Chairman: Peter Parkinson
UNIT 1, 233 CARDIGAN STREET
CARLTON SOUTH VIC 3053
A.C.N. 110 263 182
TEL: 03 9348 2613 FAX: 03 9348 2714
dboard@vbidb.org.au
www.vbidb.org.au

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

and

LEVIANTHAN TRUST T/A SUPER CITY CONCRETE CUTTING PTY LTD

and

ADVANCED SAWING & DRILLING PTY LTD

RE: ALLEGED INCORRECT APPLICATION OF CLAUSE 24 - SITE ALLOWANCE, OF THE ENTERPRISE AGREEMENTS

30 March 2017 ***009-2017***

STATEMENT

[1] The CFMEU notified two separate disputes on 17 March 2017 concerning an alleged failure of Levianthan Trust T/A Super City Concrete Cutting Pty Ltd and Advanced Sawing and Drilling Pty Ltd (the Employers) to comply with Clause 24, dealing with the concrete and drilling allowance, in the respective Enterprise Agreements [*Levianthan Trust T/A Super City Concrete Cutting Pty Ltd and the CFMEU (Victorian Construction and General Division) Concrete Sawing and Drilling Enterprise Agreement 2016-2018* and *Advanced Sawing and Drilling Pty Ltd and the CFMEU (Victorian Construction and General Division) Concrete Sawing and Drilling Enterprise Agreement 2016-2018*.]

[2] The Panel joined both matters, and the Chairman together with Panel Member Cordier held a Conference with the parties on 30 March 2017. The parties were represented by the MBAV.

[3] The principal issue in dispute is in relation to the application of sub clause 24.1 of the respective Enterprise Agreements, in particular as to whether or not the allowances provided for, should be paid for all ordinary hours and overtime or for only those hours whilst on-site. There was no dispute in relation to the payment of the allowance during overtime.

[4] The parties traversed the history of the relevant provisions over previous agreements to a time when for all hours, the minimum site allowance and travel was paid. It seems, from the information before the Panel, that over time, the industry participants subsequently determined that an averaging approach to the relevant allowances (site and travel) should apply, having regard to the industry participants and the nature of the works undertaken by employees regularly from site to site. This would, we think, have been understood to bring with it 'swings and roundabouts', nevertheless, it provides certainty and an ease of administration. This is the provision that remains today.

[5] The history seems to imply to us, with some logic, but without further detailed analysis, that it has been intended that the averaged allowance be paid for all ordinary hours including overtime, not just ordinary hours whilst on site including overtime. The Employers do not concede this however and submit that where an employee is off-site, the averaged allowance should not apply. The CFMEU submits it should.

Directions:

[6] Accordingly, with the benefit of the Conference discussion, the parties are directed to have further discussions in an endeavour to resolve the matter by agreement and to report the outcome to the Panel no later than 5.00pm Wednesday 5 April 2017. It is noted that the MBAV sought to undertake further research in to the matter as well.

[7] In absence of agreement between the parties, the parties are to submit written submissions on the matters in dispute to the Panel, copy to each other, no later than 5.00pm on Thursday 13 April 2017.

[8] A Hearing to receive final submissions by the parties will be conducted on Friday 21 April 2017 at 11.30am at the Panel's premises, unless otherwise advised.

Peter Parkinson
Chairman

Tony Cordier
Panel Member

Chairman: Peter Parkinson
UNIT 1, 233 CARDIGAN STREET
CARLTON SOUTH VIC 3053
A.C.N. 110 263 182
TEL: 03 9348 2613 FAX: 03 9348 2714
dboard@vbidb.org.au
www.vbidb.org.au

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

and

LEVIANTHAN TRUST T/A SUPER CITY CONCRETE CUTTING PTY LTD

and

ADVANCED SAWING & DRILLING PTY LTD

RE: ALLEGED INCORRECT APPLICATION OF CLAUSE 24 - SITE ALLOWANCE, OF THE ENTERPRISE AGREEMENTS

24 May 2017 ***009-2017***

STATEMENT NO.2

[1] The Panel issued a Statement in this matter on 30 March 2017 and issued Directions concerning written submissions on 22 April 2017. This Statement should be read in conjunction with the earlier Statement.

[2] Further to the written submissions received by the parties on 12 May 2017 in accordance with the Directions, the Panel has commenced its deliberations. However, it considers a further Hearing is necessary to clarify a number of aspects arising from the submissions.

[3] In particular the Panel is concerned to hear further from the parties in relation to:

A. the Scope of Agreement Clause 4, given the apparent conflict with what may have been intended in previous agreements, albeit the same issue arises in earlier Enterprise Agreements as well.
B. the application of the allowance in Clause 24.1 in relation to leave and RDO's.
C. past practice.

[4] The Panel is not seeking any further written submissions in relation to the foregoing. The matters can be adequately dealt with orally.

[5] For this purpose a further Hearing is set down for Friday 2 June 2017 at 10.00am

Peter Parkinson
Chairman

Tony Cordier
Panel Member

Daniel Hodges
Panel Member

Chairman: Peter Parkinson UNIT
1, 233 CARDIGAN STREET
CARLTON SOUTH VIC 3053
A.C.N. 110 263 182
TEL: 03 9348 2613 FAX: 03 9348 2714
dboard@vbidb.org.au www.vbidb.org.au

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

and

LEVIANTHAN TRUST T/A SUPER CITY CONCRETE CUTTING PTY LTD

and

ADVANCED SAWING & DRILLING PTY LTD

RE: ALLEGED INCORRECT APPLICATION OF CLAUSE 24 - SITE ALLOWANCE, OF THE ENTERPRISE AGREEMENTS

5 June 2017 ***009-2017***

STATEMENT NO.3

[1] The Panel issued Statements on 30 March and 24 May 2017. This Statement is to be read in conjunction with the previous Statements.

