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**HEALTHY WORKING TIME:
EVALUATING AUSTRALIA AND ITS
AVAILABLE INDUSTRIAL INSTRUMENTS**

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Healthy Working Time: Evaluating Australia and Its Available Industrial Instruments

Natasha Markovic

I. INTRODUCTION

Almost a quarter of workers globally work more than 48-hours per week,¹ including 1.2 million Australians.² Research has shown the adverse effects working long hours regularly can have on human health and workplace safety. The effects of long hours have also been shown to extend to families, communities and society more generally. Understandably maximum working hours and healthy working time are gaining increased attention globally.

Whilst incidences of long working hours decreased in the majority of countries over the last century, the past 30+ years have seen a reversal in many countries, including Australia.³ This can be partly explained by the major changes experienced across organisations globally over this time. Working time arrangements are now more complex as a result of advanced technologies, increased competitiveness and customer demands for round-the-clock services. People are increasingly required to move toward more flexible patterns of working hours to meet these new demands. The distinction between work and pleasure is, as a result, becoming increasingly blurred.

Recent research by the International Labour Organisations (ILO) proposes that working time arrangements should promote health and safety.⁴ Achieving healthy working time requires appropriate regulatory and institutional frameworks. Laws and regulations at the national, sectoral and enterprise levels that establish limits on working hours are a necessary minimum condition for restraining excessively long hours of work. Working hours in countries where working time limits exist, have decreased and conversely they have increased where no such limits exist. Australia is one such country. A weak working time regulatory framework in Australia has contributed to the trend toward longer working hours for full-time employees. During a period where the nature of work has intensified in Australia, there has been little corresponding change in the regulatory framework. Looking internationally provides a different perspective. The strongest international reference point is the European Union (EU) through its Directive on Working Time.⁵ Since 2003, all EU Member States had the Working Time Directive incorporated into their national regulatory frameworks.

This essay aims to examine and assess the industrial instruments available in Australia for achieving healthy working time with a focus on the banking industry. It starts by dissecting the

¹ Anne Spurgeon, *Working Time; Its Impacts on Safety and Health* (ILO and Korea Occupational Safety and Health Research Institute, 2003) 22.

² Australian Bureau of Statistics, 'Paid work: Longer Working Hours, Australian Social Trends', 4102.0 (2003).

³ Spurgeon, above n 1, 22.

⁴ Sangheon Lee, Diedre McCann, Jon C Messenger, *Working Time Around the World: Trends in Working Hours, Laws and Policies in a Global Comparative Perspective* (Routledge, 2007) 141.

⁵ Council Directive 93/104/EC of 1993 concerning certain aspects of the organisation of working time (1993) OJ L 307/ 18 ('EU Working Time Directive')

concept of healthy working time and its significance to Australia, with consideration to how healthy working time has evolved over the last 100+ years in Australia and internationally. The essay continues on to explore the relevance of regulatory and institutional frameworks for achieving healthy working time, with consideration to both the international and Australian experience.

The next section of the essay starts to deal with the question of whether the current industrial instruments available in Australia are adequate for achieving healthy working time by examining the various instruments available under the Fair Work Act,⁶ with some reference to the contract of employment, in the context of the frameworks available internationally. The final section of the essay continues to deal with the question of whether the available industrial instruments are adequate for achieving healthy working time by evaluating them against the current leading framework in working time reform, the EU Directive on Working Time. This is followed by a range of proposed reform options for consideration and conclusion.

II. HEALTHY WORKING TIME AND ITS SIGNIFICANCE TO AUSTRALIA

A. *What Is Healthy Working Time?*

The ILO Conditions of Work and Employment Program has proposed five interconnected dimensions which aim to advance the goal of decent work in the arena of working time. The five dimensions are articulated by Messenger⁷ as follows:

“working time arrangements should promote health and safety; be “family friendly”; promote gender equality; advance the productivity of enterprises; and facilitate worker choice and influence over their hours of work”.

For the purpose of this essay, we examine the first of these, healthy working time. Healthy working time is based on the principle that hours of work which are unhealthy should not be a means of improving firms’ profitability. This principle is reflected in the ILO Hours of Work (Industry) Convention,⁸ Hours of Work (Commerce and Offices) Convention⁹ and in the EU Working Time Directive.¹⁰

Working time is broadly defined as the number of hours worked and the pattern or schedule of those hours.¹¹ Defining an appropriate number of working hours or ‘healthy working time’ is receiving a great deal of legislative and research attention globally as many individuals work long and disruptive hours to the detriment of their health, families and lives outside of work.¹²

⁶ Fair Work Act (No 28) 2009 (Cth). (*FWA 2009* (Cth)).

⁷ Jon C Messenger, ‘Towards Decent Working Time’ in Jean-Yves Boulin, Michel Lallement, Jon C Messenger and Francois Michon (eds), *Decent Working Time: New Trends, New Issues* (International Labour Organisation), 2006) 420-21.

⁸ Hours of Work (Industry) Convention, 1919, ILO Convention C001, 1st sess, ILO Doc C1 (28 November 1919) (*Convention No 1*).

⁹ Hours of Work (Commerce and Offices) Convention, 1930, ILO Convention C030, 14th sess, ILO Doc C30 (28 June 1930) (*Convention No 30*).

¹⁰ *EU Working Time Directive*, EU Doc 93/104/EC.

¹¹ Spurgeon, above n 1, 21.

¹² Lee, McCann and Messenger, above n 4, 7.

Preserving workers health and workplace safety has from the outset been one of the central objectives of measures to address long working hours.¹³

In their recent book on working time around the world, Lee, McCann and Messenger¹⁴ from the ILO's Conditions of Work and Employment Program, suggest two possible approaches to defining healthy working time and examining long working hours. The first is "*exceeding the statutory normal hours*" with statutory normal hours determining a socially acceptable level of working hours observance and the second is "*hours exceeding the maximum hours of work beyond which negative consequences on workers are known to be visible*". The difficulty with the first approach is that there is no consistent definition internationally of 'statutory normal hours' and whilst national laws almost always dictate the definition of normal hours, cultural and economic factors also play a major determining role.¹⁵

With the second approach, there is evidence that the adverse effects of regularly long working hours on health and safety begin to manifest when regular working hours exceed 50 hours per week.¹⁶ In terms of human health, working such hours on a sustainable basis has shown to significantly increase the risk of mental health problems, increase the risk of cardio-vascular disease, increase the effects of other stressors and increase the prevalence of somatic symptoms and health threatening coping behaviours such as increased smoking and poor, irregular diet.¹⁷ At the individual level, a recent Austrian survey has also shown that levels of stress rise proportionately with increases in working time.¹⁸ With respect to workplace safety, research has established a link between long hours (ie. in excess of 48 hours per week) and accidents in the workplace as well as driving accidents going to or coming from work.¹⁹ An analysis of accident data in two countries indicated a rise in accident rates after nine hours of work and experimental data predicts an increase in worker errors after eight hours of work.²⁰ A further issue impacting both human health and workplace safety is that employees working more than 48 hours per week tend to reduce their hours of sleep rather than cut back on competing social and domestic demands.²¹

The effects of long hours and "unsocial" working hours are not limited to individual workers, but also their families, communities and society more generally.²² Long working hours, especially "very extended" or "extremely extended" hours, involve significant risks and at the collective level:²³

"can open up further competition over wages, hours and effort thereby exert pressure on all employees within a workplace, occupational group or industry, including many employees not

¹³ Ibid 143.

¹⁴ Ibid 37. (emphasis added)

¹⁵ Spurgeon, above n 1, 22.

¹⁶ Ibid.

¹⁷ Ibid, 10-11.

¹⁸ Manfred Krenn and Christoph Hermann, Long working Hours in Austria (European Foundation, 2004) 1.

