

National Security Industry Campaign 2009

Report and recommendations

March 2010



Australian Government

Fair Work
OMBUDSMAN

Table of Contents

1:	PART ONE	4
1.1:	Background	4
1.2:	Aim, objectives and performance measures	4
1.3:	Methodology	5
1.4:	Industry focus	6
2:	PART TWO	7
2.1:	Overview of report findings	7
2.2:	Types of contraventions	9
2.3:	Details of findings	10
3:	PART THREE	13
3.1:	Concluding remarks	13
3.2:	Recommendations	13
4:	Appendix A – List of stakeholders	14
5:	Appendix B – List of industrial instruments	17
6:	Appendix C – Profile of contravention by state	18

SUMMARY

As part of its commitment to educating workplace participants and ensuring effective compliance, the Fair Work Ombudsman conducted a national targeted campaign for the security industry between July and December 2009.

The campaign was prompted by the number and nature of security industry-related complaints and investigations received by the Fair Work Ombudsman, as well as the significant number of vulnerable workers employed in the sector.

The aim of the National Security Industry Campaign (the Campaign) was to enhance the sector's awareness of and compliance with the *Fair Work Act 2009* (the Act) and the *Fair Work Regulations 2009* (the Regulations).

During August and September 2009, 9,819 educational letters were sent to employers in the security industry across Australia, followed by a targeted compliance audit of security businesses in all states.

The Campaign findings reveal a sector characterised by long working hours, night shifts, high staff turnover and casual labour.

Key Campaign highlights are as follows:

- Only 51% of employers were complying with the *Fair Work Act 2009*.
- The use of flat rates of pay by employers was widespread in an attempt to avoid the application of penalty and loading provisions.
- Of businesses selected for auditing, 449 (over 60%) were found to be no longer trading or not contactable.
- Of the 298 audits commenced, 256 (86%) audits are finalised, and 42 (14%) employers are identified as warranting further investigation.
- An amount of \$452,824.00 was recovered for more than 652 workers, and is likely to increase significantly due to ongoing investigations arising from the audit.
- A significant number of contraventions were found in relation to record-keeping and the issuing of payslips.

This report recommends that the Fair Work Ombudsman undertake further activity in relation to these businesses, in order to measure the occurrence of sham contracting* arrangements and phoenixing** practices.

In addition, it is recommended that the Fair Work Ombudsman continues both educational and compliance activity across the industry, with particular emphasis on the new regulatory environment created by the introduction of the *Security Services Industry Award 2010*.

*the practice of disguising an employment relationship as an independent contracting arrangement.

**the act of self liquidating an entity to avoid paying liabilities and replacing it with another to undertake the same function.

1: PART ONE

1.1: Background

The Fair Work Ombudsman's decision to target the security industry for a national campaign was based upon the following considerations:

1) *An analysis of the number and nature of complaints received for the previous 12 months involving the security industry*

An analysis of the Fair Work Ombudsman's complaint database for the period between 1 May 2008 and 30 April 2009 showed 43 records involving entities classified as *Investigation and Security Services* under the Australian New Zealand Standard Industrial Classification (ANZSIC). This rated 13th for the number of complaints recorded as received across all industry classifications for the period.

2) *An analysis of the number and nature of matters involving the security industry where the FWO has commenced legal proceedings since 27 March 2006*

Between 27 March 2006 and April 2009, the Fair Work Ombudsman commenced 15 litigations against businesses in the security industry. The investigations associated with these legal proceedings indicated that 178 employees had been affected by alleged underpayments totalling \$308,077.33. Of these matters, eight had been through the courts and incurred a total of \$25,500 in penalties. A further five matters were being assessed for litigation, and two have been closed without being litigated.

3) *The significant number of vulnerable workers involved young workers and migrant employees*

In preparing for the Campaign, the Fair Work Ombudsman received intelligence from the Australian Crime Commission, the Australian Taxation Office, the NSW Police Force, and the Department of Immigration and Citizenship regarding the exploitation of immigrants and foreign nationals, cash in hand payments, and sham contracting in the sector.

