



Chairman: Peter Parkinson
UNIT 1, 233 CARDIGAN STREET
CARLTON SOUTH VIC 3053
A.C.N. 110 263 182
TEL: 03 9348 2613 FAX: 03 9348 2714
dboard@vbidb.org.au
www.vbidb.org.au

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CFMEU)

AND

MATANIEL LAURATE PTY LTD T/A CAREY CIVIL CONTRACTORS (CAREY CIVIL)

RE: ALLEGED NON PAYMENT OF SITE ALLOWANCE

MELBOURNE METRO PROJECT

DETERMINATION

15 AUGUST 2019

017-2019

[1] The CFMEU notified a dispute on 13 August 2019 alleging non-payment of Site Allowance for work performed on the Melbourne Metro Tunnel Project. The CFMEU advised that the parties did not require a Conference and provided copies of exchanges between the parties confirming agreement that the Panel could proceed to determine the matter without a Hearing.

[2] On 13 August 2019 the Panel sought written confirmation from the parties to the following:

1. *That the Determinations made by the Panel in Matter No. 014-2017 have been reviewed by the party (copies attached).*

2. *That the party has no submissions that demonstrate why Carey Civil should not be subject to the same outcomes found by the Panel in those Determinations.*

[3] Both the CFMEU and Carey Civil responded in the affirmative to each point.

[4] The relevantly applicable Enterprise Agreement is the *Mataniel Laurate Pty Ltd T/A Carey Civil Contractors* and *the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018*.

[4] The Agreement provides that disputes in relation to site allowances can be determined by the Panel.

[5] Carey Civil advised the Chairman on 13 August 2019 that it had performed works on the Metro Tunnel Project subcontracted to it by CYP from early 2018 continuously, and with CPB/John Holland JV, Rail Infrastructure Alliance (RIA), since November 2018 and it shortly would commence a contract with the Rail Service Alliance on the Project. The site allowances paid to its employees for the RIA works have been less than the quantum determined in Matter No. 014-2017.

[6] The parties have confirmed they have been unable to settle the matter of applicable site allowances for those works.

[7] The Panel finds that there are no matters of substance that have arisen or been submitted to it that warrant a different outcome to the findings and Determinations in Matter No. 014-2017.

[8] Accordingly the Panel determines that the Project scope, site allowance quantum and operative dates determined in Matter No. 014-2017 will apply to Carey Civil. The Panel

requires Carey Civil to implement the terms of this Determination expeditiously, including the making of retrospective payments as applicable.



Peter Parkinson
Chairman



Daniel Hodges
Panel Member



Tony Cordier
Panel Member



VICTORIAN BUILDING INDUSTRY DISPUTES PANEL
CHAIRMAN – PETER PARKINSON
Unit 1, Cardigan Street, Carlton South Vic. 3053
Ph: 03 9348 2613 Fax: 03 3482714
Email: dboard@vbidb.org.au
www.vbidb.org.au.

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

and

CYCON CIVIL PTY LTD
GEOTECH PTY LTD

MELBOURNE METRO TUNNEL PROJECT

ALLEGED INCORRECT APPLICATION OF SITE ALLOWANCE CLAUSE

22 December 2017

014-2017

INTERIM DETERMINATION

[1] On 22 June 2017 the Construction Forestry Mining and Energy Union (“the CFMEU”) notified a dispute between it and various employers arising from claims it had pressed since February 2017 for a site allowance “*in excess of \$15.00 per hour*”, based upon an alleged “*Project Value of \$11.4 Billion*”, in relation to the Metro Tunnel Project (the Project).

[2] The CFMEU alleged that employers were not paying the correct site allowance as required by the applicable Enterprise Agreements.

[3] The applicable Enterprise Agreements are:

- *Cycon Civil Pty Ltd and the CFMEU Victorian Construction and General Division) Enterprise Agreement 2016- 2018*
- *Geotech Pty Ltd and the CFMEU Industry Enterprise Agreement 2011-2015*

[4] The Metro Tunnel Project is a major public transport infrastructure construction project in Victoria for which the Melbourne Metro Rail Authority Corporation (“MMRA”) is directly responsible for its delivery.

[5] The principal purpose of the Project “*is to route the busiest metropolitan train lines through a new tunnel under Melbourne city, which will free up space in the City Loop to run more trains in and out of the city, resulting in more trains, more often across Victoria, with a less crowded and more reliable train network.*” (MMRA website). The MMRA is the Victorian Government body responsible for delivery of the Metro Tunnel Project and the Ballarat Rail Line Upgrade. MMRA is responsible “*for all aspects of the Metro Tunnel Project including planning and development of a project reference design, site investigations, stakeholder engagement, planning approvals and procurement, through to construction delivery and project commissioning.*” (MMRA website). Works commenced on the Project in July 2016, with expected completion of the Project in 2026.

[6] There is an extensive amount of material that can be readily found on-line through the MMRA web site and government publications. The Panel has been informed by the relevant information available and in particular from presentations made to it by the MMRA on 15 August 2017.

[7] Publicly referenced Project Values for the Metro Tunnel Project have been quoted at various times between \$10.9 Billion (Melbourne Metro Rail “*Business Case Briefing Feb 2016*”) and \$11.1 Billion (MMRA “*Freeing Up Melbourne’s Biggest Bottleneck August 2017*”). Traditionally Site Allowances have been determined, having regard to the project construction value, amongst other considerations, usually including preliminary costs, profit margins, trade packages (including supplier and subcontractor costs) and provisional sums. As will be identified later, the referenced quoted Project Values include other considerations, but nonetheless, the construction value is significant and substantial in the context of construction projects generally.

[8] In an endeavour to assist in resolving the dispute the Panel conducted Conferences with the parties on 30 June, 12 July, 15 August, 1 December and 8 December 2017 and issued Statements on the same dates. This Interim Determination is to be read in conjunction with those Statements which provide further relevant background to the dispute and are not repeated here.

[9] During the course of proceedings the CFMEU withdrew its dispute notifications against a number of employers and Geotech was joined to the dispute. It is noted that a Dispute notification on the same matter has also been filed by the PTEU against Geelong Roofing Pty Ltd in Matter no. 023-2017 which has been adjourned pending further notice from those parties having regard to these proceedings.

[10] The parties have not been able to settle this matter, partly due to the differences in opinion about what parts of the project should be considered for the purpose of determining a site allowance, but also due to the limited provision of relevant and applicable data and detail from the client to date.

[11] Arising from a proposal from the Panel, the parties agreed that further guidance from the Panel may assist in resolving the matter if the Panel was to make a formal Determination of the Project Scope and Project Value of the Project for these purposes. This proposal was made in anticipation of receiving further and better particulars from the MMRA. The parties acknowledged that following such Determination they would confer in an endeavour to resolve the Dispute. The Panel was not asked to determine the Site Allowance quantum but was also asked to provide some guidance to the parties.

[12] This determination, albeit an Interim Determination, is made as a consequence of Hearing of submissions by the parties, having regard to the details presently available to the Panel.

[13] Hearings took place on 8 and 15 December 2017.

[14] The CFMEU submitted written submissions on 6 and 12 December 2017. The MBAV on behalf of the Employers made a written submission on 15 December 2017. Each of the parties made various oral submissions.

[15] The MMRA, whilst invited by the Panel to do so, did not participate in the Hearings, but was represented by Industrial Relations Victoria (IRV), but did not make any submissions to the Panel. The MMRA had earlier delivered a presentation of the Project to the Panel on 15 August 2017.

[16] The Panel invited both John Holland (principal contractor for the Early Works package for the Project), and the Cross City Partnership Joint Venture (the then preferred tenderer for the Tunnel and Stations package of works for the Project) to participate to assist the Panel. Both declined to participate in any of the Conference proceedings or the Hearings.

[17] It is noted that final contracts for two significant packages of the Project were not executed until 18 December 2017, after the Hearing had concluded.

[18] The Panel has determined to issue an Interim Determination, the reasons for which are set out herein.

[19] The Panel was asked by the parties to determine the Project Scope and Project Value of the Metro Tunnel Project such that the parties might further confer with a view to settling the Dispute. It is in the spirit of this objective that the Panel considers it is able to reach the interim conclusions it has, including providing some level of guidance which is intended to assist the parties.

[20] The CFMEU submitted that the Project encompasses all activities associated with it, including a number of packages of works identified for the Project, which it submitted results in a Project Value of some \$11.4 Billion. It submitted that the minimum value for Project construction works is at least \$6.324 Billion for those packages.

