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**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**

**and**

**VARIOUS NOTIFIED COMPANIES (listed in Attachment 1)**

**MELBOURNE METRO TUNNEL PROJECT**

**ALLEGED INCORRECT APPLICATION OF SITE ALLOWANCE CLAUSE**

**13 April 2018**

**014-2017**

**DETERMINATION**

[1] The Panel has issued previous Statements in relation to this matter and an Interim Determination 22 December 2017. This Statement is to be read in conjunction with those previous Statements and the Interim Determination. In its Statement 29 March 2018 the Panel issued the following Directions:

*“Any party listed in the notification of this matter, whether formally joined to the Dispute or not, is invited to make formal written submissions to the Panel in relation to the CFMEU proposal outlined in paragraph [14]. The Panel invites submissions on the following:*

- (i) the CFMEU proposal itself;*
- (ii) the operative date of effect should the Panel determine a quantum or quantums for the `Site Allowance applicable to the relevant works;*
- (iii) the reasons whether or not an employer should be joined to any such Determination having regard to the work actually conducted or being conducted by its relevant employees;*

- (iv) *the date by which any determination of the Panel should it make one, be effected, having regard to a period of grace, as it were, being proposed by the CFMEU;*
- (v) *any other matter a party wishes to submit.”*

[2] Submissions were received from a number of parties which have been taken into account in this Determination.

[3] Having regard to all the submissions, the material before the Panel and its Interim Determination, the Panel determines as follows:

**Scope:**

[4] As proposed by the parties, this Determination is limited in scope to the works undertaken as part of the Metro Tunnel Project (Project) to those works that have become known and understood by the parties as the Early Works Programme. This is just one element of the many critical elements of the Project. It does not stand alone for the purposes of our considerations.

[5] These works have been underway since July 2016. The Project works are now transitioning to what has become known to the parties as Major Works. The Major Works commenced at the beginning of March 2018. To be clear, this Determination does not apply to any of the works undertaken as part of the Major Works contracts of the Project, including any works that may have been novated from the Early Works Programme to the Major Works contractors, from the date of such novation. The site allowance applicable to the Major Works and any novated works is yet to be determined and the Panel notes that the CFMEU is seeking to conclude further dialogue with the principal contractors in this regard. The Panel encourages the relevant principal contractors, the client and the CFMEU to settle this remaining aspect of this dispute as appropriate, including the scope of application of this next stage of site allowance application on the Project. Having regard to the observations the Panel had made in this matter we now expect the relevant parties to conclude a settlement about the quantum of the site allowance to be paid with effect from 1 March 2018 without unreasonable delay. Given the material now available and the reasonable projections that can now be made in relation to the Project and its component elements we expect this to be concluded over the course of the next month. In absence of a settlement, any relevant party is at liberty to make further application to the Panel for its assistance and/or further Determination.

[6] In the event that there is any dispute as to what is or is not part of the Early Works Programme for present purposes, any relevant party is at liberty to seek further direction from the Panel.

**Parties Bound:**

[7] Over the course of the proceedings in this matter the CFMEU notified a dispute in relation to some thirty one (31) separate employers, each of whom have been sub-contracted to perform works under the Early Works Programme.

[8] The CFMEU in its submission of 9 April 2018 does not press the dispute with Metcalf Crane Services Pty Ltd, Preston Hire (Vic) Pty Ltd and Sergi (Aust) Pty Ltd. It is not apparent to the Panel as to how these employers could be joined to the dispute given the contents of the relevant Enterprise Agreements.

[9] A number of the notified employers are parties to Enterprise Agreements that provide for an alternative allowance to be paid in lieu of a site allowance, subject to the type of work undertaken by the employees. Examples include “*demolition allowances*”, “*piling allowances*”, “*concrete drilling and sawing allowances*”. Those Enterprise Agreements with the provision of a “*demolition allowance*” apply this allowance in lieu of a site allowance when “*demolition work*” is undertaken by the employees. The “*Concrete Sawing and Drilling*” Enterprise Agreements allow for the greater of the relevant allowance to be paid, requiring a combination of “*allowances and fares*” to be taken into consideration.

[10] Various submissions made to the Panel are at odds as to whether or not *Appendix C* of the relevant Enterprise Agreements, in relation to “*special and exceptional circumstances...*”, override the provision which provide for alternative allowances to be paid in lieu of site allowances, where the works are of a specific nature, eg. “*demolition works*”.

[11] In the case of “*demolition allowance*” for example the Panel is not persuaded that in the circumstances where “*demolition works*” are specifically conducted by employees that the site allowance provision of the Enterprise Agreement has any work to do in these particular circumstances. The Panel considers that *Appendix C* only becomes relevant in these circumstances

where the work performed is not “*demolition work*” and the employee(s) in question are not receiving the “*demolition allowance*”. This is critical as to whether or not some employers sought by the CFMEU to be joined to the dispute can be joined and will require those employers that are joined to this matter to carefully assess the obligations, if any, that arise to them from this Determination.