1.2: Aim, objectives and performance measures

The aim of the National Security Industry Campaign (the Campaign) was to enhance compliance with the *Fair Work Act 2009* (the Act) and the *Fair Work Regulations 2009* (the Regulations) in the security industry across Australia.

The specific objectives were to:

1. engage with relevant stakeholders in relation to the campaign
2. provide information to Australian industry employers to help them meet their obligations under federal legislation, and to promote the role of the Fair Work Ombudsman
3. audit the level of compliance in relation to minimum wages, entitlements, and contract arrangements in a targeted range of employers
4. ensure that audited employers comply with their minimum wage and entitlement obligations
5. provide a public report on the findings of the campaign.

The effectiveness of the Campaign was measured by the following performance outcomes:

- the number of stakeholders that responded to and/or actively engaged in the campaign

- the level of voluntary compliance among audited employers in relation to identified contraventions
- the amount of money reclaimed on behalf of employees.

1.3: Methodology

In July 2009, the Fair Work Ombudsman wrote to 87 industry stakeholders informing them of the Campaign, and provided relevant articles and web links for publication in their respective newsletters and on their websites [see **Appendix A** for a list of the stakeholders].

In addition, the Fair Work Ombudsman met either in person or by telephone conference with the following key stakeholders:

- The Australian Security Industry Association (ASIAL)
- Security Providers Association of Australia Limited (SPAAL)
- Australian Industries Group (AiG)
- The Liquor Hospitality & Miscellaneous Union (LHMU)
- The Australian Crime Commission (ACC)
- The Australian Taxation Office (ATO)

Presentations were also given at nine ASIAL and four SPAAL breakfasts.

During August and September 2009, 9,819 educational letters were sent to employers in the security industry across Australia. The aim was to provide employers with information about the Campaign and resources that would assist compliance with Commonwealth workplace laws.

Following the mail out, a range of businesses were identified for a compliance audit. They were notified in writing and requested to provide time and wage records, and other particular information for a specified two week period (which included a public holiday). The selected businesses were asked to complete and return an entity information form. Upon receipt of the form, the records and documents were assessed against the relevant industrial instrument [see **Appendix B** for a list of the various industrial instruments that covered the sector during the Campaign].

Where minor contraventions that did not disadvantage an employee were identified (such as minor record-keeping and payslip irregularities, or an underpayment of a very small amount), the employer was requested to complete a 'compliance commitment form', confirming they agreed to voluntarily rectify the issue and commit to ongoing compliance.

Where more significant contraventions were identified (such as underpayment of wages, including failure to pay penalty rates), the employer was requested to undertake an audit of all their employees' working conditions and to voluntarily rectify any outstanding amounts. Once evidence of this was received, the matter was considered finalised.

Matters that were not resolved by voluntary compliance and/or the audit framework (for instance, if the employer did not comply with lawful requests or the contraventions are serious and deliberate), the Fair Work Ombudsman commenced a full investigation. It is possible that in some instances the outcome may lead to legal proceedings in accordance with the Fair Work Ombudsman Litigation Policy.

1.4: Industry focus

The particular sections of the security industry targeted in each State and Territory were as follows:

New South Wales / ACT

- Alarm monitoring services
- Security guards at events/airports

Victoria

- Crowd control and mobile patrols

Queensland

- General security in central and northern Qld
- Alarm monitoring in south east Qld
- Reviewing a small percentage of general security employers who had contraventions from the initial State Security Campaign in SE Qld

Western Australia

- Crowd control and patrol

South Australia

- Medical centre static guards, mobile patrols and crowd control

Tasmania

- General security including crowd control

Northern Territory

- General security targeting geographical locations including Darwin, Alice Springs, Tennant Creek, and Katherine

2: PART TWO

2.1: Overview of report findings

Between July and September 2009, the Fair Work Ombudsman targeted 747 businesses for an Australia-wide audit campaign. Of the businesses targeted, 449 (60%) were unsuitable for the following reasons:

- 4 were not within jurisdiction
- 133 had no employees
- 180 were unable to be contacted
- 132 were no longer trading.