[21] The Employers submitted that the Early Works package of works on which they have been engaged has a value of \$324m and is of itself a “*Project*” to which the Agreements are applicable. The Employers further submitted that in any event, they were unable to determine the quantum of the remaining packages of the Project because they were not privy to the detail and/or the detail was so imprecise that it should not be considered a project for the purposes of a site allowance.

[22] The Company submitted that the Early Works package should be regarded as a “stand alone” project in so far as the application of the Agreements is concerned, and that the Panel should in effect disregard all the other activities associated with the Project for these purposes.

[23] The Employers acknowledged that the various packages of works which will enable the completion of the Metro Tunnel Project, but submitted the relevant tests necessary to satisfy the requirements of Enterprise Agreements have not been met, other than with respect to the Early Works package, for which they submit they are correctly paying the requisite Site Allowance under the Agreements. For this they rely upon the “*Site Allowance Guidelines*”, also referred to as the “*Ives test*”.

[24] The applicable Enterprise Agreements detail the circumstances in which a site allowance will be paid on Projects with a certain Project Value, unless there are special and exceptional circumstances. It is noted that the Agreements in relation to Site Allowances differ in a number of respects, but for present purposes the differences are not relevant.

[25] Both Agreements provide that “*in all cases where the parties fail to reach agreement on the Project Site Allowance to apply to a particular site or project, then such disagreement shall be referred to the Victorian Building Industry Disputes Panel for determination.*”

[26] There is no dispute between the parties that the applicable Agreements apply to the parties and that the Agreement applies to the relevant construction works.

[27] The Geotech EA provides at Appendix C subclause 12 as follows:

“In determining the rate, the Panel shall have regard to the Site Allowance Guidelines, and shall not deviate from these Guidelines unless there are special and exceptional circumstances.” (our emphasis)

and the Cycon EA somewhat similarly provides at Appendix C subclause 12 as follows:

“In determining the rate, the Panel shall have regard to the Appendix C, and shall not deviate from Appendix C unless there are special and exceptional circumstances.” (our emphasis). The Cycon EA also provides for a definition of Project and references the “*Ives test*” principles.

[28] The parties acknowledged in the Hearing that the circumstances of this particular Project are “*special and exceptional*” and the Panel agrees. Consequently the Panel accepts it is able to proceed to make the Interim Determination that it has in this matter without having regard to the “*Site Allowance Guidelines*”. The “*Site Allowance Guidelines*” reference the principles ordinarily relied upon by the Panel in settling disputes over site allowances. These are well enunciated in the “*Port Capacity Project*” Determination in Matter No. 003-2016 and have been referred to as the “*Ives Test*”.

[29] The Panel notes however that it is not constrained by these principles given the special and exceptional circumstances of this Project. In particular these circumstances primarily arise from the sheer size and scope of the Project, its geographic coverage, its interrelationship with other activities, the lack of sufficient detail to distinguish value and connection with the Project, and the projected time frame for completion of the Project. Each of these factors together present what the Panel accepts and the parties have accepted, amount to “*special and exceptional circumstances*”.

[30] We have determined therefore that the approach to a Project such as this is different and it is clearly open to the Panel to adopt what it regards as commonsense principles to guide the parties to a solution. We consider an Interim Determination may provide sufficient impetus for the parties to enter that dialogue with a view to settling the matter.

[31] Under its Charter the Panel is able “*to inform itself on any matter in such manner as it thinks fit*”. The Charter of the VBIDP also provides that “*no decision shall be regarded as a precedent*”. The Panel has nonetheless had due regard to previous decisions of the Panel, which confirm its view that the circumstances of this Project warrant a different approach than simply determining a Project Value (if it could) and applying a set formula for the resulting allowance. We do not consider that the traditional approach to setting site allowances for projects such as this is appropriate having regard to all the circumstances.

[32] Significant aspects of the Project detail in so far as Project value is concerned, remain to be provided by the MMRA. The MMRA claimed that the state of commercial negotiations for various aspects of the Project has meant not all of the relevant detail could be made available to the Panel at this time. The Panel had asked specific questions of the MMRA which remain unanswered at the time of this Determination. The MMRA has however, since the Hearing, confirmed with the Panel Chairperson that it intends to provide this further detail by February 2018, or earlier if possible, having regard to applicable Government protocols following the execution of the major works contracts with the preferred tenderers on 18 December 2017. For present purposes, the Panel considers the absence of that further detail may not necessarily stand in the way of the parties resolving their differences, having regard to the guidance provided in this Interim Determination. Nevertheless the Panel and no doubt the parties will welcome further clarity from the MMRA.

[33] The following table has been extracted from the presentation made to the Panel by the MMRA on 15 August 2017 to which the MMRA has advised the Panel it can rely in determining the Project scope (reference letter from MMRA dated 15 December 2017). This table lists the four packages of works and Additional Costs, resulting in a total indicative cost of \$11.031 Billion.

“Metro Tunnel Indicative Amounts

ITEM	SCOPE	AMOUNT
EARLY WORKS MANAGING CONTRACTOR	<ul style="list-style-type: none"> • Utility service relocation • Works to prepare construction site 	\$324m*
TUNNEL & STATION PPP	<ul style="list-style-type: none"> • D&C • O&M (25 years period) • Financing • Special Purpose Vehicle 	Up to \$6b#
RAIL INFRASTRUCTURE ALLIANCE	<ul style="list-style-type: none"> • D&C • Rail Transport Operator (Occupations, Driver Training, Accreditation etc) • Wider Network Enhancements 	\$1b#
RAIL SYSTEMS ALLIANCE	<ul style="list-style-type: none"> • D&C • High Capacity Signaling Implementation (\$131m) • Rail Transport Operator (Occupations, Driver Training, Accreditation etc) • Wider Network Enhancements 	\$1b#
ADDITIONAL COSTS INCLUDING	<ul style="list-style-type: none"> • Owner’s Project Management • Project Design and Development • Legal, commercial and Procurement • Land acquisition (200+ properties) • Owner’s Risk • Rail and Tram Transport Operator 	\$3b
Total		Total \$11.031b

**Contract Amount published on Tenders Vic website (excludes GST)*

#Indicative amount, included in Government release.

[34] The Panel accepts that these work packages and costs determine the broad Scope of the Project, however, as is set out below, some of the scope is not relevant for the purposes of determining Construction related activity for which a site allowance might be determined.

[35] On the analysis undertaken by the Panel, having regard to the material available to it, the Project Construction Value and Scope includes the first four items, but not entirely. It does not include the fifth item “*Additional Costs Including*”. Items or packages that properly should be excluded from the first four items, that are not considered construction related for present purposes are:

- Operations and Maintenance
- Financing
- Special Purpose Vehicle Costs
- Rail Transport Operator costs other than construction
- Wider Network Enhancements, but only those that are not intrinsic to or necessary for the completion of the Metro Tunnel Project and are consequent upon a separate initiative than the Metro Tunnel Project. Works associated with the main rail corridor (ie. at least Tottenham to Caulfield and perhaps Sunbury to Cranbourne /Pakenham, the latter which might require further review based upon the MMRA detail yet to be provided) ought be included as should those that are intrinsic to or necessary for the effective performance and completion of the Project.

[36] The Panel is not able to extract the dollar values for these items as this is relevant to the questions yet to be answered by MMRA. Suffice to say the resulting project Construction Value is significant and likely to be well in excess of \$4 Billion, but likely to be less than \$7 Billion. In any event, given the Panel takes the view that the Project Value of this particular Project does not necessarily dictate the relevant quantum of site allowance, as would be the case if special and exceptional circumstances did not exist. The indicative values provided thus far by the MMRA confirm that this is a significant and substantial Project. It can be confidently assumed that over time, these values will also increase given the 10 year programme of construction.

[37] The Project commenced in approx. July 2016 with the awarding of the Early Works package to John Holland Group Pty Ltd (JH). The Early Works package includes:

- The relocation of power, drainage, gas, water, sewer and telecommunications to clear the alignment prior to the main works commencing in 2018.
- The construction of two access shafts in Franklin Street and A’Beckett Street to able future construction of the Stations.
- Major site preparation works including land clearing, property demolition, temporary relocation of monuments and tree protection and removal across all precincts.

[38] It is clear to the Panel that the Early Works are part of the overall Project. We do not accept that this can be the only determinant for a site allowance for a Project of this size, substance and complexity. The same applies to the other packages in so far as construction works are concerned. We note that if there were no “*special and exceptional circumstances*” exception and we were therefore constrained by the “*Ives test*”, there is doubt as to whether we could find sufficient detail and definition of the overall project consistent with the third leg of the principles, that would enable a site allowance to be determined. The Panel, given the circumstances, has not sought to analyse this test further.

