



DECISION

Fair Work Act 2009

s.739 - Application to deal with a dispute

Construction, Forestry and Maritime Employees Union

v

Sydney International Container Terminals Pty Limited Trading AS

Hutchison Ports Sydney

(C2024/1705)

DEPUTY PRESIDENT EASTON

SYDNEY, 2 APRIL 2025

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)] – should shiftworkers be paid for public holidays in circumstances where they are not rostered to work on a particular public holiday – Award terms incorporated into the agreement – inconsistency between the agreement and the Award.

[1] A dispute has arisen under the *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021* regarding public holiday entitlements for shiftworkers. The dispute concerns the interaction between the terms of the agreement and the underpinning modern award.

[2] The stevedore business of Hutchison Ports in Australia (**Hutchison**) is operated by two separate but related corporate entities: Sydney International Container Terminals Pty Ltd (**SICTL**) employs staff and operates the Port Botany site in Sydney and Brisbane Container Terminals Pty Limited (**BCT**) employs staff and operates the Port of Brisbane site. SICTL and BCT are both parties to the *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021 (Agreement)*, as is the Maritime Union of Australia Division of the Construction, Forestry and Maritime Employees Union (**MUA**). In this decision I will refer to SICTL and BCT collectively as Hutchison.

The Dispute

[3] Clause 2 of the Agreement incorporates some but not all terms of the *Stevedoring Industry Award 2020 (the Award)*:

“2. Effect Of The Agreement

2.1 This Agreement incorporates the terms of the Stevedoring Industry Award (SIA) 2020, (the Award). In the event of any inconsistency between any terms of the Award (as incorporated into this Agreement) and an express provision set out in this Agreement, the express provision in this Agreement shall prevail to the extent of any such inconsistency. Nothing in this clause shall operate so as to diminish the entitlements of Employees as established under any National Employment Standards (NES) referenced in the Award.

[4] The 2020 Award includes a specific additional benefit to shiftworkers who are not rostered to work and do not work on a public holiday. The Agreement does not include any specific additional benefit in the same circumstances.

[5] The MUA submitted that the proposed question for arbitration is:

“Is SICTL obligated by the terms of the *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021*, and the *Stevedoring Industry Award 2020*, to pay shiftworkers who are rostered off on the day on which a public holiday prescribed by clause 30 of the EA falls at the ordinary rate for the public holiday in addition to their ordinary weekly wage?”

[6] In short the MUA argued that the answer to the question is “yes” because:

- (a) the 2020 Award requires employers to pay shiftworkers who are rostered off on a public holiday and who do not work the day at the ordinary rate for the public holiday in addition to their ordinary weekly wage;
- (b) the public holiday provisions in the Agreement do not require Hutchisons to pay any additional amount to shiftworkers who are rostered off on a public holiday and do not work the day;
- (c) clause 2.1 of the Agreement incorporates the terms of the 2020 Award;
- (d) because the Agreement is silent regarding this particular entitlement, the 2020 Award provision applies; and
- (e) Hutchisons is therefore required to pay shiftworkers who are rostered off on a public holiday and who do not work the day, at the ordinary rate for the public holiday in addition to their ordinary weekly wage.

[7] In short Hutchisons argued that the answer to the question is “no” because:

- (a) the definition of shiftworker in the 2020 Award is different to the definition of shiftworker in the Agreement;
- (b) only employees who work 35 ordinary hours per week can be shiftworkers under the 2020 Award;
- (c) none of the employees covered by the Agreement work 35 ordinary hours per week, as such none of these employees are shiftworkers for the purposes of the 2020 Award;
- (d) therefore there is no residual requirement under the 2020 Award to pay shiftworkers who are rostered off on a public holiday and who do not work the day, at the ordinary rate for the public holiday in addition to their ordinary weekly wage;
- (e) in the alternative: the Agreement deals comprehensively with public holidays and displaces any provisions in the 2020 Award regarding public holidays; and
- (f) the Agreement does not require Hutchisons to pay any additional amount to shiftworkers who are rostered off on a public holiday and do not work the day.

The evidence

[8] Mr Ross Pettett is employed as a stevedore/maintenance worker with Hutchisons and provided a statement in these proceedings. Mr Pettett said that he is a shiftworker and that Hutchisons has never paid him for any public holidays that he was not rostered to work and he did not in fact work.

[9] Mr Pettett said that he emailed his manager Mr Glenn Stalgis to raise a dispute under clause 14 of the Agreement regarding Hutchison's alleged failure to pay his ordinary rate for public holidays in addition to his ordinary weekly wage. Mr Pettett said that Mr Stalgis failed to explain why the company disagreed with his assertion that he was entitled to be paid at the ordinary rate for public holidays in addition to his weekly wage when he was rostered off, and that no manager provided a reason during the progression of the dispute as to why the company disagrees with his interpretation of the Agreement and the 2020 Award.

[10] Mr Pettett reasoned that the Agreement is silent as to whether shiftworkers are entitled to public holiday pay when they are not rostered to work and do not work on a public holiday and that he is therefore entitled to be paid at the ordinary rate in addition to his weekly wage for all past and future public holidays occurring during the operation of the Agreement.

[11] Mr Geoff Hughes is the Manager of Terminal Operations. Mr Hughes has been this role for two years and has known Mr Pettett for eight years. He is responsible for managing the day-to-day operations of the Port Botany site, including all landside and waterside activities at the Terminal.

[12] Mr Hughes said the operational roster for Mr Pettett is set out in Part B, Schedule 3, specifically the "SICTL 12 Hour General Maintenance Roster" which requires employees to work an average of 32 ordinary hours per week. Mr Hughes said that Mr Pettett was not, and is not, required to work "ordinary hours" of 35 hours per week.

