



VICTORIAN BUILDING INDUSTRY DISPUTES PANEL  
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**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**

**and**

**CYCON CIVIL PTY LTD**  
**GEOTECH PTY LTD**

**MELBOURNE METRO TUNNEL PROJECT**

**ALLEGED INCORRECT APPLICATION OF SITE ALLOWANCE CLAUSE**

**22 December 2017**

**014-2017**

**INTERIM DETERMINATION**

[1] On 22 June 2017 the Construction Forestry Mining and Energy Union (“the CFMEU”) notified a dispute between it and various employers arising from claims it had pressed since February 2017 for a site allowance “*in excess of \$15.00 per hour*”, based upon an alleged “*Project Value of \$11.4 Billion*”, in relation to the Metro Tunnel Project (the Project).

[2] The CFMEU alleged that employers were not paying the correct site allowance as required by the applicable Enterprise Agreements.

[3] The applicable Enterprise Agreements are:

- *Cycon Civil Pty Ltd and the CFMEU Victorian Construction and General Division) Enterprise Agreement 2016- 2018*
- *Geotech Pty Ltd and the CFMEU Industry Enterprise Agreement 2011-2015*

[4] The Metro Tunnel Project is a major public transport infrastructure construction project in Victoria for which the Melbourne Metro Rail Authority Corporation (“MMRA”) is directly responsible for its delivery.

[5] The principal purpose of the Project “*is to route the busiest metropolitan train lines through a new tunnel under Melbourne city, which will free up space in the City Loop to run more trains in and out of the city, resulting in more trains, more often across Victoria, with a less crowded and more reliable train network.*” (MMRA website). The MMRA is the Victorian Government body responsible for delivery of the Metro Tunnel Project and the Ballarat Rail Line Upgrade. MMRA is responsible “*for all aspects of the Metro Tunnel Project including planning and development of a project reference design, site investigations, stakeholder engagement, planning approvals and procurement, through to construction delivery and project commissioning.*” (MMRA website). Works commenced on the Project in July 2016, with expected completion of the Project in 2026.

[6] There is an extensive amount of material that can be readily found on-line through the MMRA web site and government publications. The Panel has been informed by the relevant information available and in particular from presentations made to it by the MMRA on 15 August 2017.

[7] Publicly referenced Project Values for the Metro Tunnel Project have been quoted at various times between \$10.9 Billion (Melbourne Metro Rail “*Business Case Briefing Feb 2016*”) and \$11.1 Billion (MMRA “*Freeing Up Melbourne’s Biggest Bottleneck August 2017*”). Traditionally Site Allowances have been determined, having regard to the project construction value, amongst other considerations, usually including preliminary costs, profit margins, trade packages (including supplier and subcontractor costs) and provisional sums. As will be identified later, the referenced quoted Project Values include other considerations, but nonetheless, the construction value is significant and substantial in the context of construction projects generally.

[8] In an endeavour to assist in resolving the dispute the Panel conducted Conferences with the parties on 30 June, 12 July, 15 August, 1 December and 8 December 2017 and issued Statements on the same dates. This Interim Determination is to be read in conjunction with those Statements which provide further relevant background to the dispute and are not repeated here.

[9] During the course of proceedings the CFMEU withdrew its dispute notifications against a number of employers and Geotech was joined to the dispute. It is noted that a Dispute notification on the same matter has also been filed by the PTEU against Geelong Roofing Pty Ltd in Matter no. 023-2017 which has been adjourned pending further notice from those parties having regard to these proceedings.

[10] The parties have not been able to settle this matter, partly due to the differences in opinion about what parts of the project should be considered for the purpose of determining a site allowance, but also due to the limited provision of relevant and applicable data and detail from the client to date.

[11] Arising from a proposal from the Panel, the parties agreed that further guidance from the Panel may assist in resolving the matter if the Panel was to make a formal Determination of the Project Scope and Project Value of the Project for these purposes. This proposal was made in anticipation of receiving further and better particulars from the MMRA. The parties acknowledged that following such Determination they would confer in an endeavour to resolve the Dispute. The Panel was not asked to determine the Site Allowance quantum but was also asked to provide some guidance to the parties.