[39] The Panel notes the definition of Project in the Cycon EA. Even if the ‘*project*’ for the purposes of that Agreement is technically limited to the Early Works Package, it would still allow for the determination of site allowance in respect of that project, commensurate with a consideration of the value of other interrelated works that could reasonably otherwise be viewed as forming part of a larger project (just not for the purposes of site allowance under that Agreement). Put another way, the Panel does not accept that clause 12 of Appendix C of that Agreement empowers the Panel to ignore the definition of Project. But it does however, allows the Panel, should it become necessary, to arrive at a different site allowance figure or approach in relation to that Project in the case of “*special and exceptional circumstances*”, as is the case here.

[40] The Employers have undertaken contracts of works directly or indirectly with JH to perform certain works associated with JH’s early Works contract with the MMRA. Geotech undertook and have completed various works during 2017. Cycon has undertaken a range of activities across the package of works and are still engaged on the contract.

[41] The Employers have been paying site allowances ranging from \$4.50 -\$5.50 per hour. They say these were primarily determined upon advice received from or via the principal JH that the Project Value for the purposes of site allowance should be \$324m only.

[42] There was never any agreement reached or attempt to do so, with the CFMEU about the value or the quantum of the Project or site allowance. It is noted in relation to Geotech, that there was no disagreement between the parties in relation to the applicable site allowance

whilst Geotech was on site. It is acknowledged that no-one was in a position to advise what the actual site allowance was (i.e. if not \$4.50 per hour). The Panel has said before and says again, a good practice for the parties to Enterprise Agreements that contain provisions such as are applicable here, and principal constructors, are wise to confer in relation to site allowance quantum prior to commencement of their works on site. This should ordinarily avoid surprises.

[43] The Panel would expect that should a different quantum than has been paid, be arrived at, then the parties would need to reach agreement about that or otherwise be determined by the Panel subsequently. For now the Panel has not been asked to determine whether or not there should be any retrospectivity should a higher number than actually paid be arrived at, through whatever means. Again, this is a matter the parties might settle directly. Suffice to say that it was abundantly clear at the commencement of the works that the works were one package of a number of well identified prospective packages that would be let, carefully planned and scheduled to enable the construction of the Project. It would be naive in the extreme to assume that the matter would end there. Nor, in the view of the Panel does it follow that the total project value in a project like this should necessarily determine the value of the site allowance in such a project, from day one. Regard should also be had to the circumstances attaching to the sub contractors and the nature of the works.

[44] The Panel observes, as acknowledged by the parties, that it is unfortunate for such a significant infrastructure construction project, that no dialogue was facilitated with prospective interested parties to strike a Project Agreement or similar approach that could have answered this and other questions well in advance of works commencing, avoiding the uncertainty under which sub contractors in particular may have had to operate and employees have had to await a settlement of the question, well beyond commencement of the Project.

[45] It is noted that there has not been any industrial action in relation to this matter.

[46] The Panel considers that the approach that should be taken is one not just related to the Project Scope and Project Value by simply applying a table of increasing values and increasing allowances. Hitherto, Site allowances for Projects with significant infrastructure

and building construction elements have been determined, often between the parties themselves, together with other considerations, as distinct from say a commercial building being developed and constructed on a single site. Indeed the Site Allowance guidelines were derived primarily with such developments in mind, certainly not a Project of this nature. This is also another reason why the Panel considers the Project is special and exceptional for present purposes.

[47] We also query whether or not there should become a point in the size of a substantial infrastructure construction project like we are dealing with here, when the relevant justifications for which a site allowance ought be paid remains similar, whether the project is worth \$2 Billion, or \$10 Billion or \$20 Billion. We are not certain that an allowance should necessarily continue to increase for such projects just because of the size of the project alone. There will be other considerations of course. We are conscious however that it is important to retain personnel knowledgeable in a Project so as to maintain their engagement on a project. Given the infrastructure pipeline in Victoria and the projected values of those projects, one in excess of \$16 Billion, we think this might need to be a consideration for such special and exceptional projects. We have not been addressed on this and do not seek to settle the matter here, but suggest it is a matter the parties might contemplate in their pending further deliberations.

[48] We consider that in order to provide some guidance in a Project like this it may well be that a phased arrangement for stepped allowances and perhaps other considerations could apply such that as the value obviously increases exponentially then a stepped allowance and other considerations or conditions might apply. The Panel considers that Early Works for such a significant project cannot be regarded as stand alone. We say that some regard must be had for the size of the overall project but not such that the full construction value should dictate the starting point of a site allowance quantum for this package. We have in mind a figure that equates to a Project certainly not less than \$324m, perhaps more, from its commencement, leading to a stepped increase or increases in the allowance at commencement of the Major works and that the value then established is indexed on a per annum basis throughout the life of the Project, having regard to Indicative project value and CPI, for those activities that fall within the Scope of the Project as suggested by the Panel - refer

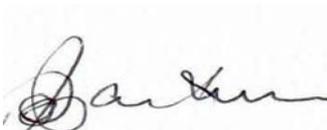
paragraphs [33] to [35]. To be clear we consider the second point of a stepped increase should be the commencement of the Tunnel and Stations package. The other packages overlap this package and the same quantum of site allowance should apply to those construction works, in so far as the works fall within the scope suggested by the Panel.

[49] We should also note that there has been some suggestion that the Early Works Package has been extended from its original scope which may have added to that value. For present purposes that can be a matter for the parties to consider in their further deliberations.

[50] This is as far as the Panel is able to take the matter given the detail yet to be provided, upon which it was hoped greater clarity could have been possible. Nevertheless, some guidance can be taken from this Interim Decision.

[51] It remains for the parties to now confer with a view to settling the matter.

[52] In the event the matter cannot be settled by direct negotiation, having been appraised of the Panel's Interim Decision, the parties are at liberty to seek a further Conference or Hearing with the Panel to assist in resolving the matter and if necessary to make a final Determination on the matter of applicable quantum of Site allowance(s) appropriate for the Project, including operative dates.



Peter Parkinson
Chairman



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UNIT 1, 233 CARDIGAN STREET
CARLTON SOUTH VIC 3053
A.C.N. 110 263 182
TEL: 03 9348 2613 FAX: 03 9348 2714
dboard@vbidb.org.au www.vbidb.org.au

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

and

VARIOUS NOTIFIED COMPANIES (listed in Attachment 1)

MELBOURNE METRO TUNNEL PROJECT

ALLEGED INCORRECT APPLICATION OF SITE ALLOWANCE CLAUSE

13 April 2018

014-2017

DETERMINATION

[1] The Panel has issued previous Statements in relation to this matter and an Interim Determination 22 December 2017. This Statement is to be read in conjunction with those previous Statements and the Interim Determination. In its Statement 29 March 2018 the Panel issued the following Directions:

“Any party listed in the notification of this matter, whether formally joined to the Dispute or not, is invited to make formal written submissions to the Panel in relation to the CFMEU proposal outlined in paragraph [14]. The Panel invites submissions on the following:

- (i) the CFMEU proposal itself;*
- (ii) the operative date of effect should the Panel determine a quantum or quantums for the `Site Allowance applicable to the relevant works;*
- (iii) the reasons whether or not an employer should be joined to any such Determination having regard to the work actually conducted or being conducted by its relevant employees;*

- (iv) *the date by which any determination of the Panel should it make one, be effected, having regard to a period of grace, as it were, being proposed by the CFMEU;*
- (v) *any other matter a party wishes to submit.”*

[2] Submissions were received from a number of parties which have been taken into account in this Determination.

[3] Having regard to all the submissions, the material before the Panel and its Interim Determination, the Panel determines as follows:

Scope:

[4] As proposed by the parties, this Determination is limited in scope to the works undertaken as part of the Metro Tunnel Project (Project) to those works that have become known and understood by the parties as the Early Works Programme. This is just one element of the many critical elements of the Project. It does not stand alone for the purposes of our considerations.

[5] These works have been underway since July 2016. The Project works are now transitioning to what has become known to the parties as Major Works. The Major Works commenced at the beginning of March 2018. To be clear, this Determination does not apply to any of the works undertaken as part of the Major Works contracts of the Project, including any works that may have been novated from the Early Works Programme to the Major Works contractors, from the date of such novation. The site allowance applicable to the Major Works and any novated works is yet to be determined and the Panel notes that the CFMEU is seeking to conclude further dialogue with the principal contractors in this regard. The Panel encourages the relevant principal contractors, the client and the CFMEU to settle this remaining aspect of this dispute as appropriate, including the scope of application of this next stage of site allowance application on the Project. Having regard to the observations the Panel had made in this matter we now expect the relevant parties to conclude a settlement about the quantum of the site allowance to be paid with effect from 1 March 2018 without unreasonable delay. Given the material now available and the reasonable projections that can now be made in relation to the Project and its component elements we expect this to be concluded over the course of the next month. In absence of a settlement, any relevant party is at liberty to make further application to the Panel for its assistance and/or further Determination.

