Attachment 1

LHMU CASE STUDY: IMPACT OF THE WORKPLACE RELATIONS AMENDMENT (WORKCHOICES) BILL 2005

CASE STUDY: THE HOSPITALITY INDUSTRY

1. Since the amalgamation in the early 1990s of the Federated Liquor and Allied Industries Employees Association and the Federated Miscellaneous Workers Union, the Liquor, Hospitality and Miscellaneous Union has worked extensively on behalf of employees in the hospitality industry. It has established and maintained safety net awards in federal and State industrial systems and where possible, it has assisted members in enterprise bargaining for agreements that improve on the minimum wages and conditions provided for in awards.

2. The Australian Industrial Relations Commission has recognized in a number of significant decisions that there is little enterprise bargaining in the hospitality industry and that, as a consequence, the vast majority of hospitality workers rely on the award system for their actual rates of pay and conditions. The reason is that employers chose not to bargain.

3. In the 1997 *Award Simplification Case*[1], for which the *Hospitality Industry – Hotels, Accommodation, Resorts and Gaming – Award 1995* was the vehicle for the application of the Howard Government's first wave of industrial relations reforms, the AIRC accepted that it should take the nature of the hospitality industry into account. The evidence demonstrated that women, particularly from non-English speaking backgrounds, had difficulty in negotiating with management. Because women were in an unequal bargaining position, they were at a disadvantage if conditions could be altered by individual agreement without Commission supervision.

4. At that time, the AIRC said, the evidence before the Commission showed that:

- 56 per cent of the employees were women, with the percentage ranging from 67 per cent to 82 per cent in semi-skilled and unskilled classifications;
- 47 per cent of employees were casuals, by far the largest proportion in any industry, and only one-third of the work force worked 35 hours a week or more; and
- 40 per cent of employees were aged between 15 and 24 years.

5. The industry has become more casualised since 1997, and there has been no discernible increase in the level of enterprise bargaining. The vast majority of hospitality workers in Australia continue to rely on the Award system for improvements in their wages and conditions, and on the LHMU to argue for and secure these improvements. Many thousands of workers who are not LHMU members benefit from our work.

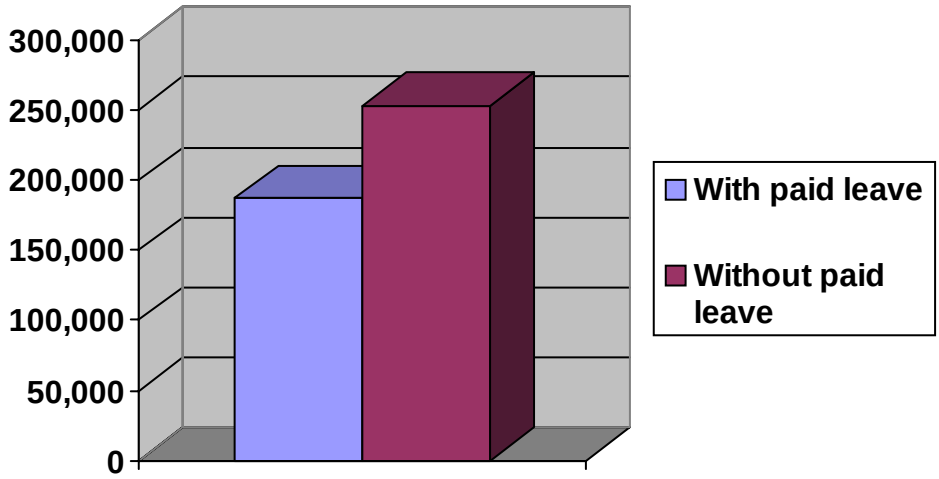
6. **ABS Series 6359.0 – *Forms of Employment Australia*** analyses the hospitality industry broadly defined – that is, by reference to the "accommodation, cafes and restaurants" sector. The latest report, issued on 19 May 2005, confirms that

