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CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

and

DELCON CIVIL PTY LTD

CITYLINK TULLA WIDENING PROJECT

RE: ALLEGED INCORRECT APPLICATION OF CLAUSE 21
APPENDIX C – SITE ALLOWANCE

23 June 2017

002-2017

Determination

[1] The Panel issued Statements on 14 February, 20 March, 5 April and 24 May 2017 in relation to a dispute notified by the CFMEU concerning the Site Allowances paid by Delcon Civil Pty Ltd (Delcon) for works on the CityLink Tulla Widening Project (the CTW Project). This Determination should be read together with the previous Statements.

[2] The two principal areas of disagreement between the parties has been:

1. Whether the CTW Project is one singular Project for the purposes of determining the Site Allowance pursuant to Appendix C of the applicable Enterprise Agreement or whether it is two distinct separate Projects for this purpose, and
2. What, if any regard, should be had to prior and existing applicable agreements concerning a significant section of the Project.

[3] Arising from various Directions issued by the Panel, both the CFMEU and Delcon made written submissions on 30 March and 13 April 2017. A Hearing was held on 5 April 2017.

[4] On 22 April 2107 the Chairman issued to the parties extracts of email exchanges between the Chairman and VicRoads in relation to the matter and invited further written submissions in relation to the material provided by VicRoads. Delcon filed a further written submission on 12 May 2017. The CFMEU notified the Panel it did not wish to make further submissions.

[5] The Panel also met with the relevant executive from VicRoads to clarify a number of aspects as to governance of the CTW Project on 2 June 2017.

[6] The Panel has been assisted in this matter by the participation of representatives of CPB, Lendlease and VicRoads, the written and oral submissions of the parties and has also informed itself through the breadth of information available about the CTW Project via the internet.

[7] Under its Charter the Panel is able *“to inform itself on any matter in such manner as it thinks fit”*.

[8] This matter is rather more complex than what is usually at issue between the parties concerning the application of Appendix C in relation to Site Allowances. The fact that it is a major infrastructure project with various sections, clients and contractors responsible for various aspects of the CTW Project, including prior Enterprise Agreements, has challenged all participants. It has warranted a lengthy and detailed analysis by the Panel.

[9] The following background arises from the Panel’s findings on the material before it.

[10] The CTW Project had its origins in an unsolicited proposal in April 2014 by Transurban Ltd (Transurban) to the State Government for the widening of the Tullamarine Freeway over the full length of the Transurban’s Concession lease, funded by increases to tolls, then described as a widening of the toll road between Essendon Airport and West Gate Freeway. At the time the State Government announced that any widening of the Tullamarine Freeway beyond Transurban’s concession to Melbourne Airport was dependent upon Federal funding and would cost in the order of \$250m. Some commentators referred to the concepts as two separate projects.

[11] The then State Government intended that the Transurban proposal would have proceeded as a single Project, notwithstanding the stated clear desire to widen the Freeway all the way to Melbourne Airport. This “Transurban” part of the Project later became known as “Section 3”. The State Government and Transurban signed an agreement for this Section for what was then referred to as an \$850 million Project in October 2014.

[12] Subsequently, arising from assessment by Infrastructure Australia and resulting funding from the State Government and the Federal Government, together with a further funding contribution by Transurban for works outside of its Concession lease, the remaining part of the Project, approximately from Bulla Rd to the Melbourne Airport was incorporated into what became known as the Citylink Tulla Widening Project (CTW Project). This part of the Project later became known as “Sections 1 and 2”.

[13] During 2015 the CTW Project had developed beyond the concept stage and various legislative and facilitative arrangements were made by the State to enable each of the 3 Sections to proceed to construction over a considered and integrated timeframe.

[14] By mid 2015 Transurban had gone to the market with a tender covering the scope of works within its concession lease, Section 3, and awarded the contract to CPB Contractors Pty Ltd. (CPB). By late 2015 CPB had commenced civil works on site and entered into an Enterprise Agreement with the CFMEU and AWU - CityLink Tulla Widening Bulla Road to Power Street Greenfields Agreement 2015 (“the CPB EA”), approved by FWC on 29 January 2016.

[15] Transurban took responsibility for determining the successful contractor and the enforcement of that contract and neither the State nor VicRoads has had any overriding say in the management of the Contract for Section 3. Similar Enterprise Agreements with other sub contractors in relation to these works were subsequently made with the CFMEU up to and including May 2016.