[13] Mr Hughes confirmed that Mr Pettett was not given any additional benefit when he was rostered off on public holidays and did not work.

The MUA's primary submissions

[14] The MUA submitted that the Agreement is silent as to whether shiftworkers are entitled to public holiday pay when they are not rostered to work and do not work on a public holiday. It argued that the 2020 Award clearly provides that "a shiftworker who is rostered off on the day on which a public holiday prescribed by clause 30 falls will be paid at the ordinary rate for the public holiday in addition to the ordinary weekly wage".

[15] The MUA submitted that clause 2 of the Agreement is clear and unambiguous, that it incorporates the terms of the 2020 Award and the terms of the 2020 Award apply unless there is an inconsistency between the terms and any express provision set out in the Agreement.

[16] The MUA submitted that Hutchisons is therefore required to pay Mr Pettett, and every other similarly situated shiftworker, their ordinary rates for each public holiday that they were rostered off and did not work.

Hutchisons' submissions

[17] Hutchisons submitted that Mr Pettett was at no time a “shiftworker” for the purposes of the 2020 Award because his ordinary hours were not 35 per week.

[18] Hutchisons relied on the “Hours of Work” clauses in both the 2020 Award and the earlier iteration of the Award, being the *Stevedoring Industry Award 2010 (the 2010 Award)*. In 2020 changes were made to the award as a result of the Modern Award review process (AM2014/90).

[19] In the 2010 Award the ordinary hours of work “for employees other than casual and guaranteed wage employees” was an average of 35 per week. In the 2010 Award, shiftwork was defined in clause 18.1 to mean “where the ordinary hours of work average 35 hours a week worked between the commencement of [certain times of the week].”

[20] In 2020 those provisions were replaced with the following:

“13.1 Ordinary Hours of Work

(a) The ordinary hours of work for a full-time employee are an average of 35 hours per week.

(b) The ordinary hours of work for a guaranteed wage or casual employee will be in accordance with clause 10 - Guaranteed wage employees and clause 11-Casual employees.

...

13.3 Ordinary hours for shiftworkers

(a) Shiftwork means where the ordinary hours of work are work between the commencement of [certain times of the week]...”

[21] Hutchison submitted that when clause 13.1 of the 2020 Award is understood in context and understood with reference to changes made to the 2010 Award, the requirement that shiftworkers work 35 hours per week (said to apply in the 2010 Award) has not been removed. Hutchison contends that the words “ordinary hours” in clause 13.3 mean 35 hours and therefore, so far as the award entitlement is concerned, only employees who work 35 hours per week can be shiftworkers.

[22] Hutchisons said that whilst the Agreement makes references to “shifts” and “shifts worked”, the Agreement does not define “shiftworker” generally but only for the purposes of annual leave (per clause 28.9).

[23] Therefore, Hutchison submitted, Mr Pettett and any other employee working 32 hours per week, cannot be considered shiftworkers under the 2020 Award.

[24] Alternatively, Hutchison submitted that clause 29 of the Agreement is a “comprehensive clause” that deals with entitlements to public holiday pay. In dealing with public holidays the Agreement provides no benefit to employees in circumstances where they are not rostered to work on a public holiday.

The MUA's reply submissions

[25] In its reply submissions the MUA submitted that Hutchison's reasoning is 'spurious' and flawed, that it is obvious that a shiftworker under the 2020 Award need not work a minimum of 35 hours per week.

[26] The MUA submitted that Hutchison's proposed interpretation of the 2010 Award would exclude all stevedores from the shiftworker entitlements under 2010 Award and the 2020 Award if those workers secure an ordinary working week of less than 35 hours in an agreement.

[27] In any event, the MUA argued, Hutchison's strained interpretation of the 2010 Award is immaterial because the terms of the 2010 Award were "expunged" by the making of the 2020 Award.

[28] Relying on the terms of the Agreement and the definition of shiftworker in the Agreement, the MUA said "it would be a curious result, indeed, if stevedores performing shift work were considered shiftworkers for purposes of annual leave, but something other than shiftworkers for purposes of public holiday pay."

[29] As to the argument that clause 29 conclusively deals with public holiday pay, the MUA said:

"While clause 29 of the Agreement deals with public holiday pay in myriad circumstances, it says nothing about whether employees are entitled to payment for public holiday pay when they are not rostered to work the public holiday. That being the case, it is necessary to consider the incorporated Award."

Interpretation principles

[30] In *AMWU v Berri Pty Limited* [2017] FWCFB 3005, (2017) 268 IR 285 ("Berri") the Full Bench distilled principles for interpreting enterprise agreements. Those principles are often quoted and are not controversial.

[31] The Federal Court has applied substantially the same approach. In *James Cook University v Ridd* [2020] FCAFC 123 at [65], (2020) 278 FCR 566, (2020) 298 IR 50 the Full Court of the Federal Court summarised the relevant principles applicable to the interpretation of an enterprise agreement:

- (i) The starting point is the ordinary meaning of the words, read as a whole and in context (*City of Wanneroo v Holmes* [1989] FCA 553; 30 IR 362, 378; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426 [53]; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 [197]).
- (ii) A purposive approach is preferred to a narrow or pedantic approach — the framers of such documents were likely to be of a "practical bent of mind" (*Kucks v CSR Limited* [1996] 66 IR 182, 184; *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 [16]; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 [197]). The interpretation "turns upon the language of the particular agreement, understood in the light of its industrial

