DECISION

Fair Work Act 2009
s.739—Dispute resolution in relation to flexible working arrangements

The Police Federation of Australia (Victoria Police Branch) T/A The Police Association of Victoria

v

Victoria Police
(C2017/3833)

COMMISSIONER WILSON MELBOURNE, 14 SEPTEMBER 2018

Request for flexible working arrangements - whether request refused on reasonable business grounds - principles associated with reasonable business grounds.

INTRODUCTION

[1] This decision concerns the refusal by Victoria Police of an application by Detective Senior Constable Gary Emery (DSC Emery) for the approval of a flexible work arrangement.

[2] DSC Emery's employment is subject to the terms of the *Victoria Police (Police Officers (excluding Commanders), Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2015*[1] (the 2015 Agreement) which includes a dispute resolution procedure enabling disputes such as this to be brought to the Fair Work Commission for determination by arbitration.

[3] DSC Emery's flexible work arrangement request was originally made in May 2017 and refused in June 2017, after which he commenced a process of disputing the decision made by Victoria Police, the culmination of which was the commencement of an application to the Fair Work Commission in July 2017 for the resolution of an alleged dispute, pursuant to s.739 of the *Fair Work Act 2009* (the Act). After conciliation of the matter over some period of time was unsuccessful, DSC Emery sought the matter be determined through arbitration.

[4] A number of matters are relied upon by Victoria Police as being its reasonable business grounds for the refusal of DSC Emery's flexible work arrangement request. For the detailed reasons set out below I have determined the dispute by finding that the basis of Victoria Police's refusal of the request do not amount to reasonable business grounds and that instead the request should now be approved.

BACKGROUND

[1] AE418283.

[5] DSC Emery has worked for nearly 31 years as a police officer and is presently 58 years of age. Since early 2008 his work has been substantially associated with units in the Mornington Peninsula. Since 24 March 2018 he has returned to a permanent assignment at the Mornington Peninsula Crime Investigation Unit (CIU). On 2 May 2017 when he was working in what is now the Mornington Peninsula Divisional Response Unit (DRU), DSC Emery submitted a flexible working arrangement request which, if approved, would enable him to work 10 hours shifts over for 4 days per week rather than working the standard eight hour shift configured over 5 days per week. DSC Emery says about his request that it was made pursuant to Clause 14 of the 2015 Agreement which in turn makes reference to s.65 of the Act and was made in an attempt to aid in his transition into retirement as well as a mechanism to allow him to spend more time with his family.[2]

[6] For the purposes of context, whereas the CIU predominantly responds to reported crime, the DRU predominantly deals with drug related crime, and includes sourcing work from intelligence activities.[3]

[7] In his request for a flexible working arrangements, DSC Emery made reference to the provisions of the 2015 Agreement setting out the following:

> "Issue:
> Request for flexible working arrangements as per the "Victoria Police (Police Officers (excluding Commanders), Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2015", Section 14.
>
> Background:
> The Enterprise Agreement 2015 section 14 details the "right to request flexible working arrangements". This section is supported by the Fair Work Act 2009 (sec 65).
>
> Section 14 lists the circumstances in which employees can apply for flexible working arrangements. The section details the six (6) criteria employees are eligible to apply for a change to their existing working arrangements. These include child caring responsibilities, disability carer, experiencing domestic violence or having attained the age of 55 years.
>
> I am 57 years old reaching the age of 55 on 11th of December, 2014. I have been a member of Victoria Police since the 16th of September, 1987. I am currently a full time employee stationed at the Mornington Peninsula CIU and own position number 20022494. I have held this position since our transfer from Hastings CIU in November 2015. Prior to this date, I was seconded to the Mornington Peninsula Tasking Unit (now Divisional Response Unit) since the 25th of August, 2013 and post the CIU transfer to Somerville I have continued to be seconded to this team 5 position 20023662.
>
> As per the Enterprise Agreement 2015 section 14, I request that I be authorised to undertake flexible working arrangements to assist in my transition to retirement. I request that my working arrangements change from the current ten 8 hour shifts per

[2] Exhibit A3, Witness Statement of Detective Senior Constable Gary Emery, [6]-[7].

[3] Transcript, PN 526.

fortnight to eight 10 hour shifts. The change would equate to two additional rest days per fortnight.

I am not requesting a set roster or specific working patterns (nominated day or shifts), flexible rosters are required with DRU duties. This arrangement would be reviewed in 12 months.

…"[4]

[8] The basis of the request made by DSC Emery is Clause 14 of the 2015 Agreement which is in the following terms:

"14. Right to Request Flexible Working Arrangements

14.1 An employee who:

(a) is the parent of, or has responsibility for, the care of a child who is of school age or under; or
(b) is a carer within the meaning of the *Carer Recognition Act 2010*; or
(c) has a disability; or
(d) is 55 years of age or older; or
(e) is personally experiencing family or domestic violence; or
(f) is providing personal care, support and assistance to a member of their immediate family or member of their household because they are experiencing family or domestic violence;

may request a change in working arrangements relating to those circumstances.

14.2 The employee is not entitled to make such request, unless the employee has completed at least 12 months of continuous service with the employer, immediately before making the request.

14.3 Such request must be made by the employee, and assessed by the employer, in accordance with the provisions of Section 65 of the FW Act."

[9] As is immediately apparent, the clause defers in important respects to s.65 of the Act which provides the following:

"**Requests for flexible working arrangements**

Employee may request change in working arrangements

(1) If:

(a) any of the circumstances referred to in subsection (1A) apply to an employee; and

[4] Exhibit A5, Bundle of Attachments, Attachment B.

(b) the employee would like to change his or her working arrangements because of those circumstances;

then the employee may request the employer for a change in working arrangements relating to those circumstances.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

(1A) The following are the circumstances:

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
(b) the employee is a carer (within the meaning of the Carer Recognition Act 2010);
(c) the employee has a disability;
(d) the employee is 55 or older;
(e) the employee is experiencing violence from a member of the employee's family;
(f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

(1B) To avoid doubt, and without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and
(b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee--the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
(b) for a casual employee--the employee:

(i) is a long term casual employee of the employer immediately before making the request; and
(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Formal requirements

(3) The request must:

(a) be in writing; and
(b) set out details of the change sought and of the reasons for the change.

Agreeing to the request

(4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

(5) The employer may refuse the request only on reasonable business grounds.

(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;
(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal. "

[10] While it is the case that s.739(2) of the Act prevents the Commission from dealing with a dispute "to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5)" the Commission is not prevented:

> "from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5))".[5]

[11] An extensive email chain relating to DSC Emery's request is attached to the originating application in these proceedings, being the Form F10. From that chain it may be ascertained that, having received the request that DSC Emery's then Acting Inspector, Miro Mastorovic, sought advice from Victoria Police's Employee Relations team regarding the request as follows:

> "Good afternoon,
>
> I spoke to Nicole and was asked to send this email with basic details pending your legal advice. A Detective at Mornington Peninsula CIU has submitted a report asking that his hours of work are changed to 4 x 10's rather than 5 x 8's, in accordance with the EB. The report was dated a week or so ago, and has been sitting in a tray for one of

[5] Note to FW Act, s.739(2).

the D/S/Sgts who has taken some unexpected personal leave, hence the delay in notifying you.

The member has cited 'transitioning into retirement' as a reason for requesting the change.

As the normal OIC of that unit, I can confirm that although the request could technically be accommodated, this would cause discontent from other members for obvious reasons (not earning the COT, which is essentially based and accounted for around 8 hours shifts).

Can you advise once you have your legal advice on the matter. I will not provide a response to the member other than that it is being considered by Employee Relations.

Regards,

Miro Majstorovic"

[12] DSC Emery relies, to some extent, on the fact that Inspector Mastorovic said that "the request could technically be accommodated".

[13] By mid-June 2017 Inspector Cornford had become the decision-maker and a dialogue ensued between the two about the request. On 18 June 2017 Inspector Cornford acknowledged that DSC Emery was due a response within 21 days of his initial request apologised for the time taken to respond and undertook to progress the matter.[6] Inspector Cornford ultimately refused DSC Emery's request on 21 June 2017 when he provided the following correspondence:

"Dear Leading Senior Constable Emery,

I refer to your correspondence of 2 May 2017 requesting changes to your working arrangements in accordance with s 65 of the *Fair Work Act 2009* and cl 14 of the *Victoria Police (Police Officers (excluding Commanders), Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2015* **(VP EA 2015).**

You have cited 'transition to retirement' as the reason you are seeking changes to your working arrangements in the form of a 'compressed' roster of four weekly shifts of ten hours each (4 x 10).

Your current role requires the performance of full time duties, worked on a standard roster of five shifts of eight hours each **(8 x 5)** as determined in accordance with cl 25.2 of the VP EA 2015. As a Detective, the regular performance of overtime and recall to duty is also part of your role, as reflected in your eligibility for Commuted Overtime Allowance **(COT).**

Following careful consideration of your request in accordance with the VP EA 2015 and the *Fair Work Act 2009,* I have determined that Victoria Police is unable to

[6] Exhibit R1, Witness Statement of Detective Inspector Justin Cornford, attachment JC-2.

accommodate your request for changes to your standard working arrangements in the form of a compressed 4 x 10 roster. The reasons for my decision are as follows:

- As a Detective, the regular performance of overtime and recall to duty is an inherent requirement of your position. In the event a 4 x 10 roster was granted, Victoria Police may require that you be recalled to duty on the fifth day. It is my view that granting you a compressed roster of longer days where this is not strictly required, in addition to the possibility of recall on the fifth day, raises occupational health and safety risks associated with fatigue.

- Granting your request imposes an unreasonable financial burden on Victoria Police because it would be obliged to pay both your full salary and the COT in respect of working the same hours. You would, in effect, be paid twice for the same work.

I would be pleased to consider other types of flexible working arrangements that will help you transition to retirement. For instance, if you wish to reduce your overall hours and work part time as you approach retirement, I would be pleased to discuss this with you.

Regards

Justin Cornford"[7]

[14] There is no contest that DSC Emery is eligible to apply for a flexible working arrangement under the 2015 Agreement, that his request was properly made, or that it has been refused by Victoria Police. There are, however, a number of contested matters requiring resolution in this decision:

- Whether granting the request will reduce DSC Emery's working hours;

- Whether, for the above for other reasons, the flexible working arrangement, if granted will increase the workload of other staff members;

- Whether there is, or may be, extra cost to Victoria Police in the event the request is granted; and

- What are Victoria Police's reasons for refusing the request and which ones may be relied upon for the purposes of these proceedings.

