Chairman: Peter Parkinson
UNIT 1, 233 CARDIGAN STREET
CARLTON SOUTH VIC 3053
A.C.N. 110 263 182
TEL: 03 9348 2613 FAX: 03 9348 2714
dboard@vbidb.org.au
www.vbidb.org.au

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CFMEU)

and

TYCON GROUP (THE TRUSTEE FOR) T/AS TYCON GROUP PTY LTD
WAGSTAFF PILING PTY LTD
MANTANIEL LAURATE PTY LTD T/AS CAREY CIVIL CONTRACTORS

WEST GATE TUNNEL PROJECT

RE: ALLEGED INCORRECT APPLICATION OF SITE ALLOWANCE CLAUSE

20 JULY 2018 ***008-2018***

DETERMINATION

BY MAJORITY DECISION (Chairperson Parkinson and Panel Member Cordier, Panel Member Hodges dissenting)

[1] On 10 May 2018 the Construction Forestry Mining and Energy Union (the CFMEU) notified a dispute between it and various notified employers regarding the site allowance to be paid on the West Gate Tunnel Project (the Project).

[2] The CFMEU advised that building of the Project had commenced and that the project value for a site allowance was uncertain and requested the assistance of the

Panel to establish the correct site allowance and resolve the matter in relation to the applicable Enterprise Agreements for each employer.

[3] The applicable Enterprise Agreements are:

* *Tyson Group Trust (The Trustee for) t/as Tycon Group Pty Ltd and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2016-2018* (the Tycon Agreement)
* *Wagstaff Piling Pty Ltd and the CFMEU (Victorian Construction and General Division) Piling Agreement Enterprise Agreement 2016 - 2018* (the Wagstaff 2018 Agreement)
* *Mantaniel Laurate Pty Ltd t/as Carey Civil Contractors and the CFMEU Building and Construction Industry Enterprise Agreement 2008-2011* (the Carey Agreement).

A related Agreement is:

* *Wagstaff Piling Pty Ltd and the CFMEU (Victorian Construction and General Division) Piling Enterprise Agreement 2011-2015* (the Wagstaff 2011 Agreement)

[4] The West Gate Tunnel Project is a significant major building construction project being undertaken in the State of Victoria representing a massive package of works to provide the second major crossing of the Yarra River, including the building of new tunnels from West Gate Freeway under Yarraville, the widening of West Gate Freeway from 8 to 12 lanes, building 14km of new paths, building new sporting grounds and pavilions, building waterways, public reserves, building a new bridge over Maribyrnong River and a new elevated road along Footscray Rd. This is a significant and complex set of works, all integrated across an extensive geographic area where numerous interchanges with existing roadway systems are required. The Project is described by Cimic Group (CPB) as *"one of Victoria's largest ever urban road projects"* and by John Holland as *"a city-shaping project"* on their web sites.

[5] The Western Distributor Authority (WDA) on behalf of the Victorian Government is responsible for the management of the West Gate Tunnel Project and is working in partnership with Transurban to deliver the Project.

[6] Transurban contracted the CPB Contractors John Holland Joint Venture (the CPBJH JV) to build the Project. The announcement of the selection of the JV was 3 April 2017. The contracts were finalised late in 2017 and construction works pursuant to the contract commenced in January 2018. The Project is planned to be completed by 2022.

[7] Transurban is funding a significant proportion of the costs for the enterprise through the raising of tolls upon completion of the Project as part its CityLink concession with the State Government, which has been extended from 2035 to 2045.

[8] The Panel held a Conference and issued a Statement in relation to this matter on 23 May 2018. That Statement is to be read in conjunction with this Determination.

[9] Notwithstanding the encouragement of the Panel, the parties were not able to reach a settlement of the dispute. In its Statement the Panel issued a number of Directions that were agreed by the parties and participants.

[10] The parties, including the participants CPBJH JV and IRV, were invited to make submissions in relation to the following matters:

1. *The Scope of the Project;*
2. *The Value of the Project for the purposes of determining a Site Allowance pursuant to the applicable Enterprise Agreements;*
3. *The Quantum of the Site Allowance;*
4. *The Operative date of any Site Allowance;*
5. *Any other matter of relevance.*

[11] Written submissions were received as follows:

- Industrial Relations Victoria (IRV) on behalf of the State Government and WDA - 1 June 2018
- Tycon Group - 20 June 2018
- Wagstaff Piling - 22 June 2018
- CPBJH JV - 22 June 2018 and 6 July 2018
- CPB Contractors - 22 June 2018
- CFMEU - 22 and 29 June 2018

[12] A final Hearing for final submissions was held on 4 July 2018.

[13] The Panel has carefully considered all oral and written submissions in the matter, undertaken a detailed analysis of all the relevant material and carefully reviewed the relevant and comprehensive web-based material and document library available in relation to the Project. Given our knowledge of the industry and the types of works to be undertaken on this Project, the Panel is satisfied that it is able to make a proper and informed decision in relation to all the relevant matters. Pursuant to its Charter the Panel is able to inform itself on any matters in such manner as it sees fit. Suffice to say, the Panel has thoroughly considered every relevant matter.

[14] The Panel made clear to the parties at the final Hearing that each of the Panel members were adequately appraised of the details of the Project, the type of works to be conducted, the Project location and intended work fronts, together with other relevant aspects of the industry itself, such that any further inspections were unnecessary. This was explained largely in response to the written submission made by Wagstaff in which it had proposed further inspections by the Panel members.

[15] On 6 July 2018 the JV wrote to the Panel also requesting that the Panel participate in further inspections of the Project. Again the Panel was of the view that our understanding, appreciation and knowledge of the evidence was comprehensive.

However in view of the concern expressed by the JV that there may be particular information about which we were unaware, the Panel decided to make itself available for an inspection with the JV and informed all parties of this.

