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

and

2CONSTRUCT PTY LTD (2Construct)

NORRIS PLANT HIRE (GEELONG) PTY LTD (Norris)

SCAFFOLD LOGISTIC PTY LTD (Scaffold Logistics)

NORTH EAST LINK PROJECT

RE: ALLEGED INCORRECT APPLICATION OF SITE ALLOWANCE CLAUSE

22 June 2021

002-2021

DETERMINATION

The Dispute

[1] The CFMEU notified a dispute on 19 March 2021 concerning the quantum of the site allowance being paid by the abovenamed employers for works associated with the North East Link Project (**the Project**).

[2] Specifically the dispute concerns:

1. A disagreement over whether sports and recreation construction upgrade works at Ford Park and Binnak Park should be included in the scope of the Project for site allowance purposes, and the quantum of any applicable site allowance; and

2. What should be the quantum of site allowance for Project works conducted prior to 1 March 2022, noting that some of the parties have agreed that \$10.35 per hour will apply from that date.

[3] CFMEU and the Major Transport Infrastructure Authority (**MTIA**) requested that the Panel in making a Determination in this matter also provide relevant guidance as to the application of site allowances on the Project. In this regard the Panel notes that it is possible that the Employers in this matter may perform other works associated with the Project, given the nature of their businesses, for which guidance as to the application of site allowances on the Project is warranted, and the Panel will do so in this Determination. The Panel understands this Determination may provide guidance to others that are not party to the present dispute. Reliance on this Determination as guidance will be subject to and entirely dependent upon their own specific circumstances and applicable industrial instruments.

The proceedings before the Panel

[4] The Panel held a Conference of the parties and issued a Statement on 24 March 2021, conducted a Hearing on 29 April 2021, issued a further Statement on 6 May 2021 and undertook inspections on site on 11 May 2021. This Determination is to be read in conjunction with the earlier Statements.

[5] The CFMEU and 2Construct participated in the Hearing. 2Construct was represented by Master Builders Victoria (**MBV**). Norris did not attend but formally advised the Panel it supported the submissions of 2Construct. Scaffold Logistics did not participate in any of the proceedings, notwithstanding repeated notifications to it by the Panel.

[6] Both MTIA and CPB Contractors (**CPB**), whilst not parties to the dispute but directly involved in the Project, were invited by the Panel to participate and were represented. The Panel thanks them for their assistance.

How has the Panel been informed?

[7] To assist the Hearing of this matter the Panel directed that the parties present written submissions in relation to the following matters:

- 1. The Scope of the Project, specifically as to whether or not the Early Works should be included in the North East Link Project for the purposes of determining the site allowance;*
- 2. The Value of the Project for the purposes of determining a Site Allowance pursuant to the applicable Enterprise Agreements if this is considered to be relevant;*
- 3. The Quantum of the Site Allowance;*
- 4. The Operative date of any Site Allowance; and*
- 5. Any other matter of relevance.*

[8] Both CPB and MTIA were also invited to make submissions in relation to any of the matters.

[9] Written submissions were received as follows:

- CFMEU – 23 April 2021
- 2Construct - 26 April 2021
- MTIA - 26 April, 7 and 18 May 2021
- CPB – 26 April 2021

[10] The Panel has carefully considered all oral and written submissions, undertaken a detailed analysis of all the relevant material and carefully reviewed the relevant and comprehensive material available online in relation to the Project. In addition, the Panel members undertook an inspection of both Ford Park and Binnak Park and other relevant locations associated with the Project on 11 May 2021 to thoroughly inform itself.

[11] The Panel also sought further details from MTIA concerning the Sports and Recreation Works associated with the Project, as answered in its submission dated 18 May 2021.

[12] The Chair, on behalf of the Panel also spoke with a representative of the City of Banyule in relation to the City’s Master Plans for both Ford Park and Binnak Park and the City provided the Panel with a copy of the Ford Park Master Plan dated September 2016.

[13] The Panel members have been adequately appraised of the details of the Project, including the type of works to be conducted and being conducted, the Project location and intended works, together with other relevant aspects of the industry itself.

[14] Given the Panel’s knowledge of the industry and the types of works to be undertaken on this Project, the Panel is satisfied that it is able to make a proper and informed decision in relation to all the relevant matters. Pursuant to its Charter, the Panel is able “*to inform itself on any matters in such manner as it thinks fit*”.

[15] Suffice to say, the Panel has thoroughly considered every relevant matter. In reviewing the written and oral submissions, whilst the Panel does not address every single matter raised in this Determination, the Panel has given due weight to the relevant matters.

Jurisdiction of the Panel

[16] The applicable Enterprise Agreements are:

- *2Construct Pty Ltd and the CFMEU (Victorian Construction and General Division Enterprise Agreement 2020-2023 and its precursor Enterprise Agreement.*
- *Norris Plant Hire (Geelong) Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018.*
- *Scaffold Logistics Commercial Pty Ltd and the CFMEU (Victorian Construction and General Division) Subcontractors Contract Scaffolding Enterprise Agreement 2020-2023 and its precursor Enterprise Agreement.*

[17] The parties acknowledged the dispute was properly before the Panel and requested that the Panel proceed to make a Determination in relation to the matters in dispute.

[18] The Enterprise Agreements at *Appendix C* each similarly make provision in circumstances where the parties fail to reach agreement on the site allowance to apply to a particular site or Project and “*for such disagreement to be referred to the Panel for determination.*”

[19] CPB, whilst not a party to the dispute, submitted that the Panel did not have jurisdiction to deal with the matter, at least in so far as Norris is concerned. For the reasons discussed below, the Panel rejects this proposition.

[20] CPB’s submission at *paragraph 43* represents that a finding by a Full Bench of the Fair Work Commission supports its contention that the Panel does not have jurisdiction to deal with the matter. This submission is factually incorrect. The Full Bench made no such finding. In proceedings after this substantive and fundamental error of fact was pointed out, CPB accepted its interpretation was incorrect.

[21] The Panel addressed the question of jurisdiction in its Determination in the *West Gate Tunnel Matter No. 008-2018* specifically at *paragraphs 59-82*. When the Norris Enterprise Agreement is considered in its totality, it is clear to the Panel that the parties intended that the Panel is able to exercise jurisdiction in relation to the matters now before it.

