

# VIBIDP

## VICTORIAN BUILDING INDUSTRY DISPUTES PANEL

**CHAIRPERSON: SIMON WILLIAMS**

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

**AND**

**QANSTRUCT**

**AND**

**HANSEN YUNCKEN PTY LTD**

**FERNTREE BUSINESS PARK**

**RE: DETERMINATION OF SITE ALLOWANCE**

**3 October 2012**

**024-2012 AND 025-2012**

### **DECISION**

#### **DECISION OF THE PANEL**

The decision of the Panel is:

- A. that, in respect to the construction work being performed by Qanstruct at the Ferntree Business Park on the office building designated as Building B and the car park site designated as CP-1, the project value for the purposes of calculating the appropriate site allowance pursuant to Appendix C of the *Qanstruct and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015* was, as of February 2012 (being the date of the

commencement of construction), between \$17.3 million and \$34.8 million;  
and

- B. that, in respect to the construction work being performed by Hansen Yuncken Pty Ltd at the Ferntree Business Park on the office building designated as Building C, the project value for the purposes of calculating the appropriate site allowance pursuant to Appendix C of the *Hansen Yuncken Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015* was, as of July 2012 (being the date of the commencement of construction), between \$7.0 million and \$17.3 million.



***Simon Williams***  
***Chairperson***  
***3 October 2012***

## **REASONS FOR DECISION**

[1] On 14 August 2012, the Construction Forestry Mining and Energy Union (“the CFMEU”) notified disputes between it and Qanstruct and between it and Hansen Yuncken Pty Ltd (“Hansen Yuncken”) regarding the alleged incorrect calculation of project value for site allowance purposes at two constructions sites at the Ferntree Business Park.

[2] The CFMEU and Qanstruct are parties to the *Qanstruct and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015* (“the Qanstruct Agreement”) [Agreement ID: AE892375; Print No: PR521229]. The CFMEU and Hansen Yuncken are parties to the *Hansen Yuncken Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015* (“the Hansen and Yuncken Agreement”) [Agreement ID: AE891108; Print No: PR519327].

[3] Clause 25 of each of the Qanstruct Agreement and the Hansen and Yuncken Agreement provides that “[s]ite allowances shall be paid in accordance with the

*formula which appears in Appendix C*". In each Agreement, the relevant formula is set out in clause 7.2 of Appendix C and provides for a site allowance to be calculated in accordance with "*project value*". The formula (as adjusted in accordance with Clause 8 of Appendix C) provides that, as of date of commencement of construction -

- where project value is between \$7.0 million and \$17.3 million, the site allowance would be \$2.30 per hour; and
- where project value is between \$17.3 million and \$34.8 million, the site allowance would be \$2.60 per hour; and
- where project value is between \$34.8 million and \$69.5 million, the site allowance would be \$3.05 per hour.

[4] In respect to the resolution of disputes about a project site allowance, Appendix C of each Agreement relevantly provides –

11. *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. Provided that any outcome so determined will not be inconsistent with the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, the Fair Work Act 2009 or the Building and Construction Industry Improvement Act 2005.*
12. *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.*

[5] At the direction of the Chairperson, a site visit was conducted by Panel Members Doyle and Hodges on 24 August 2012. A hearing was then conducted by the Panel on 29 August 2012. Subsequent to that hearing, the Chairperson of the Panel decided that a further site visit attended by all members of the Panel (including the Chairperson) should be conducted and that site visit took place on 5 September 2012. As a result of information that came to the attention of the Panel both after the hearing on 29 August 2012 and at the site visit conducted on 5 September 2012, a further hearing was conducted to allow the parties to address that information, any matters arising from it and the relevance of those matters to the determination of the disputes before the Panel.

[6] Ferntree Business Park is located within the Notting Hill commercial precinct on Ferntree Gully Road, between Forster and Blackburn Roads. It is being redeveloped by Goodman Australia (“Goodman”) to create a business park consisting of modern commercial office space within a landscaped environment.