[15] The matter of Victoria Police's reasons for refusing the request comes about because the reasons it relies upon in the hearing of this matter are markedly different from those which are set out in the original correspondence to DSC Emery on the subject of his request. The correspondence to DSC Emery from Inspector Cornford rejects the request for two essential reasons. The first being that the regular performance of overtime and recall to duty is an inherent requirement of DSC Emery's position and the second that the request imposes an unreasonable financial burden on Victoria Police. Inspector Cornford's evidence to the Commission is that these were not his reasons for refusing the request. Instead Inspector

[7] Exhibit A5, Attachment C.

Cornford puts forward that after engaging in a dialogue with the Human Resources Division (HRD), he agreed with the ultimate conclusion, but had issues with the letter as drafted, believing that the letter which had been drafted for him to provide to DSC Emery did not provide him with his clear reasons, and that he informed DSC Emery of those reasons.[8] When he engaged with the Human Resources Division about the correspondence to be sent to DSC Emery they said:

> "In relation to the second bullet point of the letter, which I added, HRD said that the level of detail I had provided was more in the nature of evidence supporting the reasons already given to Emery in the letter, rather than reasons in themselves. Therefore, HRD said, there was no need to include that detail in the letter, although it would become relevant down the track, as evidence, if the matter went to the Fair Work Commission. I accepted that and, because I agreed with the substantive outcome, approved the letter in its original form."[9]

[16] Inspector Cornford now puts forward that the reasons for his refusal of DSC Emery's request were not just that the regular performance of overtime and recall to duty are inherent requirements of DSC Emery's position or that the request imposes an unreasonable financial burden on Victoria Police, but also that matters of team culture, nature and role would be negatively affected:

> "I was the ultimate decision-maker when it came to refusing Emery's Application. My primary reasons for refusing the Application were:
>
> (a) the negative impact that the arrangement would likely have on the team, particularly as a result of parity and productivity issues; and
>
> (b) the nature of the team and the role."[10]

[17] Because of their centrality to the Commission's consideration of this matter, it is necessary to repeat from Inspector Cornford's witness statement the whole of his explanation of these reasons. Before doing so, for the purposes of context, certain paragraphs in DSC Emery's statement should be noted, which are then rebutted in the extract from Inspector Cornford's set out further below.

[18] From DSC Emery's witness statement:

> "9. My job title is Detective Senior Constable…
>
> 10. As a Detective Senior Constable at a DRU or CIU, my main duties are to..
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> - Investigate major crime and suspected criminal activity
> - Compile and execute search warrants
> -Arrest and interview suspects
> - Prepare briefs of evidence and give evidence at court
> - Gather and process intelligence

[8] Exhibit R1, [16].

[9] Exhibit R1, [18].

[10] Exhibit R1, [20].

- Assist other members and provide advice

11. Crime investigation on a typical day is dominated with administrative duties in the office as listed above. A break down of work percentage would be difficult to quantify but probably 10% or less of any shift would involve processing suspects or other duties away from the office. The vast majority of work performed at any DRU or CIU is performed at your desk. This remaining 90% of work can be done at any time and practically, undertaking these administrative tasks uninterrupted over a 10 hour period is more productive than the present 8 hour shifts."

"19. Inspector Cornford also said in his rejection letter that "Granting your request imposes an unreasonable financial burden on Victoria Police because it would be obliged to pay both your full salary and COT in respect of working the same hours. You would, in effect, be paid twice for the same work."

20. I reject this reason for rejecting my application for a number of reasons:

> -The reason offered makes no sense to me. I don't understand how working a rostered 40 hours is being paid twice for the same work because the hours are compressed to 4 day instead of 5 days
> -Performing Commuted Overtime commences at the conclusion of the day's rostered hours whether that be an 8 or 10 hour shift.
> - COT is not designed to be expended regardless of the duties performed during the shift. COT is designed to replace standard overtime payments for any overtime to perform unforseen duties occurring during a shift that require a detective to remain on duty past his rostered hours.
> - If it were the case that COT was required to be expended in overtime worked regardless of duties being unforeseen or not, the COT would amount to about 2.8 hours per week or 124 hours over 43 weeks.
> - Detectives working 5x8 hours shifts are not expected to and routinely do not expend their COT during the rostered shifts. While the employer does gain a financial advantage by detectives routinely expending their COT allowance and continuing to work overtime virtually unpaid, Victoria Police appear to assume that COT has a definitive and quantifiable value to the organization. This is not the case practically.
> - 10 hour shifts would make it more likely that I will inherit regular incidental duties outside business hours from members that complete their shifts.

21. I was aware at the time of my application for flexible rostering of other members including Detectives in Victoria Police who have had their request for compressed hours approved on the same basis of my application on 02 May, 2017.

22. I have reviewed s 65(5A)(a) – (e) of the *Fair Work Act 2009*, and do not believe any of these prescribed reasons would be applicable to my application:

> - The arrangement would not result in any extra cost to my employer;
> - There is capacity to make minor changes to working arrangements of other employees to accommodate my request;

- It would not be impractical to make minor alterations to the arrangements of other employees to accommodate my request;
- There would be no loss in efficiency or productivity in respect of my request;
- There would be no impact on service delivery."[11]

[19] The following is extracted from Inspector Cornford's witness statement on the subject of his reasons for his refusal of the request:

"*Impact on Unit*

24 At the time of his Application, Emery was a member of the DRU, which predominantly investigates matters as a team. As mentioned above, the DRU workflow is dictated by the demands of the job as each investigation arises.

25 My greatest concern was the effect of moving one individual to a compressed roster in this team environment, where the other members of the team worked on standard roster arrangements.

26 In the DRU investigation environment, it is common for investigations to require resourcing by detectives over and above the standard 40 hour week.

27 When I reviewed the draft letter prepared in the first instance by HRD …, I reviewed Emery's Timesheet Attribution data, which showed Emery's hours of work, as recorded by him. This data showed Emery to have worked an average of 9.8 hours each shift, and up to 12 hours in a shift. This was consistent with my understanding of work hours in the unit.

28 Consistent with my proposed revisions to the decision letter, I was concerned that it would be damaging to morale and the effectiveness of the unit, if a member (who was paid as a full time crew member, and remunerated with COT) was effectively "entitled" to stop work after the end of the fourth day, while those working side-by-side with the member, and also putting in the overtime where required, were then required to attend on the fifth day with no additional compensation. I know how I would feel in that situation, and it is not something I wanted to promote.

29 From a practical perspective, losing this resource on the fifth day of an investigation would also have a negative impact on the effectiveness of any investigation that was on-foot.

30 Despite this, I would have been open to considering an application for a part-time roster of four days. This is because it would not be placing other team members at a disadvantage with respect to pay.

31 As with all part time arrangements, I would also be able to "fill" the vacant FTE with another part time resource. This is not an option with a 4 x 10 arrangement, because there would be no vacant FTE to fill.

[11] Exhibit A3.

32 Workplace harmony is my number one priority. It is my true belief that everyone should enjoy coming to work, and the work environment should promote that. In my experience as a senior detective, avoiding workplace disharmony and conflict is of paramount importance.

33 I disagree with Emery's assertion at paragraph 22 of his witness statement that "the arrangement would not result in any extra costs to my employer". Under Emery's 5 x 8 roster he is entitled to COT, which compensates him for working five by eight hour days plus overtime.

34 Under the proposed 4 x 10 roster, Emery would have been entitled to the same COT benefits as he received at the time of the Request (and continues to receive). He would rarely have needed to work the additional two hours per shift (and frequently would not have needed to work any extra time per shift) to secure the same remuneration as he was receiving on the eight hour shift arrangement. In effect, by granting Emery's request, Victoria Police would bear the same cost, but lose a resource one day each week.

Nature of the Role

35 Separate to the negative impact on the team; there were elements of Emery's role which were not suited to a compressed roster and which led me to refuse the Application.

36 Emery describes his role and duties at paragraphs 9 and 10 of his witness statement. I agree with the overall description of his duties. However, I disagree with the characterisation that the duties comprising his role are mostly "administrative" in nature and that "crime investigation on a typical day is dominated with administrative duties" (paragraph 11).

37 The role of a Detective Leading Senior Constable in a DRU requires considerable surveillance activities and time spent executing search warrants (at the very least one per week, and sometimes on multiple days, which takes four hours on average-sometimes less, sometimes more). There is also an expectation that detectives rostered on night shift will perform 5 to 6 hours of patrol time unless engaged in incident investigation. This is outlined in the Regional nightshift supervisor's checklist.

38 I accept that certain investigations, such as fraud, can be performed predominantly from a desk. However, I disagree that "undertaking these administrative tasks uninterrupted over a 10 hour period is more productive than the present eight hours" (paragraph 11).

39 Even in desktop investigations, investigation work requires (for example) contacting businesses and banks, which is limited to business hours. It is my opinion that expanding the hours worked four days a week would not improve productivity.

40 I also disagree with Emery's statement at paragraph 20 that "10 hour shifts would make it more likely that I will inherit regular incidental duties outside of business hours for members that complete their shifts."

> 41 This assertion is not supported by current practice. In a CIU , if there is work to be completed at the end of a shift, it is customary for detectives to complete the administrative work connected to their shift prior to leaving or, if it is significant enough to handover, they will hand it over to detectives working on the next shift. From my experience, members at a DRU will stay together to ensure all necessary tasks are complete.
>
> 42 If a detective was in court for the day, taking into account travel time, any extra time up to 10 hours is likely to be dead time, by the time the detective gets back to work, logs onto the system and starts work again. In my opinion, a 10 hour shift in those circumstances is unlikely to be effective. Another example is attendance at training, for example, Operational Safety Tactics Training (OSTT). As can be seen in JC-3, on 26 May 2017, Emery attended OSTT and recorded he was on duty for 8 hours. Members are required to attend OSTT twice a year."[12]

[20] Discernible from the combination of Inspector Cornford's June 2017 letter to DSC Emery and his May 2018 witness statement are that there are now five reasons advanced by Victoria Police for refusing DSC Emery's request:

- That the regular performance of overtime and recall to duty are an inherent requirement of DSC Emery's position. This matter is stated in the June 2017 correspondence but appears not to be restated in the same or similar language anywhere within Inspector Cornford's witness statement or oral evidence;
- That the costs flowing from granting the request would either impose an unreasonable financial burden of Victoria Police, which is the argument mounted in the June 2017 refusal letter; or that whilst the costs incurred by Victoria Police would remain unchanged they would losing a resource one day each week. 34 more
- That granting the proposal would be damaging to the morale and effectiveness of the unit in which DSC Emery worked;
- That granting the request would mean that a resource would be lost; and
- That because of the nature of the role of the detective, elements of DSC Emery's role would not be suited to the arrangement he proposed.

