5. IS THERE AMBIT FOR EACH ACTU CLAIM?

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Introduction

[5.1] Any award provision made under the dispute settlement and prevention functions of this Commission must fall within the 'ambit' or scope of the industrial dispute which gave rise to the making of the award.

[5.2] Creighton and Stewart explain this as follows:

> [416] The fact that under the Constitution any powers of conciliation and arbitration are to be exercised in relation to a "dispute" has spawned a doctrine to the effect that the tribunal's powers are in each instance limited by the scope or "ambit" of that dispute.[1]

[5.3] Creighton and Stewart then cite the following observation from Dixon CJ in *Ex parte Kirsh*:

> [I]t is beyond its jurisdiction to impose an obligation upon [the parties] that is not related to the disagreement or issues between them, that is, to the matter of the dispute. Many expressions have been used to describe the kind and the degree of connection which is necessary. It is sometimes said that the relief contained in the award must be relevant. Sometimes that it must be reasonably incidental to the settlement of the differences constituting the dispute. Sometimes that it must be appropriate to the settlement of the dispute; that is, the relief must have a rational or natural tendency to dispose of the question at issue.[2]

[5.4] Importantly, it is not just the original dispute finding which is limited by the scope of disputation generated by the log of claims:

[1] Creighton, B. and Stewart, A. (1994) *Labour Law: An Introduction,* 3rd Ed, Federation Press, p.72
[2] R v Commonwealth Court of Conciliation and Arbitration and Others; [1938] HCA 41; (1938) 60 CLR 507, at 538 (25 August 1938)

> [418][3] The doctrine of ambit applies not just to the settlement of a dispute, but to any variation later made to that settlement. So long as the tribunal remains within the ambit of a dispute as originally recorded, neither lapse of time nor lapse of the differences that provoked the dispute will preclude the tribunal from continuing to derive jurisdiction from it[4].

[5.5] The doctrine of ambit has equal application to the making of awards and the subsequent variation of awards[5].

[5.6] Therefore, in practice for awards such as those before the Commission in this matter and those which will be the subject of any flow on applications arising from this matter, this means that any award variation must lie within the ambit or 'scope' of the original industrial dispute which gave rise to the making of the award. Where a claim (or indeed a provision of the award) falls outside the ambit of the dispute which gave rise to the award, there are only two options:

a. The generation of a new dispute and new ambit.

b. Not varying the award for the prescription sought which is beyond the existing dispute ambit / removing or varying any award provisions which exceed the underlying ambit of the award.

[5.7] There is no option to include any prescription in any award, to the extent that it is fundamentally beyond or outside the ambit of the case.

[5.8] In the early passage of award simplification cases, the Commission found that:

> "Each of the sources to which we have referred, and the form of the provision in section 89A itself, is congruent with the conclusion that the Commission's jurisdiction under subsections 89A(1) and (2) is restricted to determining an award provision that is about one of the matters within the list of allowable award matters, or is incidental to such a matter and necessary for the effective operation of the award. For such an award provision to be made, it must be within or reasonably incidental to the ambit of an industrial dispute. For that purpose, it is sufficient that there be a relevant and appropriate part of the subject matter of the dispute to which the provision can be referred.

[3] Creighton, B. and Stewart, A. (1994) *Labour Law: An Introduction,* 3rd Ed, Federation Press, p.72
[4] *R v Kelly; ex parte Australian Railways Union* (1953) 89 CLR 461.
[5] *Australian Insurance Staffs' Federation v Atlas Assurance Company Limited and Ors* [1931] HCA 35; (1931) 45 CLR 409 (6 November 1931), *R v Kelly; Ex Parte Australian Railways Union* [1953] HCA 96; (1953) 89 CLR 461 (17 December 1953), *R V. Commonwealth Conciliation And Arbitration Commission; Ex Parte Melbourne and Metropolitan Tramways Board* [1962] HCA 22; (1962) 108 CLR 166 (4 May 1962)

> […] It is not necessary that there be a specific subject matter of the dispute matching the allowable award matter description, but the subject of the dispute must afford a jurisdictional basis for the arbitration of the particular allowable award matter."[6]

[5.9] It is not necessary that there be a specific subject matter of the dispute matching the allowable award matter description, but the subject of the dispute must afford a jurisdictional basis for the arbitration of the particular allowable award matter.

