



# Closing the Casual Work Loophole

ACTU Research Note – January 2024

AUSTRALIA NEEDS A  
**Pay Rise**  
Australian Unions  
2024

## Introduction<sup>1</sup>

In early 2024, the Australian Parliament will consider the remainder of the Closing Loopholes Bill, which will seek along with other important changes to close the casual work loophole introduced into the Fair Work Act by the former Morrison Government nearly 3 years ago.<sup>2</sup>

Those changes have effectively allowed an employer to label any employee a casual in their contract of employment and made the pathway for those employees who want to challenge or change their work status even more difficult.

This research note, drawing on a new survey by the ABS, highlights the extent of the problem that these Morrison-era changes have created for many workers. It finds that:

- An estimated 554,000 casuals who have been with their employer for at least 12 months want to convert to permanent work.
- Yet less than 5% of them – or about 28,000 - have been able to convert to permanent work because the current rules are flawed.
- Casuals wanting to convert to permanent work cite job security (61.6%) and paid leave entitlements (22.2%) as their top reasons.
- More than 2.73 million workers are engaged in casual work, the highest number ever.

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<sup>1</sup> This research note is authorised by Sally McManus, ACTU Secretary, 365 Queen St, Melbourne, 3000. Document Number 4/2024

<sup>2</sup> The first part of the Closing Loopholes Bill was split out and passed late in 2023.

As has been well documented, casual work comes with a wide range of insecurity for many working people. This includes higher levels of financial insecurity, poorer mental and physical health, and higher levels of strain on family and work-life balance.<sup>3</sup> This research note also adds to that existing evidence by drawing on new data to find that:

- The pay gap between casual and permanent work is now the widest ever. Casual workers take home \$11.90 less per hour than their permanent counterparts, or a pay gap of 27.7%, despite casual workers supposedly receiving a 25% loading.
- The cost-of-living crisis has deepened for employees on casual and other insecure working arrangements more than any other group of workers: 53% of them now report being financially worse off than they were 12 months ago, an increase of 20 percentage points since 2021.

The Bill before the Parliament would introduce a commonsense definition of casual employment, and a fairer pathway for an eligible employee to choose to become permanent. For many, and especially those on the frontline of the cost-of-living crisis, it would provide them with much needed security in their lives. For those employees who prefer casual work, it enshrines their right to remain casual.

Accordingly, the ACTU urges the Parliament to pass the remainder of the Closing Loopholes Bill as soon as possible.

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<sup>3</sup> For a summary of peer reviewed research on the impact of casual and other forms of insecure work see: ACTU (May 2022), Morrison's record of failure on secure jobs page 10, and; A Senate Select Committee on Job Security, The Job Insecurity Report (February 2022) pages 43 to 54.

## Closing the casual work loophole

In early 2021, the former Morrison Government created a new loophole in the law to make it easier for an employer to call an employee a casual – denying them paid leave entitlements, predictable hours of work, and job security.

The Fair Work Act was amended to define casual employment based on the terms of the contract of employment rather than the true nature of the work relationship. This position was also reaffirmed by the High Court at the time in the *Workpac v Rossato* decision.<sup>4</sup>

Even KPMG, the big four accounting firm that gives big business workplace relations advice and was commissioned to review these changes, found that they could “...permit an employer to engage a casual employee under a sham arrangement”. Accordingly, it recommended that the new Government consider changing the definition.<sup>5</sup>

The Morrison-era changes also introduced a process for a casual to convert to permanent employment which has proven to be of limited usefulness for two reasons. Firstly, an employer could reject an employee’s conversion request on “reasonable business grounds” – an incredibly broad exemption that has proven almost impossible to challenge in practice. Secondly, while an employee could take a rejected conversion request to the Fair Work Commission, the Commission could only arbitrate on the matter if both parties agreed that it could. There is almost no incentive for an employer to agree to arbitration in such circumstances.

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<sup>4</sup> *Workpac Pty Ltd v Rossato & Ors* [2021] HCA 23.