[6] In the event that there is any dispute as to what is or is not part of the Early Works Programme for present purposes, any relevant party is at liberty to seek further direction from the Panel.

Parties Bound:

[7] Over the course of the proceedings in this matter the CFMEU notified a dispute in relation to some thirty one (31) separate employers, each of whom have been sub-contracted to perform works under the Early Works Programme.

[8] The CFMEU in its submission of 9 April 2018 does not press the dispute with Metcalf Crane Services Pty Ltd, Preston Hire (Vic) Pty Ltd and Sergi (Aust) Pty Ltd. It is not apparent to the Panel as to how these employers could be joined to the dispute given the contents of the relevant Enterprise Agreements.

[9] A number of the notified employers are parties to Enterprise Agreements that provide for an alternative allowance to be paid in lieu of a site allowance, subject to the type of work undertaken by the employees. Examples include “*demolition allowances*”, “*piling allowances*”, “*concrete drilling and sawing allowances*”. Those Enterprise Agreements with the provision of a “*demolition allowance*” apply this allowance in lieu of a site allowance when “*demolition work*” is undertaken by the employees. The “*Concrete Sawing and Drilling*” Enterprise Agreements allow for the greater of the relevant allowance to be paid, requiring a combination of “*allowances and fares*” to be taken into consideration.

[10] Various submissions made to the Panel are at odds as to whether or not *Appendix C* of the relevant Enterprise Agreements, in relation to “*special and exceptional circumstances...*”, override the provision which provide for alternative allowances to be paid in lieu of site allowances, where the works are of a specific nature, eg. “*demolition works*”.

[11] In the case of “*demolition allowance*” for example the Panel is not persuaded that in the circumstances where “*demolition works*” are specifically conducted by employees that the site allowance provision of the Enterprise Agreement has any work to do in these particular circumstances. The Panel considers that *Appendix C* only becomes relevant in these circumstances

where the work performed is not “*demolition work*” and the employee(s) in question are not receiving the “*demolition allowance*”. This is critical as to whether or not some employers sought by the CFMEU to be joined to the dispute can be joined and will require those employers that are joined to this matter to carefully assess the obligations, if any, that arise to them from this Determination.

[12] The Panel has determined to not join a number of the notified employers as parties to this Dispute as the Panel has been satisfied by the submissions that an alternative allowance applies in lieu of a site allowance, and only where the works are specifically caught by the alternative allowance.

[13] Where employers have failed to make submissions as to the type of works undertaken, and many did not, and the relevant Enterprise Agreement provides for the Panel to determine a site allowance, these employers have been joined. Those employers that otherwise are in dispute as determined by the Panel have been joined.

[14] The Panel has therefore determined to formally join these additional employers to the dispute, resulting in the following employers now being formally bound by this Determination, as set out in the table below, which includes reference to the applicable Enterprise Agreement in each case.

Advanced Sawing & Drilling Pty Ltd	<i>Advanced Sawing & Drilling PTY LTD and the CFMEU (Victorian Construction and General Division) Concrete Sawing and Drilling Enterprise Agreement 2016-2018</i>
APS Industrial Services Pty Ltd	<i>APS Industrial Services Pty Ltd and the CFMEU (Victorian Construction and General Division) Contract Scaffold Enterprise Agreement 2016-2018</i>
	<i>APS Industrial Services Pty Ltd and the CFMEU (Victorian Construction and General Division) Rigger/Steel Erector Enterprise Agreement 2016-2018</i>
Associated Rigging Pty Ltd	<i>Associated Rigging Australia Pty Ltd and CFMEU Rigger/Steel Erector Enterprise Agreement 2011 - 2015</i>
Civilex Victoria Pty Ltd	<i>Civilex Victoria Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016 - 2018</i>

Cycon Civil Pty Ltd	<i>Cycon Civil Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016 - 2018</i>
Deca Constructions Pty Ltd	<i>DECA Constructions Pty Ltd T/As DECA Constructions CFMEU (Victorian Construction and General Division) Brick Laying Enterprise Agreement 2016-2018</i>
Delta Pty Ltd	<i>Delta Pty Ltd T/As Delta Group and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>
Fortis Construction Pty Ltd	<i>Fortis Construction Products Pty Ltd T/As Total Patch & Seal and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>
Geotech Pty Ltd	<i>Geotech Pty Ltd and the CFMEU Industry Enterprise Agreement 2011-2015</i>
GVP Fabricators Pty Ltd	<i>GVP Fabricators Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>
Marine Parade Pty Ltd	<i>Marine Parade Pty Ltd T/As Auscut Gippsland Concrete Sawing and the CFMEU Concrete Sawing and Drilling Enterprise Agreement 2011-2015</i>
MC Labour Services Pty Ltd	<i>MC Labour Services Pty Ltd and the CFMEU (Victorian Construction and General Division) Labour Hire Industry Enterprise Agreement 2016-2018</i>
Mitchcon Australia Pty Ltd	<i>Mitchcon Australia Pty Ltd and the CFMEU Concrete Pumpers Industry Enterprise Agreement 2011-2015</i>
Nationwide Concrete Pumps (Vic) Pty Ltd	<i>Nationwide Concrete Pumping (VIC) PTY LTD T/As Nationwide Concrete Pumping and the CFMEU (Victorian Construction and General Division) Concrete Pumping Enterprise Agreement 2016-2018</i>
Pro-Tech Hoardings Pty Ltd	<i>Pro-Tech Hoardings Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>
Quinn Civil Contractors P/L	<i>Quinn Civil Contractors Unit Trust (Trustee for) T/As Quinn Civil Pty Ltd and the CFMEU Civil Construction Industry Enterprise Agreement 2011-2015</i>
Reliable Scaffold Services Pty Ltd	<i>Reliable Scaffold Services Pty Ltd and the CFMEU Contract Scaffold Enterprise Agreement 2011-2015</i>
SAS Steel Pty Ltd	<i>SAS Steel Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016 - 2018</i>

Scaffold Logistics Commercial Pty Ltd	<i>Scaffold Logistics Commercial Pty Ltd and the CFMEU (Victorian Construction and General Division) Contract Scaffold Enterprise Agreement 2016 - 2018</i>
Strategic Drilling Services Pty Ltd	<i>Strategic Drilling Services Pty Ltd and the CFMEU Piling Enterprise Agreement 2011-2015</i>
Super City Concrete Cutting	<i>Leviathan Turst T/As Super City Concrete Cutting Pty Ltd and the CFMEU (Victorian Construction and General Division) Concrete Sawing and Drilling Enterprise Agreement 2016-2018</i>
Tycon Group Pty Ltd	<i>Tycon Group Trust (The Trustee for) T/As Tycon Group Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>
Urban Drilling Pty Ltd	<i>Urban Drilling Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015</i>
Vertcon Pty Ltd	<i>Vertcon Pty Ltd and the CFMEU (Victorian Construction and General Division) Concrete Pumping Enterprise Agreement 2016-2018</i>
Vic Sawing and Drilling Pty Ltd	<i>Vic Sawing and Drilling Pty Ltd and the CFMEU (Victorian Construction and General Division) Concrete Sawing and Drilling Enterprise Agreement 2016-2018</i>
Vladimir Jovanovic	<i>Jovanovic, Vladimir T/As Kakosi Construction and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>

[15] Given the variations that exist across the Enterprise Agreements the Panel acknowledges that there is the possibility of some grey area as to the specific works undertaken by employees such that some further direction in specific circumstances for certain employers might be required - in this case any relevant party is at liberty to seek further direction from the Panel in this regard. For example, in addition to circumstances to where an employee has been paid the “*demolition allowance*” in lieu of site allowance, there are a number of other circumstances where the specific allowance paid to an employee (eg. Concrete sawing) may offset, either in part or in full, the site allowance. The Panel will say more on this later.

Quantum of Site allowance and Operative dates:

[16] Based upon the material provided by MMRA and available to to the Panel, the Panel accepts that the Project Value is in excess of \$5.208 Billion with additional significant works yet to be let.