- context and purpose” (*Amtcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241 [2]).
- (iii) Context is not confined to the words of the instrument surrounding the expression to be construed (*City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426 [53]). It may extend to “... the entire document of which it is a part, or to other documents with which there is an association” (*Short v FW Hercus Pty Ltd* [1993] FCA 51; 40 FCR 511, 518; *Australian Municipal, Administrative, Clerical and Services Union v Treasurer of the Commonwealth of Australia* [1998] FCA 249; 82 FCR 175, 178).
 - (iv) Context may include “... ideas that gave rise to an expression in a document from which it has been taken” (*Short v FW Hercus Pty Ltd* [1993] FCA 51; 40 FCR 511, 518).
 - (v) Recourse may be had to the history of a particular clause “Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form...” (*Short v FW Hercus Pty Ltd* [1993] FCA 51; 40 FCR 511, 518).
 - (vi) A generous construction is preferred over a strictly literal approach (*Geo A Bond and Co Ltd (in liq) v McKenzie* [1929] AR 499, 503-4; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426 [57]), but “Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties” (*City of Wanneroo v Holmes* [1989] FCA 553; 30 IR 362, 380).
 - (vii) Words are not to be interpreted in a vacuum divorced from industrial realities but in the light of the customs and working conditions of the particular industry (*City of Wanneroo v Holmes* [1989] FCA 553; 30 IR 362, 378-9; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 [197]).

[32] On review in *Ridd v James Cook University* (2021) 310 IR 109, [2021] HCA 32 at [17] the High Court observed:

“... Both parties sought to resolve any tension between the Enterprise Agreement and the Code of Conduct by interpretation of the Enterprise Agreement itself, particularly cl 14. In that process of interpretation, an important matter of context is the industrial nature of the instrument. Industrial instruments are not always drafted carefully by lawyers or professional drafters, and hence the literal words of a provision might more readily be understood to have a meaning other than their ordinary meaning if the context so suggests.”

[33] As the Full Court in *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536, [2018] FCAFC 131 summarised at [197]:

“The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context. The interpretation “turns on the language of the particular agreement, understood in the light of its industrial context and purpose.” The words are not to be interpreted in a vacuum divorced from industrial realities; rather, industrial agreements are made for various industries in the light of the customs and

working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament. To similar effect, it has been said that the framers of such documents were likely of a “practical bent of mind” and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced.”

[Citations omitted]

Consideration – the matters to be determined

[34] Given the way in which the parties constructed their respective arguments, the most expedient way to determine the dispute is to consider the central arguments in the following order:

- (a) are the shiftworker entitlements under the 2020 Award only available to employees who work an average of 35 ordinary hours per week?
- (b) If not, do the “express provisions” in the Agreement prevail over the relevant terms of the 2020 Award?

Consideration – ordinary hours for shiftworkers under the 2020 Award

[35] Hutchison’s primary argument is that none of the full-time employees of SICTL could be classified as shiftworkers under the 2020 Award because SICTL employees work 32 ordinary hours per week and the shiftwork provisions in the 2020 Award only apply to employees who work 35 hours per week. Therefore, Hutchison said, employees working 32 ordinary hours per week cannot ever be shiftworkers.

[36] Extracts from the following provisions are reproduced in Annexure A to this decision:

- (a) the Agreement:
 - i) clause 2 (Effect of the Agreement);
 - ii) clause 16 (Remuneration);
 - iii) clause 27 (Overtime);
 - iv) clause 29 (Public Holidays); and
 - v) Schedule 3 of Part B (SICTL Maintenance Rosters);
- (b) the 2020 Award:
 - i) clause 2 (Definitions);
 - ii) clause 8 (Types of Employment);
 - iii) clause 9 (Full-time employees);
 - iv) clause 10 (Guaranteed wage employees);
 - v) clause 13 (Ordinary Hours of Work);
 - vi) clause 21 (Overtime);
 - vii) clause 24 (Annual Leave); and
 - viii) clause 30 (Public Holidays).
- (c) The 2010 Award:
 - i) clause 17 and
 - ii) clause 18 of the 2010 Award.

[37] It is not necessary to provide a complete analysis of the relevant provisions of the 2020 Award, neither party did so in their submissions, suffice to say:

- (a) there are three types of employment under the 2020 Award: full-time, guaranteed wage and casual (clause 8.1);
- (b) guaranteed wage employees are guaranteed a minimum number or an average number of full shifts each week (clause 10.1);
- (c) ordinary hours for full-time employees are an average of 35 per week (clause 13.1 (a));
- (d) shiftwork is defined by reference to ordinary hours of work, but not any particular number of ordinary hours (clause 13.3);
- (e) if a public holiday falls during a period of annual leave another day is added to the annual leave (clause 24.5);
- (f) some provisions differentiate between day workers and shiftworkers (see clauses 15.1 and 15.2);
- (g) every provision in the award regarding shiftworkers refers to “employees” who work shiftwork or similar. None of these provisions state or imply that shiftwork can only be worked by full-time employees; and
- (h) clause 21.5 expressly refers to guaranteed wage employees who work shiftwork and clause 21.6 refers to “casual shiftworkers” in contradistinction to casual employees who are day workers.

[38] Hutchison relies on the conditions of the *Stevedoring Industry Award 2010*; including the previous definition of shiftworker that refers to ordinary hours of work averaging 35 per week. Hutchison submitted:

“SICTL submits that the net result of the changes that occurred to the SIA in February 2020 was not the deletion of the 35 hour requirement for "shiftworkers" but the removal of an apparent duplication in the [2010 Award]. The 2020 Changes, however, did not change the definition of "shiftworker". Ordinary hours for "shiftworkers" in the [2020 Award] remain linked to the 35 hour a week requirement.”

