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2 CONSTRUCT PTY LTD
SWANSTON STREET UPGRADE

CFMEU

RE: APPROPRIATE SITE ALLOWANCE

27 OCTOBER 2011

DECISION

037-2011

[1] On 13 October 2011, the Construction, Forestry, Mining and Energy Union ("the CFMEU") lodged a notification concerning a dispute between it and 2 Construct Pty Ltd ("the employer") over the appropriate site allowance payable pursuant to the provisions of Appendix C to the *2 Construct Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2008-2011* ("the Agreement") [Agreement ID: AC316708] in respect to work being performed on the Swanston Street Upgrade.

[2] The Swanston Street Upgrade is a project of the Melbourne City Council and involves a significant redevelopment of Swanston Street which, it is proposed, will see that Swanston Street becomes a car-free thoroughfare, open only to pedestrians, cyclists and trams. The plan includes four new public spaces, improved cycling access, universally accessible tram "super stops", flower beds, public art, lighting and street furniture. It is apparent from the material before me that the Melbourne City Council estimates that the total project cost will be $25.6 million.

[3] The employer has been involved in the first stage of the project for a contract price of $7.8 million. The first stage of the project has consisted of a street makeover in front of the State Library including the installation of a new platform tram stop between La Trobe and Little Lonsdale Streets, the lowering of the tram track and the extension of granite and bluestone pavement to the platform edge. The employer also anticipates that it will be involved in the second stage of the project at a similar contract price.

[4] The CFMEU and the employer are parties to the Agreement. Clause 7.1(a) of Appendix C of the Agreement currently provides for the payment of a site allowance for work performed on a new project within the City of Melbourne as defined in Clause 15 of Appendix C of $3.70 per hour where the value of the project is between $2.7 million and $208.6 million.

[5] There is no doubt that the work in question is being performed within the City of Melbourne as defined in Clause 15 of Appendix C. If the Agreement applies to the work in question, I am satisfied that the site allowance prescribed in Clause 7.1(a) of Appendix C would be payable. It does not matter what the value of the contract for the first stage and/or second stage is. The project value clearly exceeds $2.7 million.

[6] The employer, however, disputes that the Agreement applies to the work in question. By virtue of Clause 4 of the Agreement, the Agreement applies to the employer in respect to all of its employees engaged in building and construction work as defined by the *National Building and Construction Industry Award 2000* [AW790741]. The employer contends that, in this case, its employees are not engaged in building and construction work as defined. Further, Appendix C of the Agreement provides that the site allowance procedure applies to construction work in the commercial/industrial sector of the building industry. The employer contends that the work in question is not construction work in the commercial/industrial sector of the building industry.

[7] It is the practice of the employer to apply the provisions of the Agreement to its employees whether they are being employed in building and construction work or in civil construction work. It might be said that this is a commonsense practice where an employer commonly engages in both types of work.. In this case, the employer stated that, in respect to the employees engaged on the work in question, it is applying all the provisions of the Agreement except for the payment of the site allowance prescribed by Clause 7.1(a) of Appendix C.

[8] I accept that the application of the Agreement to civil construction work is a matter of choice for the employer. However, having regard to the employer's usual practice and the fact that it is applying to the work in question the provisions of the Agreement in every respect other than the payment of the site allowance, it would be capricious, in my view, for the employer to fail in this case to follow its usual practice. Indeed, the practice that it has followed over time might well support an argument that such a practice is now part of employees' contract of employment.

[9] In the circumstances, a determination as to whether or not the Agreement applies to the work in question is not necessary. Rather, I strongly recommend that the employer continue to follow its usual practice and, in respect to the work in question, pay to its employees the site allowance prescribed by Clause 7.1(a) of Appendix C of the Agreement.

Simon Williams
Chairman

Date: 27 October 2011