



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

**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
AND
FREYSSINET PTY LTD**

**PORT CAPACITY PROJECT, WEBB DOCK ,
WILLIAMSTOWN ROAD, PORT MELBOURNE**

**RE: ALLEGED FAILURE TO PAY APPROPRIATE SITE ALLOWANCE IN
ACCORDANCE WITH APPENDIX C OF THE ENTERPRISE AGREEMENT**

Tuesday 5 April 2016

003-2016

DETERMINATION

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

Reasons for Determination

[1] On 10 February 2016 the Construction Forestry Mining and Energy Union (“the CFMEU”) notified a dispute between it and Freyssinet Australia Pty Ltd (“the Company”). The CFMEU seeks a determination by the Panel of the Project Value for the purposes of determining the site allowance pursuant to the *Freyssinet Australia Pty Ltd and CFMEU Building and Construction Industry Enterprise Agreement 2011-2015* (the Agreement) [Agreement ID: AE893795; Print No: PR52353]. The dispute is in respect of work being performed by the Company at Webb Dock, Port of Melbourne.

[2] The matter has had some history with previous notifications to the Panel being 011A-2015 and 011-2015.

[3] The Panel heard submissions from the parties on 22 February 2016.

Background

[4] The Company has been undertaking a contract of works with McConnell Dowell Constructions (Australia) Pty Ltd (MCD) to perform certain works associated with MCD's contract with the Port of Melbourne Corporation ("PoMC") as part of the PoMC's Port Capacity Project. The Company employs approximately 60 personnel (at its peak) on the works, having commenced on site in January 2015 with an anticipated completion of its works by mid 2016.

[5] The Port Capacity Project at the Webb Dock Precinct of the Port of Melbourne is essentially an undertaking managed by the PoMC designed to accommodate forecast trade growth in the container and automotive trades. Construction of the Port Capacity Project commenced in 2013 with expected completion end 2016.

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

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

[8] 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."*

[9] There is no dispute that the Agreement applies to the parties. It is not disputed that the Agreement applies to the relevant construction works.

What is in dispute?

[10] The differences between the parties go to what constitutes the "Project" and the value of the "Project" for the purposes of determining the applicable Site Allowance pursuant to the Agreement.

[11] The CFMEU submitted that the Project encompasses all activities falling within what has been identified by the Victorian State Government and the PoMC as the "Port Capacity Project", which it submitted has a Project Value of \$1.6B (for which it submitted a site allowance of \$5.45 per hour is payable), whereas the Company submitted that the Maritime Works package of works on which it has been engaged has a Project Value of \$385m and is itself a "Project" to which Appendix C is applicable (for which a site allowance of \$4.35 per hour is payable).

[12] The Company submitted that the Port Capacity Project is itself comprised of a range of individual Projects which "stand alone" in so far as the application of the Agreement is concerned, and that the Panel

should in effect disregard all the other activities associated with the Port Capacity Project for these purposes, as only the Maritime Works Package is relevant to it.

[13] The Company acknowledges the existence of the Port Capacity Project and its component parts, but submitted the relevant tests necessary to satisfy the requirements of Appendix C have not been met, other than with respect to the individual projects within the Port Capacity Project, which in the case of its employees and work undertaken, is the Maritime Works component of the Port Capacity Project, for which it submits it is correctly paying the requisite Site Allowance under the Agreement.

[14] The principal question therefore for the Panel to determine is what constitutes the Project for the purposes of Appendix C of the Agreement? Is it the Maritime Works of the Port Capacity Project alone or is it all or some of the component parts of the Port Capacity Project? The Company contends it is only that component part relevant to the Maritime Works whereas the CFMEU contends all component parts amount to one Project for the purposes of Appendix C.

[15] During the course of the hearing for determination of the matter, the CFMEU relied upon its oral submissions and its Exhibits marked “*CFMEU 1 and 2*” and the Company represented by MBAV relied upon its oral submissions and its Exhibits marked “*Freyssinet 1, 2 and 3*”. The Panel has considered all of the material.

[16] Both parties submitted that it would be of assistance to the Panel in considering its determination, if the Panel further informed itself as to matters in contention by seeking further details as to the various activities associated with the Port Capacity Project directly from the PoMC, the responsible authority for the Port Capacity Project.

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

[18] The parties both 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*”.

[19] 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 including amongst others:

- *CFMEU v Quanstruct and Hansen and Yuncken Pty Ltd Ferntree Business Park* - Matter Nos. 024-2012 and 025-2012 (“*Ferntree Business Park*” decision)
- *CFMEU v Watpac Constructions (Vic) Pty Ltd Monash Medical Centre* - Matter No. 004-2014 (“*Monash Medical Centre*” decision)
- *CFMEU v ADCO Constructions (Vic) Pty Ltd Schools Program* - Matter No. 009-2010

[20] Whilst the Charter of the VBIDP provides that “*no decision shall be regarded as a precedent*” the Panel has had due regard to previous decisions of the Panel, including the above. The CFMEU also seeks to rely upon a decision dated 20 June 2014 by the former Chairman of the VBIDP in a private capacity between the Australian Workers Union and BMD Constructions Pty Ltd in relation to the Port Capacity Project. This was not a matter conducted under the auspices of the VBIDP and accordingly the Panel considers the findings in that matter cannot be determinant of the matter before this Panel, save and except for matters of fact that can be derived from it.

[21] The relevant approach, which it is said has been consistently applied by the Panel, 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 Lend Lease Pty Ltd v Construction, Forestry, Mining and Energy Union* [PR975618] (the “Bovis Lend Lease” decision), both decisions of Deputy President Ives. Both the Company and the CFMEU have relied upon various aspects of these decisions in this matter.

[22] In particular the parties accept that the Panel for the purposes of this matter, 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)

[23] 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.

[24] The Panel members were appraised of the Port Capacity Project in a separate matter before the Panel which was settled by the parties without requiring determination, in matter No. 014-2015. In relation to that matter, the two autonomous Panel members carried out on-site inspection of various parts of the Port Capacity Project at the Webb Dock Precinct on 12 November 2015. On 11 December 2015 the Chairman conducted an inspection of the whole of the works that make up the Port Capacity Project at the Webb Dock Precinct, including the works being undertaken by the Company in this matter.

[25] At the hearing, having heard the oral submissions of the parties, consistent with its Charter, the Panel engaged in separate discussions with the parties in an attempt to conciliate the matter. Following further exchanges between the parties, which did not settle the matter, the Chairman issued a Statement on 26 February 2016 advising that the Panel would further inform itself as to the matters in dispute by engaging with the PoMC, the responsible authority for the Port Capacity Project, as had been proposed by both parties.