¹⁹ Bruce D Kirkcaldy, Rudiger Trimpop and Cary L Cooper, 'Working Hours, Job Stress, Work Satisfaction and Accident Rates Among Medical Practitioners and Allied Personnel' (1997) 4 (2) *International Journal of Stress Management* 79-87.

²⁰ Spurgeon, above n 1, 12.

²¹ Dawson, 'Managing Shiftwork: Not Just the Roster' (1997) 15(5) *The Journal of Occupational Health and Safety - Australian and New Zealand*, 411-13.

²² Barbara Pocock, *The Work/ Life Collision* (Federation Press, 2003).

²³ Iain Campbell, 'Extended Working Hours in Australia' (2002) 13(1) *Labour and Industry* 92.

currently engaged in extended hours. Long hours also act to shape the composition of the paid (and unpaid) workforce. They signal the consolidation of barriers of entry into distinct occupational categories, industries of workplaces. Workers with family responsibilities, eg for child care or elder care, have difficulty accommodation demands for long hours, and they may feel obliged to leave jobs or to refrain from applying for jobs in which long hours are present”.

For the purpose of this essay, long working hours will be defined as expressed by Jon Messenger²⁴ in his recent article on working time trends and developments in Europe:

“usual weekly hours in excess of 48 hours per week, including both normal hours of work and overtime”.

Messenger proposes this definition for two reasons. Firstly, this threshold is in line with the 48-hour weekly limit established in ILO Conventions No. 1²⁵ and No. 30,²⁶ which were originally intended to be the maximum weekly hours that workers would be required to work under normal circumstances and it is also the maximum limit for working hours established in the EU Working Time Directive.²⁷ This definition is also very close to the 50-hour limit demonstrated adversely affect human health and workplace safety.

B. Evolution of Healthy Working Time

Evidence is increasingly showing that reducing regular long working hours can positively impact workers’ physical and mental health, improve workplace safety and increase labour productivity as a result of reduced fatigue and stress, higher levels of employee job satisfaction and motivation and lower rates of absenteeism.²⁸ In analysing the adequacy of the current regulatory and institutional frameworks available to reduce regular long working hours and achieve health working time, it is important to understand the evolution of healthy working time and the contemporary challenges to achieving this.

During the 19th century, it was common to neglect the psychological and physiological limitations of people in the workplace seen as secondary to technical and industrial needs.²⁹ There was also the assumption that greater hours meant greater production. This was successfully challenged,³⁰ which saw the start of a change in attitude toward the wellbeing of the industrial workforce and a shift in public attitude toward working time. By the middle of the 19th century, and later in some countries, a long-term process of working time reduction began.³¹

A 10-hour limit was already relatively widespread across Europe by the start of the First World War. Whilst this was the high point of progress in Europe, New Zealand the United States had

²⁴ Jon Messenger, ‘Working time trends and developments in Europe’ (2010) 35 *Cambridge Journal of Economics*, 301. (emphasis added)

²⁵ *Convention No 1*, ILO Doc C1.

²⁶ *Convention No 30*, ILO Doc C30.

²⁷ Messenger, above n 22.

²⁸ Jouko Natti, Timo Anttila and Via Vaisanen, ‘Managers and Working Time in Finland’ in Jean-Yves Boulin, Michel Lallement, Jon C Messenger and Francois Michon (eds), *Decent Working Time: New Trends, New Issues* (International Labour Organisation, 2006) 313.

²⁹ Spurgeon, above n 1, 18.

³⁰ *Ibid.*

³¹ Gerhard Bosch and Steffen Lehndorff, ‘Working-time reduction and employment: experiences in Europe and economic policy recommendations’ (2001) 25, *Cambridge Journal of Economics*, 209.

adopted the 48 week at the start of the 19th century³² and by the end of the First World War, this standard had spread to most of Europe and a number of Latin American countries.³³ The eight hour day and 48 hour week, were also included in the preamble of the ILO's constitution and the first of the ILO's standards.³⁴ The 40-hour week gradually became a vision of acceptable working hours in many jurisdictions and was expressed in the ILO's Forty Hour Week Convention.³⁵ By 1967 when the ILO did its first comprehensive review of national working time laws, there was a definite trend toward the 40 hour week in most national measures. Only 35 of the 93 countries surveyed had a statutory 48 hour week and the rest had lower limits.³⁶ Over subsequent years, normal hours as set by law steadily decreased throughout the world, including in Australia.

Normal hours defined in law do not however always reflect the actual hours people work and observance rates are low in many countries,³⁷ including Australia. It is not uncommon that substantial gaps exist between what is written in law and what is actually happening in the workplace and long hours are still widespread. 1 out of 5 or 22% of workers globally work more than 48 hours per week.³⁸ A 1999³⁹ survey of over 1,300 managers in the UK revealed that they often or always worked over their contracted hours to cope with excessive work demands and a recent European survey showed that whilst the largest percentage of workers work 39 hours or less, a substantial portion still work more than 60 hours.⁴⁰ The standard working week in Australia, as currently defined in the National Employment Standards (NES),⁴¹ is 38 hours. Whilst this standard has social and economic meaning,⁴² it is not reflective of actual working time practice with Australian full-time employees working well above this standard and increasingly over the last three decades.⁴³

Australia's long-term historical experience up until the early 1980's was declining and comparatively lower full-time working hours, however, Australia now has relatively long working hours by the standards of other industrialised countries.⁴⁴ Average actual weekly hours of full-time employees in Australia have risen by 3.1 hours on average over the past two decades; from 38.2 in 1982 to 41.3 in 2001.⁴⁵ This is a significant increase over a comparatively short period and considerably more than the 'standard' 38 hour week specified in current legislation. In August 2002, around 1.2 million Australians worked 50 or more hours per week, twice as many as in 1982, and as a proportion of full-time workers increased from 20% to

³² Lee, McCann and Messenger, above n 4, 8.

³³ Ibid.

³⁴ *Convention No 1*, ILO Doc C1.

³⁵ Forty Hour Week Convention, 1935, ILO Convention C047, 19th sess, ILO Doc C047 (22 June 1935) (*Convention No 47*).

³⁶ Lee, McCann and Messenger, above n 4, 12.

³⁷ Spurgeon, above n 1, 22.

³⁸ Ibid, 53.

³⁹ Les Worrall and Cary L Cooper, 'Working Patterns and Working Hours: Their Impact on UK Managers' (1999) 20(1) *Leadership and Organisation Development Journal* 6-10.

⁴⁰ Pascal Paoli, 'Second European Survey on Working Conditions' (European Foundation for the Improvement of Living and Working Conditions, 1996).

⁴¹ *FWA 2009 (Cth)*, s20.

⁴² Iain Campbell, 'Snatching at the Wind? Unpaid Overtime and Trade Unions in Australia' (2002) 10(2) *International Journal of Employment Studies* 111.

⁴³ Australian Bureau of Statistics, above n 2.

⁴⁴ Lee, McCann and Messenger, above n 4, 26 and Bosch and Steffen Lehndorff, above n 31, 217.

⁴⁵ Campbell, above n23, 93.

30%.⁴⁶ The Australian trend toward longer working hours is relatively uncommon among other OECD countries, most of which experienced little change, or continued the longer term trend in reducing full-time hours over the period.⁴⁷ According to OECD⁴⁸ data for full-time employees across 23 OECD countries, Australia has the highest average full-time working hours.