[1] (1997) 75 I.R. 272

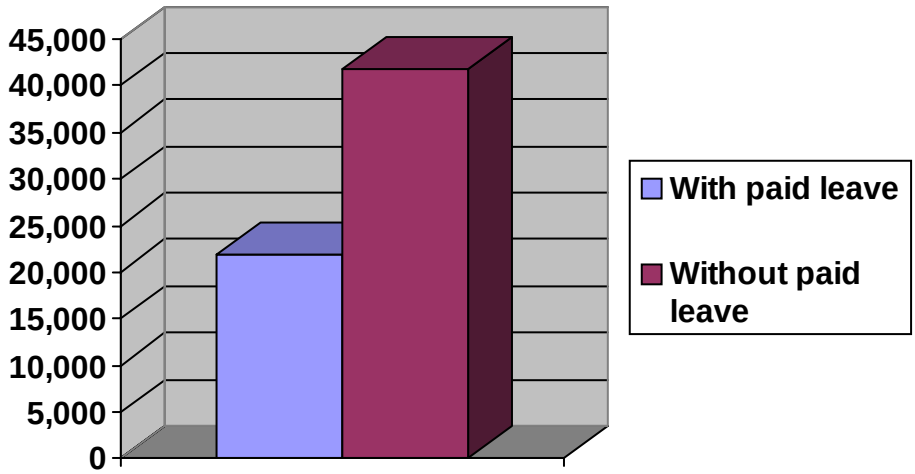
the industry is highly casualised. In our experience, employment in the industry is precarious and employees are constantly concerned that will not be able to work sufficient hours each week to make ends meet.

7. On the broad industry definition, the industry employed 503, 700 employees in November 2004 aged 15 years and over. Of these, more than half were employees without paid leave entitlements. When owner-managers are excluded from the total of employees without leave entitlements, the percentage of employees without leave entitlements increases dramatically:

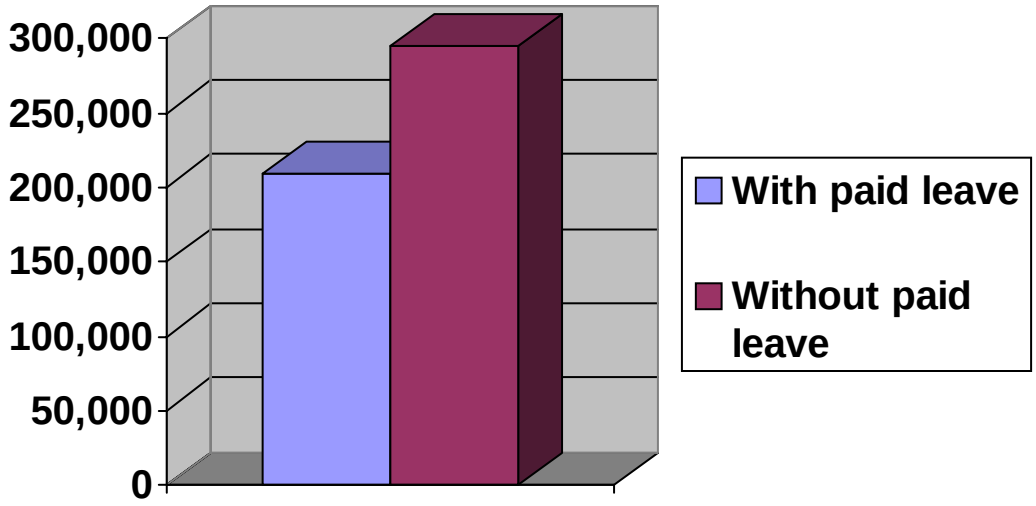
7.1 Total employment – Accommodation, cafes and restaurants – excluding owners managers



