

Towards Fairness and Security

Reforming Casual Employment in Australia



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About Per Capita

Per Capita is an independent public policy think tank. We work to build a new vision for Australia based on fairness, shared prosperity, and social justice.

Our office is located on the lands of the Wurundjeri people of the Kulin Nations, which were never ceded. We strongly support the Uluru Statement from the Heart and the call for a First Nations Voice to Parliament.

Per Capita's research and policy prescriptions are rigorous, evidence-based, and long-term in outlook. All our publications and activities are intended to deepen political, social, and economic democracy, and we are focused on challenges for the next generations rather than the next election cycle.

Our approach to public policy

Per Capita's approach to public policy challenges the dominant narrative that disadvantage arises from personal fault or failure by pointing out the policy choices that have deepened inequality and proposing alternative choices that will lessen it.

Our policy analysis and recommended solutions seek to recognise the challenges and work within the complex economic, political, and social conditions, of our age, such as:

- The impact of rapid climate change and extreme weather events;
- Growing economic inequality, with increasing returns to capital and a decline in returns to labour;
- The growing difficulty of accessing good jobs, adequate income support and secure housing; and
- The negative effects of privatisation and the deliberate shrinking of essential public services.

In doing so, we strive to incorporate new thinking in social science and economics, innovative ways of working with data, and effective evaluation tools to measure outcomes. We also engage actively with organisations across society, including the union movement, civil society, the community sector, academia, business, government and the public service, and social change movements.

In all our work, we seek to understand and highlight the experiences of those who bear the brunt of the effects of policy choices that exacerbate inequality, including underpaid and exploited workers, people who can't get a decent job, women, First Nations people, members of the LGBTQ+ community, people with disability and their carers, migrants and refugees, and others who are marginalised by our economic and social structures and denied their fair share of power and resources.

We live and work in hope and solidarity

The democracy Per Capita works for is one that shares its knowledge, wealth, and power, to ensure all its citizens can live meaningful and fulfilling lives, able to take care of each other and our shared planet.

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Acknowledgement

The authors wish to thank Jennifer Sam for the excellent research assistance she contributed to this project.



Withering the Fair Go

In Australia, the concept of the fair go remains one of our most enduring principles, saturating our cultural and political discourse. A concept so emblematic of Australia — the lucky country — where fairness, egalitarianism, and mateship shape our national character, it has permeated Australian industrial relations, from the 1907 *Harvester Decision*¹ to the 2022 *Aged Care Work Value Case*.²

The *Fair Work Act 2009* (Cth) ('FW Act') took this very Australian notion of the fair go, and built around it 'a new workplace relations system ready to meet the needs of this nation in the 21st century'.³ Key to this was the inclusion of a fair and comprehensive safety net: a set of minimum employment conditions, which cannot be stripped away.⁴ But today, too many workers find themselves excluded from this safety net, falling through loopholes in our workplace laws. The prevalence of casual employment and other forms of non-standard work have exacerbated a growing crisis of insecure work in this country, blighting our Aussie fair go.

Australians live in a rich country — one of the richest in the world.⁵ In 2023 Australia ranked 10th highest GDP per capita in the world and third highest among the world's 20 largest economies.⁶ Since 1980, labour productivity has increased dramatically, with every Australian worker contributing to that achievement.⁷ But workers have not been equally or adequately rewarded for their work, as their real wages lag behind labour productivity.⁸

Today, in our rich country, more than 90% of the gains from economic growth go to the top 10% of income earners.⁹ Company profits are soaring, while real wages are falling.¹⁰ The number of Australians working multiple jobs has hit a record high as everyday people do what they can to survive during a cost-of-living crisis.¹¹ A job is no longer enough to stave off poverty in our country, and more Australians are turning to charities just to meet their basic needs.¹²

In the face of this catastrophe, what are Australian workers told to do?

Spend less money and work more hours.¹³

Absolutely preposterous!

We know that there is another way, a way to reinvigorate the fair go in Australia.

Closing the loopholes in our workplace laws and standing up for casual employees is the right place to start.



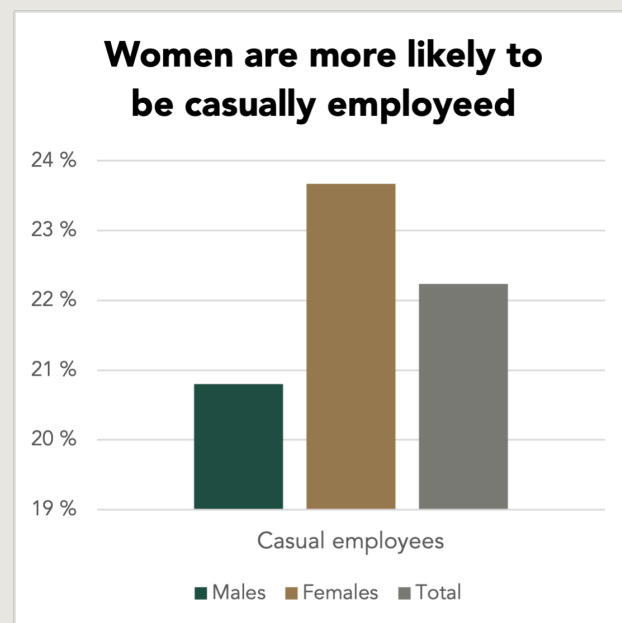
Casually Catastrophic

The Australian Bureau of Statistics measures the number of casual employees in our workforce as *employees without paid leave entitlements*.¹⁴ Casuals are generally not entitled to paid annual leave, sick leave, carer's leave, or compassionate leave.¹⁵ Instead they are meant to receive an hourly loading, normally set at 25%, in lieu of these absent entitlements.

In May 2023 there were 2.6 million leave-deprived workers in Australia, meaning 22% of all employed people are casually employed.¹⁶ These rates are higher for women and young workers. One in four female employees are casually employed (24%)¹⁷ and one in every two people aged between 15 and 24 are casually employed in their main job.