PRINCIPLES ASSOCIATED WITH THE DETERMINATION OF THE DISPUTE

[21] In dealing with disputes such as those that are the subject of this application the Commission is not undertaking an exercise of judicial power but is instead exercising a power of private arbitration, with that power deriving from the parties' agreement to submit their differences for decision by a third party. The resultant arbitrator's award is not binding of its own force but instead its effect depends on the law which operates with respect to it.[13] It is accepted that while not exercising judicial power, the Commission "may legitimately form

[12] Exhibit R1.

[13] *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645 [30]–[32]; cited in *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FCAFC 82 at [25].

and act upon opinions about legal rights and obligations as a step in the exercise of its own functions and powers".[14]

[22] The Commission is required to examine whether an enterprise agreement's dispute settlement procedure "requires or allows" the Commission to deal with the dispute. In order to do so, it is necessary to look at the text of the dispute settlement procedure, understood in light of its industrial context and purpose, to determine whether the dispute, properly characterised, falls within it.[15] The scope of a dispute settlement procedure in an enterprise agreement should not be narrowly construed; "to do so would be contrary to the notion that certified agreements are intended to facilitate the harmonious working relationship of the parties during the operation of the agreement."[16] While the parties to an enterprise agreement are free to impose limitations on the Commission's role to settle disputes about matters arising under the agreement and while there may be cases where, properly construed the clause allows the Commission to proceed to deal with matters of, despite certain steps not being satisfied, the general presumption is that where limitations are not observed, the Commission (or other independent person) has no discretion to deal the dispute referred to it under the agreement, unless one is conferred on it under the terms of the agreement.[17]

[23] In characterising the nature of a dispute the Commission is not confined to the application filed to deal with the dispute.[18] The entire factual background is relevant, and may be ascertained from the submissions advanced by the parties on the question of jurisdiction.[19] Further, a dispute may evolve during proceedings in the Commission. It may therefore be necessary in some cases when ascertaining the character of a dispute to have regard to both the nature of the dispute alleged in an originating application and the factual circumstances as they evolve.[20] The character of the dispute is distinguishable from any relief which may be sought, or granted, following an arbitration of the dispute.[21] However, the relief sought may cast light on the true nature of the dispute in some cases.[22]

[24] If the Commission has jurisdiction to deal with the dispute, the nature of the relief that the Commission may grant will depend on the limitation in s.739(5)[23] and the agreement of the parties as recorded in their enterprise agreement, provided that such relief is reasonably incidental to the application of the enterprise agreement to which the dispute relates.[24]

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[14] *Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* [2012] FCAFC 87 [21], cited in *Kentz (Australia) Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FWCFB 2019 [52].

[15] *CEPU v Thiess Pty Ltd* (2011) 212 IR 327 at [42], [47]; *CFMEU v AIRC* [2001] HCA 16.

[16] *SDA v Big W Discount Department Stores* PR924554 at [23].

[17] *The Australian Workers' Union v MC Labour Services Pty Ltd* [2017] FWCFB 5032, [38] – [39].

[18] *AMWU v Holden Limited* PR940366 at [47]; *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [23].

[19] Ibid [47].

[20] *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [19], [23]; *R v Bain; Ex parte Cadbury Schweppes Australia Ltd* (1984) 159 163 at 168; *United Firefighters' Union v Metropolitan Fire and Emergency Services Board* PR973884.

[21] *MUA v Australian Plant Services Pty Ltd* PR908236; *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [21]-[22].

[22] *United Firefighters' Union v Metropolitan Fire and Emergency Services Board* PR973884 at [20].

[23] The Commission must not make a decision that is inconsistent with the FW Act, or a fair work instrument that applies to the parties.

[24] *MUA v Australian Plant Services Pty Ltd* PR908236 at [63]; *Seven Network (Operations) Ltd v CPSU* (2003) 122 IR 97 at [31]-[32].

[25] Interpretation of an enterprise agreement requires construction of the words of the instrument. The Full Federal Court has held that the principles governing the interpretation of enterprise agreement are the same as those governing the interpretation of awards.[25] Further, the Full Bench in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*[26] (Berri) has set out in detail the principles for such a task. In that matter, and after an extensive analysis of the subject, the Full Bench summarised the principles to be applied in the following way:

> "[114] The principles relevant to the task of construing a single enterprise agreement may be summarised as follows:
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> 1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:
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> (i) the text of the agreement viewed as a whole;
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> (ii) the disputed provision's place and arrangement in the agreement;
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> (iii) the legislative context under which the agreement was made and in which it operates.
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> 2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.
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> 3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.
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> 4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.
>
> 5. The FW Act does not speak in terms of the 'parties' to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are 'covered by' such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement 'with the employees who are employed at the time the agreement is made and who will be covered by the agreement'. Section 182(1) provides that an agreement is 'made' if the employees to be covered by the agreement 'have been asked to approve the agreement and a majority of those employees who cast a valid vote

[25] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77, [189].

[26] [2017] FWCFB 3005.

approve the agreement'. This is so because an enterprise agreement is 'made' when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.

6. Enterprise agreements are not instruments to which the *Acts Interpretation Act 1901* (Cth) applies, however the modes of textual analysis developed in the general law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some general principles of statutory construction may have less force in the context of construing an enterprise agreement.

7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.

8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform and the subject matter of the agreement. Evidence of such objective facts is to be distinguished from evidence of the subjective intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

12. Evidence of objective background facts will include:

> (i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;
>
> (ii) notorious facts of which knowledge is to be presumed; and
>
> (iii) evidence of matters in common contemplation and constituting a common assumption.

13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more

> assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.
>
> 14. Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.
>
> 15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding."[27]

[26] The application of these principles, and especially to those in which ambiguity may be considered was further considered by the Full Bench in *United Firefighters Union of Australia v Emergency Services Telecommunications Authority*:

> "[35] As stipulated in Berri, the starting point for interpreting an enterprise agreement is to have regard to the ordinary meaning of the words used. Further, the text must be interpreted in the context of the agreement as a whole. Principles 7 and 10 elicited in Berri emphasise that ambiguity in a provision within an enterprise agreement must be identified before one is to have regard to evidence of the surrounding circumstances. However, principle 8 makes it clear that, in determining whether ambiguity exists, one may have regard to evidence of the surrounding circumstances. That is, such evidence can be used to identify and resolve any ambiguity."[28]

CONSIDERATION

[27] DSC Emery's request for a flexible working arrangement is connected with Clause 14.1 of the 2015 Agreement for the single reason that he is older than 55 years of age with him putting forward in May 2017 that the justification for his request was to assist in his transition to retirement. His evidence to the Commission on the subject elaborates on his justification with a second reason, but possibly one that is subsidiary to the first; that the granting of the request would enable him to spend more time with his family, citing the then evidence of becoming a grandfather for the second time.[29]

[28] As is evident from an examination of Clause 14 of the 2015 Agreement along with s.65 of the Act, the interaction between the two is to the effect that a person desiring to make a request for flexible working arrangement must fit within one of the six factual criteria in Clause 14.1, as well as meeting the requirement in Clause 14.2 that they must have completed at least 12 months of continuous service with Victoria Police, with that period being served immediately before the making of a request. Once made the request must then be assessed by Victoria Police in accordance with the provisions of s.65 of the Act. That section requires merely that a conforming request be made, which is then required to be assessed by the

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[27] Ibid [114].

[28] [2017] FWCFB 4537.

[29] Exhibit A3, [7].

employer who may refuse the request only on reasonable business grounds. There is no requirement within the section or within the 2015 Agreement for an employee to expand on or justify the reasons for their request or the efficacy, either for themselves or for their employer, of the flexible working arrangement they seek.

[29] In support of its case, DSC Emery drew the Commission's attention to the decision by Vice President Lawler in *Australian Municipal, Administrative, Clerical and Services Union v Brimbank City Council*[30] (Brimbank) which remains one of the few decisions by the Commission on the subject of flexible work arrangements. In that matter, the Commission was faced with an application by three employees of Brimbank City Council who each worked in the Council's People and Culture Team and sought the ability to work a nine-day fortnight with a rostered day off each fortnight. The Council had refused each of the employee's request and it was necessary for the Commission to determine whether the Council had complied with the obligations it held under its enterprise agreement.

[30] The applicable dispute resolution procedure[31] allowed for disputes and grievances about a matter arising under the agreement to be dealt with in accordance with the provisions of a "settlement of disputes" clause. The clause sets out a process for identification and then discussion of the dispute with the capacity for an unresolved matter to be escalated to Fair Work Australia. The powers of the tribunal, as authorised by the settlement of disputes clause included conciliation as well as the ability to determine the dispute or grievance by arbitration. In both instances the tribunal may:

> "(a) determine matters of procedure as if clause 738 of the Fair Work Act 2009 applied to the proceedings; and
>
> (b) exercise the powers set out in clause 595 of the Fair Work Act, to the relevant, as if clause 111 applied to the proceedings."

[31] The clause in dispute is in somewhat different terms to the clause in question in this matter although, as will be seen, there is similarity between a number of the essential elements of the two clauses. The provision in question in *Brimbank* is in the following terms:

> "20. ALTERNATIVE FLEXIBLE WORK ARRANGEMENTS
>
> 20.1 Any flexible work arrangement that is agreed between a manager and an employee or a work unit is a stand alone agreement and shall not be considered as a precedent or as an acceptable business case for any other flexible work arrangement that another employee or work unit seeks with their manager. Any flexible work arrangement sought must be based on the individual needs of the employee and the operational requirements with the work unit of the employee seeking the flexible work arrangement
>
> 20.2 An employee or work unit may request to work an alternative flexible work arrangement in place of their current hours of work arrangement, to support their work life balance.

[30] [2013] FWC 5.

[31] *Brimbank City Council Enterprise Agreement 6, 2010 (EB6)*, AE883755, Clause 55.