Relevance of Award Ambit for Test Case Matters

[5.10] As has been remarked in these matters at various stages, the Test Case process rests on no express foundation in the *Workplace Relations Act 1996*. Rather, it has emerged through the history of the work of the Commission, and in particular as a function of the operation of wages principles, the powers of Full Bench references and the notion of precedent.

[5.11] Test case awards are brought forward as exemplars. Any party seeking to progress a test case, or a claim designed to be flowed on as a precedent to other awards, identifies a set of awards (test case "vehicle" awards) – often on the basis of their industry or geographical diversity and representativeness, lodges applications to vary the awards in identical terms, and requests that they be determined as a group in a test case.

[5.12] However, whether ultimately considered as test case variation or otherwise, any particular prescription sought must be capable of being included in the vehicle awards, and relevantly for this section – must be within the ambit of the dispute each award is made to settle. If the awards subject to any test case may not, for whatever reason, be varied to include the prescription sought, then there can be no further consideration of the relief sought – and there would be no test case. If there is no ambit for a particular claim - there can be no test case on it.

[5.13] No general principle could be generated from any selection of awards that could not themselves be varied for the relief sought. If an award or awards may not be varied for the relief sought (e.g. because they lack the necessary

[6] *Re Newlands Underground Mine Bonus*: Print P1188 per Munro J, Polites SDP and Hodder C at p.7.

fundamental ambit for the relief sought) – then there is no basis on which to engage the issues of principle or merit raised by the prosecuting party.

[5.14] Put simply – any such claim or part of a test case application must stop dead in regard to matters fundamentally beyond award ambit.

Test Case Awards Are Exemplars

[5.15] There is however a further element to this. Test case vehicle awards are brought forward as exemplars and are generally major industry awards of the Commission (or exemplars of industry awards). If it transpires that these awards cannot be varied for the relief for which they have been brought forward as exemplars (e.g. because they lack ambit) then:

a. The proposed award prescription and the phenomena claimed to give rise to it cannot be considered and the proposed prescription cannot form the basis of a test case standard.

b. It is valid for the Commission to also reasonably extrapolate, in the absence of any evidence to the contrary, that similar problems will confront the prescription sought in other comparable awards of the Commission.

c. It may be that the prosecuting party has simply chosen the wrong awards. However, where an analysis of test case vehicle awards reveals that a claim cannot be included in these awards, this may indicate that it cannot be included in awards of the Commission at all and that disputes generally will lack the foundations to grant the relief sought.

[5.16] This is the specific contention of ACCI/NFF . In this section, we identify a number of areas in which some or all of the awards the ACTU bring forward in this case lack ambit for the relief sought. ACCI/NFF contends that the Commission should, as outlined in relation to each specific claim below, reasonably conclude (to the extent required) that other awards of the Commission will also similarly lack the necessary dispute foundations for the relief sought.

Onus on a party challenging ambit

[5.17] In *R v. Bain; ex parte Cadbury Schweppes Australia Ltd*[7], the majority of the High Court said that a prosecutor (in an appeal) bears the onus of providing a jurisdictional error and in the case of an alleged excess of ambit the prosecutor should adduce evidence to dislodge the presumption of validity of an award[8].

[5.18] This is of course the appellate onus, but ACCI/NFF is raising this issue now, as a matter of merit and jurisdiction to provide the Commission with a proper opportunity to consider the matters raised and to make and vary awards only within their ambit. This appears the onus which must attach to a party to an award matter prior to any High Court process as addressed in *R v Bain*.

[5.19] ACCI/NFF is bringing forward available evidence (logs of claims) to dislodge any presumption in favour of awards being able to validly be varied as sought by the ACTU.

Areas where there appears no ambit for the ACTU Claims

[5.20] In the course of preparing this response to the ACTU's contentions, ACCI/NFF /NFF has examined as many as possible of the logs of claims which gave rise to the awards subject to this claim (and for some other major federal awards which are directly relevant). This included the following awards:

a. *Clerical and Administrative Employees (Victorian) Award 1995*.

b. *Graphic Arts - General -Award 2000.*

c. *Retail and Wholesale Industry - Shop Employees - ACT- Award 2000*.

d. *Storage Services - General - Award 1999*.

e. ACCI/NFF /NFF has also had the opportunity to examine another available major industry log of claims from the retail industry.

