

CHAIRPERSON

VICTORIAN BUILDING INDUSTRY DISPUTES PANEL

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CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

AND

GROCON PTY LTD

MCNAB AVENUE FOOTSCRAY

**RE: DETERMINATION OF PROJECT VALUE FOR
CALCULATION OF PROJECT ALLOWANCE**

2 November 2012

031-2012

DECISION

DECISION OF THE CHAIRPERSON

A. In respect to the construction work being performed by Grocon at McNab Avenue, Footscray, the decision of the Chairperson is that the project value for the purposes of calculating the appropriate project allowance pursuant to Appendix C of the *Grocon Victoria Workplace Agreement 2011-2015* is no less than \$350 million.

B. It follows from the above that:

1. as from 1 May 2012 until 30 September 2012, the appropriate project allowance was \$4.00 per hour;
2. as from 1 October 2012 the appropriate project allowance has been \$4.10 per hour; and

3. that such project allowance is to be adjusted as required from time to time in accordance with the provisions of the *Grocon Victoria Workplace Agreement 2011-2015*.



Simon Williams
Chairperson

2 November 2012

REASONS FOR DECISION

[1] On 24 October 2012, the Construction Forestry Mining and Energy Union (“the CFMEU”) notified a dispute between it and Grocon Pty Ltd (“Grocon”) regarding the project value for the purposes of calculating the appropriate project allowance pursuant to Appendix C of the *Grocon Victoria Workplace Agreement 2011-2015* (“the Agreement”) [Agreement ID: AE894662; Print No:PR525057] in respect to the construction work being performed by Grocon at McNab Avenue, Footscray (“the McNab Avenue project”).

[2] Clause 3 of the Agreement provides that the parties to the Agreement are a number of Grocon companies and “*the Employees as defined in clause 4.1(a)*” of the Agreement.

[3] The Grocon companies named in the Agreement are Grocon Pty Ltd, Grocon Lubeca Systems Pty Ltd, Grocon Constructors Pty Ltd, Grocon Australia Pty Ltd, Grocon Developments Pty Ltd, Grocon Operations Pty Ltd, Grocon Docklands Pty Ltd, Grocon (Victoria Street) Pty Ltd, Grocon Builders Pty Ltd and Grocon Builders (VIC) Pty Ltd. For the purposes of the Agreement, they are collectively referred to as “*the Company*”.

[4] Clause 4.1(a) of the Agreement provides that the Agreement “*will apply to and be binding upon the Company, the Union and all employees engaged on the Company's building and construction projects in the State of Victoria (the employees)*”.

[5] It is not disputed that the Agreement applies to the work being done at the McNab Avenue project.

[6] For present purposes, it is appropriate to treat the dispute as being between the CFMEU and Grocon in whatever manifestation the latter may choose to present itself in respect to the McNab Avenue project. On its website, Grocon does not seek to distinguish in any way between the various entities that apparently constitute what it describes itself as Grocon to be, namely “*the largest privately owned development construction and investment company in Australia*”.

[7] The application for approval of the Agreement by Fair Work Australia (“FWA”) was made by Grocon Pty Ltd. The Agreement is described in the decision of FWA to approve the Agreement as a “*single-enterprise agreement*” [[2012] FWAA 5003; PR525057]. A “*single-enterprise agreement*” is one that may be made by an “*employer or 2 or more employers that are single interest employers*” [S.172(2) *Fair Work Act 2009*]. Two or more employers are “*single interest employers*” if (a) the employers are engaged in a joint venture or common enterprise; or (b) the employers are related bodies corporate; or (c) the employers are specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned [S172(5) *Fair Work Act 2009*]

[8] The title of the Agreement itself recognises the use of the word “*Grocon*” as an all encompassing description of the operations of the Grocon group of companies. The frontispiece of the Agreement carries the singular Grocon logo and describes the Agreement as being between “*Grocon*” and members of the CFMEU. Finally, as stated above, the parties to the Agreement include some 9 Grocon companies in addition to Grocon Pty Ltd and all entities are lumped together and identified for the purposes of the Agreement as “*the Company*”.

[9] Clause 6.4 of the Agreement provides that project allowances “*shall be paid in accordance with the formula which appears in Appendix C*”. The relevant formula as set out in clause 7.2 of Appendix C of the Agreement provides for a project allowance to be calculated in accordance with “*project value*”.