[7] From the material originally put before the Panel at the hearing on 29 August 2012, it appeared that the construction works being carried out at the Ferntree Business Park were –

- the construction by Qanstruct of a 5 level office building of 7,500 sqm and a separate 4 level car park, the individual value of which was said to be \$23,940,411.00, and
- the construction by Hansen Yuncken of a 4 level office building of 6,400 sqm, the individual value of which was said to be \$11,746,932.00.

[8] Further, it appeared that the Qanstruct construction commenced in February 2012 and that the Hansen Yuncken construction commenced in July 2012.

[9] It followed that:

- if the individual value of the Qanstruct construction works were to be the “*project value*” of those works for the purposes of calculating the appropriate site allowance for that site pursuant to the Qanstruct Agreement, that “*project value*” would, as of February 2012, have been between \$17.3 million and \$34.8 million attracting a site allowance of \$2.60 per hour; and
- if the individual value of the Hansen Yuncken construction works were to be the “*project value*” of those works for the purposes of calculating the appropriate site allowance for that site pursuant to the Hansen Yuncken Agreement, that “*project value*” would, as of July 2012, have been between \$7.0 million and \$17.3 million attracting a site allowance of \$2.30 per hour; but
- if the individual values of the two sets of construction works were to be combined and their combined value were to be the “*project value*” for the purposes of calculating the appropriate site allowance for each site pursuant to each of the Agreements, that “*project value*” would, as at February 2012 and

as at July 2012, have been between \$34.8 million and \$69.5 million attracting a site allowance of \$3.05 per hour.

[10] The office building being constructed by Qanstruct has as its prime tenant Schneider Electrics and is identified on a masterplan produced at the hearing on 29 August 2012 as Building B. The car park being constructed by Qanstruct is identified on that same masterplan as CP-1. The office building being constructed by Hansen Yuncken has as its prime tenant Olympus and is identified on that same masterplan as Building C.

[11] Subsequent to the hearing on 29 August 2012, it came to the attention of the Chairperson that press releases issued by Goodman dated 15 July 2012 and 3 August 2012 and a report in *The Australian* on 4 August 2012 (all of which appeared on the internet) had indicated that a third construction was to take place at the Ferntree Business Park, namely the redevelopment of an existing facility for Draeger Safety Pacific Pty Ltd and Draeger Medical Australia Pty Ltd (“Draeger”). Another document appearing on the internet which appeared to be calling for expressions of interest in the operation of a café at the Ferntree Business Park recorded that an “anchor tenant” of what was identified as Building F at the Ferntree Business Park would, by July 2013, be Drager (*sic*).

[12] At the site inspection on 5 September 2012, it appeared that the proposed Draeger building was not Building F as it appeared on the masterplan produced to the Panel at the hearing of 29 August 2012. Rather, it was a warehouse located at the back of the Ferntree Business Park and identified on that plan as “2 Redwood Drive” and on the later masterplan as Building F.

[13] The Charter under which the Panel operates empowers the Panel to “*conduct inquiries, prepare reports and perform other tasks as required, to reach a fair and proper decision on issues before the Panel*”. [Clause 5.2] The Charter also provides that the Panel “*is not bound by the rules or practices as to evidence and may inform itself in such manner as it thinks fit*”. [Clause 5.5] There is an overarching requirement to apply the rules of natural justice [Clause 1.6], a requirement reflected in the provision that the Panel “*shall not inform itself on, or take into consideration,*

*any matter which has not been disclosed at the hearing or in submissions, if the matter is one which ought, in the interests of justice, to be available for challenge or testing by the parties”.* [Clause 5.8]

[14] A further hearing before the Panel was therefore fixed for 19 September 2012 so that the parties could be provided with this new information and allowed to address it. In an attempt to obtain some clarification, the Chairperson requested that a representative of Goodman attend that hearing. Initially, that request was acceded to and it was anticipated that Mr Baden Holmes, a Senior Project Manager with Goodman, would attend a hearing before the Panel on that date. However, Mr Holmes, by letter dated 14 September 2012, advised the Panel that he was unable to attend the hearing.