[39] Hutchison did not provide any materials from the Modern Award review process to support this assertion and I have assumed therefore that none of the materials support its argument. The Agreement was signed in July 2021 and was approved by the Fair Work Commission on 9 August 2021 - that being more than one year after the award review process had completed.

[40] The terms of the 2020 Award are reasonably clear. Workers engaged in any of the three categories of employment can be shiftworkers under the 2020 Award. There is no basis in the text of the award to limit the shiftwork provisions to only full-time employees. In fact the text of the Award is consistent with the possibility that guaranteed wage employees or casual employees could be engaged as shiftworkers.

[41] The terms of the 2010 Award are not as clear. For present purposes I am prepared to assume that only employees working 35 hours per week were eligible to be shiftworkers under the terms of the 2010 Award.

[42] The duplication said to have been removed in 2020 was that both the ordinary hours of work clause and the shiftwork clause in the 2010 Award referred to 35 ordinary hours per week. The amendments in 2020 removed the reference to 35 hours in the shiftwork clause, which could be understood to have removed a duplication. However the 2020 process also varied the “Ordinary Hours of Work” clause to differentiate between full-time, guaranteed wage employees and casual employees. The net effect of these changes is that:

- (a) full-time employees under the 2020 Award work 35 ordinary hours per week;
- (b) guaranteed wage employees and casual employees have other arrangements regarding ordinary hours;
- (c) shiftworkers are defined by the times at which they work their ordinary hours (be it 35 or less);
- (d) the shiftwork and overtime clauses include express provisions dealing with fulltime shiftworkers by reference to their ordinary hours of work; and
- (e) the shiftwork and overtime clauses include express provisions dealing with guaranteed wage employees and casual employees who are shiftworkers by reference to their ordinary hours of work.

[43] As such I reject Hutchison’s contention that the shiftworker provisions of the 2020 Award do not apply to employees who work an average of 32 ordinary hours per week.

Consideration – the express provisions and inconsistency

[44] I therefore must determine whether the “express provisions” in the Agreement prevail over the relevant public holiday provisions of the 2020 Award as per clause 2 of the Agreement. Quite obviously the public holiday provisions of the 2020 Award include a benefit for shiftworkers who are rostered off on a public holiday and who do not work. The public holiday provisions of the Agreement do not contain any express benefit to shiftworkers in the same circumstances.

[45] Three of the four possible scenarios for public holidays (excluding annual leave) are expressly covered by clause 29 and/or the overtime provisions in clause 27 of the Agreement:

- (a) an employee is rostered to work and does work (clauses 29.12, 29.13 and 29.14);
- (b) an employee is rostered to work and does not work (clause 29.15); and
- (c) an employee is not rostered to work but does work (clause 27.8).

[46] The fourth scenario, about which clause 29 is silent, is that an employee is not rostered to work on a public holiday and does not work.

[47] Only one of the following two conclusions can be correct:

- (a) the terms of the Agreement are silent about this fourth scenario because the parties agreed not to include any additional entitlement if a shiftworker is rostered off on a public holiday and does not work; OR
- (b) the terms of the Agreement are silent about the fourth scenario because the parties agreed that clause 2 of the Agreement would incorporate the corresponding provision of the 2010 Award and would therefore confer an additional entitlement if a shiftworker is rostered off on a public holiday.

[48] The MUA essentially relies on a ‘line by line’ comparison between the Agreement and the 2020 Award. However the public holiday clause in the Agreement is not easily compared to the public holiday clause in the 2020 Award.

[49] The public holiday provisions in the 2020 Award defer to the NES and address only a small number of matters that supplement the NES. The NES do not require any particular payments to be made to employees who work on a public holiday (ss.114-116) whereas clause 30.2 of the 2020 Award requires employers to pay overtime rates to employees who work on a public holiday, including public holiday-specific overtime rates. The NES do not include any entitlement if an employee is not due to work on a public holiday whereas clause 30.3 requires payment of an additional amount, but only for shiftworkers.

[50] By contrast the public holiday provisions in the 2020 Agreement are somewhat self-contained. The relevant provisions are mostly found in clause 29 (reproduced in full in the annexure to this decision). Subclauses 29.1 to 29.11 are primarily concerned with the days that are to be treated as public holidays and the circumstances under which employees may work or not work on particular public holidays. The balance of clause 29 confers entitlements upon employees who work on a public holiday (clauses 29.12 - 29.14), who are rostered on but do not work (clause 29.15) or who are on annual leave when a public holiday falls (clause 29.16).

[51] All of these provisions must be understood in the context that employees are engaged on annual salary arrangements (clause 16.1) that are inclusive of ordinary rates of pay and shift premiums (clause 16.2). Some benefits under the Agreement are “payable” in addition to the annual salary “when worked in any shift” (clause 16.3). Most notably, “Public holidays” is included in the list of additional benefits (clause 16.3.2).

[52] Each of the provisions of the NES and of clause 30 of the Award have been dealt with in the Agreement except rostered days off for a shiftworker on a public holiday (clause 30.3) and outports (30.4). The outport provisions are presumably irrelevant for SICTL and BCT. The additional award benefit if a public holiday falls during annual leave (clause 24.5 of the 2020 Award) has been dealt with and modified in clause 29 of the Agreement (see clause 29.16).

[53] The fact that every relevant provision has been dealt with in the Agreement, except one, leads to the only available conclusion that the intention of clause 29 of the Agreement is to provide a comprehensive set of provisions relating to public holidays, subject to the NES. As such the omission of the additional provisions dealing with rostered days off for a shiftworker on a public holiday reflects the intention of the Agreement that there be no additional benefit for [salaried] shiftworkers in those circumstances.

