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QUBE PORTS PTY LIMITED

Submission to Productivity Commission's Workplace Relations Framework Inquiry

March 2015

1 Introduction

Qube Ports Pty Limited (**QUBE**) is an integrated logistics company with operations at most ports around Australia.

While the remit of this review is to cover broadly the 'workplace relations framework', QUBE wishes to frame its submission through highlighting a number of its concerns with the operation of the main underpinning statutory instrument, the *Fair Work Act 2009* (Cth) [**Act**], and identify a number of areas where QUBE considers it can be improved. These submissions draw on QUBE'S experience with the Act since its proclamation.

This submission highlights those key areas that QUBE considers require careful review and to propose changes which are likely to improve the operation of the Act, particularly with regard to its objects.

2 Background to QUBE

QUBE operations

QUBE is the pre-eminent Australasian supplier of integrated logistics and port management solutions in the import and export supply chains. QUBE has had a presence in Australia since 1852, through its heritage as a shipping company, vessel agent and stevedore. QUBE, which until 2006 operated as P&O Ports Limited, now offers over 150 years of Australian stevedoring expertise, which extends to port development, management and cargo handling services.

QUBE operations in Australasia comprise on-wharf, port precinct facilities in all Australian capital city ports, in New Zealand, and bulk and general stevedoring operations in 28 Australian ports, together with cargo storage, materials handling and road transport distribution operations in all Australian states.

Summary of employment arrangements

QUBE and its wholly owned subsidiaries employ approximately 3,400 employees across Australia. A significant majority of these is engaged under 27 Enterprise Agreements that apply to specific locations (usually specific ports) around Australia. A minority is engaged under other Enterprise Agreements with national coverage. QUBE's suite of Enterprise Agreements includes instruments negotiated with trade unions and others directly with employees without the intervention of a trade union as a bargaining representative.

QUBE has had dealings with the following unions in relation to its employees and bargaining for Enterprise Agreements:

- The Maritime Union of Australia (**MUA**)
- The Australian Workers Union (**AWU**)
- The National Union of Workers (**NUW**)
- The Transport Workers Union of Western Australia (**TWU**)
- The mining division of the Construction Forestry Mining Energy Union (**CFMEU**)

3 Bargaining and agreement making

3.1 QUBE's recent bargaining experience

Since the 1 January 2010, QUBE has negotiated 27 separate enterprise agreements – union and non-union - covering employees at ports and facilities Australia wide.

These negotiations have included hundreds of meetings to consider matters and conditions that are consistent across different ports and locations as well as accommodate transmission of business issues following acquisitions of entities that are going concerns.

The negotiations have included periods of protected employee claim industrial action (in October and December 2011) as well as employer response action (in December 2011).

In December 2011 QUBE made an application under s240 of the Fair Work Act for the assistance of the tribunal in resolving the outstanding claims. Conciliation commenced on 19 December 2011. Whilst there was some progress made in this forum a number of claims, including wage rates and increases, were not agreed.

In December 2011, QUBE made an application to what was then Fair Work Australia (**FWA**) for an order to suspend (for 120 days or other such period as FWA determined) or terminate protected industrial action pursuant to s.423, or alternatively, s.425 of the FW Act. FWA decided not to grant any orders[1].

3.2 Greenfields agreements

As an organisation that is keen to expand and grow QUBE routinely investigates new business opportunities. These investigations include consideration of the employment arrangements that will apply to any new businesses or work. Due to the fact that QUBE Enterprise Agreements are predominantly confined in their scope and operation to specific ports consideration of employment arrangements necessarily includes consideration of new, greenfields, Enterprise Agreements.

QUBE has had a mixed experience in relation to the negotiation of such Agreements. In 2010 QUBE engaged with the AWU and successfully negotiated a greenfields agreement (the '*PBL and AWU Utah Point Greenfields Agreement 2010*') to cover the operation of its Utah point facility near Port Hedland in Western Australia.

