[2026] FWCFB 44

The attached document replaces the document previously issued with the above code on 23 February 2026.

References to the respondent have been amended to correct a typographical error.

Associate to Vice President Gibian

Dated 27 March 2026

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Construction, Forestry, and Maritime Employees Union
v
Sydney International Container Terminals Pty Limited trading as Hutchison Ports Australia
(C2025/3124)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT SLEVIN
DEPUTY PRESIDENT FAROUQUE

SYDNEY, 23 FEBRUARY 2026

Appeal against decision [2025] FWC 923 of Deputy President Easton on 2 April 2025 – Dispute referred to the Commission under dispute resolution provision of enterprise agreement – Whether shiftworkers entitled to a day in lieu of public holiday if not rostered to work – Stevedoring Industry Award 2020 incorporated into agreement – Whether inconsistency between Stevedoring Industry Award 2020 and the express terms of the agreement – Permission to appeal not required – No inconsistency between Stevedoring Industry Award 2020 and the terms of the agreement – Appeal allowed.

Introduction

[1] The appellant, the Construction, Forestry and Maritime Employees Union through its Maritime Union of Australia Division (the **MUA**), seeks permission to appeal under s 604 of the *Fair Work Act 2009* (Cth) (the **Act**) and, if permission is granted, appeals a decision of Deputy President Easton dated 2 April 2025.[1] The respondent to the appeal is Sydney International Container Terminals Pty Limited (**SICTL**).

[2] The decision of the Deputy President arose from the arbitration of a dispute under s 739 of the Act and clause 14 (Issue Resolution) of the *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021* (the **Agreement** or the **Hutchison Agreement**). The Agreement is an enterprise agreement made under the Act and clause 14 permits the Commission to deal with a dispute by arbitration.

[3] The MUA is covered by the Agreement. Two employers are covered by the Agreement, being SICTL and Brisbane Container Terminal Limited (**BCT**). SICTL employs staff under the Agreement to perform stevedoring duties at Port Botany. BCT employs staff under the Agreement to perform stevedoring duties at the Port of Brisbane. SICTL and BCT are related bodies corporate. The Agreement refers to both entities as Hutchison Ports Australia or HPA. The Deputy President's reasons refer to SICTL and BCT jointly as Hutchison. In this decision, we will refer to SICTL as the employer.

Decision of the Deputy President

[4] The dispute before the Deputy President concerned the proper payment due under the Agreement to a shiftworker rostered off on a public holiday. The dispute was raised through the issue resolution process in the Agreement by Ross Pettett, a member of the MUA who is covered by the Agreement. Mr Pettett is employed by SICTL in the Maintenance Department. Mr Pettett is employed on the SICTL 12 Hour General Maintenance Roster, paid an annual salary and required to work 32 hours per week.

[5] The essence of the MUA's claim was that the Agreement incorporated clause 30.3 of the *Stevedoring Industry Award 2020* (the **Stevedoring Award**), which provided that a 'shiftworker' rostered off on a public holiday will be paid at the ordinary rate of pay for the public holiday in addition to the ordinary weekly wage. Broadly speaking, clause 2 of the Agreement provided for incorporation of the Stevedoring Award, except to the extent of inconsistency. We set out the full terms of clause 2 below.

[6] The Deputy President arbitrated the dispute 'on the papers' by answering a question posed to him by the MUA. The question was in the following terms:

> 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?

[7] The Deputy President answered the question in the negative. In doing so, the Deputy President determined that a shiftworker rostered off on a public holiday was not entitled to the ordinary rate for the public holiday in addition to their ordinary weekly wage.

[8] There were two issues dealt with by the Deputy President in reaching his ultimate conclusion:

(a) Firstly, whether the reference to 'shiftworker' in clause 30.3 of the Stevedoring Award, meant a person who worked an average of 35 hours per week; and

(b) Secondly, if not, whether the express provision of the Agreement concerning public holidays, particularly clause 29 (Public Holidays) 'covered the field' in relation to the entitlements of employees in respect of public holidays, meaning that clause 30.3 of the Stevedoring Award was not incorporated by clause 2 of the Agreement on grounds of inconsistency.

[9] In relation to the first issue, the Deputy President determined that the meaning of '*shiftworker'* under the Stevedoring Award was not limited to an employee who worked an average of 35 hours per week. In doing so, the Deputy President answered the first issue in favour of the MUA. In that regard, and as we have noted, Mr Pettett worked a 32 hour week under the Agreement.

[10] In relation to the second issue, the Deputy President determined that clause 29 (Public Holidays) of the Agreement constituted a comprehensive set of conditions relating to public holidays and the omission of an entitlement in relation to payment for a shiftworker on a rostered day off on a public holiday reflected an intention that there would not be any additional benefit for a shiftworker in that circumstance.[2] Furthermore, the Deputy President considered that clause 29 together with other clauses of the Agreement, in particular clauses 16, 27, 29 and Part 3 of Schedule B, cover with significant specificity the terms and conditions relating to public holidays, which evinced an intention of the Agreement as a whole to cover all conditions relating to public holidays, subject to the limitations regarding the NES provisions.[3] For the purposes of clause 2 of the Agreement, the Deputy President determined that the public holiday provisions in the Agreement, wholly displaced the public holiday provisions in the Stevedoring Award.[4] In doing so, the Deputy President answered the second issue in favour of SICTL. The Deputy President's determination on the second issue caused him to ultimately answer in the negative the question posed by the MUA.

[11] The MUA appeal asserts error in the Deputy President's reasoning in respect of the second issue. The grounds of appeal are as follows:

> *The Commission:*
>
> *a. misconstrued clause 2 of the Hutchinson (sic) Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021;*
>
> *b. misapplied the applicable principles for construing an enterprise agreement;*
>
> *c. erred in making findings at [53] of the "intention of the Agreement" when the record is void of any evidence of the parties' intention; and*
>
> *d. erred in finding, and failed to give proper reasons for, the conclusions:*
>
> *i. in [62] that the public holiday provisions in the Agreement are inconsistent with the Stevedoring Industry Award 2020; and*
>
> *ii. in [63] that the intention of the Agreement is to cover all conditions relating to public holidays and that the public holiday provisions in the Agreement wholly displace the public holiday provisions of the Award.*
>
> *iii. in [64] – [65] that SICTL is not obligated by the terms of the Agreement and the Award to pay shiftworkers who are rostered off on the day on which a public holiday falls at the ordinary rate for the public holiday in addition to their ordinary weekly wage.*

Permission to appeal

[12] In an appeal under s 604, a Full Bench may only exercise its powers on appeal if there is error on the part of the primary decision-maker. Ordinarily under s 604 of the Act, a person aggrieved must first obtain permission to appeal a decision of a primary decision-maker. The principles relating to a grant of permission are well established.

