

Senate Standing Committees on Education and Employment
Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Attorney-General's Department

Hearing date: 19 February 2021

Hansard page: 70

Question type: Spoken

Mehreen Faruqi asked the following question:

Senator FARUQI: Of the changes that are in this bill in front of us, do you know how many of them were requested by business and industry groups?

Ms Huender: I'm not able to quantify it.

Senator FARUQI: Can you take that on notice?

Ms Huender: I can see what we can do, yes.

The response to the Senator's question is as follows:

The process to develop the Bill and other non-legislative reforms has been highly consultative. The working group process, which had equal representation from employer representatives and unions, assisted the Government to gain a greater understanding of the participants' perspectives on key industrial relations issues.

From the outset working group meetings were confidential. The government considered all proposals and views put forward by working group members, though decisions on the provisions included in the bill were ultimately made by the Government, as had been communicated to working group participants from the outset.

The department is therefore unable to attribute individual provisions of the bill to specific proposals presented by working group members.

Senate Standing Committees on Education and Employment
Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Attorney General's Department

Hearing date: 19 February 2021

Hansard page: 71-72

Question type: Spoken

Mehreen Faruqi asked the following question:

Senator FARUQI: Another question on that: the act actually removes reference to culturally and linguistically diverse workers, young workers and workers without bargaining representatives. From my perspective, that actually weakens the provisions in the bill, particularly for vulnerable workers. Why was that done?

Ms Kuzma: Can I ask which provision you're referring to?

Senator FARUQI: At the moment I don't have the exact number, but, from what I understand, the act removes reference to these workers? Maybe you could take that on notice?

Ms Kuzma: We could take that on notice, but it's certainly not the case that existing protections for migrant workers are removed.

The response to the Senator's question is as follows:

It is unclear what provision of the Bill the Senator is referring to. The Bill retains the requirement that employees must have 'genuinely agreed' to an enterprise agreement.

The Bill provides that employers must 'take reasonable steps to ensure that the relevant employees are given a fair and reasonable opportunity to decide whether or not to approve the agreement'.

This approach allows employers to take steps that are reasonable in their particular circumstances, while also maintaining employee protections by requiring that they are given a fair and reasonable opportunity to decide whether or not to approve an agreement.

Whether employees are given a fair and reasonable opportunity would depend on the particular circumstances of the workplace, including whether there are employees from culturally and linguistically diverse backgrounds. There is an express reference to this in the explanatory note at the end of new subsection 180(3) (item 8 of Schedule 3 of the Bill).

Senate Standing Committees on Education and Employment
Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Attorney-General's Department

Hearing date: 19 February 2021

Hansard page: 75

Question type: Spoken

Senator Watt asked the following question:

Senator WATT: So what evidence do you have that this legislation will create new jobs—because there are certainly a lot of claims being made to that effect?

Mr Hehir: As I said, I think, in my earlier response, we know through survey and other exit sources that certainty around employment and clarity around employment conditions is a key factor in terms of how businesses think about their employment needs. Having confidence about employment conditions and their ability to meet those is a key factor in whether the business will make an offer of further employment.

Senator WATT: So you're relying on some surveys that tell you employers will create more jobs, but you don't know how many?

Mr Hehir: That's correct.

Senator WATT: Who are these surveys being conducted by?

Mr Hehir: I would need to take that on notice. I don't have a particular survey in mind, but I'm certainly aware of broad evidence in this space. I'll take that on notice.

Senator WATT: Has the department conducted surveys?

Mr Hehir: No.

Senator WATT: Is it employer group surveys that you're relying on?

Mr Hehir: I'll have to take it on notice. No, I don't believe so, but I'll take that on notice.

Senator WATT: I'd actually also ask that you table those surveys, if that's the evidence base that the department has for these claims.

The response to the Senator's questions are as follows:

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 provides for balanced and practical changes to known problems within the industrial relations framework so that businesses have the confidence and certainty they need to invest, including by taking on new workers.

Evidence was presented to the committee by representatives of employers – being the entities who actually make decisions to take on new workers – which included explicit confirmation of expectations that the Bill's passage will result in more jobs.