7.2 Owners managers – Accommodation, cafes and restaurants



7.3 Total employment – Accommodation, cafes and restaurants – including owner managers



THE ACCOMMODATION INDUSTRY - JUNE 2004 SNAPSHOT

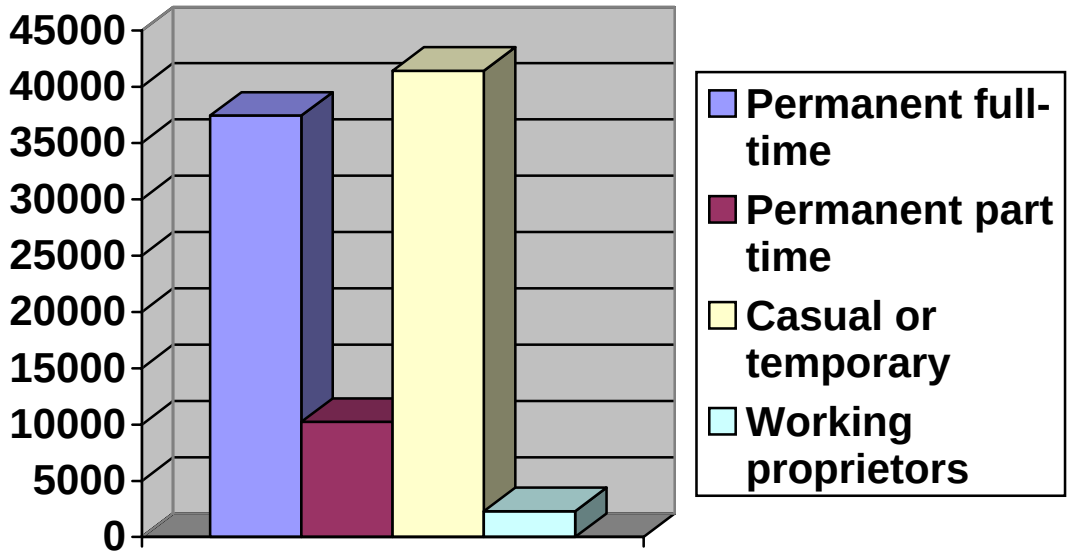
8. ABS Series **8695.0 – Accommodation Services Australia** reports the results of the 2003-04 Accommodation survey, thus enabling a more detailed snapshot of the accommodation segment of the broadly defined accommodation, cafes and restaurants sector.

- At the end of June 2004 there were 5 682 accommodation businesses operating in Australia, employing 91,399 persons in 6 372 accommodation locations around Australia.

- The major accommodation types were motels (37.6 per cent of all locations), caravan parks (19.7 per cent), and serviced apartments (9.1 per cent) and licensed hotels (8.4 per cent).

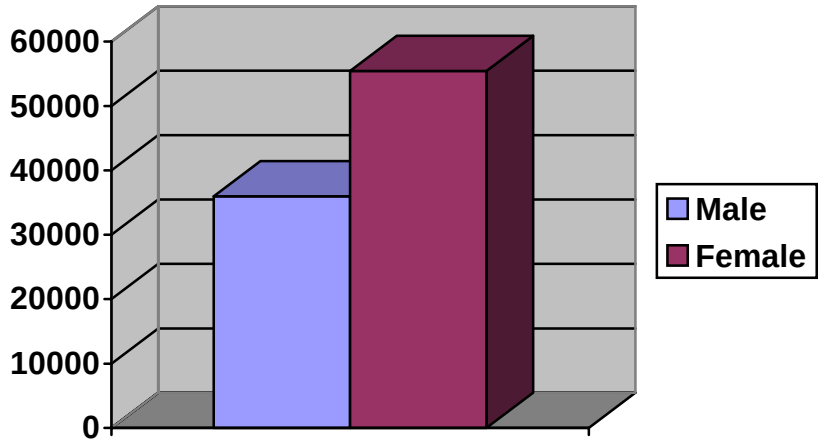
- Of the 91,399 employed persons, 41,433 (or 45.3 per cent) were employed on a casual or temporary basis. Permanent full-time employees accounted for 41 per cent (37,439 persons) whole permanent part-time employees accounted for 11.2 per cent (10,239 persons).

Permanent full-time	**37439**
Permanent part time	**10239**
Casual or temporary	**41433**
Working proprietors	**2289**



- Females dominated the accommodation services workforce, accounting for 60.7 per cent (55441 persons) of all employment:

