

13. VARYING THE LOCATION OF WORK

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Introduction

[13.1] The ACTU is claiming a new right for employees that is completely unknown to Australian employment regulation. ACCI understands this claim is as follows:

Special Provision for Workers with Family Responsibilities –
Right to Request Variation in Hours or Place of Work

- a) A employee may apply to his/her employer for a change in his/her terms and conditions of employment if:
 - i. the change relates to the hours the employee is required to work, and/or the times when the employee is required to work and/or the physical location at which the employee is required to work, and
 - ii. the purpose in applying for the change is to enable the employee to provide care and support for an immediate family member or member of the employee’s household.¹

¹ This clause continues with various supporting provisions including a detailed set of new obligations upon employers. – emphasis added

[13.2] We have already contended in detail that this claim exceeds the ambit of the industrial disputes underpinning awards upon which this matter rests.

[13.3] This fundamental consideration should preclude further contemplation of this claim from the ACTU. To the extent that further consideration of the claim is to be undertaken, this section addresses other relevant systemic and legal considerations. It supports the ACCI position that there should be (and can legitimately be) no regulation of the location of employment as sought by the ACTU in its ‘right to request’ claim.

[13.4] In addition to falling outside the necessary ambit scope of industrial disputes giving rise to awards of this Commission, such a claim to regulate “the physical location at which the employee is required to work” is:

- a. Unknown to Australian workplace relations regulation.
- b. Not an industrial matter capable of being included in an award of this Commission.
- c. Not an allowable matter capable of being included in an award of this Commission.

Part I – Fundamental considerations

Regulating place of work – Constitutional prohibition

[13.5] Creighton and Stewart, characterise the Constitutional powers underpinning the award making powers of this Commission as follows:

[403] Section 51(35) of the Constitution empowers the Commonwealth Parliament to make laws with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”. This form of words means the Commonwealth cannot legislate directly on the subject of industrial disputes, much less set minimum legislative standards on matters such as wages, occupational health and safety or job security. Instead it empowers the Commonwealth to establish the machinery to facilitate the prevention and settlement of certain types of industrial dispute by conciliation and arbitration.

...

[405] A further limitation inherent in the wording of s.51(35) is that there are many disputes that cannot be brought within the purview of the Commonwealth system: for example, those that are not “industrial” in character or which do not extend “beyond the limits of any one State”.²

[13.6] This goes the heart of the first primary issue raised by the ACTU’s claim to regulate the place at which work is undertaken.

[13.7] There are a myriad of matters upon which it is possible for employers and employees to be in dispute or disagree over, perhaps limited only by the imagination. However, as a matter of Constitutional construction and interpretation, only a limited subset of these matters can ever be the subject of regulation through the Australian Parliament, the *Workplace Relations Act 1996*, and ultimately through federal awards of this Commission. It is an unfortunate reality for the ACTU and proponents of various regulatory propositions that:

- a. Not every claim or labour market intervention it can conceive of can actually be included in awards of the Commission.
- b. Not every example of international regulation can be imported into Australian employment regulation.

² Creighton, B. and Stewart, A. (1994) *Labour Law: An Introduction*, 2nd ed, Federation Press, pp.56-57 – emphasis added

Regulating the location of work is not an industrial matter

[13.8] Disputes must be industrial in character to attract the jurisdiction of the Australian Parliament and of this Commission. As Creighton and Stewart state:

[425] The term “industrial” has spawned an extraordinary amount of litigation over the years...³

[13.9] There was a mixed and evolving passage of precedent throughout the 20th Century on what an industrial matter encompassed, and there is ongoing debate to this day. A comparatively recent and clear statement of the approach to this issue is found in the *Manufacturing Grocers’ Case*:

A matter must be connected with the relationship between an employer in his capacity as an employer and employee in his capacity as an employee in a way which is direct and not merely consequential.⁴

[13.10] In *Kelly*⁵, the High Court held that the trading hours of an employers were not an industrial matter which could be the subject of award regulation. This was confirmed in *Cram*⁶. This followed significantly earlier precedent declining to regulate shop trading hours through awards, at which time it was stated that:

If once we begin to introduce and include [in the scope of the Act] matters indirectly affecting the work in the industry, it becomes very difficult to draw any line so as to prevent the power of the arbitration [Commission] from being extended to the regulation and control of businesses and industries in every part.⁷

[13.11] Creighton and Stewart describe the current⁸ state of the law in the following terms:

...it seems that “trading” decisions remain outside the scope of the Commission’s jurisdiction: not because they happen at a given moment to be matters of “managerial prerogative”, but because they cannot be directly characterised as “employment” decisions. The same may be true for any business decisions (such as those relating to investment or product development, for instance) which have an obvious though indirect effect on jobs.⁹

[13.12] In *Cocks*, Barwick CJ stated that:

³ Creighton, B. and Stewart, A. (1994) *Labour Law: An Introduction*, 2nd ed, Federation Press, p.65

⁴ Re *Manufacturing Grocers Employees Federation*; ex parte *Australian Chamber of Manufacturers* (1986) 160 CLR 341 at 353.

⁵ *R v Kelly*; ex parte *Victoria* (1950) 81 CLR 64

⁶ Re *Cram*; ex parte *NSW Colliery Proprietors Association Ltd* (1987) 163 CLR 117.

⁷ *Clancy v Butchers Shop Employees Union* (1904) 1 CLR 181

⁸ ACCI knows of no cases at this stage after 1994 which overturn these decisions.

⁹ Creighton, B. and Stewart, A. (1994) *Labour Law: An Introduction*, 2nd ed, Federation Press, p.68

It is as well to remember that it is not every dispute between employers and employees in an industry which constitutes an industrial dispute within the meaning of the Act; it must be a dispute as to an industrial matter or industrial matters as defined and the subject matter of a dispute will not become an industrial matter simply because employers and employees are sufficiently interested in it to dispute about it.

Disputes may, of course, arise between employers and employees with respect to any practice in an industry but the Act does not commit to the Commission authority to regulate generally the manner in which industry shall be carried on; its authority is limited to regulating the relationship of master and servant in the industry and matters which are truly incidental to that relationship.¹⁰

[13.13] In *Federated Clerks' Union v Victorian Employers' Federation*¹¹, Gibbs C.J. stated that:

Cases decided on a variety of statutes, Commonwealth and State, indicate that the word "industrial" in such expressions as "industrial matter" or "industrial dispute" refers to relations between employers and employees as such, and that a demand will give rise to an industrial dispute only if there is a relevant connexion between what is demanded and the relationship of employer and employee: *Mutual Life and Citizens' Assurance Co. Ltd. v. Attorney-General (Q.)* (1961) 106 CLR 48, at p 58; *Reg. v. Portus*; *Ex parte A.N.Z. Banking Group Ltd.*, at pp 365, 371 and *Reg. v. Booth*; *Ex parte Administrative and Clerical Officers' Association* (1978) 141 CLR 257, at pp 263-264.

Those cases express what is in my opinion the essence of the ordinary notion of an industrial dispute, viz., that it is a dispute arising out of or relating to the relationship between employers and employees as such. As Stephen J. said in *Reg. v. Portus*; *Ex parte A.N.Z. Banking Group Ltd.*, at p 371: "*The matter demanded must always pertain to the employer-employee relationship so that the subject matter of demands by either party which are, for example, of a political or social or managerial nature will not be industrial matters.*" The distinction between, for example, a political dispute and an industrial dispute is easily recognized, even when the disputants are employer and employees. Where the dispute is as to a matter of management, the line may be more difficult to draw.

[13.14] Conclusion: ACCI does not believe the ACTU claim to regulate the location at which work is undertaken is in fact an industrial matter which may be included in awards of this Commission. It cannot be characterised as a matter which pertains to the direct relationship between an employer and an employee in their capacity as such. The mere fact that proposed regulation intersects employment in some general or incidental fashion is not, on a proper application of federal Constitutional powers a sufficient basis to invoke the Commission's jurisdiction.

¹⁰ Reg. V. Commonwealth Industrial Court Judges; ex parte Cocks [1968] HCA 86; (1968) 121 CLR 313 (23 December 1968)

¹¹ *Federated Clerks' Union v Victorian Employers' Federation* (1984) 154 CLR 472, at 481.

