

NES Exposure Draft Submission

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When do we stop? Achieving maximum weekly working hours in Australia

The National Employment Standards are a much needed move in the right direction to provide a safety net in labour standards for all Australian employees. The NES presents a unique opportunity to lay the foundations for balanced and fair working conditions for all Australian employees.

This submission centres on the only standard in the Exposure Draft that relates to working hours: 'Maximum Weekly Hours'. We believe that the NES provides a long awaited opportunity to regulate hours of work in order to assist Australians to achieve a better balance between work and life. However, the current proposal fails to provide a minimum standard for working hours.

Long working hours in Australia

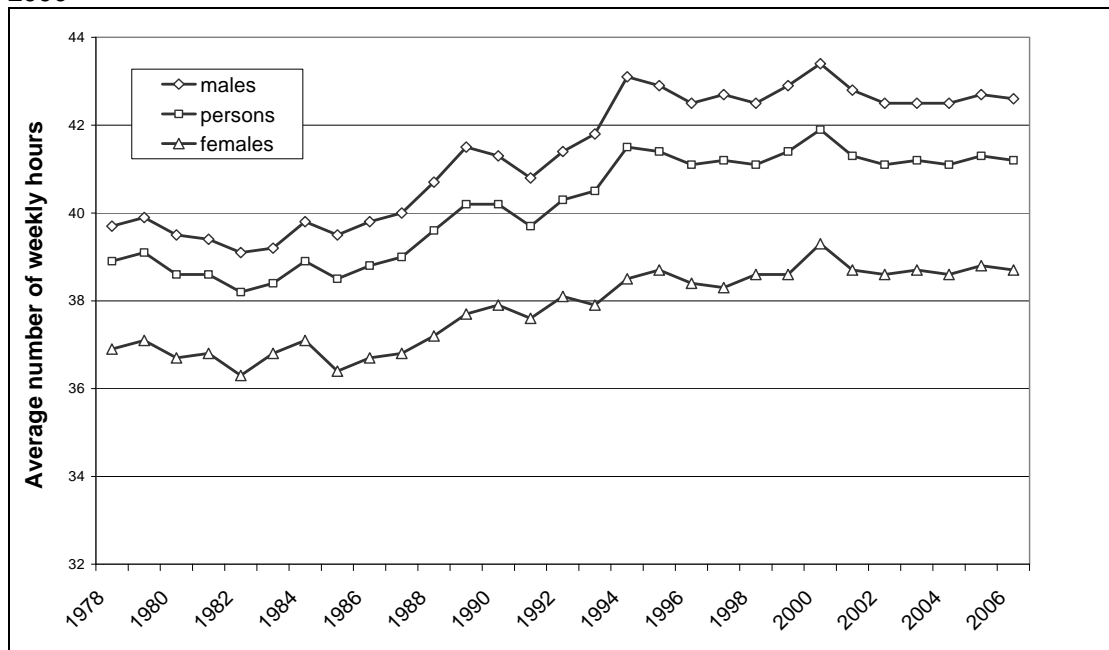
Historically, Australia led the western world in achieving shorter working hours. It was the Melbourne Stonemasons in 1856 who first achieved the 8 hour day. Australia continued to play a leadership role with the setting of the standard 44 hour working week in the 1920s and the forty hour week in the 1940s.

The situation has become far more complex in the last forty years. The rise of part-time work is now a major feature of the Australian labour market. Indeed, Australia has one of the highest levels of this form of employment in the OECD. In thinking about working time standards, therefore, it is important to not simply refer to average hours in paid employment by all workers. The key data item to track is hours worked by full time employees.

In the 1980s and 1990s working hours of full-time employees have steadily increased to above 40 hours per week. Figure 1 demonstrates the increase in full-time employees' working hours that has occurred since 1978. The data is problematic in that it provides data for *actual* hours worked, not hours *usually* worked. Actual hours include people who may have been on leave or not working as many hours as usual

and therefore, is not the best indicator of hours normally worked by Australian employees. To understand the length of hours worked in Australia we need to examine average usual hours, displayed in Figure 2. Usual hours from 2001 to 2007 show the same degree of stabilisation as actual hours for this period. Australian full-time employees are usually working 44 hours per week on average. This is considerably more than the ‘standard’ 38 hour week specified in the National Employment Standards.