[54] The dispute focused on Mr Pettett, who is employed as an electrical tradesperson in Hutchison’s maintenance department. The “SICTL 12 Hour General Maintenance Roster” applies to Mr Pettett as does the annualised salaries provisions in Schedule 3 of Part B of the Agreement. Mr Pettett’s circumstances illustrate how the terms of the Agreement operate and interrelate with the 2020 Award.

[55] Maintenance workers covered by the Agreement all work 7-day rosters (see Schedules 3 and 4 of Part B of the Agreement). Some but not all maintenance workers work 12-hour shifts.

[56] The annual salaries paid to maintenance workers vary according to the kind of roster they work. The annual salaries for maintenance workers on the 12 Hour General Maintenance Roster at SICTL are approximately 18% higher than the corresponding salary for workers on the SICTL Day Maintenance Roster.

[57] The SICTL 12 Hour General Maintenance Roster requires each maintenance employee to work 14 days per 5 week/35 day cycle. Each day is obviously very long, but under this roster maintenance employees work on average 2.8 days per week. Maintenance workers on this roster are mathematically more likely than not to be rostered off on any particular day, including any particular public holiday.

[58] The other maintenance rosters are to similar effect: the BCT 12 Hour General Maintenance Roster requires maintenance employees to work an average of 2.8 days per week and the SICTL Day Maintenance Roster requires employees to work an average of 3 days per week. Only the SICTL Maintenance Storeperson Roster and the BCT Maintenance Storeperson Roster require storepersons to work an average of 4.5 days per week.

[59] The salaries attached to each maintenance worker classification and maintenance roster cater for and compensate for the number of days that workers on each roster do and do not work. Clause 29.14 of the Agreement, which only applies to maintenance workers, confirms this understanding. Clause 29.14 confers an additional benefit on maintenance workers (time off in lieu) if they work on a public holiday – which is consistent with maintenance workers not otherwise receiving a benefit over and above their annualised salary if they are not rostered to work on a public holiday.

[60] Clause 2 of the Agreement refers to “inconsistency” between “an express provision set out in this agreement” and the 2020 Award. The applicant’s argument relies on the absence of an express provision about the fourth scenario.

[61] In my view the key term in clause 2 is “inconsistency”. The express terms of the Agreement, particularly clauses 16, 27, 29 and Part 3 of Schedule B, cover with significant specificity the terms and conditions relating to public holidays.

[62] The Agreement and the 2020 Award provisions are different in several respects and indeed deploy different approaches for dealing with public holiday entitlements (supplementary v comprehensive). The public holiday provisions in the Agreement, that include and do not include certain entitlements, are relevantly inconsistent with the 2020 Award provisions and therefore prevail over the award provisions.

[63] One final matter to address is the extent of the inconsistency between the Agreement and the 2020 Award. For the same reasons I am satisfied that the intention of the Agreement is to cover all conditions relating to public holidays, subject of course to limitations regarding the NES provisions. As such, the extent of the inconsistency for the purposes of clause 2 of the Agreement, is that the public holiday provisions in the Agreement wholly displace the public holiday provisions of the 2020 Award.

[64] The question posited for determination is:

“Is SICTL obligated by the terms of the *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021*, and the *Stevedoring Industry Award 2020*, to pay shiftworkers who are rostered off on the day on which a public holiday prescribed by clause 30 of the EA falls at the ordinary rate for the public holiday in addition to their ordinary weekly wage?”

[65] For the above reasons I find that the answer to this question is “no”.



DEPUTY PRESIDENT

Hearing details:

Determined on the papers.

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ANNEXURE A

Excerpts from the *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021*

2. EFFECT OF THE AGREEMENT

- 2.1 This Agreement incorporates the terms of the Stevedoring Industry Award (SIA) 2020, (the Award). In the event of any inconsistency between any terms of the Award (as incorporated into this Agreement) and an express provision set out in this Agreement, the express provision in this Agreement shall prevail to the extent of any such inconsistency. Nothing in this clause shall operate so as to diminish the entitlements of Employees as established under any National Employment Standards (NES) referenced in the Award.

...

16. REMUNERATION

- 16.1 Notwithstanding any of the terms of this Agreement a Permanent Full Time Employee will be employed on the basis of an Annual Salary.
- 16.2 The Annual Salary for a Permanent Full Time Employee is inclusive of the:
- 16.2.1 Ordinary Rate of Pay of the appointed Level
 - 16.2.2 Shift premiums that would otherwise be payable in accordance with the provisions of this Agreement.
- 16.3 Where a Permanent Full Time Employee is engaged on an Annual Salary, the following benefits will be payable in addition to the Annual Salary in accordance with this Agreement when worked in any shift:
- 16.3.1 Higher duty payments (upgrades)
 - 16.3.2 Public Holidays
 - 16.3.3 Meal Allowance
 - 16.3.4 Shift Extensions or Pre-Starts
 - 16.3.5 Overtime

...

27. OVERTIME

27.8 For Permanent Full Time Employees, work performed on rostered OFF shifts, Shift Extensions for a rostered OFF shift and Shift Pre-Starts will be paid at the following multiples of the Secondary Rate (Clause 16.10) appropriate to the work being performed on the overtime shift:

27.8.1 Monday to Saturday - double time

27.8.2 All shifts on a Sunday and Public Holiday day and evening shifts - double time and a half

27.8.3 Public Holiday night shifts - triple time.

...

29. PUBLIC HOLIDAYS

29.1 The following public holidays will be deemed to be voluntary public holidays:

29.1.1 Good Friday

29.1.2 Anzac Day

29.1.3 Labour Day

29.1.4 Picnic Day

29.2 Nothing prevents any Employee from declining or volunteering to work on these voluntary public holidays, providing that Employees can be compelled to work where insufficient Employees with the necessary skills volunteer to the extent required to cover ship working requirements on that day.