[10] In respect to the resolution of disputes about a project allowance, Appendix C provides as follows:

11. *In all cases where the parties fail to reach agreement on the Project Project [sic] allowance to apply to a particular site or project, then such disagreement shall be referred to the Chairperson of the Victorian Building Industry Disputes Panel for determination.*
12. *Any project allowance that is determined in accordance with 11 above shall be incorporated into the Agreement in accordance with the Fair Work: Act 2009. In determining the rate, the Panel Chairperson shall have regard to the Project allowance Guidelines, and shall not deviate from these guidelines unless there are special and exceptional circumstances*

[11] By email sent to Grocon on 19 October 2012, the CFMEU requested Grocon to advise it as to what project allowance was being paid to employees at the McNab Avenue project prior and subsequent to 1 October 2012. An email response from Grocon on the same day stated that the project allowance paid prior to 1 October 2012 was \$3.50 per hour (based upon a project value of between \$67.3 million) and from 1 October 2012 has been \$3.70 per hour (based upon a project value of between \$71.1 million and \$142.3 million).

[12] By email sent to Grocon on 22 October 2012, the CFMEU raised concerns about Grocon’s calculations as set out in its email of 19 October 2012 and suggested that, even if the relevant project value was as set by Grocon, the applicable project allowances had not taken into account the adjustments required by the Agreement and its predecessor. More importantly for the determination of the matter before me, the CFMEU asserted that the correct project value of the McNab Avenue project is and was at all material times \$350 million and requested Grocon to inform it whether or not it intended to adjust its valuation of the project to that amount.

[13] An email response from Grocon sent on 24 October 2012 stated, amongst other things, that Grocon was currently working on Stage 1 of the McNab Avenue project, that Stage 1 is a stand alone project and that the relevant project value of between \$71.1 million and \$142.3 million was correct.

[14] There is clearly no agreement between the parties as to what is the appropriate project allowance to apply to the McNab Avenue project. The dispute between the parties is in effect as to what is to be identified as the “*project*” for the purposes of determining the “*project value*” and therefore the appropriate project allowance. Is the “*project*” the whole of the McNab Avenue project with a “*project value*” of \$350 million as asserted by the CFMEU or is it Stage 1 of the McNab Avenue project with a “*project value*” \$85 million as asserted by Grocon?

[15] At the hearing of this matter on 31 October 2012, the CFMEU tendered a substantial amount of material in support of its contention that value of the McNab Avenue project as a whole should constitute the project value for the purposes of determining the appropriate project allowance.

[16] I was referred to material appearing on the Grocon website which states that the McNab Avenue project is “*a new Melbourne landmark, designed collaboratively from detailed observations of the area which respond to its physical, community and strategic position, as well as to key views and movement corridors*”, that the “*aim of the project is to deliver a contemporary, dynamic and diverse precinct that will set a new benchmark for mixed use development; one that is contextually responsive, has interesting and innovative architecture and will integrate a variety of retail, commercial, residential and community activities*”. The website identifies the McNab Avenue project as being in Grocon’s Project Portfolio with a contract value of \$350 million and a completion date of 2013.

[17] The Grocon website also states that the McNab Avenue project is “*a \$350m mixed use development being delivered in partnership with the Victorian Government as part of the revitalisation of the Footscray Central Activity Area. This revitalisation will contribute jobs and residents to the heart of Footscray, adjacent to the train station. McNab Avenue Stage One is a 20,000m², 14 level, A Grade office building*

which commenced construction in mid 2012 and will be completed by mid 2014. Victorian Government tenants State Trustees and City West Water are the anchor tenants for the building. Stage 2 will comprise contemporary residential apartments, including housing for students, retail and community uses and will commence construction sometime in 2013”.

[18] Included on the Grocon website is a media release dated 24 August 2012 concerning the start of construction of the McNab Avenue project. In that media release, Mr Daniel Grollo, Grocon CEO, is quoted as stating that *“Stage Two of the project would provide residential apartments, retail and community facilities and said Grocon hoped to have this under way in 2013”.*

[19] The website of the Department of Planning and Community Development (“the DPCD”), updated as at 3 August 2012, refers to the McNab Avenue project as *“a landmark \$350 million development”* and states that Grocon has been appointed to deliver the development by 2014. The DPCD website also contains a “Fact Sheet” in relation to the McNab Avenue development which again refers it as being *“a landmark \$350 million development”*. In describing the features of the development, the “Fact Sheet” states:

In the setting of the state heritage significant Railway Reserve, McNab Avenue is a 1.3 hectare site in the heart of the Footscray CAD. It will incorporate A Grade government office space, residential and affordable housing, student accommodation and other commercial and community uses in a 5 Star Green Star development.