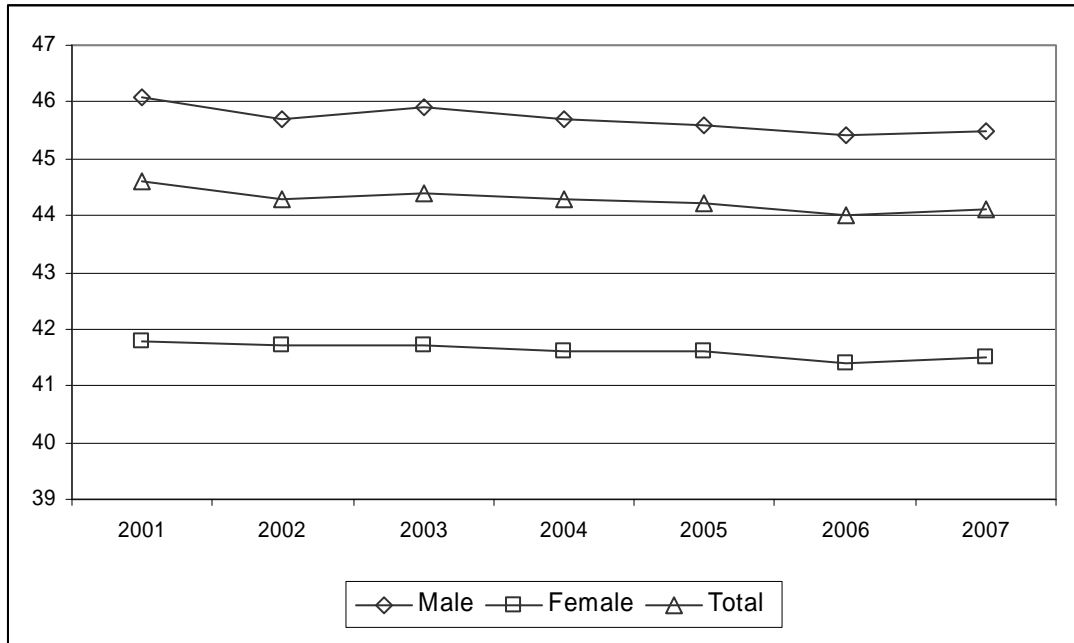
Figure 1: Average actual weekly hours for full-time employees by sex, Australia, 1978–2006



Note: August figures.

Source: Figures for 1978 to 1984 are from ABS, *The Labour Force Australia: Historical Summary 1966 to 1984*, Cat. No. 6204.0; figures from 1985 on are from ABS data cubes, 6291.0.55.01, *Labour Force Australia*, Table E04.

Figure 2: Average usual weekly hours for full-time employees by sex, Australia, 2001–2007