Having regard to the historical general methodology in setting site allowances this could lead to an allowance in excess of \$9.00 per hour, however, the Panel has determined that in relation to this particular Project, given the nature of the programme of works of the Project and its observations in its Interim Determination, a different approach is warranted here in these circumstances for these works.

[17] Having regard to the Panel's Interim Determination, the proposal submitted by the CFMEU as part settlement of the dispute, and the submissions received by the Panel, all of which the Panel has carefully considered, we find that for works conducted under the Early Works Programme, a site allowance of \$6.50 per hour shall apply with effect from 1 July 2017, increasing to \$7.50 per hour with effect from 1 October 2017, applicable until 1 March 2018, the commencement of the Major Works, from which date the yet to be determined site allowance for works on the Project shall apply. It is noted that the Early Works Programme will be completed by June 2018 and as a result there will need to be an adjustment to reflect the new rate from 1 March 2018 when it is known. The Panel wishes to make it clear that where an employer has paid an alternative allowance such as "*demolition allowance*" under the terms of the applicable Enterprise Agreement, then that allowance shall apply in lieu of the site allowance. Where a combination of "*allowances and fares*" is required to be considered under the terms of the applicable Enterprise Agreement, the employer will be required to pay the higher amount for the relevant period where the combination allowance equates to less than the sum of the relevant fares allowance and site allowance provided herein.

[18] This Determination recognises the stepped increase approach referenced in the Panel's Interim Determination.

[19] The Panel notes that these works commenced in July 2016 and in the ordinary course of events it could be expected that would be the date of effect of site allowances for the Project arising from this Determination. As we have observed, matters such as site allowances should be dealt with much earlier and a failure of principals to participate in some way to facilitate early and timely resolution of such matters should not be excused. We note there has been a range of allowances applied from that date with \$4.50 per hour applied by some employers and higher amounts for work in demolition or in connection with demolition works and other allowances. The CFMEU has proposed an operative date of 1 July 2017 for this Determination (albeit at a

higher rate than the Panel has determined), but it submits this is in genuine recognition of the difficulties experienced by the employers in this matter given inappropriate guidance or direction provided them at the outset and an absence of adequate detail being made available to the parties for “commercial” reasons. This provides some relief to those employers that ordinarily the Panel would not be inclined to give. However given the unique circumstances of this matter which is reflected in the fact that this is the first matter where the notion of “*special and exceptional circumstances*” in the context of *Appendix C* to the relevant Enterprise Agreements, has been found to apply, we consider that in all the circumstances a starting point of 1 July 2017 is appropriate.

[20] In determining the quantum of site allowance applicable in this matter the Panel has also had regard to the quantum of site allowances that are applicable in industry generally, the history of this matter and the Project itself. The Panel considers this finding to be a fair and reasonable outcome given all the circumstances of this matter.

Date of effect:

[21] The application of this Determination is to have immediate effect, however, any employer subject to this Determination will have until 1 June 2018 to effect any retrospective payments arising. This is to enable them to have dialogue, if required, with their client as suggested by the CFMEU.

[22] The Panel notes that some subcontractors have hitherto applied a lower site allowance on the Project, in the order of \$4.50 per hour, as had been unilaterally recommended to them by their client, which, from the evidence before the Panel, was done without having due regard to the provisions of the applicable Enterprise Agreements and/or the scope of the Project. Again the Panel observes that a much more constructive approach for a project of this nature is for the client and prospective parties to convene in advance of Projects commencing to seek to reach an understanding about such matters in the interests of all parties as previously envisaged by project Agreements or similar. Most participants in these proceedings have endorsed this approach rather than the process necessarily adopted in this matter in absence of it.

[23] For completeness we also find that there is nothing that stands in the way of the Panel determining retrospective application and the Determination is entirely consistent with the Panel's Charter and the applicable Enterprise Agreements. The employees the subject of the Enterprise Agreements are entitled to the terms and provisions of the applicable Enterprise Agreements.

[24] This concludes this aspect of the Dispute.



Peter Parkinson
Chairman



Daniel Hodges
Panel Member



Tony Cordier
Panel Member



Chairman: Peter Parkinson
UNIT 1, 233 CARDIGAN STREET CARLTON SOUTH VIC 3053
A.C.N. 110 263 182
TEL: 03 9348 2613 FAX: 03 9348 2714
dboard@vbidb.org.au www.vbidb.org.au

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

and

VARIOUS NOTIFIED COMPANIES (listed in Attachment 1)

MELBOURNE METRO TUNNEL PROJECT

RE:ALLEGED INCORRECT APPLICATION OF SITE ALLOWANCE

20 July 2018

014-2017

DETERMINATION

**BY MAJORITY DECISION (Chairperson Parkinson and Panel Member
Cordier, Panel Member Hodges dissenting)**

[1] This is a dispute over the payment of site allowances on the Melbourne Metro Tunnel Project. The Panel has issued previous Statements and Determinations in relation to this matter as follows:

- Statement - 30 June 2017
- Statement No. 2 - 12 July 2017
- Statement No. 3 - 15 August 2017
- Statement No. 4 - 1 December 2017
- Statement No. 5 - 8 December 2017
- Interim Determination - 22 December 2017

- Statement No. 6 - 28 March 2018
- Determination - 13 April 2018
- Statement No. 7 - 18 May 2018
- Statement No. 8 - 7 June 2018

[2] This Determination is to be read in conjunction with each of those previous Statements and Determinations and deals with the outstanding matters in relation to this Dispute.

[3] The Melbourne Metro Tunnel Project is a major public transport infrastructure construction project in Victoria, said to cost in excess of \$11 Billion and has been under construction since July 2016. It is anticipated to be completed in 2026.

[4] In its Interim Determination the Panel found that pursuant to *Appendix C* of the relevant applicable Enterprise Agreements that “*special and exceptional circumstances*” applied to this Project. The Panel went on to provide certain principles intended to guide the parties to a settlement of the Dispute including guidance as to the Scope of the Project for site allowance purposes. The parties were not able to settle the Dispute.

[5] The Panel’s Determination of 13 April 2018 was limited in scope to the Determination of site allowance for works undertaken pursuant to what had come known and understood by the parties as the “Early Works Programme” in the context of the overall Project. That Determination left outstanding and unresolved the quantum of Site Allowance that would be payable across the Project with effect from 1 March 2018. It was then hoped that the parties might settle that matter directly by further negotiation having regard to the Panel’s observations and findings. The parties were not able to settle the outstanding matter.

[6] In its Statement No. 8 of 7 June 2018, the Panel issued the following agreed directions providing for any party to the dispute, including participants in the Project, Cross Yarra Partnership JV(CYP JV), John Holland (JH) and Industrial Relations Victoria (IRV), should they wish, to make written submissions to the Panel on any of the following matters:

1. Whether or not the Panel should immediately proceed, after receipt of the written submissions, to finally determine the outstanding matters, noting that separate negotiations are proceeding between a number of unions and CYP regarding a possible Greenfields Enterprise Agreement, which may or may not have relevance to this matter and may or may not be settled in the short term; and

2. If the Panel decided to proceed to determine the matters:

(a) what should be the Scope of the Project, noting that much of this has already been traversed by the Panel, and noting also that it would be open to any party at a later date, should a dispute arise as to scope, particularly having regard to the projected time frames of the Project, to determine matters of scope that may not presently be obvious; and

(b) what should be the quantum of allowance effective from 1 March 2018, having regard to the Panel's previous Determinations in this matter, and what adjustment/review or indexation arrangements to that allowance should apply for the remainder of the Project; and

(c) any other relevant matter.

[7] Submissions were received as follows:

- CFMEU - 22 and 27 June 2018
- CYP JV - 26 June 2018
- Urban Drilling - 4 July 2018

[8] The Panel subsequently provided a further opportunity for any party to respond. The Panel reminded all parties and participants of the opportunity to make final

submissions in reply by 4 July 2018. No further written submissions on the substantive matters were received.

[9] The Panel conducted a Final Hearing on 16 July 2018 for the purpose of receiving any final submissions by any party in person, including as to whether or not the Panel should thereafter immediately proceed to determine the outstanding matter. The Hearing was attended by representatives of the CFMEU, CYP JV, John Holland, Metcalf, Associated Rigging, Reliable Scaffold and IRV, with apologies from others.

[10] The Panel has carefully considered all the oral and written submissions in the matter. Suffice to say, the Panel has thoroughly considered every relevant matter throughout the course of proceedings in this matter.

Should the Panel delay its Determination?

