

[2024] FWC 3196 [Note: An appeal pursuant to s.604 (C2024/8921) was lodged against this decision - refer to Full Bench decision dated 29 July 2025 [\[\[2025\] FWCFB 159\]](#) for result of appeal.]



DECISION

Fair Work Act 2009
s.739—Dispute resolution

**Construction, Forestry and Maritime Employees Union, John
Andrikopoulos**

v

SC Hydro Pty Ltd
(C2024/3663)

COMMISSIONER CRAWFORD

SYDNEY, 20 NOVEMBER 2024

Dispute arising under an enterprise agreement – dispute about the correct classification for employees performing tunnelling work on the Snowy Hydro 2.0 project – dispute resolved by determining the classification level for affected employees.

BACKGROUND

[1] The *SC Hydro Pty Ltd – AWU Tunnel and Associated Works Greenfield Agreement 2021 – 2025 (SC Hydro Agreement)* is a greenfields agreement made by SC Hydro Pty Ltd (**SC Hydro**) and The Australian Workers’ Union and approved by the Fair Work Commission (**Commission**) on 19 August 2021.¹ A dispute has arisen between SC Hydro and some of its employees who drive concrete agitator trucks on the Snowy Hydro 2.0 project in New South Wales (**Employees**). John Andrikopoulos (**Mr Andrikopoulos**) is a State Organiser for the Construction, Forestry and Maritime Employees Union (**CFMEU**) who has been representing the Employees in relation to the dispute. The dispute concerns whether the Employees are being correctly classified under the SC Hydro Agreement. SC Hydro considers the Employees are correctly classified as Tunneller Class 2 – TW2. The CFMEU considers the Employees fall within the higher Tunneller Class 1 – TW3 classification. This decision is directed at resolving the dispute in accordance with the dispute resolution procedure in the SC Hydro Agreement.²

[2] The parties have agreed the Commission has jurisdiction to resolve the dispute and that all steps required under the dispute resolution procedure have been followed.³ I conducted a conciliation conference on 24 June 2024, during which the dispute could not be resolved. It was apparent the parties have different views about the interpretation of some unclear provisions in the SC Hydro Agreement and that the Commission would need to arbitrate to resolve the dispute.

[3] I issued directions for the filing of material and listed a hearing in Sydney on 31 October 2024. I granted permission for all parties to be represented at the hearing because I was satisfied that would enable the matter to be dealt with more efficiently. Philip Boncardo (counsel) represented Mr Andrikopoulos and the CFMEU, instructed by Leah Charlson (CFMEU NSW

Senior Legal Officer). Andrew Pollock (counsel) represented SC Hydro, instructed by Trent Sebbens and Peta Banbas from Ashurst.

EVIDENCE AND SUBMISSIONS

Joint statement of facts

[4] The parties provided an amended statement of agreed facts which was filed on 21 October 2024. I marked this document **Exhibit AR1**.

[5] The agreed evidence included the following:

- i. Prior to commencing employment with SC Hydro, some of the Employees worked on the Snowy Hydro 2.0 project driving concrete agitator for contractors engaged by SC Hydro. The relevant commencement dates for the Employees are:

| NAME | COMMENCEMENT DATE FOR SC HYDRO | COMMENCEMENT DATE FOR A CONTRACTOR ON THE SNOWY HYDRO 2.0 PROJECT |
|---------------------|---------------------------------------|--|
| Raymond Orreal | 25 April 2022 | June 2021 |
| Edward Riley | 18 May 2022 | N/A |
| Glenn Willmott | 11 December 2023 | April 2021 |
| Gavin Blyth | 9 March 2022 | N/A |
| Steven Roach | 22 December 2021 | N/A |
| Clyde Farr | 16 May 2022 | June 2021 |
| Ian Starr | 16 May 2022 | 9 June 2021 |
| Christophe Biberian | 23 May 2022 | N/A |
| Brett Rewald | 6 April 2023 | N/A |
| Louis Brell | 20 June 2022 | 15 October 2021 |

- ii. The Employees are employed on a permanent full-time basis and have been driving/operating concrete agitator trucks at Lobs Hole, Tantangara, or Marica in New South Wales.
- iii. The concrete agitator trucks driven by the Employees transport concrete from on-site batch plants to various parts of the project. This includes three tunnels currently under construction at Lobs Hole, Tantangara, and Marica. The Employees discharge the concrete into a regular pump, a shotcrete pump, or directly onto a surface if required.
- iv. The Employees all hold a Heavy Rigid Vehicle (HR) licence and have been certified competent to operate the concrete agitator trucks.

- v. On commencement with SC Hydro, the Employees received letters of appointment stating they were to be employed in the role of “Driver” and that their classification level under the SC Hydro Agreement was “TW2”.
- vi. SC Hydro has not required and does not require the Employees to perform tasks other than driving/operating concrete agitator trucks and incidental work.
- vii. SC Hydro contends that there are no Tunneller Class 1 positions available for the Employees.

Mr Andrikopoulos and the CFMEU

[6] Mr Andrikopoulos and the CFMEU (collectively, **CFMEU**) provided the following witness statements in support of their arguments.

Brett Rewald

[7] Mr Rewald provided a witness statement dated 15 August 2024, and a reply statement dated 16 October 2024. Mr Rewald was not required for cross-examination. I marked Mr Rewald’s first statement **Exhibit A1**, and his reply statement **Exhibit A8**.