What is the Port Capacity Project?

[26] There is an extensive amount of material that can be readily found on-line through a simple search of “Port Capacity Project”, much of which the parties have relied upon. The Panel has been informed by the relevant information available accordingly, including the following information as set out in paragraphs [27] to [40]. (throughout these paragraphs the emphasis is ours)

[27] The PoMC web site provides a dedicated link to the “Port Capacity Project” which provides details of the Port Capacity Project. Therein the Port Capacity Project is identified as “.....a major infrastructure development which will accommodate Melbourne’s container and automotive trade needs well into the future.” Extensive and comprehensive details of the Port Capacity Project are provided, dealing with Project Overview, Project Liaison Group, Works Notices, Technical Documents, Publications, Viewpoints, Future views and layouts, Project enquiries and Hazard Reporting together with a detailed Project image gallery. The following sets out extracts from the PoMC web site regarding the Port Capacity Project as follows:

“Project overview

Webb Dock

The Port Capacity Project will reconfigure and redevelop Webb Dock, returning it to its original role as an international container handling facility. This new container handling terminal will be capable of handling the equivalent of at least 1 million containers per annum.

Other works around the Webb Dock precinct include additional screening and landscaping, dock deepening, minor modifications and improvements to nearby parklands, provision for on-site empty container stacking at Webb Dock and construction of noise walls to reduce the impacts of the operations on nearby communities.

Automotive facilities

An automotive facility will be created on the western side of Webb Dock.

This state of the art facility will deliver additional dock capacity for vehicle export and imports. The works will expand the automotive capacity to handle in excess of 600,000 vehicles annually and will also deliver on-site pre-delivery inspection (PDI) facilities where vehicles can be fitted with custom options and prepared for dealerships.

Benefits

It will directly create around 700 full time jobs and will provide a broader competitive environment in the container stevedoring market. It also opens the way for improvements in container handling and transport logistics.

Traffic and transport

In order to facilitate the increased capacity and efficiency of the docks and movement of containers, a key focus is to improve transport links and redirect port traffic away from residential streets.

At Webb Dock, the Project will provide direct road connections onto the M1 West Gate Freeway by closing Williamstown Road to port traffic, west of the intersection of Todd Road and Williamstown Road.

As part of appointing an operator for the new Webb Dock terminal, the port will implement ways to further reduce the impact of port traffic as well as a range of other productivity improvements including truck scheduling and dedicated port access roads.

Parks and buffers

The Project is committed to the retention of open spaces and improving buffering around the working port.

Upgrade works have taken place at Perce White Reserve in Port Melbourne including new boardwalks and a more family-friendly environment. Some minor modification works are necessary at Westgate Park adjoining the Webb Dock precinct.

There have also been improvements to the port's other 'buffer' zones such as along Todd Road and the Webb Dock perimeter. The creation of a new 'linear' park on port land creates a continuous path which runs from the Yarra River near the West Gate Bridge, through Westgate Park along vacant land near Todd Road and joins up with Perce White Reserve and the Webb Dock trail to a new observation platform at Webb Point.

Funding and performance

The value of the works undertaken in connection with the Project together with additional investment by the private sector has been estimated to be in the order of \$1.6 billion dollars.

This amount is fully funded, at no cost to the taxpayer, by Port of Melbourne Corporation.

Environmental management

The Project is being carried out in accordance with a stringent Environment Management Plan (EMP).

The EMP sets out controls and safeguards to protect local port communities along with the natural land and marine environments. It considers matters such as flora and fauna, air quality, noise and vibration, marine ecology, visual amenity and waste management.

The appropriate permits and approvals will govern dock deepening at Webb Dock.

Planning approval

Planning approval has been given by the Victorian Government in recognition of the Project's strict environmental and amenity management processes.

For the purpose of allowing an increased maximum height for container stacking at Webb Dock, in visually sensitive areas container stacking will be limited to 5 containers high while in a less visually sensitive empty container park area the limit will be 7 containers high.

Using on-site land for empty container storage will assist in reducing demand for additional off-site container storage arising from the growth in trade.

Dock deepening

It is necessary to deepen parts of Webb Dock so modern vessels can berth and manoeuvre with sufficient water depth.

The works and monitoring of operations will be overseen by a most rigorous EMP.

Project Liaison Group

As part of the Project, a formal Project Liaison Group (PLG) has been established to consult directly with the Project Team and provide an important forum for information exchange.

The PLG consists of members who represent a wide range of interests including industry, shipping, community groups, peak bodies and councils. The first meeting was held on Tuesday 14 August 2012.

[28] The following extract from the Planning Approval for the Project *“Melbourne Planning Scheme and Port of Melbourne Planning Scheme Incorporated Document - Port Capacity Project, Webb Dock Precinct, October 2012 (incorporated documents - clause 81.01 - Schedule)”*:

“Port Capacity Project, Webb Dock Precinct, October 2012

The Port Capacity Project has been developed to meet the objectives and intent of the Port Development Strategy – 2035 Vision, (August 2009) developed by the Port of Melbourne Corporation.

The Port Capacity Project comprises new cargo handling and storage facilities at the Webb Dock Precinct, declared as part of the Nominated Project by the Nomination Order dated 4 September 2012, made by the Governor in Council under section 6 of the Project Development and Construction Management Act 1994 and include:

- Construction and use of a new international container terminal (including wharfs, transport terminals and shipping container storage)*
- Construction and use of new facilities for coastal trade (including wharfs, transport terminals and shipping container storage)*
- Construction and use of new automotive (car) terminal and associated facilities (including wharfs and transport terminals)*
- Construction of new roads to service Webb Dock and to connect Webb Dock to the existing road network to facilitate freight movements*
- Increasing the maximum height permitted for container storage to exceed the heights specified in the Design and Development Overlay Schedule 2 Webb Dock Precinct at Clause 43.02 in the Port of Melbourne Planning Scheme*
- Provision of new vehicle access to Webb Dock from Todd Road*
- Provision of a landscaped buffer, and cycling linkages along the Todd Road frontage*
- Constructing or altering access to roads in a Road Zone Category 1*
-
- Subdivision of land, Lot consolidation, boundary realignment and the creation of road reserves*
- Removal of native vegetation*
- Road works, fences, landscaping and noise attenuation mounds and barriers.”*

[29] The Planning Approval referenced at [28] provides at para. 5.1:

“The use, development (including removal of vegetation), subdivision and the ancillary activities for the Port Capacity Project, must be carried out by or on behalf of the facilitating agency specified for the Nominated Project pursuant to the Nomination Order dated 4 September 2012, made by the Governor in Council under section 6 of the Project Development and Construction Management Act 1994 or pursuant to a contract or arrangement with the facilitating agency to undertake and/or perform that use, development (including removal of vegetation), subdivision and ancillary activities.”

