



DECISION

Fair Work Act 2009
s.604—Appeal of decision

“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU)

v

BOC Limited
(C2022/5539)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE

BRISBANE, 21 APRIL 2023

Appeal against decision [\[2022\] FWC 1869](#) of Deputy President Anderson at Adelaide on 18 July 2022 in matter number C2021/8354.

[1] By its notice of appeal lodged on 8 August 2022, the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU), applies for permission to appeal, and if granted, appeals a decision¹ of Deputy President Anderson issued on 18 July 2022 (Decision). The Decision determined an application by the AMWU under s 739 of the *Fair Work Act 2009* (Act) for the Commission to deal with a dispute “arising out of the operation of” the *BOC Limited (Torrensville) Collective Union Agreement 2021* (Agreement).

[2] Mr Darren Wittmann, a member of the AMWU, is a maintenance officer employed by BOC Limited (BOC) at its site in the Adelaide suburb of Torrensville, South Australia. The Agreement applies to Mr Wittmann in that employment, under which he is classified at Level 3 in the maintenance classification structure. The dispute relates to a direction given to Mr Wittmann to perform gate access duties involving monitoring an intercom phone from which a gate in a newly automated gate house could be activated and opened. The AMWU contended that the direction to perform the work was unlawful and unreasonable, because it was inconsistent with the classification structure in the Agreement. BOC contended that the direction was not inconsistent with the Agreement and was permissible under Mr Wittmann’s employment contract.

[3] The Deputy President relevantly concluded that the terms of the Agreement did not preclude BOC from directing Mr Wittmann to perform gate access duties.

The appeal ground

[4] The AMWU brings the appeal on the sole ground the Deputy President erred in his construction of clauses 7.1.1, 12 and Appendices A and C of the Agreement, in particular as to his interpretation that the maintenance classifications contain no limitation on the duties that can be allocated.

Decision under appeal

[5] As noted, the dispute the subject of arbitration was about BOC's direction to Mr Wittmann to perform gate access duties at BOC's site.² As is common in applications under s 739 of the Act, particularly those which involve a disputed construction of an enterprise agreement, when matters proceed to arbitration the parties to the dispute attempt to scope out the subject matter of the dispute in the form of one or more questions to be determined. Usually, the questions for arbitration are settled before submissions and evidentiary materials are filed, and before the hearing, if any. In the instant case the parties were unable to agree on the question for arbitration and the Deputy President formulated two questions for determination as follows:

1. Is BOC Limited's direction to Mr Darren Wittmann (relevant employee) to perform Site Warehouse Operative telephone (gate access) duties a matter that arises out of the operation of the *BOC Limited (Torrensville) Collective Union Agreement 2021*?
2. If it is, does the operation of the *BOC Limited (Torrensville) Collective Union Agreement 2021* preclude BOC Limited from issuing such a direction to the relevant employee?

[6] Unusually, the questions for arbitration were still not settled when the hearing of the dispute concluded.³ The final form of the questions reproduced above appears to have been settled in the writing of the Decision. The Deputy President answered "yes" to the first question⁴ and "no" to the second. No issue is taken on appeal to the answer given to the first question nor to the process of reasoning by which the Deputy President arrived at that answer.

[7] Before the Deputy President, the AMWU contended, *inter alia*, that the direction given by BOC intends to impose on Mr Wittmann an additional role that is not contained in the Agreement but is also inconsistent with the terms of the Agreement in that it comprises duties that are outside his classification, which is effectively prohibited by clause 7.1.1 and clauses 3.2 and 3.5 of the Agreement.⁵ The last-mentioned provision prohibits making extra claims during the nominal term of the Agreement, which need not be considered since the AMWU does not challenge that part of the Decision in which the Deputy President rejected the contention that the direction was an extra claim.⁶ Specifically the AMWU contended that clause 7.1.1 had the effect of requiring an employee to carry out duties within the limits of their training, competencies, and classification, with the consequence that any direction given to an employee (pursuant to a purported contractual right or otherwise) could not have the effect of requiring the employee to undertake duties that were outside the employee's classification under the Agreement. Such a direction would be inconsistent with clause 7.1.1.⁷

[8] In arriving at the answer to the second question, the Deputy President relevantly reasoned that:

- The dispute could not be determined without considering the operation of the Agreement and the interaction between the Agreement and Mr Wittmann's contract;⁸
- The classification structure in Appendix A of the Agreement was divided between 'Production' and 'Maintenance';⁹
- Mr Wittmann's classification of Maintenance Officer Level 3 is not defined in the Agreement¹⁰ nor does it define "maintenance duties";¹¹