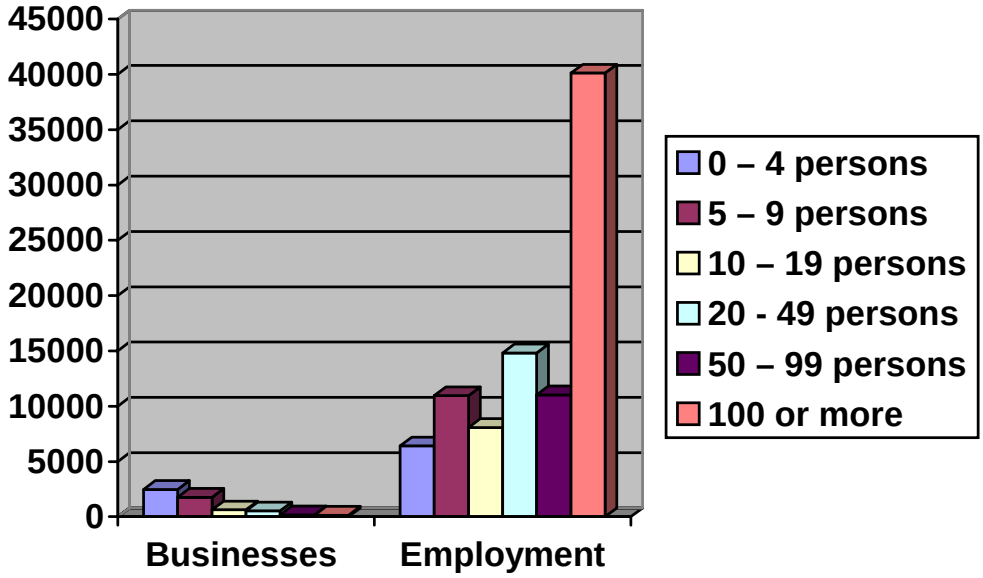
Male	**35958**
Female	**55441**



- Females were more likely to be employed in casual positions, accounting for 53 percent (29 405 persons) of all female employment.

9. The majority of accommodation businesses (74.3 per cent or 4219) employ fewer than 10 persons.

Employees	Businesses	Employment
0 – 4 persons	2466	6410
5 – 9 persons	1753	10950
10 – 19 persons	627	8075
Sub-total < 20	*4846*	*25435 (27.8%)*
20 - 49 persons	533	14817
50 – 99 persons	165	11028
Sub-total < 100	*5544*	*51280 (56.1%)*
100 or more	139	40119
Total	5682	91399

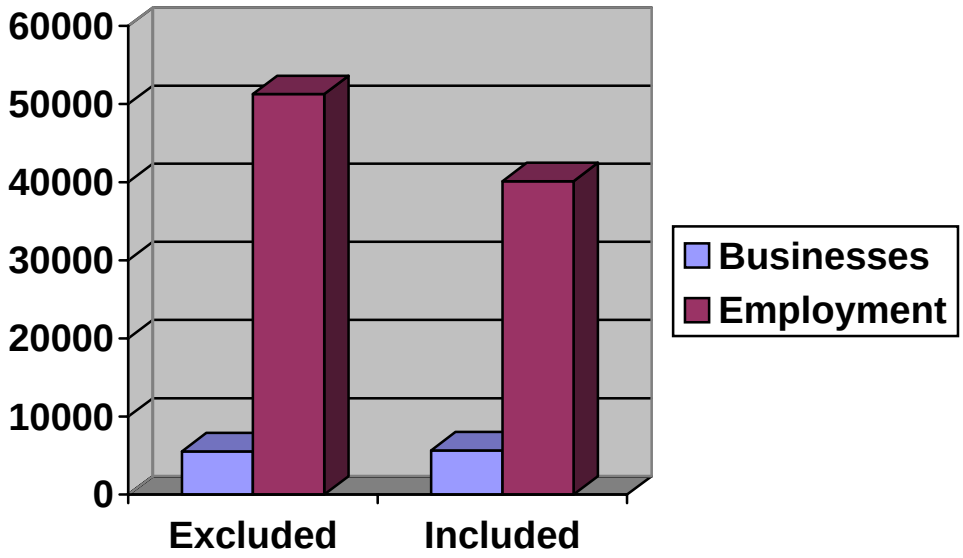


SNAPSHOT - IMPACT OF CHANGES IN UNFAIR DISMISSAL LAWS

The Government's original proposal to exempt businesses employing 20 or fewer employees from unfair dismissal laws would have excluded 4846 businesses and 25435 employees from an unfair dismissal remedy. The new proposal – to exclude businesses employing fewer than 100 employees – will exempt a further 698 businesses and a further 25845 employees, making a total of 5544 business (97.5 per cent) and 51280 employees (56.1 per cent).

