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L U SIMON BUILDERS PTY LTD (LU SIMON)

and

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CFMEU)

RE: ANZAC DAY PUBLIC HOLIDAY 2020 AND 2021

005-2020

25 MARCH 2020

DECISION

[1] LU Simon Builders Pty Ltd notified a dispute on 13 March 2020 seeking guidance from the Chairman in relation to the apparent inconsistency between Clause 39 and the Calendar in Appendix D in relation to the ANZAC Day public holiday in the *LU Simon Builders Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018*. (the Agreement)

[2] The Chairman convened a Conference of the parties, Multiplex and MBAV on 20 March 2020 and issued a Statement on 22 March 2020 which is to be read in conjunction with this Decision.

[3] The controversy in this Dispute arises from what the parties acknowledge is a clear inconsistency between the content of Clause 39 of the Agreement and the Calendar at Appendix D to the Agreement, in so far as the substitution of the Anzac Day public holiday in years 2020 and 2021 is concerned. In 2020, the Government gazetted day

for Anzac Day is Saturday 25 April and in 2021 it is Sunday 25 April. Clause 39 provides that there is no substitute day for Anzac Day when it falls on a Saturday or Sunday, whereas the Calendar prescribes that the Public Holiday be observed on the following Monday in both years. On its face this suggests that there is a substitute day. In addition, for both years, the calendars at Appendix D prescribe an RDO to be observed on the immediate following Tuesday after the Monday ‘public holiday’.

[4] Both Mr R Edwards of the CFMEU and Mr J Moschoyiannis of LU Simon have provided unequivocal collateral evidence as to the intention and understanding of the negotiations, given they were both directly involved in the negotiations in 2016 that led to the final agreement on the Calendars which are included in the Agreement at Appendix D. It is also clear that other participants involved in various aspects of negotiations over the relevant Enterprise Agreements in 2016, including Mr Kellock from Multiplex, accepted that the Calendar would be settled by Mr Edwards for the CFMEU and Mr Moschoyiannis for LU Simon.

[5] LU Simon also undertook to provide the Chairman with copies of emails it said were relevant to the matter. These have subsequently been provided to the Chairman.

[6] Notwithstanding the relevance of the details discussed in Conference before the Chairman, a proposal to change the date of the RDO scheduled for Tuesday 28 April 2020 was raised by Mr. Moschoyiannis, pursuant to the provisions of the Agreement. The CFMEU requested that the proceedings be adjourned to enable consideration of that proposal and it indicated, other similar proposals on the subject, that had also been suggested to the CFMEU. The Chairman considered it appropriate for the matter to be adjourned pending the CFMEU’s consideration. The CFMEU undertook to advise the Chairman not later than close of business 23 March 2020 as to whether or not there was a prospect of the matter being settled or if it required the Chairman to proceed to determine the matter.

[7] The CFMEU advised the Chairman later on 20 March 2020 that the CFMEU had considered the proposal from LU Simon and others and had determined that it wanted the Calendar in relation to Anzac Day at Appendix D of the Agreement to be observed.

[8] In the Statement of 22 March 2020 the Chairman invited the parties and participants in the Conference “*to make any further submissions in writing no later than 5.00pm on Tuesday 24 March 2020, following which the Chairman will proceed to issue a final Determination.*”

[9] No further submissions were received from either of the parties or the participants, Multiplex and Master Builders Victoria (MBV).

[10] The dispute is left to the Chairman to decide the matter as has been agreed by the parties.

[11] The explanations and material provided by the parties to the Chairman by their representatives who were directly involved in the negotiations that resulted in the Agreement, is incontrovertible.

[12] Both Mr Edwards and Mr Moschoyiannis agree as to the circumstances that led to Appendix D reflecting a substitute day for Anzac Day for both years 2020 and 2021. Neither of them indicate any doubt as to this very specific intention.

[13] The circumstances of the negotiations were such that the primacy of the deliberate allocation of relevant days, both in respect to public holiday substitution and the placement of the RDO adjacent to the Monday holiday, must carry substantially greater weight than the provisions set out in Clause 39.