[12] This determination, albeit an Interim Determination, is made as a consequence of Hearing of submissions by the parties, having regard to the details presently available to the Panel.

[13] Hearings took place on 8 and 15 December 2017.

[14] The CFMEU submitted written submissions on 6 and 12 December 2017. The MBAV on behalf of the Employers made a written submission on 15 December 2017. Each of the parties made various oral submissions.

[15] The MMRA, whilst invited by the Panel to do so, did not participate in the Hearings, but was represented by Industrial Relations Victoria (IRV), but did not make any submissions to the Panel. The MMRA had earlier delivered a presentation of the Project to the Panel on 15 August 2017.

[16] The Panel invited both John Holland (principal contractor for the Early Works package for the Project), and the Cross City Partnership Joint Venture (the then preferred tenderer for the Tunnel and Stations package of works for the Project) to participate to assist the Panel. Both declined to participate in any of the Conference proceedings or the Hearings.

[17] It is noted that final contracts for two significant packages of the Project were not executed until 18 December 2017, after the Hearing had concluded.

[18] The Panel has determined to issue an Interim Determination, the reasons for which are set out herein.

[19] The Panel was asked by the parties to determine the Project Scope and Project Value of the Metro Tunnel Project such that the parties might further confer with a view to settling the Dispute. It is in the spirit of this objective that the Panel considers it is able to reach the interim conclusions it has, including providing some level of guidance which is intended to assist the parties.

[20] The CFMEU submitted that the Project encompasses all activities associated with it, including a number of packages of works identified for the Project, which it submitted results in a Project Value of some \$11.4 Billion. It submitted that the minimum value for Project construction works is at least \$6.324 Billion for those packages.

[21] The Employers submitted that the Early Works package of works on which they have been engaged has a value of \$324m and is of itself a “*Project*” to which the Agreements are applicable. The Employers further submitted that in any event, they were unable to determine the quantum of the remaining packages of the Project because they were not privy to the detail and/or the detail was so imprecise that it should not be considered a project for the purposes of a site allowance.

[22] The Company submitted that the Early Works package should be regarded as a “stand alone” project in so far as the application of the Agreements is concerned, and that the Panel should in effect disregard all the other activities associated with the Project for these purposes.

[23] The Employers acknowledged that the various packages of works which will enable the completion of the Metro Tunnel Project, but submitted the relevant tests necessary to satisfy the requirements of Enterprise Agreements have not been met, other than with respect to the Early Works package, for which they submit they are correctly paying the requisite Site Allowance under the Agreements. For this they rely upon the “*Site Allowance Guidelines*”, also referred to as the “*Ives test*”.

[24] The applicable Enterprise Agreements detail the circumstances in which a site allowance will be paid on Projects with a certain Project Value, unless there are special and exceptional circumstances. It is noted that the Agreements in relation to Site Allowances differ in a number of respects, but for present purposes the differences are not relevant.

[25] Both Agreements provide 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 for determination.*”

[26] There is no dispute between the parties that the applicable Agreements apply to the parties and that the Agreement applies to the relevant construction works.

[27] The Geotech EA provides at Appendix C subclause 12 as follows:

*“In determining the rate, the Panel shall have regard to the Site Allowance Guidelines, and shall not deviate from these Guidelines unless there are special and exceptional circumstances.”* (our emphasis)

and the Cycon EA somewhat similarly provides at Appendix C subclause 12 as follows:

*“In determining the rate, the Panel shall have regard to the Appendix C, and shall not deviate from Appendix C unless there are special and exceptional circumstances.”* (our emphasis). The Cycon EA also provides for a definition of Project and references the “*Ives test*” principles.

[28] The parties acknowledged in the Hearing that the circumstances of this particular Project are “*special and exceptional*” and the Panel agrees. Consequently the Panel accepts it is able to proceed to make the Interim Determination that it has in this matter without having regard to the “*Site Allowance Guidelines*”. The “*Site Allowance Guidelines*” reference the principles ordinarily relied upon by the Panel in settling disputes over site allowances. These are well enunciated in the “*Port Capacity Project*” Determination in Matter No. 003-2016 and have been referred to as the “*Ives Test*”.