[16] Each of the Enterprise Agreements referenced in [15] provide a Definition as follows: “*Project*” means *CityLink Tulla Widening Bulla Road to Power Street project as determined by Transurban*” . Each of the agreements provide for a Site Allowance at Clause 22 for the CBP Agreement as follows:

“22.1 The parties have agreed that a site allowance will be paid to an Employee at the flat rate set out in the table below for all hours worked to compensate for all flexibilities, rostering requirements and changes, site conditions and all special factors and/or disabilities on the Project. This is a flat hourly allowance and does not attract any loadings or penalties.

22.2 Site allowance will be adjusted in accordance with the CPI movement on the anniversary of the first pay period after commencement of the agreement each year. The site allowance shall be up or down to the nearest 5 cents.

22.3 *The site allowance for the first pay period after commencement of the agreement is \$4.50.*”

[17] By late 2015 VicRoads, with direct responsibility over Sections 2 and 3, had gone to the market with a tender for these sections and awarded a contract for these works to Lendlease Corporation Pty Ltd (Lendlease) on 5 February 2016. Lendlease has not engaged any labour directly but has engaged various subcontractors to execute the works, many of whom have Enterprise Agreements with the CFMEU in similar terms to the Delcon Enterprise Agreement (*Delcon Civil Pty Ltd and the CFMEU Civil Construction Industry Enterprise agreement 2011-2015*). These Enterprise Agreements similarly provide for site allowances to be set pursuant to Appendix C.

[18] Appendix C of the Agreement details the circumstances in which a site allowance will be paid on Projects with a certain Project Value.

[19] Clause 7.2 of Appendix C sets out the Site Allowance payable relevant to the Project Value.

[20] Clause 11 of Appendix C provides 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 (VBIDP) for determination.”*

[21] There is no dispute that the Agreement applies to the parties. It is not disputed that the Agreement applies to the relevant construction works conducted by Delcon on the Project. Delcon has held contracts to perform work on each of Sections 1, 2 and 3, with some 6 employees having worked across all Sections.

What is in dispute?

[22] The CFMEU submitted that for the purposes of the Delcon Enterprise Agreement, the Project encompasses all activities falling within the CTW Project, which it submitted has a Project Value of \$1.28 Billion (for which it submitted a site allowance of \$5.45 per hour is payable). It also submits, in effect, that the Panel should distinguish the separate agreements it has entered with CPB and others for Section 3 from other contractors who have not entered such agreements and therefore the Panel should ignore the CPB and other similar agreements. To be clear, there is no suggestion from the CFMEU that it is seeking to reopen the CPB or similar Agreements or that the Panel is being asked to rule in relation to the site allowance under those agreements.

[23] Delcon acknowledges the existence of the CTW Project and its component Sections, but submitted the relevant tests necessary to satisfy the requirements of Appendix C have not been met, other than with respect to the individual Sections within the Project, for which it submits it is correctly paying the requisite Site Allowances under the Agreement. It submits in effect, that by the CFMEU entering ‘project’ agreements with CPB and others for a specific Section of the CTW Project, confirms this approach and should not be disregarded. Delcon submitted that Section 3 should stand alone from Sections 1 and 2, works for which it advised in its correspondence to the CFMEU of 17 November 2016 a Project Value of \$574 m (Section 3) and \$300m (Sections 1 and 2) in so far as Appendix C provides.

[24] The first question for the Panel to determine is what constitutes the Project for the purposes of Appendix C of the Agreement? Is it two Projects, being Section 3 and Sections 1 & 2, or is it all of these Sections of the Project? Delcon contends it is two projects, whereas the CFMEU contends all Sections amount to one Project for the purposes of Appendix C.

[25] The parties both generally relied upon the principles applied in previous decisions of the Victorian Building Industry Disputes Panel in relation to the determination of the term “project” in the context of the term “project value”.

[26] The general approach to the determination of how the word “*project*” is to be defined in the context of the term “*project value*” is canvassed in a number of decisions of the Panel, most recently in a majority decision, *CFMEU v Freyssinet Pty Ltd Port Capacity Project, Webb Dock* - Matter number 003-2016 (“*Port Capacity Project*” decision).

[27] Whilst the Charter of the VBIDP provides that “*no decision shall be regarded as a precedent*” the Panel has had due regard to the principles applied in previous decisions of the Panel in regard to this first question.

