

THE FAIR WORK ACT 2009 - IMPLICATIONS FOR EMPLOYERS

by **Chris Delaney***

OVER THE PAST 5 years workplace relations legislation has changed dramatically. Under the present federal Government the Fair Work Act 2009 (Cth) came into effect on 1 July 2009 with further provisions commencing on 1 January 2010.

This new legislation covers employers who are Corporations, however most Australian State Governments have enacted legislation referring State industrial relations powers to the federal government, thereby bringing sole traders and partnerships under federal awards and legislation.

These changes will have a major effect on all employers on and from 1 January 2010. Here we consider the effect of the legislation, what employers should know and provide an overview of the key awards affecting Security Industry employers.

WORKPLACE RIGHTS AND EMPLOYMENT

Workplace rights protect employers, employees, independent contractors from adverse action. They are general protections arising out of various sources of legislation including OH&S, Trade Practices legislation and the Fair work Act itself.

Adverse action may include such matters as dismissing or causing injuring to an employee, changing an employee's job to their detriment, discriminating against an employee, or refusing to employ a prospective employee and in some instances may extend to independent contractors.

For example if an employee is denied a

promotion because he or she made a genuine complaint against the employer, then the employer may have engaged in adverse action under the Fair Work Act.

These protections also include applicants for employment. This group has the same workplace rights as if they were employees making it imperative for employers to initiate rigorous recruitment processes.

NATIONAL EMPLOYMENT STANDARDS (NES)

The 10 NES are part of the Fair work Act 2009 and come into effect on 1 January 2010. These are minimum standards applying to all employees, whether covered by a modern award or not. The NES along with the modern award form the basis determining whether Enterprise Agreements are approved. The 10 NES are:

1. Maximum weekly hours of work

Standard working hours for a full time employee will continue to be 38 hours per week, plus reasonable additional hours. Reasonableness will be determined having regard to a number of listed factors, including the level of remuneration, penalty rates or other compensation for the additional hours and the needs of both the employee and the enterprise. The maximum of 38 hours is the basis for accruing annual leave and personal leave.

2. Requests for flexible working arrangements

An employee with 12 months continuous service, who is a parent of, or has caring responsibilities for, a child under school age will be entitled to request (in writing) flexible working arrangements. This includes a casual employed on a regular and systematic basis with a reasonable expectation of continuing employment. Flexible working arrangements are not defined, but examples could include reduced hours, different start or finish times or home-working arrangements.

- An employer may only refuse the request of reasonable business grounds and must detail the reasons for any refusal.

3. Parental leave and related entitlements

Each parent who is an eligible employee will have a right to 12 months, unpaid parental leave in relation to the birth or adoption of a child. In the case of casuals this will include those engaged on a regular and systematic basis for a period of 12 months. However, couples will only be entitled to take up to 3 weeks, parental leave concurrently. If both parents wish to take parental leave, the remaining periods of leave must be taken consecutively.

- In addition, if one parent would prefer to take a longer period of leave, they can ask their employer for an additional period of up to 12 months, unpaid leave. The employer could only refuse this request on "reasonable business grounds".
- This NES also provides for return to work

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and other related entitlements. Employers are required to consult with an employee where a decision of the employer may significantly affect the employees return to work status.

4. Annual leave

As is currently the case, all full time employees will be guaranteed 4 weeks, paid annual leave, with an extra week (5 weeks) for shift workers. Part time employees would receive a pro rata amount. Casual employees would not be entitled to annual leave.

- Employees entitled to Annual Leave may be able to cash out annual leave if the modern award enterprise agreement or in the absence of an award Common Law Contract includes that provision and with the consent of both parties and there remains 4 weeks leave in balance.

5. Personal, carer's and compassionate leave

All full-time employees will receive 10 days' paid personal and carer's leave per year of service (pro rata for part-time employees). Employees would also be entitled to 2 days' paid compassionate leave per occasion. Casual employees will not receive these entitlements.