<sup>5</sup> KPMG (October 2022), *Review of the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021*, pages 6 & 7 <https://www.dewr.gov.au/workplace-relations-australia/resources/review-fair-work-amendment-supporting-australias-jobs-and-economic-recovery-act-2021-cth>

In practice they haven't. The provisions have been in place for nearly three years and the FWC has only arbitrated on 4 cases (2 of which went to whether the FWC had the power to arbitrate). The KPMG review also criticised these limitations, albeit in fairly vague language stating that the process "may present barriers that discourage employees" and that further consideration should be given to "better dispute resolution methods".<sup>6</sup>

The new ABS data examined for this research note confirms the flawed nature of the current conversion process, showing that less than 5% of long-term casuals who want to convert to permanent employment have been able to do so.<sup>7</sup>

The Closing Loopholes Bill introduced into Parliament on 4 September 2023 seeks to address these flaws by introducing:

- a commonsense definition of casual employment that better reflects the case law prior to 2021, and
- a fairer test for an employee to convert from casual work to permanent, based on whether or not they are indeed a permanent worker, rather than just letting the employer decide if they can accommodate the change on "reasonable business grounds".
- Enabling the FWC to arbitrate on a dispute without requiring employer consent.

While parts of the Closing Loopholes Bill were passed by the Parliament in late 2023, the measures on casual work will be debated by the Parliament in early 2024.

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<sup>6</sup> KPMG page 75.

<sup>7</sup> See page 8 for further details.

Some business groups have constructively worked with the Government to tweak the proposed changes to casual work.<sup>8</sup> Others have just complained, claiming that this “radical overhaul will cost jobs”<sup>9</sup> or “destroy job creation”.<sup>10</sup> Given that the key change in the Bill is to bring the definition of casual work effectively back to where it was less than three years ago, such claims are absurd.

## Casual work in Australia

Today 2.73 million workers are in casual work, the highest number ever.

Prior to the Morrison-era changes, a worker engaged on a casual basis was supposed to be one who worked irregular or unpredictable hours and had no firm commitment of future work. They have no paid leave entitlements and limited job security. In return, a casual employee is supposed to receive a loading, usually 25% extra pay, on top of their base rate of pay, and a right to say no to requests by their employer for them to work. Even then, up to one-third of casual workers report receiving no loading.<sup>11</sup>

Women make up 53.0% of all casual employees. While 38.9% of casual employees are between the ages of 15 to 24, there are people of all ages on casual work arrangements. Retail, accommodation, food services, health care and social assistance together employ 50.4% of all casual employees.<sup>12</sup>

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<sup>8</sup> AFR, “Burke’s concession on casuals rattles business on IR”, 31 October 2023.

<sup>9</sup> Bran Black, “Radical casual work overhaul will cost jobs” Australian Financial Review, 18 October 2023.

<sup>10</sup> ACCI Submission to the Closing Loopholes Bill Senate Inquiry, September 2023 <https://www.australianchamber.com.au/wp-content/uploads/2023/10/Fair-Work-Amendment-Closing-Loopholes-Bill-2023.pdf>.

<sup>11</sup> Peetz D. and May, R. (2022). Casual truths: what do the data on casual employment really mean?, *Journal of Industrial Relations*, 64(5), 734-758

<sup>12</sup> ABS Labour Force Survey

## The fear of saying no

Peter worked as part time casual worker on night shifts at a major supermarket for 15 years, regularly clocking 25 hours a week. Peter found it difficult to plan his life on a casual contract as shifts would come to him at short notice. It was not unusual for Peter to get a call from his boss at around 8pm for a 12am-3am shift that night. As a casual he was nervous that if he refused a shift the availability of future shifts would dry up and he couldn't afford to take that chance.

Whilst Peter's shifts would often be roughly the same hours, he found that after taking a short holiday the supermarket had already found someone else to cover his pattern and his hours dropped.

Several times through his employment Peter had asked to become a permanent part-time member of staff, Peter wanted the security of a regular income and paid leave, but despite several requests over the years he was always turned down. Peter turned to his union, the SDA, to help. They secured Peter a permanent part-time contract. Peter said despite his long service as a casual he was always worried his employer would "chop him" and his income would dry up.

## How many casual workers want to become permanent?

To better understand the extent to which people change between casual and permanent working arrangements, the Australian Bureau of Statistics conducted a new survey module run throughout the 2022-23 financial year.<sup>13</sup>

Under the Fair Work Act, an employee has to be with an employer for at least 12 months before they can access the provisions to seek to convert to permanent work. This survey showed that 70% of employees identifying as casual would meet this requirement of being “long term”. Of those employees 29% would prefer to be permanent, 58% would prefer to continue with working casually and 13% were unsure.

