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CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CFMEU)

and

ADCO CONSTRUCTION PTY LTD (ADCO) and DELTA PTY LTD (DELTA)

RE: DISPUTE CONCERNING RECTIFICATION OF SAFETY HAZARD

Project - Kew Recreation Centre, 383 High Street, Kew

001-2023

3 February 2023

DECISION

[1] The CFMEU notified a dispute on 16 January 2023 concerning the Rectification of a Safety Hazard provisions of the applicable Enterprise Agreements and requested a Site Inspection by the Panel in the first instance.

[2] The applicable Enterprise Agreements are:

- *ADCO Group Limited, ADCO Constructions Pty Ltd and the CFMEU (Victorian Construction and General Division) Builder Enterprise Agreement 2020 – 2023* (ADCO Agreement)
- *Delta Pty Ltd T/as Delta Group and the CFMEU (Victorian Construction & General Division) Subcontractors Demolition Enterprise Agreement 2020 – 2023* (Delta Agreement)

[3] The Panel conducted a site inspection and Conference together with representatives of the parties on 18 January 2023.

[4] The Project is the construction of the new Kew Recreation Centre at 383 High Street Kew by ADCO on behalf of the City of Boroondara.

[5] The Project commenced in early 2021. On 20 October 2022 a section of the steel roof structure that had been under construction, collapsed late at night when no personnel were on site. ADCO made appropriate health and safety arrangements to close the site to any work. WorkSafe issued a non disturbance notice. No substantive work has occurred since, until works began to get underway late January 2023 in preparation to remove the collapsed steel structure and associated works (*relevant work*), as approved by WorkSafe, in order that construction works may eventually recommence.

[6] ADCO has engaged Delta to undertake the relevant work together with its own personnel and other sub-contractors.

[7] The relevant work to be undertaken will be for a presently anticipated period of some 4-5 weeks following which normal construction work will resume pending a yet to be settled construction plan. It is not presently anticipated that any other works will be conducted on the site until the "rectification" work is complete, unless WorkSafe approves same.

[8] The Dispute concerns the application of Sub clause 59.11 (Delta Agreement) and Sub clause 60.11 (ADCO Agreement) which are in identical terms as follows:
"Where, because of the existence of a safety hazard, a site has been stopped for a defined period of time and Employees sent off site by agreement between Site Managers and any combination of Union Official/s, Health and Safety Committee, those people who remain on site to do rectification work will be paid at the rate of double time for all such work."

[9] The Dispute is about whether or not the relevant work that is about to commence is considered "*Rectification of a Safety Hazard*" as provided for in the Subclauses of the Agreements and is work that should be paid at double time rates to the personnel involved.

[10] At the conclusion of the site inspection the Panel determined that the matter would proceed as follows:

1. Each party (CFMEU, ADCO and Delta) to file brief written submissions on the following matters for receipt by the Panel, copied to all parties, no later than 5.00pm on Tuesday 31 January 2023 (The Chair subsequently amended this date to Wednesday 1 February 2023*):*

a. *The intention of the parties as to the application of relevant Sub clause and the circumstances under which the Sub clause was intended to have application, and, in addition, the intended rationale for why double time is provided for under such circumstances. The Panel notes that the CFMEU intends to also rely upon expert witness evidence to be presented at the Hearing for which the employer parties will have the opportunity to cross examine.*
b. *The effect, if any, that the effluxion of time between the incident that gave rise to the necessity of the relevant works and the commencement of the relevant works, has on the application of the Sub clause.*
c. *The custom and practice in the industry as to the application of the Sub clause in circumstances where rectification of a safety hazard has been required, by*

providing actual examples and how the clause was applied or not applied as the case may be.

d. *Any other relevant matter that the party wishes.*

2. *A Hearing will be conducted on Wednesday 1 February 2023 at 1.00pm at the Panel's premises Unit 1 233 Cardigan Street, Carlton.*

[11] The Panel issued a Statement on 18 January 2023 to the above effect and noted that the Panel had been sufficiently appraised as to the incident itself and the proposed scope of the relevant works such that the Panel did not require further submissions or material from the parties in this regard.

[12] Written submissions were filed by ADCO and the CFMEU dated 1 February 2023 as requested. Delta failed to make any written submission.

[13] The Panel conducted a Hearing on 2 February 2023 which was attended by representatives of ADCO and CFMEU. Delta failed to attend the Hearing or provide any notification to the Panel.

[14] Both CFMEU and ADCO spoke to their written submissions, the CFMEU also presented oral evidence through Mr R Edwards, former President and a long time official of the CFMEU Construction & General Vic/Tas Branch, and answered questions of the Panel.