[11] CYP JV's submission of 26 June 2018 was limited to advising the Panel that it was continuing to negotiate with the unions in respect of site allowance claims and other matters pertaining to the Project more generally. It identified that negotiations were underway and urged the Panel "*...to take no further action until those negotiations have progressed.*" It had made a similar suggestion in an earlier letter to the Panel dated 17 May 2018 and in another letter in essentially identical terms to the 26 June 2018 letter, dated 31 May 2018.

[12] The CFMEU submitted that the Panel should proceed to issue its Determination on the outstanding matters.

[13] At the Hearing on 16 July 2018 CYP JV confirmed that the negotiations it was seeking to progress with the relevant unions were in relation to two Greenfields agreements for its prospective employees only, one for surface works, the other for tunneling works. It confirmed that the proposed agreements would cover all terms and conditions of which site allowance was one such term. Such an agreement if made would not have any application to the employees employed by the subcontractors party to this dispute. The JV advised that the negotiations had progressed and it anticipated that the negotiations would be settled in a matter of weeks.

[14] The Employers, found earlier by the Panel to be party to the dispute, some 26 of them, have not made any submissions that the Panel delay its Determination, and a number have expressed the wish for the matter to be finally resolved, one submitting “*sooner rather than later*”.

[15] The CFMEU has urged the Panel to issue a Determination as it would only apply to the employees of subcontractors not the JV. The CFMEU confirmed that it anticipated negotiations for the greenfield agreements could be settled in a matter of weeks.

[16] We note, as acknowledged by the JV, that the matters that are subject to negotiation for the Greenfields agreements directly with the JV for its intended employees go to a wide range of matters, not just site allowance, whereas the matters before us are specific to the site allowance only. Other matters concerning

terms and conditions of employment on the Project are already settled in the Agreements before us.

[17] We note also the number of subcontractor employees on the Project presently and the projected increases in subcontractors and subcontractor employee numbers commencing on the Project. There are presently some 200 employees on site. It is expected that these numbers will grow considerably.

[18] It is almost certain that some of these additional subcontractors to the Project will have similar Agreements to the ones before us, in so far as the application of site allowances is concerned.

[19] Certainty of this matter now will assist good practice industrial relations and avoid any further confusion, given it is very likely that the tests in relation to site allowance rates will be identical for many, and this we consider will be instructive to the parties to those agreements. We note this will not just apply to enterprise agreements to which the CFMEU is party, but is likely to also apply to electrical and plumbing enterprise agreements, many of which provide for site allowances in similar terms. Apparently the parties to those agreements have already been following the Panel's determinations under this matter to date.

[20] Given the long history of this matter, any reading of the Statements and previous Determinations should be evidence enough that this matter needs to be finalised. We do not consider there is any good reason to delay our Determination any further and note that the negotiations being pursued by the JV have progressed. The Panel has provided every opportunity for the outstanding matters in dispute to be resolved by negotiation directly between the parties well before now. We do not

consider that it is helpful to allow negotiations which are not before the Panel and for which the Panel has no involvement, to stop it from determining the matters before it as provided by the Agreements and the Panel's Charter. Any settlement of a greenfields agreement by the JV will have no influence on the conclusions the Panel has reached in the matters before it. The outstanding matters before the Panel need to be settled for the best interests of everyone, the employers and employees covered by the agreements and for the Project itself.

[21] Having regard to all the circumstances, facts and evidence in this matter the Panel reaffirms its findings in its previous Determinations and Statements published in the matter. The parties are encouraged to reappraise themselves of those findings. We set out the following matters for clarity.

Parties Bound

[22] The Panel reaffirms its findings in its Determination of 13 April 2018 at paragraphs [7] to [15] which are unnecessary to repeat here as all relevant parties have been provided with that Determination, and no party has raised any issue in relation to the application of that Determination. The same 26 employers are bound by this Determination in the same way explained by the Panel in the earlier Determination in relation to any works they have conducted or are conducting on the Project for the relevant periods. We note that some may not have worked on the Project for some time. Should they return, this Determination will be binding on them.

[23] During earlier proceedings in this matter the Panel excluded Wagstaff from the Dispute for reason that its the Enterprise Agreement (*Wagstaff Piling Pty Ltd*

and the CFMEU (Victorian Construction and General Division) Piling Enterprise Agreement 2011-2015) (the Wagstaff 2011 Agreement) did not have application in this matter. In the West Gate Tunnel Project (Matter number 008-2018) the Panel has been informed by Wagstaff that it has replaced that agreement with a new Agreement (*Wagstaff Piling Pty Ltd and the CFMEU (Victorian Construction and General Division) Piling Agreement Enterprise Agreement 2016 - 2018)* (the Wagstaff 2018 Agreement) which would now have application in this matter with effect from 18 May 2018 if it were to perform work on this Project. We however do not formally rejoin Wagstaff to this matter; rather we leave it to the commonsense of the parties to apply the appropriate site allowance pursuant to its agreement consistent with the findings in this Determination. Should there be any dispute about this any party is at liberty to apply to the Panel.

Scope of Project

[24] The Panel is satisfied that the scope of the Project for the purposes of the applicable site allowance will be for any works undertaken within the works as referred in paragraphs [33] to [34] of its Interim Determination dated 22 December 2017, subject to the qualifications set out therein. We do not see any reason to revisit this. There have not been any submissions that have led the Panel to accept that the scope of works are either more or less than the guidance we then provided which we now adopt for this Determination. We repeat this description from the Interim Determination below for the purposes of clarity:

“[33] The following table has been extracted from the presentation made to the Panel by the MMRA on 15 August 2017 to which the MMRA has advised the Panel it can rely in determining the Project scope (reference letter from MMRA dated 15 December 2017).

This table lists the four packages of works and Additional Costs, resulting in a total indicative cost of \$11.031 Billion.

“Metro Tunnel Indicative Amounts

<i>ITEM</i>	<i>SCOPE</i>	<i>AMOUNT</i>
<i>EARLY WORKS MANAGING CONTRACTOR</i>	<ul style="list-style-type: none"> • <i>Utility service relocation</i> • <i>Works to prepare construction site</i> 	<i>\$324m*</i>
<i>TUNNEL & STATION PPP</i>	<ul style="list-style-type: none"> • <i>D&C</i> • <i>O&M (25 years period</i> • <i>Financing</i> • <i>Special Purpose Vehicle</i> 	<i>Up to \$6b#</i>
<i>RAIL INFRASTRUCTURE ALLIANCE</i>	<ul style="list-style-type: none"> • <i>D&C</i> • <i>Rail Transport Operator (Occupations, Driver Training, Accreditation etc)</i> • <i>Wider Network Enhancements</i> 	<i>\$1b#</i>
<i>RAIL SYSTEMS ALLIANCE</i>	<ul style="list-style-type: none"> • <i>D&C</i> • <i>High Capacity Signaling Implementation (\$131m)</i> • <i>Rail Transport Operator (Occupations, Driver Training, Accreditation etc)</i> • <i>Wider Network Enhancements</i> 	<i>\$1b#</i>
<i>ADDITIONAL COSTS INCLUDING</i>	<ul style="list-style-type: none"> • <i>Owner’s Project Management</i> • <i>Project Design and Development</i> • <i>Legal, commercial and Procurement</i> • <i>Land acquisition (200+ properties)</i> • <i>Owner’s Risk</i> • <i>Rail and Tram Transport Operator</i> 	<i>\$3b</i>
<i>Total</i>		<i>Total \$11.031b</i>

**Contract Amount published on Tenders Vic website (excludes GST)*

#Indicative amount, included in Government release.

[34] The Panel accepts that these work packages and costs determine the broad Scope of the Project, however, as is set out below, some of the scope is not relevant for the purposes of determining Construction related activity for which a site allowance might be determined.

[35] On the analysis undertaken by the Panel, having regard to the material available to it, the Project Construction Value and Scope includes the first four items, but not entirely. It does not include the fifth item “Additional Costs Including”. Items or packages that properly should be excluded from the first four items, that are not considered construction related for present purposes are:

- Operations and Maintenance*
- Financing*
- Special Purpose Vehicle Costs*
- Rail Transport Operator costs other than construction*
- Wider Network Enhancements, but only those that are not intrinsic to or necessary for the completion of the Metro Tunnel Project and are consequent upon a separate initiative than the Metro Tunnel Project. Works associated with the main rail corridor (ie. at least Tottenham to Caulfield and perhaps Sunbury to Cranbourne/Pakenham, the latter which might require further review based upon the MMRA detail yet to be provided) ought be included as should those that are intrinsic to or necessary for the effective performance and completion of the Project.”*

[25] The CFMEU made a number of submissions concerning scope and argued that there were a range of questions as set out at para.11 of its submission 26 June 2018. We consider that the description of the scope that the Panel has found to exist as set out above is sufficiently clear for present purposes and deals with matters raised by the CFMEU.