29.3 Employees shall be deemed to be available to work voluntary public holidays unless they make application to be off.

- 29.4 On Christmas Eve and Christmas Day the Company will not conduct Operations between the end of day shift on Christmas Eve and the commencement of day shift on Boxing Day.
- 29.5 An Employee may however be required to work during this period in the case of marine casualties and reefer monitoring.
- 29.6 The option to be free from duty for Permanent Part Time Employees shall not constitute a counted shift within rostering arrangements.
- 29.7 Permanent Part Time Employees or Supplementary Employees rostered to a shift on 31 December may be allocated to day shift that day if required by the Company, to perform work on that shift.
- 29.8 The following public holidays will not be deemed voluntary. Nothing prevents any Employee from declining or volunteering to work on these public holidays providing that Employees can be compelled to work where insufficient Employees with the necessary skills volunteer to the extent required to cover ship working requirements on that day:
- 29.8.1 New Year's Day
 - 29.8.2 Australia Day
 - 29.8.3 Easter Saturday
 - 29.8.4 Easter Sunday
 - 29.8.5 Easter Monday
 - 29.8.6 Queen's Birthday
 - 29.8.7 Royal Show Day (Brisbane)
 - 29.8.8 Christmas Eve from 1800 (Brisbane)
 - 29.8.9 Boxing Day
- 29.9 Employees may be required to work on those days in accordance with Clause 29.8.

- 29.10 In any site where an additional holiday is gazetted beyond the above listed Public Holidays, Employees may be required to work on that day.
- 29.11 Where the relevant State government gazettes a substitute Public Holiday, the voluntary day or public holiday arrangements will apply on the substitute day, unless otherwise agreed at a local level. The only exceptions to this are Anzac Day, in which case the holiday will be observed on 25 April, and Christmas Day where an Employee is required to work in accordance with Sub-Clause 29.8, in which case Employees required to work will be paid the voluntary holiday rate on Christmas Day and not on the substitute or alternative holiday.
- 29.12 Employees who work on a Public Holidays shall be paid at the Award public holiday rates of pay.
- 29.13 Operations Employees who work on a voluntary public holiday shall also be entitled to a day in lieu.
- 29.14 Maintenance Employees will accrue a day (Time Off in Lieu) in respect of any shift worked on a public holiday (or thereof).
- 29.15 Where an Employee is rostered to work a Public Holiday and is not required to work on a Public Holiday or makes themselves unavailable (voluntary Public Holiday or otherwise), they shall be paid their normal salary and the shift shall be counted as a shift worked.
- 29.16 Where a public holiday falls during an Employee's period of annual leave, the Employee shall receive a day in lieu for the public holiday.

Part B: Schedule 3 - SICTL Maintenance Rosters

1. SICTL MAINTENANCE

- 1.1 The rostering and allocation requirements detailed in this Schedule will apply in addition to the provisions of Clause 26 (Allocation and Working Arrangements), subject to skills.

1.2 SICTL 12 HOUR GENERAL MAINTENANCE ROSTER

Week	MON	TUES	WED	THURS	FRI	SAT	SUN
1	N	N	N	OFF	OFF	OFF	OFF
2	D	D	D	OFF	OFF	OFF	OFF
3	OFF	OFF	OFF	N	N	N	N
4	OFF	OFF	OFF	D	D	D	D
5	OFF	OFF	OFF	OFF	OFF	OFF	OFF

Excerpts from the *Stevedoring Industry Award 2020*

2. Definitions

In this award, unless the contrary intention appears:

day shift means a shift which commences between 6.00 am and 9.00 am.

day work means work performed by employees other than shiftworkers, where the ordinary hours of work are worked between 7.00 am and 5.00 pm Monday to Friday inclusive.

7 day continuous shiftwork means work performed on shifts on each of the 7 days of the week and may be worked over one, 2 or 3 shifts on each day.

shiftwork employee means a person who performs shiftwork in accordance with clause 0 of this award.

...

8. Types of employment

8.1 Employees under this award will be employed in one of the following categories:

- (a) full-time;
- (b) guaranteed wage; or
- (c) casual.

8.2 The type of employment must be established at or prior to the commencement of employment.

9. Full-time employees

A full-time employee is engaged to perform a full week's work each week.

10. Guaranteed wage employees

10.1 A guaranteed wage employee is an employee who is guaranteed a minimum number or an average number of full shifts each week, or instead of that engagement, is provided the equivalent payment.

10.2 For the purposes of leave accruals under the [NES](#), a guaranteed wage employee's ordinary hours of work will be deemed to be the hours actually worked by the employee over the qualifying period for the leave.

...

13. Ordinary hours of work

13.1 Ordinary hours of work

- (a) The ordinary hours of work for a full-time employee are an average of 35 hours per week.
- (b) The ordinary hours of work for a guaranteed wage or casual employee will be in accordance with clause 0—10. Guaranteed wage **employees** and clause **Error! Reference source not found.**—**Error! Reference source not found.**

...

13.3 Ordinary hours for shiftworkers

- (a) Shiftwork means where the ordinary hours of work are work between the commencement of night shift on Sunday and either:
 - (i) the end of the evening shift on the following Friday;
 - (ii) the end of the evening shift on the following Saturday; or
 - (iii) the end of the evening shift the following Sunday (which is 7 day continuous shiftwork).
- (b) There are 3 types of shifts:
 - (i) **day shift** commences between 6.00 am and 9.00 am;
 - (ii) **evening shift** commences between 1.00 pm and 5.00 pm; and
 - (iii) **night shift** commences at or after 10.00 pm.
- (c) **7 day continuous shiftwork** means work performed on shifts on each of the 7 days of the week and may be worked for one, 2 or 3 shifts on each day.
- (d) Unless otherwise agreed in accordance with clause **Error! Reference source not found.**, the normal length of each shift will be 7 hours.
- (e) Except in the case of emergency:
 - (i) an employee who has worked a night shift will not be required to work the next succeeding evening shift; and
 - (ii) an employee who has worked a day shift will not be required to work the next succeeding night shift.
- (f) Where 12 hour shifts are introduced, the ordinary hours must not exceed an average of 35 hours per week. Twelve hour shifts are inclusive of meal breaks and rest periods.