[13] When exercising arbitral powers under a dispute resolution term in an enterprise agreement and s 739 of the Act, the Commission is exercising a power of private arbitration. Consequently, the underlying enterprise agreement may modify or remove requirements ordinarily applicable to an appeal under s 604, including the requirement that permission to appeal must be obtained.[5]

[14] The matter of whether an enterprise agreement removes the requirement for permission is a question of the proper construction of the agreement. Clause 14 of the Agreement is relevantly in the following terms:

> **Step 3 Fair Work Commission (FWC)**
> 14.4 If the matter cannot be resolved at National Level, either Party may refer the matter to the FWC. The FWC may deal with the dispute in 2 stages:
> 14.4.1 The FWC will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and
> 14.4.2 If the FWC is unable to resolve the dispute at the first stage, the FWC may then arbitrate the dispute.
> 14.5 Any resultant decision or determination by the FWC under this Clause shall be binding and accepted by the Parties, subject to their rights under the Act.
> 14.6 If the FWC arbitrates the dispute:
> 14.6.1 It may also use the powers that are available to it under the Act, and
> 14.6.2 An appeal may be made against the decision.
> 14.7 Either Party may refer the dispute to FWC at any stage of the procedure if the procedure is not being followed or is otherwise inappropriate in the circumstances
> ...

[15] Both the MUA and SICTL proceeded on the basis that permission to appeal is required. However, the terms of clause 14, in particular clause 14.5 and 14.6, require the Full Bench to consider whether permission to appeal is so required.

[16] Clause 14.5 of the Agreement provides that a decision of the Commission resulting from an arbitration is binding and accepted by the parties 'subject to their rights under the Act'. This terminology is suggestive that s 604 of the Act, including the requirement for permission, operates in full in an appeal from an arbitration under clause 14 of the Agreement. However, clause 14.6.2 of the Agreement provides that if the Commission arbitrates the dispute, '[a]n appeal may be made against the decision'. It is noteworthy that the reference to an appeal in clause 14.6.2 is not qualified by a requirement to first obtain permission.

[17] On balance, we consider that the express and unqualified provision for an appeal in clause 14.6.2 supports a construction that permission is not required to appeal. In that regard, clause 14.6.2 is directed to the specific subject of an appeal. In contrast, clause 14.5, refers more generally to "rights under the Act". The specific, express and unqualified provision for an appeal in clause 14.6.2, should in context, be given full operation. We consider that the clause evinces an intention that an appeal from an arbitration under clause 14.4.2 is by way of right. Consequently, the MUA need not obtain permission to appeal to conduct its appeal.

[18] However, if it were necessary to grant permission to appeal, we would grant permission to appeal. As our reasons below disclose, there is an arguable case that the Deputy President erred. The subject of the appeal raises an issue as to the proper approach to the construction of enterprise agreements when incorporating an award. It is not unusual for enterprise agreements to incorporate the provisions of a relevant modern award. Consequently, the appeal raises issues of general application beyond the interests of the parties. Furthermore, the subject of the appeal goes to the public holiday entitlements of shiftwork employees of SICTL at the Port Botany Site. As such, the interests raised by the appeal are not confined to those of the MUA, Mr Pettett

and SICTL. To the extent permission is required, we would grant permission on public interest grounds and otherwise on the basis of the general discretion available to the Full Bench.

Construction of the Agreement – standard of appeal

[19] The primary issue raised in the appeal is in respect of the proper construction of the Agreement. That issue is substantially raised under grounds 1(a) and (d), albeit it also arises under the ground (b) and (c). The issue of construction is whether clause 2 of the Agreement incorporates clause 30.3 of the Stevedoring Award in the Agreement, or whether such incorporation is precluded due to inconsistency between the Agreement and the Stevedoring Award.

[20] In support of its preferred construction, the MUA submitted at first instance and on the appeal that, because the express provisions of the Agreement do not deal with the scenario set out in clause 30.3 of the Stevedoring Award, clause 30.3 of the Stevedoring Award can comfortably be read together with the public holiday provisions of the Agreement and hence there was no inconsistency which prevented clause 30.3 being given effect in the Agreement.[6]

[21] At first instance, SICTL submitted that clause 29 of the Agreement '*covers the field in relation to public holidays for employees*'. On appeal, SICTL made a number of contentions in respect of the proper construction of the Agreement. SICTL submitted that the Deputy President was correct to note that each provision of the NES and clause 30 of the Stevedoring Award was dealt with in the Agreement, except (relevantly) the provision in clause 30.3 for a shiftworker not rostered on public holiday. SICTL further submitted that the public holiday provision of the Agreement is comprehensive, a submission which relies on par [50] of the Deputy President's reasons where he analysed different aspects of clause 29 of the Agreement. SICTL submitted that the Deputy President was correct in deciding that the only available conclusion was that the intention of clause 29 of the Agreement was to provide a comprehensive set of provisions relating to public holidays subject to the NES and that the consequence of this conclusion was that clause 30.3 of the Stevedoring Award was inconsistent with clause 29. Furthermore, SICTL contended that this intention could also be gleaned from clause 2 of the Agreement, in that it distinguished between '*an express provision of the Agreement*', such as a provision dealing with public holidays, and an '*entitlement*' such as an entitlement '*in a provision dealing with public holidays*'.

[22] SICTL also relied on the Deputy President's observations regarding differences between terms of engagement of employees and modes of remuneration being different as between the Agreement and the Stevedoring Award. SICTL referred further to the Deputy President's findings that SICTL maintenance employees working under the SICTL 12 Hour General Maintenance Roster worked on average 2.8 days per week, working 14 days per 5 week/35 day cycle and that the annual salaries earned by those workers was 18% higher than the corresponding salary for workers on the SICTL Day Maintenance Roster. SICTL made further submissions regarding differences between the Agreement and Stevedoring Award concerning modes of engagement and remuneration of employees, submitting that the differences are such that the circumstances in which an employee under the Agreement is employed are so different to the circumstances in which a shiftworker under the Stevedoring Award is employed, so as to render clause 30.3 of the Stevedoring Award inapplicable to an employee under the Agreement.[7]

[23] The proper construction of an enterprise agreement is a question of law to which there is only one true answer. Consequently, the standard of appeal is the correctness standard. The question on appeal is whether the primary decision was correct or incorrect. The principles in relation to the construction of enterprise agreements are well known. The Deputy President properly set out those principles in his decision.[8] We will not repeat those principles in detail. However, we do consider it useful to note that the question of construction turns upon the language of the instrument, understood in light of its industrial context and purpose.

Incorporation of the Stevedoring Award

[24] Having regard to the issues raised in the appeal, it is appropriate to set out clause 2 of the Agreement in full:

> **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.

[25] It is relevant to make a number of observations in relation to clause 2.1. The first sentence of the clause incorporates the terms of the Stevedoring Award in the Agreement. The second sentence sets out a test of inconsistency to determine the relationship between the terms of the Stevedoring Award incorporated in the Agreement and the express provision in the Agreement. The test of inconsistency is as '*between any terms of the Award <u>(as incorporated into this Agreement)</u> and an express provision set out in this Agreement*' [emphasis added]. In that circumstance, the express provisions of the Agreement '*prevail to the extent of any inconsistency*'.