This result is consistent with a similar survey of 1,200 employees on casual work arrangements conducted by BETA in 2021 which found that 26% of longer-term casuals wanted to convert to permanent work, 63% preferred to remain casual, and 11% were undecided.<sup>14</sup>

To better understand the scale of this demand, the ACTU applied these rates to the ABS Labour Force survey which provides a more representative measure of total casual employment. Today there are some 2.73 million employees that do not receive paid leave entitlements - the broadly accepted measure of casual employment in Australia. This is the highest number of casuals ever.<sup>15</sup>

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13 ABS Labour Multi-Purpose Household Survey 2022-23, included in its Working Arrangements release on 13 December 2023. See: <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/working-arrangements/aug-2023>

14 Behavioural Economics Team of the Australian Government (BETA), Casual employment research findings to inform independent review of SAJER Act (, August 2022), page 29.

15 ABS Labour Force (Detailed), November 2023. As a proportion of total employment, this remains below the pre-pandemic peak, largely because at least 540,000 casual workers lost their jobs during the pandemic.



Using that total figure, an estimated 554,000 long term casuals would prefer to be permanent.<sup>16</sup> This figure does not include casuals who have been with their employers for less than 12 months but want to convert. This estimate is also likely different from the actual number of casuals who would be eligible to apply to convert to permanent work under the proposed changes in the Closing Loopholes Bill No.2 because eligibility under the Bill's measure would kick in at 6 months for employees at a business with 15 or more employees<sup>17</sup>, and the test applied is slightly different.<sup>18</sup>

Those wanting to convert to permanent work cited job security (61.6%) and paid leave entitlements (22.2%) as their top reasons. Those not wanting to convert cited higher hourly pay (20.4%) and flexibility (39.4%) as key reasons.

**Table 1: Main reason would convert from casual to permanent in the next 12 months.**

Job security	61.6%
Paid leave entitlements	22.2%
Training or career progression	6.9%
Other reasons	9.4%

Source: ABS Labour Multi-Purpose Household Survey 2022-23. Due to rounding table may not total to 100%.

**Table 2: Main reason would not convert from casual to permanent in the next 12 months.**

Higher hourly pay	20.4%
More flexibility as a casual	39.4%
Planning to leave current job	16.9%
Other reason	23.3%

Source: ABS Labour Multi-Purpose Household Survey 2022-23

<sup>16</sup> 70% of casuals are assumed to be long term consistent with the ABS estimate. Approximately 29% of them wish to be permanent. Applying these rates gives the estimate quoted above where : long term casuals (70%) x long term casuals who want to be permanent (29%) x total casual employment (2.73 million)

<sup>17</sup> Employees working for an employer with less than 15 employees have to be employed for 12 months before being able to access this right.

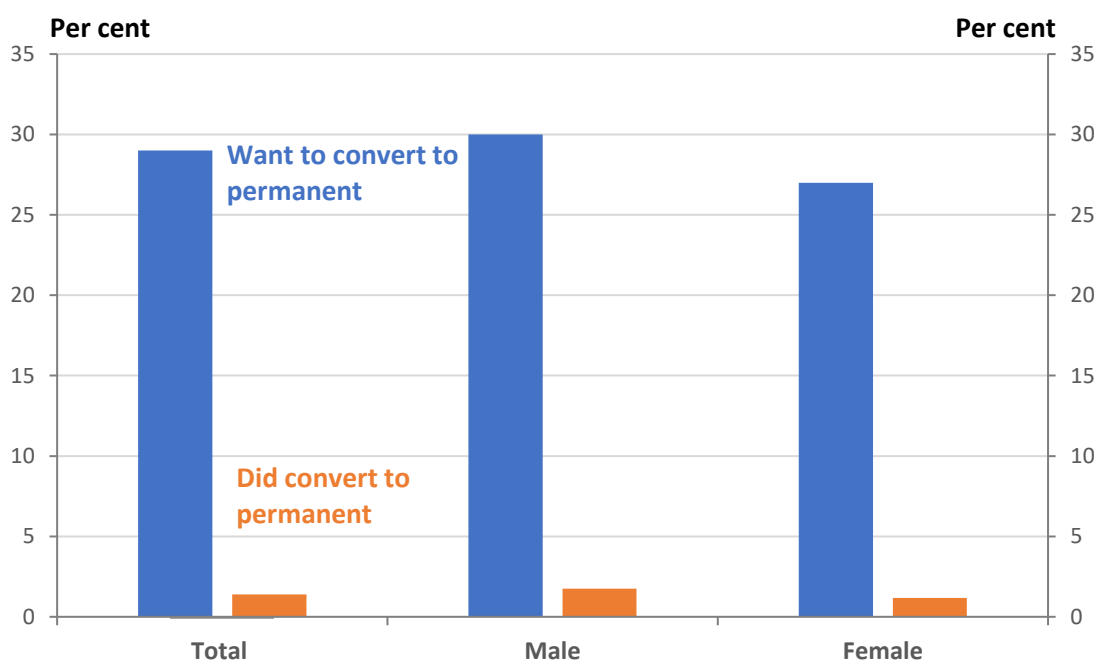
<sup>18</sup> Data on these two variables is not available in this new ABS data release but has been estimated by the Government in the Explanatory Memorandum to the Closing Loopholes Bill.