[7] *R v. Bain; ex parte Cadbury Schweppes Australia Ltd*. [1984] HCA 9; (1984) 159 CLR 163 (24 February 1984)
[8] CCH, Australian Labour Law Reporter, [¶2-535]

[5.21] ACCI/NFF sought to determine whether there is ambit in each underlying dispute for the test case claims the ACTU seeks to generate and have determined in this matter (i.e. whether there is ambit to sustain the variations sought in the ACTU's package of work and family claims).

[5.22] Based on our analysis of the available logs of claims which gave rise to the awards subject to this matter, many of the ACTU claims clearly lack the necessary ambit for the Commission to be able consider them.

Is there ambit for the claim to regulate the place of work?

[5.23] On analysis, there appears to be no ambit in the disputes which gave rise to the making of the vehicle awards to sustain any regulation of the place at which work is undertaken (the ACTU claim for a right to vary the place of work, *see Section 13*).

[5.24] On examination, the logs of claims which gave rise to the various awards (Attached) contain no claims to regulate (or have employees) determine the location at which work is undertaken.

[5.25] This is scarcely surprising, as outlined in the section on this specific claim, the regulation of the location of work is not an industrial matter which can as a matter of fundamental constitutional power, give rise to an industrial dispute and be regulated through an award of this Commission (even before one considers the issue of allowability).

[5.26] Even if included in logs of claims, it would not be open to the Commission to find this was part of an industrial dispute.

Storage Services – General - Award 1999

[5.27] The original log of claims for this award was served by the NUW in December 1992 and has been drawn from the Commission file leading to the making of the current 1999 award (Attached).

[5.28] An analysis of the storage services log of claims shows no foundation for the claim to regulate the location at which work is undertaken. The 15 page, 83 item log of claims contains no mention of, or claim in relation to, the location of work, nor the place at which work is undertaken.

a. Item 18 is a claim in relation to pay for travel to and from the home. There is no claim to regulate where work is undertaken.

b. Item 25 on the contract of employment does not claim a right for unilateral employee variation of contracted locations of work.

c. Item 71 is a claim for an allowance for a taxi home from work, not to shift the location of work.

d. Item 80 is a claim for a particular standard of employee housing, where provided, not to relocate the location of the workplace.

[5.29] There is simply no claim in this log of claims concerning the location at which an employee works nor any claim to which this could be properly considered incidental.

[5.30] There is no dispute foundation upon which the ACTU can erect its claim to regulate the location of work as proposed in its model "*Right to Request Variations to Hours and Place of Work*" clause. This claim may not proceed to arbitration in this award, and this award may not be varied for the prescription sought by the ACTU.

Graphic Arts - General -Award 2000

[5.31] The original log of claims for this award was served by the AMWU in September 1995 and has been drawn from the Commission file leading to the making of the current 1999 award.

[5.32] An analysis of the graphic arts log of claims again shows no foundation for the claim to regulate the location at which work is undertaken. The 16 page, 66 item log of claims contains no mention of, or claim in relation to, the location of work, nor the place at which work is undertaken.

a. Item 8 concerns remuneration for travel, and does not contain any claim in relation to the location at which work is undertaken.

b. Item 55 concerns amenities provided by the employer. It contains no claim to regulate the location at which an employee works.

[5.33] There is simply no claim in this log of claims concerning the location at which an employee works, nor any claim to which this could be reasonably incidental.

[5.34] There is no dispute foundation upon which the ACTU can erect its claim to regulate the location of work as proposed in its model "*Right to Request Variations to Hours and Place of Work*" clause. This claim may not proceed to arbitration in this award, and this award may not be varied for the prescription sought by the ACTU.