[22] To be clear, in respect of each Agreement here, the Panel finds for similar reasoning in *008-2018* that it is clear the Panel has the jurisdiction to deal with the dispute. We note also that the parties at the commencement of proceedings accepted that the matter was properly before the Panel and neither of the parties challenged the jurisdiction of the Panel to deal with the matter.

[23] The Panel is satisfied that it has jurisdiction to determine the matter.

What is the North East Link Project?

[24] The Project is the largest transport infrastructure project ever undertaken in Victoria, described by the State Government in its media announcement of 24 November 2017:

“The North East Link will be the biggest transport project in Victoria’s history – finally building the missing link in Melbourne’s freeway network.

The Victorian Government today confirmed the route for the long-overdue completion of the ring road.

The North East Link will begin on the Eastern Freeway at Springvale Road where capacity of the Eastern will be doubled with six extra dedicated lanes to eliminate some of eastern Melbourne's worst bottlenecks.

Heading West, the freeway will connect to a new six lane tunnel at Bulleen with local underground connections at Banksia St and Manningham Road.

The five kilometre long tunnel will then travel deep beneath the Yarra River, protecting environmentally sensitive parkland and residential areas. There will be a local connection at Lower Plenty Road, with the North East Link then running north alongside the existing Greensborough Highway, which will stay open for local traffic.

A new interchange will see North East Link travel beneath Grimshaw Street Watsonia, before seamlessly connecting to the M80 Ring Road at Greensborough, which is also being widened. Travel times between Melbourne's north and south will be cut by up to 30 minutes in each direction, with massive travel time savings for people travelling to Melbourne Airport from the south and east.

Congestion on local roads in the north eastern suburbs will also be slashed with up to 15,000 trucks taken off local streets a day and more than 9000 vehicles taken off hotspots like Rosanna Rd....”

[25] The Project cost is in the order of \$16 billion. The Project construction works commenced in July 2020. It is anticipated that the Project will be completed in 2027.

[26] The MTIA is responsible on behalf of the State for the delivering the Project.

[27] The MTIA describes the Project's purpose as follows:

“The NEL Project is the biggest road transport project in Victoria's history. The purpose of the NEL Project is to:

(a) reduce congestion along Melbourne's freeway network by connecting the Eastern Freeway at Bulleen with the M80 Ring Road at Greensborough; and

(b) further reduce travel times by improving public transport infrastructure and constructing a dedicated busway along the Eastern Freeway.”

[28] A dedicated website managed by MTIA for the Project contains extensive and comprehensive material demonstrating the detailed activities that have been undertaken in preparing the Project for construction and details the construction undertaken to date. The Panel does not intend to traverse all that material in this Determination, but having appraised itself of the material, the Panel nevertheless relies upon its content in the consideration it has given to this matter.

How is the Project being delivered?

[29] The MTIA in its submission to the Panel dated 26 April 2020 describes the Project delivery and the scope of works at *paragraphs 20-30* to include Early Works, Primary and Secondary Works Packages. The Panel accepts that this is a comprehensive description of the scope of works associated with the Project. None of the parties took issue with the descriptions submitted, save for the final sentence in *paragraph 27*. It is instructive to replicate the description here:

- “20. The scope of the NEL Project includes the Early Works package, a primary package, and intended multiple secondary packages, each of which are intended to be separately procured and delivered.*
- 21. CPB Contractors are delivering Early Works pursuant to a Managing Contractor Agreement (Early Works MCA). Construction work in respect of the Early Works commenced on 22 July 2020 (following the erection of site temporary fencing on 15 May 2020).*
- 22. The primary package is currently in the final stages of procurement, and it is envisaged that construction work will commence in late 2021.*
- 23. Procurement of the secondary packages has not yet commenced.”*

What is the scope of the Early Works package?

Under the Early Works MCA, Early Works are contracted to be delivered pursuant to a two-phase model incorporating a "planning phase" and, subject to achieving approval in respect of relevant works packages, a "delivery phase" for relevant work packages. The scope of the Early Works under the MCA comprises the:

- (a) *Initial scope comprising the potential removal, modification, relocation and/or protection of impacted utility services, sewer dilapidation survey*
- (b) *and independent environmental auditor scope, including:*
 - (i) *Relocation of 220 kV transmission towers;*
 - (ii) *Relocation of mobile telecommunications tower;*
 - (iii) *Lower Plenty Road utilities relocation;*
 - (iv) *Simpson Barracks utilities relocation;*
 - (v) *Eastern Freeway utilities relocations;*
 - (vi) *Major sewer relocation at Bulleen Road;*
 - (vii) *Geographically dispersed utilities development and relocation/protection across North East Link;*
 - (viii) *Banyule Creek Diversion; and*
 - (ix) *Sewer dilapidation assessments; and*
- (b) *Potential additional scope that was anticipated may be delivered under the Early Works MCA. Some of this scope was identified at the time of contract execution, such as:*
 - (i) *work in relation to other utilities (i.e. the MTIA may continue to consider another approximately 350 utility services potentially impacted by the North East Link and determine whether they are also suitable for inclusion);*
 - (ii) *demolition;*
 - (iii) *site preparation;*
 - (iv) *design and construct of a North East Link visitors' centre;*
 - (v) *tunnel boring machine power supply; and*
 - (vi) *road works.*

25. *Some aspects of the primary package that are being fast tracked have also been incorporated into the Early Works package through variations of the Early Works MCA. This includes construction of the Bulleen Park & Ride which is a public transportation 'hub' that will connect to the busway being constructed along the Eastern Freeway. Construction of the Bulleen Park & Ride will commence in approximately June / July this year.*
26. *A summary of the current scope of the Early Works MCA (incorporating all agreed variations that have occurred since the Early Works MCA was entered into) is set out below:*

<i>Original Scope of Works</i>		<i>Approved variations to original scope (as at 21 April 2021):</i>
<i>Description of work:</i>	<i>See paragraph 24(a)</i>	<ul style="list-style-type: none"> • <i>Relocation and site preparation works at Simpson Barracks</i> • <i>upgrade works at Ford and Binnak Parks (explained in further detail at paragraph 29 below)</i> • <i>fast-tracking of Bulleen Park and Ride Facility</i> • <i>relocation of APA licensed gas transmission pipeline</i> • <i>various additional minor works packages, hoarding and fencing works, proving works and demolition works.</i>
<i>Total Cost of Early Works package as disclosed on the Victorian Supplier Portal (approx.,</i>	<i>\$200M</i>	<ul style="list-style-type: none"> • <i>The Early Works contract is subject to variations and the Victorian Supplier Portal is updated periodically to reflect those revised values."</i>

What is the scope of the Sports and Recreational Works?