The new ABS survey module also asks whether or not an employee had a conversion conversation with their employer and then whether or not they actually converted to permanent work. The results are startling: only 1.4% of long-term casuals actually converted, despite 29% wanting to do so. The situation is slightly worse for women, where only 1.2% achieved conversion.

Measured against the total pool of casual workers, this suggests that less than 28,000 long-term casuals achieved permanent work during the survey period of 2022-23. That means that less than 5% of long-term casuals who want to convert to permanent work have been able to do so under the current process. The current pathways to permanent work for casuals are clearly deeply flawed.

***“...less than 5% of long-term casuals who want to convert to permanent work have been able to do so...”***

**Chart 1: The casual conversion gap, 2022-23**



Source: ABS Multi-Purpose Household Survey Module (2022-23); ACTU calculations.

## “I just want to be permanent”

Toby is a casual tutor and a part time primary school teacher. Since 2006 he has worked two jobs to ensure he has a regular income. As a casual worker his employment lacks the basic securities of annual leave and sick leave.

Toby finds managing the emails from two jobs difficult, and it means it takes him longer to reply than he would like. Because unsecure work in the adult education sector is the norm Toby feels pupils are missing out. Toby says, “two thirds of university staff are either casual or on fix term contracts, people just come and go...it’s a good job but many can’t deal with the insecurity”.

This means pupils risk not getting the support they need.

Toby said he’s one of the rare breed in his workplace who’s just about managed to continue but says his academic career has been in stalemate as it’s been difficult to manage his hours and finances, plus his employer won’t invest in a professional pathway for him as he’s casual. This he says against a backdrop of “university chancellors earning over a million dollars, but they can’t give tutors permanent contracts”

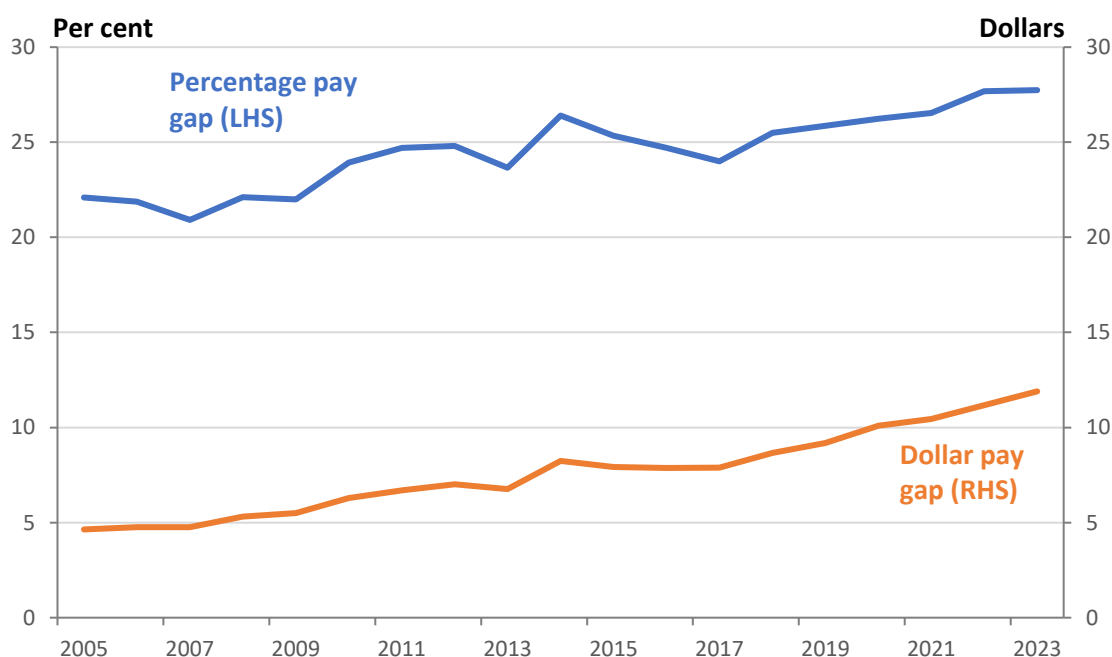
“There’s constant uncertainty ... I’m a father of three teenage kids, and I work really hard and have pride in my job. I just want to be permanent.”