- Clause 12.3.1 simply refers to “maintenance duties within the site’s operations”;¹²
- Consequently, the Agreement provides little or no guidance to the boundaries or outer boundaries of the classification except that an employee doing that work needs to have completed the prescribed training competencies;¹³
- The concept of maintenance involves working on plant, equipment or facilities to maintain that plant, equipment or those facilities in working or productive order, and matters incidental thereto;¹⁴
- Stores duties and gate access duties are not “maintenance duties” in that sense, but certain stores duties are contemplated by the maintenance training specifications in the Agreement;¹⁵
- The question arising is whether a direction by BOC requiring a person classified and paid as a Maintenance Officer to perform gate access duties is conduct inconsistent with the Agreement and thus prohibited;¹⁶
- There was no express prohibition in the Agreement on the allocation of non-maintenance duties to a Maintenance Officer;¹⁷
- Appendix C of the Agreement concerns ‘Training’ and prescribes training modules for two production roles (C1 and C2). C3 provides training for a position described as ‘Flexible Operator’. C3 is headed ‘Additional Elements for Flexible Operator’ - eight elements are referenced - and one is ‘Gatehouse Duties’, but nothing more is described;¹⁸
- Although a role of ‘Flexible Operator’ is contemplated by the Agreement, which role may include ‘gatehouse duties’, the ill-defined nature of Appendix B and the fact that Appendix C is training related and a poor proxy for descriptive position definitions, meant that ‘gatehouse duties’ are not the exclusive domain of a ‘Flexible Operator’;¹⁹
- Allocating gate access duties to Mr Wittmann pursuant to a contractual right was not inconsistent with the parties’ commitment in the Agreement to “reviewing the classification structure during the life of the Agreement”; duties additional to those within an existing classification were allocated; Mr Wittmann was not re-classified and the role of performing gate access duties was not a new classification or a proposed new classification;²⁰
- There was no express nor implied prohibition in the Agreement to the allocation to Mr Wittmann of the gate access duties, and so there was no inconsistency between BOC’s conduct and clause 12 or Appendices A or C of the Agreement;²¹
- That a contractual right to direct Mr Wittmann to undertake the duties exists is not disputed²² and the employment contract and the Agreement co-exist;²³
- There is no inconsistency between BOC’s conduct and either clause 5, clause 3.5, clause 12 or Appendices A or C²⁴ and there is no inconsistency with other clauses in the Agreement or as a whole;²⁵
- No other specific clause is relied on by the AMWU;²⁶
- As there is no basis to conclude that the performance of gate access duties by Mr Wittmann is inconsistent with the Agreement, clause F2 of the employment contract is not displaced by the Agreement on the ground of inconsistency.²⁷

Consideration

[9] We adopt without repeating, the factual matters set out at [13]-[40] of the Decision, which are not challenged on appeal. Before turning to the issues of permission to appeal and the substance of the appeal it is first necessary to deal with BOC’s challenge to the competence of the appeal.

[10] Clause 6.2.1 of the Agreement is the source of the Commission’s power to arbitrate the dispute²⁸ and relevantly provides:

- (f) In the event that the dispute/grievance cannot be resolved by conciliation, either party may request that the matter be resolved by arbitration by the FWC.
- (g) Where arbitration is requested, the following shall apply unless a specific alternative is agreed in writing by the parties to the dispute/grievance:
 - i) The FWC may exercise the procedural powers in relation to hearing, witnesses, evidence and submissions which are necessary to make the arbitration effective;
 - ii) The decision of the FWC shall be binding on all parties to the matters.

[11] BOC contends that the Agreement contains no reference to the prospect of an appeal at all and as the parties have agreed that the “decision of the FWC shall be binding on all parties to the dispute”, no right of appeal exists because clause 6.2.1(ii) operates to remove the appeal “right” that would otherwise exist by operation of s 604 of the Act and the procedural powers mentioned in clause 6.2.1(i) do not include an appeal under s 604.

[12] For the following reasons BOC’s contention must be rejected. *First*, the jurisdiction of the Commission to arbitrate the dispute under clause 6.2.1 of the Agreement involves the exercise of private arbitration (rather than statutory) power.²⁹ Acting under the authority of the dispute settlement term of the Agreement, the Commission acts as a private arbitrator, and is authorised to make decisions as to the legal rights and liabilities of the parties to the dispute.³⁰ Any arbitral award made will thereafter regulate those rights and liabilities in substitution for the rights and liabilities which were the subject of the dispute referred to arbitration.³¹ Therefore, a provision in a dispute settlement term to the effect that a decision of the Commission shall be binding on all parties to the dispute, simply states the legal effect of an arbitral award and, without more, says nothing about excluding appeal rights which might otherwise exist.

