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**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**  
**(CFMEU)**

**and**

**PRO IMAGE INTERIORS PTY LTD**  
**(PRO IMAGE)**

**AND**

**KANE CONSTRUCTIONS PTY LTD**  
**(KANE)**

**RE: ALLEGED BREACH OF ENTERPRISE AGREEMENT**  
**SHAM CONTRACTING**

**11 May 2023**

**003-2023**

**STATEMENT NO. 4**

[1] The CFMEU notified a dispute on 7 February 2023 regarding alleged breaches of the applicable Enterprise Agreements, amounting to the use of sham contracting, by Pro Image and Kane, at the Mt Eliza Aged Care Facility Project where Pro Image is a subcontractor to Kane as principal.

[2] The applicable Enterprise Agreements are:

- *Pro Image Interiors Pty Ltd and the CFMEU (Victorian Construction and General Division) Subcontractors Plastering Enterprise Agreement 2020-2023.*
- *Kane Constructions Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2020-2023.*

[3] The Panel conducted a Conferences of the parties by video on 21 February, 9 March and 29 March 2023 and issued Statements arising from those Conferences. Those Statements are to be read in conjunction with this Statement.

[4] The substantive matters in dispute concern allegations by the CFMEU of sham contracting occurring on the Mt Eliza Project, and as the matter proceeded, also at 120 Collins Street Melbourne, for which Kane is the principal and Pro Image is a subcontractor to Kane.

[5] Pro Image had subcontracted on some of its works to other subcontractors, namely One Vitro Pty Ltd (One Vitro) and Spectacular Plastering Pty Ltd (Spectacular), together with engaging its own direct labour, to conduct the works pursuant to its contract with Kane on these Projects. According to Kane it was unaware of these arrangements with One Vitro and Spectacular.

[6] Shortly after the notification by the CFMEU of this Dispute, Pro Image terminated its contracts with both One Vitro and Spectacular. Pro Image then proceeded to engage its workforce either directly as employees, or by written contracts of engagement. More is said about these contracts later.

[7] The Panel notes that early in the proceedings the CFMEU referenced possible breaches of pay slip requirements by Pro Image. The CFMEU subsequently advised the Panel on 5 April 2023 that it would not press this matter during this Dispute and reserved its rights. Accordingly, the Panel has not examined this matter.

[8] It is noted that there is no dispute that the Enterprise Agreements have application to the substantive matter concerning alleged sham contracting.

[9] The relevant provisions of the applicable Enterprise Agreements are set out in each Agreement in identical terms at sub clause 15.6 as follows:

**15.6 Sham Contracting**

*(a) The Parties to this Agreement acknowledge that sham contracting has the potential to undermine fair employment practices, erode Employee entitlements and affect the job security of Employees covered by this Agreement. A sham contracting arrangement includes where an employer attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done for the purposes of avoiding responsibility for employee entitlements.*

*(b) In this clause, "sham contracting" is where:*

*(i) An employer employs, or proposes to employ, an individual, representing to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor;*

*(ii) An employer dismisses, or threatens to dismiss, an individual who is an employee of the employer and performs particular work for the employer in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services; or*

*(iii) An employer employs, or has at any time employed, an individual to perform particular work makes a statement that the employer knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.*

*(c) Clause 15.6(b)(i) does not apply if the employer proves that, when the representation was made, the employer did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services.*

*(d) Any use of sham contracting is a breach of this Agreement.*

*(e) Where a sham contracting arrangement has been reasonably alleged and is unable to be resolved at the workplace level, any Party may refer the allegation directly to the Disputes Panel for conciliation and/or resolution under **clause 10** of this Agreement. All Parties will cooperate with the requests of the Disputes Panel including requests to provide substantiating information or undertaking an independent audit of their arrangements. For the avoidance of doubt, an affected Employee may appoint a representative in relation to such matters.*

*(f) Where the sham contracting allegation exists on the Employer's project, the Employer will make itself available to assist the disputes resolution procedure.*

*(g) Where the Disputes Panel Chair deems it necessary due to seriousness of the allegations and/or his/her findings, the Chair may refer the matter to the appropriate government authority.*