[28] The relevant approach has been taken from a decision of the former Australian Industrial Relations Commission (“the AIRC”) in *CDK Commercial Construction Pty Ltd and Construction, Forestry, Mining and Energy Union* [PR974122] (the “CDK” decision) and affirmed in another decision of the former AIRC in *Bovis Lendlease Pty Ltd v Construction, Forestry, Mining and Energy Union* [PR975618] (the “Bovis Lendlease” decision), both decisions of Deputy President Ives. Both Delcon and the CFMEU have relied upon various aspects of these decisions in this matter.

[29] In particular the parties accept that the Panel for the purposes of the first question, should follow the previous approaches founded in the “CDK” decision as to the meaning to be given to the term “project” in the context of the term “project value”. In that matter, DP Ives referenced the Concise Oxford Dictionary (10th Edition) which defines project as “*an enterprise carefully planned to achieve a particular result*” (PN 39) and concluded “*In my view a project is an enterprise or undertaking that is ‘carefully planned’ and has a clearly established entity or entities that exercise control over its development. In the context of Appendix C, the scope of a project must also be definable. That is, it must be possible to ascertain with a degree of certainty what works are included in the project in order to value the project and determine the appropriate site allowance.*” (PN 45-46) “*Accepting that it is not unusual in building and construction projects for the scope to vary during the life of a project, it is still necessary for the scope to be sufficiently defined at any given point during the project to enable a proper definition and costing of the project.*” (PN 51)

[30] It is accepted by the parties that the approach of DP Ives has three essential elements and that in so far as the application of Appendix C to the Agreement is concerned, each element must be satisfied for a site or combination of sites to qualify as a “project”. If any one element is not satisfied, the site or combinations of sites will not qualify as a “project”. The three elements, relying upon the relevant extracts from “CDK” are:-

- the site or combination of sites must constitute “*an enterprise carefully planned to achieve a particular result*”;
- the site or combination of sites must have “*a clearly established entity or entities that exercise control over its development*”;
- the site or combination of sites must have “*a scope sufficiently definable at any given point during the project to enable proper definition and costing of the project*” for the purpose of determining the appropriate site allowance.

What is the Project?

[31] The Panel has addressed each of the three elements that it is said need to be satisfied to determine Project and Project Value for the purposes of Appendix C concerning the first question.

Is the Project “*An enterprise carefully planned to achieve a particular result*”?

[32] There is no doubt that the CTW Project has been carefully planned and that the overarching objective has been to improve traffic management from the City to Tullamarine Airport. The concept has

been one with a single vision but one that has developed in stages, but with a high level of integration and purpose.

[33] Given its genesis, as outlined in paragraph 10 of this determination, it could be said that Section 3 was carefully planned by Transurban to achieve a very particular result for it - increased revenues and extended concessions. On this basis it is possible that Section 3 could be argued to be a separate project for the purposes of Appendix C. The Panel considers it unlikely to have proceeded however in absence of an overarching objective to widen the whole freeway. Sections 1 and 2, by being integrated with Section 3, as they were, completed a singular objective. It is difficult to conclude that Sections 1 and 2 can be distinguished from Section 3 as part of the overall project, other than by a geographical division determined by that Section held by the leaseholder to the State and the remainder held by the State. The very order of the numbering of the Sections of the CTW Project seems to underscore this likelihood.

[34] The fact that the separate Sections of construction works involved in the CTW Project are being performed by separate entities with separate contracts of works does not of itself render a fail to this element. It does not require one overarching contract. This is confirmed in the “CDK” decision wherein DP Ives observed that “...*a contract or contracts may establish the existence of a project but I do not accept the proposition that the existence of the project is dependent upon the existence of a relevant contract or contracts.*” (PN 45). An enterprise may involve numerous construction contractors performing separate aspects or features or parts of the project or undertaking, but it can and is often carefully planned to achieve a particular result as has been the case here.

[35] Whilst it is true that various Sections of the CTW Project are separately funded, it does not follow that they have no relationship with each other and that they do not form part of a Project, all of the Sections for which have been clearly recognised as part of the CTW Project, including by the State Governments, individual clients and constructors themselves in their own materials and press releases. A dedicated website for the CTW Project clearly demonstrates the level of integration and inter-relationship. A Project Control group comprising Transurban, Vic Roads and others also operates to assist in overseeing the CTW Project. It is also noted that Transurban does not just fund Section 3 alone, but it contributes to the funding of Section 2.