The high occurrence of discontinued and non-contactable businesses may be due to:

- a business obtaining a licence with the intention of winning a specific contract but failing to win the contract and therefore never operating
- a business obtaining a licence for a specific event (e.g. a motor racing event) and not continuing in the business at the conclusion of the event
- an individual subcontracting for another business (in addition to their personal licence) which requires a business licence for a certain period of time
- a trend towards venues hiring their own crowd controllers with a reduction in business for security operators
- the practice of phoenixing, that is, an entity self liquidating to avoid paying liabilities and replacing it with another entity to undertake the same function
- the practice of engaging contractors as opposed to employees (to minimise labour costs).

Of the 298 (40%) audits that commenced:

- 256 (86%) audits have been finalised
- 42 (14%) audits require further investigation, including the testing of assertions by businesses they engaged contractors as opposed to employees.

The following table provides an overview of the status of audits by state as at 18 February 2010.

Status of audits								
	<i>NSW</i>	<i>VIC</i>	<i>QLD</i>	<i>WA</i>	<i>SA</i>	<i>TAS</i>	<i>NT</i>	<i>Total</i>
Number of employers targeted	392	77	119	47	75	27	10	747
Number unsuitable for audit	288	37	62	16	34	10	2	449
Number of audits commenced	104	40	57	31	41	17	8	298
○ Number of audits	88	26	57	27	36	16	6	256

completed								
o Number of audits still under investigation	16	14		4	5	1	2	42

Of the 256 audits undertaken and finalised to date, it was found:

- 130 (51%) employers were compliant within the scope of the campaign
- 126 (49%) employers contravened either the Act or the Regulations.

Of these 126 employers:

- 66 (52%) had minor contraventions relating to time and wage records and payslips
- 60 /126 (48%) had monetary contraventions relating to underpayment of wages, penalty rates and allowances
- 27/126 (21%) had both types of contraventions.

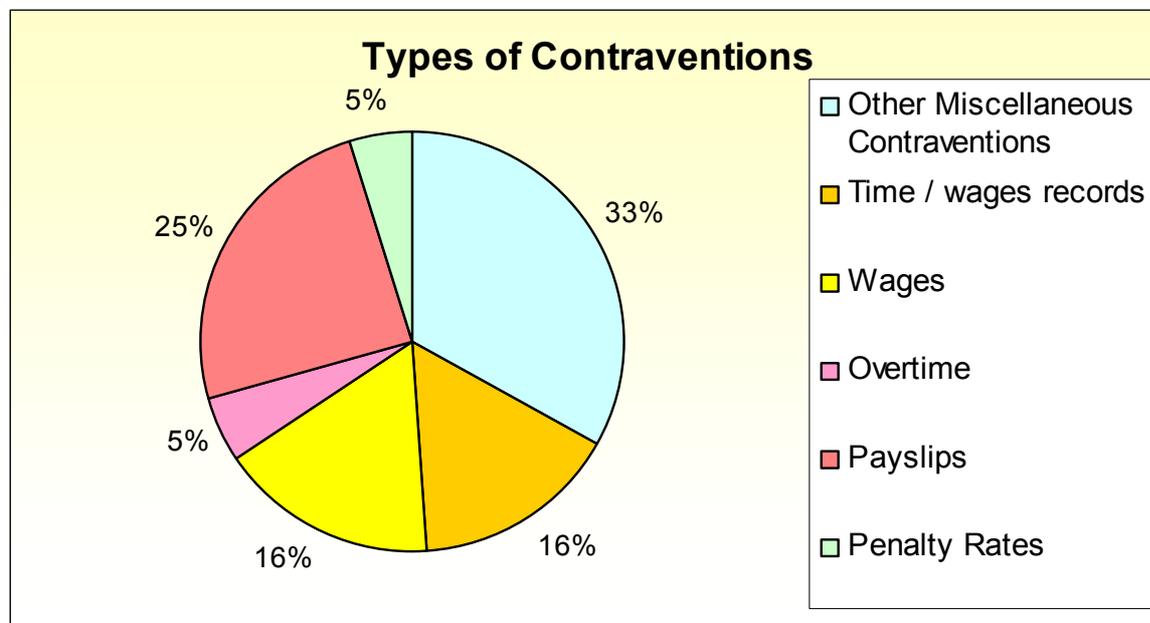
Outcome of Completed Audits								
	NSW	VIC	QLD	WA	SA	TAS	NT	Total
Employers compliant	31	13	38	14	24	6	4	130 51%
Employers found to be in contravention	57	13	19	13	12	10	2	126 49%
• Sustained - no further action	1	5	8	0	1	4	0	19
• Resolved - voluntary compliance	56	8	11	13	11	6	2	107