[13] *Second*, parties choosing to empower the Commission to arbitrate disputes under an enterprise agreement take that body as they find it. The choice to empower the Commission to do so is made with knowledge of the structure of the Commission and of the appellate function performed. The reference of a dispute for resolution by arbitration to the Commission is for resolution by that body, and not by one part of it. And if the parties intend that there be no appeal pursuant to s 604, they should say so.³² Considering what is said in the preceding paragraph, there is nothing in the dispute settlement term of the Agreement which suggests a limitation on the Commission’s appellate function.

[14] *Third*, the parties to the Agreement conferring arbitral dispute resolution power on the Commission are free to limit the Commission’s appellate function. A dispute settlement term could expressly provide that the Commission will not exercise its appellate function in arbitrating a dispute. Such a limitation is plainly contemplated by s 739(3) of the Act. Nothing to that effect is found in the Agreement. Separately, where arbitration is requested, clause 6.2.1 of the Agreement contemplates that the parties may agree in writing on a specific alternative to

that which follows, which could include an agreement to remove the appellate function in relation to the dispute the subject of an arbitration request. No such agreement was here made.

[15] We deal next with the AMWU's application for permission to appeal. For the reasons to which we will shortly come, we consider that the Deputy President's construction of the Agreement and its impact on BOC's direction to Mr Wittmann to be erroneous. Consequently, the Decision manifests an injustice. And although the outcome of the arbitration affects only the parties to the dispute, the erroneous construction of the Agreement adopted by the Deputy President means that, contrary to the prohibition in s 739(5) of the Act, the Decision is inconsistent with the Agreement. We also reject BOC's contention that the statement in clause 6.2.1(g)(ii) - that the arbitral decision is binding on the parties to the matter - is a matter that we should consider and one which weighs against the grant of permission to appeal. Clause 6.2.1(g)(ii) is, as we earlier note, no more than a statement of the legal effect of the arbitral outcome on the parties. The outcome would be no less binding on the parties absent the statement. We therefore grant permission to appeal.

[16] The dispute determined by the Deputy President in the Decision involved the interpretation of the Agreement. The correctness standard applies to an appeal against such a decision.³³ As we earlier noted the AMWU contends the Deputy President erred in the construction of clauses 7.1.1, 12 and Appendices A and C of the Agreement. Specifically, the AMWU says that the Deputy President's conclusion that the maintenance classifications under the Agreement contain no limitation on the duties that can be allocated to a maintenance employee is erroneous. BOC contends that the Deputy President reached the correct conclusion. It says the Agreement contains no prohibition in the Agreement on the allocation of additional duties to maintenance employees which are outside that classification.

[17] The resolution of the dispute and the answer to the second question posed for determination, required a consideration, as the Deputy President acknowledged,³⁴ of particular terms of the Agreement and their effect. The proper construction and effect of several provisions of the Agreement was in dispute. The task of construing an industrial instrument begins with a consideration of the ordinary meaning of the words, read in context, and taking into account the evident purpose of the provisions or expressions being construed. Relevant context will include other provisions of the industrial instrument, read as a whole, and the disputed provision's place and arrangement in the instrument. The statutory framework under which the industrial instrument is made, or in which it operates may also provide relevant context, as might an antecedent instrument or instruments from which a particular provision has been derived. Regard may be had to relevant context and surrounding circumstances to determine whether there is any ambiguity in a provision of an industrial instrument. The language of an industrial instrument is to be understood in the light of its industrial context and purpose, not in a vacuum or divorced from industrial realities. But context is not itself an end, and a consideration of the language contained in the text of the relevant parts of the instrument remains the starting point and the end point in the task of construction. A purposive approach to interpretation is appropriate, not a narrow or pedantic approach.³⁵

[18] Clause 7 of the Agreement is headed "Terms of Employment" and relevantly provides:

“7.1. Engagement of employees

7.1.1. Employees will carry out duties within the limits of their training, competencies and classification.”

[19] Clause 7.1.1 requires an employee covered by the Agreement to undertake certain duties. Those duties must be within the limits of three conditions - the employee’s training, the employee’s competencies, and the employee’s classification. The corollary is that an employee is not required by the Agreement to carry out duties which are outside of these limits. Clause 7.1.1 does not prohibit the performance of duties which may be outside of these limits, but it does not compel their performance nor does it provide a basis for the employee to be directed to undertake such duties.

[20] Clause 12 of the Agreement deals with “Classifications” of employees, as follows:

“12. CLASSIFICATIONS

12.1. Upon commencement, an Employee will be classified as a New Starter, as defined in Appendix A. Thereafter, an Employee may progress to subsequent classifications upon being certified proficient in all required qualifications, competencies and training. To be certified proficient, an Employee must successfully pass any required practical or theoretical test. The requirements for each classification are outlined in Appendix A.