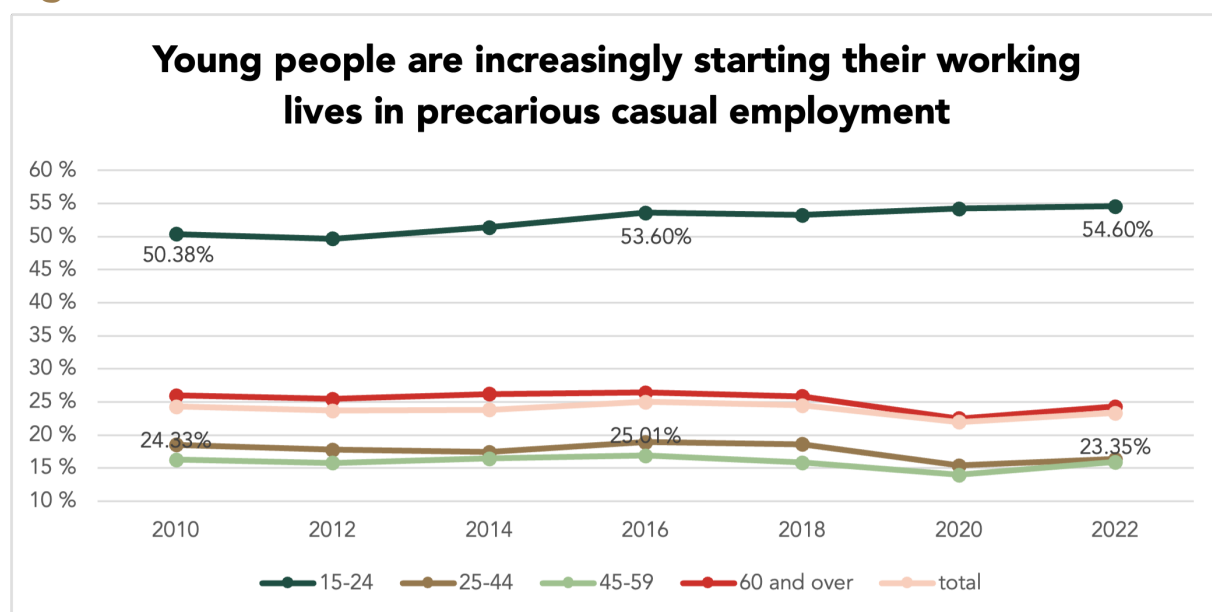
Young workers are more likely to be casuals, taking on a temporary job whilst studying for a degree, but each year the percentage of young people starting in casual employment is growing faster than any other cohort. Most young people start their working lives in precarious employment.

Figure 1



Source: ABS, 6291.0.55.001 Labour Force, Australia, Detailed, May 2023

Figure 2



Source: ABS, 6336.0 Working Arrangements, August 2014 - 2022



Defining casualness

Whether or not an employee has paid leave entitlements is how the ABS measures casual employment in Australia, but this is not its definition. Until 2021 casual employment was not defined in the *FW Act*. Like the definition of employee, it derived its meaning from the common law.²²

In *Hamzy v Tricon International Restaurants*²³ the Full Court of the Federal Court held that:

*[t]he essence of casualness is the **absence of a firm advance commitment** as to the duration of the employee's employment or the days (or hours) the employee will work.*²⁴

Manifestations of this *absence of a firm advance commitment*, generally involved the notion of informality, irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability.²⁵ While a contract of employment which clearly states that the employment is casual served as an indication of the parties' intent, whether an employee was truly casual could be determined by looking at subsequent conduct.²⁶ Previously a court was able to regard the totality of the relationship, applying an:

*objective assessment ... to consider whether that intent has been put into practice and if achieved, has been maintained.*²⁷

This is no longer
the case...

Humpty Dumpty law

When I use a word... it means just what I choose it to mean — neither more nor less.

- Lewis Carroll, *Through the Looking Glass*

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)* ('2021 *FW Amendment*'), introduced a statutory definition for casual employees and a right (in some circumstances) to be offered casual conversion into the *FW Act*.¹⁸ Pursuant to s15A, a person is a *casual employee* if they accept 'an offer of employment made by the employer ... on the basis that the employer makes no firm advance commitment to continuing and indefinite work.'¹⁹

The important factor in this definition is that classification occurs upon the offer of employment, not by reference to the subsequent conduct of the parties. Indeed, in determining whether an employee is casual or permanent, assessing the subsequent conduct of either party is not permitted.²⁰ Following acceptance, a person remains a casual employee until they are either converted to a permanent position or given an alternative employment offer.²¹ Under this definition, employers are given the full prerogative to label their workers as they wish. It ignores the inherent power imbalance which exists between workers and employees, particularly at the point of engagement. By simply applying the casual label to their employees, employers can shift their risk, engaging their workers on an insecure basis.

Workers are potentially
locked into this label
indefinitely.



A right to conversion?

The new workforce-wide right to be offered casual conversion is woefully deficient in providing a pathway to permanency, even when casuals are ostensibly working in a permanent capacity.

The provisions are neither robust nor effective, with exceptions so broad, you could drive a truck through them.

Reasonable grounds

Larger employers are exempt from offering conversion if they can satisfy any *reasonable grounds* for not doing so, or if it would require a significant adjustment.³¹

Reviews of the 2021 *FW amendment* have found no significant shift in the number of employees successfully converting to permanent positions.³²

As the case below highlights, employers are granted an excessive amount of discretion to refuse to make an offer.

***Toby Priest v Flinders University of South Australia* [2022] FWC 478**

In 2022, Toby Priest disputed his employer's decision not to offer him a permanent part-time job. He believed he met the criteria to be offered a casual conversion under the *FW Act*.²⁸ Mr Priest was employed as a casual tutor at Flinders University, where he'd worked since 2006. He had tutored the same topics each semester since 2011.²⁹ The Fair Work Commission ('FWC') agreed that he met the requirements of having worked a regular pattern of hours on an ongoing basis for at least the previous six months. Conversion to a part-time position would have given Mr Priest access to the Staff Development Fund, and to a provision in his workplace agreement that 'ensure[s] that each staff member's workload provides reasonable opportunity for research and creativity'.³⁰ But the FWC held that the changed entitlements and obligations, together with the financial impact of the differing pay required for conversion to a permanent part-time position, would not be without *significant adjustment*, and found in favour of the university.



The Real Characteristics of Casual Employment

Low
pay

Low
power

Low
safety

Low
security

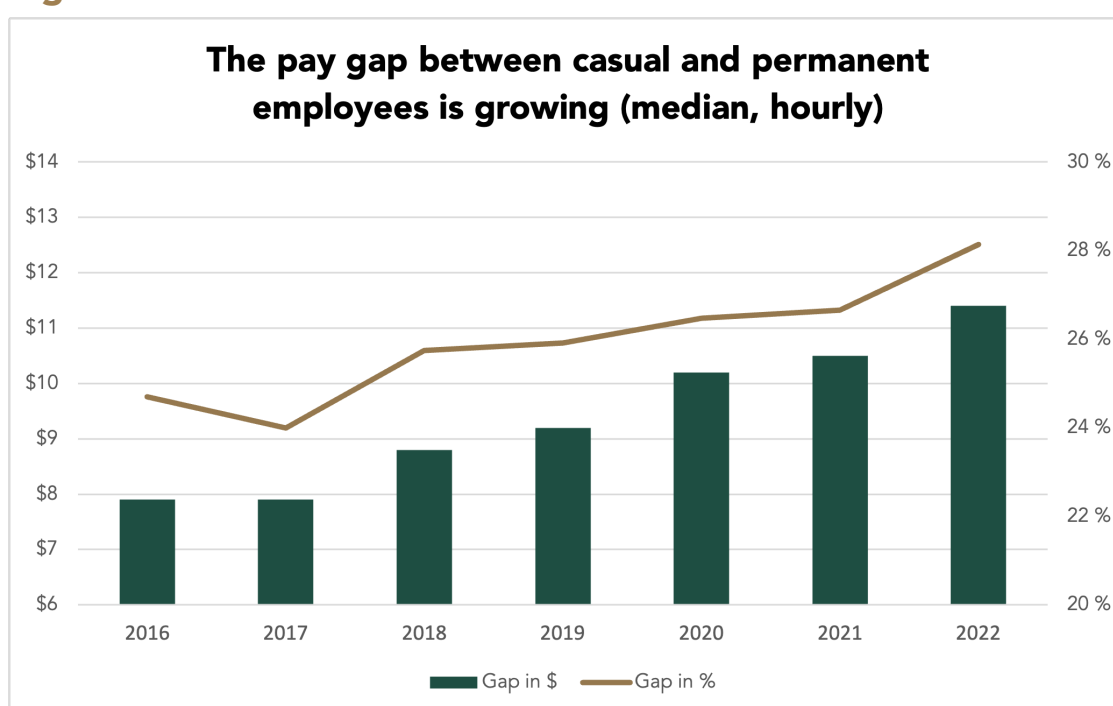
For many of the 2.6 million casual workers in Australia, their jobs are not flexible, irregular, or absent a firm advance commitment of continued work. Instead, the real characteristics of casual employment are: low pay, low power, low safety and low security.