Types of contraventions								
	NSW	VIC	QLD	WA	SA	TAS	NT	Total
Employers with monetary contraventions only	4	5	11	6	6	1	-	33 26%
Employers with non-monetary contraventions only	35	6	8	5	4	6	2	66 52%
Employers with both monetary & non-monetary contraventions	18	2	-	2	2	3	-	27 21%
Total	57	13	19	13	12	10	2	126 100%

2.2: Types of contraventions

The most common contraventions identified were non-compliance with time and wage record-keeping requirements, the incorrect payment of wages, and non-compliance with payslip requirements.

The table below shows the breakdown of contravention type.



Money Recovered

The Fair Work Ombudsman is due to recover a total of \$452,824 for more than 652 workers as a result of this campaign. The breakdown by state and sector is detailed in the table below.

Amount of money recovered on behalf of employees								
	<i>NSW</i>	<i>VIC</i>	<i>QLD</i>	<i>WA</i>	<i>SA</i>	<i>TAS</i>	<i>NT</i>	<i>Total</i>
Amount of money	\$164,388	\$40,037	\$39,627	\$119,124	\$47,197	\$42,451	-	\$452,824
Number of employees	277	61	194	43	58	19	-	652

Contained in **Appendix C** is a breakdown of the 194 contraventions committed by the 126 (49%) employers by state.

2.3: Details of findings

The Campaign identified the following issues in each region.

New South Wales / ACT

At the time of the audit, the NAPSA covering New South Wales security industry employers was informed by the AN120497: *Security Industry (State) Award*. This NAPSA provided for 16 separate allowances including meal and first aid allowances.

As the nature of the security industry involves shift work, the NAPSA provided for specific span loadings for night shift (e.g. working permanent night shift) and additional penalty loadings for weekend work.

The majority of Australian Capital Territory security employers were covered by AP796056: *Security Employees (ACT) Award 1998*. This provided for 14 separate allowances similar to the NSW NAPSA, as well as shift, afternoon, night, permanent night, and weekend shift loadings.

Many employers find the application of these various allowances and penalty rates administratively challenging, or they are in a state of ignorance as to their significance. Accordingly, a number of employers paid workers a flat rate in the belief such an arrangement would compensate allowances, shift and weekend penalties, overtime and annual leave loadings.

The flat pay rate trend was particularly evident with small business operator/managers, which typically lack a dedicated human resources department.

Those employers who appeared to lack knowledge of the NAPSA paid their employees 'the market rate', and felt there was no need to apply the appropriate penalties and allowances.

Some employers claimed they had verbal agreements with casual employees to work more than eight ordinary hours per shift, and with full time employees, to work more than 10 ordinary hours per shift without overtime payments.

Many employers contravened record-keeping and pay slip requirements, and the lack of detailed records made it difficult at times to assess whether employees had received their appropriate entitlements.