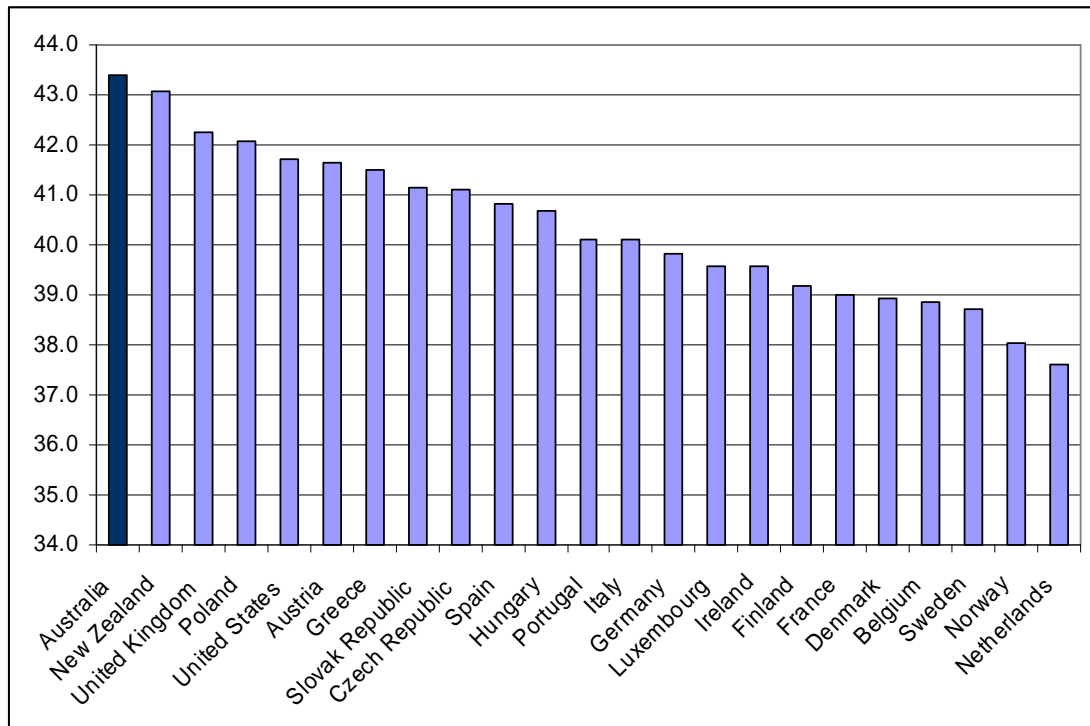
Note: August figures.

Source: ABS, 6291.0.55.01, *Labour Force Australia*, Electronic Delivery, Table EM3

Australian full-time employees not only work long hours well above the nationally prescribed standard, but also work very long hours on an international basis. Figure 3 shows the average usual working hours for full-time employees across 23 OECD countries¹. According to these data Australia has the highest average full-time working hours for employees. The countries that have the second and third highest full-time working hours are in a similar regulatory position to Australia in that they do not have a limit on working hours, along with the United States which is ranked fifth. There are ten countries where average full-time working hours are below 40 hours per week. These countries have caps on their working time.

¹ These figures have been provided by the OECD and do not correspond directly with ABS figures.

Figure 3: Employees' average full-time weekly hours usually worked by OECD countries, 2006