[29] The Panel notes however that it is not constrained by these principles given the special and exceptional circumstances of this Project. In particular these circumstances primarily arise from the sheer size and scope of the Project, its geographic coverage, its interrelationship with other activities, the lack of sufficient detail to distinguish value and connection with the Project, and the projected time frame for completion of the Project. Each of these factors together present what the Panel accepts and the parties have accepted, amount to “*special and exceptional circumstances*”.

[30] We have determined therefore that the approach to a Project such as this is different and it is clearly open to the Panel to adopt what it regards as commonsense principles to guide the parties to a solution. We consider an Interim Determination may provide sufficient impetus for the parties to enter that dialogue with a view to settling the matter.

[31] Under its Charter the Panel is able “*to inform itself on any matter in such manner as it thinks fit*”. The Charter of the VBIDP also provides that “*no decision shall be regarded as a precedent*”. The Panel has nonetheless had due regard to previous decisions of the Panel, which confirm its view that the circumstances of this Project warrant a different approach than simply determining a Project Value (if it could) and applying a set formula for the resulting allowance. We do not consider that the traditional approach to setting site allowances for projects such as this is appropriate having regard to all the circumstances.

[32] Significant aspects of the Project detail in so far as Project value is concerned, remain to be provided by the MMRA. The MMRA claimed that the state of commercial negotiations for various aspects of the Project has meant not all of the relevant detail could be made available to the Panel at this time. The Panel had asked specific questions of the MMRA which remain unanswered at the time of this Determination. The MMRA has however, since the Hearing, confirmed with the Panel Chairperson that it intends to provide this further detail by February 2018, or earlier if possible, having regard to applicable Government protocols following the execution of the major works contracts with the preferred tenderers on 18 December 2017. For present purposes, the Panel considers the absence of that further detail may not necessarily stand in the way of the parties resolving their differences, having regard to the guidance provided in this Interim Determination. Nevertheless the Panel and no doubt the parties will welcome further clarity from the MMRA.

[33] The following table has been extracted from the presentation made to the Panel by the MMRA on 15 August 2017 to which the MMRA has advised the Panel it can rely in determining the Project scope (reference letter from MMRA dated 15 December 2017). This table lists the four packages of works and Additional Costs, resulting in a total indicative cost of \$11.031 Billion.

***“Metro Tunnel Indicative Amounts***

ITEM	SCOPE	AMOUNT
EARLY WORKS MANAGING CONTRACTOR	<ul style="list-style-type: none"> <li>• Utility service relocation</li> <li>• Works to prepare construction site</li> </ul>	\$324m*
TUNNEL & STATION PPP	<ul style="list-style-type: none"> <li>• D&amp;C</li> <li>• O&amp;M (25 years period)</li> <li>• Financing</li> <li>• Special Purpose Vehicle</li> </ul>	Up to \$6b#
RAIL INFRASTRUCTURE ALLIANCE	<ul style="list-style-type: none"> <li>• D&amp;C</li> <li>• Rail Transport Operator (Occupations, Driver Training, Accreditation etc)</li> <li>• Wider Network Enhancements</li> </ul>	\$1b#
RAIL SYSTEMS ALLIANCE	<ul style="list-style-type: none"> <li>• D&amp;C</li> <li>• High Capacity Signaling Implementation (\$131m)</li> <li>• Rail Transport Operator (Occupations, Driver Training, Accreditation etc)</li> <li>• Wider Network Enhancements</li> </ul>	\$1b#
ADDITIONAL COSTS INCLUDING	<ul style="list-style-type: none"> <li>• Owner’s Project Management</li> <li>• Project Design and Development</li> <li>• Legal, commercial and Procurement</li> <li>• Land acquisition (200+ properties)</li> <li>• Owner’s Risk</li> <li>• Rail and Tram Transport Operator</li> </ul>	\$3b
Total		Total \$11.031b

*\*Contract Amount published on Tenders Vic website (excludes GST)*

*#Indicative amount, included in Government release.*

[34] The Panel accepts that these work packages and costs determine the broad Scope of the Project, however, as is set out below, some of the scope is not relevant for the purposes of determining Construction related activity for which a site allowance might be determined.



