VBIDP

VICTORIAN BUILDING INDUSTRY DISPUTES PANEL

CHAIRMAN: SIMON WILLIAMS

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LEIGHTON CONTRACTORS PTY LTD

-and-

CFMEU

RE: NON PAYMENT OF LIVING AWAY FROM HOME ALLOWANCE

13 September 2011

027-2011

DECISION

[1] On 25 August 2011, the Construction Forestry Mining and Energy Union ("the CFMEU") notified a dispute between it and Leighton Contractors Pty Ltd ('the employer") concerning the alleged non payment of living away from home allowance to one of the employer's employees at the Macarthur Wind Farm Project ("the project").

[2] The matter was originally listed for hearing before the Panel on 31 August 2011 but that hearing, at the employer's request, was adjourned to 7 September 2011.

[3] The CFMEU and the employer are named as parties bound by the provisions of the *Leighton Contractors Pty Ltd Macarthur Farm Civil Works Agreement 2010* ("the Agreement") [AE883111; PR505362] and the *Building and Construction General On-site Award 2010* ("the Award") [MA000020; PR 986361]. The Agreement operates is a greenfields agreement made under Chapter 2 – Part 2-4 of the *Fair Work Act 2009* in respect to the employer's civil engineering works on the project.

[4] The Panel is satisfied from the information before it that the prerequisites as set out in Clause 12 of the Agreement for referral of the dispute to the Panel have been met.

[5] Clause 24 of the Award, in so far as is relevant, makes the following provisions in relation to qualification and entitlement of a living way from home allowance:

24.1 Qualification

(a) *This clause operates when an employee is employed on construction work at such a distance from the employee's usual place of residence or any separately maintained residence that the employee cannot reasonably return to that place each night, provided that:*

(i) *the employee is not in receipt of relocation benefits;*

(ii) *the employee is maintaining a separate place of residence to which it is not reasonable to expect the employee to return each night; and*

(iii) *the employee has provided the details of their usual place of residence, or any separately maintained address to the employer.*

(b) *The employee is not entitled to payment under this clause if the employee has knowingly made a false statement regarding the details required in clause 24.2.*

24.2 Employee's address

(a) *On engagement, an employee must provide the employer with their address at the time of application, the address of any separately maintained residence and, if requested, reasonable documentary proof of those details.*

(b) *No subsequent change of address will entitle an employee to the provisions of this clause unless the employer agrees.*

24.3 Entitlement

> ***(a)*** *Where an employee qualifies under clause 24.1 the employer will:*
>
> > ***(i)*** *pay a living away from home allowance of $413.78 per complete week. In the case of broken parts of the week the living away from home allowance will be $59.20 per day. This allowance may be increased if the employee satisfies the employer that the employee reasonably incurred a greater outlay than that prescribed; or*
> >
> > ***(ii)*** *provide the worker with reasonable board and lodging in a well kept establishment with three adequate meals each day; or*
> >
> > ***(iii)*** *where employees are required to live in camp, provide all board and accommodation free of charge.*
>
> ***(b)*** *The accommodation provided will be of a reasonable standard having regard to the location in which work is performed, including the provision of reasonable ablution/laundry, recreational and kitchen facilities, as well as reasonable external lighting, mail facilities, radio or telephone contact and fire protection.*

[6] Clause 34 of the Agreement, in relation to qualification and entitlement of a living away from home allowance provides as follows:

> ***34.1 LIVING AWAY FROM HOME ALLOWANCE***
>
> *34.1 At the time of engagement to the Project, Employees will be required to provide proof of their normal place of residence, prior to commencing on the Project. No subsequent change of address will entitle the Employee to a Living Away From Home Allowance (**LAFHA**).*
>
> *34.2 An Employee who does not nominate an address will be deemed to reside locally.*
>
> *34.3 An Employee in receipt of LAFHA will only receive the Fares and Travel Allowance when the Employee is required to use his or her own transport to travel to and from the Project site and meets the requirements for the payment.*
>
> *34.4 LAFHA will be paid at the rate of $99.70 per day or $698.00 per week of 7 days.*
>
> *34.5 LAFHA will be adjusted in line with the annual wage increase, at the same time and by the same percentage calculated to the nearest $0.10.*

[7] Clause 5 of the Agreement, in relation to relationship between the Agreement and the Award, provides as follows:

5. RELATIONSHIP TO AWARD & THE NATIONAL EMPLOYMENT STANDARDS

*5.1 This Agreement operates to the exclusion of all awards that would otherwise apply. However, any term of the Building and Construction General On-Site Award 2010 (**Award**) that provides a greater entitlement to an Employee, will apply in respect of the Employee as if it were contained in this Agreement but will not form part of this Agreement.*

5.2 Where there is an inconsistency between the Award and this Agreement, the term providing the greater entitlement to the Employee will prevail.