[8] Mr Rewald has worked in the construction industry for around 47 years. Mr Rewald holds the following licences and tickets:

- Multi-combination driver’s licence.
- Forklift ticket.
- Front end loader ticket.
- Skid steer loader (bobcat) ticket.
- Excavator ticket.
- Roller ticket.
- Dozer ticket.
- High risk work licence.

[9] Mr Rewald has experience operating, and is capable of operating, the following equipment:

- Forklift.
- Front end loader.
- Excavator.
- Hiab – a truck with a crane on the back.
- Tele-handler.
- Dump truck.
- Loader.
- Trucks.

[10] Mr Rewald states he spends around 90% of his work time doing duties associated with tunnelling work.

Clyde Farr

[11] Mr Farr provided a witness statement dated 2 August 2024. Mr Farr was not required for cross-examination. I marked Mr Farr's statement **Exhibit A2**.

[12] Mr Farr has worked in the construction industry for 34 years driving concrete agitator trucks. Mr Farr has a heavy combination driver's licence. Mr Farr is also qualified to perform high risk work and to operate a:

- Front end loader.
- Forklift.
- Articulated dump truck.
- Elevating work platform and crane.

Edward Riley

[13] Mr Riley provided a witness statement dated 13 August 2024. Mr Riley was not required for cross-examination. I marked Mr Riley's statement **Exhibit A3**.

[14] Mr Riley currently holds a HR driver's licence. Mr Riley has previously held a forklift licence and a boom pump licence which have now expired.

Gavin Blyth

[15] Mr Blyth provided a witness statement dated 12 August 2024. Mr Blyth was not required for cross-examination. I marked Mr Blyth's statement **Exhibit A4**.

[16] Mr Blyth has worked in the construction industry for 20 years. Mr Blyth holds a HR licence, front-end loader ticket, and forklift ticket.

Ian Starr

[17] Mr Starr provided a witness statement dated 7 August 2024. Mr Starr was not required for cross-examination. I marked Mr Starr's statement **Exhibit A5**.

[18] Mr Starr has worked in the construction industry for approximately 27 years. Mr Starr currently holds a HR truck licence and a front end loader ticket. Mr Starr previously held a forklift C19 ticket which has expired.

Raymond Orreal

[19] Mr Orreal provided a witness statement dated 15 August 2024, and a reply statement dated 16 October 2024. Mr Orreal was not required for cross-examination. I marked Mr Orreal's first statement **Exhibit A6**, and his reply statement **Exhibit A9**.

[20] Mr Orreal has worked in the construction industry for the last 20 years. Mr Orreal is licenced to operate trucks of all sizes and has a front end loader ticket. Mr Orreal spends around 90% of his time performing work associated with tunnels.

Steven Roach

[21] Mr Roach provided a witness statement dated 2 August 2024. Mr Roach was not required for cross-examination. I marked Mr Roach's statement **Exhibit A7**.

[22] Mr Roach holds a multi-combination vehicle licence (open), a forklift licence, and has a Certificate 111 in Surface Extraction (Mining and Civil Induction) – which includes hydraulic excavator operation and wheel loader operations.

Submissions

[23] The CFMEU provided an outline of submissions dated 19 August 2024, and reply submissions dated 16 October 2024. Mr Boncardo provided oral submissions during the hearing on 31 October 2024. I have considered all the submissions.

SC Hydro

[24] SC Hydro provided the following witness statements in support of its arguments.

Glen Pottinger

[25] Mr Pottinger provided a witness statement dated 12 September 2024. Mr Pottinger was cross-examined on his evidence during the hearing on 31 October 2024. I marked Mr Pottinger's statement **Exhibit R1**.

[26] Mr Pottinger is working on secondment to the Future Generation Joint Venture (**FGJV**) in the role of Logistics Supervisor. Mr Pottinger is an experienced truck driver. Mr Pottinger works at the batch plants located at Lobs Hole, Tantangara, and Marica. Mr Pottinger and another supervisor maintain the fleet of concrete agitator trucks. Mr Pottinger states the concrete agitator truck drivers spend 40% of their time in tunnels, 30% on standby, and 30% working on the surface. Mr Pottinger states the drivers may have some involvement in determining and maintaining the slump levels for the concrete, however other workers have responsibility for ensuring the slump levels are accurate and the drivers operate under instruction from those employees.

Gino Brussa

[27] Mr Brussa provided a witness statement dated 12 September 2024. Mr Brussa was cross-examined on his evidence during the hearing on 31 October 2024. I marked Mr Brussa's statement **Exhibit R2**.

[28] Mr Brussa is working on secondment to the FGJV as a Batch Plant Supervisor. Mr Brussa states there are 38 agitator truck drivers working on the Snowy Hydro 2.0 project. Mr Brussa explained the work performed at the batch plant and the role of the drivers. Mr Brussa states the drivers are only required to have a Heavy Rigid vehicle licence and the drivers are not responsible for ensuring the accuracy of the slump level.

Ettore Norris

[29] Mr Norris provided a witness statement dated 12 September 2024. Mr Norris was cross-examined on his evidence during the hearing on 31 October 2024. I marked Mr Norris' statement **Exhibit R3**.

