



DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Paper Australia Pty Ltd trading as Opal Australian Paper

v

Anthony May
(C2025/2638)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT MASSON
DEPUTY PRESIDENT FAROUQUE

SYDNEY, 1 OCTOBER 2025

Appeal against decision [\[2025\] FWC 799](#) of Commissioner Yilmaz on 20 March 2025 – Dispute in Commission under s 65B regarding request for flexible working arrangement – Arbitration by Commission under s 65C - Nature of rights under Division 4 (Requests for Flexible Working Arrangements) of National Employment Standards – Interaction between enterprise agreement and National Employment Standards – Whether reasonable business grounds to refuse request – Whether compliance with an enterprise agreement constitutes reasonable business grounds to refuse request – Whether order of Commission granting request for flexible work inconsistent with enterprise agreement and prohibited by s 65C(2A)(b) - Permission to appeal granted – Appeal dismissed.

Introduction

[1] Paper Australia Pty Ltd (**Paper Australia**) seeks permission to appeal under s 604 of the *Fair Work Act 2009* (Cth) (the **Act**), and if permission is granted, appeals a decision¹ and order² of Commissioner Yilmaz dated 20 March 2025. The decision and order were made following an arbitration of a dispute about Paper Australia’s refusal to grant a request for a flexible working arrangement by one of its employees, Anthony May.

[2] The request made by Mr May was that his start and finish times on Thursdays be flexible so as to allow him to meet his parental responsibilities around school pick up times and after school activities. Paper Australia refused the request citing reasonable business grounds being that the relevant enterprise agreement did not provide a mechanism for the type of individual change to the roster sought by Mr May. The order made by the Commissioner pursuant to s 65C specified that the grounds on which Paper Australia refused the request for a flexible working arrangement are taken not to be reasonable business grounds³ and required Paper Australia to grant the request.⁴

[3] The Australian Industry Group (the **Ai Group**) sought leave to be heard by the Full Bench and made submissions in support of Paper Australia’s contention of error by the Commissioner and in relation to the proper construction of the Act as it relates to enterprise

agreements and flexible working arrangements requested under Division 4 (Requests for Flexible Working Arrangements) of Part 2-2.

Background

[4] Mr May is a longstanding employee of Paper Australia having commenced employment in 1985 as an apprentice boilermaker. Mr May has been subsequently promoted to various trades maintenance roles and is currently employed in the position of Team Leader Planner Roll Workshop at the Maryvale Plant, Victoria.

[5] Mr May is a parent of school age children and has been a parent of children who are school age or younger since 2006. Mr May, together with his wife, provides care for his school age children. Mr May's wife is employed as the Stroke Co-ordinator at La Trobe Regional Hospital and co-ordinates the Transient Ischaemic Attack Clinic at La Trobe Regional Hospital. On a Thursday, Ms May concludes her work at the Clinic at 5:30pm. As Mr May is the only other carer for his children and in light of Ms May's work commitments, on a Thursday Mr May is responsible for picking up his three children from school and taking them to any extracurricular activities on that day.

[6] Commencing in 2011, Mr May reached an agreement with Paper Australia which permitted him to alter his start and finish times on a Thursday, such that he could conclude work at 3:30pm. In 2016, after the introduction of a four-day working week, Mr May was permitted to swap a 10 hour day on a Thursday with an 8 hour day (either Monday or Friday), which continued to permit him to conclude work at 3:30pm on a Thursday.⁵ These flexible work arrangements permitted Mr May to fulfil his Thursday after school care responsibilities for his children.

[7] On 25 July 2024, Paper Australia sent Mr May and other maintenance dayworkers an email the effect of which was to cease pre-existing individual variation to dayworker rostered start and finish times. The stated rationale for this change was that an audit by Paper Australia had identified potential non-compliance with "*requirements of the maintenance EBAs*" and that "*it is important that moving forward [Paper Australia] and our employees comply with the provisions of the EBAs in relation to start and finish times*".⁶

[8] On 9 August 2024, Mr May made a request by email to Paper Australia under s 65(1) of the Act for a flexible working arrangement. The request was to swap a 10 hour day on a Thursday with an 8 hour day (either Monday or Friday) and to start thirty minutes earlier on a Thursday.⁷ The request if granted, would permit Mr May to work between 6:30am – 3:00pm on a Thursday, as distinct from the standard rostered hours of 7:00am – 5:30pm.

[9] By letter dated 30 July 2024, Paper Australia refused Mr May's request for a flexible working arrangement. The stated rationale for the refusal was "*reasonable business grounds*" further elaborated as "*unfortunately the enterprise agreement does not provide a mechanism for the changing of rosters prescribed in clause 18.6 of the enterprise agreement by individual agreement between the employer and employee*". The letter further noted that Paper Australia had "*conferred with the union and they have indicated that they have no intention of seeking to negotiate a change to the rosters prescribed in clause 18.6*". The letter proposed an alternative arrangement being the use of make-up time under clause 22.7 of the *Pulp and Paper Industry*

(Maintenance and Services) Award 2003, which was incorporated into the relevant enterprise agreement. Mr May did not accept the alternative makeup pay arrangement proposed by Paper Australia.

[10] The relevant enterprise agreement is the *Opal Australian Paper Maryvale Mill Mechanical Maintenance & Engineering Store Enterprise Agreement 2024* (the **Maryvale Agreement**) which covered and applied to Paper Australia, employees in the classifications in the agreement, the Australian Manufacturing Workers' Union and the United Workers' Union. We note that clause 2.3 of the Maryvale Agreement provides that the National Employment Standards apply at all times and if there is inconsistency between the enterprise agreement and the National Employment Standards, the more beneficial term to the employee will apply to the extent of any inconsistency.

[11] Clause 18 of the Maryvale Agreement is entitled "Hours of work – Dayworkers" and provides for a four-day week roster in which employees work 38 hours but are paid 36 hours. It is convenient to set out clause 18.1 to 18.6 which provide as follows:

18. HOURS OF WORK – DAYWORKERS

18.1 Dayworkers work a four-day week roster, between 6 am and 6 pm Monday to Friday inclusive, provided that the spread of hours herein prescribed, and the meal breaks, may be altered by agreement between the parties covered by this Agreement.

18.2 Dayworkers agree to work 38 hours but be paid for 36 hours, on the basis that Dayworkers work a 4-day week. Accordingly, the parties have agreed that any change to this roster for Dayworkers will require the agreement of the parties or a new replacement Agreement.

18.3 The thirty-eight (38) ordinary hours (paid 36 hours) for Dayworkers shall be worked over a four day week in accordance with the roster profile set out below.

18.4 Start times for the commencement of Day Shift under the roster profile will be 7.00 a.m. or may be varied to between 6.00 a.m. and 7.30 a.m. as agreed by the majority of employees in the workplace or a section or sections of it.

18.5 Notwithstanding any other provision of this Agreement, a change to the 38 ordinary hours 4 day per week roster may only be made by agreement between the parties to this Agreement.

18.6 The Unions covered by this Agreement must be informed by the Company of the intention to change the roster and be given a reasonable opportunity to participate in the negotiations regarding the change.

[12] At the end of clause 18, a table sets out a four-day a week roster with 10 hours to be worked each Tuesday, Wednesday, Thursday and 8 hours to be worked on alternating Mondays and Fridays. We interpolate that the table appearing at the end of clause 18 sets out the "roster profile" referred to in clause 18.3 in accordance with which the ordinary hours of a day work "shall be worked".

[13] On 15 August 2024 and 20 September 2024, Mr May met with Paper Australia and unsuccessfully attempted to resolve a dispute about Paper Australia's refusal of the requested flexible working arrangement. On 7 October 2024, Mr May referred the dispute to the

Commission under s 65B(3). On 23 October 2024, Commissioner Yilmaz first dealt with the dispute by conference but there was no resolution of the dispute in the conference. The Commissioner subsequently conducted an arbitration hearing under s 65B and on 20 March 2025 issued her decision and consequential order under s 65C.