[13.15] The test of directness to the employment relationship and the precedent which has been established by the High Court in adopting a strict approach to the federal Constitutional power remains the basis for delineating which possible union claims are and are not industrial matters capable of being included in awards of this Commission.

[13.16] The location of work and workplaces, and the staffing levels and profiles of particular workplaces are fundamentally determinations of a commercial and operational, rather than employment nature.

Conclusion

[13.17] The ACTU contend that:

- 1.4 The ACTU Applications relate to industrial matters pertaining to the relationship between an employer and a group of employees. The elements of the application are allowable matters or are incidental and necessary for the effective operation of the awards.¹²

[13.18] This appears to be a specific contention that the ACTU's claim for a new and novel regulation of the place at which employees are employed is an industrial matter which can constitutionally, as a matter of power, be included in an award of this Commission.

[13.19] In advancing its claim, the ACTU provided nothing but this bald contention – apparently as a statement of faith.

[13.20] The Commission now has before it the preceding substantial set of reply considerations from ACCI in contention form. To be clear, the Commission now has before it clear grounds to conclude that the ACTU prescription claimed cannot be awarded, regardless of any consideration of merit and other arguments.

[13.21] ACCI specifically contends that the ACTU claim to regulate the location of employment is not an industrial matter and cannot be included in awards of this Commission made under the *Workplace Relations Act 1996*.

[13.22] Creighton, Ford and Mitchell state quite clearly the consequences of a finding that any claim does not relate to an industrial matter:

¹² ACTU First Written Outline of Contentions, 30 April 2004, p.5 – emphasis added

Of course the characterisation of a matter as non-industrial does little to prevent employers and employees from disputing about it. What it means, however, is that since (in theory at least) the Commission is thereby denied authority to conciliate or arbitrate the disagreement; the parties have to try to resolve the issue themselves.¹³

[13.23] Since this was published in 1993, there has of course been a decade's evolution in the bargaining system. In today's system, a lack of capacity to secure an arbitrated outcome does not carry the consequences it arguably once did.

[13.24] Employees, employers and unions are in ongoing negotiating relationships where the system of collective and individual bargaining is able – indeed given statutory authority – to be used to address all aspects of the employment relationship (and indeed other matters, within legal constraints).

[13.25] The role of arbitrated awards under the schema determined by our Parliament reflected in the *Workplace Relations Act 1996* is fundamentally different. Awards are to operate as a safety net only, and in respect of minimum conditions only that are necessary for the safety net to be fair and enforceable. A clear distinction is drawn in the statute between matters regulated (or capable of being regulated) by agreements on the one hand and awards of the other.

[13.26] Even if the ACTU claim were capable in being reflected in agreements, and even if there were agreements that did so, it is not a proper application of the statute to simply reflect in awards subject matters that one finds in agreements merely by virtue of the fact that a cohort of employees in the labour force remain solely employed under awards and common law contracts rather than registered agreements.

[13.27] It is also appropriate to note the link between these difficulties and the links to UK law examined in the preceding section. The ACTU claim suffers fundamental inconsistencies with Australia's federal and constitutionally based legal system and the legal capacities for award regulation in Australia, precisely because it is a direct product of policy development which comes from another fundamentally different legal system (the UK system and its EU obligations). These problems demonstrate precisely the difficulties inherent in simplistic

¹³ ACTU Creighton, B., Ford, W. and Mitchell, R. (1993) *Labour Law: Text and Materials*, 2nd ed, The Law Book Co, [18.32], p.493

assumptions of transplant-ability between national systems of labour market regulation.

Regulating place of work – Not allowable

[13.28] The ACTU also contends that:

- 1.4 The ACTU Applications relate to industrial matters pertaining to the relationship between an employer and a group of employees. The elements of the application are allowable matters or are incidental and necessary for the effective operation of the awards.¹⁴

[13.29] That is, the ACTU very specifically asserts that its claim to regulate the place of employment is either an allowable matter in its own right or is incidental to an allowable matter and necessary for the operation of an award. It appears that the ACTU is arguing each of its claims is either a matter directly allowable under s.89A(2) of the *Workplace Relations Act 1996*, or an ‘Incidental Award Provision’ under s.89A(6) of the Act. On the ACTU’s own conception, if any ACTU claim failed these tests, then the Commission would not be able to include it in an award.

[13.30] ACCI has examined s.89A(2) in detail, and various decisions relating to allowable matters. ACCI cannot reconcile this claim, nor the additional regulation sought, with any of the allowable matters prescribed in the *Workplace Relations Act 1996*.

[13.31] Specifically:

- a. This is not a claim regarding remuneration, reward, or allowances: This excludes s.89A(2)(a), (c), (d), (j), (k), (l), and (t).
- b. This is not a claim regarding superannuation or types of employment: This excludes s.89A(2)(r) and (s).
- c. This is not a claim regarding leave or paid absence from work: This excludes s.89A(2)(e), (f), (g), (h), (i), and (q).
- d. This is not a claim regarding termination of employment or stand-down: This excludes s.89A(2)(m), (n), and (o).

¹⁴ ACTU First Written Outline of Contentions, 30 April 2004, p.5 – emphasis added

[13.32] Completing the preceding list, there is only one remaining allowable matter under s.89A(2) to consider:

- s.89A(2)(b) ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;

[13.33] As with each of the allowable matters, s.89A(2)(b) is framed in very specific terms. Each of the like areas of employment regulation listed in the paragraph relates to the temporal time at which work is undertaken and the times of rest periods.

- a. There is no legitimate scope for extrapolation to any inconsistent and fundamentally unlinked consideration, such as a regulation of the location of work.
- b. It would be unsustainable and illegitimate to interpret a very specific list of temporal time and hours matters to extend to the regulation of fundamentally non-temporal, physical considerations such as the location of the workplace.

Inconsistent with precedent on allowability

[13.34] The ACTU claim of allowability for this essentially unknown proposition also appears inconsistent with what we know about the allowable matters schema and this Commission's interpretation of it since 1997.

[13.35] In the 1997 *Award Simplification Test Case* decision¹⁵, the Commission determined the following approach to the allowable matters set out in s.89A(2) of the *Workplace Relations Act 1996*:

In construing the list of allowable award matters contained in s.89A we have adopted the approach taken by the Full Bench in the Commonwealth Bank of Australia Officers Award Case (CBAOA Case)¹⁶:

"The list of allowable award matters is comprised of concepts of particular kinds of award benefits and conditions of employment. The construction of Section 89A(2) demands that each concept be given a meaning consistent with the use of the concepts in industrial relations practice in Australia. In its context, section 89A is not a provision for which there is a need for either a restrictive or a generous construction. The terms in it are to be given their ordinary meaning in regard to industrial relations usage.

¹⁵ (1997) Award Simplification Test Case Decision, [Print P7500]

¹⁶ [Print P1297]

Most of the allowable award matters listed are industrial concepts formulated around entitlements and conditions of employment ubiquitously the subject of award provisions in State and Federal industrial jurisdictions. Even within the standard award concepts, the formulation of an award provision covering employment entitlements and conditions has long allowed room for craft and drafting skills. Conceivably, some conditions of employment could be formulated in sufficiently various ways to bring the conditions within one, another, or more than one of the allowable award matters. The categories of allowable award matters are not mutually exclusive. However it is generally the case that established award provisions are of a sufficiently standard content and form to be identifiable as coming within one or occasionally, more of the allowable award categories, or as not coming within the category at all."

[13.36] We see then that:

- a. The concepts in s.89A(2) must be given a meaning consistent with the use of the concepts in industrial relations practice in Australia.
- b. Section 89A is not a provision for which there is a need for either a restrictive or a generous construction.
- c. The terms in (s.89A(2)) are to be given their ordinary meaning in regard to industrial relations usage.

Ordinary meaning and industrial relations usage

[13.37] This consideration further precludes reconciling the regulation of location of employment with the allowable matters, and with s.89A(2)(b) in particular (if that is the provision the ACTU sought to rely on).