[35] On the analysis undertaken by the Panel, having regard to the material available to it, the Project Construction Value and Scope includes the first four items, but not entirely. It does not include the fifth item “*Additional Costs Including*”. Items or packages that properly should be excluded from the first four items, that are not considered construction related for present purposes are:

- Operations and Maintenance
- Financing
- Special Purpose Vehicle Costs
- Rail Transport Operator costs other than construction
- Wider Network Enhancements, but only those that are not intrinsic to or necessary for the completion of the Metro Tunnel Project and are consequent upon a separate initiative than the Metro Tunnel Project. Works associated with the main rail corridor (ie. at least Tottenham to Caulfield and perhaps Sunbury to Cranbourne /Pakenham, the latter which might require further review based upon the MMRA detail yet to be provided) ought be included as should those that are intrinsic to or necessary for the effective performance and completion of the Project.

[36] The Panel is not able to extract the dollar values for these items as this is relevant to the questions yet to be answered by MMRA. Suffice to say the resulting project Construction Value is significant and likely to be well in excess of \$4 Billion, but likely to be less than \$7 Billion. In any event, given the Panel takes the view that the Project Value of this particular Project does not necessarily dictate the relevant quantum of site allowance, as would be the case if special and exceptional circumstances did not exist. The indicative values provided thus far by the MMRA confirm that this is a significant and substantial Project. It can be confidently assumed that over time, these values will also increase given the 10 year programme of construction.

[37] The Project commenced in approx. July 2016 with the awarding of the Early Works package to John Holland Group Pty Ltd (JH). The Early Works package includes:

- The relocation of power, drainage, gas, water, sewer and telecommunications to clear the alignment prior to the main works commencing in 2018.
- The construction of two access shafts in Franklin Street and A’Beckett Street to able future construction of the Stations.
- Major site preparation works including land clearing, property demolition, temporary relocation of monuments and tree protection and removal across all precincts.

[38] It is clear to the Panel that the Early Works are part of the overall Project. We do not accept that this can be the only determinant for a site allowance for a Project of this size, substance and complexity. The same applies to the other packages in so far as construction works are concerned. We note that if there were no “*special and exceptional circumstances*” exception and we were therefore constrained by the “*Ives test*”, there is doubt as to whether we could find sufficient detail and definition of the overall project consistent with the third leg of the principles, that would enable a site allowance to be determined. The Panel, given the circumstances, has not sought to analyse this test further.

[39] The Panel notes the definition of Project in the Cycon EA. Even if the ‘*project*’ for the purposes of that Agreement is technically limited to the Early Works Package, it would still allow for the determination of site allowance in respect of that project, commensurate with a consideration of the value of other interrelated works that could reasonably otherwise be viewed as forming part of a larger project (just not for the purposes of site allowance under that Agreement). Put another way, the Panel does not accept that clause 12 of Appendix C of that Agreement empowers the Panel to ignore the definition of Project. But it does however, allows the Panel, should it become necessary, to arrive at a different site allowance figure or approach in relation to that Project in the case of “*special and exceptional circumstances*”, as is the case here.

[40] The Employers have undertaken contracts of works directly or indirectly with JH to perform certain works associated with JH’s early Works contract with the MMRA. Geotech undertook and have completed various works during 2017. Cycon has undertaken a range of activities across the package of works and are still engaged on the contract.

[41] The Employers have been paying site allowances ranging from \$4.50 -\$5.50 per hour. They say these were primarily determined upon advice received from or via the principal JH that the Project Value for the purposes of site allowance should be \$324m only.

[42] There was never any agreement reached or attempt to do so, with the CFMEU about the value or the quantum of the Project or site allowance. It is noted in relation to Geotech, that there was no disagreement between the parties in relation to the applicable site allowance

whilst Geotech was on site. It is acknowledged that no-one was in a position to advise what the actual site allowance was (i.e. if not \$4.50 per hour). The Panel has said before and says again, a good practice for the parties to Enterprise Agreements that contain provisions such as are applicable here, and principal constructors, are wise to confer in relation to site allowance quantum prior to commencement of their works on site. This should ordinarily avoid surprises.