20.3 Such a request may include, but is not limited to, changes to start or finishing times (eg. starting later or finishing earlier each day).

20.4 Flexible work arrangement requests will be considered and subject to approval by the employee's/work unit's manager. All requests for a flexible work arrangement may only be refused on reasonable grounds related to the effect on the workplace. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.

20.5 As well as the ability to request an individual flexible work arrangement in accordance with this clause, Council also offer a number of other flexible work arrangements which are outlined in Section 5, Part A of this Agreement.

(underline emphasis added)"[32]

[32] The Vice President recorded that, notwithstanding an attack on the subject by the Council, the request for a nine-day fortnight with a RDO is a "flexible work arrangement",[33] and that the meaning of the clause was plain and free from relevant ambiguity. Relevant to this matter he found:

> **"[10]** Clause 20.2 authorises an employee or work unit to request an alternative flexible work arrangement in place of their current hours, "to support their work life balance". The Agreement does not define the expression "alternative flexible work arrangement". Clause 20.3 specifies matters that the expression must be taken to include, but is not limited to.
>
> **[11]** Pursuant to clause 20.4 the employee or work unit's manager must consider the request and decide whether to approve it. However, the manager may only refuse a request "on reasonable grounds related to the effect on the workplace" and, consequently, must approve the request in the absence of such "reasonable grounds".
>
> **[12]** Clause 20.4 provides a non-exhaustive, indicative list of the grounds on which a request may reasonably be refused because of adverse effects of the proposal in the request on the workplace: "such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service." Clause 20.1 provides further guidance on objects of clause 20: "Any flexible work arrangement sought must be based on the individual needs of the employee and the operational requirements with the work unit of the employee seeking the flexible work arrangement."
>
> **[13]** Taking the practical approach mandated by the authorities, I am satisfied that a nine day fortnight with a rostered day off each fortnight is undoubtedly a "flexible work arrangement" and, in the case of any employee not working a nine day fortnight, would be an "alternative flexible work arrangement" within the meaning of clause 20.

[32] [2013] FWC 5, [3].

[33] Ibid, [13].

[14] Moreover, in my view clause 20 was intended to have a practical operation and requires the manager to weigh the personal circumstances relied upon by the employee against the extent of cost and impact on the business of allowing the request.

[15] Almost all requests under clause 20 will result in *some* cost, loss of efficiency or adverse impact on customer service, even if only very small. Any change to hours will see the employee unavailable at a time he or she would previously been available with the need (and consequent resource cost) for another employee to deal with urgent requests or telephone calls that the requesting employee would otherwise have taken, or the need to redo a roster or the like. If it was sufficient for the Council to simply point to *any* cost or business difficulty, however small, and then rely upon that as constituting a reasonable ground to refuse the request, the practical right intended by clause 20 would become illusory. Such an approach is inconsistent with the flavour of clause 20 read as a whole and inconsistent with the principles of construction.

[16] On the proper construction of clause 20, it is necessary for the Council to point to some cost or adverse impact over and above the inevitable small adverse impacts associated with any material request that is sufficient to outweigh the employee's personal considerations in the legitimate pursuit of a better work life balance.

…

[19] The manifest intent of clause 20 is to provide *alternative* flexible work arrangements to those specified elsewhere in the Agreement. That is brought home particularly by the language of clause 20.2: "An employee or work unit may request to work an alternative flexible work arrangement <u>in place of their current hours of work arrangement</u>". That "current hours of work arrangement" is as specified elsewhere in the Agreement, including for various employees, in clause 19. The fact that clause 20 does not appear in Section 5 of Part A and instead follows clause 19 only serves to underscore the practical interpretation of clause 20 that gives effect to the ordinary meaning of its broad words.

[20] The presence of clause 20 in the Agreement demonstrates that the parties intended that there should be a genuine and substantive right to seek alternative flexible working arrangements and that such arrangements should be accepted unless they could be refused because of the adverse effects in the workplace. The importation of the standard reasonableness necessarily connotes a weighing of any adverse impact against the personal circumstances and legitimate work/life balance aspirations of the employee that grounded their request."[34]

[33] The Vice President then gave extensive consideration to the evidence before him with his findings about the evidence informed by the observation set out above. His decision included the following, relevant to the questions of the likely adverse impact from future applications as well as the consideration of whether the request would involve employees working less time or doing fewer tasks:

> **"[83]** Ms Scarfo-Williams was also concerned, and understandably so, that if she were to allow the application of one employee then by virtue of comparison of

[34] Ibid.

> circumstances she would be obliged to accept the application of all employees. A gloss on that argument was to the effect that the Council is entitled to take account, when considering any given application, the likely adverse impacts of other employees who can mount at least as compelling a case then also seeking the same flexible working arrangements. Whilst it may be possible to readily accommodate the flexible working arrangements for one such employee, there are serious adverse effects if all employees have the arrangement. However, the opening sentence of clause 20.1 makes it clear that the fact a request has been granted to a particular employee does not provide a ground for another employee having a similar request granted.
>
> **[84]** I consider it of considerable significance that that none of the three requests would involve the employee working less time or doing few tasks. Ms Scarfo-Williams accepted in cross-examination that employees are likely to get through the same number of tasks as they will continue to work the same number of hours."

[34] He then postulated the inevitability of any one of the requests or all of them causing difficulty in managing the work team. In relation to one of the applicants, Mr Girotto, he noted that the basis of that person's application was simply the desire to seek a better work life balance and that the difficulties presented by that person's request were at a background level.[35] Connected with the circumstances of the second applicant, Ms Marriot, *Brimbank* found:

> "**[88]** Ms Marriott put forward cogent personal circumstances in support of her request including a desire to be more involved in the school life of her children and the fact that her father worked weekend shifts with the result that she could not see him on weekends and therefore sought to arrange a weekday RDO when she could contribute more to the children's schooling and spend some time with her father. I accept Ms Marriott's statement evidence as to the effect of her request on workplace. Ms Marriott's role is such that the adverse effects of her proposal will be largely limited to the need for persons to take messages. I consider that the instances of difficulty specifically identified by the Council are very modest problems and I am not prepared to act on Ms Scarfo-Williams evidence on the broader effects of the proposal on the Team. I consider that there are no reasonable grounds to refuse Ms Marriott's request and it should be granted."
>
> (references omitted)

[35] In relation to the third applicant, Ms Borg, the Vice President considered that the net adverse effects "will be very small indeed".[36]

[36] Having reviewed the effects the Commission then determined that the request for flexible working arrangements made by each of three employees be granted.[37]

[37] Reference was also made in submissions to a later decision of the Commission in the matter of *Rind v Australian Institute of Superannuation Trustees*,[38] a decision dealing with a

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[35] Ibid, [87].

[36] Ibid, [89].

[37] Ibid, [91].

[38] [2013] FWC 3144.

general protections matter involving a dismissal, in which Commissioner Lewin considered the conjunction of s.65 of the Act and a provision of an enterprise agreement which enabled an employee to request to return to work from parental leave on a part-time basis. In forming his views about the operation of s.65 of the Act and the enterprise agreement, Commissioner Lewin took into account what he referred to as a "presumptive element" about the provisions:

> "**[50]** In my judgement, there is a presumptive element to the provisions of Clause 21.6 of the Agreement such that an employee returning from unpaid parental leave will be able to work part time until the child in respect of which the leave was available reaches school age, unless there are reasonable grounds upon which that part time employment can be refused. Those grounds must be objectively based and objectively judged. The presumptive element is reinforced by the terms of Clause 21.1.1 of the Agreement. The position of the Company for Ms Rind to work full time, of itself, does not displace that presumption. Particularly, having regard to the evidence that the Company has chosen to continue with part time equivalent service provision.
>
> **[51]** In my view, once a request is made and refused under Clause 26.1 of the Agreement it will be necessary for the Company to be able establish the reasonableness of the refusal on an objective basis. On my critical evaluation of all the circumstances revealed by the evidence, including the Company's position, I judge the refusal of the request not to have been reasonable.
>
> …
>
> **[54]** While an opportunity for part time work on return from parental leave might not long ago have been considered a fortunate privilege, in my judgement, contemporary circumstances require a different view. Indeed, the importance of parental leave and in particular leave in relation to maternity has become a matter of vital public interest in various ways reflected in the Act and in the Award system. The matter variously attracts general legislative proposals in the public interest. Entitlements of employees are likely to vary and will be of great importance to pregnant women who conceive children while in employment."

[38] Plainly the direction taken by the Commission in *Brimbank* is a product not only of the terms of the enterprise agreement which differ in some respects to the term now before the Commission, as well as being a product of the evidence both about the circumstances of the applicants, the Council and the consideration given by the Council to the requests that had been made. Nonetheless, the decision provides a useful insight into how matters of this type, which ultimately require an acceptance or rejection by the employer of a request made by employee should be progressed, with one of the main considerations being the stipulation that a flexible working arrangement request only be refused on reasonable business grounds. In this regard it must be noted that in the case of *Brimbank* a refusal on reasonable business grounds must be related to the request's effect on the workplace. However, in the case presently before the Commission, the legislation ultimately underpinning the 2015 Agreement is in inclusive terms, specifically referring to five matters that will be considered as reasonable business grounds, without the grounds being restricted to those five matters.

[39] In this particular matter, the 2015 Agreement term requires that a flexible working arrangement request "must be made by the employee, and assessed by the employer, in accordance with the provisions of Section 65 of the FW Act" (Clause 14.3). The section, as

presently enacted, sets out the following requirements as to the request and the decision on the part of the employer to consider the request:

> "Agreeing to the request
>
> (4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.
>
> (5) The employer may refuse the request only on reasonable business grounds.
>
> (5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:
>
> > (a) that the new working arrangements requested by the employee would be too costly for the employer;
> > (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
> > (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
> > (d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
> > (e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service."

[40] Subsection 65 (5A) commenced on 1 July 2013, after the decision in *Brimbank*.[39]

[41] The Explanatory Memorandum applying to the original unamended section provided the following relevant explanation about the provisions of what was then ss.65(3) – (5):

> "264. A request for flexible working arrangements must be in writing and set out the change sought and reasons for the change (subclause 65(3)).
>
> 265. Subclause 65(4) requires that the employer give the employee a written response to the request within 21 days, stating whether the request is granted or refused. If the employer refuses the request, the written response is required to include details of the reasons for the refusal (subclause 65(6)). The intention is that an employee is able to clearly understand why their request is being rejected. A bare refusal (i.e., without reasons) is insufficient.
>
> 266. Subclause 65(5) provides that the employer may only refuse the request on reasonable business grounds.
>
> 267. The Bill does not identify what may, or may not, comprise reasonable business grounds for the refusal of a request. Rather, the reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made. Reasonable business grounds may include, for example:

[39] [2013] FWC 5.