This reversal in the long-term pattern of work hours can be partly explained by the major changes experienced across organisations globally over the past 30 years in particular. Working time arrangements are now more complex as a result of advanced technologies, an increase in competitiveness and customer demands for 24/7 services. Increasingly people are being required to move toward flexible and irregular patterns of working hours which have emerged to meet these new demands.⁴⁹ Flexible work arrangements impede a straight forward distinction between regular and overtime hours⁵⁰ and with the distinction between work and pleasure becoming increasingly blurred, there is a concern that work is having an unacceptably disruptive effect on people's lives.⁵¹

Individuals working extended working hours in Australia can be found in many industries and occupations. There are concentrations in the finance, property, business services, mining and construction industries. There are also concentrations in occupations involving high levels of personal responsibility and accountability, jobs with relatively high earnings and in jobs with no standard working hours⁵² such as managers, administrators, professionals and associate professionals.⁵³ Of all these, very long hours are most common among managers and administrators with 56% of all full-time workers in this group working 50+ hours and 11% 70+ hours.⁵⁴

In the Australian finance industry where we might expect to find limits on hours worked, especially among clerical and sales employees, almost two-thirds of employees report working more than eight hours a day on any day of the week with an average of 2.5 hours unpaid overtime and 0.7 hours of paid overtime worked per week.⁵⁵ While managers might be expected to put in some unpaid overtime, in the finance industry the term 'manager' doesn't appear to relate just to those with high-level responsibility or pay. Research shows the increase in hours in the Australian finance industry to partly be driven by increased workloads and broad intensification stemming from industry and work restructuring.⁵⁶

⁴⁶ Australian Bureau of Statistics, above n 2.

⁴⁷ Ibid.

⁴⁸ OECD, 'Economic Policy Reforms: Going for Growth' (OECD Publications, 2008).

⁴⁹ Spurgeon, above n 1, 10.

⁵⁰ Arnold Riedmann, Harald Bielenski, Teresa Szczurowska and Alexandra Wagner, 'Working time and work-life balance in European companies' (European Foundation for the Improvement of Living and Working Conditions, 2005) 1-16.

⁵¹ Spurgeon, above n 1, 19.

⁵² Australian Bureau of Statistics, above n 2.

⁵³ Campbell, above n23, 96.

⁵⁴ Australian Bureau of Statistics, above n 2.

⁵⁵ Belinda Probert, Peter Ewer, Kim Whiting, 'Work Versus Life: Union Strategies Reconsidered' (2000) 11(1) *Labour and Industry* 37.

⁵⁶ Ibid, 43.

C. *Relevance of Regulatory and Institutional Frameworks for Achieving Healthy Working Time*

Achieving healthy working time in a constantly evolving environment requires appropriate regulatory and institutional frameworks. Legislation has long been the dominant technique in the field of working time.⁵⁷ Laws and regulations at the national, sectoral and/ or enterprise levels that establish limits on working hours are a necessary minimum condition for restraining excessively long hours of work⁵⁸. Weekly hour limits are working time laws primary method of preventing consistent or regular long hours.⁵⁹ They can play a key role in determining volume of hours worked each week and can therefore make a substantial contribution toward preserving health and safety and permitting workers to find an acceptable balance between paid work, domestic and caring labour and other aspects of their lives.⁶⁰ Organisation for Economic Co-operation and Development (OECD) data⁶¹ from 2005 shows that countries with the highest full-time working hours (Australia, New Zealand, UK and US) do not have a limit on working hours whilst countries with average full-time weekly working hours below 40 hours, all have caps on their working time.⁶²

There is a substantial degree of uniformity in the current methods used to regulate working time. International standards and legislation in a majority of countries share a similar structure, specifying the number of hours that can be worked before overtime payments are to be made, plus additional limits on overtime hours.⁶³ In all OECD countries, hours of work are determined by a combination of legislation, regulations and multi-employer collective bargaining.⁶⁴

Appropriate laws and regulations to limit excessively long working hours are important to achieving healthy working time,⁶⁵ however, they are not always sufficient in their own right.⁶⁶ Adherence to primary hours limits needs to be actively encouraged and reasons for observance levels to statutory standards in individual countries better understood for effectiveness.⁶⁷ The UK provides an interesting case study on this. Whilst a working time regulatory framework exists in the UK at the country level in the form of the UK Working Time (Amendment) Regulations⁶⁸ and at the supranational level in the form of the EU Working Time Directive, the application of the “opt-out” clause is so widespread in that almost one in five British employees are working 48 hours or more per week.⁶⁹ For legislation and regulations to be effective, credible enforcement mechanisms need to be explored and there needs to be a more targeted

⁵⁷ Lee, McCann and Messenger, above n 4, 8.

⁵⁸ Messenger, above n24, 312.

⁵⁹ Lee, McCann and Messenger, above n 4, 7.

⁶⁰ Ibid, 8.

⁶¹ OECD, above n 48.

⁶² Brigid van Wanrooy, John Buchanan and Iain Campbell, ‘When do we stop? Achieving maximum weekly working hours in Australia’ (NES Exposure Draft Submission: 2008), 3.

⁶³ Lee, McCann and Messenger, above n 4, 10.

⁶⁴ Campbell, above n 23, 98 and John M Evans, Douglas C Lippoldt and Pascal Marianna, ‘Trends in Working Hours in OECD Countries’ 45 (OECD Labour Market and Social Policy Occasional Papers, OECD Publishing, 2001).

⁶⁵ Messenger, above n 24, 313.

⁶⁶ Messenger, above no 7, 421.

⁶⁷ Lee, McCann and Messenger, above n 4, 143.

⁶⁸ The Working Time (Amendment) Regulations 2003, (UK), No. 1684

⁶⁹ Jean-Yves Boulin, Michel Lallement, Jon C Messenger and Francois Michon (eds), *Decent Working Time: New Trends, New Issues* (International Labour Organisation, 2006) 421.

approach for sectors and occupational groups in which excessive hours are concentrated.⁷⁰ There also needs to be a push for companies to adhere to the established 'norms'.⁷¹

In terms of the Australian experience, working time regulation has historically been unclear and incomplete. One of the ways of regulating working hours in Australia has been the use of penalty payments for hours that went beyond the 'standard' working week, however, since the introduction of enterprise bargaining and spread of non-standard employment, some employers have sought to '*extend the boundaries of ordinary time to minimise penalty payments and extend employees' hours*'.⁷² This has been achieved in agreements by widening the span of ordinary hours, averaging working hours, thereby reducing penalty payments and employees have taken advantage of more wages by trading off hours arrangements. This has contributed to long hours and the dominance of unpaid overtime, being overtime not directly paid or compensated for.⁷³ The increase in working hours in Australia over the past two decades seems to be almost entirely made up of such unpaid overtime.⁷⁴ In 2009, 38% of Australian employees (3.2 million) usually worked extra overtime⁷⁵ and over one quarter (27%) were not compensated for the extra hours or overtime worked.⁷⁶ This differs to the UK and US where the extra hours worked by full-time employees in the US is largely in the form of paid overtime and in the UK a combination of paid and unpaid overtime.⁷⁷

Appropriate regulatory and institutional frameworks are clearly essential for reducing long working hours and achieving healthy working time, particularly in a constantly changing environment. This points to the question of whether the current industrial instruments available in Australia are adequate for achieving healthy working time, particularly during a period where the nature of work is intensifying. This will now be evaluated using the regulatory and institutional frameworks available internationally and primarily, The EU Working Time Directive.

III. AN EVALUATIVE FRAMEWORK FOR ASSESSING THE REGULATION OF WORKING TIME

A. *International Labour Organisation and Its Relevant Conventions*

In considering the regulatory and institutional frameworks available internationally, the first point of reference is the ILO and its relevant conventions. As a multilateral international organisation, the ILO and its international rules generate labour law and outcomes at the national level. Whilst the ILO lacks power to force states to carry out their commitments, which are voluntary, once made, "*it is a major force in the circulation of work and ideas*".⁷⁸ The main

⁷⁰ Messenger, above n24, 313.

⁷¹ Lee, McCann and Messenger, above n 4, 145.

⁷² Wanrooy, Buchanan and Campbell, above no. 62, 6. (emphasis added)

⁷³ John Burgess, William Mitchell and Alison Preston, 'The Australian Labour Market in 2002' (2003) 45(2) *Journal of Industrial Relations* 136.

⁷⁴ Campbell, above n23, 94.

⁷⁵ Australian Bureau of Statistics, 'Working Time Arrangements, Australia', 6342.0 (2009).