[12] The Panel has determined to not join a number of the notified employers as parties to this Dispute as the Panel has been satisfied by the submissions that an alternative allowance applies in lieu of a site allowance, and only where the works are specifically caught by the alternative allowance.

[13] Where employers have failed to make submissions as to the type of works undertaken, and many did not, and the relevant Enterprise Agreement provides for the Panel to determine a site allowance, these employers have been joined. Those employers that otherwise are in dispute as determined by the Panel have been joined.

[14] The Panel has therefore determined to formally join these additional employers to the dispute, resulting in the following employers now being formally bound by this Determination, as set out in the table below, which includes reference to the applicable Enterprise Agreement in each case.

Advanced Sawing & Drilling Pty Ltd	<i>Advanced Sawing &amp; Drilling PTY LTD and the CFMEU (Victorian Construction and General Division) Concrete Sawing and Drilling Enterprise Agreement 2016-2018</i>
APS Industrial Services Pty Ltd	<i>APS Industrial Services Pty Ltd and the CFMEU (Victorian Construction and General Division) Contract Scaffold Enterprise Agreement 2016-2018</i>
	<i>APS Industrial Services Pty Ltd and the CFMEU (Victorian Construction and General Division) Rigger/Steel Erector Enterprise Agreement 2016-2018</i>
Associated Rigging Pty Ltd	<i>Associated Rigging Australia Pty Ltd and CFMEU Rigger/Steel Erector Enterprise Agreement 2011 - 2015</i>
Civilex Victoria Pty Ltd	<i>Civilex Victoria Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016 - 2018</i>

Cycon Civil Pty Ltd	<i>Cycon Civil Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016 - 2018</i>
Deca Constructions Pty Ltd	<i>DECA Constructions Pty Ltd T/As DECA Constructions CFMEU (Victorian Construction and General Division) Brick Laying Enterprise Agreement 2016-2018</i>
Delta Pty Ltd	<i>Delta Pty Ltd T/As Delta Group and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>
Fortis Construction Pty Ltd	<i>Fortis Construction Products Pty Ltd T/As Total Patch &amp; Seal and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>
Geotech Pty Ltd	<i>Geotech Pty Ltd and the CFMEU Industry Enterprise Agreement 2011-2015</i>
GVP Fabricators Pty Ltd	<i>GVP Fabricators Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>
Marine Parade Pty Ltd	<i>Marine Parade Pty Ltd T/As Auscut Gippsland Concrete Sawing and the CFMEU Concrete Sawing and Drilling Enterprise Agreement 2011-2015</i>
MC Labour Services Pty Ltd	<i>MC Labour Services Pty Ltd and the CFMEU (Victorian Construction and General Division) Labour Hire Industry Enterprise Agreement 2016-2018</i>
Mitchcon Australia Pty Ltd	<i>Mitchcon Australia Pty Ltd and the CFMEU Concrete Pumpers Industry Enterprise Agreement 2011-2015</i>
Nationwide Concrete Pumps (Vic) Pty Ltd	<i>Nationwide Concrete Pumping (VIC) PTY LTD T/As Nationwide Concrete Pumping and the CFMEU (Victorian Construction and General Division) Concrete Pumping Enterprise Agreement 2016-2018</i>
Pro-Tech Hoardings Pty Ltd	<i>Pro-Tech Hoardings Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>
Quinn Civil Contractors P/L	<i>Quinn Civil Contractors Unit Trust (Trustee for) T/As Quinn Civil Pty Ltd and the CFMEU Civil Construction Industry Enterprise Agreement 2011-2015</i>
Reliable Scaffold Services Pty Ltd	<i>Reliable Scaffold Services Pty Ltd and the CFMEU Contract Scaffold Enterprise Agreement 2011-2015</i>
SAS Steel Pty Ltd	<i>SAS Steel Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016 - 2018</i>

Scaffold Logistics Commercial Pty Ltd	<i>Scaffold Logistics Commercial Pty Ltd and the CFMEU (Victorian Construction and General Division) Contract Scaffold Enterprise Agreement 2016 - 2018</i>
Strategic Drilling Services Pty Ltd	<i>Strategic Drilling Services Pty Ltd and the CFMEU Piling Enterprise Agreement 2011-2015</i>
Super City Concrete Cutting	<i>Leviathan Turst T/As Super City Concrete Cutting Pty Ltd and the CFMEU (Victorian Construction and General Division) Concrete Sawing and Drilling Enterprise Agreement 2016-2018</i>
Tycon Group Pty Ltd	<i>Tycon Group Trust (The Trustee for) T/As Tycon Group Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>
Urban Drilling Pty Ltd	<i>Urban Drilling Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015</i>
Vertcon Pty Ltd	<i>Vertcon Pty Ltd and the CFMEU (Victorian Construction and General Division) Concrete Pumping Enterprise Agreement 2016-2018</i>
Vic Sawing and Drilling Pty Ltd	<i>Vic Sawing and Drilling Pty Ltd and the CFMEU (Victorian Construction and General Division) Concrete Sawing and Drilling Enterprise Agreement 2016-2018</i>
Vladimir Jovanovic	<i>Jovanovic, Vladimir T/As Kakosi Construction and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018</i>

[15] Given the variations that exist across the Enterprise Agreements the Panel acknowledges that there is the possibility of some grey area as to the specific works undertaken by employees such that some further direction in specific circumstances for certain employers might be required - in this case any relevant party is at liberty to seek further direction from the Panel in this regard. For example, in addition to circumstances to where an employee has been paid the “*demolition allowance*” in lieu of site allowance, there are a number of other circumstances where the specific allowance paid to an employee (eg. Concrete sawing) may offset, either in part or in full, the site allowance. The Panel will say more on this later.