[30] Mr Norris is working on secondment to the FGJV as Drill and Blast Area Manager. Mr Norris indicated Tunneller Class 2 workers operate one piece of equipment and that Tunneller Class 1 employees are multi-skilled and able to operate multiple pieces of equipment. Mr Norris provided a description of the process involved for an employee to move from the Tunneller Class 2 classification to that of a Tunneller Class 1. This is essentially obtaining a ticket and being deemed competent to operate additional pieces of equipment. Mr Norris states the concrete agitator drivers are not the only skilled employees in the Tunneller Class 2 classification and that ADT drivers, bus drivers, grouters and telehandler operators are also in that classification. Mr Norris' statement had advertisements for what he says are Tunneller Class 1 positions attached.

Submissions

[31] SC Hydro filed an outline of submissions dated 18 September 2024. Mr Pollock provided oral submissions during the hearing on 31 October 2024. I have considered all the submissions.

RELEVANT PROVISIONS IN THE SC HYDRO AGREEMENT

[32] The CFMEU referred to the following terms of the SC Hydro Agreement which require employees to be multi-skilled and to perform work in a flexible manner as directed:

Clause 2.6(b): Employee(s) perform work as requested, provided it is within their range of skills and competence.

Clause 3.2(a): Workplace flexibility is a condition of employment. Employees will be multi-skilled and are to work in a completely flexible manner to perform duties as directed by the Company or authorised representatives. All Employees will be required to perform a diverse range of functions within their level of skill and competence as determined by the Company. There will be no demarcation, restrictions or limitations on the performance of work whatsoever, including or between traditional crafts, trades, occupations, vocations or callings.

Clause 3.2(b): The Company or authorised representatives may direct the Employee, and the Employee will be obliged to carry out such duties (including duties of a lower or higher classification) that are within the limits of the Employee's skill, competence and training as determined by the Company and any such direction issued by the Company or authorised representatives will be consistent with the Company's responsibility to provide a safe and healthy work environment.

Clause 3.2(c): Employee(s) may be required to carry out work that they do not normally perform to satisfy the Company's Client requirements and/or to overcome other

operational problems, provided that the employee has the required skills to perform the relevant work.

[33] **Clause 5.1** of the SC Hydro Agreement is directed at how employees are to be classified and states:

- (a) At the commencement of employment, each Employee will be appointed by the Company to a classification level based on skills, qualification and experience and in consideration of the substance of duties required to be carried out at the time of the Project. The classification level will be determined by the primary role which the employee is engaged to perform, regardless of that person's level of skill or qualification. The skills-based classification structure is set out in Appendix A.
- (b) Employees will be required to perform such duties as are within the limits of the Employee's skill, competence and training, including work that is incidental or peripheral to the Employee's main function.

[34] **Appendix A** to the SC Hydro Agreement contains the following further content regarding how individual classification levels are to be determined:

- (a) The appropriate classification level will be determined by the primary role in which a person is engaged to perform by the Company, regardless of that person's level of skill.
- (b) This means that the appropriate classification level for an individual will be determined on a task rather than skills basis.
- (c) Individual classification levels will only change where the primary task for which the individual is engaged changes.

[35] The parties are in dispute regarding whether the Employees fall within the Tunneller Class 2 classification or the Tunneller Class 1 classification. **Appendix A** to the SC Hydro Agreement provides the following descriptions of the two tunnelling levels (the italics below reflect the formatting of the SC Hydro Agreement):

***Tunneller 2**

A period of 6 months is required to be spent in this role prior to being eligible to progress to Tunneller Class 1. Reclassification is subject to the Employee passing a competency assessment and a Tunneller Class 1 position being available. There is no requirement for the Company to automatically reclassify a Tunneller Class 2 after 6 months. Note an experienced construction worker may be accelerated for transition to Tunneller Class 1 subject to being deemed competent.

A Tunneller Class 2 is engaged underground in the work of assisting Tunneller Class 1; able to operate dump trucks; undertake the general duties of a member of a bull gang; carry out general excavation operations including minor concrete works associated with the tunnel excavation permanent and temporary works. A Tunneller Class 2 is able to operate pieces of normal tunnelling equipment.

****Tunneller 1**

An experienced Tunneller familiar in the operation of hydraulic and/or electrical equipment; replacement of ground engaging tools for the road header; lifting and placement devices and other mucking equipment, concrete pumping equipment, and grouting equipment. Able to operate excavator with/without rock breaker, forklifts, skid-steer loader, concrete agitator, vehicle loading crane (Hiab), tele-handler, hoists, dump trucks, grout pumps & mixers, loaders, trucks, rock drilling machines, shotcreting (in training) and rock bolting equipment (in training), gantry cranes and road headers and TBM (in training). Able to operate a wide range of equipment (excluding mobile cranes) and able to undertake minor concrete works associated with the tunnel excavation temporary and permanent works. Able to work with a shotfirer for blasting in the tunnel.

[36] The Tunneller Class 2 classification falls within the broader TW2 classification level and the Tunneller Class 1 classification falls within the broader TW3 classification level. The other primary roles listed as falling within the TW1 to TW3 classifications are:

TW1

- New Entrant (an entry level with less than 12 months experience)
- General Labourer associated with tunnel excavation works
- Dump Truck Operator (in training)
- Water Treatment Plant Helper
- Hoist Driver
- Traffic Controller
- Storeperson
- Peggy/Nipper
- Forklift
- Grout Plant Operator

TW2

- Yardman
- Form Worker/Tunnel Concreter
- Steel Fixer
- Dogman/Rigger
- Dumper Driver
- Tunneller Class 2*
- Water Treatment Plant Operator
- Grout Plant Operator
- Tunnel Steel Fixer