⁷⁶ Ibid.

⁷⁷ Campbell, above n 23, 94.

⁷⁸ Jill Murray, 'Time for a New Working-Time Convention? Ideas, Themes and Possibilities' (2003) 18(3) *Labour and Industry*, 3. (emphasis added)

ILO conventions that have driven or contributed to the regulatory and institutional frameworks that have developed globally with respect to achieving healthy working time are the very first of all ILO conventions; the Hours of Work (Industry) Convention;⁷⁹ the Hours of Work (Commerce and Offices) Convention;⁸⁰ and the Forty Hour Week Convention.⁸¹

The main precept of the Hours of Work (Industry) Convention⁸² is that “the working hours of persons employed in any public or private industrial undertaking or in any branch thereof, other than an undertaking in which only members of the same family are employed, shall not exceed eight in the day and 48 in the week”, with some exceptions. These include:

- persons “holding positions of supervision or management and those employed in a confidential capacity”;
- where hours of work on one day are less than eight, the limit may be exceeded on the remaining day by up to one hour; and
- where employed in shifts, can be employed in excess of the limit provided the average over three weeks does not exceed it.

There are some further exceptions with respect to accidents and urgent work, intermittent work, work that requires a succession of shifts and exceptional cases relating to the pressure of work. Regulations shall fix the maximum of additional hours in each instance with overtime payable.

It is important to recognise the foundational perceptions of the first of the ILO’s conventions as these are reflected in the laws and regulations at the national level in a majority of countries, particularly those with average full-time weekly working hours below 40 hours. However, ratification of this convention is very low, with only 51 of 183 ILO member countries having ratified the convention.⁸³ Australia and those countries with a similar regulatory position, including New Zealand (denounced on 9 June 1989⁸⁴), UK and US have not ratified the convention.

A little over a decade after Convention No. 1 was adopted, the Hours of Work (Commerce and Offices)⁸⁵ was introduced. It is more specific with respect to the type of private and public commercial and trading establishments to which it applies but leaves it to the relevant authority in each country to define other factors. Of most significance is that leaves the relevant national authority to define types of persons occupying positions of management or employed in a confidential capacity. The main precept of the Convention is that hours of work for whom the Convention applies shall not exceed 48 in the week and eight in the day and importantly, that they can be arranged so that hours in any day do not exceed ten hours. There are again exceptions which are more focused and commercial in nature to those in convention No. 1. The ratification of convention No. 30 is less than No. 1 with only 51 of 183 ILO member countries having ratified the convention.⁸⁶

⁷⁹ *Convention No 1*, ILO Doc C1.

⁸⁰ *Convention No 30*, ILO Doc C30.

⁸¹ *Convention No. 47*, ILO Doc C047.

⁸² *Convention No 1*, ILO Doc C001.

⁸³ ILO Ratification of Convention No. 1 (1 June 2011) ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

⁸⁴ *Ibid.*

⁸⁵ *Convention No 30*, ILO Doc C30.

⁸⁶ ILO Ratification of Convention No. 30 (1 June 2011) ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

The ILO soon after introduced the Forty Hour Week Convention.⁸⁷ The main principle of this convention was the 40-hour week. Whilst the 40-hour week has evolved to be the acceptable number of working hours in many jurisdictions over the past 50 years, the ratification of Convention No. 47 is very low with just 14 ratifications, including Australia and New Zealand.⁸⁸

Whilst the ILO and its international rules, such as convention No's 1, 30 and 47 have contributed to the generation of labour law and outcomes at the national level, the relevance of their application to contemporary working time law at the national today is highly questionable. Whilst working time regulation was the first item on the ILO's agenda when it was created in 1919 and in spite of there being widespread interest in regulating working time country by country, the actual standards adopted by the ILO clearly have very poor ratification rates.⁸⁹ The current reality is that that a fixed number of hours per day or per week in a five-day work week with weekends off, as expressed in Convention No's. 1 and 30, as a basic framework for the regulation of working time is not longer sufficient as it fails to meet basic protections in an increasingly diversified working time environment.

The current status of working time standards has been an issue of concern to the ILO Governing Body which undertook a review of ILO standards.⁹⁰ Whilst proposals to update the conventions described above have been explored, the Governing Body has not yet agreed to proceed with a revision⁹¹. Convention No. 1 and No. 30 were the subject of a 2005 review by the ILO Committee of Experts on the Application of Conventions and Recommendations where it was recommended they be consolidated into one new standard.⁹² Such attempts to revise the standards have however faced strong resistance from employers.⁹³

B. The European Union and Its Working Time Directive

In considering the regulatory and institutional frameworks available internationally, it is pertinent to refer to the current leader in working time reform, the European Union (EU) and its EU Directive on Working Time.⁹⁴ The Directive provides minimum working hours standards across Europe including, with some conditions:

- a maximum working week of 48 hours per week, including overtime, averaged over a 4 month reference period;
- a minimum of 11 hours uninterrupted time off in a 24 hour period;
- one whole day off per week, in addition to 11 hours rest, although two days off can be averaged over two weeks;
- a rest break where the working day is longer than six hours; and
- four weeks paid leave per annum.

⁸⁷ *Convention No. 47*, ILO Doc C047.

⁸⁸ ILO Ratification of Convention No. 47 (1 June 2011) ILO < <http://www.ilo.org/ilolex/cgi-lex/ratifice.pl?C047>>.

⁸⁹ International Labour Organisation, 'ILO Hours of Work: From Fixed to Flexible General survey of the reports concerning the Hours of Work (Industry) Convention (No. 1, 1919) and the ILO Hours of Work (Commerce and Offices) Convention (No. 30, 1930)', (International Labour Conference: 2005), 93rd Session.

⁹⁰ Katherine Hagen, 'Working Time and International Competitiveness' (Friedrich Ebert Stiftung: 2005), 2.

⁹¹ *Ibid.*

⁹² International Labour Organisation, above n. 89.

⁹³ Hagen, above n. 84, 13.

⁹⁴ *EU Working Time Directive*, EU Doc 93/104/EC.

The Directive allows for two main exemptions. The first being that the maximum four month reference period can be extended to six or even 12 months by collective agreement and the second being that an “opt-out” clause grants employers exemption from the weekly maximum if employees agree to this threshold.

Similar to the ILO conventions, the EU Directive on Working Time allows member States to derogate, via laws, regulations, administrative provisions or collective agreements, from some Articles of the Directive when “on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves”.⁹⁵ Of most significance is the application of this to managing executives and others with autonomous decision-taking powers. Where the derogation is applied, workers should still be provided equivalent periods of compensatory rest and where in exceptional cases this is not possible, appropriate protection.

All EU member states were to have incorporated the Directive on Working Time into their national regulatory frameworks by 1996. Unlike the poor ratification of the ILO conventions, this was achieved with all member states having incorporated the Directive on Working Time by 2003. Whilst there are exemptions present in the Directive (mostly at the insistence of the UK), there is evidence of the proportion of people working longer hours coming down since its introduction.⁹⁶

With consideration to the international research on healthy working time and the most relevant regulatory and institutional framework available internationally, the EU Working Time Directive, the main elements of working time legislation and regulation to be examined in Australia include: hour limits; overtime work; rest periods; annual leave; public holidays; and night work. These elements are consistent with those examined by the ILO in its Conditions of Work and Employment Program. The Program began in 2004 to compile and translate national working time legislation and to include summaries of the content in an online database of working time laws.⁹⁷

C. Evaluating Australia and Its Available Industrial Instruments Against the EU Working Time Directive: A Focus on the Banking Industry

The current Australian industrial relations system is characterised by a combination of legislation and collective bargaining. There are three industrial instruments available under the Fair Work Act; the NES, Modern Awards and Enterprise Agreements. Other sources of regulation include the contract of employment and state and territory legislation and state awards.