## The casual work pay gap

Casual workers are feeling a greater cost of living crunch because they are earning far less than permanent workers, both on an hourly and weekly basis. While this is unsurprising given that casual workers tend to be concentrated in lower-paid occupations and sectors, the growing pay gap between the types of employment is a worrying trend.

Casual employees now earn \$11.90 less than their permanently employed counterparts: \$31 an hour compared to \$42.90 per hour when compared on a median basis. This is a 27.7% pay gap. This is the largest gap ever in both dollar and relative terms.

**Chart 2: Casual and permanent work pay gap for median hourly earnings, 2005-2023**



Source: ABS Characteristics of Employment, August 2023

Earlier ACTU analysis shows that this pay gap still exists when comparing casual and permanent workers at the same skill levels or within the same occupation. The pay gap between casuals and permanents on this basis is between \$3.55 to \$3.84 an hour or about 11%.<sup>19</sup> This is despite casual workers supposedly receiving an additional 25% loading in lieu of paid leave entitlements and job security.

## Casual work in a cost-of-living crisis

With lower pay and less job security, it is also no surprise that those on casual and other insecure work arrangements are feeling the most pain during the cost-of-living crisis.

The ACTU runs a quarterly survey to understand the sentiments and experiences of working people, including questions on their work status and financial security. The latest wave run in late November 2023 surveyed 2,084 workers and showed that 64% of all workers list the cost-of-living crisis as their top concern.<sup>20</sup>

But it is those on casual and other insecure working arrangements that are feeling the most pain.<sup>21</sup> For example, 16% of permanent workers disagree with the statement that “I earn enough to pay my Bills”, whereas 29% of casuals disagree with it.

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19 ACTU, Closing Loopholes: Casual Work, Research Note (May 2023) page 1. This level of data from the latest ABS Characteristics of Employment (August 2023) survey is not yet available.

20 ACTU Attitudes, Sentiments and Knowledge (ASK) Survey, Wave 9, November 2023.

21 Insecure working arrangement is defined as any worker not engaged on a permanent full time or part time basis. This includes workers on casual, fixed term or gig arrangements.

**Table 3: I earn enough to pay my bills**

	Permanent	Casual
Agree or strongly agree	66%	45%
Disagree or strongly disagree	16%	29%

Source: ACTU ASK Survey Wave 9 November 2023.

Similarly, 56% of casuals feel that their household is worse off financially than at the same time last year, compared to 47% of permanent workers.

