



**VICTORIAN BUILDING INDUSTRY DISPUTES PANEL**  
**CHAIRMAN: BOB MERRIMAN**

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**CAELLI CONSTRUCTIONS**

**ASIAN PACIFIC - CHAPEL STREET PROJECT**

**-and-**

**CFMEU**

**RE: ALLEGED NON PAYMENT OF WAGES**

**TUESDAY 24 MARCH 2009**

**029-2009**

**DECISION**

On 29 January, 2009, the Union presented submissions relating to an incident which occurred on 10 December, 2008 which led to the withholding of four (4) hours normal pay for workers employed by the above contractor. In addition the Union submitted that some workers should also be in receipt of double time for safety rectification.

The Union submitted that on 10 December, 2008 the safety representative requested the involvement of a Union organiser to attend the project and in the company of the Safety Committee to view a safety deficiency relating to scaffolding. To this end, an "all in" safety walk was undertaken specifically for the purpose of inspecting a "6-12" inch gap between the scaffolding and the structure which was seen to constitute an immediate risk due to the potential for falling objects.

The Union stated that those involved in the inspection including management representatives agreed that there was an immediate risk and as a result workers were evacuated floor by floor from the top of the building down to the third floor and then into the amenities sheds. Once again, the Union submitted that this process was by agreement with management.

The Union further submitted that the processes clearly followed the provisions of clause 16 with regard to safety rectification mechanisms and as a consequence did not constitute unlawful action and in turn complied with the enterprise agreement. It was further stated that two basement levels remained opened for productive work and that the contractor's employees remained in the sheds as a consequence of a direction from the contractor.

Following smoko the top floor re-opened for productive work and progressively the whole project resumed normal work.

Other principal and sub-contractor employees were paid as they continued working on alternative activities as directed by their management which were not subject to safety concerns and therefore were not involved in this matter.

Management's representative submitted that no agreement had been reached to withdraw employees from productive work and that Management had been unaware of the Union representative's involvement and events until employees were actually in the sheds.

Management also referred to the lack of consultation and due process during the course of the dispute relating to the provisions laid out in Clause 16 - Procedure for Dealing with Safety Issue or Incidents specifically relating to the claim as to -

- Degree of risk
- Potential for items to fall off edge through gap
- Immediate risk.

The Management representative stressed the lack of consultation and the fact that the approach taken during the course of the events was inappropriate and indeed was industrially motivated. No instructions were available relating to the double time payment for safety rectification.

Subsequent to the conclusion of the hearing the Union made contact with the Panel and advised that a document referred to in the course of submissions was now available for consideration by the Panel and as a consequence was forwarded to the Panel by way of facsimile.

Having considered the further documentation the Chairman determined that a further hearing should be convened to enable matters referred to, to be now canvassed by the parties.

To this end, further hearings were scheduled, however they were unable to proceed due to availability issues and thus the matter was listed for a final hearing on Tuesday 24 March 2009.

At the outset of the hearing on 24 March 2009 the Chairman referred to correspondence received on 23 March from the MBAV on behalf of its member Caelli which reiterated concerns expressed in earlier correspondence to the affect that Management disagreed strongly with regard to the claim that there was "an immediate risk" and advising that the contractor would not be attending the hearing due to the continuing investigation of the matter by the Australian Building and Construction Commission (ABCC).

The Chairman advised the parties that it was the Panel's intention to proceed and determine the matter in accordance with the requirements of the Panel's Charter.

The principal contractor OHS Manager who was present at the hearing clarified details contained in his revised incident notification report dated 15 December 2008. The Panel is satisfied that the report constitutes a factual and accurate description of events as they occurred during the course of the dispute.

Having considered the submissions presented, the Panel forms the following view:-

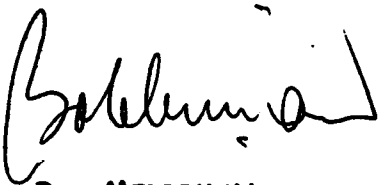
- There was agreement by the safety inspection party that an "immediate risk" was present on the upper levels which would have impacted on employees engaged from level 5 down.
- Safe alternative work areas were available for all employees in the basement levels.
- All employees other than Caelli continued working and thus were not affected by the dispute.
- Caelli employees were not directed by their management to relocate to the alternative work areas.
- An agreed safety rectification procedure was put into place which subsequently led to the progressive "opening up" of productive work areas.

Given the documented conclusion that employees were confronted by an immediate risk, the Panel concludes that employees did in fact have "reasonable concern" for their health and safety and on the day were confronted by the presence of an "imminent risk" as specified in clause 36(1)(g) of the B.C.I.I. Act 2005.

Further, to activate Section 507 of the Workplace Relations Act which involves a minimum deduction of 4 hours pay, Section 42 of B.C.I.I. Act requires under paragraph 1(a) that the building industrial action must be industrially motivated.

The Panel finds that the stoppage was not industrially motivated but occurred as a result of a real concern for their safety by the workforce which was not denied by the employer representatives on site, and was fully supported by the principal contractor's Health and Safety Manager

The Panel can only conclude that an immediate risk was present and that the 4 hours normal time wages should be reinstated for all employees of the subcontractor who remained on site. The employees engaged in safety rectification should be paid the appropriate penalty rate for such time as provided for in the contractors EBA.



**BOB MERRIMAN**  
CHAIRMAN



**PETER KNIGHT**  
PANEL MEMBER



**BILL DAVIS**  
PANEL MEMBER

DATED THIS

24

DAY OF

March, 2009