[13.38] "Ordinary time hours of work", "the times within which they are performed", "rest breaks", "notice periods" and "variations to working hours" are all clearly matters which have a firm industrial relations meaning and usage in Australia.

[13.39] These industrial concepts have been known for decades, were clearly known (and known to Parliament) at the time of the passage of the *Workplace Relations and Other Legislation Amendment Act 1996*, and had clear industrial meanings at the time of the 1996 reforms.

[13.40] The key to the 'ordinary meaning' and 'industrial relations usage' of these terms is that they relate to temporal and timing issues in employment. – There is nothing in this clear and well understood meaning which extends working time regulation to the location of work.

[13.41] ACCI will not put forward dictionary and documentary material in support of this very clear point, but certainly can do so if required.

[13.42] Any contrived construction of these words which purported to extend to the location of work would be inconsistent with their ordinary meaning and industrial relations usage.

[13.43] Had Parliament wanted to allow the inclusion of the regulation of the place of work in awards it could have attempted to¹⁷:

- a. Include an additional specific allowable matter to that effect in s.89A(2).
- b. Include some reference to regulating the place of employment in one of the existing allowable matters.

[13.44] Parliament did not do this, further indicating that it was not intended that there be scope for award regulation of the location of work.

Decisions on allowable matters under s.89A(2)(a)

[13.45] ACCI contends that none of the allowable matters, including in particular s.89A(2)(a), can be used to render allowable the regulation of the location of employment.

[13.46] Further support for this is found in the decisions of the Commission since 1997 on the simplification of awards.

[13.47] The *Award Simplification Test Case* decision contained an appendix listing each of the allowable matters and the award clauses able to be included in awards under each.¹⁸ For s.89A(2)(b), this list is as follows:

s.89A(2)(b) *Ordinary time hours of work and the times which in which they are performed, rest breaks, notice periods, and variations to working hours:*

- span of hours attracting ordinary time payment and any exemptions for particular classifications or type of employee;
- the number of hours in a time span/s (e.g. weekly, monthly or shift arrangements) which attract ordinary time payment;
- maximum daily hours attracting ordinary time payment;

¹⁷ Although it may well have lacked the constitutional power and been challenged.

¹⁸ (1997) Award Simplification Test Case Decision, [Print P7500], Attachment D.

- notification of hours/rosters and provisions to change hours/ rosters;
- provision for rostered days off;
- make up time arrangements;
- provision for meal breaks, minimum length of meal breaks and penalty arrangements to apply in the absence of a meal break;
- rest breaks (i.e. during ordinary time hours), crib breaks (i.e. during overtime) and breaks between shifts;
- payment for waiting time where employees are paid their wages at any time other than during their working time.

[13.48] There is nothing in this list, nor in the attachments to the *Award Simplification Test Case* decision more generally to support an extrapolation of s.89A(2)(b), or any other allowable matter to regulate the location of work. ACCI also knows of nothing in subsequent decisions of the Commission to support such a view.

[13.49] Indeed an examination of the matters excluded from awards as non-allowable (through the *Award Simplification Test Case* and subsequent decisions) shows that those which could even at the greatest stretch be obliquely and tenuously linked to locational issues, were removed from awards (e.g. pre 1997 award regulation of amenities, standards of accommodation¹⁹).

Conclusion

[13.50] The only nexus between hours of work and the place of work is that created by the ACTU in designing its claim. It is the ACTU that has framed its clause in the terms of a “Right to Request Variation in Hours or Place of Work” – in an attempt to replicate the UK approach.

[13.51] ACCI can see no linkage between the claim to regulate the place of work and the established allowability of traditional award hours of work provisions (i.e. spans of ordinary hours provisions, starting and finishing times, meal and rest periods etc).

[13.52] Paragraph 89A(2)(b) of the *Workplace Relations Act 1996* offers no scope to render allowable an award provision regulating the place of work – it does nothing to advance the ACTU claim.

Regulating place of work – Not incidental and necessary

[13.53] The ACTU further contend in the alternative, as an apparent exercise in strategic prudence, that if any of its claims are not allowable, they must be incidental to one or more of the allowable matters and necessary for the operation of awards.²⁰

[13.54] Whilst this may be a prudent strategy, and may be an accurate summation of the requirements for matters to actually be included in contemporary awards, it does nothing to actually advance the ACTU claim to regulate the location of work in Australia for the first time.

[13.55] At this stage the ACTU's contentions in regard to s.89A(6) of the *Workplace Relations Act 1996* are mere recitation. If the ACTU cannot show that its claim to regulate the place of employment through awards is allowable, it will have an even more difficult time in showing:

- a. That is incidental to the operation of any one of these hours of work, AND
- b. That it is necessary for the effective operation of each award.

Necessary for the effective operation of each award

[13.56] Subsection 89A(6) of the *Workplace Relations Act 1996* is in the following form:

- (6) The Commission may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award.

[13.57] Commission decisions²¹: The Commission has provided very clear guidance on what s.89A(6) means and how it is to be applied:

Thirdly, the WR Act itself, in s.89A(6), establishes the limits of the category. That subsection makes it clear that the matters specified in s.89A(2) are not to be expanded, but that an award provision which is incidental to one of the matters is permitted, provided it is also necessary for the effective operation of the award. The State of New South Wales, supported by the LTU and the ACTU, submitted that the implied incidental power is not restricted to that which is "necessary or essential" for the effective operation of the express

¹⁹ (1997) Award Simplification Test Case Decision, [Print P7500], Attachment E.

²⁰ ACTU First Written Outline of Contentions, 30 April 2004, p.5

²¹ Various characterisations in this sub-section primarily relate to the 1997 Award Simplification Test Case Decision unless indicated otherwise.

power. It cited authorities (to which we have already referred) concerning the construction of various grants of power in s.51 of the Constitution in support of that proposition. It went on to submit that, even if s.89A(6) is more restrictive than the implied incidental power, the implied incidental power is still available.

We do not accept these submissions. We have already pointed out the difference in character between a constitutional grant of power and the specification of allowable award matters. In addition, it is impossible to construe s.89A(6) by resort to an implied power which is inconsistent with the clear words of that subsection. In enacting s.89A(6), the legislature has given direct guidance on the extent to which the Commission may make provisions extending beyond the subject matters specified in s.89A(2). We see no reason to depart from the language of the statute, as explained in the CBAOA Case [cited above], and limited by s.89A(6).

The employers submitted that s.89A(6) should be construed as conferring a power analogous to the power given to a Court to imply a term into a written contract. The principles governing the implication of contractual terms are founded upon the need to complete the agreement between the parties where there is an evident and significant gap in the terms of their contract. The Court puts itself in the position of the contracting parties for this purpose.

We do not see how these principles can assist in the application of s.89A(6) which, as we have already said, is in clear terms. Substitution for those clear terms of tests for the implication of contractual terms which would require application in each case has the potential to distract attention from the statutory test and lead the Commission into error in its application.²²

[13.58] The Commission has applied s.89A(6) to retain provisions relating to indexes and arrangement clauses, record keeping, and deduction from wages provisions²³, amongst other things.

[13.59] Consideration of s.89A(6) has also led to the deletion of pre-1997 sexual harassment provisions, requirements to provide a first aid kit, and preference in regard to overtime.

[13.60] Adventurous constructions of the incidental and necessary concept have specifically been rejected by the Commission.

[13.61] Statutory guidance: ACCI can also see no basis in the Explanatory Memoranda to the *Workplace Relations and Other Legislation Amendment Act 1996* or the associated speeches during the passage of these reforms through Parliament for so adventurous a construction of s.89A(6) as would be necessary to sustain the ACTU clause as claimed.

²² [P7500], Award Simplification Decision, December 1997

²³ Found to be incidental to s.89A(2)(c).

[13.62] History is not on the ACTU's side: Without being flippant, a quick consideration of history must dictate that the ACTU's claim is not "necessary" for the effective operation of awards. Thousands of awards have been made and operated across a century without the regulation now sought by the ACTU – thus illustrating these are not necessary provisions for the operation of the award.