This Agreement provided certainty to the Utah Point project and thereby facilitated the creation of 77 new jobs with appropriate conditions in a highly competitive employment market. However, when this Agreement came up for renewal in 2013, employees elected to negotiate without the intervention of a trade union and had certified a new four year Enterprise Agreement within two months of the issuance of the Notice of Representational Rights.

This experience was in marked contrast with QUBE's unsuccessful attempts to negotiate greenfields agreements in Dampier and Geraldton with the MUA. As a direct consequence of this, QUBE has been exposed to inappropriate and unavoidable levels of commercial risk.

It has been QUBE's experience that it has been subjected to unnecessarily prolonged workplace negotiations and higher labour and start-up costs associated with unreasonable refusals to bargain by unions in relation to greenfields agreements. In addition, unions have sought to include clauses in agreements that impose restrictions on the hire of employees, which have ongoing impact throughout the life of the agreement.

While QUBE acknowledges that an alternative to negotiating a greenfields agreement with a union is to engage employees under the provisions of the relevant modern award and then later seek to negotiate the enterprise agreement, this is not a pragmatic or commercially

[1] See *POAGS Pty Ltd v MUA* [2012] FWA 114

viable solution, particularly at the commencement of a new project which is typically a tenuous and volatile period.

It is QUBE's view that the current provisions related to the making of a greenfields agreement (and particularly the requirement that they be negotiated with a union) act as a deterrent to businesses investing and expanding in new and emerging industries. The reasons are explored in further detail below.

(a) Time critical nature of new projects leads to negotiation vulnerability

The Act imposed limitations on the making of greenfields agreements for new projects or business ventures compared with its predecessor, the *Workplace Relations Act 1996* (Cth) (**WR Act**). Under the previous legislation, employers were permitted to make organisation greenfields *or* employer greenfields agreements.

The legislative requirement that QUBE, as an employer, must negotiate with a union in the making of greenfields agreements has meant:-

- delays in the start time of new projects causing missed market and growth opportunities;
- additional costs associated with protracted and lengthy negotiations with unions during time critical periods for setting up new businesses;
- increased long term labour costs; and
- impediments to the hiring of employees.

The time critical nature of new projects is a distinct disadvantage in the bargaining positions of the employer, which in QUBE's experience has resulted in higher labour and start-up costs than would otherwise be the case. This has also led to an inability for QUBE to be as competitive as possible in new markets, meaning that the outcomes are not efficient. QUBE submits that the Act is not, in this regard, meeting the object of providing laws which are "*flexible for businesses and promote productivity and economic growth for Australia's future economic prosperity*".

By way of example, QUBE embarked on a new project and sought to negotiate with a union for a greenfields agreement for employees with a union. In the early part of the discussions, the union provided QUBE with a copy of an agreement which was in place for a competitor at a nearby site. The union informed QUBE that it would only agree to terms that were the same or better than those of the competitor. This placed QUBE at a distinct competitive disadvantage within the market.

(b) No path to resolve stalemates in greenfields agreement negotiations

The Act permits only limited opportunities for employers to progress and conclude greenfields agreement negotiations with unions during time critical periods. The Act necessitates the requirement for employers who want to introduce workplace agreements to negotiate with unions, however, it does not provide a mechanism to progress matters if parties reach a stalemate – rather, it provides that an agreement will only be made if the union agrees. In terms of good faith bargaining, there are no additional requirements for bargaining representatives to have regard to the new enterprise.

In QUBE's experience, the institutionalisation of unions in the greenfields agreement process inhibits business flexibility to develop and grow in new areas, projects or industries.

*(c) Application of better off overall test (**BOOT**)*

It is QUBE's view that section 186(2) of the FW Act provides sufficient safety net protection for employees of terms and conditions of employment for prospective employees to be employed under a greenfields agreement. In relation to greenfields agreements, the Fair Work Commission (**Commission**) must be satisfied that the agreement does not contravene section 55 of the Act (which deals with the interaction between the National Employment Standards (**NES**) and enterprise agreements etc.) and that the agreement passes the BOOT.