- If paid leave entitlements are exhausted, all employees will be entitled to 2 days of unpaid personal leave for "genuine caring purposes and family emergencies". This unpaid leave will also be available to casuals.

6. Community service leave

Employees are entitled to be absent from work to engage in prescribed community service activities. Examples include jury service and voluntary emergency management activity. The entitlement would cover all periods the employee is required to provide the community service, including reasonable travelling time and time for rest immediately following the activity.

- The employee must give the employer reasonable notice of the need to attend to community service evidence to prove attendance.
- Community service leave is unpaid leave, although employees (other than casuals) on jury service leave will be entitled to make-up pay based on the employee's

base rate and only for the first 10 days, unless the Modern Award provides for a greater benefit to the employee.

7. Long service leave

The NES will preserve long service leave entitlements existing in a pre modernised award, a workplace agreement, or where there is no such agreement, in state or territory laws, until nationally uniform long service leave standards are attained. Currently, State legislation deals with long service leave entitlements.

8. Public holidays

Employees will be entitled to be absent from work on public holidays, and to be paid for the ordinary hours they would have worked at their base rate of pay.

- If an employee works on a public holiday (which may only occur at the reasonable request of the employer), they may be entitled to a penalty rate or other compensation as set out in an applicable modernised award. There is an opportunity for the employer and the employee to agree on a substitute day instead of the public holiday.

9. Notice of termination and redundancy pay

Most employees are currently entitled to minimum periods of notice of termination of their employment (or pay in lieu of notice), based on their period of continuous service.

- Notice must be given in writing prior to the termination date

10. Redundancy

In addition, employers who employ more than 15 employees will be obliged to make a severance payment to an employee terminated on the ground of redundancy. The quantum of severance payment required is determined by reference to a scale depending on the period of continuous service by the employee.

These reflect the current federal award standard. Certain employees are excluded from this right, including those serving a qualifying period, those on a fixed term or seasonal contract and casual employees.

- Where no entitlement to redundancy existed prior to 1 January 2010, (generally in the case of non award employees on common law contracts which did not

include a redundancy provision), prior service may not count towards redundancy entitlements. Employers are advised to seek professional advice before making decisions about redundancy.

FAIR WORK INFORMATION STATEMENT

Employers will be required to provide all new employees with a "Fair Work Information Statement" as soon as practicable after they commence employment. The Statement will be published by Fair Work Australia and will contain information about the NES, awards, making agreements, freedom of association and Fair Work Australia.

UNION RIGHT OF ENTRY

From 1 July 2009 the Fair Work Act 2009 has provided unions with greater access to workplaces and employees through increased right of entry opportunities.

A permit holder may enter premises:

- to hold discussions with employees whose interests they represent, whether members or not;
 - to investigate a suspected breach of an industrial instrument that relates to a member of the union; or
 - exercise a right under a state or territory occupational health and safety law.
- The union must give the employer 24 hours notice in writing prior to entering the premises.
- An employer cannot hinder, obstruct, refuse or unduly delay a permit holder from entering the premises.
 - Equally the permit holder must not unduly disrupt the business of the employer.
 - Employers should seek professional advice immediately they receive an entry notice.

CURRENT WORKPLACE ARRANGEMENTS

The following is designed to clarify how the new Fair Work Act will deal with workplace arrangements made under previous legislation.

Arrangements which may already be in place.

Australian Workplace Agreements (AWA) (expired or current)

AWA's remain in force unless rescinded. AWA's cannot any longer be varied. In the event that an AWA is not rescinded it will remain valid and lawful unless or until the rate of pay falls below the appropriate base rate

prescribed in the award, and/or the minimum provisions of the NES e.g. If the Base Rate in the award is \$25 per hour and the AWA rate is \$30 per hour (even if it includes shift penalties etc.) it will be valid and lawful.

Of course the minimum conditions that apply under the National Employment Standards, commencing 1 January 2010, will over ride an AWA where the AWA is deficient.

