DECISION

Fair Work Act 2009
s.739—Dispute resolution

Wagstaff Piling Pty Ltd T/A Wagstaff Piling
v
Construction, Forestry, Maritime, Mining and Energy Union
(C2018/4283)

DEPUTY PRESIDENT MASSON MELBOURNE, 16 NOVEMBER 2018

Alleged dispute about any matters arising under the enterprise agreement - dispute over site allowance decision of Victorian Building Industry Panel – whether Commission has jurisdiction to determine the dispute – nature of "review" to be conducted of the Victorian Building Industry Panel decision.

Introduction

[1] Wagstaff Piling Pty Ltd (Wagstaff) made an application under clause 10 Dispute Settlement Procedure (DSP) of the *Wagstaff Piling Pty Ltd and the CFMEU (Victorian Construction and General Division) Piling Agreement 2016 – 2018*[1] (the Wagstaff Agreement) for the Fair Work Commission (Commission) to deal with a dispute.

[2] On 10 May 2018, the CFMMEU notified a dispute to the Victorian Building Industry Disputes Panel (the Panel), seeking that the Panel determine a site allowance for employees who are or will be engaged on the Westgate Tunnel Project (the Project) by a number of employers, including Wagstaff.

[3] On 20 July 2018, the Panel issued a decision (the Panel Decision) in which it determined a site allowance of $8.90 per hour to be paid by Wagstaff to each of its employees engaged on the Project and who are covered by the Wagstaff Agreement.

[4] Pursuant to clause 10.4(e) of the Wagstaff Agreement, Wagstaff made an application to the Commission on 3 August 2018 in which it sought a *"review"* of the Panel Decision. The nature of the "*review*" sought by Wagstaff was that of a hearing *de novo*.

[5] At a Mention hearing conducted by the Commission on 16 August 2018, the CFMMEU confirmed its objection to the conduct of a hearing *de novo* as sought by Wagstaff. Directions were then issued to the parties for the filing of submissions and materials, both in respect to determination of the preliminary matter, that being the nature of the "*review*", and also the substantive matter. Directions regarding the determination of the substantive matter were subsequently vacated pending determination of the preliminary matter. Both parties filed submissions and material in relation to the preliminary matter.

[6] A hearing to deal with the preliminary matter was set down for 18 September 2018, on the morning of which, the CFMMEU filed supplementary submissions. In those supplementary submissions, the CFMMEU contended that Wagstaff's application should be dismissed pursuant to s 587 of the *Fair Work Act 2009* (the Act) on the grounds that the Wagstaff Agreement does not confer jurisdiction upon the Commission to determine the dispute. After a brief hearing on 18 September 2018, the matter was adjourned to allow Wagstaff to prepare and file material in response to the CFMMEU's jurisdictional objection.

[7] A further date for hearing of the two preliminary matters was then set down for 3 October 2018, which proceeded as listed. Both parties sought and were granted permission for legal representation pursuant to s 596 of the Act.

Issues for determination

[8] This decision concerns the determination of two preliminary matters:

(1) That the proceedings should be dismissed pursuant to s 587 of the Act on the grounds that the Wagstaff Agreement does not confer jurisdiction upon the Commission to determine the dispute; and

(2) Subject to a decision on the CFMMEU's jurisdictional objection, decide the nature of the "*review*" to be undertaken by the Commission in determining the dispute.

[9] Determination of the two preliminary matters turns on the proper construction of Clauses 10 - Dispute Settlement Procedure, clause 24.1 and Appendix C – Site Allowance Procedure of the Wagstaff Agreement.

[10] Clause 10 – Disputes Settlement Procedure relevantly provides as follows:

"10 Disputes Settlement Procedure

10.1 A major objective of this Agreement is to eliminate lost time and/or production arising out of disputes or grievances. Disputes over any work related or industrial matter or any matters arising out of the operation of the Agreement or incidental to the operation of the Agreement should be dealt with as close to its source as possible. Disputes over matters arising from this Agreement (or any other dispute related to the employment relationship or the NES, including subsections 65(5) or 76(4) of the Fair Work Act) shall be dealt with according to the following procedure.

10.2 Work shall continue without interruption from industrial stoppages, bans and/or limitations while these procedures are being followed. The pre-dispute status quo shall prevail while the matter is being dealt with in accordance with this procedure.

10.3 All Employees have the right to appoint a representative in relation to a dispute. It is the express priority of all Parties to attempt to settle a dispute at the workplace level at first instance.

10.4 In the event of any work related grievance arising between the Employer and an Employee or Employees, the matter shall be dealt with in the following manner:

(a) The matter shall be first submitted by the Employee/s or his/her job delegate/Employee representative or other representative, to the site foreperson/supervisor or the other appropriate site representative of the Employer, and if not settled, to a more senior Employer representative.

(b) Alternatively, the Employer may submit an issue to the Employee/s who may seek the assistance and involvement of the job delegate/ Employee representative or other representative.

(c) If still not resolved, there may be discussions between the relevant Union official (if requested by the Employee/s), or other representative of the Employee, and senior Employer representative.

(d) Should the matter remain unresolved, either of the parties or their representative shall refer the dispute at first instance to the Victorian Building Industry Disputes Panel (which shall deal with the dispute in accordance with the Panel Charter).

(e) Either party or their representative may, within 14 days of a decision of the Panel, refer that decision to FWC for review. FWC may exercise conciliation and/or arbitration powers in such review.

10.5 This procedure shall be followed in good faith without unreasonable delay.

10.6 If any party fails or refuses to follow any step of this procedure the non-breaching party will not be obligated to continue through the remaining steps of the procedure, and may immediately seek relief by application to FWC.

10.7 All Parties will cooperate with the requests of the Disputes Panel including requests to provide substantiating information or undertaking an independent audit of matters arising from this Agreement. For the avoidance of doubt, an affected Employee may appoint a representative in relation to such matters.

10.8 Any resolution of a dispute under this clause by the Panel or FWC will not be inconsistent with legislative obligations or any other applicable Codes or Regulations."

[11] Clause 24.1 prescribes the entitlement to site allowances and relevantly provides as follows:

"24.1 Site allowances shall be paid in accordance with the formula which appears in **Appendix C** (only in limited circumstances as prescribed by Appendix K Clause 1)"

[12] Appendix C – Site Allowance Procedure relevantly provides as follows:

"APPENDIX C- Site Allowance Procedure

1. This procedure shall apply to construction work in the commercial/industrial sector of the building industry in the State of Victoria. Further, it is expressly agreed by the parties to this procedure that Site Allowances will not be claimed on any project where the Project Value is below $3 million.

2. In addition to the wage rates and allowances prescribed, the Employer shall pay to Employees extra rates as set out in the special rates clause of the Award for the period when individual employees incur those disabilities prescribed by the said clauses, except those special rates which are specifically included in the Site Allowance applicable to a Project.

3. The payment of Insulation Allowance shall be paid to individual employees only who are affected (as defined in the Award) by the use of such material.

4. Subject to the foregoing, where the Union on behalf of its members, requests an Employer to consider a claim for payment of a Site Allowance, such Site Allowance shall be determined either by:

    (a) Geographic location if the project is contained within the City of Melbourne as defined in clause 15 of this appendix; or

    (b) The amount contained in clause 7 or clause 14 of this appendix.

……

11. The appropriate Site Allowance shall be based on the Total Project Value, as defined by Clause 2 of this Agreement.

    (d) 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 Industry 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.

    (e) 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 predominately contract metal trades construction/maintenance work is being carried out. Where the procedures prescribed by this Clause are being followed, work shall continue normally. In the event of employees taking industrial action in pursuance of a claim the date of operation of the Project Site Allowance shall not commence before the date on which the employees cease industrial action.

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.

……"

Approach to construing enterprise agreement terms

[13] The approach to construing enterprise agreements was most recently set out in a Decision of a Full Bench of the Commission *in "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Berri Pty Ltd*[2](Berri) as follows:

> *"1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:*
>
> *(i) the text of the agreement viewed as a whole;*
>
> *(ii) the disputed provision's place and arrangement in the agreement;*
>
> *(iii) the legislative context under which the agreement was made and in which it operates.*
>
> *2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.*
>
> *3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.*
>
> *4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.*
>
> *5. The FW Act does not speak in terms of the 'parties' to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are 'covered by' such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement 'with the employees who are employed at the time the agreement is made and who will be covered by the agreement'. Section 182(1) provides that an agreement is 'made' if the employees to be covered by the agreement 'have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement'. This is so because an enterprise agreement is 'made' when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.*
>
> *6. Enterprise agreements are not instruments to which the Acts Interpretation Act 1901 (Cth) applies, however the modes of textual analysis developed in the general*

law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some general principles of statutory construction may have less force in the context of construing an enterprise agreement.