27. *In order to minimise the impact of the NEL Project on local communities and following consultation with various councils, schools, sport and recreation clubs and associations, the MTIA is funding approximately \$89M to upgrade sports grounds and facilities in Melbourne's northern and eastern suburbs, and part of these upgrades to sports grounds and facilities are works being undertaken by the Respondents (**Sports and Recreational Works**). For the purposes of determination of a site allowance, it is notable that these works are primarily occurring away from the road corridor and are not considered to be intrinsic or necessary for the completion of the NEL road.*

28. *The Sports and Recreational Works include:*

- (a) construction of six new pavilions across the north east of Melbourne;*
- (b) upgrades to existing sports facilities to improve amenities (e.g. lighting and change rooms) and to increase their capacity;*
- (c) upgrading sports ovals to improve flood water management;*
- (d) relocation of sporting facilities that have been or will be displaced due to compulsory land acquisition; and*
- (e) associated landscaping works.*

29. *The Sports and Recreational Works are being delivered through the following arrangements:*

- (a) the works at Greensborough College, Trinity Grammar School, Monash Tennis Centre and Veneto Club are being delivered through arrangements under which third parties, such as the community sporting facilities and councils, will procure and deliver the relevant upgrades themselves (e.g. through financial grants from the State); and*
- (b) the upgrade works at Binnak Park and Ford Park, which are the subject of this dispute, are being delivered through the Early Works MCA. A brief overview of these packages of work is as follows:*

The scope of works for Binnak Park includes upgrades to the natural turf AFL/Cricket oval, construction of a seven-pitch natural turf centre wicket block, playing shelters, field lighting, electronic scoreboard, demolition and construction of a pavilion, and construction of new car parking; and

The final scope of works for Ford Park (Stage 1, noting that Stage 2 has not yet been committed or agreed) includes upgrades to the south natural turf oval, players and official shelters, field lighting, electronic scoreboard, realignment of an impacted shared granitic sand walking/running track, removal of existing cricket nets, the construction of 3 new synthetic grass enclosed cricket nets and pavilion, and the demolition of the existing grandstand, pavilion and public toilets.

What is the scope of the primary and secondary packages?

30. *A brief overview of the remaining components of the NEL Project (as currently envisaged, noting that procurement of the secondary packages has not yet commenced) are as follows:*

Package	Scope
Primary Package	<ul style="list-style-type: none"> • Construction of NEL from Somers Avenue to the Southern Tunnel Portal, including all tunnel components and interchanges at Lower Plenty Road and Manningham Road. • Operation and maintenance of the Primary Package and specified extended areas • Delivery of the Tolling Enabling Works.
Secondary Packages	<ul style="list-style-type: none"> • Construction of the M80 upgrade from Plenty Road to Somers Avenue, including the Greensborough Bypass interchange and infrastructure interfacing with the Hurstbridge Rail Line including any related changes to the Rail infrastructure. • Construction of the Eastern Freeway upgrade from Hoddle Street to Burke Road. • Construction of the Eastern Freeway Interchange with the Primary Package and upgrade from Burke Road to Tram Road. • Construction of the Eastern Freeway upgrade from east of Tram Road to Springvale Road.”

[30] The MTIA submissions of 7 and 18 May 2021 set out further details of the works that comprise the *Sports and Recreation Works* associated with the Project and the Panel accepts the details as accurate. To assist the reader, the table included in the submission of 18 May 2021 is reproduced at *Appendix A* to this Determination.

[31] The Employers in this matter have been contracted, in various capacities, to perform sports and recreation upgrade works at Ford Park and Binnak Park, identified as part of the *Sports and Recreation Works* at *paragraph 26* in the MTIA submission above and at *Appendix A* to this Determination.

[32] These particular works have been incorporated under the Early Works MCA managed by CPB. None of the other works comprehended by the *Sports and Recreation Works* have been so incorporated.

[33] There are no other works presently contracted to these Employers under the Early Works Package or works otherwise associated with the Project. Both Norris and 2Construct commenced their contracted works in about September 2020. Scaffold Logistics commenced sometime in early 2021 and only for a brief period.

Do special and exceptional circumstances exist?

[34] The Enterprise Agreements provide that in determining site allowances, the Panel shall not deviate from the methods set out in the *Appendix C* “unless there are *special and exceptional circumstances*.” (our emphasis)

[35] The parties themselves acknowledge that “*special and exceptional circumstances*” exist for this Project. The Enterprise Agreements covering 2Construct Pty Ltd and Scaffold Logistics, also specifically provide that “*special and exceptional circumstances*” includes “*Infrastructure projects with more than a four-billion-dollar Project Value*”, which is satisfied for this Project.

[36] In this matter the Panel considers that the enormous size, scope, cost and complexity of the Project, including the nature of the construction delivery program across various connected packages, are such that there are “*special and exceptional circumstances*” which allows the Panel to deal with the dispute in the manner we have.

The Submissions

[37] The CFMEU submits that all of the works managed under the Early Works Package by CPB, including the sports and recreation upgrade works at Ford Park and Binnak Park, should have a site allowance of \$9.95 per hour payable from commencement of those works, increasing to \$10.35 from 1 March 2022 with subsequent escalations during the life of the Project, for any and all works associated with the Project.

[38] 2Construct and Norris do not agree with the CFMEU and consider that the site allowance of \$4.50 per hour presently being paid to employees is appropriate in relation to the specific works they are presently undertaking at Ford Park and/or Binnak Park. They argue that *Sports and Recreation Works* should not be considered part of the Project when determining site allowances. They however do agree that \$10.35 per hour shall apply from 1 March 2022 for work comprehended by the Project. They make no submissions as to the quantum of site allowance applicable to the Project before 1 March 2022.

[39] MTIA generally concurs with the employer parties but identifies an alternative approach in the event the Panel was to find that the Project site allowance was applicable to *Sports and Recreation Works*.