Given that all workplace agreements are required to pass the BOOT, regardless of organisation involvement to frame the agreement, it should be sufficient that the Commission is satisfied that it passes that test when compared with relevant modern award(s). The additional requirement to negotiate **and agree** with the unions introduces an additional level of cost, complexity and restriction.

Reintroducing the ability to make 'employer greenfields agreements' would facilitate greater certainty around labour planning while the viability of new projects is assessed.

Suggested improvements

1. Reintroduce the ability for an employer to make an employer greenfields agreement;
2. Introduce a mechanism to resolve stalemates in relation to greenfields agreement negotiations.

3.3 Good faith bargaining obligations

In QUBE's view there is a need for the Act to define '*good faith bargaining*' more satisfactorily so that capricious or unfair bargaining behaviour is regulated and reduced.

The current good faith bargaining obligations do not require bargaining representatives to put forward proposals about matters that concern terms or conditions for employees at the workplace. The current provisions do not limit the scope or type of issues that may be tabled, which can be outside the scope of the employment relationship. That is, factors which are extraneous to the particular workplace often unnecessarily assume significance for the negotiations.

QUBE's experience is that it has been constrained in its negotiations with bargaining representatives by proposals of matters that do not pertain to the employment relationship. The tabling of those matters has caused significant delay in the process, and this has resulted in break downs in negotiations and communication between the bargaining representatives. The following are examples of this type of behaviour experienced by QUBE during the negotiation of site-based workplace agreements:

(a) A union refused to sign off an agreement with QUBE on the basis that the union's rules required full national support of each branch of the union to agree to an enterprise agreement – one state branch (in a different state to the site with no direct member interests) refused the agreement and therefore held up the finalisation of the agreement.

(b) A union refused to reach agreement on the basis that QUBE intended to expand its business to an area that would directly compete with another business with higher union membership. The union would not reach agreement on the basis that the additional competition might have caused some of its members at the unrelated business to be made redundant.

(c) A proposal was tabled by a union for consideration by QUBE. However, once QUBE considered the proposal and communicated their acceptance of the proposal it was withdrawn and replaced with a proposal with higher benefit to the employees.

Negotiations during workplace bargaining are often frustrated and fuelled by adversarial, acrimonious approaches to bargaining that verge on abusive and bullying conduct by representatives of trade unions. The process becomes unworkable without recourse to an independent arbitrator to determine the reasonableness of the parties' positions and conduct.

Suggested improvements

1. Amend clause 228 of the FW Act to make clear that the unions should refrain from making proposals, or refusal to bargain about matters that do not pertain to the employment relationship or that do not relate to the group of employees to be covered by the proposed agreement.

2. Amend subclause 228(2) of the FW Act to make clear that the parties are not required to respond to proposals about matters that do not pertain to the employment relationship by including a provision to the effect that:

The good faith bargaining requirements do not require:

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement; or

(c) a bargaining representative to respond to proposals that do not pertain to the employment relationship or are not connected to the group of employees to be covered by the agreement.

3.4 Default bargaining representatives

The Act institutionalises the role of unions as bargaining representatives by having them as 'default' bargaining representatives. If an employee is a member of a union that is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement and the employee does not appoint another person to be their bargaining representative for the agreement then the union will automatically become the bargaining representative of the employee.

In QUBE's view, this creates a number of problems:

(1) there is a presumption inherent in the Act that unions will engage in bargaining on behalf of its members and not for their own self-interest. In QUBEs experience, this presumption does not reflect the practical and commercial reality;

(2) if the members of a union are apathetic about particular issues, the union is nevertheless entitled to engage in bargaining with the employer;

(3) negotiations can be (and in QUBE's experience, have been) delayed and protracted by union bargaining in circumstances where the union represents only a small minority of the workforce to be covered by the relevant enterprise agreement;

(4) there is significant potential for conflicts of interest to arise between members of a union and the union officials in relation to particular issues in the bargaining. It is not a sufficient answer to that concern to say that individual employees could appoint themselves as bargaining representatives, as that again ignores the practical and commercial reality of the functioning of workplaces in Australia. It may simply not be a practical alternative for an employee to appoint themselves as bargaining representative during the bargaining;

(5) the current provisions do not promote workplace inclusion – rather they make it more difficult for employers to meet with employees and engage with them directly.