[13.63] Conclusion: ACCI can see no way in which a new substantive provision, and a clear new set of obligations upon employers is in any way necessary (i.e. fundamental, unavoidable and essential) for the operation of any award. This is not an index, is not a mechanical provision and it does not support in any way any existing provision of an award. This is a claim for a new, stand-alone, very substantial obligation upon employers – as such it should be capable of being reconciled with one or more of the items in s.89A(2), or it should not be able to be included in awards.

[13.64] In considering what may be "incidental and necessary for the operation of awards" one must consider the statutory role of awards. As discussed above, the statutory role of awards is as a safety net only and of minimum conditions only. What is incidental and necessary can only be so if it is of the same character and consistent with this role. It would not be proper at law, nor on merit, for the Commission to insert in an award a provision on the basis that it is incidental and necessary if it had a character beyond that of a genuine minimum safety net condition of employment.

[13.65] Further, what is incidental and necessary under s.89A(6), properly applied can only relate to matters of process or procedure and not extend to the creation or regulation of new substantive rights and obligations able to be reconciled with one or more of the allowable matters set out in s.89A(2).

Incidental

[13.66] This then leaves the ACTU to rely upon the first tranche of s.89A(6), i.e. that a particular award provision is incidental to one or more of the list of allowable award matters set out in s.89A(2).

[13.67] For the reasons set out in the preceding section on allowability, ACCI can see no nexus between the prescription sought and any one of the allowable matters listed in s.89A(2).

[13.68] It is for the ACTU to now identify which of the allowable matters it claims its prescription is incidental to, and precisely how it is incidental to such an allowable matter. In the absence of such an indication and genuine support for its claim, the ACTU should not be considered to actually be pursuing any claim under s.89A(6).

Conclusion:

[13.69] To be clear, in addition to arguing that the claim to regulate the place at which work occurs is not allowable, ACCI can see no basis to conclude that it is incidental to any allowable matter, nor that it is essential to the operation of any award (and it would need to be both to have a hope of being retained).

[13.70] The ACTU must satisfy the Commission in regard to this, and must put up (and have tested) a considerably more detailed argument/extrapolation of the basis upon which it makes its contention at paragraph 1.4 in regard to its claim to regulate the location of work. In the absence of such argument, and such argument withstanding scrutiny and counterargument, this claim must further be excluded.

Statutory considerations weigh against this claim

[13.71] The ACTU claim to regulate the place at which work is undertaken must also be assessed in its statutory context, with regard to all relevant elements of the *Workplace Relations Act 1996*.

[13.72] We have already set out the basis on which the Commission should conclude this is not an allowable matter, and cannot properly be included in an award of this Commission. However there are other statutory considerations which should preclude the variation of awards as proposed by the ACTU:

Section 143 considerations

[13.73] In the preceding section we contended that the process for employees to request a variation in the times at which work is undertaken was at odds with various elements s.143 of the *Workplace Relations Act 1996*, and in particular was a matter of detail or process more appropriately dealt with by agreement at the workplace or enterprise level.

[13.74] It is not necessary to repeat this material in full in this section as the ACTU claim would deliver employee autocracy over both the time and place of work via a single clause. It is sufficient to simply state that – each of the objections made on a statutory basis to the proposed regulation of the times of work stands in relation to the location of work.

Not a safety net

[13.75] The ACTU must also satisfy that Commission that its proposed new award obligation upon employers is consistent with the contemporary role of awards as a safety net under the *Workplace Relations Act 1996*, and further that it is not a matter which can be progressed through bargaining.

[13.76] This is not optional - nor is it discretionary. The ACTU must clear this hurdle to even begin to have its claim considered (along with all the other hurdles identified in this chapter).

[13.77] It would appear to ACCI that this ACTU claim is precisely the type of matter which should be subject to bargaining rather than award regulation, and that bargaining offers the best prospect for employers and employees (whilst they are still employed and where they determine that this should be addressed) to agree arrangements which are suited to their needs and priorities.

[13.78] ACCI is unaware of action “in the field” from unions in pursuit of such a right to vary the place of work through bargaining which have been unsuccessful.

[13.79] One would presume that if the ACTU is so familiar with UK approaches that it can replicate them in a major national award claim, then ACTU affiliated unions could also take these models and pursue them through bargaining.

[13.80] ACCI understands that there are substantial international links between the ACTU and its UK counterpart, and substantial links between Australian and UK unions at an industry level. The UK working time models should reasonably have been known to Australian unions for some time – and the Commission is entitled to consider why these claims have not been pursued through bargaining.

[13.81] ACCI has nothing to conclude that this has occurred. ACCI is unaware of action “in the field” from unions in pursuit of such a right to vary the place of work through bargaining which have been unsuccessful. In the absence of the ACTU providing information to the contrary, it must be concluded that:

- a. There is no evidence that this claim cannot be successfully pursued through bargaining.
- b. This is not in fact a demonstrated priority for employees in Australian workplaces.

[13.82] This is an important consideration. The Commission has itself in its most recent Safety Net Wages decision underlined the extent to which in its view the making and variation of the award safety net under the *Workplace Relations Act 1996* is a function of a proven incapacity to bargain:

[10] ...no one would suggest that all employees are capable of bargaining. Bargaining is not a practical possibility for employees who have no bargaining power. It is to be inferred from the statutory scheme that the award safety net should be adjusted with the interests of these employees in mind...²⁴

[13.83] The ACTU has done nothing to satisfy the Commission that its members have been unable to secure the outcomes proposed in this case in the field through workplace bargaining.

²⁴ Safety Net Review Wages Decision - May 2004, Full Bench Statement, [10], pp.10-11

Part II – ACTU Evidence

[13.84] The preceding sections have outlined the extent to which regulation of the location of work is not and cannot be part of the Australian system. The remaining parts of this section address the contentions the ACTU has advanced in support of its claim, and a range of additional practical and merit considerations which should further lead to this claim being dismissed

Introduction

[13.85] ACCI may have misunderstood the design of the ACTU's first outline of contentions, but the only paragraph appearing in specific support of the claim to regulate the location of work is the following:

- 5.31 Re-arranging the location of work is helpful to employees. In 2002, 9 per cent of fathers and 18 per cent of mothers said they work from home. Work from home is a common flexibility employed over school holidays. For other employees a change in the location of work can assist with the management of childcare and school opening hours. Travel time and cost can be a barrier to employment. The ACTU claims for change in the location of work is not confined to home based work, but also envisages employees transferring to other work-sites operated by their employer. [See Qu, (2003) ACTU I, p 563-566, Gregory et al (2003) ACTU II, p 285-297 at p 294, Witness statement of Patricia Jack].

Qu²⁵

[13.86] ACCI has examined Qu's paper upon which the ACTU seek to rely. Various key conclusions may be drawn from the Qu paper which do nothing to assist the claim from the ACTU to regulate the location of work:

- a. This is a secondary analysis of the HILDA dataset with the primary purpose of examining and describing school holiday care arrangements. It is not analytical and does not examination causation, employee or child preferences.
- b. Parents in a variety of familial circumstances are finding ways to have children cared for over the holidays. Families are inventive, and ways are being found as they always have been to meet family commitments. It was ever thus – and this does nothing to assist the ACTU claim.

²⁵ Qu, (2003) ACTU I, p 563-566

- c. Implicit in the ACTU argument is a normative value judgement against vacation care, sibling care and care by relatives. ACCI can see nothing in the ACTU materials to support such a conclusion and it is not for an industrial body, nor indeed we as industrial parties, to make value judgements about pedagogy, childhood development and welfare.

[13.87] Qu observes *“The opportunity to work from home would typically enable parents to be available for their children during school holidays”*²⁶. However, when this extract is viewed in its proper context:

- a. This is a descriptive rather than normative statement. The paragraph from which it is drawn merely describes the child care arrangements of differing family structures. In a sense this is tautological – of course parents that are present in the home are more likely to care for their children – this is obvious. What it does not do is advance a claim that more parents should on balance gain an autonomous right to structure their work in favour of this outcome.
- b. There is no opinion or preference data in the Qu paper. As observed above, we only know how parents are meeting school holiday child care, not whether they are satisfied with this, nor whether it is in the interests of the children, nor what the children think of this.
- c. The purely descriptive nature of the paper is made very clear by Qu in her conclusion. She identifies various key questions which are raised by her descriptive recitation of material from the HILDA data set – including the impact of care arrangements on children’s development and well being, and on families – but she is very clear that her article does not examine these considerations.²⁷

[13.88] This is an issue for our governments and the community: Importantly the main negative impression which may be drawn from the Qu paper (if any such conclusions may be drawn from this essentially descriptive work) is the extent to which the capacity to have children cared for during school holidays is a function of the availability of State and community provided after and extra school caring.