[40] CPB generally concurs with the employer parties, save for its position on jurisdiction, which the Panel has rejected.

Background

[41] It is important to note that both 2Construct and Scaffold have already agreed through their Enterprise Agreements that the Project from 1 March 2022 will provide for a site allowance of \$10.35 per hour, increasing over time, as set out in those Agreements:

“Project Specific Site Allowance Rates as at 30 June 2020

12.1. The Site Allowance applicable to the West Gate Tunnel Project shall be \$9.25

12.2. The Site Allowance applicable to the Metro Tunnel Project shall be \$9.55

12.3. The above rates will be adjusted as per clause 10 above.

12.4. The Site Allowance applicable to the North East Link Project shall be:

(a) As at 1 March 2022 - 10.35;

(b) As at 1 March 2024 - \$10.75;

(c) As at 1 March 2026 - \$11.15;

(d) As at 1 March 2028 - \$11.55.”

(our emphasis)

[42] The CFMEU submits that Norris and the CFMEU are in negotiations for a new Enterprise Agreement that is likely to provide for the same site allowance provisions as the 2Construct and Scaffold Enterprise Agreements. To be clear, the Panel is dealing with the matter consistent with the currently applicable instruments.

[43] The parties to the 2Construct and Scaffold Enterprise Agreements did not define in the Agreements what works are included in the scope of the Project for the purpose of calculating site allowances, and they did not specifically address in their negotiations the question of whether sports and recreation works associated with the Project formed part of the Project. The same need for definition of scope was not necessary in relation to both the West Gate Tunnel Project and or the Melbourne Metro Tunnel Project given that the Panel had some time earlier determined the scope of works for both those projects, which would have informed the parties.

[44] It is apparent that many other Enterprise Agreements reached between the CFMEU, other unions and employers in the industry, make provision for site allowances applicable for works on this particular Project. None of these agreements make any endeavour to define the scope of works for the Project, nor do any of the agreements to which the CFMEU is a party specify the quantum applicable prior to 1 March 2022.

[45] By comparison, the Panel notes that in numerous Plumbing Contractor Enterprise Agreements, a site allowance of \$9.50 per hour applies from commencement of works for the Project, increasing to \$10.35 from 1 March 2022. In addition to the payment of the site allowance, a *Productivity 'all purpose' allowance* for the Project is also prescribed in those agreements, presently \$3.00 per hour. None of those agreements define the scope of works for the Project either. There is no reference to such additional allowance in the Enterprise Agreements under consideration in this matter.

[46] The Panel notes that the Government's published Expression of Interest process of 2019 for the North East Link Project, included the following extract:

"2.2.5 Site Allowance

To provide greater certainty to Respondents, the State is considering options to facilitate upfront guidance on anticipated site allowances on North East Link. It may be possible for guidance to be provided through a general statement or in principle Determination from the Victorian Building Industry Disputes Panel taking into account the nature and value of North East Link. The State would not be seeking to interfere with the role of each individual employer in establishing terms and conditions of employment, including in any agreement they negotiate is consistent with Commonwealth law."

[47] For clarity, the Panel has not until now been called upon to provide any such guidance, this being the first occasion that the Panel has formally considered this Project for site allowance purposes.

[48] The Panel notes that the MTIA and the unions held discussions in early 2020 for the purposes of establishing some guidance for the industry as to the possible application of site allowances and other matters for the Project. Subsequently some of the unions involved signed a *North East Link Project Industrial Relations Guidance Document* in May 2020, submitted at *Appendix B* to the CFMEU's written submission 23 April 2021. To be clear the *Guidance Document* was not signed by the MTIA or any employer party. It was however included in the material that was provided to tenderers for the Primary Works Package, for information purposes.

[49] The *Guidance Document* was not available for the procurement process for the Early Works Package contract as that process had commenced well prior to the discussions conducted between the MTIA and the unions which resulted in the preparation of the *Guidance Document*.

[50] The *Guidance Document* identifies the unions' proposed quantum of site allowances for Primary and Secondary Works Packages only on the Project, which are in part reflected in the 2Construct and Scaffold Enterprise Agreements from 1 March 2022.

[51] The *Guidance Document* proposes a site allowance of \$9.95 per hour prior to 1 March 2022, referencing the site allowance payable on the Melbourne Metro Tunnel Project from October 2019, but the Enterprise Agreements in this matter make no provision to this effect. They are silent in this regard.

[52] The *Guidance Document* is somewhat instructive in so far as there is reference to “*an appropriate comparator*”, being the *CYP Melbourne Metro Tunnel and Stations Project Greenfields Agreement 2018-2022* which provided for a site allowance of \$7.50 plus an additional redundancy contribution of \$2 per hour together with other entitlements such as *overtime productivity allowance*. The then applicable contractor site allowance for the Metro Tunnel Project was \$9.40 per hour as at 1 October 2018, payable for what was described as

either *Early Works* and *Major Works* for that project, as per 014-2017.

[53] Unfortunately none of the parties, including in the process undertaken between MTIA and the unions, has collectively dealt with how to treat the works associated with the Early Works Packages or any works on the Project prior to 1 March 2022 or how to treat the *Sports and Recreation Works* at any point during the Project.

[54] It is clear from the submissions that the MTIA process did not commence early enough for there to have been any clarity in relation to these matters. Both the MTIA and CFMEU oral submissions to the Panel confirm that Project works prior to 1 March 2022 were not addressed in their discussions and would need to be considered at some point. The Panel understands that upon announcement of CPB as the successful tenderer for the Early Works Package, the opportunity to address these matters, from any guidance perspective, was no longer available, save for direct negotiation with relevant parties. The Parties and MTIA have requested the Panel now considers such matters.

[55] It is apparent though, that there has at least been some consideration of the relevant quantum by two of the Employers engaged at the Ford Park and Binnak Park *Sports and Recreation Works*, given they have been paying a site allowance of \$4.50 per hour, which seems from the submissions to have been informed by the overarching nominal value of all of those Early Works that form CPB's MCA contract.

[56] It has been submitted that the \$4.50 site allowance being paid for Binnak Park and Ford Park may be greater than is required under the terms of the Enterprise Agreements. It is clear to the Panel that the employers are paying that amount based on their understanding about the total value of the Early Works Package (which includes Ford Park and Binnak Park) of some \$200m, as advised by CPB.