Clerical and Administrative Employees (Victorian) Award 1995

[5.35] The making of this award appears somewhat complex. Various logs of claims were served in the early 1990s in identical terms under the title of the "Federated Clerks Union of Australia – Log of Claims" (Attached). These were used to create literally dozens of separate federal Victorian clerical awards, including separate awards for (for example): Armoured transportation, Building products and hardware, Car rental, Chemical and pharmaceutical industry Communications and related industries, Charities, Unions etc etc).

[5.36] These awards then appear to have then been reconsolidated into a single federal award of wide application (that entered into this case by the ACTU).

[5.37] Regardless, the original log of claims served to make this award was served by the NUW from December 1992 (attached for building products employers). It has been extracted from the Commission file leading to the making of the original awards (consolidated into the current award).

[5.38] An analysis of the Victorian clerical log of claims shows no foundation for the claim to regulate the location at which work is undertaken. The 36 page, 70 item log of claims contains no mention of, or claim in relation to, the location at which work is undertaken.

a. Item 4 refers to the employee's home, but only in respect of transportation after work has been completed (item 39 is similar).

b. Item 42 concerns amenities only at the place of work, rather than seeking to regulate the place of work itself.

c. Item 59 is a claim regarding employer provided housing however, this is not a claim to regulate where work is and is not undertaken.

[5.39] There is simply no claim in this log of claims concerning the location at which an employee works, nor any claim to which it may be reasonably incidental.

[5.40] There is no dispute foundation upon which the ACTU can rest its claim to regulate the location of work as proposed in its model "*Right to Request Variations to Hours and Place of Work*" clause. This claim may not proceed to arbitration in this award, and this award may not be varied for the prescription sought by the ACTU.

Retail and Wholesale Industry - Shop Employees – ACT - Award 2000

[5.41] The original log of claims was served by the SDA to make this award in 1993. ACCI/NFF /NFF has extracted it from the Commission's files under the original dispute number named as that which gave rise to the making of the ACT award.

[5.42] An analysis of the ACT retail industry log of claims shows no foundation for the claim to regulate the location at which work is undertaken. The 26 page, 116 item log of claims contains no mention of or claim in relation to the location of work, nor the place at which work is undertaken.

a. Any references the employee's home (e.g. Item 20) are claims only for allowances and reimbursement. There is no claim to actually regulate where work is undertaken.

b. Item 40 concerns only standards of amenities, not the location of work.

c. Item 113 concerning employee housing is about the provision and standard of housing. This appears to have been included in the log to allow for the granting of award rights to housing allowances or housing allowances or to regulate the standards of company provided housing. There is nothing in this claim which seeks to regulate where work is undertaken.

[5.43] There is simply no claim in this log concerning the location at which an employee works, nor any claim to which it could be reasonably incidental.

[5.44] There is no dispute foundation upon which the ACTU can rest its claim to regulate the location of work as proposed in its model "*Right to Request Variations to Hours and Place of Work*" clause.

[5.45] This claim may not proceed to arbitration in this award, and this award may not be varied for the prescription sought by the ACTU.

Victorian Retail Award Example

[5.46] It is also relevant to examine a recent very major log of claims from the retail industry, which has given rise to considerable award variations in the State of Victoria in particular. It led to the making of a major federal award with very wide coverage – particularly in the State of Victoria. Two particular points should be borne in mind in considering this additional log of claims example:

a. This case is prosecuted by the ACTU as a test case which would be flowed on to all (or most) awards of this Commission. The capacity of such major federal industry awards to sustain the variations sought is directly relevant to a consideration of whether the system can and should incorporate particular approaches.

b. This is a very recent major log of claims. To the extent that this log of claims cannot in fact sustain particular ACTU propositions in this case, it may be reasonably be extrapolated that major federal awards (particularly those based on logs of claims formulated and served many years before) would be even less likely to allow scope (i.e. ambit) for these ACTU propositions.

[5.47] An analysis of the retail industry log of claims also shows no foundation for the claim to regulate the location at which work is undertaken. The 20 page document contains no mention of or claim in relation to, the location at which work is undertaken.

[5.48] There is nothing about the location of work in Item 5 of the log in relation to the organisation of work. Item 5 seems to be a claim in regard to consultation and discussion on specified topics, rather than any empowerment of direct regulation. Further, there is no particularisation of this claim regarding the location of work.