[26] It is noteworthy that the clause provides for an unconditional incorporation into the Agreement of the terms of the Stevedoring Award. The incorporation itself is not conditioned by a test of inconsistency. Rather, incorporation of the terms of the Stevedoring Award in the Agreement is unconditional and occurs first in time. The test of inconsistency is applied after the incorporation of the terms of the Stevedoring Award. This is evident from the text of the first sentence, which expresses in the present tense, that the Agreement incorporates the terms of the Stevedoring Award, and further does not place a condition on the incorporation. For example, it does not say that the Agreement incorporates the terms of the Stevedoring Award only to the extent that the Stevedoring Award terms are not inconsistent with the express provisions of the Agreement. The unconditional incorporation is also evident from the text of the second sentence. That sentence speaks of '*terms of Award (as incorporated in the Agreement)*'. '*Incorporated*' is the past tense and past participle of the verb '*incorporate*'. The use of the past tense clearly indicates that the act of incorporation has been completed before application of a test of '*inconsistency*'.

[27] The terms of the Stevedoring Award only have operation as terms of the Agreement. During the operation of the Agreement, the Stevedoring Award has no independent application

to SICTL or its employees.[9] The incorporation of the Stevedoring Award by clause 2 of the Agreement is the only source for the application of the terms of the Stevedoring Award. In that regard, to paraphrase an observation of another Full Bench in *Construction, Forestry and Maritime Employees Union v DP World Melbourne Ltd (t/as DP World Melbourne)* [2024] FWCFB 317, this matter is not a situation when one instrument has presumptively paramount operation.[10] The apparent intention of the drafters of the Agreement is that the terms of the Stevedoring Award are able to operate as terms of the Agreement unless inconsistency can be identified.

[28] This circumstance raises similar issues to that which arose in *Maribyrnong City Council v Australian Municipal, Administrative Clerical, and Services Union* [2019] FCA 773; (2019) 369 ALR 704 (***Maribyrnong Council***). In *Maribyrnong Council*, the terms of an old award were contained in Part B of the relevant enterprise agreement (the **Maribyrnong Agreement**). Part A of the Maribyrnong Agreement set out other operative terms. The interaction clause of the Maribyrnong Agreement, specified that '*Part A shall be read and applied in conjunction … with Part B*' and that in the event of '*any inconsistency*' between Part A and Part B, '*the provisions of Part A shall prevail.*' In *Maribyrnong Council,* Wheelahan J identified the approach to ascertaining inconsistency between Part A and Part B of the Maribyrnong Agreement in the following terms:[11]

> Although Part B of the Agreement reproduces substantial parts of the old Award, the Award has no independent force. The source of all obligations under the Agreement is the same, namely the terms of the Agreement as given force by the Fair Work Act. These features distinguish the application and reconciliation of the terms of Part A and Part B of the Agreement from questions of inconsistency that arise in other contexts, such as under s 109 of the Constitution. That is because clause 3.1.3 of the Agreement provides – as a commencing point – that Part A shall be read and applied in conjunction with Part B. This mandate tells against construing any terms of Part B that merely qualify Part A as being inconsistent with Part A. In my view, in order that there be inconsistency between the terms of Part A and Part B, the terms must be such that they cannot sensibly or fairly be read together. Within this concept, there may be terms of Part A which demonstrate an intent to cover a particular subject-matter to the exclusion of corresponding terms in Part B. In these events, the terms of Part A prevail.

[29] A similar approach has been adopted in circumstances in which a contract incorporates the terms of a separate document. The Full Bench recently discussed relevant authorities in *Toll Transport Pty Ltd v Transport Workers' Union of Australia* [2026] FWCFB 30.[12] For example, the Full Bench referred to the decision in *Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd* [2005] SASC 400; (2005) 93 SASR 179 in which Bleby J (with whom Anderson J agreed) said:[13]

> The fundamental principle is that where parties expressly incorporate terms into a contract, the incorporated terms must be construed as if they have been written out in full in the contract, and accordingly must be construed in the context of the contract into which they have been incorporated.

[30] Terms which have been incorporated by reference will generally only be displaced if they are inconsistent or insensible when read with the expressly agreed terms of the instrument. The incorporated terms will generally be given operation so long as the terms are capable of being sensibly read together with the express terms as a whole.[14]

[31] We consider that the approach to ascertaining inconsistency in *Maribyrnong Council* is applicable in respect of the present matter. In that regard, we consider that inconsistency between the incorporated terms of the Stevedoring Award and the express provisions of the Agreement arises where '*they cannot sensibly or fairly be read together*'. We note that Wheelahan J cautioned that the adoption of tests of inconsistency applied to s 109 of the Commonwealth Constitution may be of limited utility, including an analysis of whether the express terms of an agreement 'cover the field'. Nonetheless, his Honour accepted that inconsistency may arise where an enterprise agreement clause demonstrates an intent to cover a subject-matter to the exclusion of corresponding incorporated terms of an award.

[32] The approach to be adopted to detecting inconsistency will ultimately depend on the terms and purpose of the provision dealing with incorporation.[15] We are mindful that clause 2 of the Agreement does not include the terminology of '*in conjunction*' which was a feature of the interaction clause in the Maribyrnong Agreement. However, we do not consider this difference in terminology necessitates a different approach in the present matter. The kernel of Wheelahan J's reasoning in *Maribyrnong Council* is that the source of the obligations of both the relevant award in Part B and the operative terms in Part A were the same, being the terms of the Maribyrnong Agreement given force by the Act. This reasoning is equally applicable in respect of the Agreement, as the terms of the Stevedoring Award only have operation as terms of the Agreement. Furthermore, as we have observed, the terms of the Stevedoring Award are entirely and unconditionally incorporated, and the test of inconsistency is applied after incorporation. This methodology tends against construing any incorporated terms of the Stevedoring Award that merely qualify express provisions of the Agreement, as being inconsistent with the express provisions of the Agreement.

[33] In these circumstances, it is necessary to review the express provisions of the Agreement and the terms of the Stevedoring Award relating to public holidays. The purpose of this exercise is to assess whether inconsistency arises between the relevant terms of the Agreement and the Stevedoring Award, including whether the terms of the Agreement demonstrate an intent to cover a subject-matter to the exclusion of corresponding incorporated terms of an award.

Categories of employment under the Stevedoring Award and the Agreement

[34] Before dealing with this matter, it is necessary to deal with the categories of employment under the Stevedoring Award and the Agreement. The types of employment under the Stevedoring Award are set out in clauses 9, 10 and 11. Clause 9 sets out three types of employment, being full-time, guaranteed wage or casual. Clause 10 identifies that a '*full-time employee is engaged to perform a full week's work*'. Clause 11 identifies that a '*guaranteed wage employee is an employee who is guaranteed a minimum or average number of full shifts per week, or instead of that engagement, is provided the equivalent payment*'. Under clause 2 (Definitions) of the Stevedoring Award, '*a casual employee has the meaning given by s 15A of the Act*'.