12.2. Compressed Operations

12.2.1. The classification structure has been designed to accommodate both business and Employee needs and recognises all skills and competencies required to carry out production duties within the site’s operations.

12.2.2. If the number or type of activities that are conducted on site change significantly, the structure will be reviewed in consultation with the affected Employees.

12.2.3. The classification structure requires that, to be appointed to Team Leader position, an Employee must be qualified in Level 2. This requirement does not apply retrospectively and will only apply the candidates considered for this type of position after the date this Agreement is made.

12.3. Maintenance Employees

12.3.1. The maintenance classification structure recognises all skills and competencies required to carry out maintenance duties within the site’s operations.

12.3.2. If the number or type of activities that are conducted on site change significantly, the structure will be reviewed in consultation with the effected employees.

12.3.3. BOC shall consult with an appropriate training provider to ensure the training competencies outlined in the Maintenance Classification Structure are current. Once this

review is completed, BOC shall, in consultation with the Union, seek to have this Agreement amended to reflect those changes.” [Underlining added]

[21] Several observations may be made about clause 12. *First*, clause 12 makes clear that the Agreement has two streams of classifications – production (also referred to as “compressed operations”) and maintenance – each having classifications beginning at “New Starter” and thereafter progressing through classificational levels. *Second*, progression within a stream depends on an employee being certified proficient in all required qualifications, competencies, and training. *Third*, the requirements for each classification are set out in Appendix A to the Agreement, which we reproduce below. *Fourth*, the maintenance classification structure recognises all skills and competencies required to carry out maintenance duties. Thus, contrary to the Deputy President’s reasoning - that clause 12.3.1 simply refers to “maintenance duties within the site’s operations”³⁶ - it sets out much more. Clause 12.3.1 observes that the maintenance classification structure recognises all the skills and competencies required to undertake maintenance duties. These skills and competencies find voice in the requirements for each classification which are set out in Appendix A. The same point is made in respect of production duties in clause 12.2.1. *Fifth*, it seems plain that the training competencies described in Appendix A are a key to identify that which is within or outside of the duties that must be undertaken by a maintenance employee in each classification within the maintenance stream. So much is clear from clause 12.3.1 and the obligation to ensure the training competencies outlined in the maintenance classification structure are current in clause 12.3.1. Thus, Appendix A sets out that which is within the limits of a maintenance employee’s training, competencies and classification.

[22] Appendix A to the Agreement - headed “Classification Structures” - contains two tables. One is headed “Production” and the other “Maintenance”, and is reproduced below:

Appendix A – Classification Structures

Production			
Level	BOC TRAINING REQUIRED (REFER SCHEDULES C.1- C.3)	External Training Required (refer Schedule C.4)	Qualification Conditions
New Starter	Induction Forklift Operation CBT Empty Sort Cylinder Commissioning	High risk work licence - Forklift Operation	Must have completed all site induction and orientation requirements
Level 1 Production Operator	Core Training in one of the following Areas: P&L Works Loading		Must have completed Level 1 and assessed as competent in one Core Area
Level 2 Flexible Operator	Core Training in either P&L Works Loading Plus 2 other additional elements from list as required by business needs		Must have completed Level 1 and Level 2 and assessed as competent in another core element 2 additional elements By Appointment

Level 3 Team Leader	Operational management suite of training <ul style="list-style-type: none"> • Accident/Incident Reporting& • Investigation - Synergi • Emergency Preparedness • Permittto Work • Frontline Management • Training 		Must be qualified in level 2. By Appointment
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APPENDIX A – CLASSIFICATION STRUCTURES..... (CONT)

MAINTENANCE

Maintenance Levels	Internal Modules (refer Schedule C.5)	External Modules (refer Schedule C.4)	Qualification Condition
New Starter	1,2, 14, 15, 16	Forklift, Fire Extinguisher Training	Certified Eng Trade Mechanical or equivalent and agreement to complete Internal and External Modules.
Level 2	17, 18	Breathing Apparatus Compression Fittings	On completion of internal and external blocks
Level 3	19, 21, 22, 23, 24	Gas and Tungsten Arc Welding Pneumatics 1 Welding and Brazing (Certified) Elevated Platform Licence	On completion of Level two blocks and one Level 3 Block as determined by business needs and a preparedness to lead the Maintenance team in the absence of Team Leader.
Team Leader	20	FMI Business Management Certificate Level4	By appointment with the commitment to complete BOC Team Leader Training

The parties agree to commit to reviewing the classification structure during the life of the Agreement.

