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CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

and

VARIOUS NOTIFIED COMPANIES (listed in Attachment 1)

MELBOURNE METRO TUNNEL PROJECT

RE:ALLEGED INCORRECT APPLICATION OF SITE ALLOWANCE

20 July 2018

014-2017

DETERMINATION

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

[1] This is a dispute over the payment of site allowances on the Melbourne Metro Tunnel Project. The Panel has issued previous Statements and Determinations in relation to this matter as follows:

- Statement - 30 June 2017
- Statement No. 2 - 12 July 2017
- Statement No. 3 - 15 August 2017
- Statement No. 4 - 1 December 2017
- Statement No. 5 - 8 December 2017
- Interim Determination - 22 December 2017

- Statement No. 6 - 28 March 2018
- Determination - 13 April 2018
- Statement No. 7 - 18 May 2018
- Statement No. 8 - 7 June 2018

[2] This Determination is to be read in conjunction with each of those previous Statements and Determinations and deals with the outstanding matters in relation to this Dispute.

[3] The Melbourne Metro Tunnel Project is a major public transport infrastructure construction project in Victoria, said to cost in excess of \$11 Billion and has been under construction since July 2016. It is anticipated to be completed in 2026.

[4] In its Interim Determination the Panel found that pursuant to *Appendix C* of the relevant applicable Enterprise Agreements that “*special and exceptional circumstances*” applied to this Project. The Panel went on to provide certain principles intended to guide the parties to a settlement of the Dispute including guidance as to the Scope of the Project for site allowance purposes. The parties were not able to settle the Dispute.

[5] The Panel’s Determination of 13 April 2018 was limited in scope to the Determination of site allowance for works undertaken pursuant to what had come known and understood by the parties as the “Early Works Programme” in the context of the overall Project. That Determination left outstanding and unresolved the quantum of Site Allowance that would be payable across the Project with effect from 1 March 2018. It was then hoped that the parties might settle that matter directly by further negotiation having regard to the Panel’s observations and findings. The parties were not able to settle the outstanding matter.

[6] In its Statement No. 8 of 7 June 2018, the Panel issued the following agreed directions providing for any party to the dispute, including participants in the Project, Cross Yarra Partnership JV(CYP JV), John Holland (JH) and Industrial Relations Victoria (IRV), should they wish, to make written submissions to the Panel on any of the following matters:

1. Whether or not the Panel should immediately proceed, after receipt of the written submissions, to finally determine the outstanding matters, noting that separate negotiations are proceeding between a number of unions and CYP regarding a possible Greenfields Enterprise Agreement, which may or may not have relevance to this matter and may or may not be settled in the short term; and

2. If the Panel decided to proceed to determine the matters:

(a) what should be the Scope of the Project, noting that much of this has already been traversed by the Panel, and noting also that it would be open to any party at a later date, should a dispute arise as to scope, particularly having regard to the projected time frames of the Project, to determine matters of scope that may not presently be obvious; and

(b) what should be the quantum of allowance effective from 1 March 2018, having regard to the Panel's previous Determinations in this matter, and what adjustment/review or indexation arrangements to that allowance should apply for the remainder of the Project; and

(c) any other relevant matter.

[7] Submissions were received as follows:

- CFMEU - 22 and 27 June 2018
- CYP JV - 26 June 2018
- Urban Drilling - 4 July 2018

[8] The Panel subsequently provided a further opportunity for any party to respond. The Panel reminded all parties and participants of the opportunity to make final

submissions in reply by 4 July 2018. No further written submissions on the substantive matters were received.

[9] The Panel conducted a Final Hearing on 16 July 2018 for the purpose of receiving any final submissions by any party in person, including as to whether or not the Panel should thereafter immediately proceed to determine the outstanding matter. The Hearing was attended by representatives of the CFMEU, CYP JV, John Holland, Metcalf, Associated Rigging, Reliable Scaffold and IRV, with apologies from others.

[10] The Panel has carefully considered all the oral and written submissions in the matter. Suffice to say, the Panel has thoroughly considered every relevant matter throughout the course of proceedings in this matter.

Should the Panel delay its Determination?