7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.

8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform and the subject matter of the agreement. Evidence of such objective facts is to be distinguished from evidence of the subjective intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

12. Evidence of objective background facts will include:

(i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;

(ii) notorious facts of which knowledge is to be presumed; and

(iii) evidence of matters in common contemplation and constituting a common assumption.

13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.

14. Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.

> *15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding."*

[14] In *CFMEU v Endeavour Coal Pty Ltd T/A Appin Mine*,[3] a Full Bench of the Commission held that the context of an agreement provision is significant. In this regard, the Full Bench set out the explanation of this point by the NSW Court of Appeal in *Mainteck Services Pty Ltd v Stein Heurtey SA,*[4] emphasising the following matters:

- *Until a word or phrase is understood in the light of the surrounding circumstances, it is rarely possible to know what it means*[5] *and there is always some context to any statement;*[6]

- *Language considered in its context will often have a clear meaning and context will often not displace that meaning – "but not always";*[7]

- *To state that a legal text is clear reflects the outcome of an interpretation process and means that there is nothing in the context that detracts from the ordinary literal meaning and cannot mean that context can be put to one side;*[8]

- *The phrase used by Mason J in Codelfa "if the language is ambiguous or susceptible of more than one meaning" does not mean that the susceptibility of the language to more than one meaning must be assessed without reference to the surrounding circumstances and in order to determine whether more than one meaning is available it may be necessary to turn to context;*[9] *and*

- *Context has also been described as surrounding circumstances and the meaning of terms normally requires consideration not only of the text, but of the surrounding circumstances known to the parties and the purpose and object of the transaction.*[10]

[15] The case law in relation to the approach to the construction of enterprise agreements makes it clear that context and purpose are relevant to the construction of provisions in an enterprise agreement and must be considered even where the words of the provision being construed appear, on their face, to have a clear and unambiguous meaning.

Jurisdiction of the Commission

[16] I turn first to consider the jurisdictional objection raised by the CFMMEU.

[17] The CFMMEU contend that clause 10.4 of the Wagstaff Agreement refers to disputes about *"work related grievances"* and does not capture disagreements about site allowances which are dealt with at Appendix C of the Wagstaff Agreement. The CFMMEU further submits that Appendix C prescribes a site allowance procedure. It details how site allowances are to be calculated by way of a number of machinery provisions and prescribes how disagreements over the quantum of site allowances are to be resolved.

[18] According to the CFMMEU, where the parties are unable to reach agreement, clause 11 of Appendix C provides for the referral of the site allowance disagreement to the Panel for determination and clause 13 provides that any site allowance determined by the Panel shall be *"incorporated into the Agreement in accordance with the Fair Work Act 2009"*.

[19] The CFMMEU submit that that determination of the site allowance dispute by the Panel is intended to be final, as evident by the reference to incorporation of the determined site allowance into the Wagstaff Agreement. Further, that there is no reference in Appendix C to a capacity of an aggrieved party to refer a site allowance determination of the Panel to the Commission or any other person for "*review"*.

[20] The CFMMEU point to the decision of the Full Bench in *Construction, Forestry, Mining and Energy Union v J A Dodd Ltd*[11] (Dodd) where the Full Bench relevantly observed at paragraphs [25]-[27] of its decision when dealing on appeal with the interaction of the Dispute Settlement Procedure and Appendix C in the *J.A. Dodd Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2005-2008*[12] (the J A Dodd Agreement) that:

> ***"[25]*** *It is clear from the terms of cl.11 of Appendix C that the function of determining site allowance disputes is conferred upon the Chairperson of the Disputes Panel. The question arising is whether the function thus conferred is to be exercised having regard to the terms of Appendix C alone, or whether the function is to be exercised in accordance with the powers of the Chairperson and the Disputes Tribunal as outlined in the Charter. This question is to be answered by reference primarily to the terms of the Agreement, although other material, such as the Charter, may be relevant.*
>
> ***[26]*** *The first thing to note is the contrast between cl.10(2)(f) of the Agreement and cl.11 of Appendix C. While cl.10.2(f) confers power on the Disputes Panel, cl.11 of Appendix C confers power on the Chairperson alone. While the Disputes Panel is to exercise powers in accordance with the Charter, Appendix C does not refer to the Charter at all. These are strong indications that the Chairperson is not required to act in accordance with the Charter under Appendix C.*
>
> ***[27]*** *Further, cl.10.2(g) provides that a party may refer a decision of the Disputes Panel to the Commission for review. Appendix C has no such provision. In addition, the fact that cl.13 provides that the Chairperson's determination shall be incorporated into the Agreement negatives the potential for an implication that the Chairperson's decision could be referred to the Commission for review. For these reasons we have concluded that it is clear from the text of the Agreement that the power to determine site allowance disputes is conferred on the Chairperson as a designated person and the parties did not intend that he should deal with such disputes in accordance with the Charter. It follows that the Commission has no jurisdiction to determine site allowance disputes pursuant to cl.10 of the Agreement."*

[21] The CFMMEU further contend that clause 10.4 deals with *"work related grievances"* that arise between Wagstaff and its employees, not the CFMMEU, which has a different character to that of a dispute over site allowances between Wagstaff and the CFMMEU. According to the CFMMEU this distinction *"showcases"* that disputes over site allowances are to be dealt with in accordance with Appendix C rather than clause 10.4 of the Wagstaff Agreement. The CFMMEU concede, however, that all other determinations by the Panel,

except in respect of site allowances, were referable to the Commission for *"review"* by an aggrieved party dissatisfied with a Panel determination.

[22] The CFMMEU submit that the explicit procedure in Appendix C for determining site allowance disagreements overrides the general dispute settlement procedure of clause 10.4. They further contend that the parties consciously provided for a specific process and power for the Panel to resolve site allowance disputes whereas other general *"work related grievances"* were to be determined in accordance with clause 10.4.

[23] Wagstaff reject the CFMMEU's construction and submit that it was contrary to the proper construction of the Wagstaff Agreement. It advances several arguments in support of its submission.

[24] According to Wagstaff, the DSP in the Wagstaff Agreement could not have been more broadly expressed. It refers to *"Disputes over any work related or industrial matter or any matters arising out of the operation of the Agreement or incidental to the operation of the Agreement…."*

[25] Wagstaff also reject the CFMMEU submission that *"work related grievances"* has a special character that enlivens the operation of clause 10.4 and that such matters stood apart from all other matters.

[26] Wagstaff submit that site allowance disputes are not in a special category that takes them outside the scope of clause 10.4. They refer to clause 24 which is the source of site allowance entitlements, which then points to Appendix C which provides the site allowance calculation formula. In Wagstaff's submission, Appendix C and Appendix K are only engaged by reason of clause 24; do not stand separate from the rest of the Wagstaff Agreement; and that the operation of Appendix C or a determination of the Panel under Appendix C is clearly in relation to a dispute over *"any work related or industrial matter or any matters arising out of the operation of the Agreement or incidental to the operation of the Agreement"*.

[27] A failure to reach agreement in respect of a site allowance is in Wagstaff's submission a dispute or grievance to which clause 10.4 applies and is supported by the Full Bench decision in *Dodd* where the Full Bench relevantly stated at paragraph [18]:

> ***[18]*** *Clause 10.1 of the Agreement empowers the Commission to settle disputes over "matters arising from this Agreement." Clause 10.2 refers to "any work related grievances arising between the Company and an employee or employees" and sets out procedures for resolving such grievances. A dispute about the application of the site allowance provisions in Appendix C is a dispute about the application of the Agreement and, it seems, comes within the more general words in cl.10.1 and 10.2. We therefore find that the Commission has jurisdiction to determine disputes about the operation of Appendix C and its relationship to cl.10.2. It is apparent from cl.10.2(g) that the Commission's power to determine disputes depends relevantly upon the existence of a decision of the Disputes Panel. The linchpin of the Deputy President's decision is the conclusion that the Chairperson's decision not to refer Dodd's applications to the Disputes Panel constituted a decision of the Disputes Panel.*

[28] Wagstaff submit that the facts of *Dodd* are really only distinguishable from the present matter in one material respect. While clause 10 of the J A Dodd Agreement was almost identical to clause 10 of the Wagstaff Agreement, Appendix C of the J A Dodd Agreement provided that disputes about site allowance claims would be determined by the Chairperson of the Panel rather than the Panel. Wagstaff submit that the issue before the Full Bench in *Dodd* was whether a determination of the Chairperson was amenable, under clause 10 of the J A Dodd Agreement, to the same *"review"* process which applied to determinations of the Panel, that is by referral to the Commission.