[23] Appendix A makes clear the required internal and external training which must be completed for each classification within the two streams and the additional qualification conditions which attach to each classification within each stream. As will be apparent shortly, when the training requirements in Appendix A are identified by reference to the various training units in Appendix C, each training unit is directed either to ensuring that an employee carries out duties safely or ensuring the skills or licences necessary to carry out duties are imparted to employees. In other words, the training modules appear to be directed to the carrying out of particular duties. Thus, the duties that must be undertaken by employees at each classification within the two streams are readily identified by the training condition attached to each classification.

[24] Salary rates are set out in Appendix B of the Agreement and reflect the classification levels in the two streams in Appendix A. Appendix C sets out internal training modules. It is headed “Training” and organised into 5 parts from C-1 to C-5, as follows:

Appendix C Training

C-1 Production Operator – Initial Training

On commencing employment with BOC Limited, a new Employee is required to carry out basic training prior to commencing Core Area Training. As a guide, the basic training should take approximately three months to complete. The preferred method of training delivery and assessment is competency-based training (CBT) and the modules referenced are based on those assessments available in LiMSS.

Section	Description
Induction	Site Induction
Fire Extinguisher	Practical - on site
Forklift	Forklift Operations - CBT Assessment Forklift Licence - External
Empty Sort	Cylinder Blowdown CBT Assessment Cylinder Inspection CBT Assessment Gas Packages CBT Assessment Inspection Dock@ Sites CBT Assessment LPG Overview CBT Assessment Pre-Fill Inspection CBT Assessment
Policies and Procedures Level 1 & 2	HR Policies SHEQ policies Business Overviews

C-2 PRODUCTION CORE AREAS – TRAINING

Area	Description
P&L Filling	Permanent Gas Filling - CBT Assessment Liquefiable Gas Filling- CBT Assessment FL/FLE Filling Medical Filling CBT Assessment Industrial Filling CO2 Filling Dry Ice Production
Works Loading	Yard Operations - CBT Assessment Chain of Responsibility Training (external)

Note: Trainer/Assessor and Additional Works Loading core elements will be subject to further review/discussion during the life of the Agreement.

C.3 Additional Elements for Flexible Operator

<i>Element</i>
Workplace Trainer/ Assessor
ICC Shipment Control CBT Assessment
Permit to Work CBT Assessment
Gatehouse Duties
Cylinder commissioning and registration
Cylinder repairs and condemning

Pack building and maintenance
Cylinder inventory QC and SL1200 checks

Note: Dangerous Goods and Fire Suppression Systems will be subject to further review/discussion during the life of the Agreement.

C.4 External Training Available

List of additional training to compliment employee skills base. Nominations for this training will be approved by Production Manager and will be based on business needs. (Refer Appendix A)

External Training Available

Description	Stream
Forklift Training	Compr/Maint
Fire Extinguisher Training	Compr/Maint
Dangerous Goods Storage & Transport	Compressed
Use of Power & Hand Tools	Compressed
Breathing Apparatus	Compr/Maint
Train the Trainer	Compr/Maint
Assessor	Compr/Maint
Gas Tungsten Arc Welding TAFE	Maintenance
Pneumatics 1	Maintenance
Refrigeration Fundamentals TAFE	Maintenance
Rigging Introduction	Maintenance
Compression Fittings	Maintenance
Welding and Brazing (Certified)	Maintenance
Maintenance Systems	Maintenance
Frontline Management Certificate 4	Compr/Maint
TAFE courses = 6 Metal & Eng Competency points	Maintenance

C.5 Maintenance Internal Training

<p>1. New Starter Training About Forklifts Forklift Hazards and Safety Forklift Operations Pallets Container Handling Pre-Fill Inspection</p>	<p>14. Pack Maintenance Pack inspection, cleaning, painting, Assembly & dis-assembly, valve repair All functions related to pre & post fill Inspections Record Keeping & SAP Data Entry Emergency Procedures Quality Assurance checks & tests</p>
<p>15. Process Comprehension Basic Principles of DA Production & Filling Basic Principles of Compressed Filling Systems Basic Principles of liquid Filling Systems</p>	<p>16. Oxygen Cleaning Techniques Identify & clean components to OxyClean Standards, using the vapour bath method Recognise oxygen compatibility</p>