[36] The Panel however is not entirely satisfied that the inter-relationship of the Sections is such that the CTW Project is “*an enterprise carefully planned to achieve a particular result*” for the purposes of Appendix C given there is some chance that Section 3 could well have proceeded in absence of Sec-

tions 1 and 2, even with a significant time gap between them. This lack of certainty however is insufficient for the Panel to find against the claim - more is needed to be considered in our view.

For the CTW Project, is there “A clearly established entity or entities that exercise control over its development”?

[37] VicRoads is the responsible entity acting on behalf of the State Government to ensure compliance with the Planning Approvals and the Environmental Management Plan for Construction requirements specifically issued and prepared for the CTW Project. The Panel considers however that it has not had the same level of control over the CTW Project that the Panel by majority found the Port of Melbourne Corporation had in the *Port Capacity Project* decision. VicRoads has directly let and manages the contract for Sections 1 and 2. Transurban has directly let and manages the contract for Section 3. Both entities form part of the overarching Project management of CTW Project.

[38] The Panel considers that it matters not that the various component parts of the CTW Project have been let in Sections. The test to be satisfied is that “*a clearly established entity or entities that exercise control over the development*” (our emphasis) and there can be no argument that both VicRoads and Transurban are such entities. The fact that there are two entities that have some control over elements within a project does not render a fail to the relevant test.

[39] Importantly however, nor does the fact that two entities may have control over elements within a project necessarily mean that they are exercising control over the development of a project for the purposes of the ‘control’ test. The Panel notes that the uncertainty over the first principle in this instance renders this second principle to be in doubt. More is needed.

Does the CTW Project have “A scope sufficiently definable at any given point during the project to enable its proper definition and costing for the purpose of determining the appropriate site allowance”?

[40] Whilst there exist frequent references to a CTW Project total cost of \$1.282 Billion, this includes development, planning, land acquisition costs etc. in addition to construction costs. The Panel does not accept this value as having relevance to the project value for the purposes of Appendix C.

[41] There is strong evidence to indicate that Section 3 has a construction value of at least \$570m. Delcon confirms this in their submissions and it is noted in its letter of 17 November 2016 to the CFMEU that it identifies a project value of \$574m. CPB’s web site confirms the project value at

\$570m. It is noted that the parties to the CPB Agreement agreed a site allowance for that scope of works at \$4.50 at the time the industry project value scale provided for a site allowance of \$4.55 for this value. It is not apparent to the Panel as to why the parties agreed a lesser amount than the industry scale. There may well have been other considerations relevant to the parties, however it is not so far removed from the scale to impact our considerations in this matter. The CPB Agreement site allowance value was recently adjusted under the terms of the Agreement to \$4.60. For the purposes of this matter, the Panel is satisfied that the value of Section 3 is \$570m.

[42] For Sections 1 and 2, based upon the material before the Panel it seems a value of \$280m has sufficient acknowledgement for it to be relied upon for these purposes. Delcon identifies the value at \$300m in its letter of 17 November 2017. Other references range between \$250m and \$280m. For the purposes of this matter the Panel is satisfied that the value of Sections 1 and 2 is \$280m.

[43] These are not notional amounts, but values that have been given sufficient credence in the market place such that the Panel is satisfied can be relied upon for these purposes.

[44] Whether or not the Sections should form one or two projects for the purposes of Appendix C (we will deal with this later in the decision) , the issue of scope is one that also needs to be directly addressed. Whilst the Panel is satisfied for present purposes that the scope of works of the Sections are currently sufficiently definable to enable its proper definition and costing for the purpose of determining the appropriate site allowance, it is arguable that this was not always the case. Specifically, it is not entirely clear that the scope of Sections 1 and 2 was sufficiently definable during the period between commencement of CPB's work on Section 3 in late 2015 and the awarding to Lendlease of its design and construct contract in early February 2016.

For the purposes of Appendix C is the project one or two projects?

[45] True it is that the CTW Project is being constructed in Sections. Most major projects are developed in stages. But the stages have been clearly defined with specific construction elements being acknowledged in each stage and the relevant timelines attaching thereto have been clearly defined. The Panel considers that this in no way undermines the capacity to assess the totality of the Project for the purposes of Appendix C, if, having regard to all the circumstances, this makes sense.