Low pay

Casuals are supposed to receive a pay boost, a 25% loading to the permanent hourly rate to account for unpaid leave entitlements. But when comparing median hourly pay, casuals are paid less than their permanent counterparts.

Across the entire workforce, casual employees receive more than \$11 **less** per hour, contributing to a steadily rising pay gap that is getting bigger every year. It is now the biggest pay gap on record.

Figure 3

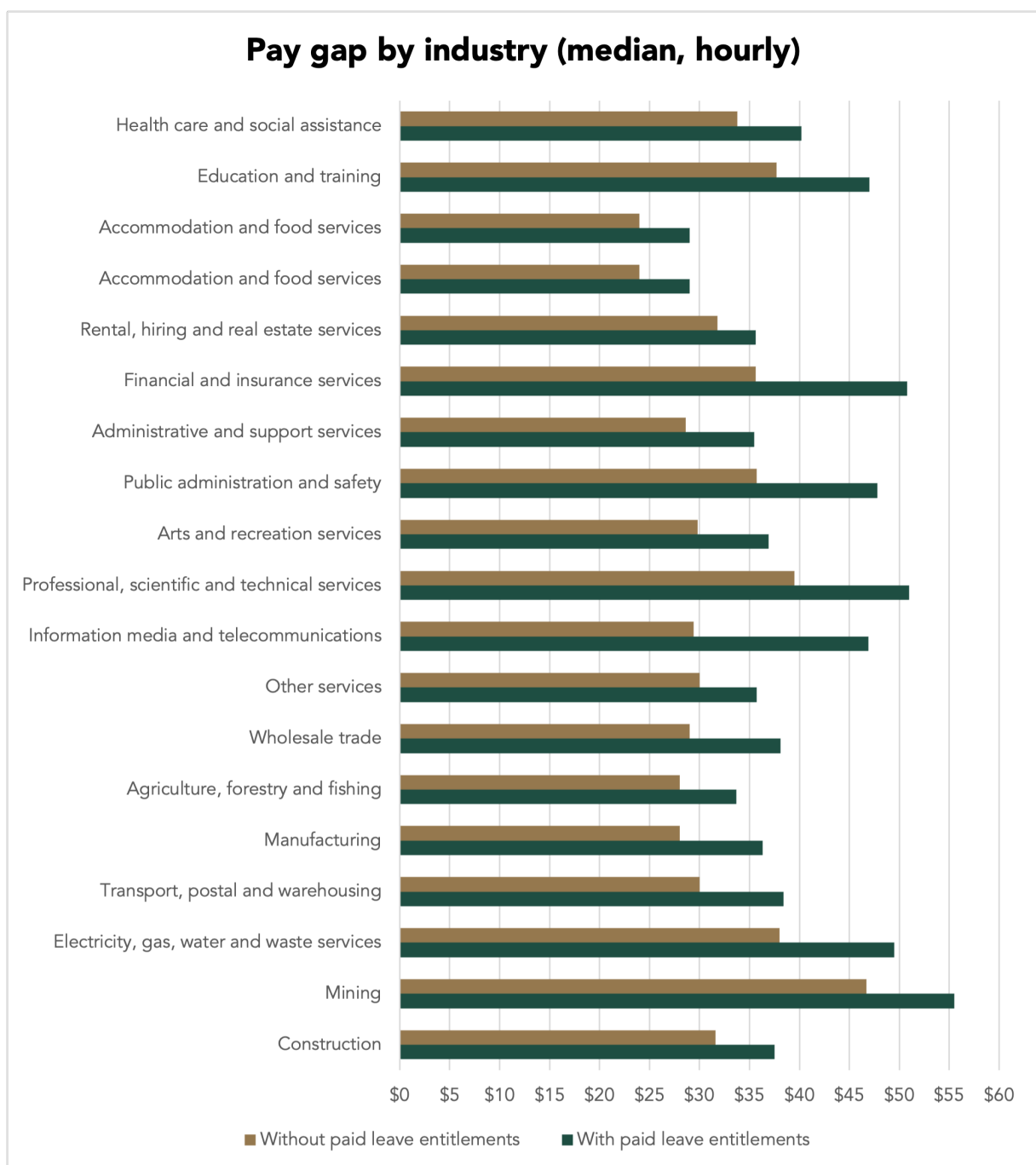


Source: ABS, 6336.0 Working Arrangements, August 2022

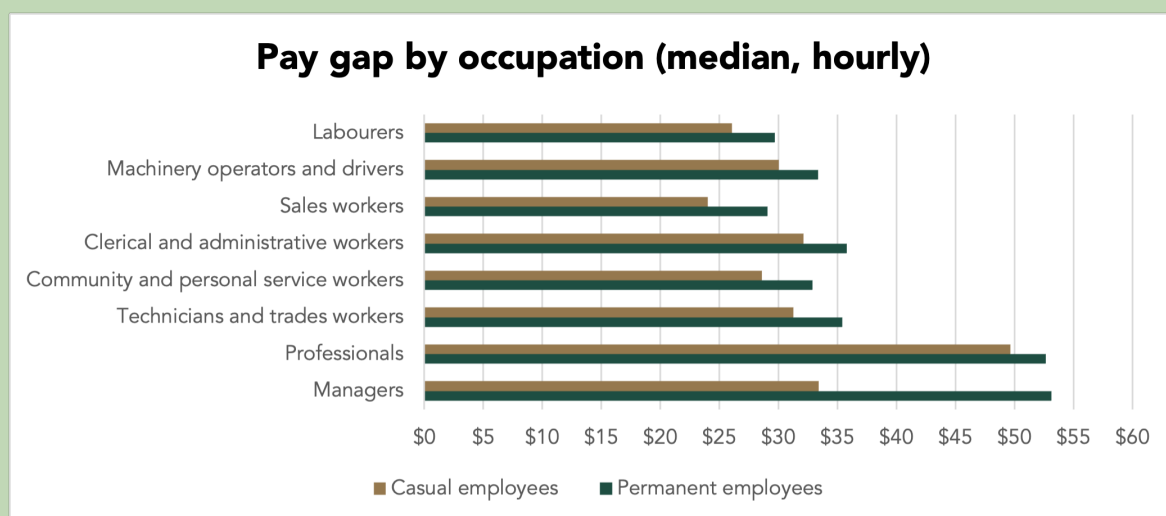
No matter which way you slice it - whether by industry, occupation, age, or skill - casual employees are paid less per hour than permanent employees.