Storage Vessels Material Compatibility	Emergency Procedures Quality Assurance checks & tests
17. High Pressure Pipe Fitting Fabricate/maintain high pressure pipe systems Select compatible materials to suit Carry out hydrostatic tests, purge/dry system Record Keeping Emergency Procedures Quality Assurance checks & tests	18. Maintenance of Compressors Maintain multi-stage compressors & all Ancillary equip, ie filters, driers, heat Exchangers & cooling systems, etc Record Keeping Emergency Procedures Quality Assurance checks & tests
19. Maintenance of Low Temp Pumps Maintain high/low pressure, low temp pumps & all ancillary equip, valves, filters, Vaporisers & gauges, etc Record Keeping Emergency Procedures Quality Assurance checks & tests	20. Team Leader Team leadership and team meetings Planning activities and assigning tasks Monitoring performance in SAP, OPAL, OHS&E, AS & BOC standards Communication Technical Support and Problem Solving Emergency Procedures
21. Instrumentation Maintain safety valves and gauges to BOC and AS standards Record Keeping Quality Assurance checks & tests	22. Maintenance Planning Utilising computer maintenance scheduling packages at an advanced level Day to day planning of maintenance activities Scheduling and planning major maintenance Record Keeping
23. Eng Purchasing & Stock Control Selection and purchasing of engineering spares Inwards goods inspection Purchasing and Invoice approval Stores issuing and ordering	24. Permit to Work

The parties agree to commit to reviewing the training elements during the life of the Agreement.

[25] Consistent with the establishment of production stream and maintenance stream classification structures, the maintenance training modules are distinct from the production modules. Except for the overlap in C-4 there are no common modules.

[26] The training identified in C-1 to C-3 is confined to classifications in the production stream. C-4 contains training which applies to classifications in one or other of the streams, and sometimes to both. C-5 sets out internal training for maintenance classifications.

[27] A significant number of the training modules have titles which in essence describe tasks or duties. And so, each training module is intended to impart skills to enable the performance of particular duties, thus emphasising the role the training modules play in determining classification levels and the duties that may attach to each level in the respective production and maintenance classification structures. The maintenance training modules include training for duties that may be described as core and some that are more appropriately described as incidental to maintenance work. An example of incidental duties for a maintenance employee are “stores duties” (or in Mr Wittmann’s case duties of a “warehouse operative”) but these are

supported by C-5 training module 23 titled “Eng Purchasing & Stock Control”. There is no reference to gate access duties or duties of that kind in any of the maintenance training modules.

[28] C-3 is concerned with additional training elements for a “Flexible Operator” and contains a training element described as “Gatehouse Duties”. As to these matters, and as we earlier noted, the Deputy President reasoned that Appendix C of the Agreement concerns “Training” and prescribes training modules for two production roles (C-1 and C-2).³⁷ This analysis is incorrect. The production classification structure in Appendix A makes clear that a training requirement for classification as a “Level 2 Flexible Operator” is:

“Core Training in either
P&L
Works Loading”

[29] P&L Filling and Works Loading are C-2 production core areas of training. C-1 and C-2 contain training elements for production employees, and it is not correct to describe them (as did the Deputy President) as prescribing training modules for two production roles (C-1 and C-2). C-1 contains foundational or initial training for a production operator who will be a new starter. C-2 contains training that is a precondition for the next two classifications beyond new starter. Between them the training in C-1 and C-2 contain the necessary training for three classifications. C-3 contains additional training requirements for the third classification.

[30] The Deputy President continued, noting that C-3 provides training for a position described as “Flexible Operator” which contains eight elements one of which is “Gatehouse Duties”, but nothing more is described.³⁸ The Deputy President reasoned that although a role of “Flexible Operator” is contemplated by the Agreement and may include “gatehouse duties”, the ill-defined nature of Appendix B and the fact that Appendix C is training related and a poor proxy for descriptive position definitions, “gatehouse duties” are not the exclusive domain of a “Flexible Operator”.³⁹ The relevance of Appendix B to this analysis is unclear since it only contains rates of pay for each classification. Perhaps the Deputy President meant to refer to Appendix A. In any event, the analysis proceeds upon a wrong premise – that as Appendix C was training related it provided a poor proxy for descriptive position definitions. This overlooks the duties that an employee may under the Agreement be compelled to perform.

[31] It is to be remembered that clause 7.1.1 only requires an employee to carry out duties within the limits of their training, competencies and classification. Thus, under the Agreement, far from being “a poor proxy”, the limits of an employee’s “training, competencies and classification” play a central role in determining whether an employee is required by the Agreement to carry out particular duties. True it is that “gatehouse duties” may not be the exclusive domain of a “Flexible Operator”. Undertaking the additional training elements in C-3 does not guarantee classification as a “Flexible Operator”. Completing two of the eight available training elements is merely a condition which must first be met in order to be eligible to be so classified. Therefore, a level 1 production operator who has completed “gatehouse duties” training could undertake the duties, as could any other production employee who has completed the training. But the issue here is not whether an appropriately trained employee could undertake the duties, but rather whether Mr Wittmann could be compelled to do so. The “gatehouse duties” training is not part of the training required of any classification in the maintenance stream. That requisite training is found in C-4 and C-5. And there is no evidence that Mr Wittmann received or undertook the “gatehouse duties” training specified in C-3.