[16] On 18 July 2018 CPBJH JV arranged for presentations to be made and conducted an inspection of the Project at Yarraville for the Panel members. The presentations and inspection did not reveal anything beyond what the Panel already had appreciated from its own previous inspections and knowledge for the purposes of this matter, nor did it identify anything of substance about which the Panel was not already well appraised, save for some clarification of preliminary and early works on the Project. The inspection did reaffirm the views and understandings adopted by the Panel which have led us to our conclusions in this matter. There is no question this is a significant and major project and was described by the Project Manager as iconic, including as it does all disciplines of the industry, massive structures, elevated roadways and tunnels. The Panel records its appreciation of the effort and assistance given by the JV staff to conduct the inspection and the presentations provided to it.

[17] As a consequence the Panel makes the following Determination for the reasons set out herein.

Scope of the Project

[18] The Panel is satisfied that the material submitted by IRV dated 1 June 2018 accurately reflects the Scope of the Project for the purposes of determining and applying a site allowance to any of the works conducted in association with that scope, pursuant to the Enterprise Agreements applicable in this matter, and the Panel adopts the description for this Determination, specifically:

"The West Gate Tunnel Project comprises the following elements:

• *Upgrade and widening of the existing West Gate Freeway by two lanes in each direction between Williamstown Road and M80 interchange generally to provide overall capacity of six through lanes each way and auxiliary lanes as required,*

widening of the Princes Freeway between the M80 and Koroit Creek Road, collector-distributor carriageways, elevated ramps, structures and surface road connections including new ramp connections to and from Hyde Street;

• *Two bored tunnels catering for three traffic lanes in each direction under Yarraville which include a road tunnel ventilation system, tunnel portals and ventilation structures;*

• *Bridges across the Maribyrnong River connecting the tunnels with twin viaducts above Footscray Road and connections to the Port of Melbourne, CityLink, Dynon Road and extension of Wurundjeri Way to Dynon Road and widening of Wurundjeri Way to Flinders Street; and*

• *Improvements, extensions and upgrades to the existing pedestrian and bicycle network, as well as the creation of new public open space areas and relocation of services."*

[19] The Panel notes that the CFMEU submitted in relation to the IRV description set out above that "*this was not an all encompassing scope.…*". The Panel is satisfied that the description identified by IRV is sufficiently clear and comprehensive for present purposes. The Panel is presently unaware of any construction works that would not be comprehended by the above description that would be relevant to the determination of a site allowance in this case, and none of the parties, including IRV, were able to point to any.

[20] IRV also confirm at paragraph 5:

"This is the only contract entered into by CPBJH with either Transurban or the State for the delivery of construction works on the West Gate Tunnel Project and covers the construction of the full scope of the West Gate Tunnel Project as generally described above."

For present purposes the Panel accepts that these works include the works that have been regarded as preliminary and/or early works, that have been performed in order to validate pricing, geological surveys and the like , which began as early as August 2017. To be clear, these works may have been the subject of a separate contract, but for the purposes of scope of the Project, the Panel includes those works.

[21] The scope of the Project does not include the Monash Freeway Upgrade Project or the Webb Dock Access Improvements Project, for which WDA is also working in partnership with Transurban.

[22] Should there be any subsequent argument or dispute as to any works which should or should not be included in the adopted scope of this Determination, the Panel is available to advise and/or determine the matter at any point during the life of the Project.

The Value of the Project

[23] The Panel finds that the value of the Project for present purposes is $4.99 billion. The material publicly available and the IRV submission at paragraph 4, confirms this figure. CPB confirms same at paragraph 32 of its submission.

[24] The CFMEU submitted that the IRV amount does not encompass "*Total Project Value*" which is defined in the Tycon Agreement and the Wagstaff 2018 Agreement as follows:

"…..means the value of the Project…comprising of:
(i) preliminary costs and profit margin;
(ii)Trade packages (including supplier and subcontractor costs); and
(iii) Provisional sums;"

[25] The CFMEU further submitted in its oral submission that the figure was "*more like $6.5 billion*" but "*at least $5 billion*"(CFMEU submission paragraph 9, 22 June 2018).

[26] For present purposes the Panel is satisfied that the Total Project Value is comprehended by the $4.99 billion. It is acknowledged that in a mega project such as this that there may be variations and other issues arising during its construction which may escalate the cost, but like most projects the industrial parties have traditionally not sought to revisit the rate of site allowances for such matters. The Panel sees no reason in this matter to change that approach. It is apparent from the material available that there is some further design works for the Project that are yet to be finally determined which could add to a higher cost for the Project. However we do not anticipate that this is likely to impact upon the quantum of site allowance we have determined. Moreover, as will become clear, the Panel has regarded the value of $4.99 billion as confirmation of

the size and scope of the Project, which has assisted it, together with a range of other factors in determining the quantum of the site allowance, which we will come to. It is not the value of the Project alone which is determinative here in our view.

Site Allowance - Quantum

[27] For the reasons set out herein the Panel has determined that a site allowance of $8.90 per hour shall be applicable with effect from 1 January 2018 for both Tycon and Carey, and for Wagstaff with effect from 18 May 2018.

[28] In relation to Wagstaff, the Panel accepts the submissions of Wagstaff that the Wagstaff 2011 Agreement has no application in this present matter. The Wagstaff 2011 Agreement provided for a different regime of "*piling allowances*" in lieu of site allowances, which Wagstaff has paid pursuant to that Agreement up until May 2018, when it was replaced with the Wagstaff 2018 Agreement. The only Agreement relevant to this present matter for Wagstaff is the Wagstaff 2018 Agreement which has operated on and from 18 May 2018. We say more about operative date later.

[29] In determining the quantum of site allowance the Panel has considered that it would be most unhelpful to the industry participants for it to determine various quantum of allowances for different Enterprise Agreements for work undertaken on a project such as this. To do otherwise would in our view lead to an industrial relations problems, create significant disharmony and confusion, and inevitably lead to disputation. It would create far too much uncertainty.