TW3

- Loader/Excavator operator
- Service Vehicle Operator
- Tunneller Class 1**

AUTHORITIES

[37] The parties provided thorough summaries of the legal principles applicable to the task of interpreting enterprise agreements, which are generally not contentious. I consider the critical points are:

- (a) The starting point for construction is the text of the agreement, with that text considered in context and in light of the industrial purpose of the particular provision in question.⁴
- (b) Words in an industrial instrument are not to be interpreted in a vacuum divorced from industrial realities. The construction of ambiguous terms should favour a sensible and practical industrial result, shorn of legalism and pedantry.⁵

[38] These general principles of interpretation are supplemented by the following principles that are specific to the task of resolving classification disputes:

- (a) In assessing whether an employee is engaged in a particular classification, the Commission is to take a practical approach and to consider the aspect of the employee's employment that is the principal or major or substantial aspect.⁶
- (b) The focus should be on the “practical reality” of what employees are required and in fact do.⁷
- (c) Both the quality and quantity of work performed are relevant in determining employee classification. That is, however, subject always to the language of the particular industrial instrument.⁸

[39] SC Hydro relied on the High Court judgments in *Jamsek*⁹ and *Personnel Contracting*¹⁰ in submitting that the binding legal rights and obligations constituting the employment relationship are central and how the parties conducted themselves after the contract is made is irrelevant unless issues of contract variation, estoppel, or waiver arise.¹¹ The CFMEU disagreed with SC Hydro on this point and submitted that “what work, tasks, and functions an employee in fact performs may and often will be relevant to whether they fall within a particular classification.”¹²

[40] It appears to me that the position of the parties on this legal point potentially conflicts with the cases they are advancing. SC Hydro is relying heavily on the fact that the Employees have only been driving concrete agitator trucks to argue they do not meet the Tunneller Class 1 classification. That is at least partially an argument about post-contractual conduct. The CFMEU is arguing the Employees are contractually employed as a “driver” and are required to perform work within their skillset in accordance with the SC Hydro Agreement. That argument

appears to rely heavily on the contractual terms and the legal rights and obligations of the parties, as opposed to post-contractual conduct.

[41] I do not consider it is appropriate to disregard evidence about the work that has been performed by the employees under their contracts of employment. Evidence on this point has been included as an agreed fact. I have taken this evidence into account in determining the dispute below.

CONSIDERATION – PRINCIPAL PURPOSE

[42] SC Hydro submitted that the classification dispute needs to be resolved by applying the two-stage test referred to by the Full Bench of the Commission in *Zheng v Poten & Partners*.¹³ The first stage of the two-stage test is examining the nature of the work performed to ascertain the principal purpose for which the employee is employed. That is a question of fact. The second step is to apply the text of the agreement to determine the appropriate classification for the primary function.

[43] The CFMEU submitted the text of the relevant enterprise agreement must be the primary focus and referred to the following statement by Logan J in *CFMEU v Anglo Coal (Callide Management)*¹⁴:

“A pithy way of putting the same proposition is that both quality and quantity are relevant when it comes to employee classification, subject always to the language employed in the particular industrial instrument.”

[44] Although identifying the principal purpose of the employment is a question of fact, I do not consider how the jobs, positions, or roles are described in an enterprise agreement is completely irrelevant to that assessment.

[45] The Employees have been contractually engaged in the generic position of “driver”. The Employees seemingly fall within the generic classification of either a Tunneller Class 1 or Tunneller Class 2 under the Agreement. However, the Employees have only been specifically directed to drive concrete agitator trucks and to perform tasks incidental to that function during their employment. Driving concrete agitator trucks is not listed as a “primary role” in the classification structure of the Agreement.

[46] I find it difficult to conclude that the principal purpose of the Employees’ employment is driving concrete agitator trucks in circumstances where I do not consider that is the only skilled task the Employees can be lawfully directed to perform. I will expand upon my reasons for that view below. It appears to me that SC Hydro has decided not to utilise the Employees in a multi-skilled manner, even though it has been lawfully able to do so, and where SC Hydro agreed to include terms in the Agreement which state employees must be multi-skilled and work flexibly as directed. Mr Norris provided evidence that Tunneller Class 1 employees are multi-skilled and may be required to operate different types of equipment a shift.¹⁵ I see no legal impediment to the Employees being utilised in that manner by SC Hydro.

[47] Mr Pollock accepted during closing submissions that I must examine “the full scope of what their contracted role requires them to do.”¹⁶ The contracted role based on the agreed evidence is that of a “driver.”

[48] I find that the principal purpose of the Employees’ employment is to perform driving duties associated with tunnelling work.

[49] That means the second stage of the two-stage test requires the identification of the appropriate classification for driving duties associated with tunnelling work under the SC Hydro Agreement.¹⁷

CONSIDERATION – THE CLASSIFICATION STRUCTURE IN THE SC HYDRO AGREEMENT

Preface

[50] There is no doubt the wording of the various terms required to be considered to resolve this dispute lack clarity. Often one term conflicts with another term. The reasoning below is an attempt to determine the meaning and industrial purpose of the various provisions and to provide a sensible and practical industrial resolution.