[26] The CYP JV submitted at the final Hearing and JH again submitted as it had done in an earlier letter to the Panel, that the scope of works for determining a site allowance should be limited to the works that were confined to their individual contracts only, and not to the total Project.

[27] Nothing new has been submitted to the Panel in this regard since it dealt with this question in the earlier proceedings and there has been nothing that has swayed us from our previous view that this is to be considered as one Project for the purposes of site allowance.

[28] To be clear, all and any works that fall within the works set out in the description determined by the Panel, whether they be Early Works, Major Works, Rail Works or any other works that are intrinsic to or necessary for the completion of the Project and are not consequent upon a separate and unrelated initiative or programme of works are included and covered by this Determination.

[29] The Panel notes the CFMEU's submission at para 10 that it seeks "*to reserve its rights*" as to a further future determination. The Panel does not consider it appropriate to allow such an open ended arrangement as we consider that it is very unlikely that the works to be conducted during the course of the Project will be such as to impact any further on the quantum of the site allowance other than for what the Panel has now determined. We can anticipate that there may be questions to be resolved about scope, given the uncertainty that still exists as to some aspects of the Project. Should there be any subsequent argument or dispute as to any works which should or should not be included in the scope of this Determination, the Panel is available to advise and/or determine the matter at any point during the life of the Project.

Quantum of Site Allowance applicable from 1 March 2018

[30] On the matter of quantum of the site allowance the Panel received written submissions from the CFMEU only. The CFMEU submitted, based on a Project

which it says has a Total Project Value of in “*excess of \$8 billion*”, that a site allowance of \$9.50 should apply from 1 March 2018.

[31] The Panel found by its earlier analysis that the Project Value is “*in excess of \$5.208 Billion with additional significant works yet to be let*”. The Rail Infrastructure Alliance contract was announced on the final day of Hearing, for a contract value of \$1 Billion, as was anticipated from the earlier indicative amounts. Some of that value was factored into the \$5.208 Billion from the earlier analysis undertaken by the Panel.

[32] There can be no doubt that the Project cost over time will be well higher than \$5.208 Billion, however, as previously observed, the Panel is not certain that a site allowance should necessarily increase exponentially for such projects just because of the cost of the project alone. It is certainly a special factor to be taken into account when setting a site allowance but we do not consider that a scale or table of values and allowances, particularly for the values we are considering here, of themselves, should dictate the quantum. Whether it is \$5 Billion or \$8 Billion is not solely determinative for a Project such as this, in our view. It may be in other contexts, but not here.

[33] This Project is a huge undertaking, with just about every facet of construction incorporated into its complex and comprehensive purpose. In reaching our Determination in this matter we have also had regard to its size, its cost, the geography that it covers, the services which make up its development and assure its performance and the interrelationship that the Project necessarily has with all modes of transport. All of these are significant factors when considered together

that impact on the way work is being performed and will be performed on this project by workers covered by agreements as we have before us.

[34] The Panel notes that in addition to the site allowance that is applicable across the Project there will be other specific allowances payable pursuant to the agreements for tunneling, towers, height work and others which are properly compensated on incidence.

[35] The Panel understands that the advice issued by one employer Association has been interpreted by some to suggest that the quantum of site allowance pursuant to the electrical enterprise agreements for this Project is \$15.00 per hour. The Panel is satisfied that this is not the advice. To be clear we have had no regard for this as we can safely assume this conclusion has been based on the overall project expenditure as is regularly quoted by the State Government (ie. \$11 Billion) which includes much more than the relevant costs to be taken into account for present purposes.

[36] We do however note that if the generally applicable electrical and plumbing enterprise agreement site allowance tables were to be applied to this Project, purely based upon project value alone, if special and exceptional circumstances did not apply, as we have found they do, a site allowance of a minimum of \$9.30 would otherwise result for a value of \$5.208 Billion, and we know the value is greater than that, or for a value of \$8 Billion, a \$12.00 site allowance could apply. As we have noted, it is not possible to be conclusive as to value. That is the nature of this enormous Project. We do not consider in the overall context of this Project that such an approach of applying a table of allowances and values is sustainable or logical. It has been acknowledged by all parties that to provide certainty of project

value for this Project is simply too difficult given all the factors at play in this Project.

[37] We note that in earlier iterations of enterprise agreements with the CFMEU prior to the 2016-2018 agreements, some of which are before us, the site allowance table in *Appendix C* makes provision for an increase in the site allowance for every \$100m in excess of the highest project value in the table. The electrical and plumbing agreements have retained this same provision, with some marginal differences in the values, except where there are special and exceptional circumstances. We find it somewhat incongruous that the provision disappeared entirely from the most recent CFMEU agreements and we really do wonder what was intended by the negotiating parties in doing so. Was it an oversight or a drafting error? We have not been adequately addressed on this point. Whatever was intended, it seems to have been repeated. The intention of the parties is not clear. We do note that at least in relation to *Clause 12* of the agreements there has been an attempt to distinguish projects above \$1.7 Billion in relation to *Appendix C*. We do not think from what has been said that the intention was that once a Project was over the highest stated value, ie. \$1.7 Billion, that no site allowance at all would be paid or that every project over \$1.7 Billion was “special or exceptional”. In the Project before us the Panel is very clear that it is “special and exceptional”, but we wish to make it clear that it does not follow that every project above \$1.7 Billion will always meet this description. Value alone does not make a project “special and exceptional” in the context of *Appendix C* to the agreements. We raise this such that the parties might take the necessary steps to provide clarity as to their intentions if their agreements are not reflective of their intentions in this regard. However, this matter has no relevance in the proceedings before us given our findings.

[38] The Panel did not receive any submissions from any employer party to the dispute or from CYP JV, JH or IRV as to quantum of site allowance. When pressed at the final hearing, JH submitted that the Panel, if it were to determine the outstanding matter, should not go beyond the current quantum of \$7.50 per hour. CYP JV effectively said the same, “*a maximum of \$7.50*”. The JV was not prepared to inform the Panel of the quantum of site allowance it had proposed for its proposed greenfields agreements, due it said to “*commercial in confidence*” reasons. The CFMEU did not reveal the amount the JV had proposed for the same reason it said.

[39] The circumstances of the earlier Determination by the Panel, in awarding \$7.50 from 1 October 2017 up to 1 March 2018, is set out clearly in the early Determination which was recognised by the Panel as a “stepped increase’ from \$6.50, having regard to the very specific circumstances of this Project, which ordinarily would not apply. The Panel recognised 1 March 2018 as the appropriate date by which the further stepped increase should properly apply, having regard to the works now underway across the Project.

[40] The Panel has also had due regard to matters and evidence of relevance that have been traversed in recent times in the West Gate Tunnel Project, matter No. 008-2018, in reaching its conclusions in this matter. The Panel has also had due regard to the quantum of site allowances that are and have been payable across the industry and consider the quantum determined here is fair and reasonable compensation in all the circumstances. We have had regard to all relevant matters in reaching this conclusion.

[41] Having regard to all the circumstances in this matter the Panel determines that a site allowance of \$8.50 per hour shall apply on and from 1 March 2018, and a final stepped increase to \$9.20 will apply on and from 1 August 2018, replacing the previously applicable \$7.50 per hour allowance. Employers bound by this Determination who have conducted works since 1 March 2018 on the Project will need to make retrospective adjustments for the difference for any employees that have worked on the Project from that date.

[42] The Panel has determined the above operative dates having regard to its earlier Determination and the now awarded final major contract pursuant to the Project. This outstanding matter is now certain for all.

Site Allowance - Indexation

[43] The Panel received written submissions from the CFMEU only on this matter. When pressed at the final Hearing there seemed to be acknowledgement from the employer parties at least that the CFMEU proposal was appropriate. CYP JV said the site allowance it had proposed for its greenfields agreements would not be indexed at all. JH said there should be no indexation.

[44] Having regard to the usual and long held approach of the industry to setting site allowance adjustments we find that, the indexation of the site allowance is appropriate to be effected on 1 October each year by the CPI (All groups, Melbourne) movement for the preceding period July to June in each year. We consider this establishes a fair basis for indexation during the life of the Project

particularly having regard to the projected time lines of the Project. To be clear, the next date of adjustment of the site allowance quantum will be 1 October 2018.