[30] The following extract from *“Reasons for Decision to Exercise Power of Intervention under Section 204(4) of the Planning and Environment Act 1987, Melbourne Planning Scheme Amendment C204, Port of Melbourne Planning Scheme Amendment C001”*, by the Minister for Planning, dated 7 February 2013:

“Background

- 1. The Port of Melbourne (PoM) is Australia’s largest container and general cargo port, handling approximately 36% of Australia’s container trade. Without immediate investment in the PoM, Victoria will run out of capacity for further growth in international container handling around 2015.*
- 2. The Amendment will facilitate the Port Capacity Project (the Project), generally in accordance with the ‘Port Capacity Project, Webb Dock Precinct Concept Plan, October 2012’. The \$1.2 billion project will*

provide 700 direct jobs and 1,900 indirect jobs across Victoria and will cater for the forecast demand in container freight.

3. *The planning approvals required for the Project specifically relate to the Webb Dock Area which includes the introduction of a new container terminal at Webb Dock capable of handling 1 million containers per annum, with direct road connections to the M1 West Gate Freeway. The works also include native vegetation removal, additional screening and landscaping, dock deepening, minor modifications and improvements to nearby parklands, provision for on-site empty container stacking at Webb Dock and construction of noise walls to reduce the impacts of operations on nearby residential areas.*

[31] The PoMC's "*Port Capacity Project Environmental Plan for Construction*" approved by its EGM, Port Capacity Project, is an extensive Plan, setting out detailed compliance requirements controlled by the PoMC in relation to all activities associated within the Port Capacity Project.

[32] A paper on the Port Capacity Project presented on 30 October 2012 by Mr Stephen Bradford, then CEO of the PoMC, acknowledges that it is the "*biggest landside port project in a generation*", is a "*\$1.6 billion development, \$900m by PoMC, \$700m by terminal operators*" including pictorials demonstrating the conceptual design of the Port Capacity Project, its Road Connections, processes for Expressions of Interest by operators for the Project being Webb Dock International Container terminal, Empty Container Park, Automotive Terminal and Pre-Delivery Inspection Services closing October through November 2012, a Roads and Services Package and a Maritime Works Package together with an overall Project time line from 2012 to 2016. Various other links confirm that by June 2012 a feasibility study had been undertaken by SKM engineers into whether the Automotive Container Facility part of the Project could be relocated to Port of Geelong. The Government confirmed on 21 June 2012 that "*a \$400 million investment by the Port of Melbourne Corporation that will almost double the vehicle import/export capacity of Webb Dock, to more 600,000 vehicles per year.....which is in addition to the \$1.2 billion Port Melbourne redevelopment plan announced in April...*".(our emphasis)

[33] From the "*Invest Victoria*" web site dated 14 March 2013:

"New port infrastructure project underway in Melbourne

Victoria's \$1.6 billion Port Capacity Project has begun with construction of purpose built road connections and a world-class automotive facility underway.

Additional shipping berths and much needed 'on-dock' pre-delivery inspection facilities are also being built to cater for Victoria's growing car trade.

The Victorian Premier, Denis Napthine, said the infrastructure project would create 1,100 new direct jobs and 1,900 indirect jobs in the export, import and freight sectors.

"It will also protect thousands of existing jobs and cement the Port of Melbourne's position as Australia's busiest container port, and ensure Victoria remains the nation's freight and logistics capital.

The works at Webb Dock have been expedited enabling Melbourne's third container terminal and new world-class automotive facilities to be operational in late 2016. The competitive bidding process for the right to operate the container and automotive facilities were also progressing.

The project is subject to strict environmental, community and amenity controls which will apply to all works on the Webb Dock site.

The first container is scheduled to cross the new dock in late 2016."

[34] The "*Port of Melbourne Corporation Annual Report 2013-14*" includes the following section:

“Port Capacity Project

The expansion of the Port of Melbourne’s container and automotive capacity has gained great momentum during a year of major announcements to promote competition, efficiency and innovation in the delivery of this major infrastructure project.

Container terminal operator

Following an eighteen month process which saw a shortlist of four bidders compete for the rights to build a new international container terminal at Webb Dock East, Victorian International Container Terminal Limited was announced as the successful bidder in May. Comprising the Philippines-based International Container Terminal Services Inc. and Anglo Ports Pty Ltd, the Victorian International Container Terminal Limited consortium will deliver a third stevedoring service in Melbourne, promoting increased competition. With global expertise in terminal development and operations, the group’s innovative bid addressed the commercial, environmental, community and amenity benchmarks established as part of the market offering. The new terminal will handle over one million TEU annually and promote off-peak truck movements to improve the efficiency of Victoria’s transport supply chain. Work on the new terminal is expected to start later this year and be completed in late 2016.

Automotive terminal operator

Following a competitive bidding process, the rights to develop and operate the new terminal were awarded to Melbourne International RoRo Automotive Terminal (MIRRAT). The bid lodged by MIRRAT offered a competitive, value for- money solution that ensures the port will continue to evolve and retain its status as the nation’s leading automotive port. The new facility will provide the capacity to meet forecast demand, with the port set to handle 600,000 vehicles in 2025 rising to 1 million vehicles in 2040.

Pre-Delivery Inspection

In December, Patrick AutoCare and Prix Car were announced as the two private sector operators of the automotive trade’s Pre-Delivery Inspection (PDI) hub after a competitive bidding process. The PDI hub consolidates the import pre-delivery service into one location at the northern end of the Webb Dock precinct and streamlines delivery by reducing the number of truck journeys required for new motor vehicles to arrive at dealerships.

Project works

Physical works are well under way with the appointment of BMD Constructions to deliver the extensive civil works package which includes internal road links, a direct link from the port to the West Gate / MI corridor and upgrades to the existing Todd Road roundabouts. The civil works package also includes delivery of the Project’s buffer strategy including construction of noise walls and landscaping to improve and protect residential amenity. The maritime works package was awarded to McConnell Dowell to construct the new 920-metre wharf at Webb Dock West, together with upgraded navigation aids and berth facilities. These works will also include dredging approximately 2.3 million cubic metres of material to deepen the shipping berths at Webb Dock.