[11] CYP JV's submission of 26 June 2018 was limited to advising the Panel that it was continuing to negotiate with the unions in respect of site allowance claims and other matters pertaining to the Project more generally. It identified that negotiations were underway and urged the Panel “...*to take no further action until those negotiations have progressed.*” It had made a similar suggestion in an earlier letter to the Panel dated 17 May 2018 and in another letter in essentially identical terms to the 26 June 2018 letter, dated 31 May 2018.

[12] The CFMEU submitted that the Panel should proceed to issue its Determination on the outstanding matters.

[13] At the Hearing on 16 July 2018 CYP JV confirmed that the negotiations it was seeking to progress with the relevant unions were in relation to two Greenfields agreements for its prospective employees only, one for surface works, the other for tunneling works. It confirmed that the proposed agreements would cover all terms and conditions of which site allowance was one such term. Such an agreement if made would not have any application to the employees employed by the subcontractors party to this dispute. The JV advised that the negotiations had progressed and it anticipated that the negotiations would be settled in a matter of weeks.

[14] The Employers, found earlier by the Panel to be party to the dispute, some 26 of them, have not made any submissions that the Panel delay its Determination, and a number have expressed the wish for the matter to be finally resolved, one submitting *“sooner rather than later”*.

[15] The CFMEU has urged the Panel to issue a Determination as it would only apply to the employees of subcontractors not the JV. The CFMEU confirmed that it anticipated negotiations for the greenfield agreements could be settled in a matter of weeks.

[16] We note, as acknowledged by the JV, that the matters that are 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. Other matters concerning

terms and conditions of employment on the Project are already settled in the Agreements before us.

[17] We note also the number of subcontractor employees on the Project presently and the projected increases in subcontractors and subcontractor employee numbers commencing on the Project. There are presently some 200 employees on site. It is expected that these numbers will grow considerably.

[18] 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.

[19] Certainty of this matter now will assist good practice industrial relations and avoid any further confusion, 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 is likely to also apply to electrical and plumbing enterprise agreements, many of which provide for site allowances in similar terms. Apparently the parties to those agreements have already been following the Panel's determinations under this matter to date.

[20] Given the long history of this matter, any reading of the Statements and previous Determinations should be evidence enough that this matter needs to be finalised. We do not consider there is any good reason to delay our Determination any further and note that the negotiations being pursued by the JV have progressed. The Panel has provided every opportunity for the outstanding matters in dispute to be resolved by negotiation directly between the parties well before now. 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. The outstanding matters before the Panel need to be settled for the best interests of everyone, the employers and employees covered by the agreements and for the Project itself.

[21] Having regard to all the circumstances, facts and evidence in this matter the Panel reaffirms its findings in its previous Determinations and Statements published in the matter. The parties are encouraged to reappraise themselves of those findings. We set out the following matters for clarity.

Parties Bound

[22] The Panel reaffirms its findings in its Determination of 13 April 2018 at paragraphs [7] to [15] which are unnecessary to repeat here as all relevant parties have been provided with that Determination, and no party has raised any issue in relation to the application of that Determination. The same 26 employers are bound by this Determination in the same way explained by the Panel in the earlier Determination in relation to any works they have conducted or are conducting on the Project for the relevant periods. We note that some may not have worked on the Project for some time. Should they return, this Determination will be binding on them.

[23] During earlier proceedings in this matter the Panel excluded Wagstaff from the Dispute for reason that its the Enterprise Agreement (*Wagstaff Piling Pty Ltd*

and the CFMEU (Victorian Construction and General Division) Piling Enterprise Agreement 2011-2015) (the Wagstaff 2011 Agreement) did not have application in this matter. In the West Gate Tunnel Project (Matter number 008-2018) the Panel has been informed by Wagstaff that it has replaced that agreement with a new Agreement (*Wagstaff Piling Pty Ltd and the CFMEU (Victorian Construction and General Division) Piling Agreement Enterprise Agreement 2016 - 2018)* (the Wagstaff 2018 Agreement) which would now have application in this matter with effect from 18 May 2018 if it were to perform work on this Project. We however do not formally rejoin Wagstaff to this matter; rather we leave it to the commonsense of the parties to apply the appropriate site allowance pursuant to its agreement consistent with the findings in this Determination. Should there be any dispute about this any party is at liberty to apply to the Panel.