[14] The Commissioner's decision discloses her essential reasoning to be as follows. The provisions regarding flexible working arrangements, in particular ss 65 and 65B, are contained in Part 2-2 (the National Employment Standards) of the Act.⁸ Flexible working arrangements include changes to hours of work, start and finish times and patterns of work.⁹ Section 55(1) provides that an enterprise agreement must not exclude the National Employment Standards or any provisions of the standards.¹⁰ Section 56 provides that a term of an enterprise agreement has no effect to the extent that it contravenes s 55. Section 61 provides that Part 2-2 sets minimum standards that apply to the employment of employees which cannot be displaced.¹¹ Mr May's request was made under s 65 and was for a change to working hours.¹² The requested working hours were not consistent with clause 18 of Agreement. In these circumstances, and having regard to the rights conferred by the statutory provisions concerning flexible work, the fact that those provisions form part of the National Employment Standards and the primacy given by the Act to the National Employment Standards embodied in ss 55 and 61, the Commissioner considered that mere inconsistency between the requested flexible working arrangements and an enterprise agreement could not be relied upon as a reasonable business ground for refusing the request for the purposes of s 65A.

[15] In relation to the order under s 65C, the Commissioner did not consider that s 65C(2A)(b) prohibited her from making an order under s 65C(1)(f)(i) granting Mr May's request. The Commissioner considered that s 65C(2A), when read in context of s 65 and also ss 55, 56 and 59, should not be read to mean that an order could not be made granting a request due to a provision in an enterprise agreement. Having regard to the Explanatory Memorandum in respect of the *Same Job Better Pay Bill 2022 (Cth)* (the **SJBP Bill**), the Commissioner considered that s 65C(2A) was directed to restricting the making of an order which is inconsistent with terms providing for pay, penalty rates or like conditions applying to patterns of work. Furthermore, the Commissioner noted clause 2.3 of the Agreement, which she concluded encapsulated the statutory precedence given to the National Employment Standards over the terms of an enterprise agreement.¹³ The Commissioner considered that clause 2.3 of the Agreement, together with s 55, operate such that any express limitation in clause 18 of the Agreement on granting a flexible working arrangement is overridden.¹⁴

Permission to appeal and Ai Group application to be heard

[16] Under s 604(1) of the Act, a person who is aggrieved by a decision of the Commission may appeal the decision but only with permission. Under s 604(2), without limiting the circumstances in which permission may be granted, the Commission must grant permission if the Commission is satisfied that it is in the public interest to do so. The task of assessing whether a "public interest" test is met is a discretionary one involving a broad value judgment. Considerations that may attract the public interest have been identified by a Full Bench of the Commission in *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343; (2010) 197 IR 266 in the following terms:¹⁵

... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an

appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters ...

[17] We consider that it is in the public interest to grant Paper Australia permission to appeal. The appeal raises two issues of importance and general application. Firstly, the proper construction of Division 4 of Part 2-2 of the Act, in particular s 65A, and the nature of the limitation imposed by s 65C(2A) on the power of the Commission to make an order under s 65(1)(f) arising from an arbitration of a dispute about a request for a flexible working arrangement. Secondly, the relationship between the National Employment Standards and the terms of an enterprise agreement having regard to the scheme of the Act, and particularly ss 55, 56 and 61.

[18] At the hearing of the matter, we permitted the Ai Group to make submissions in the appeal. Under s 590(1), the Commission may inform itself in relation to any matter before it as it considers appropriate. The Ai Group, as a peak council for employer organisations under the Act, has a proper representative interest in the subject of the appeal.

Appeal grounds, the nature of the appeal and standard of appellate review

[19] By its notice of appeal, Paper Australia advances three appeal grounds, which are as follows:

1. The primary Commissioner erred in law by concluding (at PD[42], PD[44], and PD[50]) that a proposed flexible work arrangement's inconsistency with an applicable enterprise agreement cannot be a reasonable business ground for refusing a flexible work request.
2. The primary Commissioner erred in law in concluding (at PD[45]-[46]) that clause 18 of the Opal Australian Paper Maryvale Mill Mechanical Maintenance & Engineering Store Enterprise Agreement 2024 (Agreement):
 - (a) limited the Applicant's entitlement to a legislative minimum standard;
 - (b) was of no effect by operation of s 55 of the FW Act and clause 2.3 of the Agreement.
3. The primary Commissioner erred in law by concluding (at PD[45]) that s 65C(2A)(b) did not prevent the making of an order inconsistent with clause 18 of the Agreement.

[20] An appeal under s 604(1) of the Act is by way of rehearing. Ordinarily, if there has been no further evidence admitted and there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker.¹⁶ A distinct question then arises as to the standard of appellate review applicable to the particular decision under consideration.¹⁷ Under the correctness standard, the appellate bench determines for itself the correct outcome while making due allowance for such advantages as may have been enjoyed by the decision-maker who conducted the trial or hearing. In case of a discretionary decision, the approach in *House v The King* dictates that appellate intervention is limited to circumstances where the decision-maker at first instance acted upon a wrong principle, or allowed extraneous or irrelevant matters to affect the decision; mistook the facts, failed to take into account some material consideration or made a decision that was unreasonable or plainly unjust.¹⁸

[21] The decision made by the Commissioner in arbitration of the dispute had two components, namely, that it would be “appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds” for the purposes of s 65C(1)(b)(ii) and to make an order under s 65C(1)(f)(i) that Paper Australia grant Mr May’s request. In our view, both those findings involve the exercise of a discretion at least in the broad sense discussed in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194.¹⁹ Whether an order should be made that it would be “appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds” under s 65C(1)(b)(ii) is a matter involving a considerable degree of subjectivity, including an assessment of appropriateness, such that it is appropriate to be regarded as discretionary.²⁰ The determination as to whether to make an order that the employer grant a request, or make other specified changes to the employee’s working arrangements, under s 65C(1)(f) is even more classically discretionary.²¹

[22] In this matter, however, the errors alleged by Paper Australia would, if established, be sufficient to establish error of a type discussed in *House v The King*. In appeal grounds 1 and 2, Paper Australia contends that the Commissioner misconstrued the relevant provisions of the Act in concluding that an inconsistency between a proposed flexible work arrangement and an applicable enterprise agreement could not, at least in itself, constitute a reasonable business ground for refusing a flexible work request. If that contention is correct, the Commissioner acted upon a wrong principle. In appeal ground 3, Paper Australia contends that the Commissioner misconstrued s 65C(2A)(b) and, as a result, made an order which is outside the jurisdiction of the Commission. Again, if the contention is correct, the error is of a type susceptible to correction on appeal.

Grounds 1 and 2 – Inconsistency between a Maryvale Agreement and the NES

Issues Raised by Grounds 1 and 2

[23] It is convenient to deal with appeal grounds 1 and 2 together. Ground 1 alleges that the Commissioner erred in concluding that a requested flexible working arrangement’s inconsistency with an enterprise agreement cannot be reasonable business ground for refusing the request. Ground 2 challenges the Commissioner’s underlying rationale for that conclusion, being that clause 18 of the Maryvale Agreement limited Mr May’s entitlement to a minimum standard in the National Employment Standards, causing that provision to be of no effect by operation of s 55 of the Act and clause 2.3 of the Agreement.