²⁶ Qu, (2003) ACTU I, p 563-566, at 565

²⁷ Qu, (2003) ACTU I, p 563-566, at 566

[13.89] Qu observes:

(The incidence of children looking after themselves / siblings) may reflect inadequate access to suitable sources of non-parental sources of care.²⁸

[13.90] This is an issue for the government and our community as a whole. Governments fund and facilitate after school and school holiday care. To the extent that they do not do so, or to which there is a paucity of such services – this is an issue for the political process and for pressure on governments. Qu herself concludes that ‘what is available’ is and may remain the key determinant of school holiday care²⁹.

[13.91] As with so many claims which come before the Commission, the fundamental point must again be made in response to the ACTU – it is not legitimate to seek to make imposts on the finances and operations of employers to redress what you may perceive to be governmental and social safety net failures. Changes to the social safety net and social spending are issues for the political process, not for employers and not for awards regulating employment.

[13.92] Chopping and Changing For School Holidays: There is another more fundamental point raised by this claim, and the link to school holidays – the ACTU specifically mention school holiday care priorities for employees and cite the Qu paper in support of this. Is it the ACTU’s claim that the right to vary the place of work is something which an employee could access as an implied right for each school holiday period, and then swap back to their contracted location of work for other periods (such as for example an implied right to work from the home during the school holidays and to swap into and out of the workplace throughout the year)?

[13.93] An examination of school holiday dates in Victoria for example would lead to the following work pattern in any single calendar year.

Home:	1 Jan – 28 Jan
Contracted location:	Term 1: 29 Jan - 2 Apr
Home:	3 Apr – 20 April
Contracted location:	Term 2: 19 April - 25 June

²⁸ Qu, (2003) ACTU I, p 563-566, at 566

²⁹ Qu, (2003) ACTU I, p 563-566, at 566

Home:	26 Jun – 11 July
Contracted location:	Term 3: 12 July - 17 Sep
Home:	18 Sep – 3 Oct
Contracted location:	Term 4: 4 Oct - 17 Dec
Home:	18 Dec– 31 Dec

[13.94] This would amount to 8 separate changes of employee working location during any calendar year.

[13.95] Is it the ACTU's claim that employees should assume an implied right to work from home or from a location that suits them, when it suits them?

[13.96] This is yet another example of the ACTU claim ignoring the checks and balances upon which the UK was able to erect its right to request approach. In the UK there is a specific prohibition on second or subsequent requests being made within a 12 month period³⁰. It is also very clear from the UK approach that any variation of the contracted time and location of work must be an ongoing one, and not something which chops backward and forward at the employee's discretion multiple times during the year.

Gregory et al

[13.97] The Gregory paper is an analysis of data from the Family and Community Services to report on the characteristics of persons in receipt of parenting payments and family tax benefits.

[13.98] The relevance of this research to the ACTU contentions should be properly understood. The paper contains at best a couple of "throw away lines" on the location of work – and certainly no empirical or data based assessment of the importance of this issue to the over 2400 survey respondents. It is a paper about welfare policy settings – not about the working locations of Australian parents. This is neatly illustrated by examining the '*Summary and Policy Implications*'³¹ at the conclusion of the paper – all of which centre on government policy settings and policy challenges in the area of social security and parenting payments.

³⁰ Employment Act 2002 (UK), s.80F(4)

³¹ Gregory, A., Ganley, R. and Mostafa, M. (2003) Balancing Work and Family – The Experiences of Low Income Parents, FACS Paper, ACTU II, pp.285-297, at 296-297

[13.99] Transport difficulties: There is a single line reference in the paper to transport difficulties³², with no indication of the pervasiveness or representativeness of such a concern to respondents – in reality this appears a highly marginal consideration for respondents. This also appears to be concern of parents looking for work rather than those in work. Again:

- a. Employers cannot be responsible for the costs of transport, the paucity of public transport in some areas etc. This is not a matter for employer determination – it is a matter for governments.
- b. Employers cannot be responsible for the socio demographic profile of Australian cities. If there is a mismatch between where the least expensive housing is, and where job opportunities are in our cities – employers cannot control this. More importantly – employers cannot move the jobs from where they are required to where they are not required – this is unrealistic and would be highly damaging.

[13.100] Parents want money as much as time: Interestingly, the Gregory paper underscores one of ACCI’s core contentions – that there is a diversity of family preferences and that some families prioritise additional money over additional time and locational flexibility. Of the minority of respondents who were not happy with their hours of work, most wanted more hours of work to earn more money³³.

[13.101] Access to high paying employment: The following statement is reported on p.293:

‘All the high paying jobs are in the city...and it was costing a fortune in travel costs, in care. There’s no high paying jobs in my local area.’

[13.102] This does nothing to assist the ACTU claim:

- a. The ACTU claim is to gain a right to move one’s job, with ones employer to a location which suits the employee. This is a shift in the same job – on the same remuneration. This would do nothing to deliver greater access to higher paying jobs – indeed there have periodically been concerns that

³² Gregory, A., Ganley, R. and Mostafa, M. (2003) Balancing Work and Family – The Experiences of Low Income Parents, FACS Paper, ACTU II, pp.285-297, at 294

³³ Gregory, A., Ganley, R. and Mostafa, M. (2003) Balancing Work and Family – The Experiences of Low Income Parents, FACS Paper, ACTU II, pp.285-297, at 289

removing women from the workplace in favour of working from home can lead to disengagement and a reduction in promotional opportunities.

- b. Taking the example of Ms Jack – whether she works in a Red Rooster in the wealthiest area of Sydney or in one of the poorest, there is likely to be little or no earnings differential.
- c. Whatever the outcome of this case, or of anything we do in this jurisdiction, we cannot fundamentally reengineer the socio-demographic nature of Australia’s cities and regions. Nothing in this claim could for example reverse the gentrification of Australia’s inner city areas.

[13.103] A government and community consideration: Properly assessed, the Gregory paper underscores the extent to which the central determinant of outcomes in this area is the government, the levels of payments it provides and the rules, procedures and conditions attached to benefits, payments and support. There are also comments about the cost of child care – another issue for government not employers (and one where government has changed policy after the data/opinions were gathered for the Gregory paper). The conclusion to the paper firmly posits it as an exercise in social policy consideration for government – the authors state that:

A taskforce is examining how to ensure that working age people have appropriate incentives and rewards for paid work, receive adequate support to become self reliant, and have requirements and assistance tailored to their individual capacities and circumstances.³⁴

[13.104] Unreliable assertions: There are some additional unsupported assertions and opinions reported on in the Gregory paper which cannot be relied upon, including perceptions of employers attitudes to employees with child care responsibilities³⁵ and employers exercising their award rights to require a medical certificate (something for which no apology need be made³⁶). Nothing can be drawn from these unsubstantiated observations. There is no basis to conclude they are representative or common or that any conclusions could validly be based on them.

³⁴ Gregory, A., Ganley, R. and Mostafa, M. (2003) Balancing Work and Family – The Experiences of Low Income Parents, FACS Paper, ACTU II, pp.285-297, at 297

³⁵ Gregory, A., Ganley, R. and Mostafa, M. (2003) Balancing Work and Family – The Experiences of Low Income Parents, FACS Paper, ACTU II, pp.285-297, at 290

³⁶ Gregory, A., Ganley, R. and Mostafa, M. (2003) Balancing Work and Family – The Experiences of Low Income Parents, FACS Paper, ACTU II, pp.285-297, at 292

Witness evidence

[13.105] The ACTU relies on the statement of Ms Patricia Jack in support of this claim³⁷. ACCI will further consider her statement and cross examination of this evidence at the appropriate juncture of this case. This said, the relevance of her statement and conclusions which may be drawn from it are questionable – and it is clear that she is working an hours of work pattern agreed with her employer and at a location she requested.