Employees covered by an AWA (current or expired) would have to have the AWA rescinded (either by agreement with the employer or unilaterally) to enable coverage by another industrial instrument

An AWA may be terminated by agreement or unilaterally

To Terminate an Australian Workplace Agreement

There must be a Termination agreement signed by both parties. The DOB of the employee must be included to ensure minors are protected. There is no standard form for the agreement, however, there is a standard form for the application to terminate. The FWA will usually confirm termination after 30 days.

Standard form on FWA website - F29

The employer must:

- Include the AWA number
- Lodge with FWA within 14 days
- Lodge 1 application + spreadsheet for all employees

To Terminate an Australian Workplace Agreement Unilaterally

An employer can make an application to terminate an AWA without the permission of the employee. The process usually takes around 90 + days and must follow the formal guidelines set out on the Fair Work Australia website.

Employees on (expired) Enterprise Bargaining Agreement

The Enterprise Bargaining Agreement will remain in place until varied or rescinded. When a new agreement is made it may include any classifications of employees agreed by the parties. Those not included may be covered by an appropriate award and stand out of the agreement. Those included in new approved agreement will be bound by it unless covered by a continuing AWA.

NEW MODERN AWARDS

The making of new modern industry based awards by the Australian Industrial Relations

Commission is due to be completed by the end of 2009. Modern awards will come into effect on 1 January 2010 with transitional arrangements commencing 1 July 2010 and phasing-in until 2014.

National system employers (corporations) and their employees, employees in Victoria and employees of sole traders and partnerships in States which have referred their industrial relations powers to the federal government will be covered by a modern industry award unless:

- They are excluded from the coverage clause in the award;
- They are a party to a current workplace (enterprise agreement);
- The employee is classed as a "high income employee".

The current threshold for a high income employee is \$108,300.00 per annum. The salary must be guaranteed in writing for a period of 12 months, may include non monetary benefits provided that they are clearly defined and for which a value has been agreed and provides a benefit to the employee. The compulsory component of superannuation is excluded from the calculation of earnings. The form of guarantee differs between new and existing employees, making it important that employers seek professional advice about this group of employees. Therefore in some instances a "high income employee" may not be exempt from the award.

Introduction of Modern awards and Transitional Arrangements

Modern Awards will commence on 1 January 2010. Some awards have not yet been finalised and the AIRC has not (at the time of writing) announced its final decision on transitional arrangements. Therefore it is essential that employers consider their award obligations carefully and ensure they properly understand how the phasing in will affect them.

The Australian Industrial Relations Commission (AIRC) has announced an intention that some provisions in certain modern awards – minimum wages, loadings and penalties – will not operate on 1 January 2010 but will be phased in over a five-year period, starting 1 July 2010 and ending on 1 July 2014. ASIAL has made an application to the AIRC for this to apply in the case of the Security Services Award 2010, however no

decision has yet been announced.

The phased-in introduction is to apply only to "minimum wages, including wages for junior employees, employees to whom training arrangements apply and employees with a disability, casual and part-time loadings, Saturday, Sunday, public holiday, evening and other penalties and shift allowances."

All Modern awards contain clauses dealing with:

1. Coverage;
2. Classifications;
3. Minimum wages;
4. Type of work performed i.e. permanent, part time or casual;
5. Work arrangements;
6. Overtime rates,
7. Penalty rates;
8. Allowances;
9. Leave;
10. Superannuation;
11. Consultation and
12. Dispute Settling Procedures.

New modern awards have been made along industry lines. The following awards affecting ASIAL members will take the place of all State and Territory awards throughout Australia:

- Security Services Award 2010
- Transport (Cash In Transit) Award 2010
- Electrical Electronic and Communications Industry Award 2010
- Clerks Private Sector Award 2010
- Manufacturing and Associated Industries and Occupations Award 2010.

Copies of these awards can be accessed through the ASIAL website. It is extremely important that employers become familiar with any changes to pay and conditions and other matters affecting the way work may be performed under a Modern award combined with the minimum standards in the NES.