The majority of businesses employed casual security guards at Level 1 or 2 as defined in the NSW NAPSA.

The New South Wales NAPSA provides that Grade 1 security officers conduct basic duties, such as watching over persons/property, responding to basic alarms, monitoring entrances and activities in certain properties, and using basic electronic devices. Grade 2 security officers share similar duties, but had additional responsibilities, such as operating more advanced technological devices (e.g. computer monitoring systems) or handling a dog.

Workers at these levels were typically employed as casuals (notwithstanding in some situations the 'long term basis' of the engagement), while others were employed as the need arose. The practice of hiring lower grade casual security employees assisted NSW/ACT employers manage workload variations.

Victoria

In Victoria, bigger security companies had a higher level of compliance, with the return rate of records being prompt and of good quality. As with NSW, payment of flat rates was prevalent throughout the sector.

Complexities were identified in the application and effect of various clauses in the *Security Employees Award 1998* that related to coverage and classification - for example, determining when

a concierge is a security officer. (A concierge is generally responsible for reception duties, while a security officer is responsible for taking action when there is a breach of security.)

There were issues regarding the breaks a security officer could take while on patrol. As security officers often work late nights and early mornings, taking breaks is not necessarily monitored or recorded. The importance of documenting the requirement of breaks was discussed with employers.

Difficulty interpreting the various circumstances in which security officers have minimum engagements (e.g. cash pickups in small towns) was also found. An assessment of the evidence was required to determine if employees were paid sufficiently for hours worked in these circumstances.

Finally, consideration was given to evidence where security officers had been called to a genuine emergency (which does not attract overtime), instead of being asked to work additional hours and therefore paid overtime.

Queensland

In the main, Queensland employers were cooperative. They were sometimes difficult to contact, as many employers themselves work within their businesses as security guards and thus work irregular hours.

Collective agreements were common and these workplace agreements often contained a flat rate of pay which purported to include penalty loadings. The majority of these agreements were pre-Fairness Test collective agreements, with rates of pay much lower than the NAPSA. This was not surprising, as the majority of work performed by employees involved night shifts / allowances / overtime and other penalties, all of which represent higher business costs.

It was noted that many agreements were identical. In a competitive sector, such a situation may indicate companies had either had agreed upon industry pay rates or they shared the same bargaining agent.

Western Australia

As in other states, a number of security companies in Western Australia were paying employees flat rates to simplify their pay structure, often resulting in an underpayment of night shift, weekend penalty and overtime rates.

Nearly half of the Western Australian security employers audited had collective agreements, AWAs or ITEAs with their workers. The employers used these options to ensure they remained competitive in an industry where remuneration for long hours and night shifts is commonplace.

Some security employers remained competitive by sourcing their workers from a large labour hire company with a pre-Fairness Test collective agreement in place. It should be noted that the Fair Work Ombudsman has received a complaint from a competitor about the rates paid by this labour hire company.

This allegation will be followed up with a separate investigation, including examining whether this business has complied with Transfer of Business laws. (It was reported that employees often transfer from the original employer to the labour hire business, but are subsequently remunerated at a lower rate.)

South Australia

Many employers in South Australia reported difficulties in interpreting and understanding the *Security Officers' Award 2010 / NAPSA*.

A number of employers were not paying penalty and overtime rates and, even more concerning, not lodging agreements. The employers who had not lodged agreements will be the subject of separate investigations, with the potential for litigation.

The majority of employers who had not contravened workplace laws were pleased to see the audit carried out, as they believed their competitors were underpaying staff and, therefore, had an unfair business advantage. It was also pleasing to note that employers owing back payments to their workers were readily rectifying their monetary contraventions.

Record-keeping contraventions commonly included failure to record superannuation details, and to accurately record the pay details and time records (start and finish times) of casual workers.

