New statute ignites stoush over casualisation

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Proposed federal government laws aimed at clarifying the rights of casual employees have sparked a fresh debate about whether the legislation could hand employers greater freedom to classify workers as casuals.

The federal government yesterday introduced proposed amendments to the Fair Work Act to Parliament, including a clause stating that a worker can be treated as a casual employee if “designated” as such by their employer.

The changes were sparked by a landmark full federal court ruling last year that granted a Rio Tinto truck driver, who was hired as a casual, annual leave entitlements based on several factors including the regular and continuous pattern of his work. Because he did not have to return the casual loadings he was paid employers have complained the decision could allow so-called “double dipping”.

Labour law professor Shae McCrystal, of the University of Sydney, said the wording of the legislation could cause a fresh problem as the current laws required a much broader test of who could be classified as a casual.

“Any reference to an employer delegating an employee as a casual in their contract of employment could have very significant implications if it was subsequently interpreted as giving employers the ability to designate workers as casual under contract,” she said.

“This seems a quite concerning potential development.”

A leading employer lawyer from Melbourne disagreed, saying the clause was limited to one particular issue around the conversion of casuals to employees. “This is like crossing the Grand Canyon to say the definition of casual here will in some way infect the court’s interpretation of a casual elsewhere,” he said.

The Australian Council of Trade Unions though flagged concerns the new statutory definition could potentially be applied more broadly because there is no other statutory definition of a “casual”.

“It hands the power to employers to arbitrarily determine who is or is not a casual, rather than applying an objective test of casual work, which is what courts currently rely on, and what working people need for their own job security,” ACTU president Michele O’Neil said. “A job should be either permanent or casual based on the characteristics of the work itself – an objective test – as courts have repeatedly found.”

Industrial Relations Minister Kelly O’Dwyer’s spokesman played down the concerns saying the proposed laws had very limited application. “The ACTU’s lies would have the effect of depriving many casuals of a new right to request conversion to full-time or part-time work, including their members in the coal industry,” he said.

Under the Fair Work Act national employment standards, a casual employee is not entitled to annual leave and other entitlements permanent employees receive. The act does not define a casual employee.

Murky territory

The absence of a legal definition means the courts currently determine casual status according to the nature and pattern of work.