Preliminary conclusion

[13.106] The claim to regulate the location at which work is undertaken and to deliver employees autocracy over the place at which they work, appears to be little other than a simplistic replication of the UK approach without proper consideration of its application in Australian workplace relations.

[13.107] This is reflected in the paucity of evidence able to be brought forward by the ACTU in support of this claim.

[13.108] In addition to the fundamental difficulties and considerations which should lead to this claim being rejected for want of jurisdiction and fundamental award underpinnings, there is no merit basis to consider such a massive change to employment regulation in Australia. Nothing in the evidence of Qu, Gregory or Ms Jack, when properly considered aids the ACTU in making its extremely ambitious claim to regulate the location at which people work.

³⁷ ACTU Contentions, 30 April 2004, [5.31]

Part III – What the ACTU ignores

[13.109] This outline has already examined the extent to which the ‘Right to Request’ model will not in fact operate as purported by the ACTU, and the extent to which it the clause sought yield practical and managerial difficulties in workplaces and cause more disputes.

[13.110] There are however a set of additional considerations which the ACTU ignores which are vital to the determination of this claim. These are matters which the Commission must have regard to under the *Workplace Relations Act 1996*, and the ACTU has been deficient in not presenting the Commission with a proper examination of these issues in the first instance in relation to its claim to regulate the location of employment.

Most jobs simply not suitable for home based work:

[13.111] In making an offer of employment and the employee accepting that offer of employment there is an understanding as to how and where work is to be performed.

[13.112] Indeed, in deciding whether to offer employment an employer makes an assessment of the nature of the work that needs to be done. That assessment includes the context in which the job will be performed within the broader frame work of the employers business operation and its requirements to meet client or customer demands.

[13.113] The staffing of any working location is based on a financial, operational and demand driven assessment by the employer. It also involves an employer assessing commercial risk given that an offer of employment carries risk and open ended obligations.

[13.114] Employers are entitled to offer employment where the work of an employee is able to be performed at optimum levels of productivity. Further, whether work can or cannot be performed productively from an alternative location, an employer is entitled to (and must and a matter of their commercial duties and responsibilities) decide upon the interests of its business as a whole.

[13.115] An employee working from home may in some circumstances may in some circumstances be able to perform productive work, however even in these situations, the absence of that employee from the workplace may impact on other crucial issues, such as: the workplace culture, the interaction and integration between management and staff and the collegiality derived from ongoing and direct face to face interaction between staff.

[13.116] It is for an employer to make judgements about these issues. Those judgements will invariably extend beyond the narrow consideration of whether work can or cannot be performed outside of the primary contracted work location.

[13.117] This recognition is sadly lacking from the clause the ACTU seeks. As ACCI understands it:

- a. A retail award would be varied to include scope to seek to work from the home – an absurdity – and employee cannot, for example, sell fried chicken out the back door cooked on her home stove for the employer.
- b. A graphic arts industry award would be varied to include scope to seek to work from the home – an absurdity – printing machines weigh tons and cost millions of dollars.

The location of jobs is a commercial and operational matter

[13.118] This is not a claim solely for home based work. It is also a claim to change the location of work more generally, including specifically to shift an employees working location from one employer operation to another more to the employee's liking.

[13.119] Consistent with the preceding:

- a. Employers determine the organisational, functional and staffing composition of their various operations based on their assessments of the commercial, operational and client requirements they are trying to meet.
- b. Employers determine the organisational, functional and staffing composition based on their familiarity with, and plans for their businesses.

- c. Employers determine the organisational, functional and staffing composition based on their appreciation of the differing cultures of their various operations.

[13.120] There are reasons why employers locate specific jobs at specific locations and indeed, this is an issue in the selection of staff for employment in these locations. This can include cultural and human resource considerations.

[13.121] Again, it is for an employer to make judgements about these issues. Those judgements will invariably extend beyond the narrow consideration of whether work can or cannot be performed outside of the primary contracted work location.

Additional costs of working from home

[13.122] The ACTU completely fails to engage the issue of any additional costs of an employee working from home. These for example could include:

- a. Necessary infrastructure for the employee to undertake her or his work from home (e.g. additional software, a dedicated additional phone line, a proper workspace, ergonomic furniture etc).
- b. Costs of additional equipment or material for the employee to work from home (e.g. a PC for the employee to work from).
- c. The costs of making the home workplace safe, and the employer meeting his/her OHS duty of care in relation to work in the employee's home. (e.g. modifications to the home).

[13.123] There are also other costs of working from home which it is in no way clear who would meet. There is wear and tare on the employee's home and personal infrastructure, the additional cost of heating and cooling an employee's house etc. Does the ACTU claim proceed on the basis this would all necessarily fall to the requesting employee? Where does the clause sought make this clear?

[13.124] Insurance: There may also be an issue with the employee's home and contents insurance. Many insurance companies levy additional insurance premiums (or indeed may refuse to insure a home entirely) if a business is being carried out from the home or if work is regularly being undertaken there. How is this to be considered/addressed?

[13.125] There may also be some issue in relation to the liabilities of an employer in regard to public liability issues which may arise. Consider for example an employee who after successfully seeking to work from home, chooses to see a client or supplier in the home who is then injured. Whose insurance would pay – the employee's or the employer's? What if the employee's insurer repudiated the claim on the basis it had no idea a commercial operation was being carried out there?

[13.126] Council restrictions: Using the home for work may also be contrary to Local Government bylaws regulating where businesses may be located, the need for permits etc.

[13.127] There may be a wide variety of other costs which may arise in individual circumstances.

[13.128] What the ACTU fails to consider: Who is to meet these costs in the ACTU's view? The employer or the employee, both, in what proportions? This is in no way made clear by the clause sought by the ACTU. Again, the clause the ACTU seeks appear to be recipe for more rather than less disputation in workplaces.

[13.129] It is also not clear that this is taken into account in the costings the ACTU seeks to rely upon in this case. If these costings ignore costs such as these their reliability more generally is questionable.

OHS Issues with working from home

[13.130] The ACTU has also completely failed to turn its mind to the Occupational Health and Safety (OHS) ramifications of an employee shifting his or her place of work from that contracted and at which work has been undertaken to date.

[13.131] Whilst there are OHS related costs in shifting to another employer work site (for example the costs of another induction and additional instruction on OHS equipment and procedures) – the primary OHS issue raised by the ACTU clause is the issue of an employee unilaterally shifting his or her work from the employer's workplace into the home.

Duty of care³⁸:

[13.132] Employers have an unavoidable OHS duty of care under State and Territory law to maintain a safe workplace for their employees and other people in the workplace. This duty of care is in no way diminished by the relocation of work for the employer into the employee's home, as the following quote from the Northern Territory government indicates:

The Northern Territory *Work Health Act* outlines the responsibilities of employers to provide and maintain a safe workplace for workers and other people (Section 29). Having workers work from their homes does not relieve employers from this duty of care. A home based worker is entitled to work in an environment that is free from risk and is eligible for workers' compensation and rehabilitation just like any other worker.

[13.133] Returning to the ACTU claim, an employer forced to relocate work into the employee's home at the employee's instigation and insistence would also pick up / maintain responsibility for OHS duties over a whole new environment.

[13.134] This is an important point. An employer may have invested considerable time, effort and capital in securing a safe workplace at the workplace. How can this be translated into other places? What about the considerable additional expense which may be replicated at these other worksites?

OHS Risk Assessment:

[13.135] Employers also have duties to undertake OHS risk assessments of the employee's home, as the following materials from the Western Australian government indicate:

Employers are required to undertake a risk assessment of the work activities carried out by homeworkers. Completing a risk assessment involves identifying the hazards relating to the homeworkers' work activities and deciding whether enough steps have been taken to prevent harm to them or to anyone else who may be affected by their work. A hazard is anything that may cause harm. A risk is the chance, great or small, that someone will be harmed by a hazard.³⁹

[13.136] This risk assessment is unavoidable and must encompass consideration of all persons / able to be affected by any hazard:

³⁸ Each State and Territory has published guidance materials for employers and employees on OHS considerations raised by the relocation of work into the employee's home. These have been used to outline this issue in this subsection.