[51] I do not consider the reference in the Employees’ letters of appointment to their classification being TW2 to be of much assistance in resolving the dispute about the appropriate classification for the Employees in the SC Hydro Agreement. The contractual terms cannot operate to reduce the classification level of an employee under the SC Hydro Agreement. I also do not consider the classification label identified in the letters of appointment should be afforded significant weight in circumstances where my view about how the classification structure in the SC Hydro Agreement is intended to operate is different to that of both parties. If my view is correct, the parties were proceeding on an erroneous understanding of the SC Hydro Agreement when the letters of appointment were prepared. In any event, Mr Pollock accepted in closing submissions that it is not open for the parties “to simply designate the classification.”¹⁸

Tunneller Class 1 classification

[52] I read the Tunneller Class 1 definition in the SC Hydro Agreement as requiring a mixed assessment of an employee’s experience, skills, and the tasks they can be directed to perform. The classification definition relevantly refers to an employee meeting the definition if they are:

- (i) An “experienced tunneller”; and
- (ii) Have the required skills and competencies to be “able to operate a wide range of equipment (excluding mobile cranes) and able to undertake minor concrete works associated with the tunnel excavation and permanent works.”

[53] The term “experienced tunneller” is not defined in the SC Hydro Agreement. However, there is reference in the TW1 classification to a “New Entrant (an entry level with less than 12 months experience).” There is also reference in the TW4 classification description to a

“Mechanical or Electrical or Other Tradesperson with <12 months experience in tunnelling.” The higher TW5 classification then refers to an “Experienced tunnelling Mechanical or Electrical or Other Tradesperson.”

[54] There is also reference in the Tunneller Class 2 definition to an employee being required to spend six months as a Tunneller Class 2 before they can progress to being a Tunneller Class 1. The CFMEU relied on this reference to submit that I should find that an “experienced tunneller” is an employee with a minimum of six months of experience performing tunnelling work.

[55] I determine that the reference to an “experienced tunneller” means an employee who has 12 months of experience performing tunnelling work. I do not consider an employee with only six months of experience working in tunnels would ordinarily be understood to be an “experienced tunneller.” My interpretation is consistent with the other references to what constitutes as experienced employee in the TW1 and TW4 classifications. I do not see any reason to conclude that the tunnelling experience would need to be obtained working for SC Hydro. The words “an experienced Tunneller” are sufficiently broad to capture tunnelling experience obtained working for other employers.

[56] The Tunneller Class 1 definition repeatedly uses the term “able to.” I consider the meaning of that term is clear. An employee is “able to” operate a piece of equipment if they have the skills and qualifications necessary to lawfully operate the piece of equipment. However, I also consider that the reference to “able to” must be understood in the context that the Tunneller Class 1 role is clearly intended to be a multi-skilled classification, and that the SC Hydro Agreement requires employees to work flexibly. I consider “able to” must effectively mean “ready, willing, and able” to operate the relevant pieces of machinery. The holding of the relevant skill or qualification is not enough, the employee must be capable of being directed to operate the equipment by SC Hydro and the employee must be prepared to operate the equipment if directed.

[57] The term “wide range of equipment (excluding mobile cranes)” is also not defined in the SC Hydro Agreement. Mr Norris suggested during cross-examination that being able to operate at least two of the listed types of equipment was sufficient. However, I do not consider Mr Norris’ subjective view to be overly relevant to interpreting the SC Hydro Agreement.

[58] There are at least 15 different types of equipment listed in the Tunneller Class 1 definition. I am not satisfied that being able to operate two of the listed types of equipment meets the description of a “wide range of equipment.”

[59] I determine that the reference to a “wide range of equipment” means at least four of the types of equipment listed in the Tunneller Class 1 definition. Using the Employees as a reference point, that interpretation would capture employees that can drive a concrete agitator truck, a dump truck, and then two other pieces of equipment. I am satisfied an employee meeting that description can operate a “wide range of equipment” and is a multi-skilled employee.

[60] Based on my determinations above, an employee falls within the Tunneller Class 1 definition if:

- (i) The employee has 12 months of experience performing tunnelling work;
- (ii) The employee has the skills and competencies to operate at least four of the pieces of equipment listed in the classification definition and the employee is ready, willing, and able to operate the equipment if directed; and
- (iii) The employee can be lawfully and reasonably directed by SC Hydro to work in a multi-skilled manner operating the types of equipment they are competent to operate.

Tunneller Class 2 classification

[61] I have had more trouble making sense of the definition of a Tunneller Class 2. The reference to a Tunneller Class 2 being “able to operate pieces of normal tunnelling equipment” is particularly confusing. It is not clear whether the various pieces of equipment listed in the Tunneller Class 1 classification constitute “normal tunnelling equipment.” If that is the case, it would appear to eliminate most of the distinctions of significance between the two classifications because all the different types of equipment listed in the Tunneller Class 1 classification would be replicated in the Tunneller Class 2 classification via a mere reference to “normal tunnelling equipment.” I doubt that is the intended effect of the classification structure. I consider the reference to “pieces of normal tunnelling equipment” must include some equipment that requires less skill to operate than the equipment listed in the Tunneller Class 1 definition.

[62] The Tunneller Class 2 definition refers to assisting a Tunneller Class 1 employee. I reject SC Hydro’s argument that the Employees are assisting Tunneller Class 1 employees when they deliver concrete to the tunnels. It is clear a Tunneller Class 1 employee may be directed to drive concrete agitator trucks. It is difficult to see how a Tunneller Class 1 employee so directed could be said to be assisting a Tunneller Class 1 employee. I do not consider a Tunneller Class 2 employee doing the same driving work is assisting a Tunneller Class 1 employee either. The Employees are performing the task of driving a concrete agitator truck without assistance from an employee at a higher level.