> • the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
> • the inability to organise work among existing staff; and
> • the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.
>
> 268. It is envisaged that FWA will provide guidance on this issue.
>
> 269. Rather than refusing a request, it would be open for an employee and their employer to discuss the request and come up with an approach that would accommodate the needs of both parties.
>
> 270. An employee who is not eligible to request flexible working arrangements under this Division (e.g., because they do not have the requisite service) is not prevented from requesting flexible working arrangements. However, such a request would not be subject to the procedures in this Division."[40]

[42] It is instructive that alternatives are intended by the explanation. Instead of refusing a request, it is open for an employee and their employer to "discuss the request and come up with an approach that would accommodate the needs of both" and that there may be a discussion between parties even where an employee may not be eligible to make a formal request.

[43] When the Parliament considered the amendment to the legislation which inserted s.65 (5A) the following further explanation was given on the subject:

> "37. Currently, under subsection 65(5) of the FW Act, an employer may refuse a request for a change in working arrangements only on reasonable business grounds.
>
> 38. Item 18 inserts new subsection 65(5A), which sets out a non-exhaustive list of what may constitute reasonable business grounds, including:
>
> - the excessive cost of accommodating the request;
> - that there is no capacity to reorganise work arrangements of other employees to accommodate the request;
> - the impracticality of any arrangements that would need to be put in place to accommodate the request, including the need to recruit replacement staff;
> - that there would be a significant loss of efficiency or productivity;
> - that there would be a significant negative impact on customer service.

[40] *Fair Work Bill 2008 Explanatory Memorandum.*

> 39. The list of reasonable business grounds is not exhaustive and such grounds will be determined having regard to the particular circumstances of each workplace and the nature of the request made."[41]

[44] Plainly set out within the foregoing material is both that an employer is not limited in the reasonable business grounds that may be taken account of, as well as that an employer may grant a request for almost any reason they see fit. The way the provisions are constructed, reconsideration of a request really only takes place once it has been refused. Unless a dispute were to be agitated for some other reason under a dispute resolution procedure, no review is ever likely to occur.

[45] What may be drawn from this consideration both of the legislation, as well as the Commission's earlier decision in *Brimbank*, are the following principles, pertinent to a decision to refuse or cutback the scope of an request that has been made:

1. Consideration must be given to an assessment of whether the request was made is actually a request for a flexible working arrangement;
2. The employer is obliged to give a written response to the request, within 21 days of it being made;
3. The legislation requires that an employer may refuse a request only on reasonable business grounds. There needs to be an objective basis for those grounds.
4. The "refusal" of a request is when it is communicated to the applicant that the request is not agreed, and the reasonable business grounds upon which the refusal rests are those communicated at the time;
5. The intent of the legislation, as well as the intent of a flexible working arrangement clause, is to provide for flexible working arrangements.
6. There is a need for managers to weigh the personal circumstances relied upon by the employee against the extent of cost and impact on the business of allowing the request;
7. Since almost all requests will result in some cost from the proposed arrangement, it will generally be insufficient for an employer to simply point at cost as being a reason for refusal;
8. It follows from the foregoing that it will be necessary for the employer to point to some cost over and above what may be regarded as inevitable small adverse impacts.

[46] In applying these principles, it is appropriate to first consider the evidence now available about Victoria Police's five grounds as summarised above.

[47] Two of the matters, that the regular performance of overtime and recall to duties is an inherent requirement of DSC Emery's position and the cost burden to Victoria Police were advanced to DSC Emery in June 2017. The remainder were not identified by Victoria Police until Inspector Cornford's witness statement from May 2018, nearly a year later.

Inherent requirements for overtime and recall to duty

[48] The extent of Victoria Police's argument about inherency was set out in its correspondence to DSC Emery in June 2017 as follows:

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[41] *Fair Work Amendment Bill 2013, Explanatory Memorandum.*

> "As a Detective, the regular performance of overtime and recall to duty is an inherent requirement of your position. In the event a 4 x 10 roster was granted, Victoria Police may require that you be recalled to duty on the fifth day. It is my view that granting you a compressed roster of longer days where this is not strictly required, in addition to the possibility of recall on the fifth day, raises occupational health and safety risks associated with fatigue."[42]

[49] It is a matter of record that Inspector Cornford wanted to add further material on the subject to this paragraph, but failed to persuade the Human Resources Department of the need to do so. The material that he sought to include with the refusal letter on the subject of inherency is this paragraph:

> "• A review of your Timesheets from the period 14 May 2017 to 10 June 2017 show that you consistently work well in excess of an 8 hour shift which, as a detective, is an inherent requirement of your position. Only on three out of seventeen shifts completed during this period did you work less than 9 1/2 hours. In my view, granting you a compressed roster would likely result in significant loss of productivity from giving you an extra day off for performing similar duties to that you are performing now. A summary of your hours works based on the Time Attribution System is as follows:

Date	Start Time	Finish Time	Total Hrs / Mins worked
14/05/2017	Rest Day		
15/05/2017	1250	2230	9.40
16/05/2017	0700	1930	10.30
17/05/2017	1200	2200	10
18/05/2017	0600	1600	10

[42] Exhibit A5, Attachment C.

19/05/2017	Rest Day		
20/05/2017	Rest Day		
21/05/2017	Rest Day		
22/05/2017	0740	1600	8.20
23/05/2017	0745	1715	9.30
24/05/2017	1230	2205	9.35
25/05/2017	0655	1630	9.35
26/05/2017	0800	1600	8.00 (Attend OSTT)
27/05/2017	Rest Day		
28/05/2017	0800	1615	8.15
29/05/2017	0740	1940	12.00
30/05/2017	0555	1630	10.35
31/05/2017	0750	1720	9.30
01/06/2017	Rest Day		
02/06/2017	Rest Day		
03/06/2017	Rest Day		
04/06/2017	Rest Day		
05/06/2017	0730	1740	10.10
06/06/2017	0700	1800	11.00
07/06/2017	1310	2300	9.50
08/06/2017	0700	1650	9.50
09/06/2017	PL W/O Cert		
10/06/2017	Rest Day		

,,[43]

[50] Inspector Cornford's analysis of this data is that it "showed Emery to have worked an average of 9.8 hours each shift, and up to 12 hours in a shift. This was consistent with my understanding of work hours in the unit".[44]

[51] To the extent that Inspector Cornford's previously undisclosed reasoning is part of Victoria Police's reasonable business grounds, the argument he puts forward asserts that working above 8 hours on each shift is an inherent requirement of a detective's role. Such a case is affirmed by the inclusion in the 2015 Agreement of a Commuted Overtime Allowance as follows:

> "46. Commuted Overtime Allowance
>
> 46.1 An employee not above the rank of Senior Sergeant employed as a Detective or performing similar duties or determined by the employer as having a similar pattern of work as Detectives, must be paid a commuted overtime allowance in lieu of any payment for overtime worked, or any recall to work in accordance with Schedule B.
>
> 46.2 An employee not above the rank of Senior Sergeant employed as a Detective will receive COT 2 in accordance with Schedule B.
>
> 46.3 An employee will be determined as performing similar duties as a Detective where the employee is temporarily assigned to a Detective's position and shall be paid COT 2 in accordance with Schedule B.

[43] R1, Attachment JC-3.

[44] Ibid, [27].

46.4 An employee will be determined as having a similar pattern of work as a Detective where the employee is attached or assigned to a covert unit undertaking surveillance or intelligence gathering and shall be paid COT 2 in accordance with Schedule B.

46.5 An employee, other than those described in sub-clauses 46.3 and 46.4, temporarily assigned duties at an investigative unit for a period of 6 months or less, shall be paid COT 1 in accordance with Schedule B.

46.6 Where the temporary duties referred to in sub-clause 46.5 extend beyond 6 months an employee shall be paid COT 2 in accordance with Schedule B from the date of commencement of the temporary duties.

46.7 An employee who at the commencement date of this Agreement, holds a position performing duty as a Tactical Intelligence Officer or is temporarily assigned duties to an investigative unit shall retain their existing entitlement to the commuted overtime allowance until they vacate their position.

46.8 An employee appointed or assigned to perform duty as a Tactical Intelligence Officer after the commencement of this Agreement shall be paid COT 1 in accordance with Schedule B.

46.9 Any direction or requirement for an employee in receipt of COT 1 or COT 2, as prescribed in this clause, to work overtime should have regard to the provisions of clause 41.

46.10 Commuted overtime is intended to cover instances of overtime worked in the normal flow of work for Detectives or employees with similar patterns of work.

46.11 Commuted overtime is not intended to cover overtime for planned organisational exercises such as counter terrorism planning or emergency management exercises. Where the employer requires planned work of this nature, this should be rostered as ordinary hours; otherwise, payment for any additional hours must be made in accordance with clause 42.

46.12 The employer and employees will, wherever possible, ensure that appropriate work practices are in place to reduce the possibility of employees working ‘excessive’ hours. Where ‘excessive’ hours are worked the employer will ensure that employees are provided with appropriate rest breaks without detriment. For the purpose of this clause ‘excessive’ means more than 12-hours.

46.13 Where an employee, in receipt of COT 2 and not in receipt of a disturbance allowance paid in accordance with clause 169, is approved by an Officer to work in excess of 12 hours they will be paid an excessive hours penalty for all hours worked in excess of 12 hours until they have received an 8 hour break. This may include court and crime scenes.

46.14 Where an employee, in receipt of COT 1 and not in receipt of a disturbance allowance paid in accordance with clause 169, is approved by an Officer to work in

excess of 11 hours they will be paid an excessive hours penalty for all hours worked in excess of 11 hours until they have received an 8 hour break. This may include court and crime scenes.

46.15 For employees in receipt of a disturbance allowance paid in accordance with clause 169, excess hours should only be worked on occasions where an operational imperative exists and no alternative arrangements can reasonably be put in place. Entitlement to payment of the excessive hours penalty will not exist until 16 continuous hours have been worked provided that when payable the allowance shall be paid from the end of the 12th continuous hour.