Under the Fair Work Act, there is a two-tier ‘safety net’ for workers. The NES are statutory conditions that apply to all national system employees and the system of Modern Awards which provide additional protections on an industry or occupational basis. The NES provides minimum terms and conditions in the form of 10 standards. These cover maximum working hours, flexible work, parental leave, annual leave, personal leave, community service leave, long

⁹⁵ *EU Working Time Directive, EU Doc 93/104/EC.*

⁹⁶ Department for Trade and Industry, United Kingdom, ‘Working Time – Widening the Debate’ (UK Government Consultation, 2004), URN 04/1313.

⁹⁷ Lee, McCann and Messenger, above n 4, 11.

service leave, public holidays, notice of termination and redundancy pay and a right to receive a Fair Work Information Statement on being employed. Awards operate “with the force of legislation” regulating the terms on which defined types of workers can be employed.⁹⁸ Awards typically indicate the basis on which workers can be hired (full-time, part-time, casual etc) or dismissed and they also determine standards in relation to wages and allowances for different work classifications, the range and number of hours employees can be expected to work, various types of leave, rest breaks , and other related matters.⁹⁹ They can also address the resolution of workplace disputes.

The NES always apply as minimum terms and conditions and cannot be displaced. Modern Awards, together with Enterprise Agreements, supplement the NES. An Enterprise Agreement is a collective agreement covering one or more national system employers and the employees they specify as covered in the agreement and an ‘enterprise’ can be any sort of business, activity, project or undertaking.¹⁰⁰ Modern Awards and Enterprise Agreements cannot simultaneously apply to an individual employee at the one time. Whilst an Enterprise Agreement may not deal with all the issues in a particular Award, provided it meets the “better off overall test” (BOOT) it overrides the Award.

In terms of the industrial instruments available in Australia for achieving healthy working time in the banking industry, as follows is an analysis of the Fair Work Act, the Banking, Finance and Insurance Award¹⁰¹ and enterprise agreements for the four largest and national banks in Australia and four smaller banks in the context of: hour limits; overtime work; rest periods; annual leave; public holidays; and night work.

1. *Fair Work Act*

The Fair Work Act¹⁰² does not define working time or working hours as such; however, ‘working day’ is defined as a day that is not a Saturday, Sunday or public holiday. For the purpose of the statutory limitation on working hours, an employee’s working hours include any hours of authorised leave or absence, whether paid or unpaid. The Fair Work Act prescribes maximum weekly hours as part of the NES,¹⁰³ but not daily working hours. The Act prescribes a general limit in so far as an employer must not request a full-time employee to work more than 38 hours in a week unless the additional hours are reasonable.¹⁰⁴

To determine whether the additional hours an employee is required or requested to work are reasonable, a number of factors must be taken into account. These include the following:¹⁰⁵

- any risk to the worker's health and safety;
- the worker's personal circumstances (including family responsibilities);
- the needs of the workplace or enterprise;

⁹⁸ Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 2011), 99.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, 122.

¹⁰¹ *Banking, Finance and Insurance Award 2010* (Cth). (*BFI Award 2010* (Cth))

¹⁰² *FWA 2009* (Cth) ss12, 62(4).

¹⁰³ *FWA 2009* (Cth) divs 3 of pt 2-2 of ch 2.

¹⁰⁴ *FWA 2009* (Cth) s62.

¹⁰⁵ *FWA 2009* (Cth) s 62(3).

- whether the employee receives overtime payments; notice given by the employer of any request or requirement to work the additional hours;
- any notice given by the worker of his or her intention to refuse additional hours; usual patterns of work in the industry;
- nature of the employee's role;
- whether the additional hours are in accordance with averaging terms included in a modern award or enterprise agreement that applies to the employee; and
- any other relevant matter.

The relevance of each of these factors and the weight given will vary according to the particular circumstances of each case. In some situations it will be that one single factor is of great importance and outweighs all others, whilst others will require a balancing of factors. In some instances, hours that may be found reasonable for one type of job may be found unreasonable in another.

A recent case¹⁰⁶ highlights the above, that 'reasonable additional hours' must be considered on a case-by-case basis with consideration to all points relative to the work involved. In addition to the points covered in the Act for what constitutes 'reasonable additional hours', the Court also gave consideration to a number of other factors, including:

- number of additional hours worked;
- total number of hours worked during a particular shift;
- extent of night work;
- number of hours worked without a break;
- time off between shifts;
- remuneration received for additional hours;
- amount of annual leave;
- total working hours;
- length of shifts; and
- working patterns.

Whilst this determination was under the previous Workplace Relations Act,¹⁰⁷ reasonable additional is still fundamental in determining the maximum weekly hours of an employee under the NES of the Fair Work Act.

The Fair Work Act¹⁰⁸ allows for an averaging of hours. This is used when an employee's actual hours vary from week to week but are averaged to determine compliance with restrictions on the maximum ordinary hours. Employees covered by a Modern Award or Enterprise Agreement will have terms included that allow for the averaging for hours over a specified period. An employee not covered by an award or agreement may agree in writing with their employer to average their weekly hours over a period of six months or less and any hours worked in a week above 38 (for full time employees) will be treated as additional hours. In determining whether the additional hours are reasonable, the averaging period will be taken into account.

¹⁰⁶ *MacPherson v Coal & Allied Mining Services Pty Ltd* (2009) 2 FMCA 881

¹⁰⁷ *Workplace Relations Act (No 28) 1996* (Cth).

¹⁰⁸ *FWA 2009* (Cth) ss63-64.

The Fair Work Act¹⁰⁹ does not regulate overtime, beyond requiring that any additional hours requested or required by an employer must be reasonable. It doesn't define overtime or prescribe what constitutes overtime work. It is envisaged that, where applicable, the hours that constitute overtime, and the rates payable, will be provided for at the industry level in modern award.¹¹⁰ The only limit on overtime hours prescribed by the Fair Work Act is that additional hours requested or required by an employer are to be reasonable and an employee may refuse a request to work unreasonable additional hours.¹¹¹ Further limitations may be prescribed by a relevant award or enterprise agreement. Notice requirements with respect to overtime work are generally set at an industry or enterprise level, however, the amount of notice given to an employee with regards to a request or requirement to work additional hours is relevant to the reasonableness of the request or requirement.¹¹²

The Fair Work Act does not make provision for rest period entitlements and it is envisaged that all rest periods (i.e. daily, weekly) will be set by the relevant modern award.¹¹³

The NES provide a statutory entitlement to annual leave and public holidays.¹¹⁴ All employees, other than casuals, have a statutory entitlement to annual leave.¹¹⁵ There is no qualifying period and annual leave entitlements accrue progressively throughout a year of service, according to the employee's ordinary hours of work.¹¹⁶ For each year of service with his or her employer, an employee is entitled to 4 weeks of paid annual leave, unless the employee is a shift worker, in which case he or she is entitled to 5 weeks of paid annual leave.¹¹⁷

An employee is entitled to be absent from work on a public holiday¹¹⁸ and will be paid at their base rate of pay for ordinary hours.¹¹⁹ An employer may request an employee to work on a public holiday, but the employee may refuse to work if the request is unreasonable.¹²⁰ In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, one must take into account a number of factors,¹²¹ including but not limited to the nature of the employer's workplace or enterprise, the nature of the work performed by the employee and the employee's personal circumstances and the amount of notice given by the employer when making the request. The Fair Work Act 2009 does not prescribe a rate of compensation to be paid in the event that an employee works on a public holiday, however, his or her entitlement to overtime pay is relevant to determining the reasonableness of a request and/or a refusal to work on such a day.¹²²

The Fair Work Act does not deal with night work arrangements.

¹⁰⁹ *FWA 2009* (Cth) s62.

¹¹⁰ *FWA 2009* (Cth) s139.

¹¹¹ *FWA 2009* (Cth) ss62 and 139.

¹¹² *FWA 2009* (Cth) ss62 and 139.

¹¹³ *FWA 2009* (Cth) s139.

