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CRANES FOR U PTY LTD T/AS GARNER & WHEELER CRANE HIRE

CFMEU

COMPLIANCE WITH THE ENTERPRISE AGREEMENT INCLUDING CLAUSE 23.2 RATES OF PAY

16 March 2016 **005-2016**

DECISION

[1] This decision arises out of a notification on 4 March 2016 by the Construction Forestry Mining and Energy Union ("the Union") of a dispute between it and Cranes for U Pty Ltd trading as Garner and Wheeler Crane Hire ("the Company") concerning the alleged underpayment of wages and entitlements to a member Mr K Brauch pursuant to the Cranes for U Pty Ltd t/a Garner Wheeler Crane Hire and the CFMEU Mobile Crane Hiring Industry Enterprise Agreement 2011-2015 [Agreement ID: AE890362: Print No: 518231] (the Agreement).

[2] Having heard from the parties in Conference on 9 March 2016, the Chairman issued a Statement which urged the parties to resolve their differences as to the employee's entitlements under the Agreement by further discussion, having regard to the Panel's express views.

[3] The parties were unable to settle the matter and a further Conference was held on 16 March 2016. The CFMEU relied upon its oral submissions and Exhibits CFMEU 1 and 2. The Exhibits are held on file by the VBIDP. The Panel advised the parties that in absence of agreement to settle the matter the Panel would proceed to issue a formal decision. The parties confirmed that they could not settle the matter. The Company was represented by Mr Peter Sgro.

[4] There is no dispute between the parties that the terms of the Agreement apply to the Company and to the employee concerned.

[5] There is no dispute between the parties that the employee commenced employment in the classification of "Crane Crew" under the terms of the Agreement at least from October 2015. The employee had been a working director of the Company for some years prior, with the Company contributing to Incolink, CBus and Coinvest on behalf of the employee for at least 10 years prior, according to the Company.

[6] The Company submitted that certain arrangements had previously been entered into between the employee and the Company as to remuneration of employment from October 2015. The Company acknowledged that the full terms and entitlements of the Agreement had not been applied to the employee since that time. The Company submitted that benefits provided over and above the terms of the Agreement should be considered as an offset to entitlements under the Agreement.

[7] The Company confirmed that the Company and the employee had not entered an Individual Flexibility Agreement (IFA) pursuant to Clause 7 of the Agreement, nor had the employee provided a written authorisation for a deduction to be made for the purposes of s.324 of the Fair Work Act 2009 (FW Act).

[8] The Union submitted that the Company could not contract out of the entitlements to the Agreement and that a sum in excess of $11,000 to date was owed to their member through a failure of the Company to pay in accordance with the Agreement, including wages at the correct classification.

[9] In lieu of Fares and Travel Allowance, and as provided for under the Agreement, the employee has hitherto been provided with a fully maintained motor vehicle. The Company also submitted that it provided additional life and income protection insurance cover and mobile phones to the employee. Again the Panel confirms that no such provision can offset employee entitlements under the Agreement.

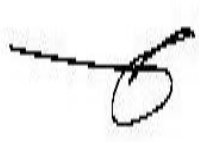
[10] The Union on behalf of their member was prepared to settle any retrospective claim for entitlement based upon a fair settlement and indeed presented a fair proposal in so far as the Panel is concerned. In addition the Union on behalf of their member acknowledged that it accepted that the Company was entitled to strictly apply the Agreement going forward, meaning that the additional benefits hitherto received by the employee would cease. The Company rejected the proposal and was not prepared to entertain further consideration for settlement.

[11] Accordingly, based upon the evidence submitted by both parties , including the clear acknowledgement by the Company that it had not been providing the entitlements to the employee under the Agreement, the Panel determines that the employee has been underpaid since commencement of his employment in relation to the classification of "Crane Crew", the position in which he has been employed. An employer cannot offset wages, terms and conditions of employment provided by the applicable Enterprise Agreement on the basis that it says it is providing alternative entitlements absent a genuine IFA or it constituting a permitted deduction for the purposes of s.324 of the FW Act.

[12] In this case there is no doubt the employee has not been paid his correct entitlements under the Agreement and the Panel directs the Company to comply with the full terms of the

Agreement on and from the commencement date of employment and expects that the Company will comply with the law accordingly. The Company is requested to engage with the Union to confirm wage sheets and working times in order to ensure compliance expeditiously.

[13] The Union is entitled to take the necessary steps to recover monies owed to its member and ensure compliance through the appropriate provisions of the FW Act.



Peter Parkinson	Tony Cordier	Daniel Hodges
Chairman	Panel Member	Panel Member