[29] Wagstaff submit that the Full Bench in *Dodd* found that under Appendix C in the J A Dodd Agreement, the Chairperson stood independently of the Panel; was not bound to follow the Panel Charter[13] for the purposes of determining site allowance disputes; and that the Commission consequently had no jurisdiction to deal with a dispute over a decision of the Chairperson.

[30] Wagstaff submit that the Master Builders Association of Victoria (MBAV) sought to alter the wording in Appendix C having regard to *Dodd*, during negotiations for the 2011-2015 Victorian construction industry pattern agreement. Wagstaff rely on the evidence of Mr Lawrie Cross[14], an employee of MBAV, who was involved in the negotiations of that industry pattern agreement.

[31] Mr Cross in his evidence states that the MBAV sought to remedy the consequences of *Dodd* by clarifying that any determination of site allowances would be made by the Panel (not the Panel Chairperson) and that such determination would be subject to *"review"* by the Commission in accordance with the relevant agreement dispute settlement procedure.[15] Mr Cross gave evidence that the specific amendment sought by the MBAV was ultimately agreed to by the CFMMEU and incorporated into individual enterprise agreements.[16]

[32] Wagstaff submits that the objective evidence leads to an inescapable conclusion that the parties intended to alter clause 13 in Appendix C following *Dodd* to ensure the Panel Chairperson was not the final arbiter of site allowance claims and that the Panel determined site allowance disagreements within the terms of the Panel Charter.

[33] Wagstaff also submits that the CFMMEU's construction is directly at odds with the Panel's own view as to the conditional finality of its decisions and referred to a recent determination[17] of the Panel.

Consideration

[34] The central premise of the CFMMEU's submission is that disagreements over site allowances cannot be determined according to clause 10.4 of the Wagstaff Agreement. Rather, they can only be determined strictly in accordance with Appendix C of the Wagstaff Agreement.

[35] It is necessary to start with a consideration of clause 10 of the Wagstaff Agreement.

[36] Clause 10.1 of the Wagstaff Agreement prescribes a broad scope of operation of the DSP. It refers to the objective of dealing with disputes as close as possible to the source and in doing so describes that objective in respect of:

"...any work related or industrial matter or any matters arising out of the operation of the Agreement or incidental to the operation of the Agreement..."

[37] Clause 10.1 goes on to require disputes to be dealt with according to the DSP when it relevantly states:

"Disputes over matters arising from this Agreement (or any other dispute related to the employment relationship or the NES, including subsections 65(5) or 76(4) of the Fair Work Act) shall be dealt with according to the following procedure."

[38] The procedural steps referred to in clause 10.1 are then detailed in the remaining sub-clauses of the DSP. For the purpose of the present matter, the relevant steps in the procedure are found in clause 10.4. The escalation step, in circumstances where the matter remains unresolved following union official and senior employer representative discussion, requires the referral of the dispute to the Panel:

"(d) Should the matter remain unresolved, either of the parties or their representative shall refer the dispute at first instance to the Victorian Building Industry Disputes Panel (which shall deal with the dispute in accordance with the Panel Charter)."

[39] Where a party is aggrieved by a decision subsequently made by the Panel, it may, in accordance with clause 10.4(e) of the DSP, then refer the matter to the Commission for *"review"*:

"(e) Either party or their representative may, within 14 days of a decision of the Panel, refer that decision to FWC for review. FWC may exercise conciliation and/or arbitration powers in such review."

[40] I am satisfied that a plain reading of the DSP leads to a conclusion that the parties intended the scope of the procedure to be so broad as to allow disputes over any matter arising under the agreement, the employment relationship and the NES to be dealt with under the procedure. Further, that disputes over such matters could be progressively escalated under the procedure through to the Panel for determination and then to the Commission for *"review"* by a party aggrieved by a Panel decision. There are, in my view, no limiting words within the DSP that narrow the scope of the disputed agreement, employment or NES matters that may be progressed under the procedure. Nor does the procedure identify a particular category or categories of matters that fall outside the scope of the DSP.

[41] I am satisfied that site allowances are a matter specifically provided for in the Wagstaff Agreement at clause 24 with the calculation methodology provided in Appendix C. Putting aside the effect of clauses 11 and 13 of Appendix C at this point, there can be no doubt that a dispute over a site allowance is a dispute over a matter arising under the Wagstaff Agreement. The question to be answered, therefore, is whether clauses 11 and 13 of Appendix C limit the scope and operation of clause 10 of the Wagstaff Agreement in respect of site allowance determinations of the Panel.

[42] The CFMMEU effectively conceded the breadth of scope of clause 10 in their oral submissions and that all Panel determinations, except with respect to determining site allowances, were capable of referral and *"review"* by the Commission[18]. They contend,

however, that the Commission should have regard to the Latin description for the syntactical presumption of *generalia specialibus non derogant*, that where there is a conflict between general and specific provisions, the specific provision will prevail. It is important to note that the presumption is not of general application. It is one that applies only if provisions are in conflict. It is therefore necessary to consider whether the terms of Appendix C conflict with clause 10 and consequently prevail over the general DSP.

[43] Appendix C of the Wagstaff Agreement prescribes a procedure for determination of site allowances. Clause 4 of Appendix C details how site allowances are to be calculated whereby the CFMMEU may request, on behalf of its members, that an employer consider a claim for a site allowance. Clause 4 relevantly provides:

> *"4. Subject to the foregoing, where the Union on behalf of its members, requests an Employer to consider a claim for payment of a Site Allowance, such Site Allowance shall be determined either by:*
>
> *(a) Geographic location if the project is contained within the City of Melbourne as defined in clause 15 of this appendix; or*
>
> *(b) The amount contained in clause 7 or clause 14 of this appendix."*

[44] Clause 4 of Appendix C provides that the first step in raising a claim for a site allowance is for the CFMMEU to request the employer to consider a site allowance claim on behalf of its members. That first step is to be distinguished from the procedural steps described in clause 10 of the Wagstaff Agreement, whereby the first step at clause 10.4(a) is for an employee or his/her job delegate or representative to raise a work related grievance directly with the relevant supervisor. The difference in approach in Appendix C is unsurprising. It appears a sensible and efficient process given that a site allowance, once agreed or determined, would have general application across the relevant contractor workforce or multiple contractor workforces, as the case may be. Nevertheless, the fact that the parties explicitly provide for a different starting point in the process for resolving site allowances is, in my view, of some significance.

[45] Appendix C then details a number of machinery steps that prescribe the site allowance calculation methodology having regard to project value and geographic location. In circumstances where the parties are unable to reach agreement, clause 11 of Appendix C requires the referral of the site allowance disagreement to the Panel:

> *"11. The appropriate Site Allowance shall be based on the Total Project Value, as defined by Clause 2 of this Agreement.*
>
> *(d) 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 Industry Disputes Panel for determination."*

[46] Clause 12 prescribes how the Panel is to determine the disputed site allowance and relevantly states that it:

"shall have regard to the Appendix C, and shall not deviate from Appendix C unless there are special and exceptional circumstances."

[47] Clause 13 then provides that any determination of the Panel in accordance with clauses 11 & 12 is to be incorporated into the Wagstaff Agreement where it states:

> *"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."*

[48] Some things can be said about Appendix C. Firstly, it provides for the raising of a site allowance claim by the CFMMEU on behalf of its members. This approach may be distinguished from the manner of work related grievances being raised under clause 10 of the Wagstaff Agreement.

[49] Secondly, there is no reference in Appendix C to the Panel being bound to follow its Charter in determining the dispute. I don't regard this point as being significant as the Panel is ultimately bound to follow its charter in any case according to clause 1.3 of its Charter which relevantly states as follows;

> *"1.3 The Disputes Panel shall hear and determine all matters referred to it having regard to the disputes procedure and to the Charter as agreed by the Building Industry Consultative Committee."*[19]

[50] The fact that Appendix C makes no reference to the Panel's Charter, unlike Clause 10 of the Wagstaff Agreement, does not relieve the Panel of the requirement to deal with <u>all</u> matters before it in accordance with the Charter. Unlike the situation that existed at the time of *Dodd* where site allowance disputes were dealt with by the Panel Chairman, site allowance disputes are now referred to the Panel, not the Chairman, and as such any site allowance dispute must be dealt with by the Panel in accordance with the Panel Charter.