...

21. Overtime

21.1 Definition of overtime—day work employees

For a day work employee overtime is any time worked:

- (a) outside the span of the employee's ordinary hours as defined in clause **Error! Reference source not found.**; or
- (b) in excess of an average of 35 hours per week.

21.2 Definition of overtime—shiftwork employees

Overtime work is any work performed:

- (a) before or after a shift during which the employee's ordinary hours of work are performed; or
- (b) in excess of an average of 35 hours per week.

...

21.5 Overtime rates—full-time and guaranteed wage employees—shiftwork employees

- (a) A full-time or guaranteed wage shiftwork employee required to work overtime that is continuous with the commencement or conclusion of a shift in which their ordinary hours of work are performed will be paid **100%** of the ordinary hourly rate in addition to the rate appropriate to the shift in which the overtime is worked.
- (b) A full-time or guaranteed wage shiftworker required to work overtime that is not continuous with the commencement or conclusion of a shift in which their ordinary hours of work are performed will be paid:
 - (i) **200%** of the ordinary hourly rate for Monday to Saturday;
 - (ii) **250%** of the ordinary hourly rate for Sunday;
 - (iii) **250%** of the ordinary hourly rate for day and evening shifts worked on a public holiday; and
 - (iv) **300%** of the ordinary hourly rate on a night shift on a public holiday.

21.6 Overtime rates—casual employees—shiftwork employees

- (a) A casual shiftworker required to work overtime that is continuous with the commencement or conclusion of a shift in which their ordinary hours of work are performed will be paid **125%** of the ordinary hourly rate in addition to the rate appropriate to the shift in which the overtime is worked.
- (b) A casual shiftworker required to work overtime that is not continuous with the commencement or conclusion of a shift in which their ordinary hours of work are performed will be paid:
 - (i) **250%** of the ordinary hourly rate for Monday to Saturday;
 - (ii) **312.5%** of the ordinary hourly rate for Sunday;
 - (iii) **312.5%** of the ordinary hourly rate for day and evening shifts worked on a public holiday; and
 - (iv) **375%** of the ordinary hourly rate on a night shift on a public holiday.

NOTE: The overtime rates for casual shiftworkers have been calculated by adding the casual loading prescribed by clause **Error! Reference source not found.** to the ordinary hourly rate before applying the overtime rates for shiftworkers prescribed by clauses (a) and (b).

...

24. Annual leave

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24.5 Public holidays falling during annual leave

- (a) If a public holiday falls during an employee's annual leave, and is on a day which the employee would otherwise have worked as ordinary time, then:
 - (i) an extra day should be added to the employee's annual leave; or
 - (ii) an extra day may be taken separately at a mutually agreed time within the following 12 months.
- (b) The employee will not receive the extra day instead of the public holiday unless:
 - (i) the employee is available to start work at the next rostered shift on the first working day after their annual leave ends; or
 - (ii) the employee has reasonable cause for not being available.
- (c) If a public holiday is a part-day public holiday, then clause 0 applies on a pro-rata basis for the number of ordinary hours on the part-day public holiday.

30. Public holidays

30.1 Public holidays are provided for in the [NES](#).

30.2 Where an employee works on a public holiday they will be paid in accordance with clause **Error! Reference source not found.** or (b).

30.3 Rostered day off for a shiftworker on a public holiday

A shiftworker who is rostered off on the day on which a public holiday prescribed by clause 0 falls will be paid at the ordinary rate for the public holiday in addition to the ordinary weekly wage.

30.4 Outports

An employee required to work in an outport on a day on which a public holiday occurs in their home port will be paid public holiday rates for such work. An employee who works in an outport on a day which is a public holiday in the outport but is not a public holiday in the employee's home port will be paid at the rate applicable in the employee's home port.

30.5 Day instead of holiday for 7-day continuous shiftworkers

- (a) Tradespersons who are 7-day continuous shiftworkers will accrue a day instead of a holiday to be taken by mutual agreement between the employer and employee in respect of any shift worked on a public holiday.
- (b) If a public holiday is a part-day public holiday, then clause (a) applies on a pro-rata basis for the number of ordinary hours on the part-day public holiday.

Excerpts from the *Stevedoring Industry Award 2010*

17. Ordinary hours of work and rostering

17.1 The ordinary hours of work for employees other than casual and guaranteed wage employees will be an average of 35 hours per week.

17.2 Travelling and washing time

Travelling and washing time, where applicable, will be paid and taken before or after the normal commencing or finishing times of a shift or the usual working hours and will be paid at the rate applicable to the shift.

17.3 Day work

An employer may introduce day work arrangements in accordance with this clause.