46.16 The excessive hours penalty will be equivalent to the ordinary hourly rate of pay for each excessive hour worked."

[52] The clause makes reference to a payment to be made in accordance with the 2015 Agreement's Schedule B, which provides as follows:

"Schedule B. Salary Related Allowances
Commuted Overtime
Allowance

COT 1	1-Dec-15	1-Jul-16	1-Jul-17	1-Jul-18	1-Jul-19
Sergeant & Senior Sergeant	$6,465	$6,545	$6,725	$6,910	$7,169
Constable & Senior Constable	$5,151	$5,215	$5,358	$5,506	$5,712

COT 2	1-Dec-15	1-Jul-16	1-Jul-17	1-Jul-18	1-Jul-19
Sergeant & Senior Sergeant	$12,929	$13,091	$13,451	$13,821	$14,339
Constable & Senior Constable	$10,301	$10,430	$10,717	$11,012	$11,425

"

[53] Neither the commuted overtime clause nor any other part of the 2015 Agreement indicates the basis of calculation of the Allowance. However, for the purposes of this decision in which Victoria Police complains that it will not be getting its money's worth from continued payment of the Commuted Overtime Allowance in the event that DSC Emery's request for flexible working arrangement is approved, it becomes relevant to consider what it is that the Allowance may be paying for. After consideration not only of the clause itself, but of the 2015 Agreement as a whole, it is evident that the Allowance is intended to be a "swings and roundabouts" allowance in the form a prepayment which pays officers for regular incidences of overtime. It saves everybody the bother of having to complete overtime forms, calculate overtime and pay precise payments, presumably varying week by week. It follows that the allowance will over compensate some people, and potentially under-compensate others.

[54] Clause 46.3 provides that DSC Emery is entitled to payment of the Commuted Overtime 2 Allowance (COT 2), which presently equates to $11,012 per year. Schedule A of the 2015 Agreement provides the ordinary rates of pay for classifications within the Agreement. The current rates for Senior Constables range between $82,196 per year and $95,247 per year, from which may be derived the range of ordinary hourly rates; namely $41.60 per hour to $48.20 per hour. Once loaded to time and half payments, being the lowest

payment which overtime might be paid, those rates become $62.40 per hour and $72.30 per hour.

[55] These calculations are performed in order to infer how much overtime might be expected from payment of the Commuted Overtime Allowance. With time and half payments ranging between $62.40 per hour and $72.30 per hour it may be seen that the Commuted Overtime Allowance nominally pays in advance for between 152 and 176 hours each year for a Detective Senior Constable. For it to be the case that no one is either overcompensated or under-compensated from the allowance, it can be expected that in any given fortnight the allowance would be anticipated to cover between 6.7 and 5.8 hours of overtime – that is, somewhere between 30 and 40 minutes of overtime on each shift if it were to be presumed there were 10 shifts in fortnight.

[56] The reasoning in Inspector Cornford's omitted paragraph also contains an expectation that the flexible working arrangements sought by DSC Emery would make him available for less time than at present. Additionally, when looked at in combination with the paragraph that was included in the June 2017 letter it appears to be put forward that the concern on the part of Victoria Police that DSC Emery's work in excess of 8 hours on each shift, was that the number of consecutive hours per shift that could be worked by DSC Emery may amount to an occupational health and safety hazard.

[57] It would appear from the materials and the context of the statements in the correspondence that the "inherent" aspect of the detective duties being referred to is the need to work longer than originally scheduled because of the circumstances of the shift. This appears to be coupled with the apprehension by Inspector Cornford that a person working a standard 8 hours shift could easily work additional hours without a risk to their health and safety, or without refusing or otherwise make it clear they were not about to work the greater hours, whereas this was going to be more difficult for the management of an employee working a standard 10 hour shift.

[58] As is evident from Clauses 46.12 and 46.13 of the 2015 Agreement, an employee in receipt of the Commuted Overtime Payment will be entitled to an "excessive hours" payment when they work in excess of 12 hours. The evidence is that excessive hours are tightly controlled by Victoria Police with formal approval being required to be given before a person can be called upon to work excessive hours.

[59] Drawing these matters together, the apprehensions of Victoria Police on the subject of the inherent requirements of the role and the impact that may be had from a flexible working arrangement of the type proposed by DSC Emery, stem from its perception about what are the inherent requirements of the role and the effects which the arrangement would have upon those requirements.

[60] The inherent requirements referred to by Inspector Cornford flow from the routine need of a detective to work additional hours. Those additional hours will be in excess of 8 hours per shift for most, if not all of the rostered 10 shifts in a fortnight.

[61] The Victoria Police's argument is that DSC Emery may be prevented from performing inherent requirements of the position because of the following:

- he will only be working 8 shifts in a fortnight, instead of 10;

- he will potentially not be able to work as many hours during Commuted Overtime (COT) as he once was given that he would be routinely working 10 hours shifts. This is a because instead of having a maximum of 32 hours per fortnight to be worked during the COT time before excessive hours payments would be incurred, he would only be able to work a maximum of 16 hours per fortnight during COT; and

- he may be prevented from working as many hours as he once may have for reasons of fatigue or health and safety.

[62] Is it objectively correct that DSC Emery's proposed working arrangement will mean that he is unable to perform the inherent requirements of his job? Such question is unlikely to be answered in the affirmative without meeting one or both of two conditions:

- that DSC Emery's actual capacity to work on Commuted Overtime is curtailed through the arrangement; and

- that claims of fatigue are more likely than not to eventuate into restrictions about his working hours, days or patterns that previously did not exist.

[63] Victoria Police's claims that a changed shift arrangement would impede DSC Emery's ability to perform the inherent requirements of the job given there will be fewer days in a fortnight able to be worked, which then in turn reduces the capacity to recall DSC Emery for overtime to undertake such tasks is ultimately not an argument about whether the inherent requirements of the job can be performed. Instead, it is an argument about something else entirely – namely whether the reduction in overall fortnightly shifts means there is inconvenience to Victoria Police or disruption of its work.

[64] Two forms of evidence are available about the total hours DSC Emery presently works:

- the anecdotal opinion of a number of people about those hours, including DSC Emery and Inspector Cornford; and

- the snapshot of hours set out in the extract above from the letter Inspector Cornford wanted to send in refusing DSC Emery's request, together with his analysis of that material.

[65] Only the latter passes scrutiny as objective evidence in these proceedings, albeit it has to be noted that the time period involved is very narrow, meaning that the extrapolations from that period may well be somewhat fraught.

[66] Such evidence as is before me does not lead to a proposition that DSC Emery will be unable to perform work during the Commuted Overtime because more hours will be required to be worked than may be available. The evidence before the Commission, in the form of the extract from Inspector Cornford's drafted but not sent letter, is that the following shift lengths were worked over the 17 day period between 14 May 2017 on 10 June 2017:

Hours worked per shift	Number of shifts in the

	period
8 ≤ 9 hours	3
9 ≤ 10 hours	7
10 ≤ 11 hours	5
11 ≤ 12 hours	2

[67] There were 10 shifts in the period in which DSC Emery worked less than a total of 10 hours and there were 7 in which he worked for longer than 10 hours, but less than 12 hours in total. It is doubtful on the basis of this evidence that it could be said that a changed shift arrangement flowing from a flexible work arrangement would lead to Victoria Police being short-changed on its Commuted Overtime allowance in the case of DSC Emery.

[68] If DSC Emery had been given the working arrangements he wanted, he would have worked less than 17 shifts in the period. While it is not absolutely clear what the number would have been, it may be assumed that since he would work 2 less shifts in a 14 day period, he may have worked 14 shifts in the 17 day period, instead of 17. If that were the case, then some work between the 8th and 10th hour of the shift could be done by him simply because he was rostered at work. The proportion of that time is not identifiable on the evidence. However, it may be assumed that it is something more than 0% and less than 100%. That is, not all of the hours worked between the 8th and 10th hour of the shifts actually worked would be pushed beyond the 10th hour of the restructured shift arrangements – but some potentially may.

[69] In a restructured flexible work arrangement shift pattern in the 17 day period of 14 shifts of 10 hours duration, a maximum of 28 hours would have been available by DSC Emery to work in Commuted Overtime, compared with the maximum 68 hours under the arrangement actually worked. While the restructured maximum is demonstrably lower than the actual maximum, and significantly so, the hours DSC Emery actually worked in Commuted Overtime was 8 hours 20 minutes. By no stretch does this lead to the finding that DSC Emery is working a large amount of Commuted Overtime, or that Victoria Police will be short-changed with the arrangement he proposes.

[70] Even so, it is the case that on the basis of Inspector Cornford's analysis DSC Emery will likely have less capacity to work during Commuted Overtime than might be demanded. It would seem from Inspector Cornford's analysis, in which he imputed an average shift length of 9.8 hours, that in the actual 17 day period referred to above DSC Emery would have worked just over 30 hours during the COT, whereas in the hypothetical 14 day period working a 10 hour shift roster pattern DSC Emery would only be able to work a total of 28 hours during COT. While plainly the latter is less than the former, illustrating the concern which Inspector Cornford holds, it may also be the case that for reason of physical endurance that DSC Emery may have some difficulty in achieving the 28 hours COT over the 14 shifts, since it would come at the price of having to work 12 hours on every one of those shifts, which crystallises the dilemma inherent in the questions posed above.

[71] Matters of fatigue were not especially well dealt with in the evidence before me. On the one hand the Respondent witnesses contend that DSC Emery, in working a minimum of 10 and possibly 12 hour shifts would inexorably become fatigued, whereas DSC Emery merely batted away the proposition or did not address the matter in his evidence. In either case, the evidence overlooks the fact that matters of fatigue are both well-known in the Occupational Health & Safety literature as being significant drivers of incidents and injury,

while on the other hand matters of a person's own physiology may either contribute to or delay the onset of fatigue. There is simply insufficient evidence before the Commission to make any qualitative findings on the subject of the likelihood of fatigue stemming, in DSC Emery's case, from a changed shift arrangements, and in one which he may, already being at the age of 58, be called upon to frequently or always work up to 12 hour shifts.

[72] After consideration of these matters, the findings that are appropriately made upon the questions posed above about DSC Emery's proposed flexible working arrangements limiting his ability to meet such needs as there are about overtime or recall to duty, as well as whether that need amounts to an inherent requirement of his job, are:

- With regard to the Commuted Overtime Allowance drafted as a mandatory payment to an eligible detective, the obligation is that the detective be available to work overtime as and when required. While it is likely a misdescription to refer to that obligation as being as an inherent requirement of the job, there is nonetheless, at the very least, the obligation that the detective be available to work overtime.

