Intractable bargaining: ending the endless

Pictured: a statute of Lady Justice, the symbolic representation of law. Opinion is split as to whether a legally-mandated end to bargaining is a good development or not. Photo credit: Tingey Personal Injury Law Firm.

Everyone in the maritime sector in Australia will be aware that one problem with the Fair Work system is the endless bargaining process. Eventually, a deal is done… just in time for next three-yearly or four-yearly round of bargaining to begin. Sometimes, the bargaining is even one whole cycle behind – the companies and employers are not bargaining for the current round of enterprise bargaining, they're bargaining for the one before that.

During the whole time, the employer is subjected to repeated industrial action. There is a now notorious example of bargaining that led to more than 1,100 notices of protected industrial action between October 2020 and November 2022; there were more than 250 instances of protected industrial action between 20 October 2022 and mid-November 2022 amounting to nearly 2000 hours of work stoppages. It took nearly three years to conclude a four-year agreement.

That kind of dispute will no longer be possible because of the new "intractable bargaining" rules. A bargaining representative can apply for an "intractable bargaining" declaration if the parties have been bargaining for at least nine months, and have already once tried to have their dispute resolved with the help of the Fair Work Commission, and want to settle the matter. There will then be a further conciliation period, and, if the matter cannot be settled by the parties, the Fair Work Commission will make a binding ruling on the matter and will set the terms of the enterprise agreement.

The Hon. Tony Burke MP, Minister for Employment and Workplace Relations, argued in the House of Representatives that the Secure Jobs Bill (as it then was), would allow the Fair Work Commission to resolve disputes through arbitration where there is no reasonable prospect of an agreement.

"These changes are intended to provide a strong incentive for good-faith negotiations, reduce the time for enterprise agreements to be finalised and allow for quicker resolution of intractable disputes," Minister Burke told the House.

Kyle Scott, a director and lawyer of Australian Business Lawyers & Advisors welcomed the advent of the intractable bargaining regime. "I think it's sensible… you don't want to live in a world like the bargaining system [which] historically has been fairly unrefined… If you can't reach an agreement, you just bargain forever or the workforce strike and that's not a particularly helpful. It's quite destructive. I don't think we'll see a lot of it but the fact that it's available, I think, is a good step," Scott said.

The question is, will the intractable bargaining regime benefit unions or employers? Expert views are split.

"It's… the really big one. It's the availability of arbitration", says Professor Andrew Stewart of the University of Adelaide and who is a well-known expert on Australian industrial relations and employment law, "because this is going to be relevant in relation to multi-employer bargaining but also single employer bargaining as well. It is really going to put a lot more pressure on employers, in particular, [those] who've done enterprise agreements in the past and have maybe said 'no, we don't want to do them anymore'. It's going to be much, much, easier for unions to get employers back to the bargaining table and encourage agreement to be reached if there is this last resort available… there is this big spectre of arbitration at the end if you don't reach agreement… [we will see what happens]… but just the threat of them going to arbitration should be enough to produce more agreements being made".

Meanwhile, the Australian Industry Group – a lobby group typically representing employers – argues that the expanded capacity of the Fair Work Commission to arbitrate will "only encourage unions to make unreasonable demands and risks taking us back to a system of centralised setting of wages and conditions".

However, other experts think that interactable bargaining could benefit employers.

Nick Ruskin, Partner at law firm K&L Gates, suggested that an intractable bargaining declaration could work positively for employers in relation to industrial action that is going on for a long time.

"After nine months, a declaration could be made which stops the industrial action effectively by requiring bargaining to occur. Some employers might say, well, the demands are so unreasonable we're comfortable. We're more comfortable for the commission to arbitrate this than for us to endure more industrial action," he argues.