Project engagement

PoMC continued to convene the Project Liaison Group (PLG) which comprises industry, shipping, community groups, peak bodies and local councils. Headed by an independent Chairman, the PLG has played an important role in shaping the buffer management plan which delivers community infrastructure and amenity in the vicinity of Webb Dock. PoMC has also brought together shipping lines, transport operators and industry representatives to form the Trade Relocation Industry Group (TRIG) to manage the necessary trade relocation as some berths will no longer be available for use during the construction phase of the project. This enables PoMC to liaise closely with its customers and stakeholders and draw on the group’s industry expertise as a proactive initiative to identify and resolve potential issues to minimise any inconvenience which might arise from alternative berthing arrangements.”

[35] Extracts from a Press release from the Minister for Ports on 1 May 2013:

“Port of Melbourne Set to Expand Capacity (Australia)

Minister for Ports David Hodgett welcomed today’s news, from the PoMC, announcing a shortlist of bidders to build and operate Melbourne’s third international container terminal.

“The \$1.6 billion Port Capacity Project is a critical infrastructure project that will drive competition and fundamentally enhance Victoria’s future economic growth,” Mr Hodgett said.....

“It was only a year ago when the Coalition Government announced the Port Capacity Project and already we have leapt forward to a stage where we are well on track to having an operating terminal by 2016, providing the certainty in container capacity this state needs for at least the next decade.”

The announcement of the short-list for the international container terminal follows the announcement last week of the short-list of bidders to operate the new automotive terminal and pre-delivery inspection hub and concludes this stage of the Port Capacity Project..... Mr Hodgett said the development of the third international container terminal is the centrepiece of the Port Capacity Project and today marks a significant milestone towards delivering the project.”

[36] An extract from a release dated 3 February 2014 on the web site of MCD, the contractor for the Maritime Works package of the Port Capacity Project:

“McConnell Dowell Wins \$400 million Melbourne Ports Project

PoMC has awarded McConnell Dowell the contract to design and build the Maritime Works Package for the upcoming Port Capacity project, including a new wharf at Webb Dock West.

The project is part of the Victorian Government’s \$1.6 billion investment to secure Melbourne’s future with world class terminal and freight facilities.

The State Minister for Ports David Hodgett announced the awarding of the contract which will involve around \$400 million being invested in the Project’s maritime works.

“The design and construct contract will deliver improved waterside infrastructure to Webb Dock including upgraded navigation aids and berth facilities.” Mr Hodgett said.

“McConnell Dowell will build a new 920-metre wharf at Webb Dock West that will service the expanded, world class automotive terminal”.

In addition to the automotive works, McConnell Dowell will expedite the rebuilding of existing wharfs at Webb Dock East. This will enable the appointment and commissioning of Melbourne’s third international container terminal which is expected to be operational by late 2016.....

The Port Capacity Project will maintain Port of Melbourne’s position as Australia’s largest container port and freight hub, and is critical to Victoria’s ongoing economic growth and development. Construction of the Maritime Works will commence in mid 2014, with completion expected in 2016.”

[37] A press release on 22 April 2014 from the web site of Georgiou Group, the constructor for the Pre-delivery Inspection Facility of the Port Capacity Project:

“Georgiou secures role on big port project

National construction, engineering and property development company, Georgiou Group, has recently won a \$16 million contract to build Patrick Autocare’s new Pre-Delivery Inspection facility at Melbourne’s Webb Dock. The new ‘on-dock’ Pre-Delivery Inspection facility is part of the Victorian Government’s \$1.6 billion Port Capacity Project at the Port of Melbourne which is the nation’s largest container and automotive port.

Georgiou’s Victoria General Manager Geoff Thomas said the works package includes earthworks; construction of processing shed, wash-bay and re-fuelling facilities; pavement works; and installation of utilities including communications, power, drainage and sewer.

“The new pre-delivery inspection facility covers an area of around 12 hectares and is an important link in the automotive supply chain by enabling vehicles to be processed as they roll off the ship and then be delivered direct to dealerships across the state” he said.

The new automotive terminal and pre-delivery inspection hub is expected to handle up to one million vehicles annually by 2040.”

[38] An extract from a release of 4 July 2014 on the web site of MIRRAT, the developer and operator of the Automotive Terminal of the Port Capacity Project:

*“MIRRAT is investing \$65 million into Victoria to develop a world class Automotive and RoRo terminal that will push the envelope in both efficiency and sustainability. The facility will make up a key component of the PoMC’s Port Capacity Project.
The Port Capacity Project provides certainty of Victoria’s ability to handle the increasing volume of international container and Automotive trade in the short and medium term; and secures ongoing competitiveness within the Port encouraging productivity and supply chain efficiencies.
The MIRRAT facility will provide capacity to cater for a throughput of 1 million vehicles per year...”*

[39] An extract of a release of 2 May 2014 on the web site of ICTSI, the contractor and operator for the Container Terminal and Empty Container Park of the Port Capacity Project:

“ICTSI brings innovation and greater competition to Australian Ports

International Container Terminal Services, Inc. (ICTSI) and Anglo Ports, through their Australian subsidiary, Victoria International Container Terminal Limited (VICTL), have signed a contract in Melbourne with the Port of Melbourne Corporation on 2 May 2014 for the design, construction, commissioning, operation, maintenance and financing of the Port of Melbourne’s new international container terminal and empty container park at Webb Dock. The contract grants VICTL the rights to design, build and operate the new terminal at Webb Dock and design, build and operate the new, on-port Empty Container Park at Webb Dock East. The lease concession extends to 2040, enabling a competitive platform for the development of ICTSI’s Australian business.

“Finally, we are pleased to have a partnership with the Port of Melbourne Corporation and their Port Capacity team who have conducted the entire tender process with efficiency and transparency.” Mr. Gonzalez said.

Investment for the full development of the Webb Dock Container Terminal and the ECP is estimated at around AUD\$550 million dollars, and forms part of the Port of Melbourne’s AUD\$1.6 billion Port Capacity Project. The new facility will create around 200 new jobs at the port.

[40] More recently the Minister for Ports response to a question in Parliament on 15 October 2015 regarding “*how the port capacity project is progressing, what its impact will be and what benefits it will deliver....?*”:

“The Port Capacity Project in the Webb Dock precinct is Melbourne’s largest port infrastructure initiative since the development of Swanson Dock in the 1960s.

I’m pleased to report that its progress is on schedule and within budget.

Progress on site is clearly visible with significant works undertaken including piles being driven, minor dredging, installation of navigation aids at the northern end of Webb Dock and the construction of internal roads including a direct link from the port to the West Gate / M1 corridor, together with upgrades to the existing Todd Road roundabouts.

The development of the new 920 metre quay line at the automotive terminal at Webb Dock West is well advanced with berths 1 and 2 already in operation.

The new container terminal development undertaken by Victoria International Container Terminal at Webb Dock East is on schedule to host container vessel arrivals in the latter half of 2016-early 2017.