- DSC Emery's proposed flexible working arrangement will curtail to some degree his ability to be available to work overtime, with it likely to be the case that if he is able to establish and maintain a 12 hour shift working pattern that such curtailment is either low or not significant;

- Because of the lack of appropriate evidence on the subject of the potential for occupational health and safety risks stemming from the potential fatigue, I consider that matter to be a neutral factor in my consideration.

[73] With there being some, but likely not great, restriction in hours worked stemming from granting the flexible work request, I find that the matter is to be properly considered as a contributor, perhaps in tandem with other matters to reasonable business grounds for the request to be refused, but not a strong enough ground on its own.

Costs for Victoria Police

[74] Commander Hollowood gave evidence about the costs which may flow from granting the flexible work arrangement sought by DSC Emery, extrapolating those costs across the organisation:

> "63 I have been provided with information by HRD that, as of October 2017, 2,524 members were in receipt of COT 2, which is the type of COT payable to Emery.
>
> 64 Of these members, I am informed that 285 are aged over 55.
>
> 65 For any one of these members on a 4 x 10 roster, there would be a loss of 43 shifts per year (being one shift per week, bearing in mind 9 weeks per year is the recreation leave entitlement).
>
> 66 I am informed that Emery's salary is that of a Leading Senior Constable at increment 16. Including COT, this amounts to $108,918 each year ($98,201 base salary plus $10,717 COT 2). The cost of each lost shift is therefore approximately

> $418 ($108,918 I (5 shifts x 52 weeks)). Based on his present salary, the total cost of lost shifts associated with the 4 x 10 arrangement sought by Emery would be $17,974 ($418 x 43). With annual increases under the enterprise agreement (and assuming that annual pay increases continue after 2019), this cost will increase each year.
>
> 67 This is an issue for the organisation, particularly given the increasing numbers of requests for 4 x 10 arrangements by detectives, among others.
>
> 68 Having said that, to be clear, the resourcing implications of 4 x 10 arrangements in investigative units are of much greater concern to me, along with parity issues and further fracturing of the team environment if only some detectives are working 4 x 10."[45]

[75] Commander Hollowood agreed in giving evidence that the basis of the costings was notional and that no additional labour would be employed to cover DSC Emery on the fifth day and therefore Victoria Police would not actually be liable to incur the financial costs he imputes.[46]

[76] Commander Hollowood's evidence about costs connects with the fact that in certain circumstances Victoria Police will not "replace" an unavailable employee, which I understand to mean that, having funded the employment of the person, no additional funding is given when the person is unavailable for some reason, such as for leave, or flexible work arrangements. Inspector Cecchin best articulated the apprehended problem in his oral evidence this way in relation to a question about problems which would be experienced with 8 shifts per fortnight:

> "What concern do you have with that?---I have a number of concerns. As I'll just reiterate what I've actually articulated in my statement. I don't see anything particularly wrong or erroneous with a case by case assessment of applications to work compressed rosters or flexible work arrangements. I think in some cases those shifts can be beneficial - certainly workable, depending on the dynamics of a particular office. In addition, it can in fact, be beneficial, but it needs to be assessed on a case by case basis. I have serious concerns about a blanket authority across the organisation to allow people to work compressed rosters. Because in my view, it will quickly become unsustainable, depending on the particular workplace, the dynamics of that workplace, the numbers of people working there, their additional requirements and responsibilities of that workplace. For instance, in a number of workplaces not only do the detectives have their calling - their responsibilities or duties, but I've got to provide detectives for morning crime shifts, afternoon response crime shifts, not only in their particular police service area, but also the division, in some cases, part of a region, and also night shifts. Also, there's a number of - whole range of additional responsibilities and tasks I need to provide detectives for. So, very quickly if I had an office where the majority of some of the people, detectives applied for flexible work arrangements and those applications weren't carefully assessed, I'd simply run out of detectives. Really, in my view, you really need to be careful, or give careful consideration as to what the dynamics of the office is, the responsibilities of that office, for what tasks detectives

[45] Exhibit R3, *Witness Statement of Paul Hollowood*.

[46] Transcript, PN 773 – 786.

> need to be assigned to or required for because I don't get replacements. Once I lose a detective, I lose shifts, that detective or shift is not replaced. …"[47]

[77] What may be seen from these exchanges is that the claimed costs to Victoria Police are, at the very best, notional and not actual. The costs will not crystallise unless and until someone decides to employ – and therefore pay – an additional staff member. A shop that works Monday to Friday and needs to employ some entirely fresh and supernumerary employee for Friday because its one and only full-time employee is approved to work a 4 day per week pattern will incur additional costs. A police force that does not engage an additional Detective Senior Constable because DSC Emery works an 8 shift per fortnight arrangement instead of a 10 shift per fortnight arrangement is not incurring any additional cost.

[78] While the same police force may experience a reduction in flexibility or responsiveness because it accedes to the request for a changed rostering arrangement, and that such is not in the community interest, those matters are a world away from the claim that approval of the arrangement will incur additional costs. To be clear, an objective reduction in flexibility or responsiveness may be reasonable business grounds to refuse a request for flexible work arrangements, as objectively costs may likely be incurred; however, costs which are notional and unlikely ever to be crystallised are not.

[79] For these reasons I am unable to find that the matter of expected costs is a reasonable business ground upon which to refuse the request.

Damage to morale and effectiveness of unit

[80] DSC Emery first submitted his flexible working arrangements request on 2 May 2017 with it being considered for the first time shortly after his then Acting Inspector, Miro Majstorovic, after seeking advice from the Human Resources Department about the matter, who made the observation that approval of the request could cause some discontent:

> "As the normal OIC of that unit, I can confirm that although the request could technically be accommodated, this would cause discontent from other members for obvious reasons (not earning the COT, which is essentially based and accounted for around 8 hours shifts)."[48]

[81] The matter of the impact on morale of an approval of DSC Emery's flexible work arrangement was addressed to a limited degree within Inspector Cornford's written witness statement in which he made the following observations:

> "28 Consistent with my proposed revisions to the decision letter, I was concerned that it would be damaging to morale and the effectiveness of the unit, if a member (who was paid as a full time crew member, and remunerated with COT) was effectively "entitled" to stop work after the end of the fourth day, while those working side-by-side with the member, and also putting in the overtime where required , were then required to attend on the fifth day with no additional compensation. I know how I would feel in that situation, and it is not something I wanted to promote.

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[47] Transcript, PN 573.

[48] Originating Application Form F10, 13 July 2017, Attachment C.

> 29 From a practical perspective, losing this resource on the fifth day of an investigation would also have a negative impact on the effectiveness of any investigation that was on-foot."[49]

[82] In his oral evidence Inspector Cornford conceded that his observation about morale was his personal view with him not having taken any steps to ascertain the actual views of the detectives who would be reporting to him or working alongside DSC Emery.[50] The evidence he gave about the effect of this proposition was essentially an extension of the matters referred to above as well as the proposition that DSC Emery would become less effective for reason of working fewer days.[51] On the other hand, DSC Brock[52] and DSC Simpson who also work out of the Mornington Peninsula CIU both provided witness statements to the effect that discontent from granting the proposal would be unlikely, with these views being expressed by DSC Simpson in his statement (noting that neither of these co-worker statements were the subject of cross examination).

> "27. To my knowledge, Gary's request has not caused any resentment, discontent or disharmony in the unit. In fact I would say the Unit's response is the opposite. Over the past few months whilst this matter has been ongoing I have spoken to everyone in the Unit about the request, either directly or within a group conversation. Not one person has raised any concern with the request and instead the vast majority have been vocally supportive of it for all of the reasons I have set out above.
>
> 28. If anything has caused discontent it has been the Victoria Police refusing this request. The Agreement gives officers the right to request a flexible arrangement in the exact circumstances Gary has and for no good reason that request is being refused and the right under the Agreement is being denied.
>
> 29. I do not think that Gary working the roster proposed will impact on the way work is arranged in our crew or the broader unit. The rostering sergeant will be notified of the arrangement in advance and work it into the roster as required and as he does in relation to all work related requests from all Detectives. For example, we are all able to put in preferences for certain shifts and/or rest days that are considered by the rostering sergeant and worked into the roster."[53]

[83] In all, the evidence on the matter of the impact of granting DSC Emery's flexible working arrangement on the morale and effectiveness of the unit in which he works is no better than thin and it would be dangerous to rely upon that which is before the Commission to make any findings of substance. There is insufficient material that would lead to formation of an objective view on the subject one way or another.

[84] For that reason I am unable to find that the matter of damage to unit morale and effectiveness is a reasonable business ground upon which to refuse the request.

Loss of resource

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[49] Exhibit R1.

[50] Transcript, PN 453 – 458.

[51] Transcript, PN 444.

[52] Exhibit A8, *Witness Statement of Rohan Brock.*

[53] Exhibit A10, *Witness Statement of William Simpson*.

[85] The potential for there to be a loss of resources because of the flexible work arrangement comes about because DSC Emery would not be available on the same number of days as in the past, irrespective of the number of hours he actually worked. With reference to the fortnightly number of rest days which is dealt with in Commander Hollowood's witness statement as follows:

> "37 For the reasons I set out above, an extra day off per week means that the team is down a resource, which has a negative impact on sending members out to actually do their job.
>
> 38 The other issue that complicates our overall head count is the members who may be part of the unit on paper, but for a whole variety of reasons (such as WorkCover leave, long service leave, annual leave, parental leave) may not actually be in position.
>
> 39 The organisation already has difficulty managing the number of rest days carried by Detectives. Generally, Detectives carry rest days owed into the next fortnight. The granting of a compressed roster creates two additional rest days each fortnight, which further depletes resources and would increase the surplus number of days carried. Ultimately, given the escalation in requests for 4 x 10 arrangements, adding a third rest day could create real difficulties in getting adequate coverage across the entire roster."

[86] Inspector Cornford's witness statement includes that "in effect, by granting Emery's request, Victoria Police would bear the same cost, but lose a resource one day each week".[54]

[87] It may be accepted that working fewer days a week, or in DSC Emery's case, fewer days of the fortnight, will mean that there is some potential for a lower physical presence of the employee than would otherwise be the case. The argument though, at least in the frame of the evidence presented to the Commission, is overstated.