[8] From the information provided to the Panel, the Panel is satisfied:

- that the employee was, until approximately 10 months ago, engaged as an employee of a sub-contractor on work relating to a site in Melbourne;
- that, as the work relating to the site in Melbourne was coming to an end, the employee enquired of the principal employer (Leighton) as to the availability of employment with the principal employer;
- that the employer informed the employee of the availability of work on the project and that, if the employee took up work on the project, he would be "looked after";
- that the employee applied for and obtained employment on the project;
- that, at the time of engagement to the project, the employee advised the employer that his usual or normal place of residence was Torquay;
- that the employee on the first few days on which he was employed on the project resided in a motel in Port Fairy, some 45 minutes drive from the project;
- that the employee has subsequently occupied a residence in Port Fairy; and
- that, since commencing employment on the project, the employer has not paid the employee any living away from home allowance.

[9] The employer contends that the Agreement must be read in conjunction with the Award, that in respect to qualification and entitlement to a living away from home allowance, the Award "does most of the work" and that, on a strict reading of the Award, no living away from home allowance is payable in

this case as the employee in question is maintaining a separate place of residence in Port Fairy to which he could reasonably return each night.

[10] There does appear to be some confusion as to the interaction between the Award and the Agreement. Clause 5.1 of the Agreement initially excludes the operation of the Award but then allows for more favourable Award entitlements to apply as if "*contained*" in the Agreement but not forming part of the Agreement. Clause 5.2 of the Agreement provides that in the case of an inconsistency between the Award and the Agreement, the more favourable provision is to apply.

[11] The approach to the construction of an industrial instrument is well settled. The language of the instrument is to be understood in light of the industrial context and purpose. [*Amcor Limited v Construction, Forestry, Mining and Energy Union* ("*Amcor*") (2005) 222 CLR 241, (Gleeson CJ and McHugh J) at [2]] Consideration of context requires regard to the text of the clause, the text and operation of the instrument as a whole and by reference to other particular provisions and the legislative background of the instrument. [*Amcor*, (Gummow, Hayne and Hayden JJ) at [30]].

[12] The following passage from the judgement of Madgwick J in *Kucks v CSR Limited* (1996) 66 IR 182, at 184 ("*Kucks*") provides further guidance in relation to these principles of construction.

> *It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with an expression and intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite near inconsistencies or infelicities of expression which might tend to some other reading. Any meanings which avoid inconvenient or injustice may reasonably be strained. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand. But the task remains one of interpreting a document produced by another or others. A Court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinarily or well-understood words are in general to be accorded their ordinary or usual meaning.*

[13] Clause 34 of the Agreement does not appear to deal with the issue of "qualification" for an entitlement to payment of a living away from home allowance. If recourse is then had to Clause 24.1 of the Award, it is then apparent that the initial pre-requisites for an entitlement to payment of a living away from home allowance are that:

- the employee is employed on construction work and the construction work is located at such a distance from the employee's usual place of residence that the employee cannot reasonably return to that place each night, *or*
- the employee is employed on construction work and the construction work is located at such a distance from a residence separately maintained by the employee that the employee cannot reasonably return to that place each night.

[14] The provisos contained in Clause 24 are apparently intended to add further preconditions. However, the proviso contained in Clause 24.1(a)(ii) does not appear to add anything to the initial pre-requisites. Strictly applied, it would mean that no entitlement would arise if the employee had a usual place of residence but did not have a separate place of residence to which it is not reasonable to expect the employee to return each night. Such a construction would be contrary to the evident purpose of the clause, namely that, where an employee is required to live away from what may be accepted to be that employee's "home", an allowance is payable. Further, such an approach to the construction of the clause would not allow for payment of a living away from home allowance if an employee, subsequent to engagement with an employer, obtained accommodation closer to the job whilst still retaining the employee's usual place of residence.

[15] Applying accepted principles of construction, the provisions of Clause 24.1 of the Award must be read in the context of the whole clause. The Panel does not consider that such a construction as that advanced on behalf of the employer is consistent with the requirements of Clause 24.2 of the Award. Nor is it consistent with the provisions of Clause 34.1 of the Agreement. The determination as to qualification for the entitlement for the allowance is to be made at the time of engagement. In this case, it is clear that, at the time of engagement, the employee maintained a usual place of residence that was located at such a distance from the project that he could not reasonably be expected to return each night to that place.

[16] The employer's contention that no claim to such an entitlement was raised for some 10 months after the employment commenced is irrelevant. Even if the Panel were accept that the employee had not queried the non payment of the allowance until recently, the entitlement to payment of such an allowance either exists or it does not.

[17] On the material available to the Panel, the Panel is satisfied that the employee concerned is entitled to payment of a living away from home allowance from the time that he commenced employment on the project.

SIMON WILLIAMS
CHAIRMAN

FERGAL DOYLE
PANEL MEMBER

DANIEL HODGES
PANEL MEMBER

DATE: 13 SEPTEMBER 2011