[30] In exercising the power available to the Panel under its Charter and the Enterprise Agreements, we have determined a quantum that realistically reflects the market in our view, having regard to the quantum of site allowances being paid across the industry, taking into account the nature of the work being conducted and to be conducted across the Project, recognising the size, cost, complexity and longevity of the Project.

[31] Pursuant to the Agreements at *Appendix C Clause 5*:

"A Site Allowance shall be paid….. to compensate <u>for all special factors and/or disabilities</u> on a project and in lieu of the following Award special rates - confined space, wet work, dirty work, second-hand timber and fumes." (our emphasis)

[32] The Project will expose workers to a wide range of disabilities across the Project, including those identified above. The Panel is satisfied that the disabilities that will be present in this Project together with the special factors of working on a mega project such as this, when taken together, are sufficient to warrant the level of allowance we have determined. It is noted that there are other allowances, such as height work, underground and other allowances that still apply as provided by the agreements where and when those specific works are undertaken. The Panel notes a significant amount of the works will be constructing elevated roadways and approximately 30% of the works will be tunneling.

[33] At paragraph 15 the JV suggests there will be "*a significantly corresponding reduction in disabilities across the Project"* however nowhere has it articulated as to how the disabilities of confined space, wet work, dirty work or second hand timber and fumes will be reduced. The Panel did observe on the inspection at Yarraville that real efforts were being made to provide effective job access and decent pathways and the like, however we do not consider this will contribute to a significant reduction in disabilities across the Project such that it would impact quantum. Amenities will be in compliance with requisite standards and will not be any different such as to impact any consideration of site allowance.

[34] The JV submits that the nature of work on the Project is such that it will be:

"*more akin to secure employment with skill-based pathways and complete career progression opportunities entirely within the Project…..*"

As a result the JV submits that there should be a reduction in the quantum of site allowances on the Project. In real terms this is largely illusory. It is not as if all the employees engaged to perform work on the Project are guaranteed employment through

to the end of the Project. Longer term employment and skills-based training are not unique to this Project or to many of the employers that operate across the industry. It is not peculiar only to longer term projects. Indeed many of the subcontractors working on the Project may not necessarily be engaged on the Project throughout its construction life, but their employees could have worked and may work for even longer periods on many different projects with access to skills training and the like with the same employer. Site allowances are not affected for these reasons. It is recognised that the JV is applying the State Government's requisite Major Skills Guarantee for projects in excess of $20m and that the efforts being taken by the JV demonstrate they are taking this very seriously. The Project does provide an excellent opportunity to create a legacy of skilled personnel as it should.

[35] We do not consider this should be weighed to diminish the quantum of the site allowance. We do not consider that longevity of employment on a particular project has any bearing on the quantum of allowance that should apply. Many workers on the Project will be transferred to other sites and projects from time to time. Whether an employee is working on the site for 4 years or 4 weeks is no reason of itself to treat them any differently when it comes to payment of a site allowance. It may be a consideration for matters related to service such as redundancy and leave for those who may be engaged permanently and throughout the Project for reasons of retention and the like, but not consideration for site allowance purposes.

[36] The JV also submitted that the level of amenity should be weighed in favour of diminishing the value of a site allowance. We do not consider this bears any weight in this particular matter.

[37] The JV further submitted that the Project may lead to "*development and career progression*" and "*corporate programs*" and somehow this should also diminish the quantum of site allowance applicable. We do not agree with that proposition. It may well be a project with broader social considerations and impact, given the emphasis that the State Government has sought to impress upon the principal contractors, for very

good public policy purposes, but arguably that is something that all employers in the industry should be aspiring to deliver. It is not something that bears any relationship to the quantum of site allowance that should be paid, rather we would expect other appropriate means of remuneration through promotion and/or reclassification and further job opportunities in the industry to account for this.

[38] It is submitted that the provision of car parking facilities to employees, which the JV seems to be suggesting will be available to every worker on the Project, should be a factor that diminishes the value of any applicable site allowance. This is not the first project where car parking facilities have been made available to employees working on site and in the many circumstances that the Panel is familiar with, there has been no diminution in the rate of site allowance applicable as a consequence. None were brought to our attention. The complex nature of the various works and many work fronts that will exist across this Project will not in any way diminish the disabilities arising in moving around and performing works in and across the various work fronts on the Project. There will many workers too for whom public transport is their only mode of transport. Employers are obliged to provide a standard of amenity pursuant to the applicable Agreement. In this case the Panel does not consider that the level of amenity should impact the quantum of the site allowance.

[39] We have noted the range of site allowance values that have or are being paid on sites and projects throughout the State of Victoria. We note the JV referred us to the Gorgon Project off Western Australia for which a site allowance of $10.68 per hour applied, however the Panel does not regard that project as sufficiently relevant in the context of the matters and Project before us that such a figure is sustainable, other than it too was a mega infrastructure building project.

[40] We note the terms and conditions and allowances paid on the Victorian Desalination Project, the Melbourne Metro Tunnel Project, the Tullamarine Freeway, CityLink and EastLink Projects, Geelong Rd, Upgrade of Burnley Tunnel, West Gate

Freeway, Craigieburn By-Pass, Regional Rail Project and many others against which the Panel has benchmarked this Project and to other works in the industry sector in the State of Victoria. For a number of these earlier projects the site allowance was also paid on an all purpose basis, an approach that the industry has moved away from, for good reason. For large and complex projects and sites similar to this Project we consider that the site allowance quantum we have determined is fair and reasonable compensation for the workers with an entitlement under the agreements across this Project.

[41] To be clear, we have not sought to simply extend the scale of allowances and project values that apply under some Enterprise Agreements to reach this conclusion, rather we have taken into account all of the factors set out in this Determination including our view that site allowances do not necessarily increase proportionately to the increased cost of a project for what we regard as 'mega projects'. The Panel made this observation in the *Melbourne Metro Tunnel Project Interim Determination 013 - 2017* at paragraph [47].