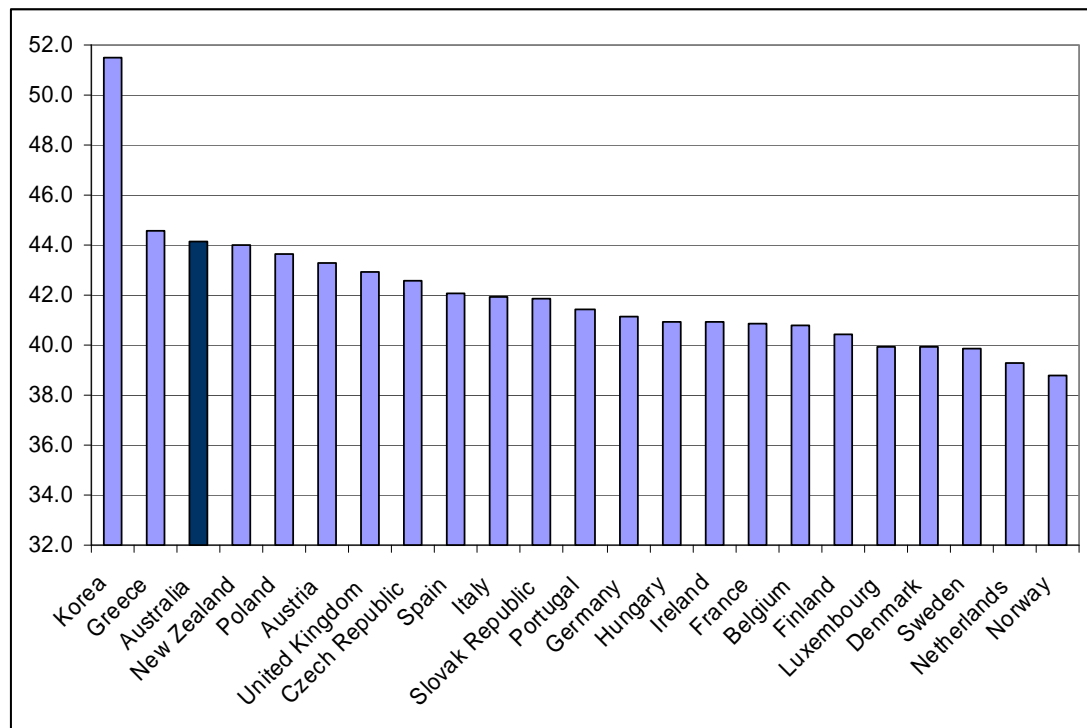


Source: OECD.Stat extracted 4th April 2008

Data not available for: Canada, Iceland, Japan, Korea, Mexico, Switzerland, Turkey

The data provided is for employees and has not included self-employed workers. The main reason being that the National Employment Standard on working time is unlikely to impact on these groups of workers. Nevertheless Figure 4 shows where Australia stands if we examine the full-time working hours of all employed persons. Self-employed people in Australia tend to work longer hours and including these workers has increased the average by just under one hour. Australia ranks among the top three countries with the longest full-time working hours. Korea has incredibly long hours, averaging at more than 50 hours per week. Overall, the evidence is unambiguous: Australian full-time employees are working extremely long hours.

Figure 4: Employed persons' average full-time weekly hours usually worked by OECD countries, 2006



Source: OECD.Stat extracted 4th April 2008

Data not available for: Canada, Iceland, Japan, Mexico, Switzerland, Turkey, United States

Are employees happy with long hours of work?

Data on working time preferences in Australia is limited. That which is available indicates a very large percentage of full-time employees are unhappy when they work extended hours. For example, in 2007 27 per cent of all full-time employees expressed a preference for shorter hours (van Wanrooy et al. 2007:71-72). It is well known that these proportions rise to much higher levels when (a) workers are not separately paid for work in excess of standard hours and (b) the longer the extended hours are. For example, among women working more than 45 hours per week 61 per cent wanted fewer hours in 2001. Among men the proportion was 49 per cent (Watson et al. 2003: 89).

Long working hours culture and the need for standards

In devising ways to combat the working hours problem in Australia it is important to acknowledge that long working hours is not a problem confined only to the individual employee. A long working hours culture has arisen in Australia as a result of a whole range of influences such as employer expectations; reward, recognition and promotion practices; competition between employees and firms; and household consumption patterns. Addressing working hours from the industrial relations perspective will not wipe out these factors, but a strong stance on working time is a necessary first step in breaking down the long hours culture. Employers and employees need a reference point to know what acceptable working hours are in Australia; a reference point that tells Australians the working hours that meet both occupational health and safety

standards and societal norms. As we note below, there is also a growing literature on the direct association between extended hours of work and increasing risks to health and safety for individuals and the population at large.

Working time regulation in Australia: A recent historical perspective

Historically, Australia has experienced a long-term decline in the length of the working week (Campbell 2002a:92). From union campaigns and regulation emerged a standard working week, which involved an eight-hour day over a five-day week, with four weeks leave. International experience shows that working time standards and practices only improve where there are movements across the community based on clearly defined enforceable norms embedded in statutes or delegated legislation like awards.

The current standard, often stated in awards and agreements, is a 38-hour week for most full-time employees (Campbell 2002b:121). This standard is ‘rich in social and economic meaning’ (Campbell 2002b:111). However, this standard is not reflective of actual working time practice. Australian full-time employees have been working well above this standard for several decades.

The most common way of regulating working hours in Australia has been the use of penalty payments for any hours that went beyond the ‘standard’ working week, including weekend and night work (ACIRRT, 1999:101). However, penalty payments were by no means compulsory and were relatively scarce in certain occupations. Working-time regulation in Australia has never been comprehensive and explicit. This situation has been compounded by labour market deregulation. As Heiler (2001:24) illustrates:

On the basis of the changes to hours of work, bargaining arrangements and workplace practices, it is clear that the ad hoc approach that has characterised the way the Australian regulatory system has handled the [working hours] issue is inadequate.