### **Quantum of Site allowance and Operative dates:**

[16] Based upon the material provided by MMRA and available to to the Panel, the Panel accepts that the Project Value is in excess of \$5.208 Billion with additional significant works yet to be let.

Having regard to the historical general methodology in setting site allowances this could lead to an allowance in excess of \$9.00 per hour, however, the Panel has determined that in relation to this particular Project, given the nature of the programme of works of the Project and its observations in its Interim Determination, a different approach is warranted here in these circumstances for these works.

[17] Having regard to the Panel's Interim Determination, the proposal submitted by the CFMEU as part settlement of the dispute, and the submissions received by the Panel, all of which the Panel has carefully considered, we find that for works conducted under the Early Works Programme, a site allowance of \$6.50 per hour shall apply with effect from 1 July 2017, increasing to \$7.50 per hour with effect from 1 October 2017, applicable until 1 March 2018, the commencement of the Major Works, from which date the yet to be determined site allowance for works on the Project shall apply. It is noted that the Early Works Programme will be completed by June 2018 and as a result there will need to be an adjustment to reflect the new rate from 1 March 2018 when it is known. The Panel wishes to make it clear that where an employer has paid an alternative allowance such as "*demolition allowance*" under the terms of the applicable Enterprise Agreement, then that allowance shall apply in lieu of the site allowance. Where a combination of "*allowances and fares*" is required to be considered under the terms of the applicable Enterprise Agreement, the employer will be required to pay the higher amount for the relevant period where the combination allowance equates to less than the sum of the relevant fares allowance and site allowance provided herein.

[18] This Determination recognises the stepped increase approach referenced in the Panel's Interim Determination.

[19] The Panel notes that these works commenced in July 2016 and in the ordinary course of events it could be expected that would be the date of effect of site allowances for the Project arising from this Determination. As we have observed, matters such as site allowances should be dealt with much earlier and a failure of principals to participate in some way to facilitate early and timely resolution of such matters should not be excused. We note there has been a range of allowances applied from that date with \$4.50 per hour applied by some employers and higher amounts for work in demolition or in connection with demolition works and other allowances. The CFMEU has proposed an operative date of 1 July 2017 for this Determination (albeit at a

higher rate than the Panel has determined), but it submits this is in genuine recognition of the difficulties experienced by the employers in this matter given inappropriate guidance or direction provided them at the outset and an absence of adequate detail being made available to the parties for “commercial” reasons. This provides some relief to those employers that ordinarily the Panel would not be inclined to give. However given the unique circumstances of this matter which is reflected in the fact that this is the first matter where the notion of “*special and exceptional circumstances*” in the context of *Appendix C* to the relevant Enterprise Agreements, has been found to apply, we consider that in all the circumstances a starting point of 1 July 2017 is appropriate.

[20] In determining the quantum of site allowance applicable in this matter the Panel has also had regard to the quantum of site allowances that are applicable in industry generally, the history of this matter and the Project itself. The Panel considers this finding to be a fair and reasonable outcome given all the circumstances of this matter.

**Date of effect:**

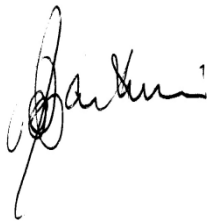
[21] The application of this Determination is to have immediate effect, however, any employer subject to this Determination will have until 1 June 2018 to effect any retrospective payments arising. This is to enable them to have dialogue, if required, with their client as suggested by the CFMEU.

[22] The Panel notes that some subcontractors have hitherto applied a lower site allowance on the Project, in the order of \$4.50 per hour, as had been unilaterally recommended to them by their client, which, from the evidence before the Panel, was done without having due regard to the provisions of the applicable Enterprise Agreements and/or the scope of the Project. Again the Panel observes that a much more constructive approach for a project of this nature is for the client and prospective parties to convene in advance of Projects commencing to seek to reach an understanding about such matters in the interests of all parties as previously envisaged by project Agreements or similar. Most participants in these proceedings have endorsed this approach rather than the process necessarily adopted in this matter in absence of it.



[23] For completeness we also find that there is nothing that stands in the way of the Panel determining retrospective application and the Determination is entirely consistent with the Panel's Charter and the applicable Enterprise Agreements. The employees the subject of the Enterprise Agreements are entitled to the terms and provisions of the applicable Enterprise Agreements.

[24] This concludes this aspect of the Dispute.



**Peter Parkinson**  
**Chairman**



**Daniel Hodges**  
**Panel Member**



**Tony Cordier**  
**Panel Member**