[42] We regard this Project as one which is also distinguishable by its sheer size, complexity and cost, for which it is inappropriate in our view to exponentially increase the site allowance based on value alone. We acknowledge that the higher the cost of a Project, the more likelihood that there will be special factors to be taken into account such as size and scope, which may be reflected in a higher site allowance. We consider for this Project the quantum we have determined is appropriate.

[43] The JV has submitted that the Panel should also consider the commercial viability of the Project in determining the quantum of site allowance.

[44] We have done so, and note that there is nothing so unusual about our Determination in terms of quantum that the JV could not properly and reasonably have anticipated, given what it knew when it tendered for the work and before it finalised its contract terms with Transurban. It was also open to the JV to have entered into dialogue with the relevant unions before that time to seek to settle the site allowance quantum

and other matters if it wished. Indeed this is something that the Panel has frequently recommended. Given that it did not, this deficiency is not something which should tell against the setting of fair and appropriate site allowances.

[45] The JV knew its price and would reasonably have been able to assess the likely quantum of site allowance. It appears it advised at least one of its subcontractors, Carey, of the value of the Project for site allowance purposes at *"$4.998 billion"*. This led the subcontractor to implement a site allowance of $8.83 per hour. Carey sought confirmation of this amount from the JV at the time of its commencement on the contract proper in January 2018.

[46] The JV could have applied the same logic, even though Carey got the number a little wrong in its calculation in our view.

[47] The quantum the Panel has determined is not too far removed from this number. The JV cannot now be surprised as to the value of the Project or the quantum of site allowance. The Panel assumes that from a due diligence perspective the JV would have undertaken its own calculations for this purpose. It did for at least one subcontractor.

[48] From its submissions it would appear that the JV has not adequately catered for this matter in settling its commercial terms for its contract. It submitted that it has entered a fixed price contract. It did this with its eyes wide open and should have appraised all of its prospective subcontractors similarly as to the likely site allowance quantum, which it has effectively done in at least one case.

[49] To seek to put the commercial viability of the Project at the feet of the Panel as the JV asserts in its letter of 6 July 2018 is illogical. It ignores the important role which the industry participants and the State Government has vested in the Panel. For the reasons set out above the Panel is unmoved by the commercial viability submission and we affirm that our consideration of the matters has included the relevant commercial viability of the significant enterprise that this Project represents.

Operative date

[50] The commencement of works pursuant to the contract for the Project was in January 2018. Preliminary and early works commenced in mid 2017.

[51] The JV submitted that if the Panel was to determine a site allowance its determination should operate prospectively. We see no reason in this case to depart from the logic that the commencement of works should be the date upon which the site allowance under an applicable agreement is paid, as has been the case in the vast majority of cases.

[52] For the Carey Agreement and the Tycon Agreement the Panel determines that 1 January 2018 will be the operative date, such that any employee covered by either Agreement will be paid the determined site allowance from the commencement of their employment and work on the Project after that date. The applicable Wagstaff 2018 Agreement has only applied since 18 May 2018, accordingly the Panel has determined that 18 May 2018 will be the operative date, such that any employee covered by that Agreement will be paid the determined site allowance from the commencement of their employment and work on the Project after that date.

[53] As noted earlier, preliminary and/or early works have been performed as part of the Project which began as early as August 2017. Whilst it is open to the Panel to apply retrospectivity to then, we have determined having regard to all the circumstances, that 1 January 2018 is a fair and reasonable operative date from which to commence the terms of this Determination for all works on the Project.

[54] The employees to whom the Agreements apply are entitled to the provisions of the Agreements from their commencement of works on the Project. In this case the parties including the Principals, the client, the State Government and contractors were all under clear notice as to the Project, the scope of the Project, its cost for the purposes of

determining a site allowance such that this could have been resolved at or prior to the commencement of works on the Project quite simply. We distinguish this from the *Melbourne Metro Tunnel Project* for the reasons set out in our Determination in that matter of 13 April 2018.

[55] The employees here should not be disadvantaged as a result of a failure to address these issues at commencement. The Panel has been at pains to encourage the industrial parties, clients and principals in particular to do so. The JV has referenced the *Delcon* matter in its submissions, a matter in which CPB itself was directly involved as a participant. In that matter the Panel noted in its Determination of 23 June 2017 at paragraph [53] as follows:

"Notwithstanding this conclusion, the Panel again reminds the parties, including the principals, that the settlement by way of certainty of site allowance and project value prior to or at or near commencement of a Project of works is the most efficient and effective way of dealing with site allowances rather than leave open the opportunity for disputation well into the project works such as here. At or prior to commencement of Delcon's engagement on the project, the question should have been raised and settled, in writing, or in absence of settlement, referred to the Panel to assist the parties accordingly. This gap it seems from the submissions may well apply to many other contractors on the CTW Project. The Panel recommends the industry close these gaps sooner rather the later."

We say the same about this matter.

[56] As we have noted that at least with respect to Carey, the requisite information was provided to it by the JV at the outset from which it determined a site allowance value according to its calculation pursuant to *Appendix C* of the Carey Agreement. The correct calculation pursuant to *Appendix C*, is made by applying the provisions correctly and, if this was found by the Panel to be the applicable term, the amount would be $9.10 per hour flat per hour worked or $9.00 per hour all purpose, not $8.83 per hour flat. It seems that Carey applied the table provided for in other similar 2016-2018 Agreements, for which there are differing values, and not its own. We understand this was known at the time. Carey commenced paying the site allowance of $8.83 per hour to its employees in January 2018.

[57] The Panel sees no justification in a later operative date in this case, save for Wagstaff, for the reasons set out earlier.