In short, the institutionalisation of unions in the bargaining process has diminished the ability for employees themselves to have direct input into the negotiation of their terms and conditions. It is QUBE's experience that the issues raised by unions during bargaining are not necessarily reflective of the issues and concerns that the workforce and employees have at the enterprise level.

Suggested improvements

1. Removal of the default bargaining agent provisions and the introduction introduction of an 'opt in' system where the employees are required to nominate a bargaining representative, rather than a default position.

3.5 Reintroduction of 'prohibited content' as defined by the WR Act

In recent times, QUBE has seen an increase in the number of proposals from unions about matters that were previously 'prohibited content' under the *WR Act*. These proposals tend to be about matters attaching solely to provisions which benefit the union itself rather than the benefit its members. For example, QUBE has received claims for trade union training leave, time off and pay for attendance at union meetings.

Suggested improvements

1. Re-introduce the list of matters which are 'prohibited content' that must not be included in enterprise agreements.

4 Industrial Action

QUBE has experienced a number of difficulties with the manner in which the Act operates in respect of protected industrial action by employees during enterprise bargaining. These are set out below.

4.1 Cancelling / withdrawing industrial action

It has been QUBEs experience that the Act permits unions and employees to conduct themselves in a way that enables them to cause damage to the employer which is disproportionate to any industrial action which takes place. This can occur, for example, by a union or employees notifying the employer that they will take industrial action (three (3) days in advance of the date the action is to commence) but then cancelling or withdrawing the industrial action immediately prior to the time it was due to commence – and after the employer has put in place contingency plans to deal with the disruption.

The 'threat' of protected industrial action following a protected action ballot has had a significant impact on QUBE's business and can be as damaging to the business as the actual industrial action. The costs associated with preparing contingency plans are significant and may not be recoverable in the event that the threatened protected industrial action does not proceed.

Suggested improvements

1. Introduce a mechanism whereby bargaining representatives must only give notice of industrial action which they genuinely intend to take;
2. Introduce penalties where bargaining representatives notify industrial action which they did not intend to take.

4.2 Inability to easily assess whether persons entitled to take industrial action

In QUBE's view, the Act does not sufficiently deal with the need for an employer to assess whether particular employees were entitled to engage in protected industrial action. In particular:-

(a) only those employees set out in the scope of a protected action ballot order are entitled to take protected industrial action. Typically, this scope is limited to members of the relevant union;

(b) QUBE (and other employers) do not necessarily know whether particular employees are members of that union or not. The usual way in which protected action ballots take place is for both the union and the employer to provide lists of persons to the ballot agent – who then compiles the list of valid voters. The employer does not receive that list;

(c) as a result, it is generally not possible for QUBE to determine whether a particular individual was entitled to engage in industrial action on a particular day. If QUBE had doubts that the person was so entitled, it would be required either to request the person provide proof of union membership or alternatively withhold pay and place itself at risk of proceedings being brought by the employee for underpayment if the person was not a union member.

In the circumstances, employers have no ability to test whether the industrial action is being taken in a legitimate fashion.

Suggested improvements

1. Introduce a mechanism whereby an employer is able easily to test whether a particular employee is entitled to take protected industrial action

4.3 Small range of responses available to employer

Under the Act, a lockout is the only type of industrial action which an employer can take to respond to protected industrial action by its employees. In QUBE's view, the Act therefore necessitates a dramatic and potentially disproportional response from the employer, even in circumstances where the threatened or actual industrial action by employees is relatively minor. A lockout has a range of negative consequences for an employer, including cost to both the business and its reputation.

Suggested improvements

1. Introduce mechanisms under the FW Act to allow employers to make reactive and calibrated responses to protected industrial action, without necessarily locking out employees.