As noted in the OECD's most recent Jobs Strategy, labour market regulation and policies need to be clear, known to employers and workers, properly enforced, and strike the right balance between flexibility and stability to create high-quality jobs.¹ Similarly, the Reserve Bank of Australia states that improved certainty can be expected to facilitate an environment more conducive to investment and encourage employment growth.²

The National Australia Bank (NAB) Quarterly Business Survey also shows that business confidence and employment expectations have a positive relationship i.e. when business confidence increases so do employment expectations.³

This is consistent with international economic literature which supports the positive relationship between certainty and employment growth. For example:

- Bachmann, Elstner and Sims found that movement in uncertainty is associated with a significant reduction in production and employment in both Germany and the United States.⁴
- Taylor and McNabb found significant correlation between business confidence indicators and economic cycles in the United Kingdom, France, Italy, and the Netherlands.⁵

¹ OECD, Good Jobs for All in a Changing World of Work: The OECD Jobs Strategy, 2018, [OECD iLibrary | Home \(oecd-ilibrary.org\)](https://oecd-ilibrary.org)

² Moore A, 2016, 'Measuring Economic Uncertainty and Its Effects', *Research Discussion Paper 2016-01*, <https://www.rba.gov.au/publications/rdp/2016/pdf/rdp2016-01.pdf>.

³ NAB Quarterly Business Survey - December 2020 | [Business Research and Insights](#)

⁴ Bachmann R, Elstner S, and Sims R, 2013, 'Uncertainty and Economic Activity: Evidence from Business Survey Data', *American Economic Journal: Macroeconomics*, Vol. 5, No. 2, pp. 217-249.

⁵ Taylor K and McNabb R, 2007, 'Business Cycles and the Role of Confidence: Evidence for Europe', *Oxford Bulletin of Economics and Statistics*, Vol. 69, pp. 185-208.

Senate Standing Committees on Education and Employment
Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Attorney-General's Department

Hearing date: 19 February 2021

Hansard page: 75

Question type: Spoken

Murray Watt asked the following question:

Senator WATT: Is it employer group surveys that you're relying on?

Mr Hehir: I'll have to take it on notice. No, I don't believe so, but I'll take that on notice.

The response to the Senator's question is as follows:

Please refer to the response to CQoN21-SAJER-3 - Job creation.

Senate Standing Committees on Education and Employment
Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 [Provisions]

Attorney-General's Department

Hearing date: 19 February 2021

Hansard page: 78

Question type: Spoken

Murray Watt asked the following question:

Ms Durbin: If I can add, there are other safeguards within the framework. So if the employer does have reasonable grounds not to make the offer, they must advise the employee in writing. So again, as Ms Kuzma said, that change of focus and that obligation to advise the employee is a very new feature. Similarly, there is a requirement for the employer to provide a casual information statement to all casual employees to advise them of their rights—

Senator WATT: I accept all of that, but ultimately the point is that if you've got an employer who's being unreasonable and I want to convert to permanent, the only way I can actually get an arbitration is by going to the Federal Court, if the employer won't agree to it at the Fair Work Commission.

CHAIR: You might have to take that on notice.

Senator WATT: Is that correct?

The response to the Senator's question is as follows:

Schedule 1 to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (the Bill) inserts casual conversion provisions into the National Employment Standards (NES).

Resolution of disputes about casual conversion will utilise long-standing industrial relations dispute resolution mechanisms established under the *Fair Work Act 2009*. For the majority of employees, this process will be the same as for any other dispute about existing NES entitlements, such as annual leave.

Modern awards and enterprise agreements must contain a term providing a dispute resolution procedure for dealing with disputes in relation to the NES. This is the dispute resolution framework established in 2009 with the introduction of the NES entitlements, for example disputes about the requirement for an employer to not unreasonably refuse a request for annual leave, or disputes about the correct accrual of paid leave entitlements.

