) \[2022\] FWCFB 200](#)). Workers covered by the aged care stream have a significantly higher rate of pay, which was further increased from 1 January 2025 ([Aged Care Award 2010 \(Final Determination\) \[2024\] FWCFB 367](#)). This creates complexity for home care organisations that provide care to both aged and disabled people. If an employer's operations change so that the principal purpose of an employee's role changes from home care (disability) to home care (aged care), they could be entitled to an uplift in pay.

These difficulties were acknowledged by the Fair Work Commission, which said in Stage 3 of the Aged Care Work Value Case ([\[2024\] FWCFB 150](#) at [186]):

... On one view, having separate classifications and minimum rates of pay for aged and disability [home care workers] is an untenable situation given the functional overlap to which we have referred. There is also likely to be implications for the other categories of employees covered by the SCHADS Award. This will however need to be dealt with in future proceedings and we need not consider it further here.

Application issues can become even more complex when an employer's business model could involve more than 1 Award. For example, the SCHADS Award contains classifications for clerical employees within the social and community services sector classification stream, but not in any other stream. Where an employee is providing clerical support outside of the social and community services sector, they are likely to instead be covered by the Clerks Private Sector Award 2020. Likewise, aged care workers in institutional settings (such as aged care facilities, nursing homes, etc) are likely to be covered by the Aged Care Award 2020.

Until the Fair Work Commission makes a further determination affecting the broader workforce (beyond aged care), employers in the social services sector must grapple with these complexities, and the significant disparity in wages.

Making an Enterprise Agreement that covers all employees can bring all those employees under the same entitlements, which will simplify compliance with the instrument. However, this is itself a complex process because the employer needs to identify the correct underlying Modern Award to ensure that employees are 'better off overall' under the Enterprise Agreement.

Employers who provide services in the community care sector, particularly social and community services and home care services, should be careful to ensure that they have correctly classified their employees and review these classifications periodically to ensure that the Award and classifications remain appropriate in light of any changes in their structures or service offering.

Health Legal is familiar with the terms and entitlements under the relevant Modern Awards. If you would like any assistance with reviewing the classifications and employment terms and conditions, please do not hesitate to contact:

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