Site Allowance - Indexation

[58] Having regard to the usual and long held approach of the industry to setting site allowance adjustments we find that, the indexation of the site allowance is appropriate to be effected on 1 October each year by the CPI (All groups, Melbourne) movement for the preceding period July to June in each year. We consider this establishes a fair basis for indexation during the life of the Project. Accordingly the employers are required to make the necessary payment adjustments retrospectively to the relevant employees from their commencement of works on the Project. For Wagstaff, the allowance will be paid with effect from 18 May 2018, in addition to the applicable $2.50 per hour piling allowance pursuant to the Wagstaff 2018 Agreement. To be clear, the next date of adjustment of the site allowance quantum will be 1 October 2018.

Jurisdiction of the Panel

[59] Each of Wagstaff, CPBJH JV and CPB submitted that the Panel did not have jurisdiction to deal with the matters in relation to Wagstaff and Tycon as the relevant applicable provisions in *Appendix C Clause 1* to the Agreements provided jurisdiction to it for:

"*construction work in the commercial/industrial sector of the building industry in the State of Victoria"*.

[60] They submit that this clause does not include civil or infrastructure projects and that civil construction is distinct from this. The effect of this submission, if it were correct, would mean that no site allowances under any circumstances could be paid pursuant to the Agreements for any civil or infrastructure construction projects under these Agreements. Of course, they have been paid, knowingly, without objection and in compliance with the Agreements, on many such projects and works, for years.

[61] The parties to the agreements that include *Appendix C* have made specific provision for "*Geographic Area and Sector Specific allowances, Conditions and Exceptions*" (our emphasis) in *subclauses 24.11* to *24.14* inclusive. There is no exception provided for civil or infrastructure projects such as we are dealing with here.

[62] We also consider that the Agreements, when read in their totality, particularly taking into account for example the following Clauses, that the parties clearly intended for the inclusion of civil and infrastructure work and projects in the application of the Agreements and *Appendix C*:

- *Clause 2 Definitions*
- *Clause 4 Scope of Agreement*
- *Clause 5 Relationship to Awards, Agreements and other Documents*
- *Clause 7 Objectives and Commitments*
- *Clause 10 Dispute Resolution and Consultation*
- *Clause 11 Consultation*
- *Clause 12 Flexibility arrangements on significant, major or unusual Projects*
- *Clause 24 Allowances*
- *Clause 68 Workplace Modernisation*
- *Appendix C*
- *and in the case of Wagstaff 2018 Agreement, Appendix K.*

[63] Historically it is true that civil construction and indeed some other forms of construction in the building industry sector in Victoria have been subject to separate industrial instruments, from certified agreements to enterprise agreements to awards.

[64] However, as is well established, a range of developments in the industry has removed this separation over latter years including the establishment of the Modern Award, namely the *Building and Construction General On-Site Award 2010*, which embodies all relevant building and construction activities associated with this Project. This is the award pursuant to which the Wagstaff 2018 Agreement and the Tycon Agreement have been made. Also the relevant CFMEU Enterprise Agreements now cover the totality of the industry, save for clearly stated exceptions.

[65] Similarly enterprise agreements operating across the construction industry which also apply to the works to be undertaken on this Project for electrical and plumbing works do not exclude civil or infrastructure projects and for those agreements very similar and identical provisions to those that apply here are included in them.

[66] In both the Tycon Agreement and Wagstaff 2018 Agreement, the only works specifically identified to be excluded from coverage of those Agreements are clearly set out in *Clause 4, Scope of the Agreement,* which provides that the only exclusions are the "*cottage/housing industry*" and certain specified "*apartment"* buildings in respect to certain provisions of the Agreement, neither of which have anything remotely to do with this Project.

[67] There is no exclusion in either of the Agreements for civil or infrastructure work, it is work that is clearly intended to be included in the coverage of the Agreements.

[68] As far as a plain reading of *Clause 1 Appendix C* is concerned it is our view that the type of work to be undertaken pursuant to this Project and pursuant to the applicable Enterprise Agreements, is clearly *construction work* and it is work undertaken in each of the *commercial* and *industrial* sectors of the building industry in the State, given also that it relies upon the body of the Agreement as well. If a particular type of construction was to be excluded, such as infrastructure or civil projects as suggested, it would have been spelt out in the exclusions. It is not.

[69] In addition, the industrial participants in building industry in this State have long held that site allowance disputes pursuant to the application of *Appendix C* has provided for determinations by the Panel for the setting of Site Allowances under this very same clause in all aspects of the construction industry save for the exclusions referenced in *Clause 4, Scope of Agreement*. The Panel over many years has settled or dealt with disputes in relation to site allowances on civil and infrastructure projects pursuant to similarly structured agreements including:

002-2017 City Link Tulla Widening Project

023-2017 Geelong roofing - Metro Tunnel Project

014-2017 Melbourne Metro Tunnel Project

003-2016 Port Capacity Project

014-2011 Tulla Sydney Association M80 Project

004-2010 Westall Rail Upgrade Project

065-2009 Westall Rail Upgrade Project

052-2008 Burwood Highway Overpass – East Link

100-2008 Maroondah Highway Pedestrian Bridge

029-2007 East Link Rail Upgrade Heatherdale Railway Station

014-2007 Appleton Dock, Enterprise Road

[70] Additionally employers have not sought to distinguish the application of site allowances under their agreements by excluding civil and infrastructure works. To assert that it should be distinguished now after the clear practice and acceptance of the industry participants is we think somewhat disingenuous.

[71] It is clear to the Panel that the intention of the parties in framing the Agreements has been to ensure site allowances across the coverage of the Agreement are to be dealt with pursuant to *Subclause 24.1*:

"*Site Allowances shall be paid in accordance with the formula which appears in Appendix C.*"

[72] The only qualifier to this is in relation to the Wagstaff 2018 Agreement where *Appendix C* applies only in the:

"*limited circumstances as prescribed by Appendix K Clause 1*".