The introduction of enterprise bargaining and the growth of non-standard employment has enabled employers to minimise regulations they see as a barrier to flexibility and to reducing labour costs. Working-time arrangements have been one of the most popular targets for employers in agreement negotiations (ACIRRT 1999:101). Employers have sought to extend the boundaries of ‘ordinary time’ to minimise penalty payments and extend employees’ hours. The most common ways this has been done in agreements are by widening the span of ordinary hours, averaging working hours and eliminating or reducing penalty payments (Campbell & Brosnan 1999:379). Employers have taken advantage of the lure of more wages by trading off hours arrangements. Not unexpectedly, these changes have led to long hours and the dominance of unpaid overtime (Burgess et al. 2003:136).

In more recent regulatory experience, *WorkChoices* provided five minimum conditions in the Australian Fair Pay and Conditions (AFPC) standard, one of which purportedly dealt working hours. However, the actual provision did not constitute either a minimum or a standard. It stated that maximum ordinary hours of work were 38 hours per week, but, these could be averaged over a period of up to twelve months along with reasonable additional hours.

The original purpose of prescribing ordinary hours was to specify an actual standard to be worked. ‘Penalties’ were imposed to discourage the violation of the working hours standard. The *WorkChoices* specification removed any direct capacity to enforce or encourage publicly defined ‘standard’ hours to be worked. By enabling the 38 hour week to be averaged over the entire year, with no cap on the hours that could be worked in one week, the statutory minimum condition on hours effectively specified nothing. Cumulative to this was further capacity to increase average hours to above 38 per week. With no definition on what constituted ‘reasonable’ the AFPC standard on working hours was misleading. It provided absolutely no protection for employees against long hours of work.

The introduction of a working time standard for all Australian employees is a welcome approach. However, we believe that the NES on working hours does not offer much more than the current AFPC minimum condition.

The ‘reasonable hours’ clause

The NES refers to a concept of ‘reasonable extra hours’. The concept ‘reasonable’ is very loosely formulated and a major cause of concern. It continues the tradition of an ad hoc approach that relies on arrangements made individually between employers and employees. **It provides no enforceable standard.** The inadequacy of this approach has been clearly evident in the most recent Australian attempt to improve working time arrangements – the Reasonable Hours test Case.

In 2001 the Australian Council of Trade Unions (ACTU) launched the Reasonable Hours Test Case in the Australian Industrial Relations Commission (AIRC). Their aim was to bring attention to and address the issue of rising hours among employees. The two main clauses they were seeking to insert into the test Awards were 1) the right for an employee to only work ‘reasonable’ hours of work and 2) monetary compensation or days off for long hours over a defined period of time. Employers and the Federal Government rejected this claim on the basis that working hours need to remain flexible for the benefit of both the employer and employee. In 2002, the full bench of the AIRC handed down their decision. They agreed that more workers are working long hours in Australia and that working hour arrangements have also changed significantly in the last 20 years. While they accepted the first clause, they rejected the second component of the ACTU’s claim as they feared that providing

monetary compensation for long hours of work would only encourage it. The following is an excerpt from the AIRC's (2002:92) decision:

There are adverse health consequences associated with working long hours, particularly when associated with shift work. In addition to the adverse effect of working long hours on employees, there are adverse effects on their families and their communities. We have sought to address some of these issues by creating an explicit award right for an employee to refuse to work overtime in circumstances where it would result in the working of unreasonable hours. The nature of working hours and their impact on employees, their families and communities is subject to change over time. It may be appropriate to review the effectiveness of the provision we have decided to award after it has been in operation for some time.

Thus, the AIRC indicated that their decision only provided interim provisions and that it was possible that further working-time regulation would be needed in Australia. It has been six years since this decision was made and the 'reasonable hours' clause has made no visible impact on working time arrangements. Recent experience has shown that inserting a 'reasonable hours' clause has not provided protection against extended hours of work. The proposed NES on working time mirrors the inadequacies of the current arrangements.