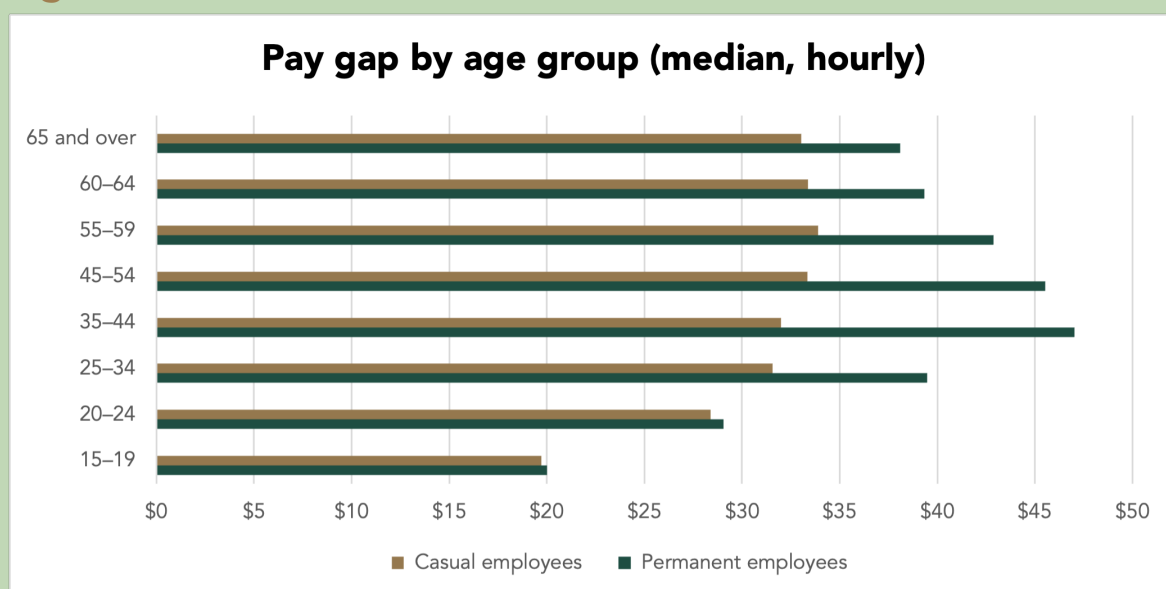
Figure 4



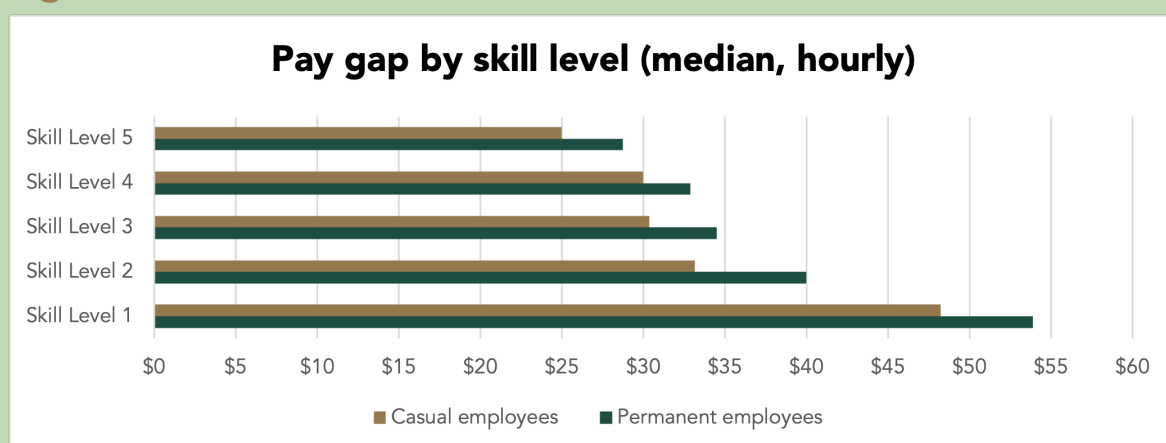
Source: ABS, 6336.0 Working Arrangements, August 2022

Figure 5

Source: ABS, 6336.0 Working Arrangements, August 2022

Figure 6

Source: ABS, 6336.0 Working Arrangements, August 2022

Figure 7

Source: ABS, 6336.0 Working Arrangements, August 2022

Low power

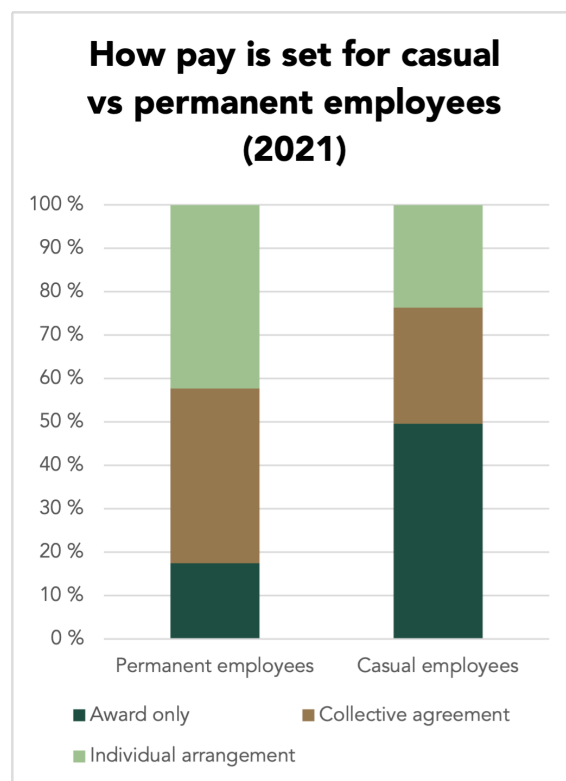
One factor affecting pay for casual employees is that they have less power in their workplaces. On average union members earn \$9.5 more per hour than non-union members,³³ but casuals are much less likely to be a member of a trade union.