- (a) **Day work** means work performed by employees, other than shiftworkers, where the ordinary hours of work are worked between 7.00 am and 5.00 pm, Monday to Friday inclusive.
- (b) An employee who is working day work is entitled to an unpaid meal break of 30 minutes duration and a paid rest period of 15 minutes duration except in the case of an employee engaged in the stevedoring industry on 25 November 1991 who maintain their entitlement to paid meal breaks and rest periods and an additional week's annual leave.
- (c) An employee working day work may not work in a relieving capacity for shiftworkers except by agreement with the individual employee.
- (d) A day work employee required to continue working during a break will be paid overtime at the rate of the ordinary rate in addition to the rate applicable to the hours worked. The employee will continue to be paid overtime until the break is taken.
- (e) Where a day work employee is required to work overtime on a Saturday or Sunday or a public holiday, a meal allowance of \$19.80 will be paid unless the employer directly provides a reasonable hot meal.

18. Shiftwork

18.1 **Shiftwork** means where the ordinary hours of work average 35 hours a week worked between the commencement of night shift Sunday and either:

the conclusion of the evening shift on the following Friday;

the conclusion of the evening shift on the following Saturday; or

the conclusion of the evening shift the following Sunday (which is seven day continuous shiftwork).

18.2 Subject to the qualification in clause (a)(ii), the normal length of each shift will be seven hours.

18.3 There are three types of shiftwork:

- (a) **day shift** commences between 6.00 am and 9.00 am;
- (b) **evening shift** commences between 1.00 pm and 5.00 pm; and
- (c) **night shift** commences at or after 10.00 pm.

18.4 **Seven day continuous shiftwork** means work performed on shifts on each of the seven days of the week and may be worked over one, two or three shifts on each day.

18.5 **Payment for shiftworkers**

All time worked will be paid as follows:

- (a) day shift on Monday to Friday—no additional payment;
- (b) day shift on Saturday—double the ordinary rate;
- (c) day shift on Sunday—two and a half times the ordinary rate;
- (d) evening shift on Monday to Friday—one and a half times the ordinary rate;
- (e) evening shift on Saturday—double the ordinary rate;
- (f) evening shift on Sunday—two and a half times the ordinary rate;
- (g) night shift on Sunday to Friday—double the ordinary rate; and
- (h) night shift on Saturday—two and a half times the ordinary rate.

18.6 An employee who, by direction of the employer, reports at the commencing time of the day shift but is not employed and is instructed to report back for work on the following evening or night shift will be paid for four hours at the ordinary rate to compensate for reporting at the commencement of the day shift in addition to their weekly wage.

18.7 An employee who, by direction of the employer, reports for work at the commencing time of the evening or night shift will be paid the shift penalty for the full shift.

18.8 An employee who, by direction of the employer, reports for work on a Saturday, Sunday or public holiday will be paid for a minimum of seven hours at the appropriate rate.

18.9 Except in the case of emergency:

- (a) an employee who has worked a night shift will not be required to work the next succeeding evening shift; and
- (b) an employee who has worked a day shift will not be required to work the next succeeding night shift.

18.10 Where 12 hour shifts are introduced, the ordinary hours must not exceed an average of 35 hours per week. Twelve hour shifts are inclusive of meal breaks and rest periods.

18.11 When an employee working on the evening shift ceases duty at a time when the usual or reasonable means of conveyance are not available, the employer will pay or alternatively reimburse the cost associated with providing such conveyance, provided always that where the employer provides such conveyance, the obligation with respect to payment or reimbursement will have been fulfilled.

18.12 Meal and rest periods for shiftworkers

- (a) Shiftwork employees working a seven hour shift are entitled to a 45 minute paid rest break or breaks during the ordinary hours of work.
- (b) Shiftwork employees working an eight hour shift are entitled to a 60 minute paid rest break or breaks during the ordinary hours of work.
- (c) Where a shiftwork employee is required to work more than one hour's overtime prior to the commencement of or following the conclusion of their normal starting or finishing time, the employee is entitled to an additional 15 minute paid rest break.
- (d) Meal breaks and rest periods will be taken at a time and manner agreed between the employer and the employee and may be staggered.
- (e) An employee required to continue working during a rest break will be paid overtime at the rate of the ordinary rate in addition to the rate applicable to the shift worked. The employee will continue to be paid overtime until the break is taken.

18.13 Meal allowance

- (a) A shiftwork employee is entitled to be paid a meal allowance in addition to overtime payments (unless a reasonable hot meal has been provided) if:
 - (i) an employee works more than an hour after or before their normal finishing or starting time including where a double header is worked; or
 - (ii) an employee is required to work overtime on a day shift on a Saturday or any shift on a Sunday or public holiday.
- (b) The meal allowance is \$14.17.

18.14 Rostering arrangements

- (a) An employer may roster employees to perform shiftwork in accordance with this award.
- (b) The employer may agree with the union or a majority of employees at the workplace the following:
 - (i) five, six or seven day shift arrangements with either irregular or regular rostering;
 - (ii) changes to the length of each shift provided that the ordinary hours of work will not exceed a weekly average of 35 hours;
 - (iii) where a seven day continuous shiftwork roster is to be worked inclusion in the ordinary hours of work of shifts worked on holidays, as prescribed by clause **Error! Reference source not found.**, as well as Saturdays and Sundays, provided that payment for such shifts is in accordance with this award;
 - (iv) provisions for the timing of meal breaks or rest periods;
 - (v) provisions for the extension of shifts provided that all such extensions will be paid at overtime rates;
 - (vi) notification and cancellation arrangements; and
 - (vii) staggering of shift start and finish times.
- (c) No rostering arrangement will require an employee to change shifts if the change would necessitate the working of two consecutive shifts, or to work more than one shift on any one day.

18.15 Day and shiftwork interchange

- (a) Where day work has been implemented, the employer may change employees from day work to shiftwork or from shiftwork to day work on seven days notice.
- (b) Where an employee is changed from shiftwork to day work, they will not forfeit any shiftwork conditions including paid meal breaks and additional annual leave provided in clauses 0 to 0.