[24] Paper Australia contends that “reasonable business grounds” in s 65A(3)(d) must include avoiding exposure to civil penalties for contravention of an enterprise agreement. Paper Australia’s appeal grounds raise in substance the question of whether compliance with an obligation in an enterprise agreement will of itself constitute a reasonable business ground. It is premised on the notion that the terms of an enterprise agreement can affect the meaning of “reasonable business grounds” in s 65A(3)(d) to the detriment of an employee. That notion, if correct, would permit or indeed compel an employer to decline a request which would or could not otherwise be declined on grounds which constitute reasonable business grounds. In respect of the present matter, Paper Australia contends that it was prohibited from granting Mr May’s request as clause 18 of the Maryvale Agreement mandated a particular roster and only permitted change by agreement of the parties covered by the enterprise agreement.

[25] The determination of appeal grounds 1 and 2 requires consideration of two matters. Firstly, a proper characterisation of the rights of employees conferred by Division 4 of Part 2-2. Secondly, the relationship between the National Employment Standards, in particular Division 4 (Requests for Flexible Working Arrangements) of Part 2-2, and an enterprise agreement made under Part 2-4. We note that clause 2.3 of the Maryvale Agreement provides that the National Employment Standards apply at all times and that where there is inconsistency between the enterprise agreement and the National Employment Standards, the more beneficial term to the employee will apply to the extent of any inconsistency. Clause 2.3 appears to be what is commonly known as an “NES precedence clause”. The apparent intention of the clause is to restate the relationship between the National Employment Standards and an enterprise agreement specified in s 55, in order to conform with the approval requirement in s 186(2)(c) that the terms of the agreement not contravene s 55. Clause 2.3 of the Maryvale Agreement does not add more to the issues to be decided in the appeal as to the interaction under the Act between the National Employment Standards and an enterprise agreement.

[26] It is useful to begin our considerations of grounds 1 and 2 with a survey of relevant provisions of the Act including a consideration of the legislative history of Division 4 (Requests for Flexible Working Arrangements) of Part 2-2. This survey is also useful for consideration of appeal ground 3.

Statutory provisions

[27] The object of the Act in s 3 is “to provide a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians” by, amongst other things:

- ...
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- ...
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- ...
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; ...
- ...

[28] Chapter 2 is entitled “Terms and Conditions of Employment” and is divided into nine parts. Part 2-1 is headed “Core Provisions for this Chapter” and is constituted by three divisions. Section 43(1), provides that the main terms and condition of employment of an employee that are provided under the Act are the National Employment Standards (see Part 2-2) and also any of the following instruments that apply to an employee:- a modern award (see Part 2-3), an enterprise agreement (see Part 2-4) or a workplace determination (see Part 2-5).

[29] Division 3 of Part 2-1 is headed “Interaction between the National Employment Standards, modern awards and enterprise agreements” and includes both ss 55 and 56. Section 55(1) is as follows:

55 Interaction between the National Employment Standards and a modern award or enterprise agreement

National Employment Standards must not be excluded

(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

Terms expressly permitted by Part 2-2 or regulations may be included

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2-2 (which deals with the National Employment Standards);
or

(b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that

the terms give an employee an entitlement (the *award or agreement entitlement*) that is the same as an entitlement (the *NES entitlement*) of the employee under the National Employment Standards:

(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

[30] Most relevantly, s 55(1) provides that an enterprise agreement “must not exclude the National Employment Standards or any provision of the National Employment Standards”. Section 56 then provides that a term of a modern award or enterprise agreement has no effect to the extent that it contravenes s 55.

[31] Part 2-2 is headed “The National Employment Standards” and is constituted by thirteen divisions. Section 61, provides that Part 2-2 “sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).” Section 127, which is in Division 13, allows amongst other things, the making of regulations that would or might otherwise be contrary to Part 2-2 or s 55.

[32] Division 4 is headed “Requests for Flexible Working Arrangements” and now includes ss 65, 65A, 65B, 65C and 66. Section 65(1) confers a right on an employee to whom any of five specified circumstances in subsection (1A) apply, to make a request to their employer for a change in working arrangements. The five circumstances set out in s 65(1A) are that the employee is pregnant, a parent or has responsibilities for the care of a child who is of school age or younger, has a disability, is 55 years or older, is experiencing family and domestic violence or provides care and support to a member of their immediate family or household who requires care and support because the member is experiencing family and domestic violence. Section 65(2) provides that an employee is not entitled to make a request unless they have been employed for 12 months, with additional conditions for casual employees. Section 65(3) provides that the request must be in writing and set out details of the change sought and the reasons for the change. Section 65A imposes certain obligations on an employer to respond to a request.

[33] Section 65A(1) provides that a written response to the request must be given within 21 days. Section 65A(2) provides that the response must either state that the employer grants the request, if discussions have resulted in agreement different to the request, the details of the agreed change, or state that the employer refuses the request and include the matters required by subsection (6). Section 65A(3) provides that an employer may only refuse the request if the

following cumulative circumstances are met: the employer has discussed the request with the employee, genuinely tried to reach agreement with the employee about making changes to accommodate the circumstances in s 65(1), the employer and employee have not reached agreement, the employer has had regard to the consequences of the refusal for the employee and the refusal is on reasonable business grounds. Section 65A(4) makes clear that the requirement on the employer to have genuinely tried to reach agreement does not require the employer to agree to a change of the employee's working arrangements if the employer would have "reasonable business grounds" for refusing a request for a change. Section 65(5) then identifies, in a non-exhaustive manner, matters that provide reasonable business grounds for refusing a request in the following terms:

Reasonable business grounds for refusing requests

(5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:

- (a) that the new working arrangements requested 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;
- (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;
- (d) that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;
- (e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

Note: The specific circumstances of the employer, including the nature and size of the enterprise carried on by the employer, are relevant to whether the employer has reasonable business grounds for refusing a request for the purposes of paragraph (3)(d) and subsection (4). For example, if the employer has only a small number of employees, there may be no capacity to change the working arrangements of other employees to accommodate the request (see paragraph (5)(b)).

[34] Section 65A(6) provides that if the employer refuses the request the written response must include the details of the reasons for the refusal, setting out the employer's particular business grounds for refusing the request and how those grounds apply to the request, either set out the changes in the employee's working arrangements that would accommodate the circumstances referred to in subsection (1) that the employer would be willing to make or state that there are no such changes, and finally set out the effect of s 65B and s 65C of the Act.

[35] Section 65B deals with disputes about the operation of Division 2. Section 65B(1) provides that s 65B applies if the employer has refused a request under s 65(1) or has not given a written response within 21 days. Section 65B(2) provides that the parties must first attempt to resolve the dispute at workplace level by discussions. Section 65B(3) provides that if discussions at the workplace level do not resolve the dispute, a party to the dispute may refer it to the Commission. Section 65B(4)(a) provides that the Commission must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances. Section 65B(4)(b) provides that the Commission may then deal with the dispute by arbitration in accordance with s 65C.

[36] Section 65C deals with the relief that may be granted by the Commission in an arbitration. It is useful to set out the terms of 65C in full:

65C Arbitration

(1) For the purposes of paragraph 65B(4)(b), the FWC may deal with the dispute by arbitration by making any of the following orders:

- (a) if the employer has not given the employee a written response to the request under section 65A—an order that the employer be taken to have refused the request;
- (b) if the employer refused the request:
 - (i) an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds; or
 - (ii) an order that it would be appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds;
- (c) if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the employee’s request under section 65A—an order that the employer take such further steps as the FWC considers appropriate, having regard to the matters in section 65A;
- (d) subject to subsection (3) of this section:
 - (i) an order that the employer grant the request; or
 - (ii) an order that the employer make specified changes (other than the requested changes) in the employee’s working arrangements to accommodate, to any extent, the circumstances mentioned in paragraph 65B(1)(a).

Note: An order by the FWC under paragraph (c) could, for example, require the employer to give a response, or further response, to the employee’s request, and could set out matters that must be included in the response or further response.