In 2022 12.5% of all Australian employees were trade union members. Whilst 15.2% of permanent employees were in their relevant trade union, only 3.7% of casual employees were.³⁴

Consequently, casual employees are more likely to have their wages and conditions set by an industry award and paid less than those on collective agreements. On average, award dependent casual employees earn \$9.3 less than casuals on collective agreements.³⁵

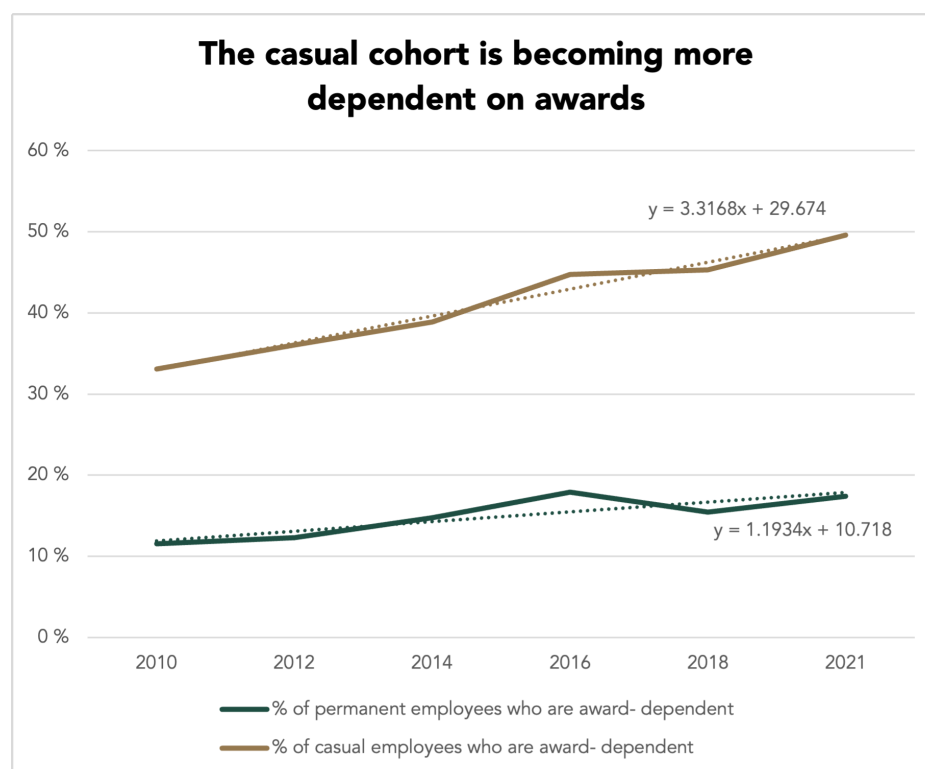
Almost one in four employees in Australia is casually employed, but they make up almost half of all award-dependent employees (45.5%).³⁶ Since 2010 the share of all employees who are award-dependent has increased, but for casuals, it is increasing almost three times faster than their permanent counterparts. Half of all casuals are now award-dependent.

Figure 8



Source: ABS, 6306.0 Employee Earnings and Hours, Australia, 2021, non-managerial employees)

Figure 9



Source: ABS, 6306.0 Employee Earnings and Hours, Australia, 2010-2021 (non-managerial employees)

Low safety

The cost of casual employment hits more than just the wallet. Casual employees experience higher workplace injury frequency rates, and are less likely to raise health and safety concerns or make complaints about working conditions or workplace harassment.⁴⁶

Whilst the percentage of insecure workers who experienced sexual harassment and other workplace issues was on par with that of permanent workers in 2022,⁴⁷ the ACTU's *Work Shouldn't Hurt Survey* found notable differences in how workers responded to instances of harassment depending on their employment status. A higher percentage of insecure workers (50%) refrained from taking action in response to workplace harassment, such as seeking assistance or making a complaint or report, due to the fear of negative consequences, compared to permanent workers (32%).⁴⁸ Additionally, a greater proportion of insecure workers said they had no confidence that the complaints process would be kept confidential (43%), compared to their permanent counterparts (24%).⁴⁹

The 2020 *Respect@Work Report* documents numerous accounts from workers, unions, academics and advocates about the extent to which casual employment affects the likelihood of workers making a sexual harassment complaint.⁴²

As a casual employee, [reporting the sexual harassment] was no[t] only not an option but terrifying, as I had no other source of income and deteriorating health. I could not afford to take such a risk. I suffered for many years in silence.

-Anonymous worker⁴³

The precarious nature of both underemployment and casual employment compounds their already relatively poor levels of power in the workplace, by reducing or compromising their ability to raise complaints about their working conditions, including any harassment that they experience, for fear of losing their job.

-Our Watch⁴⁴

When you are a casual worker or you don't have security of employment, when you are low paid, then you don't have a lot of options in terms of taking action against sexual harassment. And that makes it easier for sexual harassment to flourish in those workplaces.

-Union representative⁴⁵

Spotlight on the consequences of insecurity

The COVID pandemic shone a light on how disastrous the insecurity of casual employment can be. Casual workers accounted for around two-thirds of all people who lost jobs in the early 2020 lockdowns. In that year, just between February and May, their numbers fell from 2.6 million to 2.1 million.³⁷ Later research suggests that during the 2021 lockdown waves, casual workers were eight times more likely to experience job loss compared to permanent staff.³⁸

Of the 2.6 million casuals employed in Australia in August 2019, less than half had been with their employer for at least 12 months.³⁹ Although 80% expected to be with their current employer for the next 12 months it left many without access to the full JobKeeper payments.⁴⁰ Young people were hit the hardest; more likely to be casually employed and more likely to be with their current employer for a shorter period. When the JobKeeper payments ceased, casual workers (who generally do not have sick pay) were forced to choose between going to work and getting paid or staying home and getting healthy; between putting food on the table or keeping the community safe.⁴¹

Insecure work is a workplace hazard

When assessed on a per hour basis (hours actually worked in all jobs), casual employees get injured more often at work than permanent employees. During the 2021-2022 financial year, 436,497 employees experienced a work-related injury or illness: 78% were permanent employees and 22% were casuals.⁵⁰ Although this is consistent with the percentage of casuals and permanent employees across the workforce, casual employees experienced a 49% higher frequency rate of injury on a per hour basis, compared to their permanent counterparts. The disparity was even more pronounced for female casual employees.

In 2021-2022, female casuals had an injury frequency rate nearly double that of their permanent female counterparts (93% higher). Several factors may contribute to this alarming trend, including: inadequate training for casuals in comparison to permanent employees, a higher likelihood of casual workers attending work despite being fatigued or unwell due to the lack of access to paid sick leave, and the possibility that lower job security makes casual employees less willing to voice safety concerns, fearing the potential of losing their job or of other negative repercussions.