The 'extra reasonable hours' clause removes working hours from a nationally enforceable standard to an individual negotiation between the employer and employee. Comparing working hours outcomes for individual and collective agreements shows that this clause will not protect employees from long hours. A comparative analysis of pay outcomes for Australian Workplace Agreements (AWAs) and collective agreements shows that individually negotiated AWAs provide for longer working hours that are often not paid at overtime rates (Peetz 2005:2; van Wanrooy et al. 2007: 54).

A proposal for real maximum weekly working hours

The proposed standard for weekly working hours does not regulate a maximum number of hours that can be worked by an Australian employee. The length of hours is left up to the employer and employee to decide what is reasonable. There are too many incentives for employers to insist on their employees to work extended hours and there is not enforceable protection for the employee against this.

The Government needs to exercise leadership in combating the long hours worked by many Australian full-time employees. As noted earlier, working hours in Australia have decreased when the Government has taken a leading role in addressing the problem.

We propose that the working hours standard prescribe a maximum number of weekly working hours. The standard on working hours should be as follows:

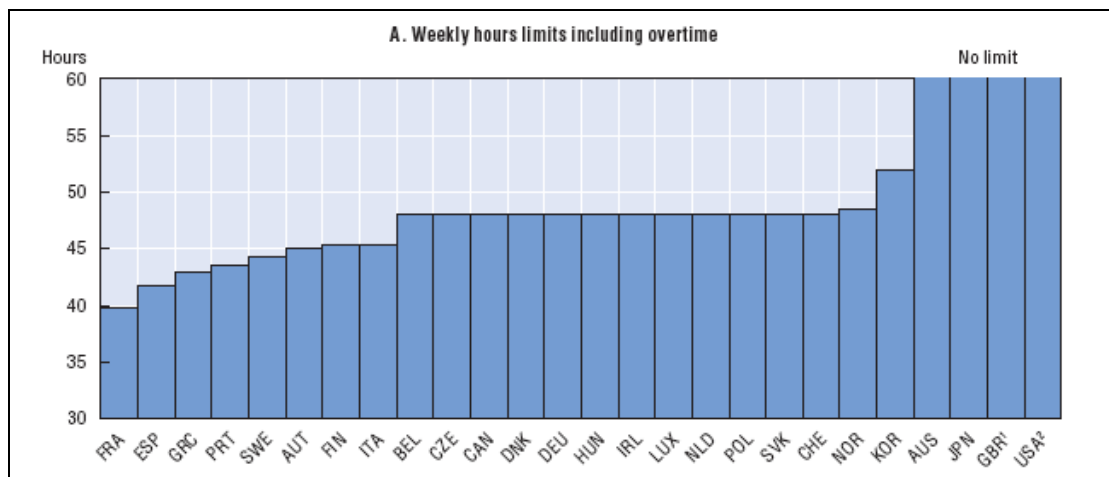
- The standard working week for full-time employees is 38 hours a week.
- This provision is subject to the rule that an employer may require an employee to work reasonable additional hours in the week.
- The reasonable additional hours must not exceed a maximum of 48 hours per week.

There is an overwhelming amount of evidence to show that long working hours are a safety risk, reduce productivity, and can contribute to the breakdown of personal relationships and community activity (Pocock et al. 2001; Pocock 2003). Long hours result in increased mental and physical effort and limit capacity for recuperative sleep (Carey and Fishburne 1989). Research has established a link between long hours and accidents in the workplace as well as driving to and from work (Kirkaldy et al. 1997). Furthermore, there is specific evidence that shows that working more than 48 hours per week is likely to result in fatigue, poor performance and risks to health and safety. Employees working more than 48 hours per week tend to reduce their hours of sleep rather cut back on competing social and domestic activities (Dawson 1997). Trimpop *et al.* (2000) found that working 48 hours per week doubled the risk of driving accidents during work hours.²

International experience: current limits on working time

Undoubtedly, the current leader in working time reform is the European Union (EU) through their Working Time Directive which establishes a maximum working week of 48 hours (with some conditions). Figure 5 illustrates the working time limits that were (or were not) established across 26 OECD countries in 2005. Australia is only one of four countries that do not prescribe a working time limit. Referring back to Figure 3 we know that in 2006 that, like Australia, two of these countries had also some of the highest full-time working hours. There is no hours data available for the other country, Japan. New Zealand had the second highest average full-time working hours for employees, although not included in Figure 5, it is also a country that does not have a limit on working hours. Considering both Figures 3 and 5 together it becomes clear that working time limits do assist in restraining growth of long working hours.