[20] I note also that both the Grocon website and the DPCD website carry identical artist’s impressions of the McNab Avenue project.

[21] Newspaper articles in the *Maribyrnong Weekly* and *Footscray-Yarraville Star* concerning the start of Stage 1 construction of the McNab Avenue project also refer to it as a \$350 million development. A media release from the Victorian Premier dated 23 August 2012 identifies the start of Stage 1 as the start of construction of a \$350 million development which is located on 1.3 hectares within the Footscray Station precinct. Hansard records that, in Parliament on 28 August 2012, the Minister for Planning identified the beginning of Stage 1 as being the beginning of \$350 million

worth of investment. Finally, the 2010/2011 Annual Report of VicUrban also identifies the McNab Avenue project as being a \$350 million development.

[22] The term “*project value*” is commonly used in enterprise bargaining agreements applying to building and construction projects in Victoria as part of the formula for determining appropriate project allowances. The proper approach to the determination of how the word “*project*” is to be defined in the context of the term “*project value*” was discussed in some detail in a recent decision of a Full Panel of the Victorian Building Industry Disputes Panel (“the *Ferntree Business Park* decision” [3 October 2012]). The consistently applied definition is that contained in a decision 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 affirmed in another decision of the former AIRC in *Bovis Lend Lease Pty Ltd v Construction, Forestry, Mining and Energy Union* [PR975618] (“the *Bovis Lend Lease* decision”). At the hearing before me, it was accepted that this was the appropriate definition to be applied in relation to this matter.

[23] In each of the 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*”.

[24] As was pointed out in the *Ferntree Business Park* decision, the definition has a number of elements, each element must be satisfied for a site or combination of sites to qualify as a “*project*” and, if one element is not satisfied, the site or combinations of sites does not qualify as a “*project*”. The three elements are that 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*”.

[25] On the material available to me, I am satisfied that the McNab Avenue project is “*an enterprise carefully planned to achieve a particular result*”. The project may contain separate components and the construction may be being conducted in two stages. These factors do not denigrate from the fact that the total project is being carried out with the specific intent of achieving a singular and particular result, the construction of a mixed use development consisting of office accommodation with retail outlets, student dwellings, private apartments, affordable housing dwellings and a gym, child care centre and community hub within a community garden. There is no suggestion that the staged development is dependent upon market forces or commercial viability. There is no intention that the construction of the project is to proceed sporadically. On the contrary, there is a clearly expressed scheduled date for completion.

[26] Further, it appears from the material before me that the entire 1.3 hectare site has been fenced off. This unequivocally suggests a clear intention to carry out the proposed development of the whole site.

[27] In the material before me it has been stated more than once that Grocon has been appointed to deliver the McNab Avenue development. Grocon’s CEO has acknowledged Grocon’s involvement in Stage 2 of the development. In the light of those statements, it would appear to be somewhat disingenuous on Grocon’s part to attempt to have the project value determined by the value of Stage 1 of the project because the Grocon entity that is involved in the construction of Stage 1 may not be the same Grocon entity as is or will be involved in the construction of Stage 2..

[28] In any event, whether or not the Grocon entity that is constructing Stage 1 has been or will be appointed to construct the whole or part of Stage 2 is irrelevant. Whether or not Stage 2 is constructed by a builder other than any of the Grocon entities is also irrelevant. It is not the existence of a contract or more than one

contract which determines whether a project is “*an enterprise carefully planned to achieve a particular result*”. Such an enterprise could involve numerous construction contractors. In this case, the enterprise is the McNab Avenue project in its entirety. It is that project which has been carefully planned to achieve a particular result. It is proposed to be completed in 2 clearly defined and scheduled stages. All the material before me compels me to the conclusion that there has been a consistent approach by government and others to bring about a particular result whomsoever may be engaged to achieve that result.

[29] I am satisfied that the McNab Avenue project has “*a clearly established entity or entities that exercise control over its development*”. The control over the development of the “*project*” is exercised by the Victorian Government in conjunction with Grocon.

[30] I am satisfied that the McNab Avenue 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*”. It is possible in this case to ascertain with a degree of certainty what works are included in the “*project*”. Although this is a staged development, the stages are clearly defined. The value of the project as a whole is not merely notional but is readily ascertainable. That value has been consistently and repeatedly expressed as being \$350 million.

[31] For these reasons, I have concluded that, in the circumstances of this matter, the requisite elements of the accepted definition of “*project*” have been made out and I have reached the decision set out above.



Simon Williams
Chairperson

Date: 2 November 2012