¹¹⁴ *FWA 2009* (Cth) divs 6, 10 of pt 2-2, ch 2.

¹¹⁵ *FWA 2009* (Cth) s86.

¹¹⁶ *FWA 2009* (Cth) s87(2).

¹¹⁷ *FWA 2009* (Cth) s87.

¹¹⁸ *FWA 2009* (Cth) s114.

¹¹⁹ *FWA 2009* (Cth) s116.

¹²⁰ *FWA 2009* (Cth) s114.

¹²¹ *FWA 2009* (Cth) s114(4).

¹²² *FWA 2009* (Cth) s114(4)(d).

2. *Banking, Finance and Insurance Award*

The Banking, Finance and Insurance Award defines the banking, finance and insurance industry as:

“the industries of banking, lending, loaning, providing credit, investment, finance, superannuation, all forms of insurance, credit unions, building societies, financial intermediaries, trustee creditors and agencies, money market dealers, credit or charge card institutions, wool broking, agribusiness and services to the above industries such as broking, trading, debt recovery, financial consulting, valuation, money changing, data processing, transaction accounts, telephone enquiries and transaction processing”

The Award covers employers throughout Australia who are engaged in the banking, finance and insurance industry in relation to work by their employees covered by a classification in the award and those employees to the exclusion of any other modern award. It doesn't cover some groups of employees such as those excluded from award coverage by the Fair Work Act or employees covered by a modern enterprise award or an enterprise instrument.

In terms of limits on working hours, the Banking, Finance and Insurance Award¹²³ provides for 38 ordinary hours per week (76 in 2 weeks, 114 in 3 weeks and 152 in 4 weeks), exclusive of meal breaks. Ordinary hours can be worked 7am to 7pm, Monday to Friday and 8am to 12pm on a Saturday. On no more than one night per week, the span of hours can be up to 9pm. The Award¹²⁴ also provides for the option of a Rostered Day Off (RDO).

In terms of overtime,¹²⁵ for all time worked at the direction of the employer outside of ordinary hours of work, employees are entitled to overtime pay paid with a premium applied depending on whether the overtime worked is a week night, Saturday or Sunday. Alternatively, under the Award employees can take time off instead of payment for overtime at a time agreed with employer, hour for each hour worked.

In terms of rest periods,¹²⁶ a rest break must be allowed during a working day at a time agreed by the employee and employer and an employee will not work in excess of five hours without a meal break, unless they apply to work six hours or less. An employee must also have at least 10 consecutive hours off between work on successive days.

Annual leave is as per the NES and work on public holiday or a substituted day is paid at double time and a half with no less than 4 hours pay.¹²⁷ Night work¹²⁸ is defined as applying after 7pm Monday to Friday, paid at a premium of 1.5 times for the first three hours and double thereafter. The Award¹²⁹ provides for one night to be worked up to 9pm as part of the span of ordinary hours.

¹²³ *BFI Award 2010* (Cth) pt5, cl22.

¹²⁴ *BFI Award 2010* (Cth) pt5, sub-cl22.7.

¹²⁵ *BFI Award 2010* (Cth), pt5, cl23.

¹²⁶ *BFI Award 2010* (Cth) pt5, sub-cl22.4.

¹²⁷ *BFI Award 2010* (Cth) pt6, cl27.

¹²⁸ *BFI Award 2010* (Cth) pt5, sub-cl22.1.

¹²⁹ *BFI Award 2010* (Cth) pt5, sub-cl22.1.

3. *Enterprise Instruments*

For the purpose of this essay, eight enterprise agreements in the banking industry have been reviewed and analysed. This included the four largest banks in Australia:¹³⁰ Australia New Zealand Banking Group Limited (ANZ), Commonwealth Bank of Australia (CBA), Westpac Group and National Australia Bank (NAB). It also included four smaller banks:¹³¹ Community CPS (CPS), ING Bank, Bank of Western Australia (Bank WA) and St George Bank (St George) and Bank SA. Table 1 provides a summary of each enterprise agreement against the following elements of working time legislation and regulation: hour limits; overtime work; rest periods; annual leave; public holidays; and night work.

In terms of hours limits, the majority of the banking enterprise agreements analysed provide for a 38 hour week which may be averaged out over a period of up to four weeks. Some also provide for a 40 hour week averaged out over a four week period. Each agreement defines ordinary hours, but defined applying a very wide span. The widest is 8am to midnight.¹³² Most of the agreements specify that the maximum period for any work day is 10 hours (some specify this as 'ordinary hours'), and in some cases 12 hours where agreed between the employer and employee and OHS considerations are addressed. A noticeable observation is that all but two of the analysed agreements exclude the category of employees that includes executives, managers and professionals/ specialists from the hours limits coverage. Some specified a salary maximum for coverage which is approximately \$52,000 per annum using 2010 data. This is low when compared to the full-time adult ordinary time earnings in Australia of \$66,981 per annum,¹³³ even with the one year difference in the data.

Overtime work, including at night, is paid at a higher rate than normal pay (or compensated for by time off in lieu) by all the banking enterprise agreements analysed and all exclude the category of employees that includes executives, managers professionals/ specialists from this provision. It is important to note that overtime applies outside of ordinary hours which can be undertaken during a wide span in all of the banks whose enterprise agreements were assessed.

Six of the eight agreements specified that there needs to be at least a 10-consecutive hour rest break between one work day and the next, unless otherwise agreed and where required this would be paid until a 10-hour break is able to be taken. Other rest breaks specified in the majority include unpaid meal breaks after five continuous hours and two consecutive days off per working week or seven day period. A minimum entitlement to annual leave is provided for at four weeks per annum by all the banking enterprise agreements analysed; two provide for slightly more.

All of the agreements pay, and at a higher rate, (or compensate for it by time off in lieu) work on a public holiday and half exclude the category of employees that includes executives, managers professionals/ specialists.

¹³⁰ ANZ Collective Employment Agreement 2010-2012 (Cth), Commonwealth Bank of Australia Enterprise Agreement 2011 (Cth), Westpac Group Enterprise Agreement 2010 (Cth), Westpac Employees' Award 2002 (Cth) and National Australia Bank Limited Enterprise Agreement 2011 (Cth)

¹³¹ ING Bank (Australia) Limited Enterprise Agreement 2011 (Cth), BankWest General Enterprise Agreement 2011 (WA), BankWest/TrustWest Award 1998 (WA), Community CPS Australia Ltd Enterprise Agreement 2010 (Cth) and St. George Bank Enterprise Agreement 2010 (Cth)

¹³² Commonwealth Bank of Australia Enterprise Agreement 2011 (Cth)

¹³³ Australian Bureau of Statistics, 'Average Weekly Earnings, Australia, 6302.0 (2011)

All of the enterprise agreements provide for loading where an employee is required to work at night, however, only when outside of their ordinary hours. The problem with this is that the span of ordinary hours of work defined across all the agreements is very broad (from as early as 6 or 7am through to 9pm and as previously mentioned with the widest span from 8am to midnight) and with the averaging of working hours may result in situations of reduced penalty payments. The exception here is with respect to shift workers who are generally paid loading where night work forms part of their standard hours.

4. *Individual Contracts*

As mentioned above, the category of employees that includes executives, managers professionals/ specialists are excluded from the parts of the enterprise agreements analysed relating to healthy working time and specifically hours of work and would generally be covered by an individual contract of employment. As individual contract templates for the eight analysed banks are not publicly available to assess for working time coverage, the clause that is included in the employment contract policy and procedure templates the Australian Human Resource Institute (AHRI)¹³⁴ sells to its members is provided as follows:

“Hours of work: 38 per Week. Employers may request employees to work a reasonable additional hours a week although employees can refuse these if they are unreasonable. Averaging of hours over a specified period is allowed but may not exceed the average of 38 hours a week”.

¹³⁴ Australian Human Resource Institute (Employment Contract Policy and Procedure Templates, 2011).