[63] However, I also reject the CFMEU’s argument that the Employees cannot be classified as a Tunneller Class 2 because they are not “assisting” a Tunneller Class 1. The classification description must be read as a whole, and I consider driving the concrete agitator trucks can fall within the meaning of “minor concrete works associated with the tunnel excavation permanent and temporary works.”

[64] Some of the other tasks referred to in the Tunneller Class 2 definition provide further indications that the classification is directed at less skilled work than the Tunneller Class 1 classification. There is reference to undertaking the “general duties of a member of a bull gang”, which is a team of labourers. There is reference to general excavation operations. All of this reinforces my conclusion that the main difference between the Tunneller Class 1 definition and the Tunneller Class 2 definition is that a Tunneller Class 1 is expected to be a multi-skilled employee that can be directed to perform tasks beyond what is expected of a Tunneller Class 2.

[65] I determine that the Tunneller Class 2 classification is a classification intended for employees that perform work beyond the entry-level TW1 classification, but who do not have the experience, skills, or potentially required duties necessary to meet the Tunneller Class 1 definition. An employee may also fall within the Tunneller Class 2 classification if they are “experienced” and qualified to operate four or more of the pieces of equipment listed in the Tunneller Class 1 classification but cannot be lawfully directed to operate four or more of the listed pieces of equipment. For example, where an employment contract states the employee will only be required to operate one piece of equipment, such as a concrete agitator truck. Although an employee that is specifically contracted to drive a concrete agitator truck may have other skills, they cannot be directed to utilise those skills and are not engaged to be a multi-skilled employee.

Are there barriers to an employee transitioning out of the Tunneller Class 2 classification?

[66] The following italicised words which appear at the beginning of the Tunneller Class 2 definition appear intended to impose limits on when an employee can progress to the Tunneller Class 1 role:

A period of 6 months is required to be spent in this role prior to being eligible to progress to Tunneller Class 1. Reclassification is subject to the Employee passing a competency assessment and a Tunneller Class 1 position being available. There is no requirement for the Company to automatically reclassify a Tunneller Class 2 after 6 months. Note an experienced construction worker may be accelerated for transition to Tunneller Class 1 subject to being deemed competent.

[67] I consider these terms intentionally draw a distinction between an “experienced construction worker” and an employee that is learning new skills while employed by SC Hydro. I consider an “experienced construction worker” means an employee with 12 months of experience performing construction work, which is consistent with the meaning I have determined for an “experienced tunneller.” An “experienced construction worker” can progress to Tunneller Class 1 “subject to being deemed competent” and is not required to complete six months in the Tunneller Class 2 position, or to wait for a Tunneller Class 1 position to be available. It makes sense for these limitations to not apply to experienced construction workers who have already developed significant skills and experience prior to commencing employment with SC Hydro. I also note the requirement for an employee to have 12 months of experience performing tunnelling work before they can be classified as a Tunneller Class 1 will act as a separate barrier to progression for many experienced construction workers for a period beyond the six months referred to in the Tunneller Class 2 classification.

[68] I consider the situation is different for an employee that would need to train and learn skills while employed by SC Hydro, which may ultimately enable them to be reclassified as a Tunneller Class 1. SC Hydro may not wish to invest the energy and time of training an employee to operate additional types of equipment if SC Hydro does not actually need more multi-skilled employees. In that context, a Tunneller Class 1 position can be said to be not “available.”

What turns on the Employees having only been required by SC Hydro to drive concrete agitator trucks?

[69] It is an agreed fact between the parties that the Employees have only been directed by SC Hydro to drive concrete agitator trucks and to perform work incidental to the driving of these trucks.¹⁹

[70] However, it is also agreed that each Employee was appointed by SC Hydro to the position of “driver”. That means the contract of employment between SC Hydro and the Employees relates to the generic position of driver. I consider this means SC Hydro can lawfully and reasonably direct the Employees to drive vehicles and equipment that they are qualified and competent to drive. That position is consistent with other provisions in the SC Hydro Agreement which make workplace flexibility a condition of employment and require employees to be multi-skilled and to work in a completely flexible manner.

[71] The appropriate classification for the Employees who have a contract with SC Hydro to perform the role of “driver” is determined by the terms of the SC Hydro Agreement. Clause 5.1 and Appendix A both state: “the classification level will be determined by the primary role which the employee is engaged to perform, regardless of that person’s level of skill or qualification.”²⁰

[72] SC Hydro submitted that the “primary role” the Employees are engaged to perform is that of driving a concrete agitator truck. However, that is not a “primary role” that is listed in the classification table appearing in Appendix A of the SC Hydro Agreement. The table suggests that the “primary role” that each employee is engaged to perform must be either Tunneller Class 2 or Tunneller Class 1.

[73] I accept the words: “Individual classification levels will only change where the primary task for which the employee is engaged changes” do suggest the “primary task” of an employee is of some significance to how classification levels can change. However, I suspect those words are primarily directed at the task specific roles in the classification structure. For example, an employee’s primary task and role may change from performing traffic control work to dumper driving work. The employee’s primary role and primary task in that example would change and the employee would move up from the level of TW1 to TW2. The reference to a “primary task” is more problematic for the Tunneller Class 1 and Tunneller Class 2 definitions because these are “primary roles” that can involve the performance of a range of different tasks. I consider the specific wording in the Tunneller Class 2 and Tunneller Class 1 definitions to be a far superior indicator of how those classifications are meant to operate than the generic wording under the heading “Determination of Classification for Individual Employees”.