(2) In making an order under subsection (1), the FWC must take into account fairness between the employer and the employee.

not make an order under paragraph (1)(c) or (d) that would be inconsistent with:

- (a) a provision of this Act; or
- (b) a term of a fair work instrument (other than an order made under that paragraph) that, immediately before the order is made, applies to the employer and employee.

(3) The FWC may make an order under paragraph (1)(d) only if the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.

(4) If the FWC makes an order under paragraph (1)(a), the employer is taken to have refused the request.

(5) If the FWC makes an order under paragraph (1)(b), the grounds on which the employer refuses the request are taken:

- (a) for an order made under subparagraph (1)(b)(i)—to be reasonable business grounds; or
- (b) for an order made under subparagraph (1)(b)(ii)—not to be reasonable business grounds.

Contravening an order under subsection (1)

(6) A person must not contravene a term of an order made under subsection (1).

Note: This subsection is a civil remedy provision (see Part 4-1).

[37] When first enacted in 2009, the Act made provision in Division 2 of Part 2-2 for an employee who was a parent to request flexible work. At that time, s 65(4) provided that “[t]he employer may refuse the request only on reasonable business grounds.” However, Division 2 made no specific provision for dispute resolution in the Commission. Dispute resolution in the

Commission was only available on the matter of whether the employer had “reasonable business grounds” under s 65(5) if a contract of employment, enterprise agreement or other written agreement permitted the Commission to deal with the dispute.²² Furthermore, a refusal by an employer to approve a request for flexible work on grounds which were not reasonable business grounds, was not captured by s 44, a provision which dealt civil remedies for contraventions of the NES.²³

[38] In 2013, s 65 was amended by the *Fair Work Amendment Act 2013* (Cth) (the **2013 Act**). The amendments expanded the category of employees eligible to request flexible work²⁴ and introduced new s 65(5A) which set out a non-exhaustive list of “reasonable business grounds”. The present scheme in Division 4 of Part 2-2, regarding requests for flexible working arrangements, is the result of further significant amendments made to that Division by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (the **SJBP Act**). The amendments to Division 4 commenced on 6 June 2023 and included the insertion of new sections, s 65A (Responding to requests for flexible working arrangements), s 65B (Disputes) and s 65C (Arbitration).

[39] The general effect of these new sections was twofold. Firstly, to create more rigorous obligations in the National Employment Standards on employers when considering requests for flexible working arrangements.²⁵ Secondly, to confer a power on the Commission to arbitrate and make orders resolving disputes about requests for flexible working arrangements where the employer has refused the request or failed to respond to a request within 21 days. There are two aspects of the more rigorous obligation imposed on employers in considering requests. Section 65A(2) and (6) require greater specificity in the written response required to be given by the employer, particularly if the request was refused. The new s 65A(3) imposes cumulative obligations on an employer before it could refuse the request, being that the employer discussed the request with the employee, the employer had genuinely tried to reach agreement with the employee about making the changes to the working arrangements, the employer had not reached agreement, the employer had regard to the consequences of the refusal for the employee and that the refusal was on “reasonable business grounds”.

[40] Consequently, after the amendments made by the SJBP Act, the substantive grounds upon which an employer could refuse a request remained confined to “reasonable business grounds”, albeit this requirement was now part of other cumulative obligations in s 65A(3) with which an employer had to comply before refusing a request. The SJBP Act repealed s 65(5A), which had set out a non-exclusive list of reasonable business grounds, and re-enacted that provision in relevantly identical terms in new s 65A(5). Further, the SJBP Act amended s 44, such that an employer could now be liable for a civil penalty if it refused a request for flexible work arrangements on grounds other than reasonable business grounds.²⁶

[41] Having surveyed, the objects of the Act, the structure of Chapter 2, the interaction rules between an enterprise agreement and National Employment Standards, Part 2-2 (National Employment Standards and in particular Division 4 (Requests for Flexible Working Arrangements) and its history, it is appropriate to consider relevant provisions relating to enterprise agreements.

[42] Part 2-4 of the Act is headed Enterprise Agreements. Section 172(1) permits the making of an enterprise agreement about permitted matters. Under s 172(2)(a), a single enterprise

agreement may be made between an employer and its employees who are employed at the time the agreement is made and who will be covered by the agreement. Section 186 sets out general requirements in the approval of enterprise agreements by the Commission. Section 186(2)(c) provides that the Commission must be satisfied that “the terms of the agreement do not contravene s 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc)”.

[43] Section 202 requires that an enterprise agreement must include a “flexibility term” that “enables an employee and his or her employer to agree to an arrangement (an **individual flexibility arrangement**) to vary the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer”. If an individual flexibility arrangement (an **IFA**) is agreed under a flexibility term, the enterprise agreement has effect as it were varied by IFA and the IFA is taken to be a term of the agreement.²⁷ If an enterprise agreement does not contain a flexibility term, a model flexibility term is taken to be a term of the agreement.

[44] Section 203 requires a flexibility term to meet various requirements. A flexibility term must set out the terms of the enterprise agreement the effect of which may be varied by an IFA, must require the employer to ensure that the IFA is about permitted matters under s 172 and not include unlawful terms under s 194, must require that the IFA is genuinely agreed to by the employer and the employee, must require the employer to ensure that the IFA results in the employee being better off overall than if no IFA were agreed, must require the employer to ensure that that any IFA must be able to be terminated by either the employer or employee giving written notice of no more than 28 days or at any time if agreed in writing and must require the employer to ensure that the IFA is in writing signed and provided to an employee. The model flexibility term referred to in s 202 is now the term made by the Commission for that purpose.²⁸

Proper approach to construction

[45] The issues raised in the appeal involve questions as to the construction of the Act. The proper approach to statutory construction is usefully described in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 as follows (footnotes omitted):²⁹

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

[46] In *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ said (footnotes omitted):³⁰

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language

of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

[47] Furthermore, s 15AA of the *Acts Interpretation Act 1901* (Cth) requires that an interpretation that would best achieve the purpose or object of the Act should be preferred to a construction that would not do so. The purpose is ascertained objectively³¹ and may appear from an express statement in the statute, inference from its terms including its text and structure and by reference to extrinsic materials.³²

Proper characterisation of rights regarding flexible work

[48] As we have observed, resolution of appeal grounds 1 and 2 requires a characterisation of the rights of employees conferred by Division 4 of Part 2-2. In its written submissions, Paper Australia correctly submitted that Division 4 essentially confers four rights: a right to request a flexible work arrangement, a right to have that request considered in particular ways, a right to have that request refused only on reasonable business grounds and the right to have that dispute subject to dispute resolution including arbitration in the Commission.

[49] During the hearing of the appeal, counsel for Paper Australia characterised the subject matter of the right conferred by s 65 as being a right to request flexible work arrangements. The Ai Group in effect submitted that the right of an employee under Division 4 of Part 2-2 constituted no more than a right under s 65 to request a flexible working arrangement. We consider that a confined focus to the right to request in s 65, does not properly characterise the range of employee rights under Division 4 of Part 2-2, particularly an employee's right to have a request refused only on reasonable business grounds as specified in s 65A(3)(d). As set out in our review of the relevant statutory provisions, the Act at its inception contained this right in then s 65(5) and the amendments made by the SJPB Act re-enacted the right in s 65A(3)(d). The re-enactment of the right in new s 65A(3), indicates that the content of the right and the meaning of the term "reasonable business grounds", was not affected by the amendments made by the SJPB Act.

[50] The term "reasonable business grounds" is not defined in the Act. The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) stated as follows in relation to s 65(5):

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:

- 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.