More than 10 000 persons employed under the *Hospitality Award* are employed by employers of fewer than 10 employees. Approximately 15,000 are employed by employers of fewer than 15 employees. These employees will be denied both redundancy pay AND the right to compensation if their employment is terminated unfairly.

End June 2004	Excluded	Included
Businesses	5544	5682
Employment	51280	40119



CASE STUDY; THE HOSPITALITY INDUSTRY AWARD – LIKELY EFFECTS OF THE WORKCHOICES LEGISLATION

1. Introduction

1.1 The *Hospitality Award* covers more than 100,000 employees in the four Eastern States of Australia. It is a minimum rates Award which operates in many areas as a maximum rates Award. This is because the Howard Government's first wave 1996 industrial changes (known as "award simplification") for which the Award was the testing ground in 1997-8 reduced conditions and eliminated valuable employee rights.

1.2 At the same time, the *Workplace Relations Act* 1996 effectively made enterprise bargaining voluntary for hospitality industry employers, and most have chosen not to bargain with their employees or with the LHMU for wages or conditions above the award minimums.

1.3 The Howard Government's proposed Second Wave industrial legislation will eliminate at least 10 more clauses from the Award and force the modification of other clauses. In most cases, the modifications will transfer workplace power further away from workers as well as reduce conditions.

1.4 The legislation will do little, if anything, to improve enterprise bargaining in hospitality workplaces. Rather, it will encourage wage cost- cutting through the use of individual contracts that will be permitted to contain wages and conditions below

even what remains in the Award. Where collective agreements are now in place, the proposed legislation will give the employer the option, unilaterally, to opt out of them and to revert not to *Hospitality Award* conditions, but five lower "standards".

1.5 A "sleeper" clause in the Government's "*WorkChoices*" package relates to what is currently section 89A(6) of the Act. This provision currently allows awards to include provisions that are "incidental to" the (allowable award) matters in s.89A(2) and "necessary" for the effective operation of the award. This will be changed to enable the AIRC to include in an award only provisions that are incidental to allowable matters where these provisions are essential for making a particular provision operate in a practical way.

1.6 In the 1997 *Award Simplification Case* [75 IR 272], for which the Hospitality Award was the vehicle, a number of workers' rights were retained in the Award over the opposition of employers and the Government as being "necessary" for the effective operation of the award.

1.7 One example was the obligation to keep a written record of agreements relating to annualised salaries (clause 22 – Option for Annualised Salary in the current award) which the Full Bench said was incidental to and "necessary" for the effective operation of award provisions governing pay and allowances. Without such a provision, there would have been inadequate protection for employees required to work extended hours.

1.8 This and other award duties and obligations will now be subject to a more restrictive test – they will need to be "essential" to the effective operation of a "particular" allowable award matter.

1.9 Current Award provisions will need to be tested against three separate criteria:

- whether they have become non-allowable and must be deleted;
- whether they remain allowable and can be retained either in whole or in modified form;
- whether they are protected as being superior to new legislative standards.

2. CLAUSES LIKELY TO BE DELETED

2.1 The clauses which appear vulnerable to deletion in their entirety, either immediately or over time, are the following:

Clause 9: Enterprise Flexibility Provisions. This clause allows employers and employees to agree at a workplace on how particular award provisions are to operate at the workplace. The clause requires that such decisions require the agreement of a majority of workers affected. This protection will be lost. Employers will now be free to persuade individual employees to "agree" on how particular award clauses will operate at the workplace (for example, requiring regular part-time employees to "agree" to a last-minute change in their starting or finishing times by requiring them to initial the change on the roster).

Clause 33 – Jury service: This award clauses guarantees that an employee required for jury service will have his or her pay "topped up" by the employer: the employer is required to pay the employee an amount equal to the difference between the amount paid for their attendance for jury service and their ordinary Monday to Friday wage for time they would have worked but for the jury service. The removal of the clause means that employees will be entitled only to the jury service stipend and not to lost wages. The Government says this provision will remain in awards for current and new employees on an on-going basis, but cannot be included in "new" awards. It is a benefit that can be wiped out if the employer so specified in an AWA.