[51] Thirdly, there is no reference in Appendix C to a party aggrieved by a site allowance determination of the Panel having the right to seek a Commission *"review"* of the determination. However, the Panel Charter explicitly references such right of Commission *"review"* of its decisions, however, that right of referral and *"review"* expressed in the Charter is, importantly, conditioned by the right available under the relevant industrial instrument dispute settlement procedure. This can be seen in the various clauses of the Panel Charter including clauses 1.7 and 6.8 which relevantly provide:

> *".....*
>
> *1.7 The Dispute's Panel's decision will be accepted as final and binding by all parties subject to any right of either party to refer the dispute to the Fair Work Commission (FWC) within 14 days of the Panel's decision.*
>
> *……..*
>
> *6.8 Notwithstanding any other term, any party may apply to the FWC, as specified in the procedure. In such circumstances, an application must be lodged within fourteen (14) days of the Disputes Panel decision."*[20]

[52] It follows from the above that, while the Panel Charter may express the right of an aggrieved party to refer a disputed decision of the Panel to the Commission, such right does not operate exclusively of or override the DSP. It will be the terms of the Wagstaff Agreement DSP, not the Charter that determines whether disputed matters arising from Panel decisions may be referred to the Commission.

[53] Finally, there is an expressed intention under clause 13 of Appendix C to incorporate the Panel determination into the Wagstaff Agreement in accordance with the Act. While the Wagstaff Agreement may express such an intention to incorporate Panel site allowance determination/s, such determinations cannot be so incorporated unless done so in accordance with agreement variation processes prescribed under part 2-4, Division 7 of the Act. Absent a variation of the Wagstaff Agreement in accordance with the Act, the Panel determination is not incorporated into the Wagstaff Agreement and to purport to do so is impermissible in my view.

[54] Incorporation of the Panel's site allowance determination into the Wagstaff Agreement is cited by the CFMMEU as effectively barring the Commission from reviewing such determination, likening the effect of a Panel site allowance determination to other provisions of the Wagstaff Agreement which the Commission has no jurisdiction to alter, other than by formal variation processes under the Act. The flaw in the CFMMEU's argument on this point lies in the fact that a Panel determination is not incorporated unless the Wagstaff Agreement is formally varied to reflect the determination. That has not occurred in the present case.

[55] As determination of the site allowance by the Panel is not incorporated into the Wagstaff Agreement other than by the Wagstaff Agreement's formal variation, which has not occurred, it cannot be said that the Panel Decision in the present matter is then automatically immune from *"review"* by the Commission. Appendix C is, in fact, silent on what steps may or may not be taken by a party aggrieved by a Panel decision on a site allowance. The silence of Appendix C on this point leads me to conclude that there is no conflict between Clause 10 and Appendix C. Consequently. I do not accept the proposition of the CFMMEU that the specific Appendix C procedure overrides and displaces the general dispute settlement procedure in clause 10.

[56] Furthermore, I am not satisfied that a plain reading of Appendix C leads to a conclusion that clause 10 of the Wagstaff Agreement has no work to do. In reaching this conclusion, I have had regard to certain factors weighing in favour of the construction advanced by the CFMMEU including that the starting point for the raising of a site allowance claim is different in Appendix C to that of clause 10. Balanced against this is that a site allowance determined by the Panel is, despite the wording of clause 13 of the Appendix C, not incorporated into the Wagstaff Agreement. Further, the breadth of the scope of clause 10 covers all matters arising out of the Wagstaff Agreement, of which site allowances is clearly one such matter as it is provided for at clause 24.

[57] The competing factors considered in construing Appendix C and its interaction with clause 10, leads to the conclusion that there is ambiguity and that the Wagstaff Agreement is susceptible to more than one meaning. It is therefore necessary to consider the surrounding circumstances according to *Berri*.

[58] Wagstaff adduced evidence that it submits reveals the objective intention of the parties in renegotiating the terms of Appendix C in the wake of the *Dodd* decision. Mr Cross gave evidence that the parties amended the terms of the 2011-2015 Victorian construction industry pattern agreement to make clear that site allowance disputes were to be dealt with by the Panel rather than the Panel Chairman to overcome the effect of *Dodd*. The CFMMEU reject Wagstaff's submission that Mr Cross' evidence reveals the objective intent of the parties. Rather, all that Mr Cross' evidence reveals, according to the CFMMEU, is the subjective intent of the MBAV at the time of the negotiation of the 2011-2015 Victorian construction industry pattern agreement.

[59] I am satisfied on the evidence of Mr Cross that the MBAV sought to amend clause 13 of Appendix C during negotiations for the 2011-2015 Victorian construction industry pattern agreement to remedy the consequences of *Dodd*. I am also satisfied that the CFMMEU ultimately agreed to the amendment sought. There is, however, no evidence that the objective intent of the CFMMEU in agreeing to the proposed changes mirrored that of the MBAV in relation to the meaning and effect of the agreed term. I also note that clause 13 of Appendix C as agreed and included in the 2011-2015 pattern agreement remains in the same form in the current Wagstaff Agreement.

[60] As both parties variously relied on *Dodd*, it is necessary at this point to say something about that decision. While it may be inferred, I do not believe the Full Bench conclusively determined that a site allowance determination of the Panel could or could not be subject to *"review"* by the Commission on reference to it by an aggrieved party. That is because the power to determine site allowance disputes resided with the Chairman at that time, not the Panel. The issue the Full Bench were considering was whether the powers of site allowance dispute determination by the Panel Chairman were to be exercised having regard to the terms of Appendix C alone, or whether the function was to be exercised in accordance with the powers of the Chairperson and the Disputes Tribunal as outlined in the Charter. Ultimately the Full Bench concluded at paragraph [27] that:

> *[27] .....it is clear from the text of the Agreement that the power to determine site allowance disputes is conferred on the Chairperson as a designated person and the parties did not intend that he should deal with such disputes in accordance with the Charter. It follows that the Commission has no jurisdiction to determine site allowance disputes pursuant to cl.10 of the Agreement.*

[61] It follows from the above, in my view, that the changes made to clause 13 of Appendix C in the 2011-2015 Victorian construction industry pattern agreement and since retained in the same form, means that that the Panel was and is vested with the power and obliged to deal with site allowance disputes in accordance with its Charter. Consequently, the changes made to Appendix C described above, removed the apparent jurisdictional hurdle to the referral of a disputed Panel decision to the Commission that was identified in *Dodd*.

[62] There is no evidence before me that the parties have since acted other than in the belief that the changes made to clause 13 of Appendix C in the 2011-2015 Victorian construction industry pattern agreement required the Panel to determine site allowance disputes according to the Charter. Importantly, the Charter refers to the right of any party to refer a disputed decision of the Panel to the Commission, subject to the right to do so under the relevant dispute settlement procedure.

[63] Acceptance and support for the role of the Panel and the importance of the Charter in the specific context of the present matter is also found in the statement of the CFMMEU witness Mr Ralph Edwards where he variously states as follows:

> *"…….*
>
> *8. Enterprise Agreements made by the CFMEU and its members have included reference to the VBIDP as an arbitrator of industrial disputes since around 2000.*
>
> *9. Based on my experience, industry unions, employers and employer associations have been able to have recourse to, and have regularly utilised the services of the VBIDP in resolving industrial disputes occurring within the industry.*
>
> *…….*
>
> *17. Also available from the VBIDP website is a copy of its Charter. This version of the Charter was in place when the agreement subject to the present dispute was made and when the VBIDP resolved the dispute the subject of this review. Attached to this statement and marked RE-4 is a copy of the Charter.*
>
> *……..".*[21]

[64] Further evidence of the surrounding circumstances can be seen in the Panel's own view of the conditional finality of its decisions. In dealing with a site allowance claim for workers on the Melbourne Metro Tunnel Project, it stated unanimously at paragraph [5] of a recent determination that;

> *"…The panel reaffirms that Employers are legally bound to comply with the terms of the applicable Enterprise Agreements and, subject only to the exercise of rights of review, the Determination made by the Panel pursuant to those Agreements."*[22]

[65] I am consequently satisfied that the context and surrounding circumstances indicate an intention of the parties to vest power to determine site allowance disputes with the Panel and that such determinations are to be made by the Panel in accordance with the Panel Charter. I am further satisfied that the the power of referral and *"review"* of a Panel decision by the Commission is explicitly provided for in the Charter and is subject only to the terms of the relevant dispute settlement procedure. Critically, clause 10.4(e) of the Wagstaff Agreement allows for any decision of the Panel to be referred by an aggrieved party to the Commission for *"review"* within 14 days of the Panel's decision.

[66] As I have found above, the meaning and effect of clause 11 and 13 of Appendix C of the Wagstaff Agreement is, in my view, ambiguous and susceptible to more than one meaning. In reviewing the context and surrounding circumstances, I am satisfied that the parties intended that the Panel determine site allowance disputes referred to it in accordance with Appendix C and the Panel Charter. Importantly, the Panel Charter provides for decisions of the Panel to be reviewed by the Commission subject only to the terms of the relevant dispute settlement procedure which, in the present matter, allows for referral of the disputed Panel decision to the Commission.