[15] On 17 September 2012, a telephone discussion between the Chairperson and Mr Holmes resulted in the making by the Chairperson of the following file note:

***CFMEU AND QANSTRUCT AND HANSEN YUNCKEN  
FERNTREE BUSINESS PARK  
[024-2012 and 025-2012]  
FILE NOTE***

*I today spoke by telephone with Mr Baden Holmes, Senior Project Manager with Goodman, the developer of the Ferntree Business Park (“the Park”).*

*Following a request made by the Chairperson of the Panel by telephone on 12 September 2012, Mr Holmes had agreed to attend the hearing before the Panel scheduled for Wednesday 19 September 2012. By email dated 14 September 2012, Mr Holmes advised the Panel that he was unable to attend the hearing.*

*In today’s telephone conversation, I asked Mr Holmes whether he would be able to attend a meeting on some other date or at some other time. He advised me that his company had decided that he should not attend. He offered to attempt to answer any questions I might have regarding the Park.*

*I informed him that there was some confusion, at least in my mind, as to what construction was proceeding and/or planned for the Park. The confusion arose as a result of press releases and other information available on the internet that indicated that, in addition to the buildings being constructed by Qanstruct and Hansen Yuncken, a further construction was proceeding for a tenant called Draeger. This was identified on some of that material as being “Building F”.*

*I informed him that, on the masterplan for the Park tendered at the hearing on 19 September 2012, Building F is clearly identified. [It appears on that masterplan as being on the eastern side of the Park]. However, on another masterplan appearing in a document on the internet which appears to be a request for expressions of interest in operating a café at the Park, Building F is identified as a warehouse at the back of the Park [on the western side of the Park]. The entrance to Building F is not from Ferntree Gully Road but from Redwood Drive. What was identified as Building F on the masterplan originally provided is now identified as Building K.*

*That the construction for Draeger concerns the warehouse at the back of the Park was confirmed by the site visit conducted on 5 September 2012. At that site visit, the position of the warehouse was identified and the Qanstruct representative confirmed that it had recently taken possession of the site for the purposes of carrying out construction work.*

*Mr Holmes informed me:*

- that Goodman was developing the Park on a pre-lease basis, i.e. it commenced construction of any building only when it had received commitment for tenancy of 75% of the building;*
- that it had commenced the redevelopment of the Park in 2006 with the construction of Building A (the Heidelberg Building);*
- that no further redevelopment commenced until commitments from Schneider Electrics and Olympus were obtained in 2008;*
- that the construction of Building B and Car Park 1 commenced after Goodman had obtained a tenancy commitment from Schneider Electrics;*
- that the construction of Building C commenced after Goodman had obtained a tenancy commitment from Olympus;*
- that Goodman had attempted to convince the previous tenant in Building F to remain but the tenant had obtained premises at another site and had only just recently ceased its occupation of Building F;*
- that the construction relating to Building F for Draeger commenced after obtaining a tenancy commitment from Draeger;*
- that the construction relating to Building F involved the refurbishment of a warehouse and car park, one third of which would involve the provision of office space;*
- that the land occupied by Building F is on a separate title to the land occupied by the rest of the Park;*
- that the upper levels of proposed Buildings B and C have not yet been tenanted and the trust which owns the land has instructed Goodman that no further buildings are to be constructed until the untenanted floors in Building B and C have been tenanted.*



*Simon Williams*  
*Chairperson*  
*17 September 2012*

[16] At the hearing on 19 September 2012, the Chairperson provided each of the parties with a copy of the above file note and read out the contents of the file note. He asked if any Member of the Panel wished to obtain further information and if any of the parties wished to obtain further information and/or make further submissions.