[15] The parties confirmed that they remained in dispute over the matter and requested that the Panel proceed to determine the matter.

[16] The Panel notes that Delta representatives participated in the Inspection and Conference conducted on site on 18 January 2023, at which Delta representatives provided some limited information to the Panel about other examples of Safety

Rectification work where double time penalty had been paid previously. Following the Hearing, the Chair contacted Delta's representative, Mr G Grumley who advised that Delta would rely upon the evidence before the Panel as submitted by both ADCO and the CFMEU and that it did not intend to make any submissions to the Panel and that Delta understood that the Panel would proceed to determine the matter.

[17] The Panel has considered all of the material submitted, the evidence adduced at the Hearing, the circumstances attaching to the incident and the relevant works together with the oral submissions of the parties present.

[18] The Panel in considering the application of the relevant sub-clause of the Agreements notes that the terms do not provide for an entirely plain meaning, and consequently we have, necessarily, been assisted by the material and evidence presented to reach our conclusions in this matter.

[19] Whilst the written submissions seek to traverse the entirety of the terms of the sub-clause the real basis for the dispute is in relation to the terms *"remain*" and "*rectification"* as to the circumstances of this matter. The construction of these words must be undertaken in the context of the particular circumstances and the usual or common practice.

[20] To be clear, the Panel finds that for this matter there is no question that there is an *"existence of a safety hazard"* consequent upon the collapse of the structure, and that the site work *"has been stopped for a defined period of time"* consequent upon both agreement between site managers and union officials, Health and Safety Committee and the site closure by WorkSafe. The parties have acknowledged same.

[21] For completeness the Panel had sought that the parties address it on the question of effluxion of time. The Panel finds that the time that it has taken WorkSafe to finalise decisions about access to the site for rectification works to commence should not be held

as a reason to avoid the obligations to the employees that arise from the interpretation of the Enterprise Agreements - the work is the same whether or not it is performed within days of the safety hazard occurring or months later as is the case here and has been the case in other examples brought to the attention of the Panel.

[22] What remains in dispute is the term *"……. those people who remain on site to do rectification work will be paid at the rate of double time for all such work."* (Our underline).

[23] As to the term *"remain"* it is clear from the evidence presented to the Panel that the history of the application of the sub-clause in its various iterations, consistently since 1989 in the Building and Construction Industry in Victoria, has been applied to include those people who have been engaged to undertake the rectification work of a safety hazard whether they were on site at the time of the incident or not. This has included new contractors engaged specifically to undertake specialist works intrinsic to the rectification work and/or personnel who may have been engaged on site prior to the incident. The evidence before the Panel demonstrated that in all such examples, and there were many such examples that have occurred over the years, the people engaged for such work were paid double time for the rectification work performed. Indeed, notwithstanding the Panel pressing the parties, there was no evidence able to be adduced of any example of rectification works conducted in the industry where the relevant agreements applied that such work has ever been paid at single time.

[24] ADCO also sought to represent the works to be undertaken in this matter as not *'rectification'* works but as *'demolition'* works, that is, no different to a contractor being engaged to demolish an existing structure. The Panel does not agree, as what ADCO's position ignores is that this work is qualified by the fact there has been a real and genuine safety hazard, for which rectification work is necessary for the normal construction of the project to recommence as intended. As referenced above, the Panel has not been appraised of any such works where single time has applied, ever. It is very clear that the industry,

pursuant to the application in practice of the relevant clauses in the Agreements have hitherto accepted that double time is warranted and has paid it. The Panel also considers from the evidence, that the warranting of double time arises from a very real and genuine concept that those that are engaged to undertake rectification works following a safety hazard, do so with the presence of a level of uncertainty and care that might not otherwise have applied had the hazard not occurred.

[25] The Panel also finds it constructive and relevant to this matter that in all the time the relevant clauses or similar have applied in the industry and given the extensive amount of rectification of safety hazard works that has clearly occurred over time, there has not been one dispute either before the Panel or the Fair Work Commission or its predecessors as to this matter, the industry seemingly on all fours with the unions, in paying double time for such rectification works.

[26] The Panel finds that in relation to those people engaged pursuant to the applicable Enterprise Agreements performing the relevant work must be paid the rate of double time for all such work. The Panel notes that given the circumstances of the yet to be determined works programme for normal construction to recommence, there may become a fine line as to what is rectification work pursuant to the incident itself and what might be regarded as normal construction work once the substantive rectification works near completion. In this regard the Panel is available to assist the parties should this not be able to be settled between the parties, should any issue arise.

Peter Parkinson
Chairman

Tony Cordier
Panel Member

Adrian Ziccone
Panel Member