³⁹ <http://www.safetyline.wa.gov.au/pagebin/workhazd0004.htm>

It is the duty of the employers to look at what may cause harm to their homeworkers, or other people, as a result of the work being done in the home. It may be necessary for employers to visit their homeworkers to carry out a risk assessment, although homeworkers can also help in identifying the hazards for their employers. Small hazards should not be ignored as they may result in harm, for example keeping potentially harmful substances out of the reach of children.⁴⁰

Employers must look at who may be affected by the work done at home and how they may be affected; this may include the homeworker, and members of the household, including children or visitors.

[13.137] Having determined risk – there is then the issue of making alterations at the employer's expense. Changes must be made when risks are identified.

[13.138] The key to all this is that factors which we would all consider the day to day way we run our homes may become serious OHS risks when homes become workplaces. These issues cannot be shirked or ignored the way we do in our family and homes lives – they must be acted on or work cannot proceed as a matter of strict OHS liability.

First Aid:

[13.139] In home based work, first aid in the home ceases to be an employee's personal concern and becomes the responsibility of the employer. At very least, an employer becomes responsible for the provisioning and upkeep of an employee's first aid cabinet. The question of course is what happens if this is used up without the employer's knowledge.

[13.140] Employers may also have obligations to provide medical services in the event of injury which could not be met in the employee's home.

Electrical Safety:

[13.141] If homeworkers use electrical equipment as part of their work, the employer becomes responsible for assessing whether the equipment is in safe working condition.⁴¹ NSW guidance for home work⁴² makes clear that consideration must include:

⁴⁰ <http://www.safetyline.wa.gov.au/pagebin/workhazd0004.htm>

⁴¹ <http://www.safetyline.wa.gov.au/pagebin/workhazd0004.htm>

⁴² Workcover NSW (1996) Working From Home : a guide to occupational health and safety, rehabilitation and workers compensation requirements - http://www.workcover.nsw.gov.au/NR/rdonlyres/517049FC-51E7-46CE-A616-4DC57537B2A8/0/gen_workfromhome_220.pdf

For example, is there sufficient lighting? Are exits from the work area kept clear? Does a smoke detector and/or an earth leakage protection device need to be installed in the room where the person will be working? Are there sufficient powerpoints (overloaded powerpoints are a fire hazard)?

Equipment costs?

[13.142] There is also the issue of OHS costs and compliance in relation to using equipment, as the following materials from WA indicate:

Employers who provide homeworkers with equipment to carry out their work have a duty to ensure that:

- the equipment is correct for the job being done
- proper information and training is given on how to use the equipment, so the job can be done properly and safely
- the equipment being used is checked regularly and kept in a condition that does not cause harm to the homeworker or others
- people who test the equipment or train the homeworker are suitably trained themselves, so that the correct information and training is provided.
- the machine being used has relevant protective equipment, for example a machine guard to prevent the homeworker, or anyone else, being injured when it is in use
- the necessary personal protective equipment is provided for using the work equipment safely; for example gloves are provided when working with needles
- the equipment has the right controls to allow the work to be done safely; for example the controls should be clearly marked and properly positioned
- checks on equipment are carried out safely; for example machines are switched off while being checked

Are the amenities such as the bathroom, toilet and kitchen free of hazards?

[13.143] Work breaks for coffee or to use the bathroom are considered a part of normal work and as such require safe access and facilities⁴³. So – an employer trying to meet an employee request to work from the home would need to have a suitable professional expert inspect their toilet and bathroom (at the employers expense) and presumably to make changes to it if it were in any way unsafe in a foreseeable way! This is not a flippant or frivolous consideration – it is a genuine OHS duty raised by relocating work into the employee’s home.

⁴³ <http://www.nt.gov.au/deet/worksafe/corporate/bulletins/pdf/11-15/15.01.01.pdf>

[13.144] There is also the issue of hazardous substances and chemicals in an employee's home – even where these are in no way used to undertake the employee's paid work in the home. Employers gain responsibilities concerning these chemicals as the following from a WA OHS guide shows:

If the risk assessment shows that a homeworkers' health is at risk from exposure to any hazardous substance, the employer must take appropriate action. The employer should:

- ensure that the homeworker's exposure to the substances is prevented or adequately controlled. If possible, the employer should replace the hazardous substance with a less hazardous one
- supply the homeworker with personal protective equipment, for example gloves or a mask, in addition to providing other control measures - but only in cases where other measures are insufficient, on their own, to adequately control exposure
- take all reasonable steps to ensure that the homeworker uses control measures, such as personal protective equipment, properly
- carry out any exposure monitoring, or health surveillance, that may be required
- inform, instruct and train homeworkers about the nature of the substances and materials they work with, and the risks created by exposure to those substances and materials and the precautions they should take; for example when using materials with sharp edges such as sheetmetal, tinplate or needles

[13.145] Any failure to address issues of access to and storage of hazardous substances in the "workplace" resulting in exposure to the employee, the employee's family or visitors, may render the employer liable at law.

[13.146] It appears that employers gain responsibilities for example in relation to household bleaches and cleaners which must be met for work in the home.

Safety training not transferable to the home

[13.147] There is also a genuine concern about the transferability of OHS training and employers' attempts to minimise injury and risk from the workplace into the home. As McLay⁴⁴ observes:

Current office safety programmes have reduced the number of employee injuries and illnesses to a low level. But what works in an office building does not always apply to the home environment – the home can be a hazardous place.

⁴⁴ McLay, C.J. (1998) *The Development of Work-At-Home Safety Programs*, Professional Safety, Vol.43, No.1, pp.39-41, at p.39

[13.148] A key outcome of shifting work into the home is a paucity of employer-employee contact and contacts of employees with the safety infrastructure of the workplace (including contact with personnel charged with safety responsibilities):

A key element of office safety is related to employee contact. It is useful for safety professionals to be able to discuss issues and concerns face-to-face with employees. Most importantly, conventional hazard assessment relies on what can be seen...the telecommuters workplace cannot be seen. This creates a unique situation for management and safety professionals.⁴⁵

[13.149] The point is that an employee unilaterally transferring their work out of the workplace into their home is taking work for which the employer is responsible through a statutory duty of care out of the environment in which the employer has endeavoured to control and meet that duty of care. The work is being removed from the infrastructure through which the employer has sought to secure particular OHS outcomes.

Additional OHS Costs

[13.150] Such considerations add up to more costs to the employer.

- a. There appear to be a range of safety considerations that must be properly assessed (and such an assessment costs employers money to undertake).
- b. Any deficiencies or potential hazards or risks must be acted on/eliminated to ensure a safe workplace within the home (for example, employees being forced to fund modifications and adjustments of the employee's home).
- c. Employers would assume liabilities in regard to employee provided equipment. An employee may be quite content to look into an ageing, flickering VDU and having their children surf the net on it – but when this becomes a tool used for an employer's gain the employer gains responsibility for it. It cannot simply be assumed that all employees can work from home using their own IT equipment – this is not the case.
- d. Importantly, economies of scale in addressing OHS costs will be lost in effectively multiplying the locations at which work is undertaken.

⁴⁵ McLay, C.J. (1998) *The Development of Work-At-Home Safety Programs*, Professional Safety, Vol.43, No.1, pp.39-41, at p.39

- i) Inspections and certifications will need to be done for multiple locations rather than single locations (for example 6 × \$300 inspections at employees' homes and a \$1000 OHS inspection of head office, will cost more than inspecting the head office inspection alone).
 - ii) Any safety equipment will need to be purchased multiple times. Where in a single location there may only need to be a single piece of periodically used safety equipment – if work is to be spread to multiple sites, the equipment would need to be provided at multiple sites. In short – it would need to be purchased and maintained multiple times.
- e. There are also the costs of monitoring – OHS duties are not met just by a one off exercise. To the extent that the home becomes a place of work, an employer will assume ongoing monitoring and rectification duties and responsibilities.