[5.49] There is nothing about the location of work in Item 52 of the log in relation to hours of work and meal breaks. (Thus refuting the nexus between the regulation of working hours and work location now proposed by the ACTU).

[5.50] There is nothing about the location of work in Item 77 of the log in relation to transferring employees. The regulation of work transfer sought in the log relates solely to transfer at the initiative of the employer, and seeks to regulate only employee consent, any transfer allowance/reimbursement, and relocation pay. There is nothing in this claim which could empower an employee capacity to determine the location at which they work. It is not a claim for an employee to regulate their own hours of work as now sought by the ACTU.

[5.51] There is also nothing about the location of work in Item 89 of the log in relation to Amenities.

Conclusion

[5.52] There is no ambit foundation to sustain the ACTU claim to regulate the location of work. There is therefore no interstate industrial dispute with respect to such matters, that could give rise to settlement by compulsory conciliation and arbitration.

[5.53] There is no dispute foundation in the claims which gave rise to the making of major awards of this Commission which can sustain the award variation now being pursued. If the Commission were to do so, it would have acted without jurisdiction and beyond Constitutional power.

[5.54] The awards subject to this claim cannot be varied for the relief sought by the ACTU.

[5.55] The Commission should not continue to hear this alleged test case claim from the ACTU. The claim should be dismissed on the basis that the proposed award prescription cannot properly be included in the awards upon which it has been prosecuted.

[5.56] In light of the constitutional limitation precluding the generation of a dispute on the location of the workplace, and the evidence from the available award logs of claims, there is no basis to conclude that the situation would be in any different in awards of this Commission more generally.

Is there ambit for the claim for a right to purchased leave?

[5.57] ACCI/NFF has also examined the various logs of claims in regard to the ACTU claim to provide employees with a right to purchased leave – that is exchanging an ongoing wages discount for additional time off of up to 6 weeks in any one year above all other forms of leave.

a. None of the logs of claims contain claims entitled 'purchased leave' or for purchased leave as an industrially understood concept.

b. None seek to empower employees to unilaterally readjust their leave against their wages as proposed by the ACTU (i.e. the wage-leave trade off proposed).

c. None contain claims to which is this incidental, appropriate, or to which the claim has a natural or inherent tendency to dispose of[9].

[5.58] The question also arises as to whether there is scope in award logs of claims for the inclusion of an additional 6 weeks leave in awards.

a. The annual leave claims in ambit logs do not add up to 10 weeks per year (e.g. *Victorian Clerks* = 6 weeks only).

b. Additional paid family leave claims at best are only for two weeks per year.

c. Special leave clauses are quite express in their purposes, such as the special leave claim in the *Victorian Clerks* log of claims which is specifically based on exigencies and emergencies, not foreseeable absences.

[5.59] Perhaps the only log which could create some arguable basis for this claim may be the Graphic Arts industry log, which contains a claim for 60 days per year paid, "special leave" for "private purposes". However – this provides no foundation for the commensurate adjustment of wages in a discounting arrangement.

[9] *per*. 30 (April 2003) *Re Pastoral Industry Award 1998*, [PR930781], Ross VP, Lawler VP and Mansfield C.

Is there ambit for the claim for extended parental leave?

[5.60] The ACTU has two claims to extend existing parental leave rights:

a. An extension from 12 to 24 months.

b. A claim to further extend parental leave up to the time the employee's child enters school (the 'child rearing' leave claim).

[5.61] Again, to even begin to have these propositions considered, there would need to be ambit for the variation sought in the award vehicles in this matter.

[5.62] All the available award logs of claims appear to have sought 24 months parental leave, including maternity pay as an ambit claim. ACCI/NFF /NFF does not dispute the capacities of the vehicle awards to be used to consider the ACTU claim for 24 months unpaid parental leave.

[5.63] Some award logs of claims (e.g. that underpinning the *Storage Services - General - Award 1999*) contain a further generalised claim for additional unpaid leave beyond the 24 months.

a. This does not necessarily provide a clear basis for the ACTU child rearing leave claim to be considered.

b. The unbounded and un-particularised nature of this claim arguably renders it inconsistent with a proper dispute of the Commission (as something un-quantified, there was a lack of the necessary exactitude in the claim and response, such that an award provision may not reliably be erected on this foundation).