[57] It seems this led to a sense by the employers, that all those works making up the Early Works Package formed the basis for determining the quantum of site allowance for Early Works and that this was appropriate under the circumstances. The employers here apparently recognised the connection their works have to the Early Works Package by affording a higher

site allowance than might otherwise apply. This seems to have been the consideration by the employers here, however there was no engagement or concurrence with its workforce or the CFMEU in this regard before this Dispute arose.

[58] Whatever the reasoning, 2Construct and others have been paying \$4.50. Importantly 2Construct has undertaken that it will not pay less than \$4.50 per hour for the remainder of the Ford Park and Binnak Park works, notwithstanding its view that this amount may be greater than it would be required to pay if the works were not considered to be included in Early Works for the purposes of payment of site allowance.

[59] With this background it is necessary for the Panel to determine in the first instance as to whether *Sports and Recreation Works* associated with the Project ought to be included in the scope of the Project. In relation to *Sports and Recreation Works*, the issue for the Panel is whether these works fall within the definition of *Project* in the Agreements. Also, of relevance in the Panel's view, is whether the connection to the Project of these associated works is so enshrined, so linked, and so necessary for the Project that those works warrant the payment of a site allowance at the same quantum as the Project itself.

What work falls within the definition of Project?

[60] Each of the applicable Enterprise Agreements define *Project* as follows:

“Project means building and construction works performed on a site or combination of sites for which:

(a) the site or combination of sites must constitute an enterprise or undertaking carefully planned to achieve a particular result; and

(b) the site or combination of sites must have a clearly established entity or entities that exercise control over its development; and

(c) the site or combination of sites must 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.”

[61] These three elements of the definition of *Project* have been informed by previous long established principles concerning site allowances.

[62] The principles, which have been applied by the Panel over many years, are taken from a decision of the 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 Lend Lease Pty Ltd v Construction, Forestry, Mining and Energy Union* [PR975618] (the “Bovis Lend Lease” decision), both decisions of Deputy President Ives.

[63] The Panel has also previously considered these elements in the context of a number of mega projects and held that these elements may not be so precisely applied to a mega project where there are “*special and exceptional circumstances*”. We adopt the same approach here for this mega project.

[64] We now address each of the three elements.

What is the enterprise or undertaking carefully planned to achieve a particular result?

[65] In this case the Panel considers the available material clearly confirms the construction of a major freeway which is an enterprise designed to deliver significant improvements to transport movement. It necessarily includes works that are essential to its delivery and without which it would not be possible to construct, including for example, demolition of facilities or structures in the construction zone corridor or relocation of utilities. It also includes component works which would not otherwise be undertaken had it not been for the freeway construction such as the bus park and ride, bike paths and walkways.

[66] Clearly there are infrastructure construction projects which have component works that have some level of discretionary element but nonetheless have been incorporated into a project when site allowance considerations have arisen.

[67] But this is not so in every case and certainly not with regard to every component. Each component properly needs consideration on its merits, if a disagreement arises.

[68] The Panel does not accept that just because some works have some association with the enterprise that those works should be included for the purposes of determining a site allowance relevant to that broader project or enterprise. We consider it needs to be more than just an association.

[69] A project of this size and complexity is bound to impact the community in many ways. Most major road infrastructure projects cause significant disruption and displacement. Often homes need to be acquired and demolished requiring then to be rebuilt elsewhere, businesses are relocated, parklands and reserves are subsumed by the development. Sporting facilities and recreation parks are impacted, some lost forever, others rebuilt elsewhere. This is the pattern of every major road infrastructure project.

[70] The rebuilding of such facilities undertaken in other locations away from the principal construction works for such activities, whether or not performed concurrently with the construction on site, are not ordinarily incorporated in the Project when site allowances are considered.

[71] These works are invariably undertaken by contractors responsible to principals other than those responsible for the road project itself.

[72] Certainly it is true that often the funding of such works may come from the client/developer responsible for the substantive road project, either by way of full or part compensation, acquisition, or a combination of same. That of itself however does not make it part of the enterprise. Also, often the rebuilding works of the affected facilities are the responsibility of a different entity who exercises control over the new site/facility. Indeed, the Panel is not familiar with any such works undertaken at other locations, that have hitherto been incorporated in a project for the purposes of site allowance payment, unless they were integral to the Project purpose.

[73] In this regard the CFMEU sought to rely upon a decision by the Panel in *Matter No. 026-2007* concerning *Eastlink Rail Upgrade*. In that matter the works in question were found to be part of a "*total integrated transport system along the corridor*". The Panel distinguishes that

from the current matter, as it is clear the particular Eastlink Project incorporated the relevant works as an integrated response to the transport solution for the corridor as part of the enterprise. This is similar to the way in which the bus park and ride is incorporated here. In that matter there was no consideration of sports and recreation facilities or similar.

[74] CPB in its submission sought to rely upon a Conciliation and Arbitration Commission decision of Bennett C in *C No. 2388* of 25 November 1986 suggesting that any consideration of site allowance should be confined to disabilities on the site. That particular case was for a relatively small project with a value of \$1.1m at a time when the composition and purpose of site allowance application in the industry was applied on a significantly different basis to that which has been developed by agreement and applied since. This is reflected in a long history of industrial instruments and awards, such that the Panel considers the decision of Bennett C is not relevant to today's circumstances.

[75] The Panel is not assisted by either of these decisions in this case.

[76] The *Sports and Recreation Works* as referred to by the MTIA in its submission of 18 May 2021 (refer *Appendix A* to this Determination) at this point are 10 primary locations across the municipalities of Banyule, Manningham, Boroondara, Monash and Whitehorse where various works have commenced, been completed or planned.

[77] These works are a combination of temporary or permanent relocation of sporting clubs and facilities, upgrading of facilities and replacement of facilities as a consequence of the Project works. It is anticipated that most of the works will be complete by end of 2021 save for the realignment of the Freeway Golf Course, construction of the new Monash Tennis Centre in Glen Waverley and the reinstatement of the Elgar Park cricket oval, the timing for which is yet to be determined. The works include the upgrades to Ford Park and Binnak Park, at a cost of approximately \$30m, both of which are on track to be completed by July 2021.

[78] Significantly, it is the relationship that the *Sports and Recreation Works* bear to the Project which is at issue. The *Sports and Recreation Works* whilst associated with the Project, do not of themselves appear to the Panel to be a necessary or essential feature of the Project

enterprise itself.