Table 1 - Banking industry enterprise agreements and elements of working time legislation

Bank	Hour Limits					Overtime Work	Rest Periods			Annual Leave	Public Holidays	Night Work
	38 hrs per wk averaged over 4 wks	Option al 40 hrs per wk over 4 wks	Hours limit	Mon to Fri Ordinary hours defined	Exclusions	Paid (with loading) or TOIL	10-hr break between work days	Daily Rest Period	Weekly Rest Period	4 wks per annum	Paid (with loading) or TOIL	Paid (with loading)
ANZ	√ + option for RDO	√	√ - 10 per day, but to 12 if agreed	√ - 7am to 7pm	√ - Group 4 employees, higher management roles or paid a salary of \$85,369 or more	√ (excluding group 4 employees, higher management roles or paid a salary of \$85,369 or more)	√ + limited paid exceptions until break can be taken	√ - Unpaid meal break after 5 continuous hours	√ - 2 consecutive days per working week	√	√ (excluding group 4 employees, higher management roles or paid a salary of \$85,369 or more)	√ in addition to contracted hours (excluding group 4 employees, higher management roles or paid a salary of \$85,369 or more)
CBA (excludes managerial grade employees with salary from \$90,383)	√ + option for RDO	X	√ - 10 per day, but to 12 if agreed	√ - 8am to Midnight (9pm for branches)	X	√ (excluding mobile bankers)	√ + limited paid exceptions until break can be taken	√ - Unpaid meal break after 5 continuous hours	√ - 2 consecutive days per week	√	√ - TOIL as additional leave day (excluding mobile bankers)	√ where outside ordinary hours (excluding mobile bankers)
Westpac	√ + option for RDO	√	√ - 10 per day/ 50 per week of ordinary hours	√ - 7am (and 6am where agreed) to 9pm	X	√ (excluding packaged employees and employees with salary from \$53,364)	√ + limited paid exceptions until break can be taken		√ - 2 days in any 7 day period (excluding packaged employees)	√	√ (excluding packaged employees)	√ where outside ordinary hours (excluding packaged employees)
NAB	√ + option for RDO	X	√ - 10 per day of ordinary hours	√ - 7am to 9pm	√ - Management, leadership, professional/ specialist and executive roles	√ (excluding management, leadership, professional/ specialist and executive roles)	√ + limited paid exceptions until break can be taken	√ - Unpaid meal break after 5 continuous hours	√ - 2 days in any 7 day period	√	√ (excluding management, leadership, professional/ specialist and executive roles)	√ where outside ordinary hours (excluding management, leadership, professional/ specialist and executive roles)
CPS	X - 75 hours per fortnight	X	X	√ - 7am to 8pm (9pm on late night trading)	√ - C to F category employees (with salary of \$51,670 to \$84,780)	√ (excluding C to F category employees except where directed to work weekends)	Not specified	√ - Unpaid meal break after 5 continuous hours	Not specified	√	√ - where directed	√ where outside ordinary hours or more than hours in one day 10(excluding C to F category employees with

Bank	Hour Limits					Overtime Work	Rest Periods			Annual Leave	Public Holidays	Night Work
	38 hrs per wk averaged over 4 wks	Optional 40 hrs per wk over 4 wks	Hours limit	Mon to Fri Ordinary hours defined	Exclusions	Paid (with loading) or TOIL	10-hr break between work days	Daily Rest Period	Weekly Rest Period	4 wks per annum	Paid (with loading) or TOIL	Paid (with loading)
												salary)
ING Bank	X - 36.25 hours per week averaged over 4 weeks	X	X	√ - 6am to 9pm	X	√ (excluding employees paid TEC of \$70,000 or more)	As agreed by between company and employee	√ - At a time/s mutually agreed + unpaid meal break after 5 continuous hours	Not specified	√ + one additional day	√	√ where outside ordinary hours (excluding employees paid TEC of \$70,000 or more)
BankWest (excludes managerial grade employees)	√ + option for RDO	√	√ - 10 per day/ 47.5 per week of ordinary hours	√ - 6am to 9.30pm	X	√	√ + limited paid exceptions until break can be taken	√ - Toilet breaks on as needs basis, unpaid meal break after 5.5 continuous hours, less than 5.5 hours 10 min unpaid break	Not specified	√ + five additional days in specified remote locations	√	√ where outside ordinary hours
St George and Bank SA	√ where inc. RDO, otherwise 150 hours over 4 week cycle	√	√ - 10 per day of ordinary hours	√ - 7am to 9pm	√ - Packaged employees	√ (excluding packaged employees)	√ + limited paid exceptions until break can be taken	√ - 2 paid breaks where 7.5+ hours per day and 1 where less than 7.5 hours per day + unpaid meal break after 5 continuous hours	√ - Over 4 week cycle: 8 or more days off per cycle; 1 day after 6 consecutive days of work; and at least 2 periods of 2 consecutive days off	√	√	√ where outside ordinary hours (excluding packaged employees)

NB: √ denotes criteria are present and X denotes criteria not present in the relevant enterprise agreement. Salary information is based on 2010/ 11 data.

IV. ADEQUACY OF THE INDUSTRIAL INSTRUMENTS AVAILABLE IN AUSTRALIA FOR ACHIEVING HEALTHY WORKING TIME

Given the regulatory and institutional frameworks available internationally, the adequacy of the Australian industrial instruments analysed above for achieving healthy working time in the banking industry are best evaluated in the context of the current leading framework in working time reform, the EU Directive on Working Time.

The EU and its Directive on Working Time states that the maximum working week should be 48 hours (including overtime) averaged over a four month reference period. As outlined above, the NES do prescribe a limit on working hours in so far as an employer must not request a full-time employee to work more than 38 hours in a week unless the additional hours are reasonable.¹³⁵ It is however misleading for the working hours clause in the NES to be characterised as 'maximum working hours' as a maximum number of hours has not been prescribed by the standard.¹³⁶ Rather it relies on a principle of 'reasonableness' with arrangements made individually between employers and employees. In doing so, the clause effectively removes working hours from being a nationally enforceable standard to an individual negotiation between an employer and employee. It thereby reduces bargaining over hours to the individual level in an intensified and globalised work context where there are too many incentives for employers to insist on their employees to work extended hours with no enforceable protection.

The relevant modern award, the Banking, Finance and Insurance Award, does not address the inherent weakness of how 'maximum working hours' are defined. Whilst it defines ordinary hours per week and that overtime must be paid above these, it does not stipulate a maximum working week. Whilst the relevant enterprise agreements provide more vigour in addressing the maximum working week, they are still unsatisfactory when evaluated against the EU Directive on Working Time as a benchmark. All but two agreements define a limit on working hours; 10 per day, whilst two out of the eight also allow for up to 12 per day where mutually agreed between the employee and employer. These limits generally specify as applying to ordinary time only, thereby generally excluding overtime, whilst the EU Directive specifically states that the 48 limit is inclusive of overtime. This has been achieved by the agreements widening the span of ordinary hours and averaging working hours, and as mentioned earlier in this essay, this inevitably leads to a reduction in penalty payments.

Of particular note is that the category of employees that includes executives, managers professionals/ specialists are excluded out of the parts of the enterprise agreements that cover maximum working hours. This is a group for whom the regulatory framework in Australia has long been particularly weak and for whom there is a dominance of unpaid overtime. With this group generally on individual contracts of employment, to assess their adequacy in dealing with maximum working hours, it is pertinent to point back to the 2003 ABS¹³⁷ data which shows that 56% of all full-time workers in the 'manager' group in Australia worked 50+ hours and 11% worked 70+ hours. This suggests individual contracts are grossly inadequate for dealing with working hours limits for this category of employees.

¹³⁵ *FWA 2009* (Cth), s62.

¹³⁶ Wanrooy, Buchanan and Campbell, above no. 62, 11.

¹³⁷ Australian Bureau of Statistics, above n 2.