The project is designed to accommodate Melbourne’s container and automotive trade needs well into the future.

Alongside the development of container and automotive trade capacity, the project incorporates a Pre-Delivery Inspection (PDI) Hub at Webb Dock North which consolidates the import pre-delivery service. One of the benefits of situating the PDI Hub in the precinct is the streamlining of new motor vehicle delivery to dealerships thereby avoiding duplicate truck journeys over the West Gate Bridge.

I am also pleased to note that there have been extensive community amenity works undertaken as part of the project following community consultation and input. At the southern end of Webb Dock, the recently

completed Webb Point / Maritime Cove Observation Deck Is open to the public offering an elevated vista from the city skyline to Williamstown. The Webb Trail which runs along the eastern edge of Webb Dock has also been redeveloped with improved lighting.”

Panel meets with PoMC

[41] On 10 March 2016 the Panel met with representatives of the PoMC, Mr Jason Price, Executive General Manager Port Capacity and Property and Mr Tony Murphy, General Manager Infrastructure Delivery Port Capacity at the PoMC premises. Both are directly involved in managing the Port Capacity Project and have intimate knowledge of it. Mr Price *“is responsible for leading PoMC’s Division which oversees the planning approval, management and development of PoMC’s short to medium term container and automotive capacity”* including responsibility for the Port Capacity Project. The Panel acknowledges the assistance provided by the PoMC. Paragraphs [42] to [55] summarises their advice to the Panel, the content of which has been reviewed and confirmed by Mr. Price as a true and accurate reflection of the PoMC representatives’ advice to the Panel.

[42] The PoMC representatives provided the Panel with an historical overview of the development of the Port Capacity Project and provided answers to the various questions posed by members of the Panel. They explained that the Port Capacity Project as it is understood and regarded by the PoMC, is a project which has been specifically developed from the PoMC’s master plan *“Port Development Strategy 2035 Vision”* of August 2009 for the development of the Webb Dock Precinct to improve the capacity and efficiency of the Port for international container handling and auto trade. The PoMC representatives confirmed that the Port Capacity Project also provided for *“an opportunity”* to upgrade Swanson Dock precinct, however the Swanson Dock upgrade had not proceeded to date. The PoMC representatives said that the value of the Swanson Dock upgrade was less than \$20 million. The PoMC representatives confirmed that all other aspects of the detailed Port Capacity Plan have proceeded thus far in accordance with a clear predetermined schedule and time line from 2013 to end 2016.

[43] The PoMC representatives agreed that the key objective of the Port Capacity Project was to improve the capacity and efficiency of the Port of Melbourne specifically at the Webb Dock Precinct.

[44] The PoMC representatives confirmed that for the purposes of the State Government budget , the project value of the Port Capacity Project was allocated a total sum of \$921 million. The PoMC representatives acknowledged that various references had been made to the total value of the Port Capacity Project being either \$1.2 billion and \$1.6 billion, which included the forecasted the investment by prospective tenants. These figures they said included the staffing responsible for managing the Project, construction works, capital equipment and all other aspects. They said they were not in a position to breakdown these numbers. The PoMC representatives said they were not in a position to divulge the actual value of the various component parts of the Project for commercial in confidence reasons.

[45] The PoMC representatives stated that the responsibility of the PoMC is to provide Port infrastructure, Port infrastructure development, control over activities in the Port and access to the Port land, but not as an

Operator of the Port. They said the PoMC development process is to look forward and ensure the Port demands into the future are in place well ahead of time and not just in time. They stated that the Port Capacity Project was a clear example of that responsibility.

[46] The PoMC representatives confirmed that the PoMC was responsible for designing and developing what they described as a “backbone infrastructure” for the Webb Dock Precinct to enable the private sector to develop components parts in accordance with the specific requirements of the Port Capacity Project which had been approved by the State Government, for which the PoMC was directly and singularly responsible for letting contracts and managing leases across the whole Port Capacity Project. They said this was a deliberately planned comprehensive plan that integrated private funding with Government funding managed by PoMC.

[47] The PoMC representatives confirmed the PoMC has been directly and singularly responsible for letting the principal contracts associated with the Port Capacity Project including Site preparation and earthworks, Roads and Services infrastructure, Interface buffers, landscaping and Maritime works including dock deepening, wharf upgrade and construction and bank protection works.

[48] The PoMC representatives confirmed that the PoMC was also directly responsible for issuing Expressions of Interest for innovative solutions, issuing Request for Proposals and award of contracts for the main facilities of the Port Capacity Project, including a new International Container Terminal, Empty Container Park, new Roll-on Roll-off and Automotive Terminal and Vehicle Pre-delivery Inspection facility. They said these facilities to be developed by the private sector in exchange for long term leases of the land were each part of the approved Port Capacity Project for which the PoMC was responsible. The PoMC representatives explained that for each of these principal facilities of the Port Capacity Project, the successful bidder was required to deliver purpose built solutions that complied with the PoMC “*clearly prescribed performance specifications and criteria*” for each particular facility. They confirmed that the PoMC has the direct responsibility for arranging detailed auditing of these facilities by third parties on its behalf against the “*clearly prescribed performance specifications and criteria*” in order for it to confirm the granting of long term leases to the individual operators through to 2040, during and at the satisfactory conclusion of the relevant construction activity for the facility within the Webb Dock Precinct. The PoMC representatives said that whilst the successful bidder was able to exercise some discretion over the methods and materials for the facilities, they were required to comply with the requisite “*clearly prescribed performance specifications and criteria*” which the PoMC representatives said were not available publicly due to commercial in confidence reasons.

[49] The PoMC representatives explained that these particular facilities were under strict escrow arrangements. They explained that the granting of the long term leases were held in escrow until such time that the conditions associated with the relevant facility had been completed to the satisfaction of the PoMC in accordance with the requisite auditing in accordance with its “*clearly prescribed performance specifications and criteria*” as defined by the relevant Development Agreements.

[50] The PoMC representatives confirmed that the PoMC was also directly responsible for managing the Planning Approvals as the responsible agency and the Environmental Management Plan requirements which were both specific to the Port Capacity Project.

[51] The PoMC representatives confirmed that the Port Capacity Project was designed with a very specific objective to expand the capacity of the Port through the development of the precinct and to provide the requisite infrastructure and development in the most economically beneficial way possible, as had been approved by the Government. They confirmed that the Port Capacity Project was well planned to develop a very clear outcome.

[52] The PoMC representatives also made it clear to the Panel that the Port Capacity Project would not have proceeded and the substantial investment would not have been made had it not been for the opportunity to integrate the component parts of the Port Capacity Project at the Webb Dock Precinct including private investment by operators.