There were also instances of employees working under common law contracts that purported to be AWAs or ITEAs. Employers had avoided paying higher rates to security officers by employing them as Crowd Control Officers as identified in the NAPSA, but nonetheless required them to secure property as part of their duties.

Tasmania

The majority of employers audited were covered by the Tasmanian Security Industry NAPSA. The most common contraventions included failure to pay overtime rates and shift loadings, and weekend penalty rates.

Many employers were paying employees on a flat rate, which seems to be an industry standard in Tasmania. This flat rate was, typically, above the award rate, but in most cases, it did not compensate employees for penalty rates.

Northern Territory

It was found security employers generally paid above the award rate (sometimes up to \$10-\$15 above), but that this flat rate did not cover penalties and overtime. Businesses incorporated post 27 March 2006, however, were not required to pay penalties.

Given Darwin is a small business centre, security guards tended to move readily between employers, sometimes covering three different jobs in one night. The industry showed a high turnover of staff, and most were employed as casuals.

3: PART THREE

3.1: Concluding remarks

The security industry is competitive, with features unique among Australian industry groups, particularly in regional areas. Many security employees work long hours and regular night shifts. There is a high level of competition and mobility, with the result that employees are often employed as casuals or sourced under labour hire arrangements.

The Fair Work Ombudsman was pleased with the positive interest demonstrated by respective employer associations, including the security industry's support of the education seminars.

Similarly, the number of employers to respond positively to the Fair Work Ombudsman's intervention and to commit themselves to voluntary compliance was extremely gratifying. Among these compliant and committed employees was a feeling that poor practices among their competitors should be exposed and remedied.

The primary finding from the Campaign across all states was the common practice of employers paying flat rates. While these rates were sometimes significantly above the 'hourly rate' in the relevant industrial instrument, the rate failed to compensate for shift and weekend penalties, overtime or annual leave loadings.

Due to inherent ambiguities and contradictions in the drafting of the NAPSAs, employers reported difficulties in the interpretation of some clauses of the various State NAPSAs.

Also of note was the widespread use of 'WorkChoices' collective agreements, AWAs or ITEAs, indeed, Western Australia reported nearly half of the security businesses employed their workers under one of these agreement types.

As reflected in the recommendations below, the Campaign's findings reinforce the importance of continued education support and contact with the industry as a whole.

3.2: Recommendations

As a result of the findings of this Campaign, the Fair Work Ombudsman will:

- 3.2.1 continue to work in cooperation with employer associations to ensure compliance with Commonwealth workplace laws, with particular emphasis on the *Modern Security Services Industry Award 2010*
- 3.2.2 provide ongoing education and awareness amongst sector employees, particularly through the development of website products
- 3.2.3 continue to investigate the 42 employers found to be not complying with either the Act or the requests of Fair Work Inspectors
- 3.2.3 research and further investigate a sample number of the 60% of employers found to be unsuitable for audit to gauge the extent of sham contracting arrangements and phoenixing practices
- 3.2.3 undertake a follow-up audit in 2011 of a sample of the Campaign's non-compliant employers to assess behavioural change.

4: Appendix A – List of stakeholders

ORGANISATION
Australian Security Industry Association
NSW Police Security Industry Registry
Master Locksmiths Association of Australasia, MLAA
Victoria Police Licensing Services Division
National Australian Security Providers Association
Building Service Contractors Association of Australia - NSW Division
Building Service Contractors Association of Australia - QLD Division
Building Service Contractors Association of Australia - SA Division
Building Service Contractors Association of Australia - WA Division
Institute of Security Executives Inc.
Australian & NZ Locksmiths Association
Australian Hotels Association
Australian Retailers Association (ARA)
Locksmiths Guild of Australia Inc NSW (LGA)
National Electrical & Communications Association (NECA)
National Security Training Academy Pty Ltd
Victorian Security Industry Advisory Council Secretariat
LHMU National Office
LHMU ACT branch
LHMU NSW Branch
LHMU NT Branch
LHMU QLD Branch
LHMU SA Branch
LHMU TAS Branch
LHMU VIC Branch
LHMU WA Branch
Office of Regulatory Services - Business & Industry Licensing
Department of Employment, Economic Development and Innovation
Office of Consumer and Business Affairs
Consumer Affairs and Fair Trading
Western Australia Police - Police Licensing Services
International Security Training Academy
SECTA Training
Security Training and Tactics