[73] *Appendix K* of the Wagstaff 2018 Agreement makes provision for Piling Allowances and *Clause 1* of that Appendix provides:

"In recognition of the difficult conditions and necessary flexibility of working hours inherent in piling operations, employees covered by this agreement, for each hour worked on construction sites at the rates set out below. These rates are in lieu of all

other site allowances and multi-storey allowances (clauses 24.1, 24.2, 24.3, 24.11, 24.12, 24.13,24.14, 24.15) and the Piling Industry Allowance (comprising of special rates of Clause 22.2 of the award) of $2.50 per hour. The City of Melbourne (CBD) area is as defined by Appendix C - Site allowance Procedure

	Melbourne CBD & Shopping Centres		Non CBD
From 1 March 2018	$7.89		$6.47

For Projects in excess of 1.7 Billion, Appendix C, Clauses 12 and 13 will apply. In such circumstance, the determined site allowance incorporated in accordance with Clause 13 will be paid in addition to a Piling Allowance of $2.50. For projects below 1.7 Billion, the Site piling allowance will be paid in accordance with the above table."

[74] It is telling in our view that there is nothing in *Appendix K* that excludes any type of construction as it clearly relies upon the Wagstaff 2018 Agreement at *Clause 4, Scope of Agreement*. The term "*Projects*" in *Appendix K* is otherwise all encompassing. If there was any intention to exclude any further aspect of the industry from the application of this *Appendix K* it would have been well and truly spelt out. Indeed the references to "*Projects in excess of 1.7 Billion"* can only have been provided to deal with those projects that could not be settled by application of the Table in *Appendix C subclause 7.2*, it would be incomprehensible otherwise. It can be no coincidence that the table in *Appendix C subclause 7.2* runs out at *"$1.7 billion."*

[75] Wagstaff submitted at paragraph 27 that it made no submission on the value of the Project:

"*…as the values are only relevant to Appendix C on the basis that they are already set out in the table of values and Site Allowances in clause 7.2 of Appendix C"*.

[76] This submission fails to take account of the provisions of *Appendix K* which Wagstaff must understand as A*ppendix K* is peculiar to Wagstaff. Indeed it contradicts its own submission at paragraph 9. The Panel does not accept Wagstaff had any other intention but that Projects above $ 1.7 billion can be open to the Panel to make site allowance determinations pursuant to the Agreement. We note there were exchanges

between the bargaining parties prior to settlement of these terms, which simply confirm that the parties were negotiating issues connected with this subject. We put those exchanges no higher than that. The final agreed terms are clear and conclusive.

[77] We find that the intention of the parties was clearly to include civil and infrastructure project construction within the scope of the Agreements and that *Appendix C* includes such works. The Panel finds that it has jurisdiction to deal with the matters.

[78] The submissions of Wagstaff, the JV and CPB ignore the provisions which apply to the Carey Agreement and, given the reliance the JV has put on *Delcon* in its submission, the relevance of that Delcon enterprise agreement is also telling. *Delcon Civil Pty Ltd and the CFMEU Civil Construction Industry Enterprise Agreement 2011-2015*, (the Delcon 2011 Agreement).

[79] It is instructive to note that in the Delcon 2011 Agreement its *Appendix C* commences precisely in the same way as the Wagstaff 2018 Agreement and the Tycon Agreement at *Clause 1 Appendix C*:

"*This procedure shall apply to construction work in the commercial/industrial sector of the building industry in the State of Victoria….*"

Appendix C continues on at *subclause 4.3* to deal with:
"*major road infrastructure projects, as per schedule….* and …*New Projects*".

[80] Quite obviously the parties intended that civil and infrastructure projects were to be covered by *Appendix C* and that the reference to "*construction work in the commercial/industrial sector of the building industry in the State of Victoria*" clearly encompassed and intended to include "*major road infrastructure projects.*"

[81] To suggest otherwise ignores a long held practice that the industrial parties including the parties in this matter have followed and until now have never questioned.

CPB was a direct participant in the *Delcon* matter, clearly a civil infrastructure project. In the *Melbourne Metro Tunnel Project* matter, another infrastructure project, every opportunity was provided by the Panel for the parties and participants, including John Holland, CPB, IRV and MMRA (now Rail Projects Victoria) to make submissions on the application of *Appendix C*.

[82] In the *Melbourne Metro Tunnel Project* matter, twenty six (26) separate employers were found to be bound by similar provisions and not one of them disputed the application of *Appendix C* in the way that is now suggested. A number of those employers only operate on civil and infrastructure works, but their agreements contain precisely the same wording as Wagstaff 2018 Agreement and Tycon Agreement at *Appendix C Clause 1*. MBAV for its part in representing parties in the Melbourne Metro Tunnel matter confirmed that the dispute was properly before the Panel right from the outset. The constructions of the Agreements are clear. There is no intended exemption of civil or infrastructure projects from these Agreements.

[83] We now deal with the Carey Agreement specifically. Carey submits that it is paying the correct site allowance pursuant to the Agreement of $8.83 per hour flat based upon the contract value it was advised by its principal, the JV, ie. *"$4.998 billion"* prior to Carey's commencement on the Project.

[84] The Carey Agreement, which is still in force and applicable today provides at *subclause 4.3* for the calculation of site allowances on a number of bases, including:

1. By applying the table in *subclause 7* of *Appendix C* which provides for "*New Projects*" projects above $384.7m to receive an allowance of $3.65 per hour and for projects above 384.7million there shall be an additional increment of 10 cents per additional $100m or part thereof, or;
2. For major road construction projects of $300million -$500million an allowance of $3.75 per hour is to be paid for all purposes, and for Projects above $500million there shall be an additional increment of 10 cents per $100million or part thereof.

[85] The *Appendix C* provides at *subclause 9* that:

"The site allowance values and project values are to be adjusted by the CPI (All Groups, Melbourne) effective 1 October 2009 and for each year thereafter according to the above CPI movement for the preceding period July to June in each year. The Site allowance shall be adjusted up or down to the nearest 5 cents and project value to the nearest $100,000."