² A useful summary of the literature can be found in Jakubauskas et al 2007 Chapter 5.

Figure 5: Working time regulations in OECD countries, 2005

Source: OECD 2008, p.73

Employers are typically hostile to legislative limits on working hours claiming economic harm will ensue if employer-led flexibility of hours is sacrificed. For example the Confederation of British Industry (CBI) predicted the implementation of EU Working Time Directive in 1998 would cause economic disaster and mass redundancies. The Directive provides minimum working hours standards across Europe including:

- A maximum working week of 48 hours per week averaged over a 17 week reference period.
- A minimum of eleven hours uninterrupted time off in a 24 hour period.
- One whole day off per week (in addition to eleven hours rest) although two days off can be averaged over two weeks.
- Four weeks paid leave per annum and rest breaks.

Although riddled with opt-out clauses and exemptions (mostly at the insistence of the UK), the evidence is that the proportion of people working long hours is coming down without the accompanying economic catastrophe (DTI 2004).

The NES needs to curb long working hours in Australia to make other provisions in the NES effective and not discriminatory. For example, if a long hours culture continues among full-time employees the provision for the Right to Request flexible working arrangements will in turn encourage discrimination of those who use such provisions.

The importance of allied standards and the role of working time standards in the wider policy mix

As noted earlier we know that working time problems in Australia are not simply a result of a weak regulatory structure. Issues of consumption norms, deepening inequality and increased employer power in the labour market, inter alia, have had a

huge impact (e.g. Schor 1992, 1998; Watson et al. 2003). The long term viability of such improved working time standards will require all Australian workers having a decent wage. Indeed, it is impossible to have decent hours of work unless there are also decent wages. The commitment in *Forward with Fairness* to restoring the role of an independent umpire in the labour market is a welcome development in this regard. But while working time standards alone cannot solve Australia's deep-seated extended hours of work problem, *there can be no solution without the explicit formulation of improved hours standards*. Indeed, a clear standard on hours provides the unambiguous reference point for setting other standards – such as those for pay. Public formulation of such a standard would also provide clear guidance as to what is safe, sustainable and legitimately desirable hours of work. The international evidence is unambiguous on this point: without such guidance hours of work for full timers drift out of control.

Summary

- It is misleading for the working hours clause to be labelled ‘maximum weekly hours’. A maximum weekly number of hours has not been prescribed by this standard.
- The clause that employees will be able to work ‘extra reasonable hours’ reduces bargaining over hours to the individual level and incorrectly assumes this is the best way of managing the challenge of extended hours.
- Australia has a culture of long hours among full-time employees due, in part, to the lack of enforceable regulation of working time. Relying on the premise of ‘reasonableness’ continues Australia’s legacy of weak regulatory working time practices, which has led to some of the longest full-time hours among OECD countries.
- We propose that the standard on working hours should be as follows:
 - The standard working week for full-time employees is 38 hours a week.
 - This provision is subject to the rule that an employer may require an employee to work reasonable additional hours in the week.
 - The reasonable additional hours must not exceed a maximum of 48 hours per week.
- In formulating our recommended standards we recognise that it will be possible to modify them slightly to ensure they work appropriately in particular industries and occupations on the basis of relevant award provisions.
- The success of the standard we propose will depend on the adoption of other supportive policies and standards, especially improvements in base rates of pay for low income earners. Such a standard is, however, also essential as a reference point for other realms of policy in providing a core definition of decent work.
- Without such a standard it is unlikely future gains in productivity will result in reduced hours of work for many in the community. This is not only likely to be unsafe but will also have a major impact on the quality of family and community life in the future.

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