[17] Following a suggestion from one of the Panel members, it was agreed that it was in the interest of all parties that the Chairperson seek from Mr Holmes written confirmation that the above file note was an accurate record of the information provided by Mr Holmes to the Chairperson. If such confirmation was received, the Panel could proceed to a decision without further submissions from the parties. If such confirmation was not received or if Mr Holmes advised that the file note was not accurate and some changes were required, the parties would be notified and asked for their comment.

[18] On the same day, therefore, the Chairperson forwarded to Mr Holmes by email a copy of the file note with a request that he advise the Chairperson as soon as possible whether file note was accurate or required any and, if so, what amendments.

[19] On 25 September 2012, the Chairperson received the following response by email from Mr Holmes:

*I confirm that that the notes from our conversation are correct with the following exceptions:*

*Dot Point 3 – that no further redevelopment commenced until commitments from Schneider Electrics and Olympus were obtained in 2010;*

*Dot Point 9 – at the time the Tenant Lease and the Building Contract were signed, the land occupied by Building F was on a separate title to the land occupied by the rest of the park*



*Should you require any further clarifications, please do not hesitate to contact me.*

[20] On the same date, the Chairperson replied by email to Mr Holmes in the following terms:

*Thank you very much for your email. One question that does arise is in relation to your correction to dot point 3. Could you please let me know what “further redevelopment” commenced before the commitments were obtained from Schneider Electrics and Olympus in 2008?*

[21] On the same date, Mr Holmes provided the Chairperson with the following emailed response:

*Just confirming timing and status of development at Ferntree BP as follows:*

- *2006 – Demolition of 3 x existing warehouses to facilitate development on part of the site in accordance with the masterplan at that time;*
- *2007 – Completion of Heidelberg Facility*
- *2008 – No construction activity due to no leases being signed;*
- *2009 – No construction activity due to no leases being signed;*
- *2010 – No construction activity due to no leases being signed;*
- *2011 – No construction activity due to no leases being signed;*
- *Feb 2012 – Building B commenced (following signed agreement with Schneider Electrics);*
- *July 2012 – Building C commenced (following signed agreement with Olympus);*
- *Sept 2012 – Building F commenced (following signed agreement with Draeger);*

*Hope this clarifies the timing of the development at Ferntree BP.*

[22] In accordance with the agreement reached at the hearing on 19 September 2012, by letter sent by email on 26 September 2012, the Chairperson referred the above responses from Mr Holmes to the parties for their comment. Each party was requested to advise the Panel *in writing no later than 4.00 p.m. on Tuesday, 2 October 2012 –*

- whether it wished to make any further submissions in relation to these matters, and/or
- whether it wished to make such submissions in writing or at a hearing before the Panel, and/or

- whether it was prepared to have the matters determined by the Panel without further submissions and/or hearing.

[23] By email dated 28 September 2012, Qanstruct advised the Panel that it did not “*wish to make any further submissions regarding the site allowance of the Ferntree Business Park, and hence would prefer for the panel to determine the matter*”.

[24] By email dated 1 October 2012, the Master Builders Association of Victoria (“the MBAV”), which had represented Qanstruct and Hansen Yuncken during the course of the proceedings before the Panel, advised the Panel that it did not “*wish to make any further submissions on behalf of Hansen Yuncken or Qanstruct*”. It further stated:

- that the material contained in the response from Mr Holmes *confirms that there is no substantive change to the details or scope of the works being performed as discussed by the parties*: and
- that Hansen Yuncken and Qanstruct relied on the submission made on their behalf on 29 September 2012 and maintained that the test outlined in the decisions of the former Australian Industrial Relations Commission (“the AIRC”) in *CDK Commercial Construction Pty Ltd and Construction, Forestry, Mining and Energy Union* [PR974122] (“the CDK decision”) and in *Bovis Lend Lease Pty Ltd v Construction, Forestry, Mining and Energy Union* [PR975618] (“the Bovis Lend Lease decision”) “*is most relevant in order to determine each of the value of works being undertaken by the contractors and the appropriate site allowance*”.