[88] DSC's Emery's evidence was that the work is frequently self-directed. There is no direct evidence before the Commission that this is a circumstance in which a detective is required on the ground 365 days a year. Likewise there is no evidence before the Commission that by not being in place for an additional two days per fortnight there would be an unduly difficult operational effect in which policing otherwise required to be done would not be done.

[89] With the correct evidence, the argument that approval of the arrangement will lead to a loss of resource could well be established. However, the difficulty for Victoria Police is that it is not established in this case.

[90] I am consequently unable to find that the argument that the arrangement would lead to a loss of resources for Victoria Police amounts to a reasonable business ground for the refusal of DSC Emery's flexible work arrangement request.

Elements of detective role would not be suited to the arrangement

[91] Victoria Police argue that there are elements of DSC's Emery's role which would not be suited to a compressed roster.[55]

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[54] Exhibit R3, [34].

[92] In considering this proposition, it is noted that DSC Emery sets out his role and duties as follows:

> "- Investigate major crime and suspected criminal activity
> - Compile and execute search warrants
> -Arrest and interview suspects
> - Prepare briefs of evidence and give evidence at court
> - Gather and process intelligence
> - Assist other members and provide advice"[56]

[93] He says about those duties that:

> "Crime investigation on a typical day is dominated with administrative duties in the office as listed above. A break down of work percentage would be difficult to quantify but probably 10% or less of any shift would involve processing suspects or other duties away from the office. The vast majority of work performed at any DRU or CIU is performed at your desk. This remaining 90% of work can be done at any time and practically, undertaking these administrative tasks uninterrupted over a 10 hour period is more productive than the present 8 hour shifts."[57]

[94] Inspector Cornford argued through his evidence that it would not be correct to characterise DSC's Emery's duties as being mostly administrative in nature:

> "37 The role of a Detective Leading Senior Constable in a DRU requires considerable surveillance activities and time spent executing search warrants (at the very least one per week, and sometimes on multiple days, which takes four hours on average-sometimes less, sometimes more). There is also an expectation that detectives rostered on night shift will perform 5 to 6 hours of patrol time unless engaged in incident investigation. This is outlined in the Regional nightshift supervisor's checklist.
>
> 38 I accept that certain investigations, such as fraud, can be performed predominantly from a desk. However, I disagree that "undertaking these administrative tasks uninterrupted over a 10 hour period is more productive than the present eight hours" (paragraph 11).
>
> 39 Even in desktop investigations, investigation work requires (for example) contacting businesses and banks, which is limited to business hours. It is my opinion that expanding the hours worked four days a week would not improve productivity."

[95] While Victoria Police endeavoured through cross examination to demonstrate that DSC Emery's characterisation of his role being dominated with administrative duties was incorrect, such picture did not meaningfully emerge from the oral evidence in these proceedings. While it could be argued that DSC Emery's estimation of there only being 10% or less of a shift in which work would be spent away from the desk is somewhat optimistic

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[55] Ibid, [35].

[56] Exhibit A3, [10].

[57] Ibid, [11].

from his perspective, equally it is not the case that an overwhelmingly different position emerges from the oral evidence.

[96] What did emerge from the evidence is that DSC Emery had significant opportunity to choose what work should be performed and when, as well as the manner in which it should be undertaken. It would be an unreasonable characterisation of the overall evidence to form the view that DSC Emery would be impeded in the undertaking of his role as a detective or that in turn he would impede others in the performance of their detective duties.

[97] Consideration of the argument that elements of detective roles generally or DSC Emery's role specifically would not be suited to the flexible work arrangement he proposes does not lead to a finding that such matter amounts to a reasonable business ground for the refusal of DSC Emery's flexible work arrangement request.

Conclusion on the bases of Victoria Police refusal of the request

[98] After considering the five bases advanced by Victoria Police as its reasonable business grounds for the refusal of DSC Emery's flexible work arrangement request, only one of them, the need for him to be able to return to undertake overtime or to undertake a recall to duty has any grounding in objective fact. The other four matters, imposition of an unreasonable financial burden on Victoria Police; damage to morale and effectiveness, loss of resources, and that elements of detective work would not be suited to the arrangement, are featured by unresearched opinion and supposition and have little, if any objective grounding.

[99] While the evidence does lead to the proposition that there may be some restriction in DSC Emery's availability to undertake overtime and to be available for recall to work that restriction is not great and certainly is not great enough to be seen as a reasonable business ground to refuse the request. As was noted in *Brimbank*, it is necessary for a decision maker "to point to some cost or adverse impact over and above the inevitable small adverse impacts associated with any material request that is sufficient to outweigh the employee's personal considerations in the legitimate pursuit of a better work life balance"[58] The evidence on the restrictions that may flow from granting DSC Emery's request shows that those restrictions are minor.

[100] Two further matters require consideration.

[101] When it refused DSC Emery's flexible work arrangement request Victoria Police put forward two reasons to him as to why the request could not be proved. The first was that the regular performance of overtime and possible recall to duty were inherent requirements of his position. The second of the reasons put forward to him in June 2017 was that approval of the request would impose an unreasonable financial burden on Victoria Police.

[102] Later, and only after the matter had progressed to the Fair Work Commission, did Victoria Police put three further potential reasons as to why the request should not be approved; the potential for damage to morale and effectiveness, the potential loss of resources, or that elements of detective work would not be suited to the arrangement.

[58] [2013] FWC 5, [16].

[103] The proper construction of Clause 14 of the 2015 Agreement, relying as it does upon s.65 of the Act is that there is an obligation on Victoria Police to provide a written response to the request within 21 days, stating whether it grants or refuses the request and when doing so may only refuse the request on reasonable business grounds. It is not especially relevant to the Commission who drafted the letter that was sent to DSC Emery, or what internal differences of opinion there may have been about what should be included in the letter.

[104] Ultimately the letter was from Victoria Police and not its Human Resource Department or even Inspector Cornford, who was merely the delegated signatory of the correspondence. The letter was a corporate determination by Victoria Police disclosing its decision about the request and DSC Emery is entitled to accept it at face value as the organisation's corporate determination. That Inspector Cornford personally had a different set of opinions to the organisation is not relevant. No part of the legislation underpinning Clause 14 gives a warrant to Victoria Police to make up its reasons many months after the refusal has been given. The obligation Victoria Police holds and should honour is to make its decision within 21 days and if that decision is to refuse the request to say why it has been refused at that time. Having chosen its colours it must then reasonably be expected to be constrained to them.

[105] As a result the third, fourth and fifth reasons advanced by Victoria Police must be viewed as no more than purported reasons for decision on its part and not its actual reasons. While that is the case, each of those purported further reasons fail on their own merits; as it turns out, Victoria Police's best argument was within the originally stated reasons for refusals.

[106] The other matter that requires discussion is that it was very clear in the course of conducting the case that one of the apprehensions of Victoria Police about DSC Emery's request and no doubt one of the reasons it refused the request was that it had the perception that these requests were getting out of hand. In Commander Hollowood's witness statement he submits that "since Emery's request, in the last six months or so, Victoria Police has received an influx of such applications. I would say at least a dozen or so across the region, of which I am aware"[59] referring to requests to move from 5 x 8 hour shifts to 4 x 10 hours shifts. In cross examination however, Commander Hollowood conceded that he was only aware of one other request in DSC Emery's region seeking such flexibility"[60] with Counsel for the Applicant submitting in closing that such a low number of requests could hardly be seen as opening the flood gates.[61] Additionally, Detective Inspector Cecchin submitted that there were 41 approved flexible working arrangements such as DSC Emery's, however, again in cross-examination it was confirmed that only two of those approvals were for Detectives in DSC Emery's division.[62]

[107] *Brimbank* recognised this dilemma, as do I, when it set forward, albeit on the basis of the relevant term under consideration, that the obligation of an employer is to determine each request on its own particular merits and not otherwise, with it being the case that "the fact a request has been granted to a particular employee does not provide a ground for another employee having a similar request granted."[63]

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[59] Exhibit R3, [17].

[60] Transcript, PN666 - PN672.

[61] Transcript, PN830

[62] Transcript, PN581-PN590.

[63] [2013] FWC 5.

[108] While Clause 14 of the 2015 Agreement does not employ the same language as clause 20 in the Brimbank enterprise agreement, the 2015 Agreement provisions are of course subject to the provisions of s.65 of the Act which specifically enables an employer to take into consideration factors associated with the working arrangements of other employees in forming its reasonable business grounds for refusal of a request. Section 65(5A) includes the following matters within consideration of "reasonable business grounds", unquestionably allowing consideration of other people's working arrangements in determination of the request at hand:

> "(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
>
> (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;"

[109] Crudely put, it may well be that an employer has no reasonable business grounds to refuse the first flexible work arrangement request which might be made. It may not even have reasonable business grounds to refuse the 30th, even on the basis of what may be worked by other employees. However what of the 200th request? Very plainly at some point the preponderance of approvals going before the one presently before an employer may well lead to the conclusion that there is a reasonable business ground available for the refusal of the request simply because too many other staff have arrangements in place with varying degrees of flexibility which means that the full span of unit work demands are not able to be filled by the available working hours of the available staff. Notwithstanding that observation, I do not find that either Victoria Police or DSC Emery were in such place.

[110] As a consequence of the foregoing analysis, my findings are:

- that at the time it refused DSC Emery's flexible work arrangement request it did so on two and only two bases; that the regular performance of overtime and recall duty is an inherent requirement of his position; and that granting the request imposes an unreasonable financial burden on Victoria Police;

- neither of those bases for refusal of the request is a reasonable business ground for the refusal of a flexible work arrangement within the meaning of Clause 14 of the 2015 Agreement; and

- none of the purported further bases for refusal of the request, damage to morale and effectiveness, loss of resources, or that elements of detective work would not be suited to the arrangement are reasonable business grounds for the refusal of a flexible work arrangement within the meaning of Clause 14 of the 2015 Agreement.

[111] These findings lead inexorably to the conclusion that at the time it refused DSC Emery's request for a flexible work arrangement Victoria Police did not have reasonable business grounds for its refusal and I determine the dispute on that basis.

COMMISSIONER

Appearances:

Mr Malcolm Murphy of Counsel, instructed by Maurice Blackburn for the Applicant.
Ms Rebecca Preston of Counsel, instructed by Corrs Chambers Westgarth for the Respondent.

Hearing details:

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