[67] I consequently do not accept the construction advanced by the CFMMEU and find that the Commission does have jurisdiction to conduct a *"review"* of the Panel Decision issued 20 July 2018 in accordance with the terms of the Panel Charter and clause 10 of the Wagstaff Agreement. I now turn to consider the nature of the *"review"* to be conducted.

Nature of *"Review"*

[68] Wagstaff contend that the nature of the *"review"* intended by clause 10.4(e) of the Wagstaff Agreement, in referring the disputed Panel Decision to the Commission, is that of a hearing *de novo*. Wagstaff further contend that a plain reading of clause 10 leads to an *"inescapable conclusion"* that the parties envisaged a hearing *de novo*.

[69] Wagstaff referred to judicial and Commission authority for the principle that, where decisions of administrative bodies and panels are subject to *"review"*, that *"review"* connotes a hearing *de novo* rather than an appeal in the legal sense. Attention was drawn to the High Court decision in *Builders Licensing Board v Sperway Constructions Pty Ltd*[23] (Sperway) where Mason J observed as follows:

> *"9. Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing de novo, although there is no absolute rule to this effect. Despite some suggestion in argument to the contrary, I do not read Ex parte Australian Sporting Club Ltd.; Re Dash (1947) 47 SR (NSW) 283 as enunciating such an absolute rule. There are, of course, sound reasons for thinking that in many cases an appeal to a court from an administrative authority will necessarily entail a hearing de novo and I exclude for present purposes the case of an appeal to a federal court exercising the judicial power of the Commonwealth under Ch. III of the Commonwealth Constitution. The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence or the issues which arise may be non-justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may be ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo. (at p 621)"*

[70] Wagstaff refer to a number of decisions of the Commission in which the Commission has held that a *"review"* of a decision of the Panel was a hearing *de novo*: *CDK Commercial Constructions Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2005-2008*[24] (CDK); *Abigroup Contractors Pty Ltd v CFMEU*[25] (Abigroup); and *Entire Mechanical Services Pty Ltd and Entire Fire Protection Pty Ltd v CEPU*[26] (Entire Mechanical).

[71] Wagstaff further submit that that the features of the Wagstaff Agreement DSP and the operations of the Panel and its Charter point strongly in favour of a hearing *de novo*, those features being:

- The panel is an informal body with its jurisdiction conferred by the terms of the Wagstaff Agreement;

- The role of the Panel is that of dealing with matters referred to it by the parties at *"first instance"*[27];

- The hearing of the matters by the Panel is not recorded, no transcriptions of hearings are provided and rules of evidence do not apply[28].

- There is no requirement for reasons to be provided in a Panel decision and no record of the reasons for dissenting views of Panel members is required or provided; and

- Where a disputed Panel decision is referred to the Commission it may exercise both conciliation and arbitration powers.

[72] The CFMMEU submit that properly constructed, clause 10.4(e) of the Wagstaff Agreement limits the power of the Commission, in dealing with the disputed Panel Decision referred to it for *"review"*, to that of considering whether the Panel has erred in law or in fact, not that of conducting a rehearing of the dispute.

[73] The CFMMEU further submit that the Panel in making decisions is not exercising administrative or executive power, in the sense referred to in *Sperway*. The power exercised by the Panel is that of a consensual power of private arbitration in accordance with clause 10 of the Wagstaff Agreement. According to the CFMMEU, references to administrative law decisions are of little assistance in assessing the nature of the *"review"*, given that both the Panel and the Commission are not exercising public law functions.

[74] The CFMMEU submit that in order to ascertain what the parties intended by referring a matter to the Commission for "review" it is necessary to consider the nature of the Panel, its Charter and the terms of the DSP.

[75] According to the CFMMEU there are a number of features of the Panel and its Charter that point strongly to the intent of the parties that the Commission's role is limited to that of strict appeal rather than hearing *de novo*. Those features are:

- The Panel is comprised of members with industry specific knowledge and expertise;

- Matters before the Panel are to be concluded as soon as reasonably practicable;

- The Panel may exercise both conciliation and arbitration in settling a dispute;

- The Charter requires rules of natural justice and procedural fairness to be applied in proceedings;

- Parties are able to present their case in full before the Panel;

- The Panel is required to issue a decision in matters that it is required to formally determine;

- The Panel is able to review its decisions if new evidence comes to light;

- Decisions of the Panel are to be accepted by the parties as *"final and binding"* save for circumstances where a *"review"* of a Panel decision by the Commission is sought.

[76] The CFMMEU further submit that the nature of the Wagstaff Agreement DSP also points strongly to the intent of the parties to limit the scope of the Commission *"review"* of Panel decisions to that of strict appeal. The relevant provisions in the Wagstaff Agreement that the CFMMEU referred to were:

- Clause 10.2 prescribes that when a dispute arises, the status quo shall prevail until its resolution. To allow a rehearing as contended by Wagstaff would unreasonably delay resolution of the dispute.

- Clause 10.4(d) refers to the matter being dealt with by the Panel at *"first instance"*, that term being a well understood legal expression which distinguishes the Panel from that of a body of last resort in an appeal sense.

- Clause 10.4(e) refers to referral of the disputed *"decision"* of the Panel, not the dispute itself, to the Commission for *"review"*.

- Clause 10.4(e) allows the Commission to exercise conciliation and arbitration powers in the *"review"* process. Reference to conciliation indicates the facilitative role of the Commission, whereas reference to arbitration is unexceptional. However, what is significant is that those powers are to be exercised in relation to the Panel decision, not the dispute.

- Clause 10.5 requires the DSP to be followed in good faith without unreasonable delay. Consequently, a hearing *de novo* would be antithetical to the resolution of the dispute without unreasonable delay.

- Clause 10.6 allows a party to seek immediate relief from the Commission where a party has failed to comply with the DSP. Under clause 10.6, the role of the Commission is noticeably different from that of 10.4(e) and would necessarily involve an exercise of its powers under ss 595(2) and 595(3) of the Act, including the arbitration of the dispute as opposed to reviewing the decision.

[77] The CFMMEU also submit that the term *"review"* has no pre-determined meaning and takes its meaning from the context in which it appears. In ordinary English, *"review"* requires scrutiny, inspection and assessment of the Panel decision. It does not allow the Commission to inquire generally into or otherwise rehear the dispute. This is supported by a proper analysis of the context of the Panel, its Charter and the DSP.

[78] As regards the Commission authorities advanced by Wagstaff, the CFMMEU reject those cases as irrelevant as the relevant agreements, the subject of those decisions, contained different provisions and the issue of the Commission *"review"* function was not debated as both parties accepted a hearing *de novo*.

Consideration

[79] Neither party adduced direct evidence as to the objective intent of the parties in negotiating and concluding the Wagstaff Agreement. Limited extrinsic material was referred to and was essentially confined to the composition and functions of the Panel and the Panel Charter. Both parties submitted that I should direct my attention to the terms of the Wagstaff Agreement and the context in which it operates, specifically having regard to the role of the Panel and the Panel Charter. I accept that I must look to the terms of the Agreement with, if required, the assistance of the extrinsic material submitted.

[80] Before turning to the task of consideration of the parties' substantive submissions regarding the construction of clause 10 of the Wagstaff Agreement, I intend to say something about the prior decisions of the Commission and what, if any, weight I should attach to those decisions.

[81] In each of those decisions, that of *CDK*, *Abigroup* and *Entire Mechanical,* single members of the Commission held that the *"review"* to be conducted by the Commission in accordance with the relevant dispute settlement procedures was that of a hearing *de novo*. Unsurprisingly, Wagstaff submits that I should follow those authorities, whereas the CFMEU argue they are irrelevant and should be ignored. For the reasons that are outlined below, I have concluded that caution should be exercised in simply following the prior Commission decisions of *CDK, Abigroup and Entire Mechanical*.

[82] I turn first to *CDK*. The dispute settlement term in the *CDK Commercial Constructions Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2005-2008*[29] (CDK Agreement) contained almost identical wording to that contained in clauses 10.4(d) and 10.4(e) of the Wagstaff Agreement. The relevant sub clauses in the CDK Agreement state at clause 10 of that agreement:

> *"* ……..
>
> *f.* *Should the matter remain unresolved either of the parties or their representative shall refer the dispute at first instance to the Victorian Building Industry Disputes Panel (which shall deal with the dispute in accordance with the Panel Charter).*
>
> *g.* *Either party may, within 14 days of a decision of the Panel, refer that decision to the Australian Industrial Relations Commission (AIRC) for review. The AIRC may exercise its conciliation and/or arbitration powers in such review.*
>
> ……."