[46] However, it is important for the Panel to note, that with respect to major infrastructure projects over extensive distances it has at times been accepted by the industry parties that sections of a project can be isolated for the purposes of determining scope of project value and consequently for the pur-

poses of determining site allowances. Examples referenced before the Panel include both roads and lengthy rail projects. This is not unique.

[47] The fact that the CFMEU in the instance of Section 3 of the CTW Project did precisely this for some contractors at least is indicative of this practice. It was not as if this was done by any of the parties to the CPB Agreement in isolation of any knowledge of Sections 1 and 2. At the time of those negotiations Section 1 and 2 had been approved by the State Government and were well understood publicly to be part of the CTW Project. That would have been the opportunity to press an argument for the value of the CTW Project in its entirety to be utilised for the purposes of determining site allowances. Had it been, the Panel may have taken a different view, but it cannot now ignore the eyes wide open agreement then struck in relation to Section 3, that then continued to be made in other agreements, post the awarding of the contract to Lendlease for Sections 1 and 2.

[48] The Panel believes it would be entirely inequitable to disregard the very clear message to the industry participants of the agreement affecting Section 3 as concerns site allowance costing, and at this juncture to determine for all other contractors that the totality of the project value should determine the site allowance. This would create unnecessary and unjustified tensions, create unreasonable unforeseen costs and be contrary to constructive sensible industrial relations. Under all the circumstances the Panel considers it would have been reasonable to deduce that the parties acknowledged that the Sections of the CTW Project were to be dealt with as two separate projects.

[49] Whilst the Panel understands that the terms of the enterprise agreements at issue provide a different approach to site allowance setting, it is not so different having regard to industry standards that would warrant a significant departure from the current arrangements in place some 20 months after the commencement of the CTW Project. The only qualification to this we make is that the correct application of the scale attaching to the relevant Delcon Enterprise Agreement should ordinarily be adopted.

[50] In this regard it is noted that Delcon has submitted that it has paid site allowances as follows:

Sections 1 and 2 - from 1 October 2015 \$4.20 and from 1 October 2016 \$4.50

Section 3 - from 1 October 2015 \$4.40 and from 1 October 2016 \$4.50.

Based upon the site allowance scale in Appendix C and the values of the Sections accepted by the Panel, the correct allowances would have been for Sections 1 and 2, \$4.20 and \$4.25 respectively, and for Section 3, \$4.55 and \$4.60 respectively.

Conclusion

[51] The Panel therefore determines that for the purposes of the CTW Project, having regard to the historical developments concerning the striking of agreements for site allowances for at least one major section of the Project, the effluxion of time, together with the ambiguity present here in applying the tests relevant to determining site allowances pursuant to Appendix C as previously adopted by the Panel, it is appropriate for the Delcon Enterprise Agreement that Section 3 of the CTW Project, with a value of \$570m, be regarded as one project for the purposes of Appendix C and Sections 1 and 2 of the CTW Project with a value of \$280m be regarded as one Project for the purposes of Appendix C. It follows then for Delcon that whilst working on Section 3 employees be paid the site allowance of \$4.55 from 1 October 2015 and \$4.60 from 1 October 2016 and whilst working on Sections 1 and 2 be paid the site allowance payable of \$4.20 from 1 October 2015 and \$4.25 from 1 October 2016.

[52] The Company is encouraged to facilitate any retrospective adjustments arising from this decision to the relevant employees who have worked on Section 3 expeditiously. The Panel recommends that Delcon continue to pay the current amount it is paying employees whilst working on Section 1 and 2 of \$4.50 and not disadvantage employees who have worked across all Sections, noting that such an approach may well be subject to an agreement to offset against any site allowance underpayment applicable to those employees in relation to Section 3.

[53] Notwithstanding this conclusion, the Panel again reminds the parties, including the principals, that the settlement by way of certainty of site allowance and project value prior to or at or near commencement of a Project of works is the most efficient and effective way of dealing with site allowances rather than leave open the opportunity for disputation well into the project works such as here. At or prior to commencement of Delcon's engagement on the project, the question should have been raised and settled, in writing, or in absence of settlement, referred to the Panel to assist the parties accordingly. This gap it seems from the submissions may well apply to many other contractors on the CTW Project. The Panel recommends the industry close these gaps sooner rather the later.



Peter Parkinson
Chairman



Tony Cordier
Panel Member



Daniel Hodges
Panel Member