The Fair Work Act defers to the relevant modern award to set rest periods and as outlined above, the Banking, Finance and Insurance Award stipulates a rest break must be allowed at a time agreed by the employee and employer and an employee must have at least 10-consecutive hours off between the work of successive days. The same is reflected in the majority of banking industry enterprise agreements analysed which specify that there needs to be at least a 10 consecutive hour rest break between one work day and the next, unless otherwise agreed. Where required this would be paid, often at a premium, until a consecutive 10-hour break is able to be taken. The enterprise agreements, like the Award, also provide for unpaid meal breaks after five continuous hours and the majority provide for two consecutive days off per working week or seven day period.

These provisions are assessed as somewhat satisfactory when evaluated against the standard defined in EU Directive on Working Time (a rest break where the working day is longer than six hours, 11 hours uninterrupted time off in a 24 hour period and one whole day off per week, in addition to 11 hours rest). However, there is a differential that needs to be addressed. The 10-consecutive hour rest break between work on successive days as stipulated in the Award and most of the Enterprise Agreements is not satisfactory when assessed against the EU standard of 11 hours uninterrupted time off in a 24 hour period, despite the derogations accessible under the EU Working Time Directive.

The Banking, Finance and Insurance Award and all eight analysed enterprise agreements provide a minimum entitlement to four weeks annual leave per annum, which is to be expected given the NES act as minimum standards. The standards defined in the Australian industrial instruments are therefore satisfactory when evaluated against the standard defined in EU Directive on Working Time, which is the same at four weeks paid leave per annum.

None of the Australian industrial instruments adequately deal with night work arrangements when compared to the EU Directive on Working Time. The Directive is very specific with respect to night work:

- night workers do not exceed an average of eight hours in any 24-hour period;
- night workers are entitled to a free health assessment before their assignment and thereafter at regular intervals;
- night workers suffering from health problems recognised as being connected with the fact that they perform night work are transferred wherever possibly to suitable day work; and
- certain categories of night workers who incur risks to their safety or health linked to night work are subject to guarantees, under conditions laid down by national legislation and/ or practice.

A. *Proposed Reform Options*

A wide range of influences have contributed to a long working hours culture in Australia. Some of these include changing working time arrangements as a result of an intensified and globalised work environment, increased competition between employees and employers with customer demands for round-the-clock service and household consumption patterns.¹³⁸ Addressing the industrial instruments available in Australia for achieving healthy working time will not remove

¹³⁸ Wanrooy, Buchanan and Campbell, above no. 62, 5.

these influences, however, a clearly defined and best-practice position on working time is an important first step in breaking down the long hours culture. Employers and employees need a point of reference on what acceptable working hours are in Australia.¹³⁹ Working hours in other countries have decreased where working time limits exist. This is shown by the EU experience where there is evidence of the proportion of people working longer hours coming down since the introduction of the EU Working Time Directive and the experience of OECD countries where those with established working time limits have comparatively lower full-time working hours to those that don't. In addition to recommending a clear and complete position on working time for Australia, a number of reform options for Australia's industrial instruments are proposed.

It is firstly proposed that the working hours standard in the NES prescribe the standard working week for full-time employees in Australia to be 38-hours per week and that this continue to be subject to an employer being able to require an employee to work reasonable additional hours in the week. It is however further proposed that the NES prescribe reasonable additional hours must not exceed a maximum of 48 hours per week. It is recognised that there will be flexibility required for particular industries and occupations. The degree of flexibility needs to be analysed and clearly understood for a clear and complete framework to be developed. This needs to be done in collaboration with all stakeholders to ensure buy-in and achieve correct application by employers and employees. Reflecting on the experience of the EU and its Directive on Working Time, the types of industries and occupations for consideration may include, but are not limited to:

- security and surveillance activities requiring a permanent presence in order to protect property and persons;
- services related to the treatment and/ or care provided by hospitals or similar establishments and prisons;
- dock or airport workers;
- ambulance, fire and civil protection services;
- gas, water and electricity production and household refuse collection; and
- industries in which work cannot be interrupted on technical grounds.

Whilst the EU allows member states to derogate from a number of its articles, including Article 6¹⁴⁰ on maximum working time and the ILO excludes persons occupying positions of management from convention No's 1 and 30,¹⁴¹ this group of employees is clearly a high risk group with respect to working unhealthy hours, both in Australia and internationally. It is therefore secondly proposed that further research be undertaken with respect to managers, executives and senior professionals to explore a more constructive working time regime that meets the employer requirements of such roles whilst ensuring the incumbents are working healthy hours on a sustainable basis. Natti, Anttila and Vaisanen,¹⁴² for example point to the "ambiguous" nature of management and professional roles thereby "stretching" their working hours. They go on to explain the complex drivers being both work and individual level factors and culture at the organisational and occupational level. Such issues could provide a starting point for further research.

¹³⁹ Ibid, 5.

¹⁴⁰ *EU Working Time Directive, EU Doc 93/104/EC.*

¹⁴¹ *Convention No 1, ILO Doc C1; Convention No 30, ILO Doc C30.*

¹⁴² Natti, Anttila and Vaisanen, above no 28, 311.

It is thirdly proposed that the current rest break of 10-hours uninterrupted time off between successive work days is extended to be provided over a 24-hour period, which is more aligned to the EU standard.

The final proposal is that the NES specifically deal with night work arrangements and health and safety. Articles 8, 9 and 10 of the EU Working Time Directive¹⁴³ which focus on night work provide a sound basis for possible options, including a night work hours limit, periodic health assessments and a right to transition to suitable day work where found to be suffering from health problems recognised as being connected with the fact that an employee performs night work.

V. CONCLUSION

Healthy working time is an important issue for contemporary Australia. With 30% of full-time workers in this country working more than 50 hours per week there is a very real risk of the adverse effects of long working hours impacting human health, workplace safety, families, communities and society at large, all which act against our national interest.

Whilst the majority of other industrialised countries have seen a reduction or sustained level working hours of full-time workers over the past 20 to 30 years, Australia has reversed its historical trend and steadily seen an increase in full-time working hours. A weak working time regulatory framework during a period in which the nature of work has intensified in Australia has been shown to have contributed to the trend toward longer working hours for full-time workers. Despite the recent changes in our industrial relations system, this is unlikely to substantively change. The three instruments available under the Fair Work Act: the NES; Modern Awards; and Enterprise Agreements together with other sources of regulation, such as the contract of employment are shown to be inadequate for achieving healthy working time in Australia when assessed against a best practice framework.

The primary weakness of the regulatory framework in Australia can be found in the 'maximum working hours' clause in the NES which relies on an ineffectual principle of 'reasonableness'. Other weaknesses can be found in relation to rest periods and night work. All of these weaknesses are exacerbated by the widening span of ordinary hours and averaging of working hours which is able to be readily applied our regulatory framework. One of the most striking observations is how the regulatory framework in Australia has virtually ignored executives, managers and professionals and is significantly lacking in its ability to deal with working hours limits for this category of employees.

This essay has recommended a clear and complete position on working time based on international best-practice as a critical first step in breaking down the long hours culture in Australia. It is evident that we then need urgent reform in terms of current laws and regulations. Some reform options for Australia's current industrial instruments have been proposed and summarised as follows:

- The NES to prescribe reasonable additional hours must not exceed a maximum of 48 hours per week.

¹⁴³ *EU Working Time Directive, EU Doc 93/104/EC.*

- Research and stakeholders consultation be undertaken to ascertain the flexibility required for particular industries and occupations in relation to the proposed reasonable additional hours limit.
- Comprehensive research be undertaken with respect to managers, executives and senior professionals to determine a more constructive working time regime, perhaps in partnership with international organisations or other governments with an aligned interest and need.
- The rest break of uninterrupted time off between successive work days be extended and provided over a 24-hour period.
- Explore the NES dealing with night work arrangements and health and safety.

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