Clause 17 – Notice of Termination. While the amount of notice required to terminate the employment of an employee is stipulated in section 170CM of the WR *Act*, the conditions attaching to the giving of notice stipulated in the Award are not specified in the Act, and their benefits will be lost to employees.

Clause 18 – Classifications and wage rates. These provisions will transfer to the so-called Fair Pay Commission without any guarantee that the skilled-based career paths and wage relativities set out in the clause will be preserved or maintained at reasonable levels or at all. Developed over time with the assistance of experts within the AIRC and within training and education institutions, the fate of the classification structure will now be in the hands of faceless bureaucrats attached to the "Award Review Taskforce" and the value of wages will be subject to the divine inspiration of the members of the so-called Fair Pay Commission.

Clause 25 – Superannuation. This clause protects the right of employees to remain in their industry superannuation fund – Host Plus, which has traditionally out-performed most other superannuation funds – and to avoid being forced into less attractive enterprise or retail funds. The 2008 "sunset" Federal superannuation legislation is not an effective substitute.

Clause 30 – Annual Leave. Prior to 1996, an employee who had accrued a full entitlement to annual leave had the right to determine when they took the leave. This was a valuable right for an employee with school-aged children, or with a working partner or with relatives living outside Australia with whom annual holidays could be coordinated. The employer only had the right to direct an employee to take accrued annual leave at a particular time if they had not taken it within 12 months of it falling due.

The Howard Government's 1996 legislation qualified the right of employees to decide <u>when</u> they would take their four week's annual leave once it became due. The AIRC Full Bench interpreted the 1996 legislation to require employer-employee agreement on the timing of annual leave, but specified that the employee "must be allowed to take annual leave" within four months after it was due.

The Second Wave would give the employer total control over the timing of an employee's leave – the proposed legislation waters down employee rights and hands a veto to employers such that no employee can be certain they will be able to align their annual leave with school holidays or family reunions.

The employer would be entitled to refuse authorisation. (See proposed section 92H(1)(b) - The employee is only entitled to take leave at the time of the employee's choosing if the employer has "authorised the employee to take the annual leave during that period"). The proposed legislation would allow the employer to withhold "authorisation" of a particular leave request for "operational" reasons. It also empowers the employer to direct an employee to take untaken annual leave at a time specified by the employer.

If an employer acts unreasonably, the AIRC will not have the power to settle disputes over such matters by directing that the employee be allowed to take accrued annual leave at the time of the employee's choosing – for example, at school holiday time (see proposed new Part VIIA and particularly proposed subsection 176I (4)).

As the timing of taking of annual leave is not an allowable award matter (see proposed s. 116C) – the employee is left without effective redress unless they are prepared to take the matter to an eligible Court (see proposed section 176I and the proposed amendment to s. 178(1)). An eligible Court has the discretion to impose a penalty on the employer – but not to make orders that would grant the employee leave at the required time. This power currently resides with the AIRC, but will be removed.

The proposed legislation also puts in question whether employees will in fact have the ability to retain their award entitlement to four weeks annual leave – retention of the entitlement will depend on the employee's individual negotiating power.

The employer is entitled to influence or pressure an employee to cash out two weeks annual leave a year rather than taking it, provided the pressure or influence is not "undue". If the cashing out provision is contained in a workplace agreement (for example, in a pro-forma AWA offered as a condition of employment) the Act will deem the employee to have agreed to cashing out (s. 92B) and deem that the employer is not coercing the employee into accepting the reduction in annual leave.

The legislation would transfer the annual leave standard from the award system to become a statutory standard. Nothing in the legislation refers to or preserves the long-standing AIRC award standard entitling employees to a credit for public holidays which fall during their annual leave. This may have significance if an employer uses the facility given to them by the legislation to direct employees to take annual leave during a Christmas-Australia Day shutdown period. In New South Wales in 2006, four public holidays will fall during this period.

Clause 31 – Personal Leave. The Government's proposed replacement minimum standard appears similar in quantum to the current award provision (10 days paid leave each 12 months, accumulating to a maximum of 760 hours.

Clause 32 – Parental Leave. The Government's proposed replacement minimum standard on Parental Leave does not appear to have adopted the AIRC's recent test case improvement to parental leave rights.