[13.151] These costs will be the responsibility of the employer. NSW OHS⁴⁶ information makes clear that: *employers must not require workers to pay for anything done or provided to meet specific requirements made under the Act or other OHS legislation.*

[13.152] Interestingly, OHS materials on home based work very clearly recognise that not all work, nor all jobs can be suited to home based working:

- a. NSW OHS information makes clear that: *“Some jobs can only be done safely by using special equipment or by following working procedures which are not appropriate for home based work”*.⁴⁷
- b. NT OHS information makes clear that *“Some jobs are not appropriate for home based work eg. jobs that can only be done safely using special equipment or by following work procedures not suitable to home based activity.”*⁴⁸
- c. Queensland OHS information also makes clear that not all jobs can be done safely in a home environment.⁴⁹

⁴⁶ Workcover NSW (1996) Working From Home : a guide to occupational health and safety, rehabilitation and workers compensation requirements -

http://www.workcover.nsw.gov.au/NR/rdonlyres/517049FC-51E7-46CE-A616-4DC57537B2A8/0/gen_workfromhome_220.pdf

⁴⁷ http://www.workcover.nsw.gov.au/NR/rdonlyres/517049FC-51E7-46CE-A616-4DC57537B2A8/0/gen_workfromhome_220.pdf

⁴⁸ <http://www.nt.gov.au/deet/worksafe/corporate/bulletins/pdf/11-15/15.01.01.pdf>

Conclusion on OHS Considerations:

[13.153] These are live and direct considerations in assessing the ACTU claim. Shifting work from the workplace into the home carries with it genuine OHS issues and concerns, and this has contributed to employer caution and prudence in introducing telework in particular.

[13.154] Tassie⁵⁰, citing a UK study from the mid 1990s reports the following:

A recent study from England⁵¹ identified several factors which point to outwork as a form of employment with particular OHS implications. The study noted that homes are not designed to be workplaces, so generally lack features such as extractor fans or machine guards. All household members, including the most vulnerable members – the young, the elderly and the sick – are exposed to hazards. The risk of accidents is increased by the presence of children, pets and visitors to the house who are not familiar with work practices. The relative isolation of individual outworkers and the scattered nature of the homeworking population makes it difficult to provide them with information about safe working practices, and it is much more difficult for regulatory agencies to ensure that employers are acting within the law. The study adds that these problems are exacerbated in cases where homeworkers are not literate in English.

[13.155] There will also be substantial additional costs to employers in allowing employers to work from the home based on the relocation of the employer's duty of care from the workplace into the employee's home. The point of all this is threefold:

- a. The costs and complexity of OHS considerations are, in their own right, a factor weighing against the ACTU claim.
- b. A genuinely balanced approach would not simplistically assume that all employers can or should necessarily simply automatically shoulder such additional costs.
- c. It is the complexity of the implementation of work from the home, exemplified by a consideration of OHS, which leads employers and employees to introduce these changes cautiously, by agreement, with proper research and consideration of the work, working culture and

⁴⁹ <http://www.whs.qld.gov.au/guide/gde47.pdf>

⁵⁰ Tassie, J. (1997) *Home Based Workers At Risk*, Safety Science, Vol 25, pp.179-186.

⁵¹ Huws, U. (1995) *Home Truths: Key Results from a National Study of Homeworkers*. National Group on Homeworking, London

commercial considerations concerned. This is fundamentally and inherently unsuited to an absolute right as sought by the ACTU.

Additional concerns:

[13.156] There may also be an additional consideration, which even the ACTU may not be aware of. The clause sought is in the following form:

- a) A employee may apply to his/her employer for a change in his/her terms and conditions of employment if:
 - i. the change relates to the hours the employee is required to work, and/or the times when the employee is required to work and/or the physical location at which the employee is required to work, and
 - ii. the purpose in applying for the change is to enable the employee to provide care and support for an immediate family member or member of the employee's household.

[13.157] The ACTU is clearly pursuing the claim to allow employees to seek to work from the home or from an alternative employer operation (perhaps one closer to home). However there is another possibility which must be considered.

[13.158] What of an employee who wanted to work at a location which was neither their home, nor another employer run workplace, but some other location entirely? For example:

- a. An employee seeks to work out of a shop they own, or a garage, a serviced apartment, out of their car...
- b. An employee seeks to work from a workplace of another company at a location which better suits them (perhaps run by a relative or friend).

[13.159] This is not excluded by the clause as drafted. Employees would under the clause the ACTU seeks gain a right to seek to work at a location which best suits them – wherever that may be. Nothing appears to stop it being in another State or Territory, in the premises of a competitor, in the middle of an intersection – wherever.

[13.160] This further exacerbates and confuses the OHS considerations outlined above. What of an employee who sought to undertake their work from commercial premises other than those of their actual employer (for example, the employee may not have a computer at home, but may be able to work at one at his or her sibling's business or home which is closer to their home)? – Where

would the OHS responsibility lie? How could his/her employer meet their OHS duty? Would they have an OHS duty – or would the owner sharing their premises with a relative assume them.

Is this just a Telework claim?

[13.161] Putting to one side the unbounded breadth of the right the ACTU actually claims and the extent of the obligations it would impose on employers, this seems to be no more than a claim for a right to Telework from one's home. Retail clients are not going to come into the home, homes are not going to become shops, machinery is not going to be relocated from factories in to homes and we are not going to see a return to a cottage manufacturing within homes.

[13.162] It is the clerical and other jobs which use IT and PCs to generate their outputs which are really the target of this claim – everything from clerical functions to higher level jobs in academia, finance and commerce more generally.

[13.163] The various matters raised in this section and in this case generally should count strongly against this essentially telework based claim. However, other considerations also weigh against this claim:

- a. Telework and Australia's experience of it has been in substantial part an experience of Australia's non-award, managerial and professional workforce. Unique considerations attach to this employment and its capacities to work from home which do not advance this ACTU claim.
- b. For the proportion of the Australian workforce covered by this jurisdiction, Telework is being successfully implemented through workplace bargaining. Certified agreements have been used to regulate telework and work from home using a PC for over a decade – incorporating considerations affecting each workplace and its employees.
- c. There is no evidence of a failure to bargain or that bargaining is not facilitating workplace agreement on these issues, such that remediation through the award safety net could be merited.
- d. Experience in workplaces is that the introduction of Telework is a highly complex matter - for reasons just such as those raised throughout this section.

- e. This is what leads to the introduction of Telework being based on extensive consideration and research, and often following a long lead in period. This is not something which can properly be done in haste.

Preliminary conclusion

[13.164] Thus, in addition to the substantial jurisdictional problems which beset the ACTU claim, and the paucity of evidence which has been brought forward in support of the claim, the ACTU has failed to properly engage the practical considerations raised by its claim.

[13.165] Whilst this is just a bare introductory outline of the range of practical considerations which will ultimately weigh against the ACTU claim to regulate the place at which work, it shows that the ACTU has failed to address a sufficient range of considerations such that it could even begin to have the Commission give effect to this claim. When properly assessed, the ACTU claim must fail as an inherently impractical measure, the ramifications of which would be very damaging at the workplace level.

Conclusion

How the Commission should proceed

[13.166] The ACTU has failed to outline how its claim to regulate the place at which work occurs is constitutionally capable of award regulation by this Commission, how it is an allowable matter which may be included in an award, and how it may be reconciled with the allowable matters which may be included in awards. The ACTU has also failed to in any way sustain any merit basis for the prescription sought.

[13.167] ACCI has directly questioned the ACTU's contentions at paragraphs 1.4 and 5.31, and has provided substantial basis to conclude that the ACTU claim to regulate the location of work is neither allowable nor capable of being included in an award of the Commission. We say that this matter should not be countenanced for inclusion in awards.

[13.168] The onus now returns to the ACTU. It must now satisfy the Commission and must put up (and have tested) considerably more detailed argument on the basis upon which it makes its contention at paragraphs 1.4 and 5.31 in regard to its claim to regulate the location of work, and the basis for its claim more generally.