4.4 Inadequacy of provisions relating to suspension or termination of industrial action

Other than taking industrial action in response, the only other mechanisms that the Act provides to stop employee industrial action are connected with suspending or terminating industrial action for the enterprise agreement as a whole (eg sections 423 – 431). The Act provides no ability for the Commission to stop or suspend protected industrial action for reasons other than the endangerment of life, safety or welfare of the population or part of it or significant damage to the Australian economy or an important part of it. The limitations of this test to be applied by the Commission fail to consider the significant impact on the business and its going concern, even where the harm to the economy might fall short of the above statutory tests. As a consequence, those provisions require an employer to 'wait' until it has suffered harm which meets the statutory tests – which mean the destruction of the business or part of the business.

Suggested improvements

1. Introduce mechanisms under the Act to allow employers to seek the cessation of employee protected industrial action in a wider range of circumstances than currently provided for in the FW Act such as for example when an employer business is experiencing EBIT losses

4.5 Removal of Four (4) hour minimum pay deduction

The removal of the four (4) hour minimum pay deduction for protected employee action has had the consequence of increasing the number of actions taken by employees and further disruptions to the business. In QUBE's experience, the minimum four (4) hour period was a disincentive for employees to take short work stoppages. The disruption caused by work stoppages for small periods of time can have a significant business and administrative impact on employers. Employers are required to check the stoppage of each employee before making a deduction, this can have a significant and disproportionate effect on the employer from a cost and administrative point of view.

Suggested improvements

1. Introduce a four (4) hour minimum deduction from pay for protected industrial action

4.6 Impact of 30 day requirement

The Act provides that protected industrial action may be taken for a period of no more than 30 days,[2] unless the Commission grants an extension on application to the period by an additional 30 days provided that no extension previously has been granted.[3]

In QUBE's experience, this requirement-:

(a) often has the effect that unions 'rush' to take all of the industrial action during the 30 days, to ensure that further action can be taken after that time. This causes disproportionate disruption to the employer's business usually at a relatively early stage of negotiations; and

(b) given the relatively low threshold for an extension, creates an unnecessary and duplicative process for the extension of time.

[2] Subsection 459(1)(d)(i) of the FW Act

[3] Subsection 459(3) of the FW Act

Suggested improvements

1. Replace the 30 day requirement with a 60 day requirement, but do not allow extensions of that period

5 Right of Entry

Section 480 of the Act establishes a framework for officials of organisations to enter the employer's premises in certain circumstances, while maintaining the employer's right to conduct their business without undue inconvenience. Previously, section 736 of the WR Act had similar objectives, however, they also included more explicit objectives about the expected behaviour of permit holders not to misuse their position and to ensure that the permit holder is a fit and proper person.

This part of the Act recognises that permit holders are in a privileged position and that position should not be misused.

Although the provisions are largely the same, the Act still requires improvements to the right of entry provisions to strike the right balance between an organisations' right of entry to investigate WH&S and Fair Work breaches with the right of the employer to go about their business without undue inconvenience.

The current right of entry provisions make it difficult for employers to address issues when a permit holder poses a threat to the health safety and wellbeing of themselves, employees, management and the public or engage act in an improper manner. While the Act prohibits this behaviour[4], the process of addressing this behaviour involves taking the matter to the Federal Court or Federal Circuit Court, if by the person affected (usually the employer) at their own expense or alternatively through the Fair Work Ombudsman inspector.[5]

(a) Commission discretion to restrict rights of permit holder

In circumstances where the behaviour complained about arises from the permit holder's misuse of their rights under Part 3.4 of the Act, the Commission has discretionary power under section 508 as to whether to take any action against a permit holder. The Commission may take action on its own application or that of an inspector. While the behaviour to be complained of may have the intention of or has the effect of hindering, obstructing or otherwise harassing an employer or the performance of the duties is unduly disruptive, an employer cannot make an application under section 508 of the Act.