[35] The categories of employment under the Agreement are set out in clause 9.1 of the Agreement. Clause 9.1 identifies three categories of employment to be engaged in accordance with the Part B Schedules to the Agreement, being a '*Permanent Full Time Rostered Employee*' (clause 9.1.1), a '*Permanent Part Time Rostered Employee*' (clause 9.1.2) and a '*Supplementary Employee … paid the hourly rate of pay in clause 16.7* [of Part A]' (clause

9.1.3). Clause 9.2 indicates that the categories of employment for each terminal are outlined in Schedule 1 of Part B of the Agreement.

[36] Schedule 1 (Categories of Employment) of Part B outlines the categories of employment. Schedule 1 contains two headings, being '*Categories of Employment – SICTL*' and '*Categories of Employment – BCT*'. Under the heading '*Categories of Employment – SICTL*', two categories of employment are identified, being '*Permanent Rostered Employees*' and '*Supplementary Employees*'. Clause 1 (Permanent Rostered Employee) of Schedule 1 provides that a '*Permanent Rostered Employee*' of SICTL will be employed on rosters specified in either Schedule 5 or Schedule 3. Schedule 5 (SICTL Operations Rosters) sets out two rosters for operations employees, with those two rosters identified as an "*R1*" or "*R2*" roster with an applicable annual salary specified in respect of each roster. Schedule 3 (SICTL Maintenance Rosters) sets out three SICTL Maintenance Rosters and accompanying annual salaries as follows:

(a) a SICTL 12 Hour General Maintenance Roster[16], being a five week roster of 14 shifts with four shifts on a Saturday or Sunday and accompanying annual salaries specified for Level 4 & 5;[17]

(b) a SICTL Day Maintenance Roster,[18] being a five week roster of 15 shifts with two shifts on a Saturday and Sunday and accompanying annual salaries[19] specified for Level 4; and

(c) a SICTL Maintenance Storeperson Roster[20] and accompany salaries,[21] being a two week roster of 9 shifts with no shifts on a Saturday or Sunday and accompanying salaries for Level 2.

[37] As we noted above, Mr Pettett is employed under the SICTL 12 Hour General Maintenance Roster.[22] The other Schedules of Part B also set out annual salaries for Permanent Rostered Employees of SICTL and BCT.[23]

[38] Clause 16 (Remuneration) of Part A of the Agreement also contains provisions relating to annual salaries for Permanent Full Time Employees including a requirement in clause 16.1 that such an employee will be employed on the basis of an annual salary.

The terms of the Stevedoring Award concerning public holidays

[39] We now turn to the Stevedoring Award terms concerning public holidays. Clause 30 (Public Holidays) of the Stevedoring Award establishes some specific conditions relating to public holidays. Clause 30.1 identifies that public holidays are provided for in the NES. Clause 30.2 provides that where an employee works on a public holiday they will be paid rates provided for in clauses 21.3(a) or 21.5(b)[24]. Clause 30.3 provides that a shiftworker who is rostered off on a public holiday prescribed by clause 30 will be paid the ordinary rate for the public holiday in addition to the ordinary weekly wage. Clause 30.4 specifies arrangements for payment of public holiday rates where an employee works in an outport, being that public holiday payment will be made if the day is a public holiday in the employee's home port. Clause 30.5 provides that tradespersons who are 7-day continuous shiftworkers will accrue a day or part day instead of a holiday or part day public holiday in respect of any shift worked on a public holiday.

[40] It is useful to make a number of observations regarding clause 30 of the Stevedoring Award. Clause 30.1 defers to the NES in relation to the matter of public holidays. It is apparent that clause 30.1 does not of itself incorporate the public holiday provisions of the NES.[25] Rather, it merely refers to the NES provision in respect of public holidays. Furthermore, the reference in clause 30.1 to the NES clarifies that the various public holiday benefits in the Stevedoring Award (including those in clauses 30.2 – 30.5) are enlivened by a public holiday as set out in the NES. Clause 30.2 provides for the payment to be made to an employee who works on a public holiday by requiring that the employee be paid in accordance with clause 21.3(a) or 21.5(b).

[41] Clause 30.3 provides an additional monetary benefit to a shiftworker who is rostered off on a public holiday, which is in addition to the employee’s ordinary weekly wage. The evident purpose of this benefit is to compensate shift workers in relation to the matter of public holidays, because such persons are less likely to work on a public holiday, as they are less likely to work systematically on Monday to Friday when most public holidays (including substitute public holidays) will occur.[26] As such, shiftworkers suffer a disadvantage as they are less likely to obtain the benefit of a public holiday, being either a day off their usual work or payment of loaded rates of pay for work on a public holiday. This is clear from an observation made by a Full Bench of the Australian Industrial Relations Commission in Dec 251/95 (Print L9178), one of four cases which are considered together to constitute the AIRC Public Holiday Test Case.[27] In L9178, the Full Bench observed as follows at p.21-22 and p.25:

> … we propose in this decision to consider various types of non-standard arrangements and to articulate principles which we see as being generally appropriate. Members of the Commission dealing with particular awards will be expected to apply these principles wherever possible, but may need to adapt them to specific circumstances.
>
> 2 - FULL-TIME WORKERS
>
> We refer here to full-time workers who do not regularly work a five-day, Monday - Friday week. Such workers include persons who work regularly on Saturday or Sunday, workers with variable rosters, continuous shift workers and employees who work for nine days per fortnight or 19 days in each four weeks. This list is not intended to be exhaustive.
>
> It may happen that a prescribed holiday falls upon a day when the employee would not be working in any event. Fairness requires that the worker be not disadvantaged by that fact. The appropriate compensation, we think, is
>
> - an alternative "day off"; or
> - an addition of one day to annual leave; or
> - an additional day's wages.
>
> We understand that such compensation is already provided in many awards.
>
> …
>
> 8 – CONCLUSION
>
> In summary, we commend the following principles:
>
> (1) that full-time workers who do not work on Monday - Friday of each week should be assured of the benefit of prescribed holidays. They should not forfeit that benefit because a prescribed holiday falls on a non-working day;

…

[42] Returning now to clause 30 of the Stevedoring Award, we note that other clauses in the Stevedoring Award also deal with matters relating to public holidays. Clause 18 (Allowances) contains terms dealing with allowances. Clause 18.3(e) specifies a meal allowance for day workers who work overtime including overtime on a public holiday. Clause 18.3(f) sets a meal allowance for a shift worker in certain circumstances including for overtime performed on a public holiday. Clause 18.5 sets benefits for employees relating to outports including when an employee is required to remain in an outport on a public holiday (clause 18.5(c)). Clause 19 (Accident pay) concerns an employer's obligation to pay accident pay and clause 19.4 alleviates an employer to pay accident pay for any paid public holiday. Clause 21 (Overtime) contains terms setting out rates of pay for overtime including rates for overtime worked on a public holiday, being an overtime rate for a full time or guaranteed wage day worker required to perform overtime on a public holiday (clause 21.3(b)), an overtime rate for a casual day worker required to perform overtime on a public holiday (clause 21.3(b)), an overtime rate for a full time or guaranteed shift worker required to work overtime on a public holiday that is not continuous with a shift of ordinary hours (clause 21.5(b)(iii) and an overtime rate for a casual shifter worker required to work overtime on a public holiday that is not continuous with a shift of ordinary hours (clause 21.6(b)(iv)). Clause 21.10 contains some discrete provisions concerning minimum payments for Grade 7 employees relating to minimum payments for public holidays. Clause 22 (Double header) sets out payments for double headers including a rate for a double header on a public holiday (clause 22.4). Clause 23 (Penalty rates) deals with penalty rates. Clause 23.3(c) and (d) set out that an employee who, by direction of the employer, reports to work for a Saturday, Sunday or public holiday will be paid for a minimum of 7 hours. Clause 24 (Annual leave) sets out annual leave arrangements which supplement the National Employment Standards. Clause 24.5 makes provision for an additional day of leave if a public holiday falls during a period of annual leave.