[79] As MTIA itself states “*The works are a combination of temporary or permanent relocation of sporting clubs and facilities, upgrading of facilities and replacement of facilities as a consequence of the Project works.*” (our emphasis). There is ample material before the Panel that confirms and explains this connection to the Project as necessary to alleviate the impact on sporting clubs and the community as a result of the freeway construction works on existing facilities. The parties agree with this connection. The question is whether such works are so necessary and integral to the enterprise to be undertaken and completed that it must be included in the scope of the Project, consistent with its definition in the Agreements.

[80] The Panel has dealt with this type of disagreement in various Determinations previously.

[81] In the *Ports Capacity Project Matter No. 003-2016*, the Panel found that the scope of that project was determined by reference to the works that are “*inextricably linked in the sense that they are not discretionary to the Project and each relies upon the other for its viability*”.

[82] Similarly, in the *Melbourne Metro Tunnel Matter No. 014-2017*, the Panel held that some of the scope was “*not relevant for the purposes of determining Construction related activity for which a site allowance might be determined*”. Specifically, in that matter the Panel excluded works that were “*not intrinsic to or necessary for the completion of the Metro Tunnel Project and consequent upon a separate initiative than the Metro Tunnel Project*”.

[83] The Panel is satisfied that these are appropriate tests to apply in this matter. Following our examination of all of the scope of works presently incorporated in the Early Works Package, the Primary and Secondary Packages (as set out in paragraph [29] herein) the Panel is satisfied that all of the known works readily meet these tests, except *Sport and Recreation Works* of the type being dealt with here. These works require closer analysis, having regard to the purpose of the enterprise.

[84] It is clear from a community perspective that the upgrade works are necessary as a consequence of the loss of amenity arising from the freeway construction. From a public and

social policy perspective there is no doubt that they are necessary and essential, but the Panel considers they are not works that are intrinsically required or necessary for the actual construction of the Project.

[85] These are works that for the most part were always going to be delivered in some form due to local government planning and demographic changes. The CFMEU submitted that both Ford Park and Binnak Park works were directly consequential upon the Project and said “*put simply, would not be carried out but for NELP.*” The Panel does not agree. Without the Project, the works associated with Ford Park and Binnak Park would have proceeded at some point given the earlier Master Plans of Banyule Council. Whilst the detailed planning and design has been hastened by the Project, nevertheless it is considered by the Panel that this of itself does not make these works intrinsic to the Project construction.

[86] We also consider that this particular package of *Sport and Recreation Works* is not in any substantive way different to many other initiatives in the sport and recreation area that are regularly funded by the State Government through a raft of significant community investment programmes such as the following:

- Suburban Revitalisation Programme
- Open Space for Everyone Strategy
- Suburban Parks program
- Growing Suburbs Fund
- Community Sports Infrastructure Stimulus Programme

[87] These investment programmes deliver works and activities that similarly arise from demographic change that incorporate a substantial number of projects to upgrade sports and recreational facilities, amongst other community investments, across the State. Many of the works have arisen from very similar considerations that lie behind the *Sports and Recreation Works* that are associated with this Project.

[88] We agree with the MTIA with its submission at para 36:

“Applying this test to the Sports and Recreational Works, the Sports and Recreational Works are clearly not “intrinsic or necessary” for the completion of the NEL Project, nor is the viability of the NEL Project contingent on the Sports and Recreational Works being undertaken. In summary:

(a) *these works are only tangentially related to the NEL Project as a whole and in substance are being performed to improve community facilities and to keep local sporting clubs playing and thriving during major construction and beyond, rather than being part of the development and construction of the NEL roadway and surrounding infrastructure. These works are not necessary to achieve any of the purposes set out at paragraph 18 above;*

(b) *the majority of the Sports and Recreational Works are being delivered through alternative avenues (such as through the State providing funding directly to the local councils and sporting clubs), further reflecting that such works are peripheral and incidental to the NEL Project; and*

(c) *completion of the core components of the NEL Project could be achieved whether or not the improvements the subject of the Sports and Recreational Works at various other locations are achieved, and it otherwise remains open for such works to be delivered on a different timeline to the core project scope.”*

[89] Similarly 2Construct submitted as follows:

“17. The Respondent submits that the construction work at Ford and Binnak Park are not intrinsic to or necessary for the completion of the Early Works package, or the overall construction of the NELP. These projects could stop tomorrow, or never be completed, and this would not impact the construction programme of the NELP in anyway whatsoever....

24. By contrast, the Respondent is upgrading sports facilities, community spaces and carparks at Ford and Binnak Park. Such works sit a considerable distance away from the proposed freeway connection and will not form part of the site’s footprint. The only reason the redevelopment of Ford and Binnak are linked to NELP is because they been branded as part of NELP, have the same client and were awarded to the same principal contractor performing NELP Early Works

26. The construction of sports pavilions, ovals, car parks and cricket nets are not intrinsic and necessary for either the completion of the Early Works package, let alone the entire NELP. These works are ancillary and a separate initiative. There is no physical, geographic, operational and construction nexus with the preparation for and construction of a freeway connection.”

[90] Whilst it is clear that the planning of the enterprise in this case has necessarily included the activities that fall within the scope of the *Sports and Recreation Works*, the Panel is not convinced that the works are so necessary for the principal purpose of the Project or enterprise, or the amenity of use of the Project or enterprise (such as pathways, overpasses etc.) such that the first element of Project definition can be convincingly satisfied.

Does the site(s) have a clearly established entity or entities that exercise control over its development?

[91] The Panel notes the submission made by MTIA:

“38. Subject to paragraph 39 below, it is acknowledged that the majority of works undertaken as part of the NEL Project are controlled by the State of Victoria through the MTIA.

This is the case regardless of the fact that various components of the NEL Project may be subject to different site supervision or induction processes, or that other entities may also have some control over some elements within the NEL Project.

39. As an exception to this, whilst the MTIA is working closely with community centres, clubs and councils in the delivery of the Sports and Recreational Works, the planning, design and delivery for the Sports and Recreational Works being delivered outside of the Early Works MCA are being determined by the relevant councils and clubs themselves. In the submission of the MTIA, this provides further support to the assertion that these works should be excluded from the relevant scope of the NEL Project for the purposes of determining a site allowance.”