[51] The examples of “reasonable business grounds” given in the Explanatory Memorandum all refer to practical operational consequences to the business of accommodating a change to an employee's working arrangement and do not include inconsistency with an applicable fair work instrument such as an enterprise agreement or a modern award. The 2013 Act enacted the non-exhaustive list of reasonable business grounds, which was substantively re-enacted by the SJPB Act in s 65A(5). These grounds contained in s 65A(5) also focus on practical consequences for the business and do not include inconsistency with a fair work instrument. However, the grounds in s 65A(5) do not purport to be exclusive and are expressed to be without limitation to what are reasonable business grounds for the purpose of s 65(3)(d).

[52] Given the absence in the Act of an express definition, or an exhaustive list, of “reasonable business grounds”, it is necessary to give the phrase its natural and ordinary meaning. In the online Macquarie Dictionary, the term “reasonable” is relevantly defined as “1. endowed with reason. 2. Agreeable to reason or sound judgment. ...” In the online Australian Oxford Dictionary, the term “reasonable” is relevantly defined as “2. in accordance with reason, not absurd”. The term “business grounds” is directed to the business justification. It directs attention to the effect of granting the request for a change to the working arrangements of an employee on the business in question.³³

[53] Paper Australia does not contend that granting Mr May's request would cause any operational or other practical difficulties for its business. It does not suggest that granting Mr May's request would be too costly, that it has no capacity to accommodate the request or that it would be impractical to do so or that accommodating the request would be likely to result in a significant loss of efficiency or productivity or have a significant impact on customer service. It would be implausible for Paper Australia to make such a submission. Mr May had been working in accordance with the working arrangement he has requested from 2011 to 2024. There is no evidence that it produced any problems at all. There is no doubt that Paper Australia can readily accommodate Mr May's request as a practical matter.

[54] Paper Australia's contention that its refusal of Mr May's request was on reasonable business grounds is based purely on the assertion that to grant the request would contravene the Maryvale Agreement. It may be accepted that the obligations of an employer under the law or instruments imposing legal obligations might be relevant to whether there are reasonable business grounds for refusing a request for changes to the working arrangements of an employee. Paper Australia referred, by way of example, to circumstances in which granting a request for flexible working arrangements would give rise to a contractual penalty or if the nature of a request would, if granted, result in the contravention of working hours or fatigue regulations for a pilot or truck driver. Either of those circumstances might well be relevant to, and probably highly persuasive in, an assessment of whether an employer had reasonable business grounds for refusing the request.

[55] Paper Australia contends that, similarly, “reasonable business grounds” must include avoiding exposure to civil penalties for contravening an enterprise agreement. The apparent simplicity of the proposition advanced by Paper Australia is misleading. The contention presupposes that granting Mr May's request would result in it contravening clause 18 of the Maryvale Agreement. It thereby elides the critical question. Whether granting Mr May's request

would result in a contravention of the Maryvale Agreement, requires consideration of the interaction between an enterprise agreement and the provisions of the National Employment Standards, particularly having regard to ss 55 and 61 of the Act and clause 2.3 of the Maryvale Agreement.

Interaction between the National Employment Standards and enterprise agreements

[56] Chapter 2 of the Act contains the main terms and conditions of an employee being the National Employment Standards (Part 2-2), a modern award (Part 2-3), an enterprise agreement (Part 2-4) or a workplace determination (Part 2-4). The Act necessarily deals with the hierarchy of these different sources of terms and conditions. In that hierarchy, the National Employment Standards are at the apex. The National Employment Standards have primacy over the terms and conditions provided by enterprise agreements, modern awards and workplace determinations.

[57] Section 61(1) provides that Part 2-2 (National Employment Standards) are “minimum standards that apply to the employment of employees which cannot be displaced ...”. Section 61(1) is not merely a statement of purpose but it has substantive effect.³⁴ The primacy of the National Employment Standards in their interaction with an enterprise agreement is specifically dealt with in ss 55 and 56. Section 55(1) provides that an enterprise agreement “must not exclude the National Employment Standards or any provision of the National Employment Standards”. Section 56 provides that a term of an enterprise agreement “has no effect to the extent that it contravenes s 55”. Furthermore, in approving an enterprise agreement, the Commission must be satisfied under s 186(2)(c) that the agreement does not contravene s 55. Section 56 provides that a term of an enterprise agreement has no effect to the extent that the enterprise agreement term contravenes s 55. To the extent that a term of an enterprise agreement excludes any provision of the National Employment Standards, it has no effect.

[58] The clear legislative purpose embodied in s 61(1) is that the National Employment Standards are minimum standards to which all employees are entitled. Those minimum standards sit at the pinnacle of the hierarchy of terms and conditions under the Act. Those standards cannot be excluded or displaced by an instrument such as an enterprise agreement. A provision of the National Employment Standards will be excluded or displaced if an enterprise agreement term has a detrimental effect on the right conferred under the National Employment Standards. If an enterprise agreement were permitted to have a detrimental effect on a provision in the National Employment Standards, the hierarchy of the sources of terms and conditions conferred by the Act, with the National Employment Standards at the peak, would be inverted. This proposition is subject to s 55(2)-(7). Section 55(2)-(7) prescribe a detailed scheme as to how an enterprise agreement may affect the National Employment Standards. We have set out those provisions in paragraph [29] above. The detailed provisions in s 55(2)-(7) evince an intention that an enterprise agreement cannot affect the operation of the National Employment Standards except as expressly permitted by those sub-sections and certainly cannot detrimentally affect the operation of an employee right in the National Employment Standards, except as permitted by those sub-sections.

[59] In that regard, s 55(2) permits an enterprise agreement to include a term which is expressly permitted by a provision of the National Employment Standards or by regulations made under s 127. Section 127 allows the making of regulations that permit an enterprise

agreement to include terms that would or might otherwise be contrary to Part 2-2 (which includes s 61) and also s 55. The availability of this permissive regulation making power in s 127, which is referred to in s 55(2), is a further indication that an enterprise agreement cannot affect the operation of the National Employment Standards and certainly not detrimentally so, except as permitted by s 55. It is not contended by either party that clause 18 of the Maryvale Agreement falls within the type of enterprise agreement terms referred to in s 55(2)-(7).

[60] The view that we have expressed above is supported by the Explanatory Memorandum to the *Fair Work Bill 2008 (Cth)*. In that regard, we refer to the following paragraph of the Explanatory Memorandum which provides an overview of Part 2-2, including as follows:

233. The NES is designed to ‘lock in’ to modern awards and enterprise agreements. It does this by including provisions that specifically allow awards and agreements to deal with specific issues. Modern awards and enterprise agreements can also ‘build on’ the NES by including terms that supplement, or are ancillary or incidental to, the NES. But, other than as expressly allowed, an award or agreement cannot be detrimental to an employee in any respect when compared to the NES.

[61] The effect of this paragraph of the Explanatory Memorandum was not diminished by amendments to the *Fair Work Bill 2008 (Cth)* which resulted in ss 55 and 61 as finally enacted.³⁵ The view we have expressed above is also consistent with the object of the Act in s 3(b) of “ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards ...”.

[62] The question which then arises is whether the effect of clause 18 of the Maryvale Agreement, to the extent it is relied upon by Paper Australia as providing reasonable business grounds to refuse Mr May’s request, would exclude or displace a provision of the National Employment Standards for the purposes of ss 55(1) and 61(1) or give rise to an inconsistency with the National Employment Standards for the purposes of clause 2.3. Paper Australia contends that the Commissioner erroneously assumed that s 65 confers an entitlement to a particular outcome, namely, the granting of a request for a change to working arrangements. It submits that s 65 and Division 4 of Part 2-2 more generally, enshrines no more than a right to make a request and not to a particular outcome. It submits that a provision of an enterprise agreement would only exclude or displace, or be inconsistent with, s 65 of the Act if it ousted the ability of an employee to make a request. Paper Australia submits that clause 18 of the Maryvale Agreement, in providing that the ordinary hours of a day worker shall be worked in accordance with the roster profile set out in the table contained in the clause, does not prevent an employee such as Mr May making a request for a flexible work arrangement.