Scope of Project

[24] The Panel is satisfied that the scope of the Project for the purposes of the applicable site allowance will be for any works undertaken within the works as referred in paragraphs [33] to [34] of its Interim Determination dated 22 December 2017, subject to the qualifications set out therein. We do not see any reason to revisit this. There have not been any submissions that have led the Panel to accept that the scope of works are either more or less than the guidance we then provided which we now adopt for this Determination. We repeat this description from the Interim Determination below for the purposes of clarity:

“[33] The following table has been extracted from the presentation made to the Panel by the MMRA on 15 August 2017 to which the MMRA has advised the Panel it can rely in determining the Project scope (reference letter from MMRA dated 15 December 2017).”

This table lists the four packages of works and Additional Costs, resulting in a total indicative cost of \$11.031 Billion.

“Metro Tunnel Indicative Amounts

<i>ITEM</i>	<i>SCOPE</i>	<i>AMOUNT</i>
<i>EARLY WORKS MANAGING CONTRACTOR</i>	<ul style="list-style-type: none"> <i>Utility service relocation</i> <i>Works to prepare construction site</i> 	<i>\$324m*</i>
<i>TUNNEL & STATION PPP</i>	<ul style="list-style-type: none"> <i>D&C</i> <i>O&M (25 years period</i> <i>Financing</i> <i>Special Purpose Vehicle</i> 	<i>Up to \$6b#</i>
<i>RAIL INFRASTRUCTURE ALLIANCE</i>	<ul style="list-style-type: none"> <i>D&C</i> <i>Rail Transport Operator (Occupations, Driver Training, Accreditation etc)</i> <i>Wider Network Enhancements</i> 	<i>\$1b#</i>
<i>RAIL SYSTEMS ALLIANCE</i>	<ul style="list-style-type: none"> <i>D&C</i> <i>High Capacity Signaling Implementation (\$131m)</i> <i>Rail Transport Operator (Occupations, Driver Training, Accreditation etc)</i> <i>Wider Network Enhancements</i> 	<i>\$1b#</i>
<i>ADDITIONAL COSTS INCLUDING</i>	<ul style="list-style-type: none"> <i>Owner’s Project Management</i> <i>Project Design and Development</i> <i>Legal, commercial and Procurement</i> <i>Land acquisition (200+ properties)</i> <i>Owner’s Risk</i> <i>Rail and Tram Transport Operator</i> 	<i>\$3b</i>
<i>Total</i>		<i>Total \$11.031b</i>

**Contract Amount published on Tenders Vic website (excludes GST)*

#Indicative amount, included in Government release.

[34] The Panel accepts that these work packages and costs determine the broad Scope of the Project, however, as is set out below, some of the scope is not relevant for the purposes of determining Construction related activity for which a site allowance might be determined.

[35] On the analysis undertaken by the Panel, having regard to the material available to it, the Project Construction Value and Scope includes the first four items, but not entirely. It does not include the fifth item “Additional Costs Including”. Items or packages that properly should be excluded from the first four items, that are not considered construction related for present purposes are:

- Operations and Maintenance*
- Financing*
- Special Purpose Vehicle Costs*
- Rail Transport Operator costs other than construction*
- Wider Network Enhancements, but only those that are not intrinsic to or necessary for the completion of the Metro Tunnel Project and are consequent upon a separate initiative than the Metro Tunnel Project. Works associated with the main rail corridor (ie. at least Tottenham to Caulfield and perhaps Sunbury to Cranbourne/Pakenham, the latter which might require further review based upon the MMRA detail yet to be provided) ought be included as should those that are intrinsic to or necessary for the effective performance and completion of the Project.”*

[25] The CFMEU made a number of submissions concerning scope and argued that there were a range of questions as set out at para.11 of its submission 26 June 2018. We consider that the description of the scope that the Panel has found to exist as set out above is sufficiently clear for present purposes and deals with matters raised by the CFMEU.

[26] The CYP JV submitted at the final Hearing and JH again submitted as it had done in an earlier letter to the Panel, that the scope of works for determining a site allowance should be limited to the works that were confined to their individual contracts only, and not to the total Project.