NES provisions concerning public holidays

[43] As we have noted, clause 30.1 of the Stevedoring Award refers to the NES. The NES provisions relating to public holidays are set out in Division 10 (Public Holidays) of Part 2-2 (National Employment Standards) of the Act. Section 114(1) sets out a prima face right of an employee to be absent from employment on a public holiday. Section 114(2) allows an employer to request an employee to work on a public holiday if the request is reasonable. Section 114(3) allows an employee to refuse an employer's request if the request is not reasonable or the refusal is reasonable. Section 114(4) sets out various factors to take into account in determining whether an employer request is reasonable or whether the refusal is reasonable. Section 115 sets out the meaning of public holidays and provisions dealing with substitute public holidays. Section 116 imposes an obligation on an employer to pay the employee at the employee's base rate of pay for the employee's ordinary hours if the employee is absent from work on a day that is a public holiday.

Agreement provision and public holidays

[44] We now turn to the Agreement provisions concerning public holidays. The Agreement terms concerning public holidays are mainly set out in clause 29 (Public Holidays).

[45] By way of general overview, clauses 29.1 to 29.11 substantially deal with identifying days which constitute public holidays and circumstances in which an employee may be required to work on public holidays. Specifically, clauses 29.1 to 29.3 deal with public holidays deemed as '*voluntary public holidays*' (clause 29.1), set out arrangements when employees may be compelled to work on a voluntary public holiday (clause 29.2) and deem employees as available to work on voluntary public holidays unless the employee has applied to be absent (clause 29.3). Specifically, clauses 29.4 to 29.6 regulate the performance of work in the period between Christmas Eve and Christmas Day including a restriction on SICTL and BCT conducting operations in a certain period between Christmas Eve until Boxing Day (clause 29.4), create two specific exceptions to a restriction on the performance of work in that period (clause 29.5) and make specific provision for the manner in which the work free Christmas/Boxing day period impacts on counted shifts in the rostering arrangements for Permanent Part Time Employees (clause 29.6). Clause 29.7 confers a right on SICTL and BCT to allocate Permanent Part Time Employees or Supplementary Employees rostered to a shift on 31 December to a day shift. Clauses 29.8 to 29.9 identify days deemed not to be voluntary public holidays including conditions in which employees may be required to work on such non-voluntary public holidays. Clauses 29.10 to 29.11 deal with additional gazetted public holidays and substitute public holidays. Clause 29.10 provides that an employee may be required to work on an additional gazetted public holiday. Clause 29.11 applies the public holiday arrangements to substitute public holiday, with specific exceptions in respect of Anzac Day and Christmas Day, with further provision that an employee who works on Christmas Day will be paid a public holiday rate on that Christmas Day and not the substitute day.

[46] Clauses 29.12 to 29.14 specify benefits (being loaded rates or time in lieu) due to employees who work on a public holiday identified in the clause. In that regard, clause 29.12 provides that an employee who works on a public holiday shall be paid at the Stevedoring Award public holiday rates of pay. Clause 29.13 provides that operations employees who work on a voluntary public holiday shall be entitled to a day in lieu. Clause 29.14 provides that maintenance employees will accrue a day in lieu for any shift worked on a public holiday.

[47] Clause 29.15 deals with the circumstance where an employee is rostered to work on a public holiday and is not required to work on that day or makes themselves unavailable to work, in which case the employee will be paid their normal salary and the shift shall be counted as a shift worked. Clause 29.16 then provides for specific arrangements if a public holiday falls during a period of annual leave, in which case the employee receives a day in lieu of the public holiday.

[48] We make the following observations regarding clause 29 of the Agreement. Clause 29 of the Agreement sets out a slightly more extensive list of public holidays than clause 30 of the Stevedoring Award. In that regard, clause 30.1 of the Stevedoring Award adopts the NES public holidays. Clause 29 of the Agreement includes those NES public holidays and some additional days, being Picnic Day (clause 29.1.4), Easter Saturday (29.8.3) and Easter Sunday (29.8.4). Clause 29 is substantially directed to the circumstances in which an employee may be directed to perform work on a public holiday, the matter of additional and substitute public holidays and the benefits due to an employee if they perform work or are rostered to work on a public holiday. Clause 29.15 deals with a specific circumstance when an employee is rostered to perform work on a public holiday but does not do so and the benefits which flow from that circumstance. This circumstance in clause 29.15 is not dealt with in clause 30 of the Stevedoring Award.

Presumably the purpose of clause 29.15 is to confirm that the act of rostering an employee on a public holiday enlivens a right to payment even if the shift is not worked but any such payment is at normal salary and not loaded rates.

[49] We also note that clause 29.16 provides a day in lieu when a public holiday falls during a period of an employee's annual leave. However, we do not consider that clause 29.16 detracts from the substantial character of the clause being about the circumstances in which an employee may be directed to perform work on a public holiday, the matter of additional and substitute public holidays and the benefits due to an employee if the employee performs work or is rostered to work on a public holiday

[50] The Agreement contains other provisions relating to public holidays. We have already dealt with clause 16.3 of the Agreement. Clause 27.7 specifies overtime rates for employees for shift extensions including an overtime rate for shift extensions on public holidays in clauses 27.7.6 and 27.7.7. Clause 27.8 specifies overtime rates for Permanent Full Time Employees who work on 'rostered OFF shifts, including loaded rates for work performed on a "rostered OFF shift" on a public holiday in clause 27.8.2 and 27.8.3.[28] Clause 27.9 specifies overtime rates for BCT Permanent Part Time Employees for work performed on shift extensions and shift pre-starts including work so performed by those employees on public holidays in clause 27.9.3. Clause 27.10 specifies overtime rates for work performed in excess of 1,560 hours for BCT Permanent Part Time Employees, including on public holidays in clause 27.10.3.

Does the Agreement exclude public holiday provisions of the Stevedoring Award?