[63] The submission of Paper Australia characterises the effect of clause 65 too narrowly. Section 65(1) permits an employee to request a change in their working arrangements in the circumstances specified in s 65(1A). Section 65A(1) requires that an employer respond to such a request within 21 days and s 65A(3) sets out the only circumstances in which the employer may refuse a request. Relevantly, s 65A(3)(d) provides that the employer may refuse the request only if the refusal is “on reasonable business grounds”. In our view, a term of an enterprise agreement will exclude or displace the right conferred by s 65(1), when read with s 65A, if it would permit an employer to refuse a request for a change to working arrangements other than on reasonable business grounds. A term of the Maryvale Agreement which had that effect would also give rise to an inconsistency with the National Employment Standards for the purposes of clause 2.3 of that Agreement. Clause 18.3 of the Maryvale Agreement provides that

the ordinary hours of day workers shall be worked in accordance with the roster profile set out in the clause, including 10 hours on a Thursday. The effect of ss 56 and 61(1) is that clause 18 has no effect to the extent that it would permit Paper Australia to refuse Mr May's request to change his working arrangements other than on reasonable business grounds. The consequence is that Paper Australia would not contravene the Maryvale Agreement by granting Mr May's request notwithstanding the terms of clause 18.

[64] Paper Australia's contention, if it was accepted, would permit an enterprise agreement to affect the meaning or operation of an employee's entitlement not to have their request refused other than on "reasonable business grounds". The effect could, as in the present matter, be detrimental to an employee by creating grounds for refusal based on mere compliance with the enterprise agreement where no reasonable business grounds exist. We consider that that outcome would be inconsistent with the statutory scheme, expressly stated in s 61(1), that the National Employment Standards constitute "minimum standards" which "cannot be displaced". Furthermore, it is inconsistent with the prohibition in s 55(1) that an enterprise agreement must not "exclude" the National Employment Standards or provision of those standards. Paper Australia's contention would render a provision of the National Employment Standards subordinate to the terms of an enterprise agreement. Paper Australia's contention is also inconsistent with the detailed scheme set out in s 55(2)-(7) which specifically prescribe how an enterprise agreement can affect the operation of the National Employment Standards. Except as permitted by those subsections, an enterprise agreement cannot affect the operation of an entitlement or right of an employee under the National Employment Standards and certainly cannot do so to the detriment to an employee.

[65] The Ai Group referred to the decision of the Full Bench in *Re 4 Yearly Review of Modern Awards — Common Issue — Award Flexibility* [2015] FWCFB 4466; (2015) 252 IR 256. Among other things, the Full Bench considered whether a claim with respect to "time off in lieu" of overtime (TOIL) was inconsistent with the National Employment Standards, including s 65 as it then was. The Full Bench observed:³⁶

It seems that an award TOIL clause could only potentially exclude some or all of s 65 if:

- the clause applies in circumstances where s 65 also applies (that is; where an employee is in one of the personal circumstances specified in s 65(1A) and wishes to take TOIL because of those personal circumstances, is not excluded by s 65(2), and makes the request in writing setting out the details required by s 65(3)); and
- the clause would enable a request for TOIL in those circumstances to be refused by the employer without the employer having reasonable business grounds for the refusal.

We do not consider that an award TOIL clause could lawfully operate in this way, to circumvent the protections in s 65 of the Act:

- If a request for TOIL was made in accordance with s 65 then an employer could not assert that the provision for employer consent in the TOIL clause itself allowed it freedom to decline the request as it saw fit, as this would in effect exclude s 65(5). Therefore, to this extent, the TOIL clause would be of no effect pursuant to s 56.
- If a request for TOIL was made in circumstances where s 65 applies but was not made in accordance with that section, then a request for TOIL could always subsequently be made in accordance with s 65, even if it had previously been refused under the terms of the TOIL clause.

[66] This passage supports the conclusion that we have otherwise reached, namely, that the provision of a modern award, or an enterprise agreement, could not itself enable a request made under s 65(1) to be refused without the employer having reasonable business grounds for the refusal.

[67] For these reasons, we consider that the right of an employee under s 65A(3)(d) to have a request for flexible work refused only on reasonable business grounds, cannot be detrimentally constrained by an enterprise agreement, in the sense that mere compliance with a term in the enterprise agreement which prohibits the requested arrangement, would itself constitute reasonable business grounds. By operation of ss 55 and 56, an enterprise agreement term that does so has no effect, but only to the extent that it detrimentally constrains an employee's right under s 65A(3)(d).

[68] It is a significant exaggeration to suggest that the approach of the Commissioner would render provisions of enterprise agreements, and modern awards, dealing with matters such as rostering, spread of hours or ordinary hours to no effect. Section 65(1) only permits an employee to request a change to their working arrangements if one of the circumstances in s 65(1A) apply to the employee and only if the employee would like to change his or her working arrangements because of that circumstance. The circumstances set out in s 65A(1A) are pregnancy, parental or caring responsibilities for a child who is school age or younger, disability, age or that the employee is experiencing family or domestic violence or providing care or support because a member of their immediate family is experiencing family or domestic violence. The public policy justification for conferring a right to request a change to the working arrangements of an employee in those circumstances is self-evident. The section does not permit any employee to request a change to their working arrangements for any reason or no reason. In this case, for example, clause 18 will continue to define and limit the working arrangements of all other employees.

[69] Furthermore, a roster pattern prescribed by an enterprise agreement may be relevant to whether there are reasonable business grounds for an employer to refuse a request by an employee to change their working arrangements. The roster pattern contained in an enterprise agreement might well, in a particular case, reflect the operational requirements of the business such that departure from that roster pattern would affect the costs, productivity or efficiency of the business. The operational impact of granting an employee request, may provide reasonable business grounds for an employer to refuse the request. The fact that other employees will continue to be required to work in accordance with a roster pattern prescribed in the applicable enterprise agreement might also mean that it would be impracticable for the employer to change the rostering arrangements of other employees to accommodate the requested working arrangement for the purposes of s 65A(5)(c) or otherwise mean that accommodating the request would result in a significant loss in efficiency or productivity for the purposes of s 65A(5)(d). An enterprise agreement may mean that additional costs are incurred by reason of a change to the working arrangements of an employee because an entitlement to overtime, penalties or other payment will arise which will also be relevant to whether there are reasonable business grounds for refusing the request. However, we do not consider that an enterprise agreement can create reasonable business grounds for refusing a request simply by prohibiting the request being accommodated by its terms.

[70] It is necessary to address three further matters raised by Paper Australia and the Ai Group. *First*, Paper Australia contends that the approach of the Commissioner is inconsistent with the scheme in ss 202 and 203 which require an enterprise agreement to contain flexibility terms to provide for the making of IFAs between an employer and employee. Paper Australia contends that the construction we have favoured would permit the bypassing of limitations and safeguards in ss 202 and 203. The matters said to be bypassed include the requirement in s 202 that a flexibility term in an enterprise agreement identify the terms that may be varied by an IFA and the requirements in s 203 that the effect of an IFA include that an employee be better off overall. The Ai Group makes in substance the same contention and relies also on provisions in Subdivision A of Division 7 of Part 2-4 concerning variation of enterprise agreements by agreement between employers and a valid majority of employees.