Table 1

Status in employment	Males	Females	Total
Number of injured workers			
Employees	239,045	197,452	436,497
With paid leave	197,923	140,559	338,482
Without paid leave	41,122	56,893	98,014
Number of hours actually worked			
Employees	2,360,663,975	1,927,854,817	4,288,518,793
With paid leave	1,995,102,088	1,594,121,945	3,589,224,033
Without paid leave	365,561,887	333,732,873	699,294,760
Incidence rate (injuries per 1000 workers)			
Employees	42.02	34.66	38.34
With paid leave	44.24	33.06	38.79
Without paid leave	33.86	39.4	36.87
Frequency rate (injuries per million hours worked)			
Employees	101.26	102.42	101.78
With paid leave	99.20	88.17	94.31
Without paid leave	112.49	170.47	140.16

Source: Calculations based on: ABS, 6291.0.55.001 Labour Force, Australia, Detailed, May 2023; 6336.0 Working Arrangements, August 2022; 6324.0 Work-Related Injuries, 2021-22

Low security

Many casuals work regularly, on an ongoing basis, working the same hours week in, week out. Their work is not genuinely irregular, intermittent, or unpredictable. For many, they are only casual in name.

All risk, no reward: the flexibility myth

A key driver of casualisation came from the growing employer demand for a more flexible workforce; one which can be quickly adjusted in response to operational needs.⁵¹

As with all forms of insecure employment, this is essentially a tool by which business owners can shift

the risk of operating a profit-making enterprise from themselves to their workers.

Employing workers on a permanent basis requires employers to manage risks associated with fluctuating workloads. In contrast, by using a casualised workforce, they are relinquished of obligations to pay benefits and entitlements associated with permanent employment and can budget in a way that is purely responsive to demand.

But this risk doesn't disappear. It is simply transferred from the business owner to the worker. When the amount of work required to service the business drops, employers can shed staff quickly and cheaply.

Why should workers bear the risk if they don't share in the rewards?

45.3% of all casual employees get paid the same every week



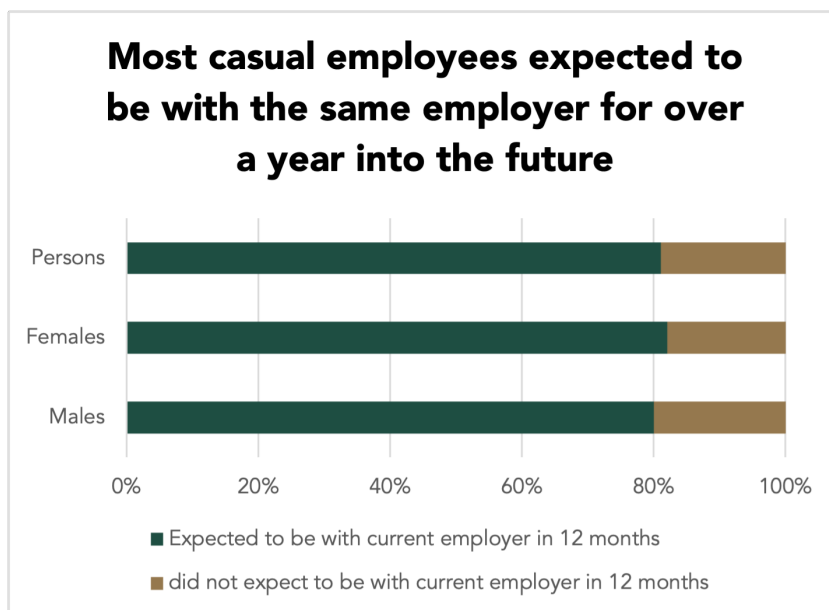
Source: ABS, 6336.0 Working Arrangements, August 2022

60% of all casual employees usually work the same hours each week



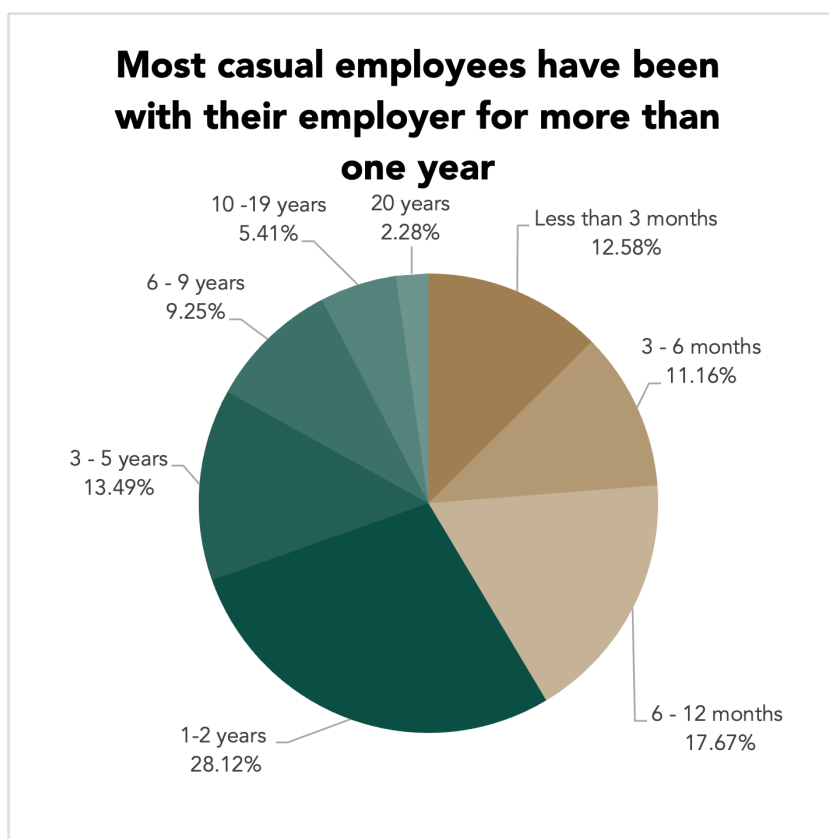
Source: ABS, 6336.0 Working Arrangements, August 2022