In deciding whether to take action against a permit holder, there are no legislative prescriptions as to what the Commission must take into account in exercising its discretion to restrict the rights of a permit holder. In *Alfred v CFMEU* [2011] FCA 556 at para 70, Tracey J in deciding whether to impose civil penalties on a union official for unlawful industrial action, cited a number of relevant precedents:-

> *"The following factors, in my view, have relevance in the circumstances of the present proceeding:*
>
> - *The nature and extent of the conduct which led to the breaches.*
> - *The circumstances in which that relevant conduct took place.*
> - *The nature and extent of any loss or damage sustained as a result of the breaches.*
> - *Whether there had been similar previous conduct by the respondent.*

[4] See for example section 499 and 500 of the FW Act

[5] Section 539 of the FW Act

- *Whether or not the breaches were deliberate.*
- *Whether the respondent had exhibited contrition.*
- *Whether the respondent had taken corrective action.*
- *Whether the respondent had co-operated with the enforcement authority.*
- *The need for specific and general deterrence."*

This case was also applied in the matter of *ABCC v Mitchell & Ors* [2011] FMCA 622 (16 August 2011) where Raphael J imposed penalties for breaches of sections 499 and 500 of the Act.

(b) Circumstances in which the Commission must revoke or suspend entry permits

The Commission is required to take action in circumstances prescribed in section 510 of the Act. Where a permit holder has acted in an improper manner but there are no civil penalty provisions imposed, the Commission is not required to suspend or revoke entry permits. Acting in an improper manner may include repeated assault, verbal abuse, intimidation and / or threats, however unless civil penalties are imposed, it will not be captured by the provisions in section 510 of the Act.

A permit holder may not qualify for a permit on the basis of being convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving, among other reasons:-

- entry onto premises; or
- fraud or dishonesty; or
- intentional use of violence against another person or intentional damage or destruction of property.

While this is a ground for not qualifying for a three (3) year permit, there is no obligation on the permit holder to inform the Commission of a breach after the approval of a permit or any other disclosure that would render them not to be a fit and proper person.

Suggested improvements

1. Section 508 should be amended to also permit a 'person affected' to bring an application before the Commission.

2. The factors to be taken into account in *Alfred v CFMEU* [2011] FCA 556 are also relevant factors that should be required to be taken into account by the Commission in determining whether to impose a restriction to the rights of a permit holder. Introducing these factors into the legislation will make clear the seriousness of a breach and provide transparency as to the matters that will be considered by the Commission when making a decision to restrict the rights of a permit holder.

3. Section 510 should be amended to include reasons to require the Commission to revoke or suspend an entry permit holder where:-

   (a) they are considered not to be a fit and proper person as required by section 513 of the Act; or

   (b) the Commission has imposed restrictions on a permit holder under section 508 on three or more separate occasions.

6 Jurisdictional Arguments re Unfair Dismissal Applications

When a Form F2 Unfair Dismissal Application (**Application**) is made before the Commission, the Commission forwards a copy of the application to the employer who is then required to respond by way of filing a Form F3 Employer Response (**Response**). The same communication from the Commission to the employer sets down a date for conciliation – irrespective of the jurisdictional merits of the Application. That is the Commission convenes a conciliation conference regardless of the nature of the Employer's Response, the Response merely permitting an employer to note jurisdictional objections in the event the matter proceeds to a hearing.

It is QUBE's experience that this process often leads to employers incurring unnecessary costs and expenditure of time. It is cumbersome and time consuming when on many occasions the Application is vexatious, is made by an individual clearly not afforded protection under the Act or is out of time pursuant to section 394 of the Act, there being no 'exceptional' mitigating circumstances. It is QUBE's view that this process also encourages employees (and their representatives) to file unmeritorious claims because they are able to exert pressure on the employer due to the need to prepare an Employer Response, attend the conciliation conference (at the employer's cost) and incur further expenditure if it wishes to have the jurisdictional arguments dealt with – that is, the current arrangement encourages the filing of unmeritorious claims in order to obtain 'go away' money.

It is QUBE's view that the Act should be amended to permit the jurisdictional merits of the Application to be determined prior to the Application being permitted to proceed to a conciliation.