[27] Nothing new has been submitted to the Panel in this regard since it dealt with this question in the earlier proceedings and there has been nothing that has swayed us from our previous view that this is to be considered as one Project for the purposes of site allowance.

[28] To be clear, all and any works that fall within the works set out in the description determined by the Panel, whether they be Early Works, Major Works, Rail Works or any other works that are intrinsic to or necessary for the completion of the Project and are not consequent upon a separate and unrelated initiative or programme of works are included and covered by this Determination.

[29] The Panel notes the CFMEU's submission at para 10 that it seeks "*to reserve its rights*" as to a further future determination. The Panel does not consider it appropriate to allow such an open ended arrangement as we consider that it is very unlikely that the works to be conducted during the course of the Project will be such as to impact any further on the quantum of the site allowance other than for what the Panel has now determined. We can anticipate that there may be questions to be resolved about scope, given the uncertainty that still exists as to some aspects of the Project. Should there be any subsequent argument or dispute as to any works which should or should not be included in the scope of this Determination, the Panel is available to advise and/or determine the matter at any point during the life of the Project.

Quantum of Site Allowance applicable from 1 March 2018

[30] On the matter of quantum of the site allowance the Panel received written submissions from the CFMEU only. The CFMEU submitted, based on a Project

which it says has a Total Project Value of in “*excess of \$8 billion*”, that a site allowance of \$9.50 should apply from 1 March 2018.

[31] The Panel found by its earlier analysis that the Project Value is “*in excess of \$5.208 Billion with additional significant works yet to be let*”. The Rail Infrastructure Alliance contract was announced on the final day of Hearing, for a contract value of \$1 Billion, as was anticipated from the earlier indicative amounts. Some of that value was factored into the \$5.208 Billion from the earlier analysis undertaken by the Panel.

[32] There can be no doubt that the Project cost over time will be well higher than \$5.208 Billion, however, as previously observed, the Panel is not certain that a site allowance should necessarily increase exponentially for such projects just because of the cost of the project alone. It is certainly a special factor to be taken into account when setting a site allowance but we do not consider that a scale or table of values and allowances, particularly for the values we are considering here, of themselves, should dictate the quantum. Whether it is \$5 Billion or \$8 Billion is not solely determinative for a Project such as this, in our view. It may be in other contexts, but not here.

[33] This Project is a huge undertaking, with just about every facet of construction incorporated into its complex and comprehensive purpose. In reaching our Determination in this matter we have also had regard to its size, its cost, the geography that it covers, the services which make up its development and assure its performance and the interrelationship that the Project necessarily has with all modes of transport. All of these are significant factors when considered together

that impact on the way work is being performed and will be performed on this project by workers covered by agreements as we have before us.

[34] The Panel notes that in addition to the site allowance that is applicable across the Project there will be other specific allowances payable pursuant to the agreements for tunneling, towers, height work and others which are properly compensated on incidence.

[35] The Panel understands that the advice issued by one employer Association has been interpreted by some to suggest that the quantum of site allowance pursuant to the electrical enterprise agreements for this Project is \$15.00 per hour. The Panel is satisfied that this is not the advice. To be clear we have had no regard for this as we can safely assume this conclusion has been based on the overall project expenditure as is regularly quoted by the State Government (ie. \$11 Billion) which includes much more than the relevant costs to be taken into account for present purposes.

[36] We do however note that if the generally applicable electrical and plumbing enterprise agreement site allowance tables were to be applied to this Project, purely based upon project value alone, if special and exceptional circumstances did not apply, as we have found they do, a site allowance of a minimum of \$9.30 would otherwise result for a value of \$5.208 Billion, and we know the value is greater than that, or for a value of \$8 Billion, a \$12.00 site allowance could apply. As we have noted, it is not possible to be conclusive as to value. That is the nature of this enormous Project. We do not consider in the overall context of this Project that such an approach of applying a table of allowances and values is sustainable or logical. It has been acknowledged by all parties that to provide certainty of project

value for this Project is simply too difficult given all the factors at play in this Project.