[83] The only significant distinction between the dispute settlement procedure of the CDK Agreement and the Wagstaff Agreement is that the CDK Agreement did not contain sub clauses similar or equivalent to that of clauses 10.7 and 10.8 of the Wagstaff Agreement. Those two clauses go to the obligation of the parties to co-operate with Panel requests for substantiating information and auditing; and that dispute resolution by the Panel or Commission must not be inconsistent with legislative obligations or any other applicable codes or regulations.

[84] I am not persuaded by the CFMMEU arguments that the absence of similar or equivalent clauses in the CDK Agreement to that of clauses 10.7 and 10.8 of the Wagstaff Agreement render the CDK decision irrelevant. Clauses 10.7 and 10.8 of the Wagstaff Agreement add little to resolve the meaning of the term *"review"*, in my view. The required co-operation of the parties with the Panel and compliance with legislative obligations are sensible and do not assist answer the question before me, consequently the absence of those clauses from the CDK Agreement does not mean the task before Deputy President Ives was so different as to render the value of that decision meaningless.

[85] It is however true, as the CFMMEU contend, that in *CDK* neither the CFMMEU nor the intervenor (the ABCC) demurred from the approach sought by CDK, that of the Commission conducting a hearing *de novo*. Deputy President Ives was not asked to consider the broader context and circumstances of the Panel, its Charter and the relevant dispute settlement procedure. Consequently, I approach with caution any suggestion that I should automatically follow and apply the approach of *CDK* in the present matter.

[86] As with the CDK Agreement, the terms of the dispute settlement procedure in the *Abigroup Contractors Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2005-2008*[30] (Abigroup Agreement), which was the subject of the *Abigroup* decision of Commissioner Blair, are in similar terms to that of clauses 10.4(d) & (e) of the Wagstaff Agreement. The Abigroup Agreement dispute settlement procedure relevantly provides as follows at clause 10 of the Abigroup Agreement:

> *"* ……..
>
> *f.* *Should the matter remain unresolved either of the parties or their representatives shall refer the dispute at first instance to the Victorian Building Industry Disputes Panel (which shall deal with the dispute in accordance with the Panel Charter).*
>
> *g.* *Either party may, within 21 days of a decision of the Panel, refer that decision to the Australian Industrial Relations Commission (AIRC) for review. The AIRC may exercise its conciliation and/or arbitration powers in such review.*
>
> ……..*"*

[87] As was the case with the CDK Agreement, the Abigroup Agreement does not contain equivalent clauses to that of clauses 10.7 and 10.8 of the Wagstaff Agreement. Nor was the hearing *de novo* approach adopted by Commissioner Blair in *Abigroup* apparently contested by the CFMMEU. However, for the same reasons advanced above, I approach with caution the submission that I should simply adopt the approach taken by the Commissioner in *Abigroup*.

[88] The *Entire Mechanical* decision of Deputy President Gooley dealt with two agreements - the *Entire Mechanical Services Pty Ltd and CEPU - Plumbing Division Victorian Branch Enterprise Agreement 2015-2019*[31] (the Mechanical Services Agreement) and the *Entire Fire Protection Pty Ltd and CEPU - Plumbing Division (Vic) Fire Protection Agreement 2015-2019*[32] (the Fire Protection Agreement). The nature of the *"review"* to be conducted by the Commission was contested in the matter before the Deputy President.

[89] The Mechanical Services Agreement and Fire Protection Agreement both contained wording in their dispute settlement procedures that closely reflected clauses 10.4(d) & (e) of the Wagstaff Agreement. The dispute settlement term of the Mechanical Services Agreement relevantly provides as follows:

> *"* ……

> *14.2.6 Should the matter remain unresolved either of the parties or their representative shall refer the dispute at first instance to the VBIDP (which shall deal with the dispute in accordance with the Panel Charter).*

> *14.2.7 Either party may, within fourteen (14) days of a decision of the Panel, refer that decision to the FWC for review. The FWC may exercise its conciliation and I or arbitration powers in such review."*

[90] Significantly, however, the Mechanical Services Agreement and Fire Protection Agreement both contain additional provisions in the dispute settlement procedure that described the required conciliation and formal determination processes once the matter is referred to the Commission for *"review"* pursuant to clause 14.2.7 of the Mechanical Services Agreement or clause 14.2(p) of the Fire Protection Agreement. The Mechanical Services Agreement, which has similar terms to those contained in the Fire Protection Agreement, relevantly states as follows in respect of the conciliation and formal determination processes:

> **"Conciliation**

> *14.6.1 The person(s) who raised the dispute, or his or her expressly nominated representative (or agent), may refer the dispute to the FWC for private conciliation.*

> *14.6.2 Before the process commences the FWC may confer with the parties informally about matters of procedure, such as:*

> *14.6.2(a) the presentation of each side's position (whether oral or in writing);*

> *14.6.2(b) confidentiality requirements;*

> *14.6.2(c) representation at the private conciliation;*

> *14.6.2(d) timing, location and duration of the conciliation;*

> *14.6.2(e) whether a telephone conference is all that is needed in the first instance; and*

> *14.6.2(f) any further particulars about the FWC's role in relation to establishing procedures.*

> *14.7 Subject to the preceding clause, it is agreed that the FWC will observe confidentiality about all aspects of the dispute, and, consistent with its expected role to this point, may do such things as:*

14.7.1 help the parties identify and define the matters in dispute;

14.7.2 help the parties to develop a procedure which is aimed at achieving resolution of the dispute quickly, fairly and cost-effectively;

14.7.3 where appropriate, suggest particular dispute resolution techniques for individual issues aimed at narrowing the matters in dispute quickly, fairly and cost-effectively; and

14.7.4 act as the facilitator of direct negotiations between the parties.

14.8 The parties further agree that during the conciliation, the FWC may, at its discretion, discuss the matter(s) in dispute privately with any of the parties to the dispute or their representatives. The FWC shall keep confidential the content of any such discussion, and shall not expressly or impliedly convey the content of such discussion (or part thereof) unless specifically authorised to do so.

14.9 If the FWC is of the view that having completed the above process the matter(s) in dispute remains unresolved, it may:

14.9.1 make suggestions for resolution of the dispute;

14.9.2 express opinions as to what would constitute a reasonable resolution of the dispute, or any part thereof; or

14.9.3 if the matter in dispute is not resolved, it may within seven (7) days of notice of termination provide a written report to the parties expressing the FWC's opinion of what would constitute a reasonable resolution of the dispute, or any part thereof.

14.10 Any function performed by the FWC in this regard is advisory only, and is not binding upon the parties.

Formal Determination

14.11 If the matter(s) in dispute remain unresolved the FWC may make a formal determination.

14.12 The parties agree to abide by the determination.

14.13 An employee/s may be represented for the purposes of a formal determination procedure by the FWC.

14.14 Before making its determination the FWC will give the parties an opportunity to be heard formally on the matter(s) in dispute. In making its determination the FWC will only have regard to the materials, including witness evidence, and submissions put before it at the hearing and will disregard any admissions, concessions, offers or claims made in mediation.

14.15 The FWC can make and issue directions in relation to the process leading to its determination and the parties will abide by those directions.

14.16 The FWC will provide the determination in writing to the parties as quickly as practicable after hearing the parties. A determination of the disputed matter or matters will not constitute an order by the FWC under the FW Act.

14.17 This procedure shall be followed in good faith without unreasonable delay.

14.18 If any party fails or refuses to follow any step of this procedure the non-breaching party will not be obligated to continue through the remaining steps of the procedure, and may immediately seek relief by application to the FWC."