[25] By email dated 2 October 2012, the CFMEU advised the Panel that it did “*not wish to make any further submissions*” and that it was “*prepared to have this matter determined by the Panel without further submissions and/or hearing*”.

[26] The Panel, therefore, notes that no party has sought to contest the factual nature of the information provided by Mr Holmes.

[27] Central to the determination of the disputes is how the word “*project*” is to be defined in the context of the term “*project value*” as it appears in Appendix C of each Agreement. The definition consistently applied by the Panel is the definition contained in a decision of the former AIRC in the *CDK decision* and affirmed in another decision of the former AIRC in the *Bovis Lend Lease decision*. At the hearing on 19 September 2012, the parties each confirmed to the Panel that they agreed that this was the appropriate definition to be applied in the determination of these matters. The MBAV, in its email of 1 October 2012, further confirmed that Qanstruct and Hansen Yuncken maintained that approach.

[28] In each of these decisions of the AIRC, a “*project*” was defined as being “*an enterprise carefully planned to achieve a particular result, that has a clearly established entity or entities that exercise control over its development and that has a scope sufficiently definable at any given point in time to enable its proper definition and costing for the purpose of determining the appropriate site allowance*”.

[29] This definition has a number of elements. Each element must be satisfied for a site or combination of sites to qualify as a “*project*”. If one element is not satisfied, the site or combinations of sites does not qualify as a “*project*”. The site or combination of sites -

- must constitute “*an enterprise carefully planned to achieve a particular result*”; and
- must have “*a clearly established entity or entities that exercise control over its development*”; and
- must have “*a scope sufficiently definable at any given point in time to enable its proper definition and costing for the purpose of determining the appropriate site allowance*”.

[30] What, therefore, in the circumstances of this case, constitutes the “*project*” within the meaning of that word as it appears in Appendix C of each Agreement? Is it the redevelopment of the Ferntree Business Park? Is it the combination of the two sets of construction works which are the subject of these disputes? Is it the

combination of those sets of construction works together what is now described as the Draeger site? Is each set of construction works an independent and separate project?

[31] On the material available to the Panel, it is clear that the redevelopment of the Ferntree Business Park has been the subject of at least two masterplans. It is not disputed that the redevelopment commenced some 6 years ago. On the evidence of Mr Holmes, it commenced with the demolition of some of the then existing buildings “to facilitate development on part of the site in accordance with the masterplan at that time”. The construction of one building then followed and the redevelopment has proceeded sporadically subject to ongoing assessment of its commercial viability. There is no apparent schedule for the completion of the redevelopment. There is no settled form for the redevelopment. Whatever form it may eventually take is dependent entirely on market demand and commercial viability. Such a conclusion is supported by the existence of the different masterplans and the changing nature of the redevelopment.

[32] If the meaning of the word “*project*” were to encompass some enterprise, vision or grand plan of an indeterminate nature, then the redevelopment of the Ferntree Business Park might be properly described as a “*project*”. However, to qualify as a “*project*”, the redevelopment must be “*an enterprise carefully planned to achieve a particular result*”. In the view of the Panel, the redevelopment of the Ferntree Business Park cannot be viewed as such. Rather the design and planning of its content has changed from time to time with a view to the achievement of a general result, namely the creation at some unspecified time in the future of a business park consisting of modern commercial office space within a landscaped environment. This is to be achieved by the construction and/or refurbishment at different times over a relatively indefinite but apparently lengthy time frame of a series of buildings, car parks and associated facilities in accordance with a market driven and largely dynamic masterplan. [See the *Bovis Lend Lease decision*, para [32]]