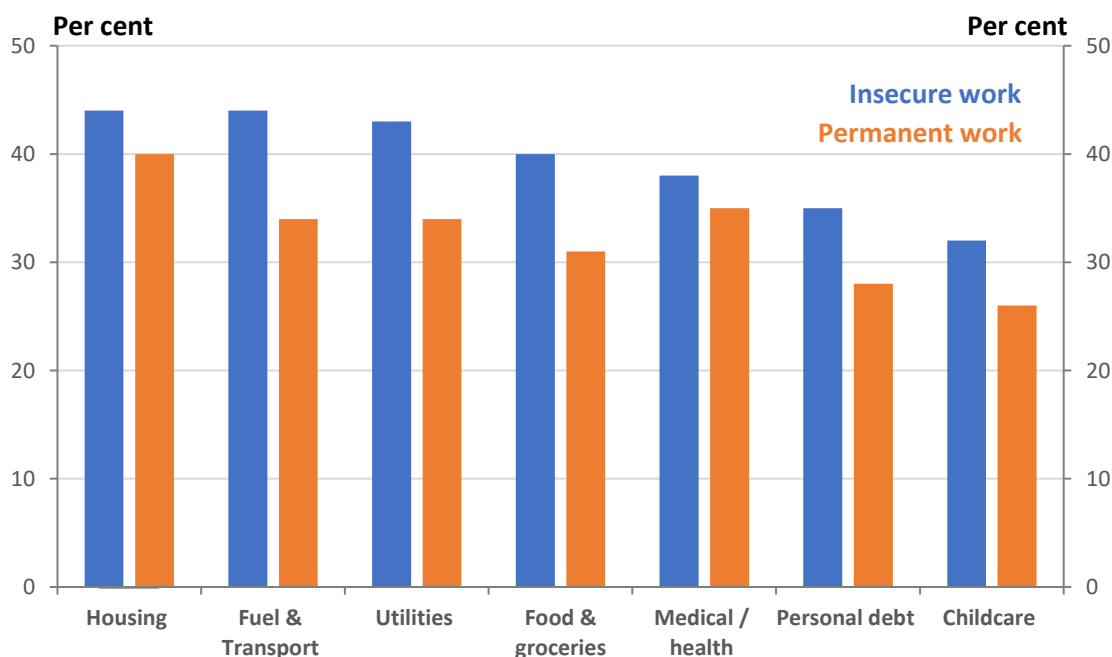
**Table 4: My household is better off financially now than at the same time last year.**

	Permanent	Casual
Agree or strongly agree	30%	25%
Disagree or strongly disagree	47%	56%

Source: ACTU ASK Survey Wave 9 November 2023.

When asked if their household would be able to afford the following costs without significant stress, those in insecure work consistently disagreed or strongly disagreed at higher levels than permanent workers, across all categories of costs.

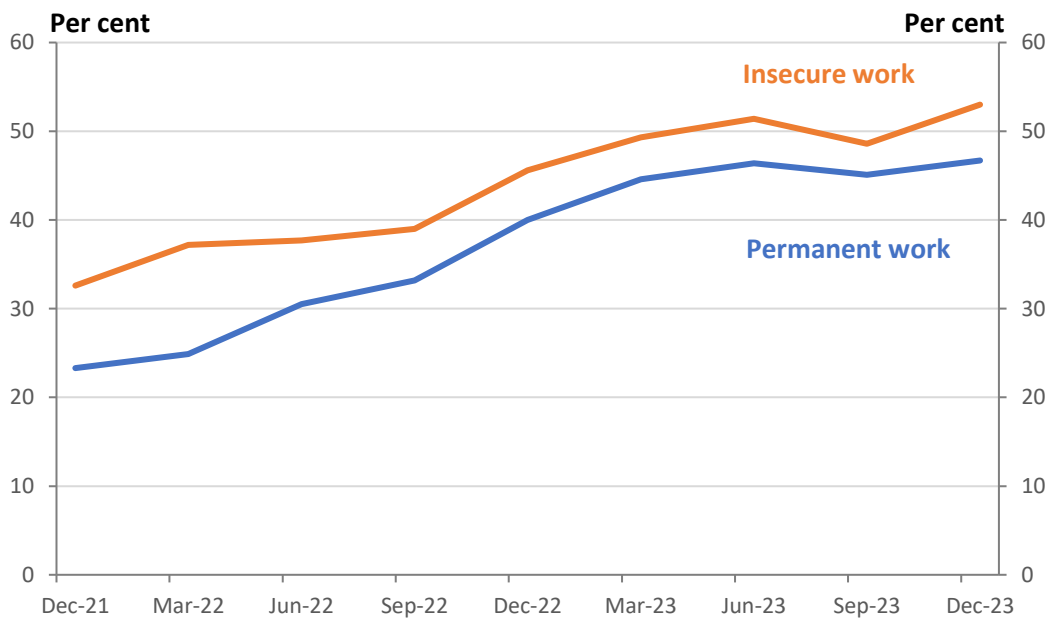
**Chart 3: Cannot afford without significant financial stress in the next 12 months.**



Source: ACTU ASK survey, Waves 9, November 2023.

There has also been a consistent escalation in workers saying that they are financially worse off than twelve months ago. Since this series started at the end of 2021 there has been a 20% increase in this answer for workers in insecure work. For workers in permanent work, the increase has followed a similar trajectory, but from a lower base.

**Chart 4: My household is worse off financially than the same time last year.**



Source: ACTU ASK survey, waves 1 to 9. Measure combines “disagree” and “strong-disagree” responses to the question: My household is better off financially than the same time last year.