FEATURES OF SECURITY SERVICES AWARD 2010

This award covers Guarding, Mobile Patrols, Crowd Control, Dog Handlers, Escorts, Body Guards, Loss Prevention, Traffic Control (Airports), Monitoring and Control Room.

Not included is Cash in Transit, Prisons, correctional or other detention facilities, installation, maintenance or repair of electronic alarm and/or monitoring systems; or

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installation, maintenance, repair or replenishing of ATMs.

Rates of pay, shift work provisions, casual loadings and part time provisions are different from most current State and Territory Awards.

Features of Electrical, Electronic and Communications Contracting Industry Award 2010.

This award covers a wide range of classifications. The most important of these to employers engaged in all types of electronic/communications work not requiring the full range of skills and training of an electrical tradesperson is Stream 2 Electronics/Communications.

These are defined as the industry and trades which are connected with the installation, maintenance, monitoring, controlling, repairing or testing of any electrical, electronic, or acoustic equipment or device, or any combination thereof which includes any intruder alarm system incorporating closed circuit television, video or photographic systems, electronic, electromechanical access control systems, any computer hardware systems and/or computer software including ancillary equipment or any external or internal lighting device used for any commercial, industrial, domestic or governmental purpose.

This award allows employees to be engaged on shift work and casuals to be engaged for six months before being considered for permanent employment

Enterprise Agreements and Collective Bargaining

Enterprise agreements are the centrepiece of the Fair Work Act 2009. Changes to agreement-making and enterprise bargaining are among the important changes, essentially creating a new framework for negotiations.

AWAs or other types of “individual agreements” can no longer be made. Four types of Enterprise agreements can be made:

1. Single Enterprise Agreement; are made directly between an employer and its employees, will be the most common type.
2. Multiple Enterprise Agreements; multi-enterprise agreements involve more than one unrelated employer and more than one business. These agreements may be the result of a union campaign across a number of businesses in an industry.
3. Greenfields Single Enterprise; are made by

a single business intending to set up a new business, but as yet has no employees;

4. Greenfields multiple Employer Agreements; are made by a group of business intending to set up a new business, but as yet has no employees. This may be, for example, a joint venture project.

All enterprise agreements must contain a number of terms including a term allowing the employer and an employee to vary such matters as arrangements for when work is performed, overtime rates; penalty rates; allowances; and leave loading by making an individual flexibility agreement.

Enterprise Agreements must include:

- A nominal expiry date
- A dispute settlement clause
- A flexibility clause
- A consultation clause

Enterprise Agreements may include:

- Matters pertaining to the relationship between the employer and the employee
- Matters pertaining to the employer/union relationship, where the union is a party to the agreement, such as:
- Union training, paid time for employees to attend union meetings and terms giving union rights of representation.

Enterprise Agreements may not include:

- Matters that are unlawful such as those that cause discrimination, cause or permit a bargaining fee etc.;
- Clauses prohibiting various classes of workers;
- Requirements for employers to make donations to a political party;
- Prohibitions on or requirements to use particular suppliers or customers

Commencing the Bargaining Process

Bargaining can be commenced by the employer the employees or their union or bargaining representative.

The employer must notify employees in the prescribed form about their right to appoint a bargaining representative and who can act on their behalf throughout the bargaining process.

Good faith bargaining

Those involved in the bargaining process,

including bargaining representatives, are required to bargain in good faith.

The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:

- attending, and participating in, meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- responding to proposals made by other bargaining representatives for the agreement in a timely manner
- giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining
- recognising and bargaining with the other bargaining representatives for the agreement.

The good faith bargaining requirements do not require a bargaining representative to:

- make concessions during bargaining for the agreement
- reach agreement on the terms that are to be included in the agreement.

Scope Orders

Bargaining representatives may apply to Fair Work Australia, including to ask it to determine the scope of the agreement, to decide whether there are too many bargaining representatives for the agreement, or even for assistance and advice.

Bargaining disputes

A bargaining representative for a proposed enterprise agreement may apply to FWA for assistance in resolving a dispute in relation to the proposed agreement.