Vast Academy
Safecity Services Pty Ltd
Tactical Security Training Australia
Site Security Training Pty Ltd
Aviation Security International Systems Training Pty Ltd
Integracom Management Group Pty Ltd incorporating The Australian School of Security and Investigations
Asset Training Australia
Intercept Group Pty Ltd
TCB Elite Security
Complex Training Academy
National Guarding & Training Services
Pro-System Training Services Pty Ltd
Australian Security Training Pty Ltd
Brisbane Executive Security Training
Training-1 Pty Ltd
Central Coast Business and Training Strategies
John Shipway Nationwide Security Training Academy
Paul Hutchins Security Training
Executive Security Training
Green & Gold Security Training
Aces Training
Event Security Management
Australian Security Academy Pty Ltd
Wilson Security
Ram Security Australia
Always Synergy
Lynx security Services SA Pty Ltd
Paragon Corporate Training
Department of Justice - Licensing, Regulation & Alcohol
Australian Crime Commission
Australian Chamber of Commerce & Industry
Department of Commerce
Office of Industrial Relations
Department of Innovation, Industry and Regional Development
Department of Innovation, Industry and Regional Development
Department of Employment and Industrial Relations

Department of Consumer and Employment Protection	
SafeWork SA	
Workplace Standards Tasmania	
Northern Territory Chamber of Commerce	
Business SA	
Tasmanian Chamber of Commerce & Industry	
MINISTER	PORTFOLIO
The Hon. Simon Corbell MLA	Minister for Police and Emergency Services
The Hon. Delia Lawrie	Minister for Justice and Attorney-General
The Hon. Kon Vatskalis	Minister for Racing, Gaming and Licensing
The Hon. Michael Atkinson MP	Attorney-General
The Hon. Tony Kelly ALGA MLC	Minister for Police
The Hon. Andrew Fraser MP	Treasurer and Minister for Employment and Economic Development
The Hon. Lisa Singh	Minister for Corrections and Consumer Protections
The Hon. Bob Cameron	Minister for Police and Emergency Services
The Hon. Robert Johnson MLA JP	Minister for Police

5: Appendix B – List of industrial instruments

SECURITY AWARDS – NATIONAL AND STATE		
ACT	<i>Security Employees (ACT) Award 1998</i>	AP796056
NSW	<i>Security Industry (State) Award</i>	AN120497
VIC	<i>Security Employees (Victoria) Award 1998</i>	AP796143
QLD	<i>Security Industry (Contractors) Award - State 2004</i>	AN140269
WA	<i>Security Officers Award</i>	AN160287
SA	<i>Security Officers' Award</i>	AN150139
TAS	<i>Security Industry Award</i>	AN170092
NT	<i>Security Industry (Northern Territory) Award 2002</i>	AP819072

6: Appendix C – Profile of contravention by state

CONTRAVENTION	ACT/NSW	VIC	QLD	WA	SA	TAS	NT	TOTAL
Allowances	1	1						2
Annual leave	2							2
Night loading	1							1
Other monetary				1		2		3
Other non-monetary				1				1
Other physical					1			1
Overtime	6					4		10
Payslips	30	4	6	4	5	6	2	57
Penalty rates	6		3	1	2	1		13
Pro-rata annual leave		1	1					2
Public holidays	3	1						4
Shift loadings	2	2				4		8
Time/wage records	27		3	1		3	1	35
Wages	23	3	7	5	6	1	1	46
Weekend penalties	1	2		2		4		9
TOTALS	102	14	20	15	14	25	4	194