[91] It is clear that the differences between dispute settlement clauses in the Mechanical Services Agreement and Fire Protection Agreement reproduced above, compared with the CDK Agreement considered in *CDK* by Deputy President Ives, was an issue of significance in the reasoning of Deputy President Gooley, when she stated as follows:

[32] *I am satisfied that the parties intended the Commission to conduct a re-hearing of the matter. These are my reasons.*

[33] *Unlike the disputes resolution procedure considered by Deputy President Ives, the parties to these Agreements have included details about the Commission's role once a decision is referred to it. The inclusion of those provisions support the conclusion that the Commission's role was not limited to determining simply whether the judgment of the VBIDP was right on the material before it or a re-hearing on the evidence before the VBIDP.*

[34] *Once the decision is referred to the Commission the Commission can exercise its conciliation and arbitration powers. The conciliation process is not limited to conciliating the decision. The process makes clear that what is being conciliated is the dispute. However that is not determinative of the matter. It is not unusual, even at the appellate level, for conciliation of the underlying dispute to be undertaken. The mere fact that the Agreements provide for conciliation is not determinative of the nature of the review.*

[35] *If conciliation is unsuccessful, the Commission is empowered to make a formal determination which is binding on the parties. Before it makes its determination the parties have the right to be heard on "the matters in dispute". There is nothing in this language which limits the dispute to one about the correctness of the decision of the VBIDP. Further, in making its determination the Commission "will only have regard to the materials, including witness evidence, and submissions put before it at the hearing."*

[36] *There is no suggestion in this language that the Commission is limited to a consideration of the material that was before the VBIDP subject to a limited right to call new evidence.*

> ***[37]*** *I accept the submission of the CEPU that the decision of Deputy President Ives relied upon by Entire Mechanical and Entire Fire Protection is not binding on me. I also accept that the submission that the nature of the proceeding before the VBIDP in this matter was significantly different to that discussed by Deputy President Ives. A detailed decision was made by the Panel. Witnesses were called although there is no recording of the hearing. Submissions were made and factual findings were made on the evidence before the VBIDP.*
>
> ***[38]*** *However, I consider it relevant that from at least since 2006 the parties were on notice that Deputy President Ives and, from 2011, Commissioner Blair had formed the view, albeit without opposition and in relation to a matter involving different parties, that the review meant a hearing de novo. After Deputy President Ives' decision, the parties included in predecessor agreements the detailed procedures which are contained in the current Agreements about how the Commission was to exercise its conciliation and arbitration powers. If the parties had wished to limit the Commission's role they could have entered into agreements which provided for such limitation and they did not.*[33] *(footnotes omitted)*

[92] While the Deputy President was assisted in her consideration of the meaning of the term *"review"* in *Entire Mechanical* by the prescription in the conciliation and formal determination clauses reproduced above, no such clauses are present in the Wagstaff Agreement. Consequently, a significant basis on which the Deputy President formed her view that the term *"review"* meant a hearing *de novo*, is absent in the matter before me. Those differences lead me to again approach with caution the submission that *Entire Mechanical* is relevant and should be followed. *Entire Mechanical* was decided on agreement terms that were materially different to those in the Wagstaff Agreement and is consequently of limited assistance.

[93] I now turn to the consideration of the parties' submissions regarding the construction of clause 10.4(e) and the meaning of the term *"review"*.

[94] According to *Berri*, the starting point for consideration of the meaning of the term *"review"* is the ordinary meaning of the words having regard to its context and purpose. Reference to the Commission's *"review"* of a Panel decision is made in the context of the dispute settlement procedure of the Wagstaff Agreement which provides for the progressive escalation of the matter in dispute. It is therefore necessary to consider the dispute settlement procedure as a whole to understand the purpose and context of the clause in which the term *"review"* is used.

[95] The first thing to be said is that the Wagstaff Agreement does not prescribe the process of *"review"* to be conducted by the Commission pursuant to clause 10.4 as being by way of strict appeal. This is, in my view, significant as the term *"appeal"* has a particular meaning under the Act and the principles that have evolved through relevant case law are well understood by the industrial parties.

[96] If it had been the intention of the parties to confine the Commission *"review"* to that of strict appeal, any doubt of that intention could have been removed by prescribing it as such and not simply maintaining the term *"review"*. That has not occurred. Nor have the parties to the Wagstaff Agreement sought to prescribe the *"review"* process in terms similar to that of the Entire Mechanical Agreement. Perhaps the attitude of employers is understandable due to

their comfort with the prior approach adopted by the Commission in each of the prior decisions referred to above and saw no reason to pursue any clarifying changes to the Wagstaff Agreement. Significantly however, the CFMMEU were a party in both the *CDK* and *Abigroup* matters, took no issue at the time as to the meaning of the term *"review"* and took no apparent action in the several years since those decisions to clarify the meaning of the term *"review"* in subsequent agreements, despite now contesting the meaning of the term.

[97] There is nothing in the wording of the clause that explicitly confines the scope of the Commission's *"review"* to that of strict appeal. The absence of specific reference to the *"review"* being by way of strict appeal weighs strongly against the construction contended by the CFMMEU. Further context is evident through the CFMMEU's direct involvement in *CDK* and *Abigroup*, in which proceedings they did not contest the nature of the *"review"*. Nor were clarifying amendments sought to relevant construction industry agreements through various re-negotiations and over several intervening years since those prior Commission decisions.

[98] Clause 10.1 of the Wagstaff Agreement expresses a major objective of the Agreement as being that of the elimination of lost time and/or production arising out of disputes or grievances. Clause 10.1 goes on to refer to the scope of the procedure as covering disputes over matters arising from the Agreement or any other dispute related to the employment relationship or the NES. The terminology is clear in clause 10.1 in its reference to disputes being dealt with in accordance with the DSP.

[99] Clause 10.3 refers to employees having the right to appoint a representative in relation to a dispute. Clause 10.4 provides the machinery for the raising and progressive escalation of a work-related grievance arising between the employer and an employee or employees. In an entirely orthodox approach, it provides for a matter to be initially raised by an employee or their representative with the relevant supervisor or other appropriate site representative per clause 10.4(a). In the event that the matter is unable to be resolved at that level, clause 10.4(c) provides for the escalation of the matter to more senior levels of the company and with the involvement of a relevant union official, if requested by the employee or other representative.

[100] Where a dispute is unable to be resolved at the enterprise level, it shall then be referred to the Panel in accordance with clause 10.4(d). The Panel is required to deal with the dispute in accordance with the Panel Charter, which may include rendering a decision. It is of some significance having regard to the terminology in later sub-clauses that it is the dispute that must be referred to the Panel.

[101] Where a party is aggrieved by a Panel decision, the decision may be referred within 14 days to the Commission for *"review"*, pursuant to clause 10.4(e). The difference in language between clause 10.4(d) and 10.4(e) is of some significance, in my view. Whereas clause 10.4(d) requires the Panel to deal with the dispute, clause 10.4(e) uses different language. It is the decision of the Panel that is referred to the Commission for *"review",* not the dispute. That language appears to give the *"review"* process a different character to that of simply conducting a rehearing of the dispute. This weighs against the construction advanced by Wagstaff that a *"review"* is that of a hearing *de novo*.

[102] Clause 10.4(e) also refers to the powers that the Commission may exercise in conducting its *"review"*, those powers being that of conciliation and/or arbitration. It is important to note use of the term *"may"*. It follows from the use of the term *"may"* that the

Commission is not compelled to conduct conciliation prior to conducting arbitration. Even were the Commission to conduct conciliation prior to arbitration in conducting its "review" I am not satisfied that much turns on that in resolving whether the arbitral step is to be by way of a hearing *de novo* or strict appeal.

[103] Conciliation and arbitration are terms that industrial parties are familiar with and may infer that the Commission will use those powers to resolve the underlying dispute. The CFMMEU submit that the exercise of those powers is, however, directed in clause 10.4(e) to the decision, not the dispute. I don't regard this point raised by the CFMMEU to be decisive as whether the *"review"* is to be conducted by way of strict appeal or by way of hearing *de novo*, any determination by the Commission would be an exercise of arbitral power. Consequently, the terminology is unhelpful in resolving the nature of the *"review"* that is required.

[104] Clause 10.5 provides for the procedure to be followed in good faith and without unreasonable delay. The CFMEU contends that this provides support for its contention that the referral of the matter to the Commission for *"review"* should be conducted by way of a strict appeal as opposed to a full rehearing of the dispute. The CFMEU submit that a full rehearing would unreasonably delay resolution of the dispute and would be contrary to clause 10.5. In my view that submission has little merit.

[105] Clause 10.5 is an unexceptional provision and is of a kind to be found in many dispute settlement terms, not just in building and construction agreements. It adds nothing to the analysis of the meaning of the term *"review"* and in my view is a neutral consideration in understanding the overall context of the clause within which the term *"review"* appears. My comments here similarly apply to the CFMMEU's reliance on the status quo provisions at clause 10.2.

[106] Clause 10.6 allows a party to apply to the Commission for immediate relief in circumstances where another party to the Wagstaff Agreement has failed or refused to follow any step of the procedure. Such a breach relieves the non-breaching party of the requirement to follow the remaining steps of the procedure. It effectively allows a non-breaching party to refer a dispute directly to the Commission, bypassing earlier steps including that of Panel referral and determination of the dispute. While the meaning of the term *"relief"* is not specified, self-evidently, in circumstances where the matter were to come to the Commission prior to a Panel decision having been made, the Commission would be required to deal with the dispute as opposed to conducting a *"review"* of the decision.