[33] The intended result may well be to transform a business park that is dominated by older style buildings into a modern campus-style business park. The car park under construction may well be being built to service the occupants of more than one of the buildings under construction and/or existing and future buildings. The café

proposed to be included in one of the buildings currently under construction may be being promoted and intended as a facility available to all occupants of the existing development or future redevelopment. But the mere construction of some buildings and provision of some facilities for development-wide use is insufficient. More is required to demonstrate careful planning to achieve a particular result. Bearing in mind the apparently changing nature of any masterplan, the sporadic nature of the construction of new buildings and facilities and the very market driven nature of the redevelopment, it is understandable that there is no evidence of a value having been ascribed to the redevelopment. Any assessment of such a value could, at best, be notional.

[34] Nor does the combination of the two construction sites the subject of these disputes constitute a “*project*” for the purpose of Schedule C of each Agreement. Each site individually is a “*project*” in its own right as each is an enterprise carefully planned to achieve a particular result, namely the construction of a specific building and car park in the one case and a specific building in the other case. The construction of each has been brought about by the obtaining of a commitment for occupancy. Even if taken together, their simultaneous construction is a matter of coincidence rather than design. The concurrent nature of their construction does not render them one enterprise, let alone one enterprise carefully planned to achieve a particular result. They are and have been planned as the construction of separate individual buildings as part of the redevelopment of the Ferntree Business Park, an enterprise which itself is not carefully planned to achieve a particular result.

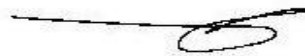
[35] Secondly, the “*project*” must have “*a clearly established entity or entities that exercise control over its development*”. The Panel accepts that the control over the development of the “*project*”, in so far as it can be described as the redevelopment of the Ferntree Business Park, is being exercised by a single entity, namely Goodman. The control over the “*project*” in so far as it can be described as either the combination of the two construction sites the subject of these disputes or each individual construction site may reasonably be argued to be Goodman. The mere fact that there are individual building companies involved in respect to the construction sites does not necessarily mean that the control over the development is not exercised by Goodman. Further, it should be noted that the definition refers to “*entity or*

*entities*". But satisfaction of this one element of the definition is not enough. All elements of the definition must be satisfied.

[36] Thirdly, the "*project*" must have "*a scope sufficiently definable at any given point in time to enable its proper definition and costing for the purpose of determining the appropriate site allowance*". It is not unusual in a development project for the scope of that project to vary during its life, particularly where the development takes place over a number of years and the scope and nature of the development is market driven and relies upon commercial viability. In order to value a "*project*" and determine the appropriate site allowance, it must be possible to ascertain with a degree of certainty what works are included in the "*project*".

[37] On the basis of the material before the Panel, it is not possible to ascertain with any degree of certainty the totality of the works that may be included in the redevelopment of the Ferntree Business Park. Some construction works at the Ferntree Business Park were commenced in 2006 and have been completed. Some are currently being carried out. At least one other set of works, if not already commenced, is about to be carried out. But there is no evidence of any specific plan for other construction works to be commenced in the near future or at all. The "*project*" in so far as it is constituted by the redevelopment of the Ferntree Business Park does not consist solely of the works currently being carried out, namely those works which are the subject of the disputes before the Panel. The "*project*" is the redevelopment of the Ferntree Business Park as a whole. As that redevelopment is being carried out on a sporadic basis subject to the vagaries of market demand, it is not possible to conclude that the "*project*" has "*a scope sufficiently definable at any given point in time to enable its proper definition and costing for the purpose of determining the appropriate site allowance*". Indeed, as stated earlier, the changing nature of the masterplan and the market driven nature of the redevelopment means that any value placed upon the redevelopment would, at best, be notional.

[38] For these reasons, the Panel has concluded that, in the circumstances of these disputes, the requisite elements of the accepted definition of "*project*" have not been made out and has reached the decision set out above.



***Simon Williams***  
***Chairperson***

***Fergal Doyle***  
***Panel Member***

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

**Date: 3 October 2012**