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**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CFMEU)**

**and**

**KASALO STEEL FIXING PTY LTD**  
**FITZGERALD CONSTRUCTIONS AUSTRALIA PTY LTD**  
**CYCON CIVIL PTY LTD**  
**TOOHEYS FORM CRETE UNIT TRUST T/AS TOOHEYS FORM CRETE**  
**R AND K UNIT TRUST (THE TRUSTEE FOR) T/AS DB FARRELLS**  
**PTY LTD**  
**IDIG DEVELOPMENTS PTY LTD**  
**WEST GATE TUNNEL PROJECT**

**RE: ALLEGED INCORRECT APPLICATION OF SITE ALLOWANCE CLAUSE**

**1 NOVEMBER 2018**

**023-2018**

**DETERMINATION**

**By Majority (Chairperson Parkinson and Panel Member Cordier; Alternate Panel Member Cross did not attend the Hearing)**

[1] The CFMEU notified a dispute on 9 October 2018 alleging the payment of the incorrect Site Allowance by the above named employers in relation to works on the West Gate Tunnel Project (the Project).

[2] The Panel convened a Conference of the parties and issued a Statement on 18 October 2018. That Statement is to be read in conjunction with this Determination.

[3] The parties had been provided with a copy of the Determination in Matter No. 008-2018 dated 20 July 2018 that deals with the same Project, together with the Notification of that Conference.

[4] There is no dispute that the following Enterprise Agreements apply to the matters in dispute:

- *Kasalo Steel Fixing Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018.*
- *Fitzgerald Constructions Australia Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018*
- *Cycon Civil Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018*
- *Tooheys Form Crete Unit T/As Tooheys Form Crete and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018*
- *R and K Unit Trust (The Trustee for) T/As DB Farrells Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018*
- *Idig Developments Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018*

[5] The Panel has noted correspondence dated 17 October 2018 received from the principal contractor for the Project, CPBJH Joint Venture, and the CFMEU dated 18 October 2018, copies of which were made available to all the parties.

[6] Each of the relevant Enterprise Agreements at Appendix C provide for identical provisions in each with respect to the Panel's functions in determining disputes over site allowances.

[7] The substantive issues in dispute here are no different to the matters in dispute in Matter No. 008-2018 which were determined by the Panel. In that matter the presently named employers in this matter were not party to that dispute notification. Also of note is that one of the employers in that matter, Tycon Group, was party to an Enterprise Agreement with identical provisions at Appendix C to the Enterprise Agreements in this matter. The other two employers, Wagstaff Piling (Wagstaff) and Carey Civil, in 008-2018 were parties to Enterprise Agreements, each with different provisions to those provisions in the present matter. In relation to Carey Civil, its Enterprise Agreement provided a differing scale for site allowance purposes, including the option of a flat hourly rate or an all purpose rate. In relation to Wagstaff its Enterprise Agreement was different to all others including those before us in this matter, by way of Appendix K, dealing with Piling specifically.

[8] The Panel notes that Wagstaff made an application to the Fair Work Commission (FWC) seeking a review of the Panel's Determination in Matter No. 008-2018. The Panel understands that a decision regarding the jurisdiction of the FWC to deal with that application is pending. It is this matter that is the subject of the correspondence referenced in paragraph [5].

[9] The Panel set the matter down for Hearing on 1 November 2018 for which it had invited submissions from each of the parties and the CPBJH Joint Venture, on the following matters:

1. *Having regard to the provisions of the applicable Enterprise Agreements and the Charter of the Panel, whether or not the Panel should proceed to make a Determination in this matter and the reasons why; and*
2. *For each of the employers in this matter, is there anything that is so substantively*
3. *different to the findings made by the Panel in 008-2018 that the Panel should reach a different conclusion as to scope and quantum of site allowance, should it proceed to a Determination in this matter; and*

4. *Any other relevant matter.*

[10] The Panel received written submissions from the CPBJH Joint Venture dated 30 October 2018 and from the CFMEU on 31 October 2018, copies of which were provided to all parties. These submissions addressed each of the matters identified in [9] above.

[11] None of the employer parties to the dispute attended the Hearing and none of them made any submissions as had been invited by the Panel. Each of the employers had been formally notified of the Hearing.

[12] The Panel has carefully considered all of the submissions that have been made.

[13] The Panel has been advised that the FWC has not issued any decisions in relation to the Wagstaff matter. There has been no stay application made by Wagstaff or any other party and none has been issued. There has been no application to the Panel to reconsider its Determination in 008-2018 or any submissions to the Panel by Wagstaff since the Determination.

[14] The Panel is advised that the other two employers bound by the Panel's Determination in 008-2018 are fully complying with the Determination as it applies to them.

[15] We are not persuaded that the FWC matter concerning Wagstaff, in any way constrains the Panel from exercising the functions that it is required to exercise pursuant to the applicable Enterprise Agreements and the Panel's Charter, in relation to the parties in the present matter.

[16] Having regard to the terms of the applicable Enterprise Agreements and the Panel's

Charter we see no basis upon which we should refrain from dealing with the matters that are properly before us. We do not consider there is any prejudice to the rights of any party in doing so. We consider the balance of convenience favours the union application being determined and we proceed to do so.

[17] The CFMEU has submitted that the Determination of the Panel in Matter No. 008-2018 and the circumstances of that Determination for the purposes of Appendix C of the applicable Enterprise Agreements are equally relevant here and that the site allowances determined by majority in that matter should apply to the parties in this matter. The CFMEU's written submission is persuasive and in particular the Panel agrees with its submissions at paragraphs 13 through to 19.

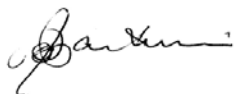
[18] The Panel finds that no party has made any submissions that in any way has identified anything that is substantively different to the findings made by the Panel in 008-2018 such that it alters the Panel's findings in that matter in respect to the relevant considerations for site allowance in this matter. The Panel finds that the same issues arise for each of the present employers in so far as the application of the applicable Enterprise Agreements, the scope of the Project, the value of the Project and the quantum of the site allowance and its operative date, as found and determined by the Panel by majority in 008-2018.

[19] The Panel finds that there are no matters of substance that have arisen or been submitted in these proceedings that warrant a different outcome to the majority finding in Matter No. 008-2018.

[20] Accordingly the Panel determines that the Project scope, site allowance quantum and operative dates determined by majority in Matter No. 008-2018 will apply to the parties in

this matter. The Panel requires each of the employer parties, namely Kasalo Steel, Fitzgerald Constructions, Cycon Civil, Tooheys Form Crete, DB Farrells and Idig Developments, to implement the terms of this Determination expeditiously, including the making of retrospective payments where applicable.

[21] To be clear, the Panel has determined that a site allowance of \$8.90 per hour shall be applicable with effect from 1 January 2018 for each of the named Employers party to this dispute for any works undertaken on the Project on or after this date. The indexation of the site allowance is to be effected on 1 October each year by the CPI (All groups, Melbourne) movement for the preceding period July to June in each year. Accordingly the employers are required to make the necessary payment adjustments retrospectively to the relevant employees from their commencement of works on the Project. The site allowance quantum of \$8.90 shall be indexed with effect from 1 October 2018.



**Peter Parkinson**  
**Chairman**



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