[107] While sub-clause 10.6 stands in contrast to the wording in clause 10.4(e), it fails to shed light on the nature of the *"review"* to be undertaken in accordance with 10.4(e). To conclude, as I have, that clause 10.6 must allow the Commission to arbitrate the dispute in the absence of a Panel decision, it does not, in my view, clarify what the Commission is required to do in accordance with clause 10.4(e). Clause 10.6 stands on its own, in my view, and says nothing about clause 10(e). I am not persuaded that clause 10.6 weighs in favour of either construction advanced by the parties and is a neutral consideration.

[108] Clause 10.8 requires that the resolution of a dispute by either the Panel or Commission must not be inconsistent with relevant legislative obligations or other applicable Codes or Regulations. This wording infers the Commission may direct its attention and powers to the dispute, not merely the Panel decision being challenged by an aggrieved party. Reference to

the capacity of the Commission to resolve the dispute at clause 10.8 highlights a tension in the CFMMEU's reliance in part, on the specific distinction made between referral of the dispute to the Panel pursuant to clause 10.4(d) as opposed to referral of a Panel decision for *"review"* to the Commission in clause 10.4(e). Clause 10.8 weighs against the CFMMEU's construction of the meaning of the term *"review",* that of strict appeal.

[109] I have considered the competing constructions advanced by the CFMMEU and Wagstaff in relation to clause 10.4(e). There are factors in terms of the broader dispute settlement clause within which 10.4(e) sits that weigh both in favour and against the construction advanced by the CFMMEU. Most significant in favour of the CFMMEU's construction is the explicit reference in 10.4(e) to referral of the disputed Panel *"decision"* to the Commission for *"review"* as opposed to referral of the *"dispute"*. That reference, on which the CFMMEU places some reliance, is however, undermined by the later reference in clause 10.8 to both the Panel and the Commission being obliged to resolve the *"dispute"* not inconsistently with applicable legislative, Code or Regulation requirements.

[110] Other elements of the dispute settlement term are of limited assistance in resolving the meaning of the term *"review"*. Most persuasive in my consideration is that the parties have not explicitly sought to constrain the Commission's role to that of conducting the *"review"* by way of strict appeal. To have done so would have been a straightforward task, if that was the intention of the parties. That they have not done so against the background of prior decisions of the Commission and the periodic renegotiation of construction industry agreements is telling. On balance, I am satisfied that the objective intent of the parties was to enable the Commission to conduct a hearing *de novo* pursuant to clause 10.4(e) of the Wagstaff Agreement.

[111] Notwithstanding my conclusions regarding the meaning of clause 10.4(e) above, it is also appropriate to consider the Panel and the Panel Charter to see if that extrinsic material further assists understanding of the context and purpose of clause 10.4(e) and thereby the meaning of the term *"review"* in that clause.

[112] The CFMMEU point to the industry specific expertise and composition of the Panel, as well as aspects of the Panel's constitution, functions and procedures as detailed in the Panel Charter, in support of its contention that the intent of the parties was to confine the Commission's *"review"* to that of strict appeal. I do not accept that submission for the following reasons.

[113] True it is that the Panel is composed of three independent members, nominated and endorsed by the Building Industry Consultative Council and appointed for a period of three years.[34] That the Panel members must have industry specific knowledge and expertise, while not stated in the Panel Charter, appears self-evident and sensible. The composition and experience of the Panel does no more than evince an apparent intention of the parties to ensure disputes are specifically dealt with at *"first instance"* by persons respected within the building and construction industry as having the necessary knowledge to deal with disputes and having regard to the unique features of the construction industry. However, the composition and experience of the Panel sheds no light in my view on the objective intent of the parties with respect to the role of the Commission once a disputed Panel decision is referred to it for *"review"*.

[114] Furthermore, there are a number of features of the Panel's functions and procedures that, in my view, weigh in favour of the construction that the Commission *"review"* is that of a hearing *de novo*. Those features go to particular strengths of the Panel, that being the level of speed and informality of the hearing process and includes:

- Matters must be listed for hearing expeditiously[35];
- Matters must be listed for hearing within 48 hours of a dispute being lodged or the matter will lapse[36];
- Listed hearings must be conducted within 7 days of receipt of a dispute notification[37];
- Hearings are to be conducted as informally as possible, with all expedition and normally within 2 days[38];
- The Panel is not bound by the rules of practices as to evidence[39];
- Decisions of the Panel are reached by way of voting, with the majority vote prevailing[40];
- Decisions of the Panel are not to be regarded as precedents[41];
- Decisions of the Panel are to be communicated as soon as practicable, which shall normally be within 48 hours[42];
- There is no requirement for reasons for a decision to be provided or for the reasons of a Panel member voting against a decision to be provided; and
- No transcript is available as a record of hearings before the Panel.

[115] While I accept that *Sperway* dealt with the appeal of a decision of an administrative body, the principles outlined by the High Court in that matter are relevant in resolving the present matter. Just as the High Court identified the nature of the proceedings before an administrative tribunal as relevant to the nature of the appeal before an appellate court, so to, in my view, is the nature of the proceedings before the Panel relevant to the nature of the Commission's *"review"*.

[116] The nature of the hearing before the Panel contains a number of features which, consistent with the High Court's reasoning in *Sperway*, weigh in favour of the Commission exercising original jurisdiction or that of a hearing *de novo*. I have summarised those features in paragraph [114] above. I accept that the Panel is obliged to apply the rules of natural justice and procedural fairness[43] and that its decisions are binding on the parties save for rights of referral of a disputed Panel decision to the Commission for *"review"*, but I do not regard those features of the Panel's hearing process as sufficient to offset the other matters I have identified above.

[117] I am consequently satisfied that the nature of the proceeding before the Panel supports my earlier conclusion that in conducting a *"review*" of a disputed Panel decision, the

"review" is to be conducted by the Commission by way of a hearing *de novo*, as contended by Wagstaff.

Conclusion

[118] For the reasons furnished above I have determined the preliminary matters before me as follows:

(i) That the Wagstaff Agreement confers jurisdiction for the Commission to determine the dispute notified by Wagstaff in accordance with clause 10 Dispute Settlement Procedure; and

(ii) That the nature of the *"review"* of the Panel Decision of 20 July 2018 to be undertaken by the Commission pursuant to clause 10(e) of the Wagstaff Agreement is that of a hearing *de novo*.

[119] Directions in relation to programming of the matter shall be issued shortly.

DEPUTY PRESIDENT

Appearances:

J Forbes for the Applicant:

R Reitano for the Respondent.

Hearing details:

2018.
Melbourne.
October 3.

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[1] AE428334.

[2] [2017] FWCFB 3005 at [114].

[3] [2017] FWCFB 4487.

[4] [2014] NSWCA 184 at [71] – [85].

[5] *Manufacturers' Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cas 60-853 at 75-343.

[6] *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKPC 6; [2005] 1 All ER 667 at [64].

[7] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [78].

[8] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 391 per Lord Hoffman, approved in *Campbell v R* [2008] NSWCCA 214; 73 NSWLR 272 at [48] (Spiegelman CJ, Weinberg AJA and Simpson J agreeing) and *Dale v The Queen* [2012] VSCA 324 at [73].

[9] *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; 76 NSWLR 603 at [17] cited in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR at [71] – [85].

[10] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at [40].

[11] [2007] AIRCFB 989.

[12] PR972945.

[13] Exhibit R1, Witness Statement of Mr Ralph Edwards dated 4 September 2018, Annexure RE-4.

[14] Exhibit A1, Witness Statement of Mr. Lawrie Cross, dated 1 October 2018.

[15] Ibid at paragraphs [9]-[10].

[16] Ibid at paragraph [14].

[17] PANEL Statement No. 9, 014-2017, 13 September 2018.

[18] Transcript at PN294-295.

[19] Exhibit R1, Annexure RE-4.

[20] Ibid.

[21] Exhibit R1 at paragraphs [8]-[9] & [17].

[22] PANEL Statement No. 9, 014-2017, 13 September 2018.

[23] [197] HCA 62; (1976) 135 CLR 616.

[24] PR974122.

[25] [2009] AIRC 595.

[26] [2016] FWC 8817.

[27] Agreement, clause 10.3(e).

[28] Exhibit R1, Annexure RE-4, at clause 5.5.

[29] PR972023.

[30] PR972337.

[31] [2016] FWCA 3267.

[32] [2016] FWCA 3873.

[33] [2016] FWC 8817 at [32] – [38].

[34] Exhibit R1, clause 2.2.

[35] Ibid, clauses 1.6(i).

[36] Ibid clause 5.3.

[37] Ibid, Clause 3.1(ii).

[38] Ibid clause 5.4.

[39] Ibid clause 5.5.

[40] Ibid, clauses 6.1 & 6.2.

[41] Ibid clause 6.5.

[42] Ibid clause 6.3.

[43] Ibid clause 1.6(ii).