[53] During the course of the meeting with the PoMC representatives reference was made to a large plan map of the Port Capacity Project which was presented and referred to by the PoMC representatives as the Project plan. The Panel map demonstrates the interconnectivity of the various activities within the project to each other and the connectivity of the various maritime, roads and services works under construction at the Webb Dock Precinct.

[54] The PoMC representatives also confirmed that activities which form part of the Port Capacity Project in order to ensure community support, including the community green offset activities such as the Perce White Reserve upgrade and associated landscape and amenity works as part of the Port Capacity Project plan. It was acknowledged that a recent contract was let by PoMC for the playground equipment and installation associated with the reserve as well as a final Completion Works package which had been awarded by the PoMC to MCD, which would finish off and tie-in the relevant services and infrastructure aspects of the Project, the latter for which is valued at greater than \$10 million according to the PoMC representatives and has been reported by MCD to have a value of \$12 million.

[55] The PoMC representatives confirmed that only small changes have been accommodated during the Port Capacity Project's construction from the original approved plan. The changes they said were only in relation to some minor infrastructure changes, for example electricity supply, and some minor road access changes, otherwise the project had remained consistent throughout. They said there were some adjustments to the Webb Dock East wharf design to accommodate the final Ship to Shore crane specifications. They confirmed there was no substantive change to the construction projects as planned and *"that not a lot has changed since the original project"* including the requisite time lines for completion.

[56] It remains for the Panel to address 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.

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

[57] Having regard to the publicly available information, it is not a coincidence that the material similarly describes a significant major infrastructure project for the State, undertaken by the PoMC, for a very specific purpose. This was also clearly confirmed by the PoMC representatives. Whilst it might be said that the master plan being the “*Port Development Strategy 2035 Vision*” described objectives for a general purpose across the Port, the Port Capacity Project itself has been very clearly defined and executed with minimal change to its clear intent and purpose of the final plan in late 2012. The PoMC, when planning the Port Capacity Project, undertook a comprehensive and detailed process to plan a project that would enable it to redevelop the Webb Dock Precinct of the Port of Melbourne to expand and improve the capacity and efficiency of the Port for container handling and auto trade. Detailed feasibility studies, economic analyses, highly developed consultation processes and engagement with all stakeholders, preparation of plans and approvals, and the like, driven by the PoMC, clearly demonstrate an enterprise carefully planned to achieve a particular result.

[58] The Panel is clearly of the view that every aspect of the activity within the Port Capacity Project is clearly and intentionally integrated operationally with each other having been carefully planned to do so. There are clear tangible links between the various activities which bring significant economies of scale to the Project being developed in the manner it has. Whilst various activities within the Project have been fenced off from other activities, separate site supervision arrangements have applied, and separate inductions undertaken, each and all of the activities have been planned to be part of the overall objective of the Project. The PoMC representatives confirmed that without a total plan the project would not have proceeded on the scale of the Project. It seems to the Panel that no activity would have proceeded if each component part was a ‘stand alone’ activity, the Port Capacity Project would have made little economic or development sense otherwise and the Government would not have allocated \$921 million to the Project. This is further underscored by the process involving the Automotive Container Facility. The early plans for the Port Capacity Project included the Automotive Container Facility, following which the Government undertook a feasibility study for that component to be alternatively developed at the Port of Geelong, which resulted in the confirmation of the component forming part of the Port Capacity Project, given the integrated economic advantages and vehicular movement advantages demonstrated amongst other considerations.

[59] The Port Capacity Project contains a number of separate components and the construction is clearly being carried out in a number of well planned stages. However, the Port Capacity Project is being carried out with the specific intent of achieving a singular and particular result, the redevelopment of the Webb Dock Precinct of the Port of Melbourne to expand and improve the capacity and efficiency of the Port for container handling and auto trade. This result was to be achieved in a carefully planned manner and in accordance with a clearly expressed schedule of works which formed the Port Capacity Project, as it has done so.

[60] The PoMC has recently let the final parcel of works for the Port Capacity Project, known as the “Completion works package”, which is designed to finalise and tie-in all of the relevant services and works that form the final stage of the Port Capacity Project, as has always been the intention since commencement, as part of a carefully planned project.

[61] The fact that the separate components of construction works involved in the Port Capacity Project are being performed by separate entities with separate contracts of works does not 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 is the case here. There has been at all times and continues to be a consistent approach to bring about a particular result irrespective of number of contractors and developers that may be engaged to achieve that result for the Port Capacity Project.

[62] The Panel notes that having regard to the current component parts of the Port Capacity Project, compared to the Project as proposed by end 2012, all that which was intended and approved, has been constructed or is being constructed as intended and approved, broadly in line with the originally intended and planned time line. It cannot be said that this is a Project for a general purpose, as was the distinguishing factors in “Bovis Lend Lease” decision. In “Bovis Lend Lease” Deputy President Ives found:

“Victoria Harbour, as opposed to being an enterprise carefully planned to achieve a particular result, appears to me to be an enterprise planned to achieve a general result . That general result being a series of buildings of varying purposes constructed at some time within a relatively lengthy time frame in accordance with a market driven and largely dynamic master plan. Particularity is unascertainable based upon the changing nature of the master plan The evidence is that Victoria Harbour, given the changes to date in the nature and extent of the building work projected by the initial master plan and the high potential for further commercial driven adjustments, is uncertain as to scope It might be reasonably argued in the case of the Victoria Harbour precinct, that a clearly established entity or entities exercise control over its development.....” (PN32-37) (our emphasis). The Port Capacity Project has had a high degree of particularity since its commencement, its plan has been consistent and it has not changed in any substance throughout its construction life, its fundamental construction elements were identified up front at commencement and did not consider further changes beyond its plan content from its commencement.

[63] And similarly in “Ferntree Business Park” decision the Panel found:

“...There is no settled form for the redevelopment. Whatever form it may eventually take is dependent entirely on market demand and commercial viability. Such a conclusion is supported by the existence of the different masterplans and the changing nature of the development..... Rather the design and planning of its content has changed from time to time with a view to the achievement of a general result, namely the

creation at some unspecified time in the future of a business park consisting of modern commercial office space with a landscaped environment. This is to be achieved by the construction and/or refurbishment at different times over a relatively indefinite but apparently lengthy time frame of a series of buildings, car parks and associated facilities in accordance with a market driven and largely dynamic masterplan.” “More is required to demonstrate careful planning to achieve a particular result. Bearing in mind the apparently changing nature of the construction of the new buildings and facilities and the very market driven nature of the redevelopment, it is understandable that there is no evidence of a value having been ascribed to the redevelopment. Any assessment of such value could, at best, be notional” (our emphasis). Similarly in “Monash Medical Centre” the Panel found that the relevant projects “cannot be said to be part of some existing masterplan which provides for a staged development to be achieved within a specific timeframe.”