[14] The intention of the parties is patently clear from their unequivocal collateral evidence. Together they committed to align the Calendars for the industry by deliberately aligning these dates and the adjacent RDO with the other trades namely electrical and plumbing. There is no doubt about this.

[15] The exchanges of emails in 2016 concerning these matters with Mr Moschoyiannis provided to the Chairman confirm this intention.

[16] It is also acknowledged that the purpose and intention to align the Calendars with the rest of the industry was done, and has been done, to ensure productivity and efficiency across the industry.

[17] It is also noted that a significant and somewhat forensic review was conducted by other parties, including by officers of the MBV, in relation to various other aspects of the Calendars where there was disagreement and adjustment in 2016. Throughout that process there was no query or questions raised by anyone it seems as to the substituted Anzac Days for 2020 and 2021. The MBV itself prepared and published Calendars reflecting this as well.

[18] In addition, there exist many Enterprise Agreements in the industry in Victoria which provide precisely the same Calendar provisions which have been entered into by employers, their employees and the CFMEU.

[19] It is also noted that following settlement of Enterprise Agreements including these Calendars, further detailed attention to the content of those agreements was revisited for the purpose of establishing Code Compliant Enterprise Agreements and no controversy was raised in relation to the Calendars at that time.

[20] I note that the MBV issued a notification to its members in February 2020, nearly four years after the Agreement was reached, purporting to advise, notwithstanding the existence of the Calendar in the Enterprise Agreements, that there was not to be a substitute day observed for Anzac Day in 2020. MBV has confirmed in these proceedings that this was issued without reference to senior personnel or to personnel previously engaged in preparing and publishing the Calendar, and without any consultation with the CFMEU, the other party to applicable Enterprise Agreements. Accordingly I place no weight on the notification.

[21] Multiplex also provided the Chairman with a 'brief advice' from its solicitors which I have considered. The advice does not contemplate the unequivocal evidence of the parties in these proceedings and consequently is silent in respect to the intention of the parties, which must in the circumstances of the negotiations and the agreement reached, be given much more weight, indeed it is compelling.

[22] It is clear that the focus of the negotiating parties was on the development of the Calendars that became Appendix D to reflect the days that would be observed pursuant to their bargain. They acknowledge that the provisions of Clause 39 are in conflict with

the Appendix, but as they say, Clause 39 was not the focus of their negotiation nor was it what informed their bargain.

[23] Had the parties turned their attention to the provisions of Clause 39, having regard to their desire to align with the other industry trades, in particular the plumbing trades, they would have noticed that the relevantly applicable terms similar to Clause 39 were and are clear as to a substitute day for Anzac Day when its falls on a Saturday or Sunday being the clear entitlement, irrespective of whether or not it is gazetted by the State Government. Notwithstanding the veracity and frankness of the parties as to their intention, this latest controversy could have easily been avoided had they paid attention to the drafting of the Agreement in its totality, in particular Clause 39. Something they are urged to do in future.

[24] However, it is the clear and unequivocal intention that has been confirmed absolutely by both parties to the Enterprise Agreement that must be relied upon to decide this matter. The Calendar was not an error, not a detail overlooked, not a confusion in transmission or a misunderstanding, it was, as the parties have clearly stated, their clear intention for the Anzac Day holiday in 2020 and 2021 to be substituted to the following Monday and for the RDO to fall on the following Tuesday.

[25] Accordingly I decide, based upon the material and evidence before me, that the Calendars for 2020 and 2021 as appended to the Agreement at Appendix D correctly set out the provisions that are to be observed by the parties.

[26] I note that these proceedings were adjourned to enable a proposal to observe an alternative day to the Calendar allocated RDO falling on the Tuesday after the substituted Anzac Day. Whilst the CFMEU has required that the matter of controversy be settled by the Chairman, as I have done, I make it clear that it remains open to the parties pursuant to the provisions of the Agreement at Sub Clause 35.11 to reach agreement about alternative RDO's. To be clear, nothing in this decision diminishes the provisions of that Sub Clause.



Peter Parkinson
Chairman