[32] In light of our analysis above, the Deputy President’s conclusion that the Agreement does not define the classification of Maintenance Officer Level 3, and that it provides little or no guidance to the boundaries or outer boundaries of the classification, is incorrect. As we have already observed, there are two streams in the classification structures in Appendix A - “Production” and “Maintenance”. The classification levels in each stream are established by reference to internal and external training modules and conditions for maintenance employees and BOC training and external training for production employees, which in turn are detailed in Appendix C. The nature of the training modules therein described, when read with Appendix A, gives a clear indication about the classification to which the training is directed and the nature of the duties for which the training modules will prepare the person completing the training to undertake.

[33] Under the Agreement properly construed, it is apparent that:

- The Agreement covers employees employed in the classification structure discussed in clause 12 and described in Appendices A and C;
- On commencement, an employee is classified as a New Starter, as defined in Appendix A. Thereafter, an employee may progress to subsequent classifications after being certified proficient in all required qualifications, competencies and training;
- Certified proficient, means that an employee must successfully pass any required practical or theoretical test. The requirements for each classification are outlined in Appendix A;
- Clause 12, and Appendices A and C operate together to establish the classification structures for production and maintenance streams respectively and the requirements for each level of those structures;
- These also set out and recognise all skills and competencies required to carry out production or maintenance duties at the site and so delimit the duties that each level in the classification may undertake, because the completion of the training modules for each level means that the person at a particular level is certified proficient in all required qualifications, competencies and training. This is important in determining whether for the purposes of clause 7.1.1 particular duties are within (or outside of) the limits of an employee’s training, competencies and classification;
- The classification structures under the Agreement cannot be altered unilaterally;
- An employee who has not undertaken the training modules for a particular level cannot be certified proficient in all required qualifications, competencies and training;
- Duties for which a module of training would prepare an employee, need not be undertaken if the employee has not completed the training. This is because clause 7.1.1 only compels an employee to undertake duties that are within the limits of an employee’s training;
- Gate access duties are duties for which the “Gatehouse Duties” training module in C-3 prepares an employee to undertake. The training modules in C-3, available only to employees in the production stream, two of which must be completed as a condition that must be satisfied before a production employee may be classified as a Level 2 Flexible Operator under Appendix A.

[34] Accordingly, the Deputy President’s conclusion (at [146] of the decision) that BOC’s direction to Mr Wittmann that he perform gate access duties was not inconsistent with the Agreement, was wrong. As should be evident from our analysis above, BOC’s direction to Mr

Wittmann to undertake gate access duties is inconsistent with clauses 7.1.1 and 12, and Appendices A and C of the Agreement. It follows that the Deputy President's reasoning underpinning his conclusions about the relationship between the Agreement and Mr Wittmann's contract of employment was also affected by the error. The employment contract did not authorise the direction to perform gate access duties or any other duties which are inconsistent with the aforementioned provisions.

[35] It is doubtful that the employment contract authorised the direction at all, since clause 1 of Part A makes clear that other "terms and conditions specific to [his] position are covered by . . . ([his] EBA)"⁴⁰ and clause 2 of Part F (on which BOC placed reliance) stipulates that Mr Wittman was required to "diligently and carefully perform all of the duties assigned to [him] by BOC, which are within [his] skill and competence . . ."⁴¹. Thus, although BOC was permitted by clause 2 of Part F to change duties from time to time to meet the business requirements, the obligation to perform such assigned duties only arises if the duties are within Mr Wittmann's skill and competence. By reason of clause 1 of Part A of the employment contract, those matters are determined by Mr Wittmann's EBA. The skill and competence of the position into which Mr Wittman was employed is not dealt with in the contract but is dealt with under the Agreement as noted earlier.

[36] For the reasons set out above, the gate access duties are not within the classification of Maintenance Officer at any level of the maintenance classification structure under the Agreement.

[37] We should also note that the Deputy President's observation that Mr Wittmann had for a considerable time prior to the direction, been performing "non-maintenance functions (stores duties)" and that these had become a substantial proportion of his work responsibilities, was incorrect. These were duties which formed part of the maintenance classification training modules as is evident in item 23 of C-5.

[38] The stores duties were not non-maintenance classification functions because they were within the training of the maintenance classification. Accordingly, the fact that Mr Wittmann was undertaking those duties did not support the finding that the direction to perform gate access duties – which duties are not within the maintenance classification structure and are non-maintenance functions - was not inconsistent with the Agreement.