[45] The Panel having made this Determination considers that all matters in relation to this Dispute are now settled. As we have noted earlier, it can be anticipated that given the scope and time to completion of the Project that issues as to scope may arise which the Panel can assist the parties in resolving or determining should it become necessary. However we do not presently anticipate that such matters are likely to impact the quantum of the now determined site allowance, rather only whether or not certain works are within or outside scope. The only basis upon which the quantum could be revisited other than as provided by this Determination would be if the performance of works were so unusual as to warrant a review, and even in this case it would very likely be limited to a specific type of work process not something that would impact a project wide site allowance.



Peter Parkinson
Chairman



Tony Cordier
Panel Member

ATTACHMENT 1

Company Name	Agreement Name	Agreement ID	Contact Name	Contact Details
Advanced Sawing & Drilling Pty Ltd	ADVANCED SAWING & DRILLING PTY LTD AND THE CFMEU (VICTORIA CONSTRUCTION AND GENERAL DIVISION) CONCRETE SAWING AND DRILLING ENTERPRISE AGREEMENT 2016-2018	AE421666	MARION GOMIZELJ	mario@advancedsawing.com.au
APS Industrial Services Pty Ltd	APS INDUSTRIAL SERVICES PTY LTD AND THE CFMEU (VICTORIAN CONSTRUCTION AND GENERAL DIVISION) CONTRACT SCAFFOLD ENTERPRISE AGREEMENT 2016-2018	AE420043	DAVID MURRAY	david.murray@apsystems.net.au
	APS INDUSTRIAL SERVICES PTY LTD AND THE CFMEU (VICTORIAN CONSTRUCTION AND GENERAL DIVISION) RIGGER/STEEL ERECTOR ENTERPRISE AGREEMENT 2016-2018	AE420792		
Associated Rigging Pty Ltd	ASSOCIATED RIGGING AUSTRALIA PTY LTD AND THE CFMEU MOBILE CRANE HIRING INDUSTRY ENTERPRISE AGREEMENT 2016 - 2019	AE421456	KEIRAN HOARE	kh@associatedrigging.com.au
City Circle Demolition & Excavation Pty Ltd	City Circle Demolition & Excavation Pty Ltd T/As City Circle Demolition and the CFMEU (Victorian Construction and General Division) Demolition Enterprise Agreement 2016-2018	AE422572-2	Gary Fisher	deborah@citycirclegroup.com.au

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Civilex Victoria Pty Ltd	Civilex Victoria Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016 - 2018	AE422768	Andrew Fairbairn	andrew.f@civilexvic.com.au
Cycon Civil Pty Ltd	Cycon Civil Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016 - 2018	AE422571	Anthony Ciccone	ac.cyconciv@telstra.com
Deca Constructions Pty Ltd	DECA CONSTRUCTIONS PTY LTD T/As DECA CONSTRUCTIONS CFMEU (Victorian Construction and General Division) Brick Laying Enterprise Agreement 2016-2018	AE421441	Timothy Mangan	admin@decaconstructions.com.au
Delta Pty Ltd	Delta Pty Ltd T/As Delta Group and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018	AE420725-2	Con Petropoulos	con@deltagroup.com.au
	Delta Pty Ltd T/As Delta Group and the CFMEU (Victorian Construction and General Division) Demolition Enterprise Agreement 2016-2018	AE420723-2		
Fortis Construction Pty Ltd	Fortis Construction Products Pty Ltd T/As Total Patch & Seal and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018	AE420553	Stephen Lynch	stephen@fortismelbourne.com
Geotech Pty Ltd	Geotech Pty Ltd and the CFMEU Industry Enterprise Agreement 2011-2015	AE895366	Bede Noonan	info@geotech.net.au
GVP Fabricators Pty Ltd	GVP Fabricators Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018	AE422624	Stulianos Papay	admin@gvpfabricators.com.au

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Marine Parade Pty Ltd	Marine Parade Pty Ltd T/As Auscut Gippsland Concrete Sawing and the CFMEU Concrete Sawing and Drilling Enterprise Agreement 2011-2015	AE896838	Dale Scott	auscutgipps@bigpond.com
MC Labour Services Pty Ltd	MC Labour Services Pty Ltd and the CFMEU (Victorian Construction and General Division) Labour Hire Industry Enterprise Agreement 2016-2018	AE419781-2	Marc Lunedei	marc@mclabour.com.au
Metcalf Crane Services Pty Ltd	Metcalf Crane Services Pty Ltd and the CFMEU Mobile Crane Hiring Industry Enterprise Agreement 2016 - 2019	AE421083-2	Tim Metcalf	tim@metcalfcranes.com.au
Mitchcon Australia Pty Ltd	Mitchcon Australia Pty Ltd and the CFMEU Concrete Pumpers Industry Enterprise Agreement 2011-2015	AE403531	Jake Mitchell	admin@mitchcon.com.au
Nationwide Concrete Pumps (Vic) Pty Ltd	NATIONWIDE CONCRETE PUMPING (VIC) PTY LTD T/As NATIONWIDE CONCRETE PUMPING and the CFMEU (Victorian Construction and General Division) Concrete Pumping Enterprise Agreement 2016-2018	AE421616	Pamela Roberts	pam.roberts.p@gmail.com
Preston Hire (Vic) Pty Ltd	Preston Hire (Vic) Pty Limited and the CFMEU Mobile Crane Hiring Industry Enterprise Agreement 2016-2019	AE421676	Jenny Grosvenor	jenny.grosvenor@prestonhire.com.au
Pro-Tech Hoardings Pty Ltd	Pro-Tech Hoardings Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018	AE420175	Kamil Zajac	info@proas.com.au
Quinn Civil Contractors P/L	Quinn Civil Contractors Unit Trust (Trustee for) T/As Quinn Civil Pty Ltd and the CFMEU Civil Construction Industry Enterprise Agreement 2011-2015	AE406840	Patrick Quinn	pat@quinncivil.com.au

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Reliable Scaffold Services Pty Ltd	Reliable Scaffold Services Pty Ltd and the CFMEU Contract Scaffold Enterprise Agreement 2011-2015	AE892747	Mark Tymms	info@reliablescaffold.com.au
SAS Steel Pty Ltd	SAS Steel Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016 - 2018	AE421140	Spiro Maroulis	account@sasteelfixing.com.au
Scaffold Logistics Commercial Pty Ltd	SCAFFOLD LOGISTICS COMMERCIAL PTY LTD and the CFMEU (Victorian Construction and General Division) Contract Scaffold Enterprise Agreement 2016 - 2018	AE419976	Mike Adshead	mike@scaffoldlogistics.com.au
Sergi (Aust) Pty Ltd	SERGI (AUST) PTY LTD and the CFMEU Mobile Crane Hiring Enterprise Agreement 2016-2019	AE421341	Mark Sergi	m.sergi@sergi.com.au
Strategic Drilling Services Pty Ltd	Strategic Drilling Services Pty Ltd and the CFMEU Piling Enterprise Agreement 2011-2015	AE890475	Michael Alan Hanlon	michael@strategicdrilling.com.au
Super City Concrete Cutting	LEVIATHAN TRUST T/As SUPER CITY CONCRETE CUTTING Pty Ltd and the CFMEU (Victorian Construction and General Division) Concrete Sawing and Drilling Enterprise Agreement 2016-2018	AE421382	Jason Richard Franken	supercity@bigpond.com
TyCon Group Pty Ltd	TYCON GROUP TRUST (THE TRUSTEE FOR) T/As TYCON GROUP PTY LTD and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018	AE426620	Ty Logan	ty@tycongroup.com
Urban Drilling Pty Ltd	Urban Drilling Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015	AE894366	Bradley Hepwort	urbandrill@iprimus.com.au

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Vertcon Pty Ltd	Vertcon Pty Ltd and the CFMEU (Victorian Construction and General Division) Concrete Pumping Enterprise Agreement 2016-2018	AE422466	Matthew Dawes	info@vertcon.com.au
Vic Sawing and Drilling Pty Ltd	VIC SAWING AND DRILLING PTY LTD and the CFMEU (Victorian Construction and General Division) Concrete Sawing and Drilling Enterprise Agreement 2016-2018	AE421613	Duncan Chaponda	info@vicsawing.com.au
Vladimir Jovanovic	Jovanovic, Vladimir T/As Kakosi Construction and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018	AE421661	Vladimir Jovanovic	vlad@kakosi.com.au
Wagstaff Piling Pty Ltd	Wagstaff Piling Pty Ltd and the CFMEU Piling Industry Enterprise Agreement 2011-2015	AE894560	Ashley Tonkin-Hill	a.tonkin-hill@wagstaffpiling.com.au