[86] If these provisions of the *Appendix C* were to be adopted by the Panel, this would have the current allowance for Carey at either $9.00 per hour all purpose or a flat $9.10 per hour worked.

[87] Similar provisions to the other Agreements are then included at *Appendix C subclause 12* which provides for the Panel to deal with disputes and similarly provide that it not deviate from the "*Site Allowance Guidelines……unless there are special and exceptional circumstances"*.

[88] In this context, the "*Site Allowance Guidelines"*, which are clearly enunciated in the *Port Capacity Project* Determination in matter no. 003-2016, if required to be put to the test, would in the Panel's opinion, be met in this matter. There is no question that in this case the Project meets the relevant tests in that regard, that is:

- the site or combination of sites must constitute "*an enterprise carefully planned to achieve a particular result*";
- the site or combination of sites must have "*a clearly established entity or entities that exercise control over its development*";
- the site or combination of sites must have "*a scope sufficiently definable at any given point during the project to enable proper definition and costing of the project"* for the purpose of determining the appropriate site allowance.

[89] However, as we now go on to explain, we have determined that for this Project "*special and exceptional circumstances"* do exist and for the reasons set out we do not consider we should find a different outcome or quantum of allowance for Carey alone. Indeed if *"special and exceptional circumstances"* were found not to exist, the Panel would be bound to apply either the $9.00 all purpose or $9.10 flat per hour worked for

the Carey Agreement. In those circumstances the Panel has no discretion as to quantum save for whether it be paid for "all purposes" or "flat". Introducing different rates and even the notion of all purpose site allowances at this time, would not in the Panel's opinion be at all helpful to the industry, indeed it would create further confusion across the industry and add higher costs.

Special and exceptional circumstances

[90] Clauses *11, 12 and 13* of *Appendix C* provide as follows:

"11. The appropriate Site Allowance shall be based on the Total Project Value, as defined by Clause 2 of this Agreement.
In all cases where the parties fail to reach agreement on the project Site Allowance to apply to a particular site or project, then such disagreement shall be referred to the Victorian Building Industries Disputes Panel for determination.
12. In determining the rate, the Panel shall have regard to the Appendix C, and shall not deviate from Appendix C unless there are special and exceptional circumstances.
Special and exceptional circumstances may include working on projects where disabilities not comprehended in the Site Allowance procedure described herein exist. This may include where predominantly contract metal trades construction/maintenance work is being carried out……..
13. Any site allowance that is determined in accordance with 11 and 12 above shall be incorporated into the agreement in accordance with the Fair Work Act 2009."
(our emphasis)

[91] Provided the Panel finds that "*special and exceptional circumstances*" exist, the Panel is not constrained in its determination of the rate of site allowances by *Appendix C*. In other words, the Panel is at large in terms of its determination, subject only to compliance with its Charter and the other relevant provisions of the agreements.

[92] Wagstaff and CPB submitted that in relation to the Tycon Agreement and Wagstaff 2018 Agreement that in order for the Panel to determine the site allowance rate according to *Appendix C, "Special and exceptional circumstances"* must exist. We agree with this submission.

[93] In relation to this Project, as we found in relation to the Melbourne Metro Tunnel matter, this is a project that is both special and exceptional given its size, scope, cost

complexity and geographic coverage. As CPBJH JV acknowledge throughout its submission, this is a "*mega project*" which we agree is "*entirely different in nature and performance from traditional construction projects*" which also makes it special and exceptional. As noted by the JV at paragraph 2a:

"*mega projects stretching over a number of years and geographic locations with substantially differing types of worker amenities and disabilities depending on the differing natures of work, locations and times of the year need to be dealt with under the rubric of special and exceptional circumstances within enterprise agreements*".
(our emphasis)

and at paragraph 8:

"*we confirm that the Project is one of Victoria's "mega" infrastructure projects which will see it run for 4 years and involve a significant range of activities across 20km work-front locations with world standard levels of amenity from the M80 interchange, to the tunnel under Yarraville and the roadway over Maribyrnong River, through to the elevated roadway to the doorstep of the CBD itself.*"

[94] This stands in stark contrast to what CPB says in its submission at paragraph 22 that the project is *"simply a major road project"*. It is patently much more than just another major road project, which the JV does acknowledge.

[95] CPB at paragraph 26 seek to rely upon the CityLink and EastLink Projects having not been deemed to be *"special and exceptional"*. There is a good reason for this, because the Panel was not required to intervene in those projects, given in both cases, the principal parties settled the site allowance by agreement. The only intervention by the Panel in relation to EastLink related works was to determine the various subcontract construction works that were comprehended by the Project. We can say with confidence that if either of those Projects came before the Panel today for the purposes of determining the rate of site allowance, we would likely deem "*special and exceptional circumstances"* to apply for the projects as we do not consider them merely *"simply a major road project."* They were significant and complex projects, also including elevated roadways and tunnels.

[96] The Panel notes that the Tycon Agreement and the Wagstaff 2018 Agreement both provide for the inclusion of *Clause 12, "Flexibility arrangements on significant, major or unusual Projects,"* a clause that is clearly aimed at promoting early consultation on such projects *"…including the application of Appendix C"*. This is surely one of those Projects and goes to acknowledging that such projects can be special and exceptional. It is unfortunate that steps along these lines as provided by Clause 12 were not initiated.

[97] As the JV observes at paragraph 9:

"*this Project stands in marked contrast to "traditional" projects which typically involve short sharp builds with a transient workforce."*

and in its letter to the Panel on 6 July 2018 the JV again makes the point about "*…special circumstances on this Project."*

[98] We find that special and exceptional circumstances apply here, and that the Panel has jurisdiction pursuant to each of the applicable agreements to make the determinations we have.

Should the Panel delay its Determination?

[99] The JV, CPB and Wagstaff submit that the Panel should delay its determination of this matter in order that the JV may proceed to negotiate entirely separate greenfields agreements for the Project to apply to direct employees of the JV, but not to employees of the subcontractors before the Panel in this dispute.