Bargaining orders

A bargaining representative may apply to Fair Work Australia for a bargaining order in relation to the agreement if the bargaining representative has concerns that:

- one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith

bargaining requirements;

- the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement.

To obtain approval for an enterprise agreement from Fair Work Australia there are a certain procedural matters which must be traversed, and it's important to comply with all requirements to ensure you get that approval.

Voting

Voting must not be undertaken within 21 days of employees being given initial advice of the right to have a bargaining representative. The voting process may be as simple as a show of hands or as complex as being conducted by an electoral office.

It is very important for employers to seek professional advice and ensure they have attended appropriate training to deal with the changes.

Transfer of business

Four conditions must be in place to create a transfer of business

- The employee must be terminated from the old business;
- The employee must start employment with the new business within 3 months of ceasing with the old business;
- The employee carries out the same or substantially the same work with the new employer;
- The old employer and the new employer are "connected".

The implications for employers are significant. A transferable industrial instrument (award or agreement or a common law contract (high income earner)) applies to the employee indefinitely.

Termination and Unfair Dismissal

Dismissing an employee brings with it a host of costs and stresses. The cost of replacement, down time and often effects on other employees can be substantial. There are also the legal obligations which, if not properly considered, can create even greater costs to the employer.

Under the new Fair Work Act employers

have increased responsibilities to ensure they correctly terminate employees and more employees are able to make unfair dismissal claims.

An employee of a small business will be able to claim for unfair dismissal after they have been employed for at least 12 months. The employer will have to comply with the new Fair Dismissal. A checklist has been developed to help small business employers comply. The small business will be immune from unfair dismissal claims if it complies with the Small Business Unfair Dismissal Code.

A small business is one with 15 or fewer equivalent full-time positions

For businesses with more than 15 employees a claim can be made after 6 months of employment.

FWA must take into account:

- whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- whether the person was notified of that reason; and
- whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters that FWA considers relevant.

The FWA may:

- Re-instate the employee to their former position or a comparable position; and
- Re-imburse the employee lost remuneration for the period of unemployment; and/or
- Award compensation/damages up to 6 months pay.

A dismissal will not be unfair if an employer can show that it was a genuine redundancy.

It's a genuine redundancy if the

employee's position is no longer required to be done by anyone, the employee cannot reasonably be engaged elsewhere in the business (including related entities), and the employer has complied with any consultation obligations in the award or enterprise agreement.

The time limit for an employee making an unfair dismissal application has been reduced from 21 to 14 days and so far Fair Work Australia have made it difficult for employees seeking an extension to be successful.

It is important to seek advice to make sure that your managers and supervisors understand their obligations under the Fair Work Act when terminating someone's employment.

SUMMARY

We have attempted to provide clarity to the main aspects of the Fair Work Act 2009 in a practical way.

Accurately interpreting The Fair Work Act 2009 and all of the implications arising out of it cannot at this stage be an exact science. There have been decisions of Fair Work Australia that have so far been helpful, some have been contradictory. There are aspects of the Act that are yet to be tested, and surely some decisions will be the subject of appeal – such is the process with any piece of workplace legislation.

We strongly recommend that employers audit their business policies and process to avoid exposure to non compliance and possible litigation.

At the very minimum review:

- recruitment practices including contracts of employment and policies;
- disciplinary procedures, termination and redundancy;
- Award coverage, including changes arising out of award modernisation and transitional arrangements;

We also recommend that employers seek training opportunities in order to develop awareness and understanding of the effects of the Fair Work Act on their business. And before taking any decision on workplace matters always seek professional advice.

Note: The information provided above is for convenient reference only. ASIAL and Chris Delaney & Associates Pty Ltd provide this information on the basis that it is not to be relied upon in any or all cases, as the circumstances in each matter are specific. Accordingly, we provide this information for general reference only, but we advise you to take no action without prior reference to an Employee Relations professional. ASIAL members can contact Chris Delaney by emailing ir@asial.com.au