[71] We do not agree with these contentions made by Paper Australia or the Ai Group. The respective mechanisms in Division 4 of Part 2-2 and the provision for enterprise agreement flexibility terms in sections 202 and 203 deal with discrete subject matters and create distinct processes to deal with those discrete matters. Division 4 of Part 2-2 provides certain rights for employees to whom seven circumstances in s 65(1A) apply (for example, those with parental responsibilities) in relation to flexible work arrangements including the right of an employee to request flexible work arrangements and the right not to have that request declined other than on reasonable business grounds. Those rights constitute part of the minimum standards in the National Employment Standards to which all national system employees are entitled. By contrast, ss 202 and 203 are directed to the making of IFAs to vary the effect of an enterprise agreement “in order to meet the genuine needs of the employee and employer”. The making of an IFA under a flexibility term in an enterprise agreement, may be sought either by an employer or employee. Furthermore, a flexibility term in an enterprise agreement must set out the terms of the enterprise agreement the effect of which may be varied under the IFA. There is no requirement for a flexibility term to permit variation of terms in an enterprise agreement dealing with matters such as hours of work or patterns of work. However, under Division 4 of Part 2-2, the variation of hours of work or patterns of work are clearly the type of working arrangements which may be the subject of flexible work arrangements³⁷.

[72] *Second*, Paper Australia and Ai Group contend that the construction we prefer would risk sidelining the interests of other employees who have bargained for conditions such as the maintenance of a roster pattern or span of hours. The Ai Group refers to its experience that unions often bargain to limit terms of enterprise agreements that can be varied by a flexibility term. Paper Australia further contends that an employee or union dissatisfied with the granting of a request by another employee would have no standing to bring a dispute under s 65B or have that dispute arbitrated under s 65C. We are not persuaded that these contentions have substance in relation to the proper construction of the Act. Those matters do not constitute unreasonable consequences that tend to a different construction to that which we prefer. Furthermore, Paper Australia’s case is not assisted by its reliance on the object in s 3(f) of “achieving productivity and fairness through an emphasis on enterprise-level bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action”. That object is directed to emphasising collective bargaining and the process of the bargaining.³⁸ The “emphasis” on enterprise-level bargaining referred to in s 3(f) is implemented in the context of the Act as a whole, including the prescription of a safety net of minimum terms and conditions through, relevantly, the National Employment Standards.³⁹ The construction

which we prefer concerning the interaction between an enterprise agreement and the right in s 65A(3)(d) of Division 4 of Part 2-2 is not inconsistent with the object in s 3(f).

[73] *Third*, Paper Australia submits that the existence of s 65C(2A)(b) contemplates that a term of an enterprise agreement or modern award might operate to limit the range of permissible flexible work arrangements. Section 65C(2A)(b) provides that the Commission must not make an order under s 65C(1)(e) or (f) that would be inconsistent with a term of a fair work instrument. We do not consider that s 65C(2A)(b) assists in construing ss 65 and 65A or in assessing the interaction between those sections and an enterprise agreement. Section 65C(2A)(b) is directed at the orders able to be made by the Commission when arbitrating a dispute under s 65C and not the scope of a request able to be made by an employee under s 65(1) or the circumstances in which such a request may be refused. Section 65C(2A) was introduced by the SJBP Act in 2022 whereas the capacity of an employee to request a change to their working arrangements has been a part of the Act since its commencement in 2009. There is nothing to suggest that the 2022 amendments were intended to alter the nature of the reasonable business grounds that justify refusal of a request for changes to working arrangements previously contained in s 65(5) and (5A).⁴⁰ Furthermore, to the extent that the Commission makes an order under s 65C(1)(f)(i) that the employer grant a request, analysis of whether the order would be inconsistent with a fair work instrument for the purposes of s 65C(2A)(b) must be assessed after the application of ss 55(1), 56 and 61(1) of the Act to determine the true operation of the relevant instrument and not independently of that assessment.

Conclusion regarding Grounds 1 and 2

[74] Appeal grounds 1 and 2 are rejected. We do not consider that the Commissioner erred in her consideration of the interaction between clause 18 of the Maryvale Agreement and the National Employment Standards or in failing to find that Paper Australia had reasonable business grounds upon which to refuse Mr May's request on the basis that the request was inconsistent with the Maryvale Agreement.

Ground 3 – Inconsistency between order of the Commission and the enterprise agreement

[75] Appeal ground 3 alleges that the Commissioner erred by concluding that s 65C(2A)(b) did not prevent the making of an order which was inconsistent with clause 18 of the Maryvale Agreement. Section 65C deals generally with the orders the Commission may make in arbitrating a dispute about flexible working arrangements under s 65B(4)(b).

[76] Section 65C(1), sets out the type of orders that may be made including:

- (a) an order under s 65C(1)(b) that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds or to be taken not have been reasonable business grounds;
- (b) an order under s 65C(1)(e) that the employer take further appropriate steps if the Commission is satisfied that the employer has not responded or has not responded adequately having regard to the matters in s 65A; and

- (c) an order under s 65C(1)(f) that the employer grant the request or make specified changes (other than the requested changes) to the employee's working arrangements to accommodate the circumstances mentioned under s 65B(1)(a).

[77] Section 65C(2) requires the Commission take into account fairness between the employer and employee in making an order under subsection (1). Section 65C(2A) provides that the Commission may not make an order under paragraph (1)(e) or (f) that would be inconsistent with a provision of the Act or a term of a fair work instrument that applies to the employer or employee immediately before the order is made. A fair work instrument is defined in s 12 of the Act to include an enterprise agreement.

[78] The Commissioner's order had two substantive aspects. Firstly, paragraph A of the order provided that the grounds on which Paper Australia refused the request for a flexible working arrangement were taken not to have been reasonable business grounds. Paragraph A was clearly made pursuant to s 65C(1)(b)(ii) as the terms of the order reflects that of the provision. Secondly, paragraph B of the order required Paper Australia to grant Mr May's request. Paragraph B was clearly made pursuant to s 65C(1)(f)(i) as the terms of the order reflects that of the provision.

[79] Ground 3 constitutes a challenge to paragraph B of the order. This is because paragraph B constituted an order pursuant to s 65C(1)(f) and that paragraph is regulated by s 65C(2A). Paper Australia contends that paragraph B of the order is inconsistent with clauses 18.2 and 18.5 of the Maryvale Agreement as the requirement on Paper Australia to grant a request which was inconsistent with the roster specified under clause 18 and further that clauses 18.2 and 18.5 only permitted a change to the rosters by agreement of the "parties" to the Agreement. Paper Australia contends, and we accept, that the "parties" to the Maryvale Agreement are persons covered who are specified in clause 3 (Coverage of the Agreement) being Paper Australia, the AMWU, the UWU and employees covered by the agreement. It could also be contended that the order is inconsistent with clause 18.3 which requires that the ordinary hours of day workers shall be worked in accordance with the roster profile that appears in the table at the end of clause 18. As has been observed, that roster profile includes 10 hours on a Thursday.

[80] The Revised Explanatory Memorandum to the SJBPA Bill sets out the following in relation to s 65C(2A):

638. New subsection 65C(2A) would clarify that the FWC cannot make an order:

- to ensure compliance with the procedural requirements in new section 65A (proposed new subparagraph 65C(1)(e))
- that an employer grant a request for flexible working arrangements (proposed new subparagraph 65C(1)(f)(i)), or
- that an employer make specified changes to an employee's working arrangements to accommodate their circumstances (proposed new subparagraph 65C(1)(f)(ii)),

that would be inconsistent with a provision of the FW Act or a fair work instrument that applies to the employee and employer (other than a previous order made by the FWC under these provisions). This amendment is modelled on existing subsection 739(5), which applies to FWC consent arbitration.