- Generally, the standard dispute resolution terms in awards and agreements require parties to attempt to resolve the dispute at the workplace first. If that is not successful, the dispute can be referred to the Fair Work Commission (FWC) which can deal with the dispute including by mediation, conciliation, expressing an opinion or making a recommendation.

- Arbitration by the FWC is only available by consent under the modern award model term. Under the enterprise agreement model term (prescribed by regulation), the FWC can arbitrate if mediation and conciliation are not successful.

If an award/agreement-free employee otherwise has a dispute resolution procedure that is able to deal with casual conversion disputes (e.g. a dispute process for NES disputes) in their contract of employment or another written agreement, then that dispute process will apply to the new casual conversion provisions in the Bill.

For employees who do not have access to a dispute resolution term that provides a procedure for dealing with disputes about the new casual conversion provisions, the Bill provides a default dispute process that is modelled on the modern award model dispute resolution term.

In addition, the Fair Work Ombudsman has enforcement powers in relation to NES entitlements. The Ombudsman has a number of functions:

- Providing education, assistance and advice to parties
- Monitoring and investigating compliance with the Act
- Litigating in the public interest as an option of last resort.

If an employee believes their employer has not met their statutory obligations in relation to casual conversion, as currently exists with any other NES entitlement, the employee or their representative can take the matter to the Federal Court. There are civil penalties for breaches of NES entitlements, as has been the case since the introduction of the Fair Work Act.

Employers can be subject to significant penalties for failing to meet their casual conversion obligations – currently up to \$13,320 (60 penalty units) for individuals and up to \$66,600 (300 penalty units) for businesses, or 10 times that amount for serious contraventions.

Senate Standing Committees on Education and Employment
Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 [Provisions]

Attorney-General's Department

Hearing date: 19 February 2021

Hansard page: 80-81

Question type: Spoken

Mehreen Faruqi asked the following questions:

Senator FARUQI: Can you tell me if secure work was mentioned in the minister's speech when he introduced the bill in parliament?

Mr Hehir: I'll have to take that on notice and go through Hansard and check.

Senator FARUQI: And is secure work mentioned in the explanatory memorandum for the bill?

Ms Kuzma: Just to be sure about that, I would have to take that on notice to check.

Senator FARUQI: Can you tell me if secure work is mentioned in the actual bill?

Ms Kuzma: I can take that on notice, too, but 'secure work' probably wouldn't be a legal term. But I can take it on notice.

Senator FARUQI: Was secure work mentioned in the minister's media release announcing these very significant industrial relations reforms?

Ms Durbin: Similarly, I haven't got it in front of me, so we'd need to take that on notice. But, similarly, as Ms Kuzma said, I understand that 'secure work' and 'insecure work' are used in a range of different contexts. It's not a legally defined definition. It has been looked at in terms of things like the OECD, but they agree that there is no definition, that there's no unified terminology that actually can be put together—

The response to the Senator's questions are as follows:

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (the Bill) amends the *Fair Work Act 2009* to assist Australia's recovery from COVID-19.

The Bill aims to improve the operation and usability of the national industrial relations system. By providing greater certainty and flexibility to employers and employees, the Bill aims to support productivity, employment and economic growth and ensure that employees

also receive their share of benefits that flow from economic recovery.

The terms ‘secure work’ and ‘insecure work’ do not have legal or universally accepted definitions. As such, the terms are not included in the Bill or its formal supporting materials.

A media release issued by the Attorney-General and Minister for Industrial Relations on the day of the Bill’s introduction into Parliament, referred to measures in the Bill “*ensuring employees have pathways to more secure and permanent employment*”.¹

As distinct from language, the Bill contains a number of substantive measures to empower employees when it comes to their own preferences about their own employment arrangements. These include a new statutory pathway under the National Employment Standards for eligible casual employees to convert to full-time or part-time employment, and support for more part-time employment opportunities (complete with paid leave entitlements) or additional hours of work in key award-reliant industries.

¹ Hon Christian Porter MP, Media Release, “*Industrial relations reform - supporting jobs and our economic recovery*”, page 3, “*How the Bill supports Australia’s jobs and economic recovery*”, paragraph 2, issued 9 December 2020.