[51] We will first consider whether clause 29 of the Agreement demonstrates an intent to deal comprehensively with the subject of public holidays in a manner that excludes the operation of the Stevedoring Award. This was the contention made by SICTL at first instance.[29] The Deputy President considered that '*the only available conclusion*' is '*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*'.[30] A key element of the Deputy President's conclusion was that each of the '*relevant provisions*' in clause 30 of the Stevedoring Award have been dealt with in the Agreement, except for the term concerning additional payment for a day when a shift worker is not rostered on a public holiday, namely, clause 30.3.[31] The Deputy President also seems to have in part founded his conclusion on his assessment that the terms of clause 29 were '*self contained*', as compared to clause 30 of the Stevedoring Award. The Deputy President assessed that clause 30 of the Stevedoring Award deferred to the NES and specified a small number of supplemental matters, whereas '*each of the provisions of the NES*' concerning public holidays were dealt with by the Agreement, an apparent reference to clause 29 of the Agreement.

[52] We do not consider that clause 29 of the Agreement can be characterised as broadly as evincing an intention to provide a '*comprehensive set of provisions relating to public holidays*'. As evident from our analysis of the Agreement, there are conditions relating to public holidays which are contained in Agreement provisions other than clause 29. These additional conditions relate to what is in essence overtime performed on public holidays and are primarily set out in clause 27 (Overtime) of the Agreement. We are mindful many comparable Stevedoring Award conditions are contained in clauses 21 (Overtime) and 23 (Penalty Rates). However, the material matter is that clause 29 of the Agreement does not cover the field in relation to

conditions relating to public holidays. In these circumstances, we do not accept the Deputy President's broad proposition that the '*intention of clause 29 is to provide a comprehensive set of provisions relating to public holidays*'.

[53] The Deputy President seems to have considered that because clause 29 of the Agreement did not make express provision of a benefit of the type provided in clause 30.3 of the Stevedoring Award, this was indicative of an intention that clause 29 covers the field in relation to public holidays.[32] As we have set out above, clause 29 of the Agreement is substantially directed to arrangements regarding the circumstances when SICTL/BCT may direct an employee to perform work on a public holiday, the matter of additional and substitute public holidays and the identification of some but not all benefits due to an employee when the employee performs or is rostered to work on a public holiday. Having regard to the substantial character of clause 29, the fact that it makes no express provision for a public holiday monetary benefit to a shiftworker who is not rostered to work, is not indicative that clause 29 is intended to comprehensively deal with the subject of public holidays.

[54] As we have noted above, the Deputy President expressed a view that the Agreement deals with each of the provisions of the NES. However, in other paragraphs of the decision the reasons disclose a view that clause 29 was not intended to be comprehensive in regard to matters dealt with by the NES.[33] We are mindful of these further observations. Nevertheless, it is appropriate to consider whether the terms in which clause 29 deals with NES public holiday matters, indicate that clause 29 exhaustively deals with public holidays. We do not consider that an analysis of clause 29 having regard to the NES provisions supports a conclusion that clause 29 covers the field in relation to public holidays. Clause 29 does not replicate the prima facie right in s 114(1) of the Act for an employee to be absent from work on a public holiday or the rights relating to reasonable requests to work on a public holiday or reasonable refusal of such request under s 114(2)-(4). Clause 5 of the Agreement requires that the Agreement be read in conjunction with the NES and confirms that where the NES provides a more generous benefit, that benefit will apply to the exclusion of such a provision in the Agreement. However, once again, the material matter is that clause 29 does not cover the field in relation to public holidays, as the clause itself is silent regarding the NES right in s 114 of the Act. Consequently, we respectfully consider that the Deputy President was not correct to the extent he considered that clause 29 covered the field in relation to public holidays for reasons that included that it dealt with '*each of the provisions of the NES*'.[34]

[55] In light of the matters set out above, we do not consider that clause 29 is intended to comprehensively deal with the subject of public holiday. However, it is necessary to consider whether the Agreement as a whole intends to be a comprehensive provision in relation to public holidays. This is because the Deputy President not only concluded that clause 29 covered the field in relation to public holidays but also concluded that the Agreement as a whole covered the field in relation to public holidays.[35] At first instance, SICTL's 'covering the field' submission was confined to clause 29. However, the Deputy President's additional conclusion that the Agreement as a whole covered the field in relation to public holidays relied on other clauses of the Agreement. On the appeal, SICTL in essence submit that the Deputy President was correct in concluding that other provisions of the Agreement indicate that the Agreement as a whole covered the field in relation to public holidays.

[56] The Deputy President's view principally centred on his analysis of the annual salary arrangements for Permanent Full Time Employees under the Agreement and was expressed as follows:

> **[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.

[57] In light of this reasoning, it is necessary to consider in greater detail the nature of the annual salary arrangements. In that regard, clause 16 of the Agreement provides for annual salary in the following terms:

> **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:

16.2.1.1. Ordinary Rate of Pay of the appointed Level

16.2.1.2. 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:

16.3.1.1. Higher duty payments (upgrades)

16.3.1.2. Public Holidays

16.3.1.3. Meal Allowance

16.3.1.4. Shift Extensions or Pre-Starts

16.3.1.5. Overtime

…

[58] Clause 16 obviously identifies the nature of the annual salaries in Schedule B payable to a Permanent Full Time Employee such as Mr Pettett. It is noteworthy that clause 16.2 specifies that the annual salary for a Permanent Full Time Employee is inclusive of the '*Ordinary Rate of Pay*' and '*Shift premiums that would otherwise be payable in accordance with provisions of this Agreement*'. The phrases '*Ordinary Rates of Pay*' and '*Shift premiums*' in clause 16.2 are evidently referrable to benefits which would otherwise have been payable to a Permanent Full Time Employee when an employee performs works.[36]

[59] It is also noteworthy that clause 16.3 identifies specific benefits which will be payable to a Permanent Full Time Employee '*in addition to Annual Salary … when worked in any shift*'. Again clause 16.3 is evidently referrable to benefits payable when a Permanent Full Time Employee performs work. This is clear not only from the phrase '*when worked in any shift*' but also from the nature of the additional monetary benefits referred to which include '*Higher duty payments (upgrades)*', '*Meals Allowance*' and '*Shift Extensions or Pre-Starts*'. These additional benefits are self-evidently paid in relation to the performance of work. We note that clause 16.3 refers also to '*Public Holidays*'. We understand clause 16.3, in its reference to '*Public Holidays*', is directed to confirming that public holiday loadings are payable in addition to annual salary when a Permanent Full Time Employee works on a public holiday.[37]

[60] We consider that the terms of clauses 16.2 and 16.3 indicate that the annual salary for Permanent Full Time Employees referred to in clause 16.1 and specified in Schedule B are in satisfaction of certain benefits payable to those employees when they perform work. We expressly note this matter because the Deputy President seems to have considered that the annual salary for maintenance workers on the maintenance worker rosters compensate those employees '*for each day worked and not worked*'.[38] Having regard to what we have ascertained from clauses 16.1 to 16.3, we respectfully disagree with this view of the Deputy President. The annual salaries in Schedule B compensate Permanent Full Time employees for days worked. The annual salary does not compensate for days not worked.