[100] CPB notes at paragraph 40 that the JV:

"is currently in the process of negotiating 2 greenfields agreements for the project".

The JV submitted that:

"*the Panel should allow the JV and the relevant unions more time to continue negotiations to seek to see if such agreement can be reached"*.

[101] The JV in its oral submissions stated that it had recently provided 2 proposed greenfields Agreements for the Project to the relevant unions and that the Panel should delay making a Determination in this matter, in effect, until those negotiations were

finalised. The JV in its letter of 6 July 2018 again urged the Panel to delay its Determination "*until the greenfields agreements are finalised…*"

[102] The JV argument is that if the Panel was to proceed to determine the matter of quantum of site allowance in this matter it might prejudice the parties in terms of the settlement of the greenfields' agreements.

[103] The JV was not able to provide any idea at all to the Panel as to when such negotiations might be completed. There has been no bargaining with the CFMEU at this point in time. It seemed from the direct questioning of the JV that any prospect of settlement was many months away. It was certainly not imminent.

[104] The JV submitted that the Panel should not proceed in order to allow negotiations to proceed as it did in *Delcon* (Matter no. 002-2017, Statement dated 14 February 2017). The Panel notes that the opportunity given by the Panel in that matter was purely to give the parties who were already before the Panel a chance to resolve the dispute given the particular circumstances of that matter. As it occurred, it made no difference and ultimately the Panel had to determine the *Delcon* matter anyway as negotiations failed to settle the matter, in fact no negotiations were even attempted by CPB.

[105] Similarly we note the experience in the *Melbourne Metro Tunnel Project*, where our repeated encouragement to the parties to bargain and settle the matter required the Panel to determine the matters.

[106] The CFMEU for its part has said it has no confidence at all that such negotiations would be resolved "*any time soon*" and submits that the Panel should proceed to make a Determination without further delay.

[107] Neither Carey nor Tycon made submissions on this point.

[108] It is apparent to the Panel that the prospect of an early settlement of the proposed greenfields agreement between the JV and the CFMEU is very low indeed. The application of the proposed greenfields agreements will be directly on any prospective JV employees, and not on the employees of subcontractors, who are many and already employed and working on the Project.

[109] We also note that the JV was awarded the contract in April 2017 and settled contract terms in December 2017. Works pursuant to the contract commenced January 2018. It is now July 2018. As at the date of this Determination still no settlement has been reached with the CFMEU, indeed there have been no further meetings scheduled. We also understand that there has been no settlement with the AWU.

[110] We note also, as acknowledged by the JV, that the matters that are proposed to be subject to negotiation for the greenfields agreements directly with the JV for its intended employees, go to a wide range of matters, not just site allowance, whereas the matters before us are specific to the site allowance only. The other matters are already settled in the Agreements before us.

[111] The Panel requested that the JV provide the proposals it tabled with the unions to better inform ourselves. Unfortunately the JV was unable to enlighten the Panel on the contents of its proposals. Notwithstanding our specific request to be addressed on it, we have no purposeful submission or view from the JV as to the quantum of a site allowance, other than its submission at paragraph 23:

"The Joint Venture believes an averaged figures (sic) in the middle of expectations most appropriately encapsulates the multitude of variables outlined above into a flat figure across all work-types, times, locations, disabilities, amenities and seasons, while also providing a fair balance of remuneration for project value and economic business outcomes."

Whilst the JV does not suggest a quantum, we consider our Determination does provide:

"a fair balance of remuneration for project value and economic business outcomes."

[112] We note also that there are approximately 300-400 subcontractor employees on the Project presently. With the projected increases in subcontractors and subcontractor employee numbers commencing on the Project over the next few months the JV estimates this will see 500 site employees on the Project by 1 September 2018. More than 1500 people are already working on the project, with the workforce to grow to 6000 at the peak of construction according to the latest announcement by the Acting Premier.

[113] It is almost certain that some of these additional subcontractors to the Project will have similar Agreements to the ones before us, in so far as the application of site allowances is concerned.

[114] Certainty of this matter now will assist good practice industrial relations and avoid any further confusion if the Panel proceeds to determine the matter, given it is very likely that the tests in relation to site allowance rates will be identical for many, and this we consider will be instructive to the parties to those agreements. We note this will not just apply to enterprise agreements to which the CFMEU is party, but may also apply to electrical and plumbing enterprise agreements, many of which provide for site allowances in similar terms as we have noted.

[115] We agree with the sentiments of the JV at paragraphs 2.d and 21 that we should be creating *"…site allowance outcomes that promote harmonious relations across the Project"* and *"…bring certainty to the Project"*, and to the extent we can influence that through the making of this Determination in relation to the agreements before us, we consider we have. To not proceed is much more likely to create disharmony across the Project and continue the uncertainty that clearly presently exists.

[116] We do not consider making a Determination now in relation to subcontractors will prejudice any party in the JV proposed greenfields' negotiations. There is nothing about our Determination that should be all that surprising to any participant or party such that they could not have had a reasonable appreciation of the outcome had they

given the matter adequate and proper attention. We do not consider that it is helpful to allow negotiations which are not before the Panel and for which the Panel has no involvement, to stop it from determining the matters before it as provided by the Agreements and the Panel's Charter. Any settlement of a greenfields agreement by the JV will have no influence on the conclusions the Panel has reached in the matters before it.

[117] We have determined that there is no good reason for us to delay our Determination in this matter any further, in the best interests of the parties to the Enterprise Agreements and the employees for whom the entitlements thereto apply, and in the best interests of the Project itself.

[118] We note also that the IRV, Transurban or WDA made no submissions in relation to this and we conclude there is no public policy reason or any reason why we should not proceed.

[119] Accordingly, we issue our Determination.

Peter Parkinson
Chairman

Tony Cordier
Panel Member