639. One situation in which this may arise is where a fair work instrument provides for rates of pay, penalty rates or other conditions that apply to certain patterns of work. An order of the FWC may not be inconsistent with or less favourable than those provisions. For example, an enterprise agreement may provide that firefighters working non-standard roster patterns get paid at the same rate as firefighters

working on a 10/14 shift roster. An order of the FWC could not provide for a rate of pay for the non-standard roster pattern that was inconsistent with this requirement.

[81] Section 65C(2A) relevantly constitutes a prohibition on the making of an order that would be inconsistent with a term of an enterprise agreement. It is apparent that the inconsistency can only be with a term that has operative effect in the relevant circumstance. A term in an enterprise agreement which has no effect in the relevant circumstance, cannot engage the prohibition in s 65C(2A). As we have set out in our reasons in relation to grounds 1 and 2, if a term of an enterprise agreement detrimentally constrains a right conferred by a provision of the National Employment Standards, it has no effect to the extent that it does so, except to the extent that it is permitted to do so by s 55(2)-(7). This is so because of the operation of ss 55(1), 56 and 61(1) of the Act and also, in this case, as a result of the operation of clause 2.3 of the Maryvale Agreement.

[82] In our view, by mandating a particular roster which could only be varied by agreement of the parties or relevant employees and that the ordinary hours of employees be worked only in the defined pattern, clause 18 of the Maryvale Agreement detrimentally constrained Mr May's right to have his request refused only on reasonable business grounds. The only ground relied on by Paper Australia to refuse the request was compliance with clause 18 and it did not rely on any underlying reason relating to cost, productivity or efficiency. To the extent that clause 18 of the Maryvale Agreement required Paper Australia to refuse Mr May's request without there being reasonable business grounds for doing so, it was of no effect by operation of ss 55(1), 56 and 61(1) of the Act. The prohibition in s 65C(2A) was not engaged. For the reasons we have explained, the order made by the Commissioner was not inconsistent with the Maryvale Agreement once the effect of ss 55(1), 56 and 61(1) is properly understood. The Commissioner was, in the circumstances, entitled to make an order that Paper Australia grant Mr May's flexible work request.

[83] The approach that we take in relation to s 65C(2A)(b) is consistent with a harmonious operation of the Act. Furthermore, s 65C(2A) still has work to do. The Commission is able to make orders under s 65C(1)(e) and (f)(ii) which do not simply reflect the request of the employee. Insofar as the Commission makes an order outside the terms of the request made by the employee, it could not do so in a manner that is inconsistent with a fair work instrument. The provision would also operate to prohibit the Commission from making an order that would vary terms in an enterprise agreement, such as rates of pay and penalty rates, which would apply to an employee as a consequence of working particular hours that result from the Commission granting a flexible working arrangement. These are the type of circumstances referred to in paragraph 639 of the Revised Explanatory Memorandum to the SJBPA Bill.

[84] We reject ground 3 of the appeal.

Conclusion and disposition

[85] For these reasons, permission to appeal should be granted, but the appeal must be dismissed.

[86] The Full Bench makes the following orders:

- (a) Permission to appeal is granted;

(b) The appeal is dismissed.



VICE PRESIDENT

Appearances:

A Pollock, of counsel, for the appellant.

A Bonello, Legal and Industrial Officer of the AMWU, for the respondent.

P Willink, Senior Adviser, for Ai Group.

Hearing details:

16 June 2025.

Melbourne (in person).

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¹ *May v Paper Australia Pty Ltd* [\[2025\] FWC 799](#) (Decision).

² [PR785391](#).

³ Paragraph A of the order made pursuant to s 65C(1)(b)(ii).

⁴ Paragraph B of the order made pursuant to s 65C(1)(f)(i).

⁵ May Witness Statement par [8] (AB61).

⁶ May Witness Statement par [8] (AB61) and AM-1 (AB66-65).

⁷ May Witness Statement par [9] (AB62) and AM-2 (AB66-67).

⁸ Decision at [35] & [39] (AB17-18).

⁹ Decision at [42] (AB19).

¹⁰ Decision at [35] (AB17).

¹¹ Decision at [40] (AB19).

¹² Decision at [42] (AB19).

¹³ Decision at [46] and [47] (AB20).

¹⁴ Decision at [47] (AB20).

¹⁵ *GlaxoSmithKline Australia Pty Ltd v Makin* [\[2010\] FWAFB 5343](#); (2010) 197 IR 266 at [27].

¹⁶ *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [14] and [17] (Gleeson CJ, Gaudron and Hayne JJ).

¹⁷ *Helensburgh Coal v Bartley* [2025] HCA 29; (2025) 99 ALJR 1185 at [54] (Gageler CJ, Gordon and Beech-Jones JJ) and [141] (Steward J).

¹⁸ *Moore (a pseudonym) v The King* [2024] HCA 30; (2024) 98 ALJR 1119 at [14] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ); *DP World Sydney Pty Ltd v Witherden* [\[2025\] FWCFB 133](#) at [16].

¹⁹ *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [20] (Gleeson CJ, Gaudron and Hayne JJ).

²⁰ See, for example, the approach adopted in relation to s 389(2) in *Helensburgh Coal v Bartley* [2025] HCA 29; (2025) 99 ALJR 1185 at [84]-[91] (Edelman J).

²¹ *Ridings v Fedex Express Australia Pty Ltd T/A Fedex* [2024] FWCFB 473; (2024) 336 IR 372 at [33]-[34]. See also, in another context, *Toms v Harbour City Ferries Pty Ltd* [2015] FCAFC 35; (2015) 229 FCR 537 at [86]-[87] (Buchanan J).

²² See ss 186(6), 738 and 739 of the FW Act. See also *4 yearly review of modern awards – Family Friendly Working Arrangements* [2018] FWCFB 1692 at [404].

²³ The exception was previously contained in s 44(2). The SJBPA Act amended s 44(2) to delete the reference to s 65(5) and did not insert an exception to s 65A which was the successor provision to s 65(5).

²⁴ The pre-existing s 65(1) was omitted and new sub-sections (1), (1A) and (1B) were inserted.

²⁵ The Revised Explanatory Memorandum to SJBPA Bill indicates at [609] that the strengthened employer obligations when considering an employee request were “based on the model award term developed by the FWC”.

²⁶ The exception was previously contained in s 44(2). The SJBPA Act amended s 44(2) to delete the reference to s 65(5) and did not insert an exception to s 65A which was the successor provision to s 65(5).

²⁷ See s 202(2).

²⁸ *Re Model terms for enterprise agreements and copied State instruments* [2025] FWCFB 39.

²⁹ *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ).

³⁰ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [70] (McHugh, Gummow, Kirby and Hayne JJ).

³¹ *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 at [23].

³² *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 at [44].

³³ *Police Federation of Australia (Victoria Police Branch) v Chief Commissioner of Police T/A Victoria Police* [2022] FWC 2223 at [79].

³⁴ *Construction, Forestry, Mining and Energy Union v Jeld-Wen Glass Australia Pty Ltd* [2012] FCA 45; (2023) 213 FCR 549 at [19], [21] and [24] (Gray J).

³⁵ See Supplementary Explanatory Memorandum to the *Fair Work Bill 2008 (Cth)* at [20]-[30].

³⁶ *Re 4 Yearly Review of Modern Awards – Common Issue – Award Flexibility* [2015] FWCFB 4466; (2015) 252 IR 256 at [109]-[110].

³⁷ The legislative note under s 65 provides that “Examples of changes in working arrangements include changes in hours of work and changes in location of work.”

³⁸ See, in another context, *Australian Municipal, Administrative, Clerical and Services Union v Central Goldfields Shire Council* [2024] FWCFB 444; (2024) 335 IR 110 at [76].

³⁹ *Fair Work Act 2009 (Cth)*, s 3(b).

⁴⁰ *Fyfe v Ambulance Victoria* [2023] FWC 49; (2023) 321 IR 260 at [39].