[92] All of the works that make up the *Sport and Recreation Works* as set out in *Appendix A*, whilst funded in full or in part by the Government, are ultimately responsible to entities other than the State. In this case those entities have no control over the Project itself. However, the Panel does not consider that just because there are multiple entities involved with various sites, that this of itself renders a fail to this element.

[93] The Panel notes that it is only the *Sports and Recreation Works* at Ford Park and Binnak Park that are being delivered through the CPB Early Works MCA. All other *Sports and Recreation Works* are being delivered by the responsible entity such as the relevant school, the Victorian Schools Building Authority or the relevant Council. It is clear to the Panel that the City of Banyule did not have the resources necessary to deliver the works for Ford Park and Binnak Park and it was agreed that the State would arrange delivery at its cost and elected to do so through the Early Works MCA with CPB.

[94] In the view of the Panel it does not automatically follow that these particular works should therefore be treated the same as other construction works on the Project.

[95] The Panel acknowledges that there is a significant amount of published material about Ford Park and Binnak Park which bears the formal logo of the *North East Link Project* and is distributed and promoted to the community under the auspices of the Project. Indeed all of the relevant signage at these works carries the signage of the *North East Link Project*. The CFMEU relies upon this as another justification for including these works in the Project for site allowance purposes. We do not consider this of itself is sufficient to align the compensation that might arise to work performed by this linkage alone.

[96] The only distinguishing factor for Ford Park and Binnak Park from other works that are included in the Sports and Recreation Works, is that CPB is the managing contractor through its Early Works MCA contract. If the Panel was to be persuaded that the Project site allowance should apply to these two sites, it would follow that all other works within the *Sports and Recreation Works* should be treated similarly for site allowance purposes, whether or not the fall under the Early Works Package contract. The works themselves do not change in any substantive way just because CPB is the managing contractor.

[97] By way of example, included in the *Sports and Recreation Works*, albeit not presently managed under the CPB Early Works MCA, is the construction of the new Monash Tennis Centre. This is to replace the existing Boroondara Tennis Centre facility which is located on land needed for a crucial interchange to connect the Project to the Eastern Freeway. If we were to adopt the CFMEU's submission, logic would suggest that the Monash Tennis Centre proposed to be built in Glen Waverley, many kilometres away from the Project, should attract the Project site allowance for its construction. We do not agree that the bow can be stretched so far. This would extend the application of site allowance science well beyond what is intended or reasonable under the circumstances in our view.

[98] The fact that Ford Park and Binnak Park fall under the CPB Early Works MCA, is not sufficient in our view to meet the relevant test for the definition of *Project*. Whereas, in our view, the other construction activities in the Early Works Package do meet the test.

[99] The very existence of the range of entities that do and will exercise control over the various *Sports and Recreation Works* whilst associated with the Project, may diminish in our view the

capacity of this element of the definition to be met, but we say must be considered together with the other elements.

Does the site(s) have a scope sufficiently definable at any given point during the project to enable proper definition and costing of the project?

[100] In relation to this element the Panel considers that for a mega project such as this, it is simply impractical for every part of the scope to have been conclusively designed and costed “*at any given point*”. For this mega project we are satisfied that sufficient and fundamental aspects of the Project have been defined which allows proper definition and costing as demonstrated by the substantial data and detail available for the Project. The Panel holds what it regards as a commonsense view, that the works being anticipated to be performed in any of the relevant packages, subject to the other elements being met, are “*sufficiently definable at any given point*” for present purposes, and when taken together with the “*special and exceptional circumstances*” of this Project.

[101] Whilst the works associated with Ford Park and Binnak Park can be and have been adequately defined, given what we have found in relation to the first two elements, this is insufficient for the works to meet the overall definition requirements. When taken together the Panel is not satisfied that each of the three elements that make up the definition of *Project* are met in a way that directs the inclusion of *Sports and Recreation Works* in this Project, for site allowance purposes, even having regard to the application of “*special and exceptional circumstances*”.

[102] We consider that the *Sports and Recreation Works* are sufficiently distinguishable from all other works incorporated in the Early Works that they do not form part of the enterprise of the Project for site allowance purposes.

[103] The Panel accordingly does not consider that the *Sports and Recreation Works* incorporated in *Appendix A* and in particular the Ford Park and Binnak Park works, of themselves warrant a site allowance at the same level that will be paid to workers engaged specifically for construction works necessary for the Project, having regard to the definition of

Project in this particular context. We acknowledge that the employers have committed to paying a site allowance for the Ford Park and Binnak Park works of \$4.50 per hour and the Panel does not intend to interfere with that.

The Panel now turns to consider what is the applicable site allowance for works that fall within the scope of the Project prior to 1 March 2022.

[104] In this regard it is necessary to establish what other works comprehended in the Project should be entitled to a site allowance pursuant to the Enterprise Agreements. Whilst the Panel has found that *special and exceptional circumstances* exist in this matter it is still nevertheless instructive to consider the Project value.

[105] Each of the Enterprise Agreements define *Project Value* as follows:

"Project Value, including Total Project Value, means the value of the Project, comprising of:

- (a) *preliminary costs and profit margins;*
- (b) *trade packages including supplier and subcontractor costs; and*
- (c) *provisional sums;*

Project Value does not include non-construction development costs."

[106] To the extent that the value of the Project is a consideration in this context it is instructive to replicate the MTIA submission:

“43. As set out in the 2019-2020 State Budget, the NEL Project is funded for around \$15.8B (inclusive of both construction and non-construction development costs and excluding GST).

44. An approximate breakdown of this estimate is as follows:

<i>Package Business case estimate (GST exclusive)</i>	
<i>Early Works</i>	<i>\$199M</i>
<i>Primary Package</i>	<i>\$7B - \$9B</i>
<i>Secondary Packages (combined)</i>	<i>Contingent on packaging approach</i>
<i>Total</i>	<i>\$15.8B</i>

45. *The Early Works contract is subject to variations and the Victorian Supplier Portal is updated periodically to reflect those revised values.*”

[107] Suffice to say that this is a mega project for which a site allowance ought to be properly determined having regard to a range of factors and considerations and not just the value of the Project. In this regard we adopt a similar approach to that applied by the Panel in the Melbourne Metro Tunnel Project matter:

“...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.”

and

“We are not certain that an allowance should necessarily continue to increase for such projects just because of the size of the project alone.”