On the contrary, here, the Port Capacity Project time lines have been clearly enunciated with specificity as to the content of the development in its entirety across the Project. Its form has been well known and understood.

[64] The Company submitted that “a broader overall project does not exist. The employees on the isolated projects are not exposed to the same special factors as defined in Appendix C”. Appendix C clause 5 provides that “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...”. The Panel does not agree with the Company submission. It is apparent that the employees engaged across the various activities associated with the Port Capacity Project may have been exposed to the same special factors and or disabilities on the project in the sense that employees on any project for which a site allowance applies can be exposed, indeed it must be said, on the Port Capacity Project, some employees of some contractors have worked across many of the component activities associated with the Project at the Webb Dock Precinct. True it is that some employees may have been more exposed to others, but that is not the test.

[65] On the contrary, it is abundantly clear to the Panel that an overall Project certainly exists. The evidence is conclusive. The “isolated projects” as the Company describes the component parts, are in the same precinct, they overlap each other, the construction works are inextricably linked in the sense that they are not discretionary to the Project and each relies upon the other for its viability, they are intended to be part of one project.

[66] Whilst it is true that there are various component parts of the Port Capacity Project which are independently 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 component parts for which have been clearly recognised as part of the Project, including by the individual developers and constructors themselves in their own materials and press releases. It beggars belief that on the one hand it can be claimed that a development “forms an integral part of the Port Capacity Project,” or “is the central piece of the Port Capacity Project” at the awarding of a contract stage and then on the other hand at or near the end of the works, claim that they do not form part of the Project and should in effect be excised from it.

[67] The Panel is satisfied that the Port Capacity Project is “*an enterprise carefully planned to achieve a particular result*”.

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

[67] The PoMC is the responsible entity for ensuring compliance with the Planning Approvals and the Environmental Management Plan for Construction requirements specifically issued and prepared for the Port Capacity Project. The PoMC has directly let the relevant contracts of works and manages the leases of land upon which construction developments were planned for which it has set “*clearly prescribed performance specifications and criteria*”.

[68] The PoMC arranges to audit compliance with those “*clearly prescribed performance specifications and criteria*” with third parties, arranges and manages the escrow in relation to each such activity and is the entity responsible for ultimately approving the development activity for each of the component parts to enable it to proceed to issue long term leases.

[69] The private developers engaged to perform the works are not at liberty to redesign the fundamental activity for which they are responsible and for which they seek a long term lease, without compliance with the “*clearly prescribed performance specifications and criteria*” managed by the PoMC. In this regard the PoMC clearly exercises control.

[70] The PoMC also clearly has the capacity to and does exercise control over the totality of the project as it is charged to do in accordance with the planning approvals and the contractual and lessor accountabilities and responsibilities.

[71] It matters not that the various component parts of the Port Capacity Project have been let in stages, or fenced off from some of the other component parts, or been subject to different site supervision or induction processes or the like. The test to be satisfied is that “*a clearly established entity or entities that exercise control over the development*” and there can be no doubt as far as the Panel is concerned that the PoMC is such an entity. The fact that other entities might too also have some control over some elements within a project does not render a fail to the relevant test.

[72] In the Panel’s view, it would not be proper to exclude from consideration any part of the construction activity associated with the Port Capacity Project. The material before the Panel makes it clear that these activities form an integral part of the Port Capacity Project. It is said that it would not have proceeded otherwise. Whether or not these facilities are to be operated by private interests and not by the PoMC does not deny the fact that they are being constructed as part of the construction of the Port Capacity Project, moreover, they are each controlled directly by the PoMC, whose responsibility it is to satisfy itself as to the

compliance by the private company to whom it has let the works, with the relevant prescribed specifications and criteria of the construction development as part of the Port Capacity Project. Absent compliance the worst case consequence for the private company is that the long term lease is not confirmed. This control directly sits with the PoMC as its representatives have confirmed.

[73] In the ‘CDK’ decision Deputy President Ives found that *“there is nothing other than the map that links the Swim centre with other developments.... In this case, there is evidence in support of a ‘stand alone’ project being constructed by CDK, i.e.. an independent project constructed by CDK and not encompassed by some larger project. There is insufficient evidence of an overarching project controlled by Delfin that subsumes the CDK project.”* Here it is clear to the Panel that there is significantly more than just a map. It is a very carefully planned overarching project incorporating each of of component parts, with the PoMC exercising control over the total Project.

[74] The Maritime Works, as with all other works in the Port Capacity Project is clearly not independent of the other works. It is contracted to the PoMC. The PoMC clearly has control over this and the other component parts of the Project. It is not as if the PoMC has taken a hands off approach and let long term leases and contracts of works to allow the incumbent to develop and or construct what it likes without the PoMC satisfying itself as to the compliance with the critical specifications and criteria adopted as part of the Port Capacity Project. The Panel does not accept the Company submission that each activity is ‘stand alone’ and independent in all relevant respects of any other construction works. That is clearly not the case.

[75] The Panel is satisfied that the Port Capacity Project has *“a clearly established entity or entities that exercise control over its development”*.

Does the Port Capacity 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”?

[76] Returning to the “Bovis Lend Lease” Deputy President Ives found:

“Victoria Harbour, as opposed to being an enterprise carefully planned to achieve a particular result, appears to me to be an enterprise planned to achieve a general result. That general result being a series of buildings of varying purposes constructed at some time within a relatively lengthy time frame in accordance with a market driven and largely dynamic master plan. Particularity is unascertainable based upon the changing nature of the master plan and the lack of, other than notional, value that can be ascribed to the enterprise. The latter points bear upon any attempt to define a scope sufficient for the purposes of costing the enterprise in the context of the Schedule .(The context of this matter is Appendix C of the Agreement, rather than the Schedule as it was in “Bovis Lend Lease”). The context of the Schedule is important. It deals with particularity - namely the particular site allowance to apply to a particular project. Uncertain definition and notional value are of little utility in the context of determining a particular level of site allowance for a particular building construction project.

The evidence is that Victoria Harbour, given the changes to date in the nature and extent of the building work projected by the initial master plan and the high potential for further commercial driven adjustments, is uncertain as to scope and therefore capable of being only notionally costed.

Further, the evidence is that no commitment for an ultimate and particular monetary value for the Victoria Harbour development exists.” (PN32-36) (our emphasis).