[2] A further Conference before the Panel was held on 2 June 2017 to hear from the parties on certain matters raised by the Panel in its Statement of 24 May 2017.

[3] The principal issue in dispute is in relation to the application of sub clause 24.1 of the respective Enterprise Agreements, in particular whether or not the Concrete Sawing and Drilling allowance should be paid for all ordinary hours and overtime or for only those hours whilst on-site. In this regard the Panel confirms its finding that the allowance is required to be paid for all ordinary hours, whether or not the employee was "on-site", save

for paid leave hours, when the allowance is not paid. There was no dispute about paid leave hours.

[4] Therefore, in the circumstances referred to the Panel, where employees might be sent home by management earlier than their normal finishing time, they are entitled to be paid the allowance in sub clause 24.1 for the balance of any ordinary time on that day that they would have otherwise worked. The Panel agrees with this submission of the CFMEU and finds that this is clearly so where the work being undertaken falls within the Scope of Agreement, Clause 4. The Employers are required to comply with this provision and any retrospective adjustments to comply accordingly should be effected expeditiously by the Employers.

[5] A further issue became apparent in the proceedings regarding the Scope of Agreement Clause 4 in each of the relevant applicable Enterprise Agreements. It is noted that the current Enterprise Agreements and previously applicable Enterprise Agreements excluded some works from the Scope clause, including for example the cottage housing or domestic housing industry. In previously applicable Enterprise Agreements, the provision dealing with the Allowances for Concrete Sawing and Drilling was dealt with by an Appendix to the Enterprise Agreements in which the cottage housing or domestic housing industry and other works were clearly included in the clause for the purposes of paying the allowance. A similar clause concerning the allowance quantum is included at 24.1 of the current Agreements but there is no reference to the type of industry, as was the case in previous Agreements.

[6] The CFMEU's written submissions of 12 May 2017 provided to the Panel a chronology of Agreements dating back to 1999, from which a persuasive and logical conclusion can be drawn that the parties to these prior Agreements, that is the CFMEU and employers in the Concrete Sawing and Drilling industry, agreed that an averaging approach of sorts would be taken to site allowances and fares and travel allowances, having regard to

the nature of the industry . In effect, employees in this industry were to receive by way of a special formula (the formula is articulated in VBIDP decision in matter number 042-2011), an allowance irrespective of the industry in which the work was performed. For example, the provision in the relevant Enterprise Agreement 2011-2015 states *" This Appendix applies to the Company while engaged in Concrete sawing and drilling, whether on Building/Construction sites, or in other sectors such as non-construction, maintenance, civil engineering, public works and the domestic housing industry."*

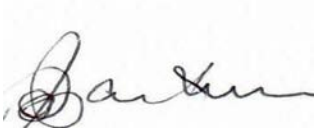
[7] It seems most likely, given the drafting of the Appendix, that the parties to the 2011-2015 Agreements intended the allowance would have a broader application than the Scope clause of the Agreement provided for. What would be the purpose of such words otherwise? Similar arrangements with some quantum differences go back to Agreements struck all the way back to 1999. There is no apparent evidence before the Panel that the original intention of the parties as to the scope of the Concrete Sawing and Drilling allowance was knowingly renegotiated such that its application would be limited by the Scope clause of the Agreements in relation to this allowance. However, the construction of the Agreements, particularly in relation to the current Scope of Agreement Clause 4 and the drafting of subclause 24.1 does not reflect such clear terms as the parties may have previously accepted. Was this change intended by the parties to reflect changes to custom and practice that may have arisen within the industry over the years since 1999? According to the CFMEU there was no such intention

[8] The two Employers party to this matter, Super City and Advanced Sawing and Drilling have not submitted any evidence that demonstrates that the parties, by entering the most recent Agreements, have intended to change what logically appears to be the history as to application of the Allowance. Nonetheless they submit that given the construction of the Agreement now, they should only be paying the Allowance when their employees are working in the Building and Construction Industry as defined in Clause 4 and not payable, for example, for work undertaken by their employees when working in the cottage/housing

industry as it is specifically excluded from the Scope clause, together with other exclusions. On the material before the Panel, logically, the Panel does not consider this was the intention of the parties, absent any evidence to the contrary. It would have otherwise been attended to with some controversy over the renegotiation process however this is not apparent. However, the Panel is constrained we think, given a plain reading of the Scope clause and absent further evidence to make such a formal determination.

[9] Given the history, the Panel considers that in the first instance, the issue as to the breadth of application of the Allowance, having regard to the drafting of the current Agreements, should be reviewed by the Concrete Sawing and Drilling industry parties with a view to resolving the matter and to provide clarity of application of the intention of the parties. It has been indicated by the Employers party to this matter that some 36 different employers are likely to be affected by the matter. The Panel would expect that amongst them there will be representatives who well understand the history of the application of the allowance as intended by the parties, including their own custom and practice, such that some good and honest dialogue between the parties should find a fair and reasonable way forward. The Chairperson has indicated that he is available to assist the parties with any meetings that might be arranged for this purpose.

[10] In the event that the matter cannot be settled, either party may seek a relisting before the Panel.



Peter Parkinson
Chairman

Tony Cordier
Panel Member

Daniel Hodges
Panel Member