[37] We note that in earlier iterations of enterprise agreements with the CFMEU prior to the 2016-2018 agreements, some of which are before us, the site allowance table in *Appendix C* makes provision for an increase in the site allowance for every \$100m in excess of the highest project value in the table. The electrical and plumbing agreements have retained this same provision, with some marginal differences in the values, except where there are special and exceptional circumstances. We find it somewhat incongruous that the provision disappeared entirely from the most recent CFMEU agreements and we really do wonder what was intended by the negotiating parties in doing so. Was it an oversight or a drafting error? We have not been adequately addressed on this point. Whatever was intended, it seems to have been repeated. The intention of the parties is not clear. We do note that at least in relation to *Clause 12* of the agreements there has been an attempt to distinguish projects above \$1.7 Billion in relation to *Appendix C*. We do not think from what has been said that the intention was that once a Project was over the highest stated value, ie. \$1.7 Billion, that no site allowance at all would be paid or that every project over \$1.7 Billion was “special or exceptional”. In the Project before us the Panel is very clear that it is “special and exceptional”, but we wish to make it clear that it does not follow that every project above \$1.7 Billion will always meet this description. Value alone does not make a project “special and exceptional” in the context of *Appendix C* to the agreements. We raise this such that the parties might take the necessary steps to provide clarity as to their intentions if their agreements are not reflective of their intentions in this regard. However, this matter has no relevance in the proceedings before us given our findings.

[38] The Panel did not receive any submissions from any employer party to the dispute or from CYP JV, JH or IRV as to quantum of site allowance. When pressed at the final hearing, JH submitted that the Panel, if it were to determine the outstanding matter, should not go beyond the current quantum of \$7.50 per hour. CYP JV effectively said the same, “*a maximum of \$7.50*”. The JV was not prepared to inform the Panel of the quantum of site allowance it had proposed for its proposed greenfields agreements, due it said to “*commercial in confidence*” reasons. The CFMEU did not reveal the amount the JV had proposed for the same reason it said.

[39] The circumstances of the earlier Determination by the Panel, in awarding \$7.50 from 1 October 2017 up to 1 March 2018, is set out clearly in the early Determination which was recognised by the Panel as a “stepped increase” from \$6.50, having regard to the very specific circumstances of this Project, which ordinarily would not apply. The Panel recognised 1 March 2018 as the appropriate date by which the further stepped increase should properly apply, having regard to the works now underway across the Project.

[40] The Panel has also had due regard to matters and evidence of relevance that have been traversed in recent times in the West Gate Tunnel Project, matter No. 008-2018, in reaching its conclusions in this matter. The Panel has also had due regard to the quantum of site allowances that are and have been payable across the industry and consider the quantum determined here is fair and reasonable compensation in all the circumstances. We have had regard to all relevant matters in reaching this conclusion.

[41] Having regard to all the circumstances in this matter the Panel determines that a site allowance of \$8.50 per hour shall apply on and from 1 March 2018, and a final stepped increase to \$9.20 will apply on and from 1 August 2018, replacing the previously applicable \$7.50 per hour allowance. Employers bound by this Determination who have conducted works since 1 March 2018 on the Project will need to make retrospective adjustments for the difference for any employees that have worked on the Project from that date.

[42] The Panel has determined the above operative dates having regard to its earlier Determination and the now awarded final major contract pursuant to the Project. This outstanding matter is now certain for all.

Site Allowance - Indexation

[43] The Panel received written submissions from the CFMEU only on this matter. When pressed at the final Hearing there seemed to be acknowledgement from the employer parties at least that the CFMEU proposal was appropriate. CYP JV said the site allowance it had proposed for its greenfields agreements would not be indexed at all. JH said there should be no indexation.

[44] 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

particularly having regard to the projected time lines of the Project. To be clear, the next date of adjustment of the site allowance quantum will be 1 October 2018.

[45] The Panel having made this Determination considers that all matters in relation to this Dispute are now settled. As we have noted earlier, it can be anticipated that given the scope and time to completion of the Project that issues as to scope may arise which the Panel can assist the parties in resolving or determining should it become necessary. However we do not presently anticipate that such matters are likely to impact the quantum of the now determined site allowance, rather only whether or not certain works are within or outside scope. The only basis upon which the quantum could be revisited other than as provided by this Determination would be if the performance of works were so unusual as to warrant a review, and even in this case it would very likely be limited to a specific type of work process not something that would impact a project wide site allowance.



Peter Parkinson
Chairman



Tony Cordier
Panel Member