[39] The Deputy President approached the dispute by framing the second question around whether the operation of the Agreement precluded the BOC from directing Mr Wittmann to undertake the gatehouse duties. There is no express term of the Agreement prohibiting a direction that is inconsistent with the Agreement from being given. The real issue is whether the Agreement requires Mr Wittmann to comply with an inconsistent direction. Plainly, it does not. For reasons we have set out above, the Deputy President's construction of the Agreement was erroneous and caused him to give the answer he gave to the second question. The AMWU has therefore made good its appeal ground. The appeal should be upheld.

[40] On a rehearing, properly construed, clause 12, read with Appendices A and C operates to identify the duties that maintenance employees, by reason of competencies and training can perform within their classification. Clause 7.1.1 only requires an employee to perform those duties. Other duties outside of an employee's training, competencies and classification may be refused. Gate access duties are, for the reasons we have earlier set out, outside of Mr Wittmann's

training, competencies and classification as is apparent from clause 12 read with Appendices A and C. Accordingly, BOC's direction to Mr Wittmann to undertake gate access duties is inconsistent with clause 7.1.1 and 12 and Appendices A and C of the Agreement. Clause 7.1.1 does not require Mr Wittmann to undertake those duties, and so they may be refused.

Order

[41] We order as follows:

1. Permission to appeal is granted.
2. The appeal is upheld.
3. That part of the decision in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* known as the *Australian Manufacturing Workers' Union v BOC Limited* [2022] FWC 1869 as dealt with question 2 of the questions for determination is quashed.
4. The dispute in matter C2021/8354 is determined as follows: In answer to the second question - "does the operation of the *BOC Limited (Torrensville) Collective Union Agreement 2021* preclude BOC Limited from issuing a direction [to perform Site Warehouse Operative telephone (gate access) duties] to the relevant employee?" – the *BOC Limited (Torrensville) Collective Union Agreement 2021* properly construed does not require Mr Wittmann to undertake the duties the subject of BOC's direction. The direction to Mr Wittmann to undertake the gatehouse duties may be refused.



VICE PRESIDENT

Appearances:

K Tobin for the Appellant
R Millar of counsel for the Respondent

Hearing details:

2022.
By Microsoft Teams:
14 December.

Final written submissions:

The Australian Manufacturing Workers' Union, 1 September 2022
BOC Limited, 16 September 2022

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¹ [\[2022\] FWC 1869](#)

² *Ibid* at [3]

³ Transcript (3 June 2022) at PN851- PN872

⁴ [\[2022\] FWC 1869](#) at [79], [174]

⁵ Appeal Book 57-58 at [79]

⁶ [\[2022\] FWC 1869](#) at [107]-[117]

⁷ Appeal Book 52-54 at [58]-[64]

⁸ [\[2022\] FWC 1869](#) at [76]

⁹ *Ibid* at [119]

¹⁰ *Ibid* at [121]

¹¹ *Ibid* at [122]

¹² *Ibid*

¹³ *Ibid*

¹⁴ *Ibid* at [124]

¹⁵ *Ibid* at [125]

¹⁶ *Ibid* at [126]

¹⁷ *Ibid* at [127]

¹⁸ *Ibid* at [129]

¹⁹ *Ibid* at [130]

²⁰ *Ibid* at [131]

²¹ *Ibid* at [132]

²² *Ibid* at [136]

²³ *Ibid* at [144]

²⁴ *Ibid* at [146]

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ *Ibid* at [147]

²⁸ *Fair Work Act 2009*, s 739(4)

²⁹ *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645 at [30]-[31]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123 at [86]

³⁰ *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645 at [32]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123 at [34]-[36]; *Linfox Australia Pty Ltd v Transport Workers' Union of Australia* [2013] FCA 659; (2013) 213 FCR 479 at [19]-[24]

³¹ *Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2014) 251 CLR 533 at [76]-[79]

³² *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd (ALS)* [2015] FCAFC 123 at [52]

³³ *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 563, 591-593

³⁴ [\[2022\] FWC 1869](#) at [76]

³⁵ *Australian Workers' Union v Orica Australia Pty Ltd* [2022] FWCFB 90 at [18] and the authorities referred to therein; See also *James Cook University v Ridd* [2020] FCAFC 123 at [65] and the authorities referred to therein

³⁶ [\[2022\] FWC 1869](#) at [122]

³⁷ *Ibid* at [129]

³⁸ *Ibid* at [129]

³⁹ *Ibid* at [130]

⁴⁰ Appeal Book 126

⁴¹ Appeal Book 128