*(h) Where it is agreed or determined by the Disputes Panel or FWC that a sham contract was in place and the person was in fact an Employee under this Agreement, the calculation for back pay will be calculated on the basis of the hourly rate contained in this Agreement plus the site allowance (if applicable), plus the multi-storey allowance and an additional 75% loading to cover entitlements other than CBUS and Incolink. Any difference between the hourly rate paid to the Employee, plus CBUS and Incolink will form the settlement for breach of this clause. The affected Employee will be re-inducted and fully informed of their entitlements under this Agreement and the Fair Work Act.*

*(i) The Employer must ensure that a person engaged to undertake building work as an Employee or as an independent contractor is lawfully entitled to be so engaged under Australian law.*

*(j) The Employer agrees that the Employees will be paid in accordance with the applicable wage rates and allowances as prescribed in this Agreement.*

*(k) The Employer in particular acknowledges the Sham Contracting Compliance Checklist, as attached at **Appendix M**, provides a useful tool to ensure ongoing compliance.*

[10] In accordance with the previous Statements and Panel Directions, Panel members Cordier and Ziccone undertook an audit investigation of Pro Image's engagement of its workers and that of its subcontractors, both with respect to worker engagement arrangements implemented shortly after the notification of the Dispute by the CFMEU, and previous worker engagement arrangements affecting persons 'engaged' by One Vitro and Spectacular, pursuant to the Panel's powers under the Enterprise Agreements and its Charter.

[11] The Panel notes that the purpose of the audit investigation was for a report to be prepared for the Panel only, in order to inform the Panel if there was any basis to the allegations that the relevant workforce ought to be treated as employees pursuant to the Agreement or are legitimate independent subcontractors, and that sham contracting was not occurring, both with respect to the new arrangements in place following the notification of the Dispute by the CFMEU, and previously. The Panel had at the time considered it would be assisted by such an audit without requiring formal written submissions from the parties.

[12] The Panel members requested and received some materials from Pro Image, met with Pro Image at its offices and conducted on-site inspections at the Mt Eliza site on 20 March 2023 and the 120 Collins Street Project on 20 April 2023. The Panel members prepared

reports for the Panel's consideration only, arising therefrom.

[13] Notwithstanding various attempts by the Panel to obtain relevant contractual evidence of the engagement of workers by the Pro Image subcontractors, One Vitro and Spectacular, no adequate material was forthcoming from anyone, and neither Kane nor Pro Image could assist the Panel in this regard.

[14] This is extremely unsatisfactory to the Panel given the overarching objectives of the Enterprise Agreements are expressed to prohibit sham contracting. "*Any use of sham contracting is a breach of this Agreement*" (see subclause 15.6 (d)). The expression '*any use*' must be given the broadest possible meaning and is not confined just to the employer but also to any use they may make of a sham arrangement of benefit to their project or contract of works. In this regard it would be necessary that regular oversight and monitoring by both Kane and Pro Image occur, to ensure that the engagement contracts are not inconsistent with the employers' obligations under the Enterprise Agreements. The availability of actual contractual and related evidence to assure same would be expected if the objectives of the Enterprise Agreements are being taken seriously.

[15] Clearly no attempt to satisfy this measure was undertaken by either Kane or Pro Image prior to the notification of the Dispute by the CFMEU. The Panel does not consider the Enterprise Agreements' objectives, and obligations arising, can be satisfied adequately if all that is relied upon is a declaration by the subcontractor itself, that '*the subcontractor is compliant*' as submitted by Pro Image.

[16] Had Kane and Pro Image sought to properly satisfy themselves as to compliance, it can be assumed that the seemingly corrective action taken by Pro Image after the notification of the Dispute by the CFMEU, to establish formal written contracts of engagement with its workers, either as direct employees or as independent subcontractors, would not have been necessary as it would have already likely to have been compliant. Indeed, Kane was not

even aware until these Dispute proceedings commenced, that Pro Image had subcontracted on any of its works on the Kane Projects to One Vitro or Spectacular. This of itself is concerning and also raised issues as to WorkSafe compliance, the subject of which is referred to later in this Statement.

[17] In absence of any relevant adequate material and having regard to the feedback from the workers interviewed by the Panel members, the Panel has concluded that there were no written contracts with the workers engaged by either One Vitro or Spectacular at any time. The Panel also notes that workers engaged by Spectacular disappeared from the Project at 120 Collins Street, upon the Panel commencing proceedings of this Dispute. Some previous workers engaged by One Vitro prior to the Dispute had been ‘re-engaged’ by Pro Image on written contracts, but only after the proceedings were commenced in this matter.