[61] In reaching this conclusion, we note that the Deputy President seems to rely in part on an assessment that the annual salary for maintenance workers working the SICTL 12 Hour General Maintenance Roster is 18% above the annual salary for maintenance workers working the SICTL Day Maintenance Roster and that maintenance workers working the maintenance

rosters are more likely than not to be rostered off on a particular day including a public holiday, than a day worker.

[62] We do not consider that any higher salary payable to workers on the SICTL 12 Hour General Maintenance Roster compared to those workers on the SICTL Day Maintenance Roster assists in the construction of the Agreement, either on the question of whether the Agreement covers the field in relation to public holidays, or in the characterisation of annual salaries as being compensation for days not worked such as public holidays. The higher annual salaries for the SICTL 12 Hour General Maintenance Roster employees may simply be compensatory for the disability (compared to employees working the SICTL Day Maintenance Roster) of working seven night shifts and working four weekend days[39] per five week roster cycle or for the absence of shift premiums which would otherwise be payable at loaded rates for working nights and more frequently on weekends.

[63] An aspect of the Deputy President's reasoning that the annual salaries for maintenance workers in Schedule 3 of Part B was compensation for days not worked, including public holidays, related to the frequency of shifts worked by maintenance workers. The Deputy President noted that the SICTL 12 Hour General Maintenance Roster and the BCT 12 Hour General Maintenance required employees to work an average 2.8 days per week and the SICTL Day Maintenance Roster required employees to work an average 3 days per week. The Deputy President noted that these employees were '*mathematically more likely than not to be rostered off on any particular day, including any particular public holiday*'.[40] The Deputy President seems to have inferred that this probability supported the characterisation of the annual salaries as compensation for days not worked including public holidays. As noted above, clause 16 makes clear that annual salaries are compensation for days worked. In that circumstance, the Deputy President's identification that the rosters in Schedule 3 are such that employees are more likely to be rostered off on any particular public holiday, brings into sharper focus the purpose of the benefit in clause 30.3 of the Stevedoring Award. As we have set out above, the purpose of the additional pay in clause 30.3 of the Stevedoring Award is to compensate shift workers in relation to the matter of public holidays not worked, because such persons are less likely to work on a public holiday, as they are less likely to work systematically on Monday to Friday when most public holidays (including substitute public holidays) occur. In that regard, we note that employees performing work on the SICTL 12 Hour General Maintenance Roster work fourteen days including four weekends per five week cycle. As such, they are certainly less likely to obtain the benefit of a public holiday.

[64] We do not consider that Schedule 3 of Part B indicates that the annual salary arrangement is compensation for days not worked including public holidays not worked. Indeed, to construe annual salaries as such would be contrary to the express terms of clause 16 of the Agreement.

[65] Noting the above matters, we turn to the test of whether the benefit in clause 30.3 of the Stevedoring Award, cannot sensibly or fairly be read together with the provisions of the Agreement as a whole. We are of the view that the benefit in clause 30.3 can sensibly or fairly be read together with the Agreement as a whole.

[66] In that regard, we note that the Deputy President at [55] considered that the express terms of the Agreement, particularly clauses 16, 27 and 29 and Schedule 3 of Part B, cover with

significant specificity the terms and conditions relating to public holidays. In relation to public holidays, we note the following matters regarding those provisions of the Agreement:

(a) clause 16 merely confirms that public holiday loadings are payable in addition to annual salary "*when worked in any shift*". As noted in pars **Error! Reference source not found. - Error! Reference source not found.** above, clause 16 is directed to loadings in respect of worked performed on public holidays;

(b) clause 27 is about rates payable in respect of overtime performed on a public holiday. Again, this clause is about loadings payable in respect of work performed on a public holiday, but specifically overtime performed on a public holiday;

(c) clause 29, as noted in par **Error! Reference source not found.** above, is substantially directed to arrangements regarding the circumstances when SICTL/BCT may direct an employee to perform work on a public holiday, the matter of additional and substitute public holidays and the identification of some but not all benefits due to an employee when the employee performs or is rostered to work on a public holiday;

(d) Schedule 3 of Part B deals with annual salaries and rosters for maintenance employees and makes no express reference to public holidays, save for meal allowances payable to a SICTL Day Maintenance Roster Employee and a SICTL 12 Hour General Maintenance Employee when such employees work overtime on a public holiday; and

(e) other schedules in Part B generally contains few express references to public holidays.

[67] As set out above, clause 30.3 of the Stevedoring Award is about providing additional compensation for shift workers not rostered on a public holiday. We consider that an award clause containing such an entitlement can sensibly and fairly be read together with the other provisions in the Agreement including provisions concerning public holidays such as clause 29. The fact that the subjects of clause 30.2 and 30.5 of the Stevedoring Award are dealt with by express provisions of the Agreement indicate that the express provisions set out in the Agreement make comprehensive provision in relation to public holidays to the exclusion of clause 30.3 of the Stevedoring Award. The fact that the parties omitted to include an express provision of the Agreement in the nature of clause 30.3 of the Stevedoring Award also does not lead to a conclusion that the Agreement was not intended to confer an additional payment to annual salary shift workers who are rostered off on a public holiday. In the context of the whole of the Agreement, the omission to include an express provision dealing with that particular subject is equally consistent with a mutual intention that the entitlement in clause 30.3 of the Stevedoring Award was to have effect under clause 2 of the Agreement.

[68] Consequently, in the absence of the express provisions of the Agreement, including in clause 29, which comprehensively deal with the subject of public holidays, there is no inconsistency between clause 30.3 of the Stevedoring Award and the express provisions in the Agreement. We consider that clause 30.3 of the Stevedoring Award has effect under clause 2 of the Agreement.

[69] For the reasons set out above, we conclude that the Deputy President erred in deciding that the public holiday provisions of the Agreement wholly displace the public holiday provisions of the Stevedoring Award.

Conclusion and disposition

[70] In light of the error identified in the decision of the Deputy President, it is necessary for the Full Bench to redetermine the matter. The parties did not suggest that there was any error in the Deputy President's rejection of SICTL's contention that a 's*hiftworker*', within the meaning of the Stevedoring Award (and clause 30.3), is an employee who works an average of 35 hours per week. We accept that this finding of the Deputy President was correct.

[71] For the reasons we have given, clause 30.3 of the Award has effect under clause 2 of the Agreement as a term of the Agreement and is not excluded by the express provisions set out in the Agreement. As a result of our conclusions, we consider that the terms of the *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021*, requires SICTL to pay shiftworkers rostered off on the day on which a public holiday prescribed by clause 30 of the Stevedoring Award falls, at the ordinary rate for the public holiday in addition to their ordinary weekly wage.

