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**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CFMEU)**

**and**

**WM FIX PTY LTD**

**MANTRA HOTEL, COOPER STREET, EPPING**

**RE: ALLEGED SHAM CONTRACTING**

**22 OCTOBER 2018**

**025- 2018**

**STATEMENT**

[1] The CFMEU notified a dispute on 12 October 2018 concerning allegations that at least two (2) employees were engaged by WM Fix Pty Ltd on sham contracts from approximately May to July 2018.

[2] The Panel convened a Conference of the parties on 19 October 2018.

[3] The Applicable Enterprise Agreement is *WM Fix Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018*.

[4] The Employer is engaged as a sub-contractor to the principal contractor, Hacer Group, on the Mantra Epping Hotel Project.

[5] There is no dispute that the Enterprise Agreement applies to this matter and that the Panel has certain powers in relation to sham contracting as defined and provided for by sub clause 15.4. The Enterprise Agreement provides at sub clause 15.4 (d) that “*Any use of sham contracting is a breach of this agreement*”. Sub clause 15.4 (h) makes specific provisions for calculation of back pay in the event a sham contract is found to have been in place.

[6] The Employer acknowledges and agrees that it has engaged four (4) workers on “contracts” who were or are in fact employees under the Enterprise Agreement and for whom the terms of the Enterprise Agreement were not provided by the Employer. Two of the employees worked between May and July of 2018 for which time they were engaged on “contracts”, one was engaged on a “contract” from April 2018 until recently when he then became engaged under the terms of the Enterprise Agreement and another who is still engaged on a “contract”. The Employer now understands as a result of the Conference, these “contracts” were sham contracts.

[7] The Employer claims it was unaware of its obligations under the law. It was unable to present any specific reason as to why it had acted in this way other than for economic reasons, particularly given it says it employs a further 12 employees under the terms of the Enterprise Agreement. The Panel notes that 15.4(c) provides that for the purposes of the Enterprise Agreement (and consistent with the *Fair Work Act 2009*), it is not “sham contracting” where an employer proves that when an Employer “*did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services*”. Based on the material currently before the Panel, it would appear unlikely that the Employer would have been able to rely on clause 15.4(c) had the matter proceeded to Determination. On the material before the Panel the Employer has breached the Enterprise Agreement, and on its own admission it has.

[8] The Enterprise Agreement provides at sub clause 15.4 (h) the terms of settlement for such a breach. The parties have agreed to resolve the matter in a manner consistent with the provisions of sub clause 15.4 (h) having application to each of the employees identified in this matter. The Employer has committed to pay the back pay calculated in accordance with this sub clause not later than 5.00pm on Friday 2 November 2018. Before that date the Employer has agreed to meet with the CFMEU to finalise the calculations in accordance with sub clause 15.4 (h) and to also provide relevant evidence to demonstrate to the CFMEU that there are no other of its workers engaged on sham contracts.

[9] In this instance the CFMEU has not pressed the Chair to exercise the provisions of sub clause 15.4. (g). The Chair is satisfied having regard to the specific circumstances of this matter, the undertakings given by the employer that it will now fully comply with the terms of the Enterprise Agreement and given its preparedness to be frank and open before the Panel.

[10] The Panel directs that both parties advise the Panel not later than **5.00pm on Friday 2 November 2018** as to the status of the matter and whether or not further assistance of the Panel is required.



**Peter Parkinson**  
**Chairman**



**Tony Cordier**  
**Panel Member**



**Daniel Hodges**  
**Panel Member**