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Intractable bargaining changes a one-way street to inflexibility

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As Senator David Pocock said in the February 1 Senate Committee report on the government's Closing Loopholes IR Bill, "effective bargaining delivers the best results for all parties".

The senator's comments were made in relation to the Government's deal with the Australian Greens to gut the intractable bargaining provisions that were introduced only in June last year and to implement an entirely lopsided pro-union regime.

It is pleasing that Senator Pocock has identified the importance of this issue and called out the strong employer opposition to the proposal.

The intractable bargaining provisions allow the Fair Work Commission (FWC) to arbitrate if the parties have been unable to reach an enterprise agreement after at least nine months of negotiations, but only if there is no reasonable prospect of agreement being reached, and only if it is reasonable in all the circumstances for the FWC to intervene.

The amendments agreed upon between the Government and the Greens, and passed by the House of Representatives, would prevent the FWC arbitrating an outcome on any bargaining item that in any way reduces an existing condition for the employees.

For example, if a union is seeking higher wages and improved leave entitlements and the employer is seeking some more flexibility with rostering, the FWC would only be able to grant the union's claims. It would have to reject each of the employer's proposals regardless of their merit. The amendments would operate as a major barrier to effective bargaining and would not deliver the best results for all parties.

A union would be able to make a series of unreasonable claims and simply wait for the FWC to arbitrate after the nine-month minimum bargaining period had elapsed, safe in the knowledge that commission members will be arbitrating with one hand tied behind their backs. Arbitration would be a one-way street, with the FWC only able to accept union claims and forced to reject all employer claims.

Under the *Fair Work Act*, the FWC is required to exercise its powers in a manner that is "fair and just". It is required to take into account "equity, good conscience and the merits of the matter". The proposed amendments would, in effect, prevent the FWC from meeting these objectives.

The proposed changes are unfair, unjust, inequitable, unconscionable and without merit. The *Fair Work Act*, as its name suggests, is intended to be fair to both employees and employers.

Australia's productivity performance is abysmal, and it is essential that companies are able to implement and maintain modern work practices. The proposed amendments would impede companies in their need to remain competitive by modernising their enterprise agreements. All too often these agreements include restrictive provisions that were negotiated at a different time and in very different circumstances.

It is extremely disappointing that the Government has accepted this grossly unfair proposal of the Greens. It is essential that the crossbench senators oppose the proposal to ensure that it never sees the light of day.

So far, there have been only three applications for intractable bargaining declarations determined by the FWC. Two applications by unions have been granted and one application by an employer has been rejected. Therefore, it is patent nonsense for anyone to suggest that the provisions are operating in a way that is unfair to unions or that they have resulted in unintended consequences.

When making an intractable bargaining determination, the FWC is currently required to take into account the following balanced factors in section 275 of the *Fair Work Act*:

- The merits of the case;
- The interests of the employers and employees;
- The significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;
- The public interest;
- How productivity might be improved in the enterprise or enterprises concerned;
- The extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;
- The extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements; and
- Incentives to continue to bargain at a later time.

Under the amendments agreed upon between government and the Greens, the fairness and balance in the above criteria would be extinguished.

It is to be hoped that the crossbench senators will protect the community's interests in this matter and oppose the intractable bargaining amendments.

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