Clause 33 – Leave for Consultation meetings. The Government's advocate failed in 1997 to persuade the AIRC that the current Hospitality Award provision allowing

employees one short paid meeting each year to discuss industrial matters should be deleted on merit. The proposed legislation ignores this Full Bench finding.

Clauses 41 and 42 - Classification definitions and wage rates for casino workers. These provisions – which provided a defined career path and established wage relativities for skilled casino workers - were developed over several years by LHMU members and employer representatives, with the professional assistance of the AIRC. They will be referred to bureaucrats in Canberra for second-guessing and will then be subject to the whims of the Fair Pay Commission.

3. CLAUSES LIKELY TO BE MODIFIED

3.1 Clauses which may need to modified as a result of the proposed legislation include the following:

Clause 3 – Classifications of employees. This clause contains the definitions of the various classifications in the skills-based career path provided for in the Award, along with a definition of "appropriate level of training". These provisions will be transferred to the purview of the Fair Pay Commission.

Clause 34 – Public Holidays. By banning "union picnic days", the Government intends that *Hospitality Award* workers in New South Wales and Tasmania will lose one paid public holiday, reducing their entitlements from the AIRC test case standard of 11 public holidays a year to 10. The Australian Hotels Association has supported the retention of Union Picnic Day in the Award for these States as it has not wanted to pay public holiday rates on big revenue days such as Melbourne Cup Day.

Clause 15.2 – Casual employees. The award provides an encouragement and a process enabling long-term casual employees to seek to convert to regular full-time or part-time employment. The employer is required to consider such a request objectively, and not to reject it unreasonably. The clause was inserted into the award by agreement, after a lengthy consultation and negotiation process involving the LHMU and the Australian Hotels Association. It has provided additional job security to a range of hospitality workers. By operation of proposed section 116(1)(b) of the Bill, the clause will become non-allowable as it deals with "transfers from one type of employment to another type of employment". Effectively, there will no longer be an obligation on the employer to act reasonably in relation to a conversion request and no role for the AIRC in any dispute(either individual or collective) over reversing further casualisation of the industry.

Clause 16 – Redundancy Pay. The effect of the Government's intention to exempt small business from the obligation to pay severance pay on redundancy will be to leave many thousands of hospitality workers without compensation for loss of their job for redundancy reasons. More than 10 000 persons employed under the *Hospitality Award* are employed by employers of fewer than 10 employees. Approximately 15,000 are employed by employers of fewer than 15 employees.

These employees will be denied both redundancy pay AND the right to compensation if their employment is terminated unfairly, as they will be excluded from the unfair dismissal jurisdiction if their employer employs fewer than 100 employees. These

employees will be available to be targeted with impunity by their employer or his or her supervisors.

The intention to re-define redundancy as "genuine redundancy" will reward unscrupulous and corrupt employers – it will open the way for all employers to avoid severance payments merely by using the device of offering employees lower-status, lower-paid jobs with fewer guaranteed hours (or, "inadequate alternative employment") which is often the case in the hospitality industry.

Working for small business has always been problematic in the hospitality industry. This Bill, if transformed into legislation, will make it singularly unattractive.

Clause 15 – Types of Employment. The provisions protecting wages and proficiency pay for apprentices, wage rates for juniors and wage rates for employees with disabilities will be removed from the clause.

Juniors are defined in the legislation (proposed new section 90B, and paragraph (4) of item 501) as being employees under the age of 21. The Hospitality Award currently provides (clauses 15.5.1 and 15.5.2) that 20-year- old employees must be paid the full adult rate. Juniors employed in bars or other places where liquor is sold must be paid the adult rate (clause 15.5.3(c)). The Bill provides for a one-size-fits-all reduction in standards for these employees.

Clause 23 – Allowances. The award provides that where an employee is asked to work overtime but then is not required to do so the employee is entitled to compensation for any surplus meal provided by the employee. The award also provides that an employer must reimburse employees for the cost of special clothing they are required to purchase and wear for their work, and for the cost of transport when they are required to start or finish work before or after their usual transport is available, or when they are required to work more than 80 kilometres from their usual place of work.

Each of these provisions appears vulnerable as the "allowable award matter" relating to allowances has been redefined to specify that awards may only contain monetary allowances in particular instances, such as where the allowance reimburses the employee for expenses incurred in the course of their employment.