[74] I determine that the Employees have contracts with SC Hydro to perform the generic role of “driver” and they fall within either the Tunneller Class 1 or Tunneller Class 2 classification in the SC Hydro Agreement, depending on their skills, experience, and what duties they can be lawfully directed to perform. I do not consider the fact that SC Hydro has only directed the Employees to drive concrete agitator trucks alters the classification of a multi-skilled employee that meets the definition of a Tunneller Class 1.

[75] It is also conceivable that SC Hydro management may decide at some point in the future that they do want to exercise the right to require the Employees to utilise their other skills and qualifications. That approach would appear to be consistent with the intended operation of the

SC Hydro Agreement based on the requirement in clause 3.2 for employees to be multi-skilled and to work flexibly. I also note an objective of the SC Hydro Agreement is “Employee Development Legacy”²¹ which is directed at promoting opportunities for employees to access training and acquire skills.

[76] In summary, I consider the fact that SC Hydro has the legal right to direct the Employees to work in a multi-skilled and flexible manner to be of more significance than its post-contractual decision not to utilise the Employees’ multiple skills thus far.

CONSIDERATION - THE APPROPRIATE CLASSIFICATION FOR EACH EMPLOYEE

[77] It is now necessary for me to determine the appropriate classification for the Employees based on my various determinations above.

[78] I accept an added complexity arises in this case because SC Hydro has seemingly not technically assessed whether the Employees are competent to operate equipment beyond the concrete agitator trucks. However, I consider that situation has arisen at least in part from SC Hydro having an erroneous understanding of the classification structure in the SC Hydro Agreement. That is not a criticism, because the classification structure is very difficult to understand.

[79] The Employees that have provided witness statements have provided proof that they have licences or tickets to operate machinery beyond that of a concrete agitator truck. There are obviously assessments undertaken on the skills and knowledge of a person before a licence or ticket is issued. I consider it is appropriate to assume that the Employees have been competent to operate equipment that they have a licence or ticket to operate at all times during their employment with Snowy Hydro.

Brett Rewald

[80] Mr Rewald is employed by SC Hydro as a “driver.” Mr Rewald is “able to operate” at least seven different pieces of equipment that are listed in the Tunneller Class 1 definition and I assume he is ready and willing to do so. SC Hydro can lawfully direct Mr Rewald to operate this equipment because it is within his skills and competency in accordance with the SC Hydro Agreement. The evidence suggests Mr Rewald had no previous experience working in tunnels prior to commencing employment with SC Hydro on 6 April 2023. I determine Mr Rewald commenced employment as a Tunneller Class 2 because he was not an “experienced tunneller.” Based on my determinations above, Mr Rewald became an experienced tunneller on 6 April 2024. I determine that Mr Rewald should have been classified as a Tunneller Class 1 and TW3 from 6 April 2024. Mr Rewald was an “experienced construction worker” when he commenced employment with SC Hydro which means there was no impediment to him being reclassified as a Tunneller Class 1, aside from competence.

Clyde Farr

[81] Mr Farr is employed by SC Hydro as a “driver.” Mr Farr is “able to operate” at least five different pieces of equipment that are listed in the Tunneller Class 1 definition and I assume

he is ready and willing to do so. SC Hydro can lawfully direct Mr Farr to operate this equipment because it is within his skills and competency in accordance with the SC Hydro Agreement. The evidence suggests Mr Farr commenced performing tunnelling work for a contractor to SC Hydro in June 2021 and commenced employment with SC Hydro on 16 May 2022. I determine Mr Farr commenced employment as a Tunneller Class 2 because he was not an “experienced tunneller” on 16 May 2022. Based on my determinations above, Mr Farr became an experienced tunneller after he had worked in tunnels for 12 months, or on around 1 July 2022. I determine that Mr Farr should have been classified as a Tunneller Class 1 and TW3 from 1 July 2022. Mr Farr was an “experienced construction worker” when he commenced employment with SC Hydro which means there was no impediment to him being reclassified as a Tunneller Class 1, aside from competence.

Edward Riley

[82] Mr Riley currently holds a HR driver’s licence. It appears Mr Riley would only be able to operate a concrete agitator and potentially a dump truck. That means Mr Riley does not meet the definition of a Tunneller Class 1 based on my determinations above. I determine Mr Riley has been correctly classified by SC Hydro as a Tunneller Class 2 and TW2.

Gavin Blyth

[83] Mr Blyth is employed by SC Hydro as a “driver.” Assuming Mr Blyth can operate a dump truck because he has a HR licence, Mr Blyth is “able to operate” at least four different pieces of equipment that are listed in the Tunneller Class 1 definition and I assume he is ready and willing to do so. SC Hydro can lawfully direct Mr Blyth to operate this equipment because it is within his skills and competency in accordance with the SC Hydro Agreement. The evidence suggests Mr Blyth commenced employment with SC Hydro on 9 March 2022. There is no evidence that Mr Blyth had prior tunnelling experience. I determine Mr Blyth commenced employment as a Tunneller Class 2 because he was not an “experiencing tunneller” on 9 March 2022. Mr Farr became an experienced tunneller after he had worked in tunnels for 12 months on 9 March 2023. I determine that Mr Blyth should have been classified as a Tunneller Class 1 and TW3 from 9 March 2023. Mr Blyth was an “experienced construction worker” when he commenced employment with SC Hydro which means there was no impediment to him being reclassified as a Tunneller Class 1, aside from competence.