Suggested improvements

1. Vary the unfair dismissal claim processes so that:
   (a) an applicant for unfair dismissal must, in the application, set out (or otherwise confirm) the reasons, and provide sufficient materials supporting those reasons, that the Commission has jurisdiction to hear the claim; and
   (b) if the Employer has jurisdictional objections to the application, the Employer is not required to prepare a Response to the substantive application prior to the conciliation conference;
   (c) a conciliation conference must not be convened prior to the Employer's response being filed and considered by the Commission; and
   (c) the Commission must be reasonably satisfied, prior to any conciliation conference being convened, that the claim is within jurisdiction such that it should be permitted to proceed to a conciliation conference.

7 Four Yearly Modern Award Review Process

The Fair Work Commission is currently undertaking its first four-yearly review of modern awards, pursuant to section 156 of the Act, which provides:

> "***4 yearly reviews of modern awards to be conducted***
>
> ***Timing of 4 yearly reviews***
>
> *(1) The FWC must conduct a 4 yearly review of modern awards starting as soon as practicable after each 4th anniversary of the commencement of this Part.*
>
> *Note 1: The FWC must be constituted by a Full Bench to conduct 4 yearly reviews of modern awards, and to make determinations and modern awards in those reviews (see subsections 616(1), (2) and (3)).*
>
> *Note 2: The President may give directions about the conduct of 4 yearly reviews of modern awards (see section 582).*
>
> ***What has to be done in a 4 yearly review?***
>
> *(2) In a 4 yearly review of modern awards, the FWC:*
>
> *(a) must review all modern awards; and*
>
> *(b) may make:*
>
> *(i) one or more determinations varying modern awards; and*
>
> *(ii) one or more modern awards; and*
>
> *(iii) one or more determinations revoking modern awards; and*
>
> (c) *must not review, or make a determination to vary, a default fund term of a modern award.*"

In at least one decision, a Full Bench of the Commission[6] has said that the four yearly award review proceeds fundamentally on the following basis:-

- the Commission will consider whether the proposed variations are '***necessary to achieve the modern awards objective***';
- prima facie, the Commission assumes that the modern award being reviewed achieved the modern awards objective at the time that it was made; and
- a substantive case for change is required and the more significant the change proposed the more detailed the case must be – including advancing detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes.

It is important to note, however, that section 156 does not contain the words '*necessary to achieve the modern awards objective*'. Those words appear in section 157 of the Act, which applies to the exercise of modern award powers *outside* the 4 yearly review and requires that the Commission be satisfied that:

> '*a determination varying a modern award ... is necessary to achieve the modern awards objective*'.

In QUBE's view, the approach adopted by the Commission to four yearly award reviews means that:

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[6] See *Security Services Industry Award 2010* [2015] FWCFB 620

- the Commission is unnecessarily constrained in considering improvements that might be made to modern awards to improve productivity, efficiency or global competitiveness – because it is assumed that the modern award is already '*doing a good job*';
- the four yearly review process is therefore not conducted with a view to considering the arrangements that would improve productivity and efficiency within the framework *wherever possible* – rather, the four yearly review process relies on interested parties making proposals for change and engaging in potentially costly and lengthy proceedings before the Commission; and
- the modern award system is, as a result, inflexible and resistant to change which would improve its operation from a systemic or holistic perspective. The fact that industrial parties have been bound by (and complied with) particular arrangements that have been present in awards for a significant period of time (and which may have been the result of deals of industrial convenience in the past) means that, on the current approach, the Commission is less likely to change those provisions. That is, employers are hamstrung by the inertia of historical arrangements that are difficult to overturn. This runs counter to the primacy that should be given to the Commission seeking out, and remedying, unproductive and inefficient practices.

Suggested improvements

1. Make clear in the legislation that, during the four yearly review process, the Fair Work Commission is empowered to consider and make changes to modern awards which, (while they may not be '*necessary to achieve the modern awards objective*' in the way in which that phrase has been interpreted to date by the Commission) would nevertheless:

   (a) improve productivity and efficiency in the relevant industry; or

   (b) enhance the global competitiveness of the relevant industry.