[43] The Panel would expect that should a different quantum than has been paid, be arrived at, then the parties would need to reach agreement about that or otherwise be determined by the Panel subsequently. For now the Panel has not been asked to determine whether or not there should be any retrospectivity should a higher number than actually paid be arrived at, through whatever means. Again, this is a matter the parties might settle directly. Suffice to say that it was abundantly clear at the commencement of the works that the works were one package of a number of well identified prospective packages that would be let, carefully planned and scheduled to enable the construction of the Project. It would be naive in the extreme to assume that the matter would end there. Nor, in the view of the Panel does it follow that the total project value in a project like this should necessarily determine the value of the site allowance in such a project, from day one. Regard should also be had to the circumstances attaching to the sub contractors and the nature of the works.

[44] The Panel observes, as acknowledged by the parties, that it is unfortunate for such a significant infrastructure construction project, that no dialogue was facilitated with prospective interested parties to strike a Project Agreement or similar approach that could have answered this and other questions well in advance of works commencing, avoiding the uncertainty under which sub contractors in particular may have had to operate and employees have had to await a settlement of the question, well beyond commencement of the Project.

[45] It is noted that there has not been any industrial action in relation to this matter.

[46] The Panel considers that the approach that should be taken is one not just related to the Project Scope and Project Value by simply applying a table of increasing values and increasing allowances. Hitherto, Site allowances for Projects with significant infrastructure

and building construction elements have been determined, often between the parties themselves, together with other considerations, as distinct from say a commercial building being developed and constructed on a single site. Indeed the Site Allowance guidelines were derived primarily with such developments in mind, certainly not a Project of this nature. This is also another reason why the Panel considers the Project is special and exceptional for present purposes.

[47] We also query whether or not there should become a point in the size of a substantial infrastructure construction project like we are dealing with here, when the relevant justifications for which a site allowance ought be paid remains similar, whether the project is worth \$2 Billion, or \$10 Billion or \$20 Billion. We are not certain that an allowance should necessarily continue to increase for such projects just because of the size of the project alone. There will be other considerations of course. We are conscious however that it is important to retain personnel knowledgeable in a Project so as to maintain their engagement on a project. Given the infrastructure pipeline in Victoria and the projected values of those projects, one in excess of \$16 Billion, we think this might need to be a consideration for such special and exceptional projects. We have not been addressed on this and do not seek to settle the matter here, but suggest it is a matter the parties might contemplate in their pending further deliberations.

[48] We consider that in order to provide some guidance in a Project like this it may well be that a phased arrangement for stepped allowances and perhaps other considerations could apply such that as the value obviously increases exponentially then a stepped allowance and other considerations or conditions might apply. The Panel considers that Early Works for such a significant project cannot be regarded as stand alone. We say that some regard must be had for the size of the overall project but not such that the full construction value should dictate the starting point of a site allowance quantum for this package. We have in mind a figure that equates to a Project certainly not less than \$324m, perhaps more, from its commencement, leading to a stepped increase or increases in the allowance at commencement of the Major works and that the value then established is indexed on a per annum basis throughout the life of the Project, having regard to Indicative project value and CPI, for those activities that fall within the Scope of the Project as suggested by the Panel - refer


paragraphs [33] to [35]. To be clear we consider the second point of a stepped increase should be the commencement of the Tunnel and Stations package. The other packages overlap this package and the same quantum of site allowance should apply to those construction works, in so far as the works fall within the scope suggested by the Panel.

[49] We should also note that there has been some suggestion that the Early Works Package has been extended from its original scope which may have added to that value. For present purposes that can be a matter for the parties to consider in their further deliberations.

[50] This is as far as the Panel is able to take the matter given the detail yet to be provided, upon which it was hoped greater clarity could have been possible. Nevertheless, some guidance can be taken from this Interim Decision.

[51] It remains for the parties to now confer with a view to settling the matter.

[52] In the event the matter cannot be settled by direct negotiation, having been appraised of the Panel's Interim Decision, the parties are at liberty to seek a further Conference or Hearing with the Panel to assist in resolving the matter and if necessary to make a final Determination on the matter of applicable quantum of Site allowance(s) appropriate for the Project, including operative dates.



Peter Parkinson  
Chairman



Daniel Hodges  
Panel Member



Tony Cordier  
Panel Member