[18] The best that the Panel has been able to establish as to the engagement arrangements in place prior to Pro Image terminating its contracts with One Vitro and Spectacular, was that the workers then engaged were paid by way of an invoice, a flat \$ hourly rate of various amounts for each worker, with no entitlements to Cbus or Incolink or other entitlements available to employees engaged under the Enterprise Agreements. These conditions fell well short of the entitlements provided to employees by the Enterprise Agreements. The question before the Panel is did this amount to sham contracting and avoidance of employee entitlements on these Projects?

[19] In absence of any satisfactory evidence to the contrary, the Panel considers that those prior arrangements are very likely to have been a use of sham contracting arrangements where the employer in this case Pro Image, with the indulgence or ignorance of Kane, has allowed the engagement of workers by way of sham contracts as comprehended in 15.6(b) (i). The Panel considers that an arrangement where a third party subcontractor supplies labour to the primary subcontractor such as is the case here, without adequate evidence to the contrary, may amount to a sham contract “*for the purposes of avoiding responsibility for employee entitlements*”, (see subclause 15.6(a). However, to be clear, we have not



finally determined these matters.

[20] The Panel acknowledges that it is possible that this particular form of engagement may have amounted to a compliant independent subcontract arrangement, but the absence of any authoritative evidence to demonstrate this, (the onus for which rests with the employers in our view), has lead the Panel to conclude at this point that it was very likely sham contracting was being used and that the terms of the Enterprise Agreement were likely being avoided deliberately. Under these circumstances, the Panel will now provide the opportunity to both Kane and Pro Image to supply to the Panel any real evidence to demonstrate that the terms of the Enterprise Agreement were not being avoided and that there was no use of sham contracting on either Project inconsistent with the employers obligations under 15.6 subclause (d).

**[21] Accordingly Kane, Pro Image and the CFMEU are directed to make written submissions, including relevant evidence, to support its contentions that there has or has not been a breach of the Enterprise Agreements in relation to the engagement of personnel on the Projects prior to the termination by Pro Image of its contracts with One Vitro and Spectacular, such submissions to be received by the Panel, copy to the other parties, no later than 5.00pm on Wednesday 31 May 2023. Following receipt of the written submissions and any evidence, the Panel will advise the parties as to next steps in the matter, which may include an opportunity for the parties to respond and/or a formal Hearing.**

[22] As to the written forms of contractual engagement that Pro Image has now effected with its workforce immediately following the termination of its contracts with one Vitro and Spectacular, copies of which have been provided confidentially to the Panel, the Panel has concluded that the arrangements now appear not to be inconsistent with the terms of the Enterprise Agreements.



[23] Accordingly it is necessary for the Panel to reach a determination only in regard to the arrangements in place immediately prior to the arrangements referenced in [22], to which the Directions in [21] apply.

### **WorkSafe matter**

[24] In Statement No. 2 the Panel noted that the parties would take further action to provide confidence that the necessary work cover arrangements are properly in place to protect the workforce, including with the assistance of WorkSafe. The Panel notes that Pro Image sought some confirmation in writing, but not from WorkSafe, which was provided to the Panel, which Pro Image agreed it would make available to the CFMEU. Nevertheless there was still uncertainty as to who is required to pay workcover premiums and the coverage of workers. Kane had agreed with the recommendation of the Chair that it would arrange and facilitate a meeting with an appropriate representative of WorkSafe, itself, the CFMEU and Pro Image to clear this up once and for all. Initially WorkSafe had declined to be involved to assist, but upon formal request of the Chair, WorkSafe undertook to provide the appropriate personnel to assist the parties in resolving this matter. At the time of this Statement arrangements are being made to put those meetings in place. The Panel requests that the parties inform the Panel of the outcomes of those discussions as soon as possible.

[25] Panel member Ziccone presently takes a different view to the majority on the approach to sham contracting outlined in this Statement. Whilst remaining a participant for any final decisions, he has declined to sign this Statement.



**Peter Parkinson**  
**Chairman**



**Tony Cordier**  
**Panel Member**