[5.64] Other awards however, do not appear to contain any foundation to set parental leave beyond 24 months:

a. The log of claims giving rise to the *Victorian Clerical* award contains a very specific claim for 24 months maternity leave (Item 23 and another for paternity (24) and adoption leave (25)). There is nothing beyond this however – there is simply no claim for further unpaid leave beyond 24 months.

b. The log of claims giving rise to the *ACT Shops Award* also contains only a claim for 24 months parental leave - there is no claim for further unpaid leave beyond 24 months.

Conclusion

[5.65] The ambit for this ACTU claim is confused and inconsistent. At this stage, its appears that the main conclusion which the Commission should reach is that it lacks capacity to vary various of its awards for an extension of parental leave above 24 months. The *ACT Shops* and *Victorian Clerks* awards in particular appear not able to be varied for the relief sought in this matter and should cease to be vehicles for consideration of this claim.

Conclusion: Where does this leave the ACTU & this case?

[5.66] The CCH Labour Law Reporter neatly encapsulates the fundamental considerations being raised by ACCI/NFF /NFF :

> "Ambit" means that the dispute between the parties determines the subject matter and the boundaries within which the Commission may make an award. The rationale is that an award is made in settlement of an industrial dispute and can do no more than is necessary to achieve that end. An award which falls outside the ascertained area of difference between the parties is invalid.[10]

The Right to Vary the Location of Work Claim

[5.67] There is a fundamental lack of ambit for one of the ACTU claims in this matter – the claim to regulate the location at which work is undertaken. A detailed analysis of the available logs of claims which gave rise to the vehicle awards and of some other major logs of claims indicates that there is no underpinning dispute upon which the relief sought could be based.

[5.68] As a matter of Australian industrial and Constitutional law – this claim cannot further proceed and, regardless of any merit based arguments of the ACTU, could not be included in the vehicle awards.

[10] CCH, Australian Labour Law Reporter, [¶2-535]

[5.69] The claim for a right for employees to vary their location of work (the right to request claim) should not be further considered in this matter unless the ACTU can satisfy the Commission that there is some dispute foundation upon which the relief sought could validly rest.

Other ACTU Claims

[5.70] The status of some other ACTU claims was varied , with the relief sought finding some arguable foundation in some logs of claims and disputes and no such foundation in others.

[5.71] In these cases, the Commission could not proceed to vary all of the vehicle awards in identical terms. If any relief were granted on the matters addressed in the ACTU claims, it would need to be restricted to those awards which did demonstrate the necessary fundamental ambit underpinnings through their log of claims.

The Vehicle Awards as Exemplars / A Representative Sample

[5.72] There is also a very real apprehension that the incidence of various matters in the disputes which gave rise to the vehicle awards are representative of awards and disputes more generally. Any test case clauses arising from this matter must be considered based on the foundation of ambit in awards that may be subject to variation to ultimately include test case clauses. The Commission itself has to be satisfied that it has the jurisdictional basis on which to order the relief sought.

[5.73] The Commission should take into account in its final decision that many, perhaps most, of its major awards fundamentally may not be able to be varied to include some of the topics sought to be addressed by the ACTU in this matter.

Dicta from *Kirsch*

[5.74] There is additional dicta arising from *Kirsch* and the associated passage of cases which needs to be properly understood. This is explained by Creighton and Stewart thus:

> [418] Ambit issues may occasionally be resolved by a simple mathematical process… Most, cases, however, cannot be dealt with so precisely. Even in it is the case of a paper dispute, to which the concept of ambit is most easily applied, it may be appropriate to look beyond the original log of claims and response

> thereto in order to determine the scope of the disagreement, particularly if that disagreement has developed further in the course of negotiations following the service of the log[11].

[5.75] This does not appear to in any way assist the ACTU in prosecuting an award prescription fundamentally unknown in the logs of claims which give rise to federal awards.

[5.76] Arguments arising from the scope of a particular claim in a log of claims to justify a particular award provision rely on there being a claim in the log of claims in the first place. If the log is entirely silent on the concept or it is unknown to the log, then these arguments do not arise.