[72] We have answered the question in a slightly different form to that posed. As set out above, the public holidays prescribed by clause 30 of the Stevedoring Award are the NES public holidays. Clause 29 of the Agreement sets out a slightly more extensive list of public holidays, noting Picnic Day (clause 29.1.4), Easter Saturday (29.8.3) and Easter Sunday (29.8.4). Clause 30.3 of the Award confers the entitlement of additional pay on shiftworkers rostered off on a public holiday by reference to "*a public holiday prescribed by clause 30* [of the Stevedoring Award]". The incorporated clause 30.3 of the Stevedoring Award can only confer the additional pay for an NES public holiday. It is not permissible to construe the incorporated clause 30.3 as conferring an additional days' pay in respect of public holidays as prescribed by clause 29 of the Agreement.

[73] In light of our conclusion regarding the proper construction of the Agreement, it is unnecessary to deal with the remaining grounds of appeal. For the reasons set out above, the Full Bench makes the following orders:

(a) To the extent necessary, permission to appeal is granted;
(b) The appeal is allowed;
(c) The decision of Deputy President Easton [2025] FWC 923 in matter number (C2024/1705) is quashed;
(d) The Full Bench redetermines the matter by answering the question posed in the following terms:

The terms of the Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021 require SICTL to pay shiftworkers for a rostered off on the day on which a public holiday prescribed by clause 30 of the Stevedoring Industry Award 2020 falls, at the ordinary rate for the public holiday in addition to their ordinary weekly wage.

VICE PRESIDENT

Appearances:

K Bond, National Legal Officer for the MUA Union Division, for the appellant
J Fernon SC, instructed by Baker McKenzie for the respondent

Hearing details:

On the papers

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[1] *Construction, Forestry and Maritime Employees Union v Sydney International Container Terminals Pty Limited trading as Hutchison Ports Australia* [2025] FWC 923 (**Decision**).

[2] Decision at [53].

[3] Decision at [61] and [62].

[4] Decision at [63].

[5] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Silcar Pty Ltd* [2011] FWAFB 2555; (2011) 208 IR 33 at [17]; *Toll Transport Pty Limited v Transport Workers' Union of Australia* [2026] FWCFB 30 at [4]-[7].

[6] MUA's Outline of Submissions dated 31 May 2024 (first instance) pars [13]-[14]; MUA Written Submission dated 5 May 2025 (appeal submission) at [19]; MUA Written Reply Submission dated 12 June 2025 (appeal reply submission) at pars [4] – [7].

[7] SICTL Outline of Submissions (appeal submission) [17]-[20].

[8] See Decision at [30]-[33] citing *AMWU v Berri Pty Limited* [2017] FWCFB 3005, (2017) 268 IR 285; *James Cook University v Ridd* [2020] FCAFC 123; (2020) 278 FCR 566 at [65]; *Ridd v James Cook University* [2021] HCA 32; (2021) 274 CLR 495 at [17].

[9] See ss 47(1) and 57 of the Act.

[10] *CFMEU v DP World* [2024] FWCFB 317 at [76].

[11] *Maribyrnong City Council v Australian Municipal, Administrative, Clerical and Services Union* [2019] FCA 773; (2019) 369 ALR 704 at [53] (Wheelahan J).

[12] *Toll Transport Pty Ltd v Transport Workers' Union of Australia* [2026] FWCFB 30 at [36]-[41].

[13] *Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd* [2005] SASC 400; (2005) 93 SASR 179 at [26] (Bleby J).

[14] See, for example, *Tradigrain SA v King Diamond Marine Ltd* [2000] 2 Lloyd's Rep 319 at 335-336 (Rix LJ); *Doggett v Commonwealth Bank of Australia* [2015] VSCA 351; (2015) 47 VR 302 at [122] (McLeish JA (Whelan JA and Garde AJA agreeing) and *Westgem Investments Pty Ltd v Commonwealth Bank of Australia* [2022] WASC 132 at [836] (Murphy JA).

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[15] *Maribyrnong City Council v Australian Municipal, Administrative, Clerical and Services Union* [2019] FCA 773; (2019) 369 ALR 704 at [43] (Wheelahan J); *Construction, Forestry and Maritime Employees Union v DP World Melbourne Limited T/A DP World Melbourne* [2024] FWCFB 317 at [75].

[16] Clause 1.2 of Schedule 3 of Part B.

[17] Clause 1.3 of Schedule 3 of Part B.

[18] Clause 1.4 of Schedule 3 of Part B.

[19] Clause 1.5 of Schedule 3 of Part B.

[20] Clause 2 of Schedule 3 of Part B.

[21] Clause 2.1 of Schedule 3 of Part B.

[22] Statement of Geoff Hughes (SICTL Manager Terminals Operations, Botany Bay) dated 13 June 2024 at [6] & [7].

[23] See par **Error! Reference source not found.** of Decision and accompanying footnote in relation SICTL operations e mployees. See also Schedule 6 (BCT Operations Rosters) which set out the following annual salaries: clause 1.3 sets out an annual salary for operations employees working a BCT Permanent Fixed Roster (PFR) (30 Hours Weekly Average); clause 6.1 sets out an annual salary for a BCT Permanent Part Time Roster; clause 7.1 sets out an annual salary for a BCT Allocator. See also Schedule 4 (BCT Maintenance Rosters) which sets outs out the following annual salaries: clause 1.3 annual salaries for the BCT 12 Hour General Maintenance Roster (AB130); clause 2.1 which sets out an annual salary for a BCT Maintenance Storeperson Roster.

[24] Clause 21.3(b) specifies an overtime rate for a full-time or guaranteed wage day worker. Clause 21.5(b) specifies an overtime rate for a full-time or guaranteed wage shift worker employee.

[25] *Award Modernisation Decision 2008* [2008] AIRCFB 1000; (2008) 177 IR 364 at [11] and [105].

[26] See *Public Holiday Test Case Decision* [1995] AIRC 443 (20 March 1995) L9178.

[27] See 4 yearly review of modern awards - Public Holidays [2018] FWCFB 4 (2 March 2018) at [27] & fn [23].

[28] In addition, it should be noted that clause 27.3 defines overtime as any time worked as an extension of a shift (clause 27.3.1) , 30 minute pre-start to a shift (clause 27.3.2) and where an employee works an additional shift on a Rostered OFF Day as per the rostering schedules to the Agreement (Clause 27.3.3). The rostering schedules are contained in the schedules to Part B of the Agreement.

[29] See Respondent's Outline of Submissions dated 14 June 2025 [19] – [22] (AB223)

[30] Decision at [53].

[31] Decision at [52].

[32] Decision at [53].

[33] Decision at [53] and [63].

[34] Decision at [52].

[35] Decision at [62].

[36] See clause 16.6 which sets outs an hourly "*Ordinary Rates of Pay*" for "*Permanent Full Time and Permanent Part time Employees*". See also clause 16.10 which sets out -"*Shift premiums*" to be applied with applicable multiple for particular shifts eg Night shift M-Fpaid at time and a half.

[37] See clause 29. 12 which provides '*Employees who work on a Public Holidays shall be paid at the Award public holiday rates of pay'*.

[38] See Decision at [54]-[59].

[39] Compare SICTL Day Maintenance Roster workers who work only two weekends per roster cycle (see clause 1.4 of Part B: Schedule 3 – SICTL Maintenance Rosters (AB125)

[40] Decision at [57].