Figure 10



Source: ABS, 6333.0 Characteristics of Employment, Australia, 2015

Figure 11

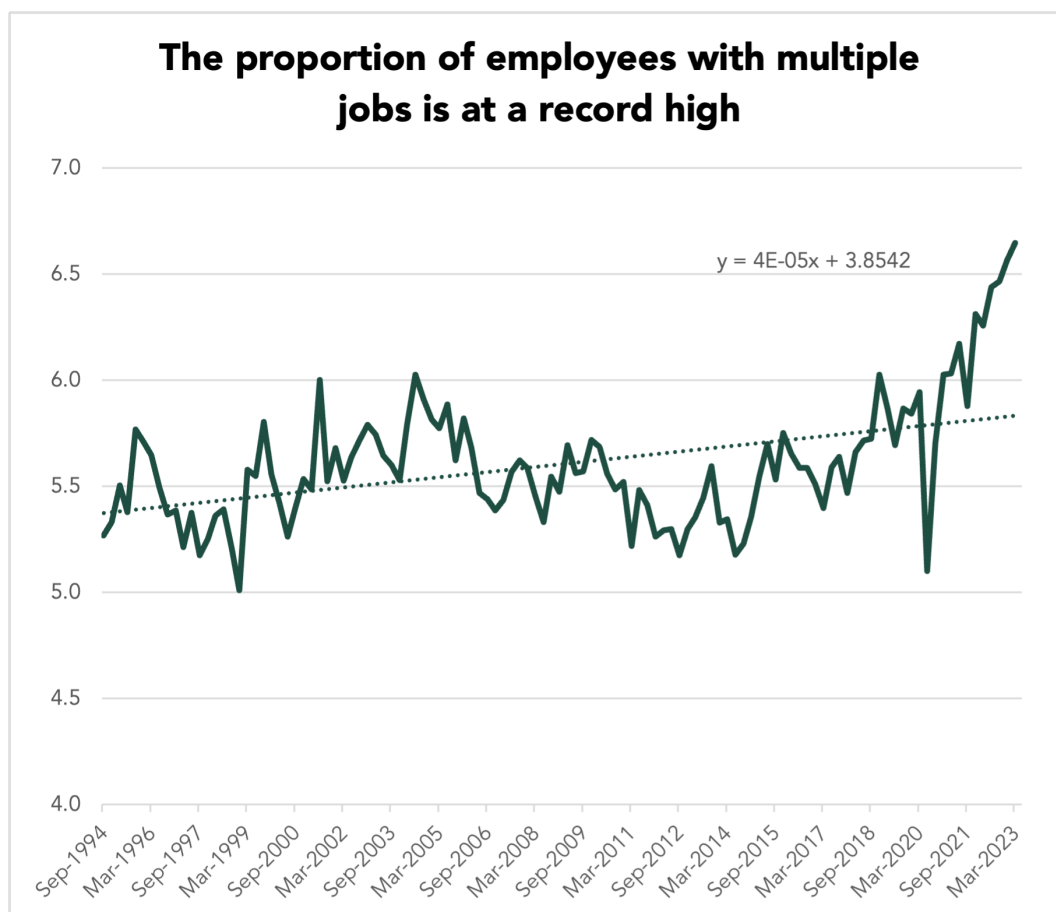


Source: ABS, 6333.0 Characteristics of Employment, Australia, 2015

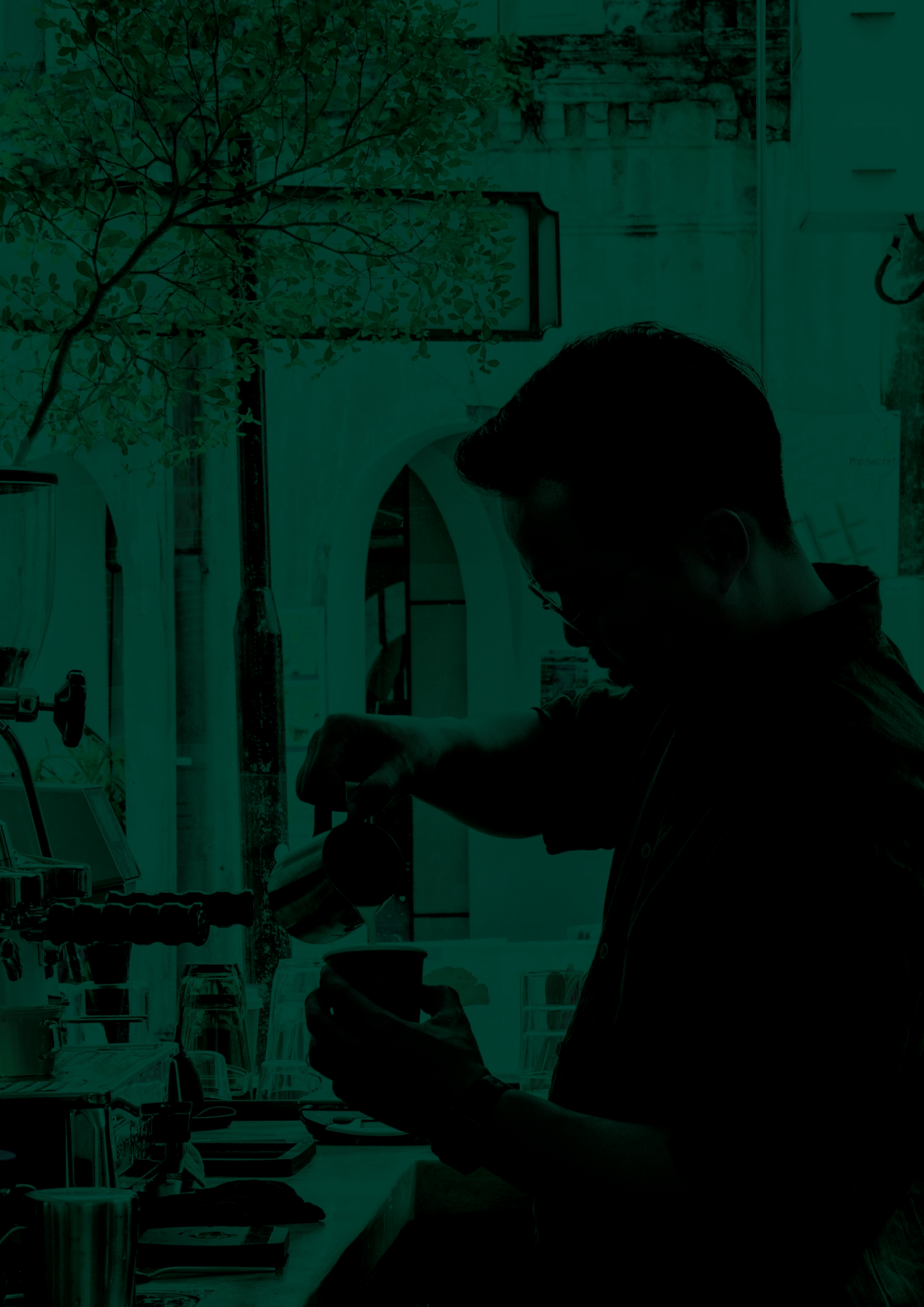
Workers in Australia are working more jobs, just to get by

In Australia, job insecurity is at a crisis point, carrying detrimental effects for the physical and mental health of Australian workers. As workers struggle to get enough hours in their main job, a record number are being forced to juggle multiple jobs, just to survive. In March 2023, 947,300 people were working two or more jobs.⁵² This increase in the number of multiple job holders sheds light on how stagnant household incomes, and the shift towards non-standard forms of work are affecting workers in Australia.

Figure 12



Source: ABS, 6150.0.55.003 Labour Account Australia, March 2023



Deepening Inequality

You Call This a Fair Go?

“[T]he labour market has witnessed deepening inequality...there have been modest gains in flexibility for workers, but not enough to meet the challenges of diversity...[M]any workers find themselves working harder, working longer, and working in jobs that are more insecure than those of a generation ago.”