Are these claims 'incidental' to the dispute?

[5.77] Another relevant consideration is the extent to which matters which may not be directly claimed in the log of claims could be considered appropriately incidental to the dispute underlying an award.

[5.78] CCH explain the scope and the limits of this additional doctrine as follows:

> Although most awards are made in settlement of the original dispute, an award may be made in relation to a matter that is not strictly within the ambit of the original dispute, as long as it is reasonably incidental to the settling of the original dispute. The test the High Court has stated is that the award must be "relevant", "reasonably incidental" or "appropriate" to the settling of the original dispute, or have a "natural tendency" to dispose of the question at issue"[12].

[5.79] The question of ambit has been raised in numerous cases before the Commission. A recent substantial consideration occurs in a major Full Bench decision relating to increasing the casual loading in the *Pastoral Industry Award 1998*[13].

[5.80] However, this appears to still fundamentally rely on there being an original dispute in regard to a particular award matter (or claim sought to be included in awards). As Dixon CJ, Webb and Fullagar JJ stated in *Galvin*:

[11] Creighton, B. and Stewart, A. (1994) *Labour Law: An Introduction,* 3rd Ed, Federation Press, p.72, referring to *R v Bain; ex parte Cadbury Schweppes Australia Ltd* (1984) 159 CLR 163.
[12] *R v. Galvin; Ex parte Amalgamated Engineering Union, Australian Section* [1952] HCA 29; (1952) 86 CLR 34 (13 June 1952) and *Federated Storemen and Packers Union of Australia, Ex parte Wooldumpers (VIC) Ltd* [1989] HCA 10; (1989) 166 CLR 311 F.C. 89/011 (10 February 1989)
[13] 30 April 2003, *Re Pastoral Industry Award 1998*, [PR930781], Ross VP, Lawler VP and Mansfield C

> An award cannot give a form of relief that is not relevant to a matter in dispute, that is not reasonably incidental or appropriate to the settlement of that part of the dispute and that has no natural or rational tendency to settle the particular question in dispute. But the award need not adhere to the remedy or relief proposed or claimed in the course of the dispute or in a demand forming a source of the dispute, so long as the provision in the award is related to the dispute or its settlement in the manner stated.

[5.81] In this case, the relief now sought is entirely unknown in the log of claims and in the original dispute. There appears nothing in the actual disputes upon which the awards to be varied in this matter must rest, in regard to the clauses now sought – there is simply no live claim/dispute[14] to be incidental to.

[5.82] Importantly, in Galvin the High Court has also held that s.120 of the *Workplace Relations Act 1996*[15] cannot "authorise the granting of a claim which did not fall with the dispute's original ambit"[16],

A final reservation

[5.83] ACCI/NFF /NFF was not able to source the original underpinning logs of claims for some of the vehicle awards in this matter for the lodging of this submission:

a. *Business Equipment Industry - Technical Service - Award 1999*

b. *Metal, Engineering And Associated Industries Award, 1998*

c. *Pharmaceutical General: CSL Award 1998*

d. *Rubber, Plastic And Cable Making Industry - General – Award*

[5.84] This was due to a number of factors, including various of the available Registry files lacking the log of claim documentation, or it being very difficult to trace the original dispute documentation across multiple award consolidations and revisions in decades past.

[14] Within its constitutional meaning.
[15] Its predecessor in the 1904 Act.
[16] CCH Labour Law Reporter, [¶4-055]

[5.85] ACCI/NFF /NFF will however continue to endeavour to obtain this information during the period leading up to any process of closing written and oral submissions in this matter. We reserve all rights with respect to jurisdictional and Constitutional matters.

[5.86] If ACCI/NFF is able to obtain additional log of claims documentation to more fully inform the Commission and other parties on the issues raised, we will provide this to the Commission and parties as additional submission materials not available to us at the time of lodging this submission.

[5.87] This process could be considerably assisted by ACTU affiliates who may have better access to these log-of-claims documents in their records than ACCI/NFF members, or indeed the Commission. It would appear to assist the Commission in considering the issues raised above if the union parties to the awards identified above could bring forward the logs of claims they used to generate these awards.