[108] We consider that for this Project, the enterprise is directed to the principal purpose of constructing the freeway and all those elements that intrinsically form part of the build itself, including the physical preparation of the corridor for access, the demolition of structures, the clearing of land, the relocation of infrastructure services (all of which are of a kind incorporated in Early Works Package), all of the Primary and Secondary packages. These are all essential features of the enterprise.

[109] It is important to note that the *Sports and Recreation Works* set out in *Appendix A* do not include any of the works necessary to demolish, remove or occupy existing sport and recreational facilities that may stand in the way of the freeway construction itself.

[110] To be clear, it is the Panel’s view that the works undertaken to demolish, relocate services and remove facilities in the freeway corridor itself are clearly an essential and integral requirement for the construction of the freeway. These activities are clearly an essential part of the Project and warrant the site allowance applicable to the Project. All other construction works that form the Early Works Package at this time are directly essential to the construction of the freeway in the corridor. At this point and for the purpose of this dispute, it is only the Ford Park and Binnak Park works in the Early Works Package that for the purposes of the Project we have determined are not essential.

[111] In this matter we do not consider there is any justifiable reason to distinguish between any of these stages of the Project when determining a quantum for site allowance for this Project, provided the works fall within the definition of the *Project* pursuant to the Agreements.

[112] Whilst the Panel in *014-2017* did adopt a stepped approach for site allowance purposes to what were described as *Early Works* in that matter, this was specifically for the reason of the timing of the dispute coming before the Panel and the particular circumstances of that dispute, which are not replicated here. That is not to say that a stepped approach may be relevant for another project.

[113] Also, we consider the title of “Early Works” itself in this Project has no real consequence for the purposes of site allowance, other than the relevant works are being undertaken earlier than other works on the Project. We note for example, the MTIA decision to bring forward works such as the Bulleen Park and Ride facility into the Early Works Package. We certainly do not intend to invite a circumstance where works could potentially be transferred from one package of works to another in order to affect a site allowance consideration. That would be contrary to providing certainty to the application of site allowances for a project and inappropriate, unless otherwise agreed. Accordingly, for this particular Project there is no reasonable basis to distinguish the relevant works in either package for the purposes of site allowance.

[114] Pursuant to the Agreements at *Appendix C Clause 5*:

“A Site Allowance shall be paid.....to compensate for all special factors and/or disabilities on a project and in lieu of the following Award special rates - confined space, wet work, dirty work, second-hand timber and fumes.”

[115] The Project will expose workers to a wide range of disabilities across the Project, including those identified above. The Panel is satisfied that the disabilities that will be present in this Project together with the special factors of working on a mega project such as this, when taken together, are sufficient to warrant the level of allowance we have determined. We have also taken into account the nature of the work being conducted and to be conducted across the Project, recognising the size, cost, complexity and longevity of the Project. It is noted that there

are other allowances, such as height work, underground and other allowances that may still apply as provided by the agreements where and when those specific works are undertaken.

[116] To be clear, the Panel confirms that there is no dispute about the quantum of site allowances on the Project where relevant Enterprise Agreements explicitly provide the site allowance rates from 1 March 2022 across the Project life through to 2028. The Panel considers these rates are appropriate under the circumstances of this Project and does not intend to disturb those agreements, as set out in para [41].

[117] We have had due regard to the industry benchmarks, and in particular our Determinations in *014-2017 and 008-2018*, to establish an appropriate quantum, and on this occasion, we are informed also by the parties' own clear agreement as to quantum for the Project from 1 March 2022 of \$10.35 and subsequent increases.

[118] We also note that consistency of approach for monetary quantum for site allowances that are payable specifically for working on a mega project is an important matter in assisting industrial harmony across a project. Whilst acknowledging the relevant site allowance and 'productivity' allowance provided for in the Plumbing Contractor Enterprise Agreements for this Project, we have determined quantum and operative dates that we consider more appropriate to the circumstances of the Agreements we are dealing with here.

[119] Having found that the works that form the Project in this case should not be distinguished for site allowance purposes, it is a simple exercise of applying some logic and reasonableness to what the parties themselves have already agreed. Working back from the amounts already agreed between the parties, and having regard to other contemporary project site allowances, a quantum of \$9.95 per hour for works undertaken prior to 1 March 2022 is logical, reasonable and warranted. The majority consider that it is appropriate for this amount to take effect from 1 July 2021 and an amount of \$9.50 per hour should apply to any works undertaken after 1 July 2020, about the time of Project commencement. Member Gruszka dissented on quantum only.

Determination - Summary

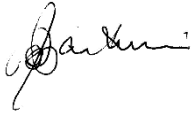
[120] For the purposes of the Enterprise Agreements in this matter the Panel determines as follows:

(i) For all Project works, other than the *Sports and Recreation Works* set out in *Appendix A*, that are undertaken by 2Construct, Scaffold and Norris, their employees will be paid a site allowance of \$9.50 per hour from commencement of those works at any time after 1 July 2020, increasing to:

- \$9.95 per hour from 1 July 2021
- \$10.35 per hour from 1 March 2022
- \$10.75 per hour from 1 March 2024
- \$11.15 per hour from 1 March 2026
- \$11.55 per hour from 1 March 2028

(ii) For *Sports and Recreation Works* undertaken at Ford Park and Binnak Park pursuant to the Early Works MCA, the Panel notes the circumstances that have led to an allowance of \$4.50 per hour being paid. The Panel does not intend to undo those arrangements and confirms that under all of the circumstances for these particular works, overseen as they are by CPB pursuant to the Early Works Programme, a site allowance of \$4.50 per hour, from commencement of the works, shall apply through to the completion of the said works. We do not consider it necessary to express a view as to any other *Sports and Recreation Works* beyond them being excluded from the works that make up the Project site allowance. Any applicable site allowance for such works will be subject to any applicable industrial instrument.

[121] In the event that any further dispute arises in relation to any of the works undertaken in association with the Project as to the application of a site allowance for such works, the Panel is available to determine the matter.



Peter Parkinson
Chair



Tony Cordier
Panel Member



Esther Gruszka
Panel Member

Appendix A – Sports and Recreation Works