-Ian Watson et al, *Fragmented Futures*⁵⁷

The above text was written two decades ago, but it could have been written yesterday. Between 1971 and 2000, the proportion of employees in non-standard forms of work increased from 24% to 47%.⁵³ Since then, it has continued to rise, reaching 55.6% by 2017.⁵⁴

The explosion in the rates of casualisation coincided with the deregulation of our labour market,⁵⁵ leaving today's workforce propped up by non-standard forms of work.

While the incidence of casual employment has been relatively stable since the 1990s, it is exceedingly high by global standards.

We have one of the highest rates of casual employment in the world.⁵⁶

It's time to do something about it.



What's the Fix?

How to Close the Casual Loophole

1.

Introduce a common-sense definition of *casual employee* into the *Fair Work Act* that only covers work arrangements that are genuinely irregular, intermittent or unpredictable.

2.

Give the Fair Work Commission the powers to quickly sort out a dispute over who is and who isn't a casual – rather than leaving it to expensive litigation, where those with the deepest pockets usually win, years later.

3.

Give the Fair Work Commission further powers to arbitrate disputes over casual conversion, given that existing powers have proven to be largely useless in practice.



Casual definition

Many casual employees are only casual in name, potentially stuck in insecure work indefinitely.

We need a common-sense definition of casual employee in the FW Act that only covers work arrangements that are genuinely irregular, intermittent or unpredictable. This should be an objective definition that includes consideration of the terms of the contract of employment as well as post-contractual conduct.

This best captures the practical reality of the relationship between the employer and employee, rather than relying merely on what label the contract gives employees. Additionally, the FWC should be granted the authority to resolve disputes regarding the classification of casual workers, so as to avoid expensive and protracted litigation that often favours those with greater financial resources.

Case study #1

Sam has been working as a casual university tutor at the same university for five years. He works regular hours, teaching the same units each semester and expects to continue in this role in the foreseeable future. Despite being labelled as a casual employee, Sam's responsibilities and workload closely resemble those of permanent staff.

Sam is getting ready to settle down but is concerned about his future employment. This is demoralising, given the level of commitment and effort that he invests in his work. Additionally, as a casual employee, Sam has limited access to career progression, leading to an overall feeling of disempowerment. Sam, like others in his position, is reluctant to voice concerns or advocate for his rights due to the potential repercussions, such as losing tutoring assignments or being offered fewer hours. The uncertain nature of casual employment amplifies this fear. Sam takes precautions to avoid getting sick, including avoiding public transport and not attending large gatherings in his own time. He is worried that if he is sick, he will not be able to pay his rent as he will have to take unpaid leave.

Sam accepted a contract of casual employment when he commenced the role. He is paid an hourly rate which includes course delivery, preparation, and student consultation. Under the current law, he cannot dispute his classification. But under an objective definition that allowed consideration of the totality of his relationship including post-contractual conduct, it is clear he has a firm advance commitment as to the duration of his employment and the days and hours he is expected to work and would likely be entitled to permanent employee benefits under the National Employment Standards.

Casual conversion reform

Changes are needed to address the shortcomings of the current casual conversion provisions. The FWC should be given further powers to effectively arbitrate disputes related to casual conversion. This would enhance the fairness and effectiveness of the conversion provision, providing greater job security and protection for casual employees.



Case study #2

Lisa has been working as a casual employee for a retail company for several years working 30 hours a week. She consistently works regular hours and has a firm commitment from her employer for ongoing work.

During the last 12 months, Lisa took on additional tasks organising shift swaps for employees who had been exposed to COVID-19 and were unable to attend work at short notice. She performed these tasks in addition to her regular work requirements. However, despite her long-term and stable employment, Lisa faces obstacles when attempting to convert to permanent employment due to the limitations of the current conversion provision.

She was notified by her employer that they would not be offering her a permanent position because they believed in the next 12 months, the extra tasks she performed would become obsolete, and as fewer staff are taking time off for COVID-related illness, rosters would be reorganised which may significantly reduce her hours - even though six new employees have been hired over the last two months because business is booming. She is concerned that pursuing action over the unreasonableness of this refusal will result in her hours being reduced. Although she believes that the FWC would agree with her, she is unable to have a decision arbitrated because her employers will not agree to arbitration.

Conclusion

Amid Australia's deepening cost-of-living crisis, too many workers are finding it increasingly difficult to make ends meet. Forced to string together multiple jobs just to keep their heads above water.

Casual work is supposed to be irregular, intermittent, or unpredictable; designed to accommodate short-term needs. But the real characteristics of casual employment are low pay, low power, low safety, and low security. Too often casual workers find themselves engaged in regular work, working the same days and the same hours, week after week. Ensnared in a loophole in our workplace laws, where it's difficult to assert the true nature of work or convert to permanent ongoing positions.

Casual employees are entitled to an additional hourly loading in lieu of paid leave benefits. Yet, the sad reality is that casuals are now earning less on average than their permanent counterparts: across every industry, skill level, and occupation.

With less job security, casuals face difficulties in voicing their concerns about health and safety issues

at work, making their workplaces riskier environments, and leading to a higher injury frequency rate than their permanent counterparts. Flexibility, intended to serve employers and employees alike, seems only to benefit employers, leaving many Australian workers scrambling to piece together jobs that barely cover their living expenses.

We have an inadequate definition of casual employment in the FW Act, locking many workers in insecure work. The existing casual conversion provisions are ineffective, leaving many without the benefits and security they deserve.

It's time to stand up for casuals and close the loopholes in our workplace laws, by implementing an objective definition of casual employee in the FW Act, and by granting the FWC with additional powers so they can swiftly and cheaply settle disputes. Closing these loopholes in our workplace legislation is a necessary step towards securing a brighter future for millions of working Australians. It is a necessary step towards a more stable and dignified future of work; towards reinvigorating the Aussie fair go.



Notes

- 1 *Ex Parte H V McKay* (1907) 2 CAR 1.
- 2 *Aged Care Work Value Case* [2022] FWCFB 200.
- 3 National Employment Standards. Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11189 (Julia Gillard, Minister for Employment and Workplace Relations).
- 4 *Ibid*; *Fair Work Act 2009* (Cth) s 61(1) ('FW Act').
- 5 Australia has the 13th largest economy in the world, based on gross domestic product in terms of nominal value: International Monetary Fund, *World Economic Outlook* (April 2023).
- 6 *Ibid*.
- 7 'Has Worker Compensation Reflected Labour Productivity Growth?' *Australian Bureau of Statistics* (Web Article, 13 December 2022) <<https://www.abs.gov.au/articles/has-worker-compensation-reflected-labour-productivity-growth>>.
- 8 Jim Stanford, 'Is productivity really a magical fix?', *The University of Sydney* (News post, 26 August 2022) <<https://www.sydney.edu.au/news-opinion/news/2022/08/26/is-productivity-really-a-magical-fix-.html>>.
- 9 David Richardson and Matt Grudnoff, *Inequality on Steroids: The Distribution of Economic Growth in Australia* (Report, April 2023).
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