Ian Starr

[84] Mr Starr currently holds a HR truck licence and a front-end loader ticket. It appears Mr Starr is only able to operate a concrete agitator truck, a front-end loader, and potentially a dump truck. That means Mr Starr does not meet the definition of a Tunneller Class 1 based on my determinations above. I determine Mr Starr has been correctly classified by SC Hydro as a Tunneller Class 2 and TW2.

Raymond Orreal

[85] Mr Orreal can operate a concrete agitator truck, a dump truck, and a front-end loader. That means Mr Orreal does not meet the definition of a Tunneller Class 1 based on my

determinations above. I determine Mr Orreal has been correctly classified by SC Hydro as a Tunneller Class 2 and TW2.

Steven Roach

[86] Mr Roach is employed by SC Hydro as a “driver.” Mr Roach can operate a dump truck, concrete agitator truck, forklift, a hydraulic excavator, and a wheel loader. Mr Roach is “able to operate” at least four different pieces of equipment that are listed in the Tunneller Class 1 definition and I assume he is ready and willing to do so. SC Hydro can lawfully direct Mr Roach to operate this equipment because it is within his skills and competency in accordance with the SC Hydro Agreement. The evidence suggests Mr Roach commenced employment with SC Hydro on 22 December 2021. There is no evidence that Mr Roach had prior tunnelling experience. I determine Mr Roach commenced employment as a Tunneller Class 2 because he was not an “experiencing tunneller” on 22 December 2021. Mr Roach became an experienced tunneller after he had worked in tunnels for 12 months on 22 December 2022. I determine that Mr Roach should have been classified as a Tunneller Class 1 and TW3 from 22 December 2022. Mr Roach was an “experienced construction worker” when he commenced employment with SC Hydro which means there was no impediment to him being reclassified as a Tunneller Class 1, aside from competence.

Glenn Willmott, Christophe Biberian, and Louis Brell

[87] Mr Willmott, Mr Biberian, and Mr Brell are identified as Affected Employees in the amended statement of agreed facts, but they have not provided witness statements which confirm their skills, qualifications, and experience as a tunneller. Given what I have determined about the meaning of the Tunneller Class 2 and Tunneller Class 1 classifications, I cannot identify the correct classification for Mr Willmott, Mr Biberian, and Mr Brell on the evidence before me. However, I am confident that the parties will be able to apply my determinations to the personal circumstances of the three Employees to determine their correct classification.

CONCLUSION

[88] The Form F10 application filed by Mr Andrikopoulos and the CFMEU sought a range of determinations.²² The determinations sought in the application are generally not consistent with my determinations above. I do not intend to make the determinations sought in the application.

[89] I consider my determinations above constitute the dispute being resolved and “arbitrated” in accordance with clause 3.12(h) of the SC Hydro Agreement.

[90] If the parties consider further steps are required to resolve the dispute, they can write to my chambers and request that the dispute be listed for Mention.



COMMISSIONER

Appearances:

Mr P Boncardo, counsel, instructed by *Ms Charlson* on behalf of *Mr Andrikopoulos* and the *CFMEU*.

Mr A Pollock, counsel, instructed by *Mr Sebbens* and *Ms Banbas* on behalf of *SC Hydro*.

Hearing

2024.

Sydney.

31 October.

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¹ AE512556.

² SC Hydro Agreement, clause 3.12

³ Amended Statement of Agreed Facts at [8].

⁴ *Ancor Limited v CFMEU* (2005) 222 CLR 241 at [2] (Gleeson CJ and McHugh J) (“*Ancor*”); *ARTBIU v KDR Victoria Pty Ltd* [2021] FCA 1377 at [39] (Wheelahan J).

⁵ *Ancor* at [96] (Kirby J); *ABCC v CFMMEU (The Nine Brisbane Sites Appeal)* (2019) 269 FCR 262 at [5] (Allsop CJ). See also *Ridd v James Cook University* (2021) 274 CLR 495 at [17].

⁶ *FWO v Complete Windscreens (SA) Pty Ltd* [2016] FCA 621 at [27] (Besanko J).

⁷ *Complete Windscreens (SA) Pty Ltd v FWO (No 2)* [2017] FCAFC 212 at [66].

⁸ *CFMEU v Anglo Coal (Callide Management) Pty Ltd* [2015] FCA 696 at [38]-[39] (Logan J).

⁹ *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; (2022) 275 CLR 254 at [8]-[9], [48] and [109].

¹⁰ *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1; (2022) 275 CLR 165 at [44] (Kiefel CJ, Keane and Edelman J).

¹¹ SC Hydro outline of submissions at [6].

¹² CFMEU reply submissions at [9].

¹³ *Zheng v Poten & Partners (Australia) Pty Ltd* (2021) 307 IR 339 at [47].

¹⁴ *CFMEU v Anglo Coal (Callide Management) Pty Ltd* [2015] FCA 696 at [38]-[39] (Logan J).

¹⁵ Witness statement of Mr Norris at [9](c), Exhibit R3.

¹⁶ Transcript at PN448.

¹⁷ *Zheng v Poten & Partners (Australia) Pty Ltd* (2021) 307 IR 339 at [47].

¹⁸ Transcript at PN459.

¹⁹ Amended agreed statement of facts at [27].

²⁰ The words “or qualification” appear in clause 5.1 but not Appendix A.

²¹ SC Hydro Agreement, clause 2.5(d).

²² Part 3 of the Form F10.