[77] And similarly in “Ferntree Business Park” decision the Panel found:

“...Bearing in mind the apparently changing nature of the construction of the new buildings and facilities and the very market driven nature of the redevelopment, it is understandable that there is no evidence of a value having been ascribed to the redevelopment. Any assessment of such value could, at best, be notional” (our emphasis)

[78] Both these decisions are readily distinguishable from the facts available here. The values that make up the Port Capacity Project for which the Panel is satisfied can be included for the purposes of Appendix C in this matter are real values, they are not notional in the sense that they are some speculative, theoretical or abstract thought, they are not imaginary, fanciful or hypothetical.

[79] In the Panel’s view, it is possible in this case to ascertain with certainty what works are included in the “project” being the Port Capacity Project. The scope has been sufficiently definable since its commencement. These works have been consistently identified since the commencement of the Port Capacity Project. The only works that have not proceeded is the upgrade to the Swanson Dock, which was always only regarded as an “opportunity”, not a finally decided part of the works programme, contrary to all other aspects that were intended to proceed. The Swanson Dock upgrade (value sub \$20m) could not be regarded as a clearly defined part of the Port Capacity Project for this reason, unlike all other aspects of the Webb Dock Precinct which have clearly been committed aspects of the Project. For this reason the Panel concludes that the Swanson Dock upgrade is excluded from the Project Value for the purposes of Appendix C.

[80] True it is that the Port Capacity Project is a staged development. Most major projects are. 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.

[81] The Port Capacity Project in its entirety has been quoted by authoritative sources as being valued at \$1.6 billion, inclusive of the Automotive Container Facility. The State Government Budget specific allocation is \$921 million for the Project. The \$1.6 billion is said to comprise \$900 million of Government funding and \$700 million of private funding. On any reasonable view the Panel considers it would be a step too far to say for the purposes of Appendix C that the Project Value is \$1.6 billion. As has been generally acknowledged, there are significant capital contributions in this project which may not ordinarily be accounted for in determining Project Value in the context of Appendix C. The Panel considers a better approach in this matter

is to identify the component parts that make up the Port Capacity Project that are clearly and readily identifiable and particularised and for the Panel to rely upon the resulting total value sum for the purposes of Appendix C in this case.

[82] It is unfortunate that this matter had not been determined between relevant parties nearer the commencement of the Project. The Project at its commencement, when the scope of work was sufficiently definable could have then been costed for the purposes of determining the appropriate site allowance or subsequently. This could have been not unlike the exercise generally conducted between the relevant parties to settle a Project Value for a Project at or near commencement of the Project. The fact that it has taken until near the completion of the Port Capacity Project to seek a determination from the Panel is not something that is to be encouraged, indeed it ought be discouraged. However, in this case the delay is not such that the employees should be precluded from making a claim for what they say is their proper entitlement under the Agreement. The Panel has taken this into account in determining the Project Value for the purposes of Appendix C.

[83] The fact that there has only been marginal change to the Port Capacity Project throughout its construction since commencement confirms that the scope is readily definable at any given point during the project to enable proper definition and costing of the Project.

[84] The Panel is satisfied that the Port Capacity Project has “*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*”.

Project Value for the purposes of Appendix C

[85] It is well recognised that assessing the value of a Project for the purposes of determining Project Value is not an altogether precise science, given there are always constraints upon commercial in confidence considerations, a desire by some stakeholders to heavily round up the numbers for public consumption and attraction, and an element of which is not principally construction work, e.g. capital cost of equipment which may be included in a project, as is no doubt the case here. However, it does not follow that it is not

open to the Panel to identify a value based on cost. If it was to be argued that the absence of a precise and accurate number would deny the awarding of a site allowance, this would in the Panel’s view be a nonsense. It is not such a constraint that has meant the parties have not hitherto settled on Project Value for many, many projects pursuant to Appendix C.

[86] On any reasonable view the parties have over many, many years recognised that the nomination of a Project Value, whilst instructed by indicative numbers of works and contract value, is not so precise as to reflect all of the relevant contributions such as profit margins, strict separation of capital, materials and

equipment, construction costs, site preparation, project management, variations, contingencies, over runs, rework etc etc.

[87] Provided a relevantly considered assessment can be made from the known principal features of a project, as they are here, the Panel is satisfied that it does not need to embark further on an expedition to confirm every aspect of the Project Value through any other means. Having regard to the constraints on commercial in confidence that necessarily arises out of a Project of this status and significance, the Panel considers little value would be added from pursuing further detail. Rather, given the time which has elapsed since the commencement of the project construction and the lateness in which the parties have brought themselves to collectively assess the relevant matters, for whatever reason, whether in dispute or not, it seems having regard to all the circumstances, a value in accordance with our finding is appropriate in this case.

[88] It is acknowledged by the Panel that with the Port Capacity Project there are other activities that may well have been incorporated as part of the overall plan, but for which the parties themselves have been unable to confirm the significance of for the purposes of establishing a value at a relevant point in time, or the material that the Panel has been able to access, enables it to provide adequate clarity upon which we are prepared to rely. Examples are the Playground upgrade to the Perce White Reserve and the Completion Works package, contracts quite recently let by the PoMC. We do not consider that such activities could be described as having been “*sufficiently definable*” when assessing a Project Value for the purposes of Appendix C in this case. That certainly cannot and does not mean that these works of themselves diminish the values of all the other well understood component parts of the Port Capacity Project for the purposes of Appendix C.

[89] Having regard to all other aspects of the Port Capacity Project and having regard to all the circumstances of this matter, the following values for the various principal component parts of the Port Capacity Project are accepted by the Panel based upon various references and submissions made by the parties, the PoMC representatives, various publications by contractors and other material available to the Panel, the total of which the Panel determines is the Project Value that is to apply for the purposes of Appendix C in this matter having regard to the timing of the works conducted by the Company on the Project:


- Site Preparation Works Package - \$5 million
- Maritime Works Package - \$385 million
- Roads and Services Works Package - \$80 million
- International Container Terminal Works Package - \$200 million
- Automotive Container and Ro-Ro Terminal and PDI Hub Packages - \$65 million

The packages for these principal components of the Port Capacity Project total \$ 735 million.

Conclusion

[90] The Panel has concluded that, in the circumstances of this matter, the requisite elements of the accepted definition of “*project*” and “*project value*” have each been satisfied. Each element of the relevant tests have been met.

[91] Accordingly, the Panel determines that the Project Value in this matter is \$735 million resulting in a Site allowance of \$4.60 per hour with effect from commencement of the Company’s works on the Port Capacity Project , adjusted to \$4.65 per hour from 1 October 2015 in accordance with the Agreement. The Company is encouraged to facilitate the retrospective adjustments to the relevant employees expeditiously.



Peter Parkinson
Chairman



Tony Cordier
Panel Member