VBIDP

VICTORIAN BUILDING INDUSTRY DISPUTES PANEL
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WAGSTAFF PILING PTY LTD

-and-

CFMEU

RE: ALLEGED WAGE ISSUES

01 June 2011

013-2011

DECISION

[1] On 23 May 2011, the Construction Forestry Mining and Energy Union ("the CFMEU") notified a dispute between it and Wagstaff Piling Pty Ltd ('the employer") concerning "wages issues".

[2] The matter came on for hearing before the Panel at 9.30 a.m. on 27 May 2011.

[3] From the information provided to the Panel at that hearing, it appears that the employer is a party to at least three enterprise agreements, namely:

- the Wagstaff Piling Pty Ltd and the CFMEU Piling Industry Enterprise Agreement 2008-2011 ("the Victorian Agreement") [Agreement ID: AC327904],
- the Wagstaff Piling Pty. Ltd./CFMEU Collective Agreement 2010-2011 ("the NSW Agreement") [Agreement ID: AE880260, Print ID: PR5000965], and
- the Wagstaff Piling Pty Ltd, CFMEU and QLD Employees Enterprise Agreement 2009 ("the Queensland Agreement") [Agreement ID: AE879528, Print ID: PR999928].

[4] The CFMEU's position in this case is said to be part of a more general concern about the employment within Victoria of interstate labour at rates of pay and conditions of work less favourable than those that apply under the Victorian Agreement. The CFMEU claims that New South Wales based employees have been and are being employed on piling work at the Ballarat Base Hospital site for in excess of two months but are being remunerated at a rate of pay that is $6.00 per hour less than the rate of pay being paid to Victorian based employees performing the same work on that site. It contends that the New South Wales Agreement does not apply to the work in question and the employees concerned should be remunerated in accordance with the Victorian Agreement.

[5] The employer contends that, because the New South Wales based employees are employed pursuant to the NSW Agreement, it is entitled to pay those employees in respect to work performed at the site at the rate of pay prescribed by that agreement and that it is not obliged to pay them at the rate of pay prescribed by the Victorian Agreement.

[6] Clause 4 of the Victorian Agreement provides as follows:

This Agreement applies in the state of Victoria to:

a) the Company in respect to all of its employees engaged in building and construction work as defined by the Award.

b) Employees of the Company who are engaged in any of the occupations, callings or industries specified in the award.

c) The CFMEU.

d) Construction work in the cottage/housing industry shall not fall within the scope and application of this Agreement. For the purposes of this Agreement, cottage/housing industry means the construction, erection, assembly, maintenance ornamentation or demolition of a single occupancy dwelling, and multiple occupancy residential units being of not more than two living levels height.

[7] In Clause 2 of the NSW Agreement, the term "The Employee" is defined as meaning "*NSW field Employees of the Company who are based, and normally work, in New South Wales but who may from time to time work in other parts of Australia on foundation work for the Company*: Clause 3 of the NSW Agreement provides that the parties and persons bound and covered by the NSW Agreement are as follows:

a) The Company in respect to all of its field Employees engaged in New South Wales in building and construction and related work as defined by the Award and/or similar

related work on civil sites including those Employees who may from time to time temporarily work in other parts of Australia for the Company.

b) The Construction, Forestry, Mining and Energy Union.

c) Employees (hereinafter referred to as "Employees") of the Company who are engaged in any of the occupations, callings or industries specified in the NBCIA.

[8] Although previous agreements applying in New South Wales appear to have contained the same definition of "The Employee", Clause 3(a) of those agreements did not contain the expression "*including those Employees who may from time to time temporarily work in other parts of Australia for the Company*".

[9] Clause 1.5 of the Queensland Agreement provides that the agreement is "*legally binding upon:*

- *Wagstaff Piling Pty Ltd; and*
- *Employees of the Company who are based in and normally work in Queensland, but who may from time to time work in other parts of Australia engaged - on foundation and related Construction Work (hereinafter 'the Employees"); and*
- *the Construction, Forestry, Mining & Energy Union.*"

[10] It might be argued that, where there is a conflict between two applicable enterprise agreements, an employer is obliged to comply with each agreement and therefore apply the better of the terms prescribed in those agreements. The employer contends, however, that in the event that, in this case, there is any conflict between the Victorian Agreement and the New South Wales Agreement, s.30(2) of Part 5 of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2000* resolves that conflict. Section 30(2) provides as follows:

(2) If an enterprise agreement or workplace determination (under the FW Act) starts to apply to an employee, or an employer or other person in relation to the employee, then a collective agreement-based transitional instrument ceases to cover (and can never again cover) the employee, or the employer or other person in relation to the employee.

[11] The employer contends that the Victorian Agreement is "*a collective agreement-based transitional instrument*" and the NSW Agreement is "*an enterprise agreement*" under the *Fair Work Act 2009* and, therefore, the Victorian Agreement cannot cover the employees in question. In view of the decision reached by the Panel, we do not need to deal with this contention.

[12] The central issue is what is meant by the expression "*those Employees who may from time to time temporarily work in other parts of Australia for the Company*" as it appears in the NSW Agreement. The CFMEU recognises that, at times, the employer requires the services of an employee with special skills and that it may therefore be necessary to bring a New South Wales based employee into Victoria for a short time. It contends, however, that the expression only covers such an employee who may be required to work in Victoria for a few day or even a week. On the other hand, the employer contends that the expression is not so limiting but covers New South Wales employees who may be required to work in Victoria other than on a permanent basis.

[13] The approach to the construction of an agreement is well settled. The language of the agreement is to be understood in light of the industrial context and purpose. [*Amcor Limited v Construction, Forestry, Mining and Energy Union* ("*Amcor*") (2005) 222 CLR 241, (Gleeson CJ and McHugh J) at [2]] Consideration of context requires regard to the text of the clause, the text and operation of the agreement as a whole and by reference to other particular provisions and the legislative background of the agreement. [*Amcor*, (Gummow, Hayne and Hayden JJ) at [30]].

[14] The following passage from the judgement of Madgwick J in *Kucks v CSR Limited* (1996) 66 IR 182, at 184 ("*Kucks*") provides further guidance in relation to these principles of construction.

> *It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with an expression and intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite near inconsistencies or infelicities of expression which might tend to some other reading. Any meanings which avoid inconvenient or injustice may reasonably be strained. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand. But the task remains one of interpreting a document produced by another or others. A Court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinarily or well-understood words are in general to be accorded their ordinary or usual meaning.*

[15] Applying the above principles of construction and giving the words their ordinary or usual meaning, the Panel is of the view that the expression "*from time to time*" is to be properly construed as meaning "occasionally" and that the inclusion of the word "*temporarily*" is to be properly construed as limiting the expression even further to mean "occasionally for a limited time". In an industrial relations

environment context, the Panel considers that the New South Wales Agreement permits the employer to employ its New South Wales based employees every now and then outside of that State but only when required to do so to supply a passing need. For the employer to be entitled to remunerate such employees at the rate prescribed by the New South Wales Agreement, the length of the engagement outside of that State would, of necessity, be short in duration.

[16] In the circumstances of this case, the Panel considers that, due to the length of time that the relevant employees have been employed in Victoria, they should be remunerated at the rate prescribed in the Victorian Agreement.

SIMON WILLIAMS
CHAIRMAN

PETER KNIGHT
PANEL MEMBER

BILL DAVIS
PANEL MEMBER

DATE: **01 JUNE 2011**