



Our ref. 19007865

7 June 2022

s 47F  
s 47F  
CFMMEU, Construction and General Division

By email: s 47F

**Australian Government Solicitor**  
Level 34, 600 Bourke Street Melbourne VIC 3000  
GPO Box 2853 Melbourne VIC 3001  
T 03 9242 1222 F 03 9242 1333 DX 50 Melbourne  
www.ags.gov.au

Canberra  
Sydney  
Melbourne  
Brisbane  
Perth  
Adelaide  
Hobart  
Darwin

**WITHOUT PREJUDICE SAVE AS TO COSTS**

Dear Ms s 47F

**Re: VID56/2020 – Lendlease Building Contractors Pty Ltd v Australian Building and Construction Commissioner & ANOR**

1. We refer to Snaden J's order of 31 March 2022 in the above proceeding (**Costs Order**).
- Division of costs**
2. The Respondents have undertaken a review of their costs in respect of the proceeding to divide them into costs in respect of the issue concerning the proper construction of s 13(2)(j) of the Building Code from 12 February 2020 onwards (**Construction Issue**), and costs in respect of the constitutional law issues from 12 February 2020 onwards (**Constitutional Issue**).
  3. Enclosed with this letter are copies of our invoices to the First Respondent for the period of this proceeding from 12 February 2020.
  4. Further enclosed with this letter are 3 spreadsheets (one for professional fees, one for counsel fee disbursements and one for other disbursements), dividing these costs into three categories:
    - a. costs in respect of the Construction Issue (labelled green)
    - b. costs in respect of the Constitutional Issue (labelled blue)
    - c. costs which may be attributable to both issues and cannot be divided between the two (**Indivisible Costs** — labelled orange).
  5. The materials enclosed with this letter contain information that is commercial-in-confidence to the Australian Government Solicitor. This material is disclosed for the purposes of these costs negotiations and is not be used for any other purpose or further disclosed to any other parties.
  6. The Respondents have adopted the following approach in dividing their costs into these three categories:
    - a. Within AGS, the constitutional aspects of this matter (as is the practice with all Commonwealth constitutional litigation) were handled by AGS' Constitutional

Litigation Unit (CLU). As such, all time recorded by the CLU was assigned against the Constitutional Issue. For your reference, the relevant members of the CLU are Guy Aitken QC, Andrew Buckland, Simon Thornton and [REDACTED]

- b. All time relating to the CFMMEU's interlocutory application to intervene in the proceeding was assigned against the Constitutional Issue.
- c. Time specific to correspondence with the CFMMEU was assigned against the Constitutional Issue. Conversely, time specific to correspondence with the Applicant was assigned against the Construction Issue. Time relating to joint correspondence to both has been assigned as an Indivisible Cost.
- d. Time relating to negotiations of timetable variations and similar has been assigned as an Indivisible Cost.
- e. Time relating to the statement of agreed facts between the Applicant and the Respondents has been assigned against the Construction Issue. Similarly, time relating to the Notices to Admit exchanged between the Applicant and the Respondents has been assigned against the Construction Issue.
- f. The Respondents consider that if the CFMMEU has not intervened, and the proceeding had not been expanded to encompass the Constitutional Issue, their need to file evidence would have been limited to the point of non-existent. The principal and overriding purpose of the Respondents' evidence was to establish constitutional facts going to the Constitutional Issue. As such, time relating to the preparation of the Respondents' evidentiary material has been assigned against the Constitutional Issue. This equally applies to the preparation of the Respondents' Extrinsic Materials Index which was also prepared for the purposes of leading and explaining constitutional fact evidence.
- g. The one exception to this is the 'Second Dalton Affidavit'. The Respondents recognise that this document was specific to an issue between the Respondents and the Applicant, and so has assigned all time related to this affidavit against the Construction Issue.
- h. Time relating to conferencing with witnesses prior to their appearance for cross-examination has been recorded against the Constitutional Issue. This is for the reasons in 5.f, above. Further, only the CFMMEU sought to cross-examine the Respondents' witnesses.
- i. Time spent on the preparation of submissions, preparation for hearing and appearance at the hearing has been assigned as an Indivisible Cost, subject to point 5.a above, or unless the narration provides a clear indication that it was specific to either the Construction Issue or the Constitutional Issue.

#### **Position on Indivisible Costs**

7. The Respondents' position is that the Costs Order requires the CFMMEU to pay 75% of Indivisible Costs. The Respondents consider that this clearly follows from such costs being divided between two categories where the CFMMEU is required to pay 100% and 50%, respectively.

**Outcome of dividing costs**

8. Applying this approach, the Respondents consider their costs payable under the Costs Order are as follows:

	<b>Constitutional Issue</b>	<b>Construction Issue</b>	<b>Indivisible Costs</b>	<b>Total</b>
<b>Professional fees</b>	\$129,164.50	\$13,487.00	\$27,202.50	\$169,854.00
<b>Disbursements (counsel)</b>	\$93,439.93	\$15,765.00	\$189,210.15	\$298,415.08
<b>Disbursements (other)</b>	\$627.30	-	\$13,870.74	\$14,498.04
<b>Total</b>	\$223,231.73	\$29,252.00	\$230,283.39	\$482,767.12
<b>Payable under Costs order</b>	\$223,231.73	\$14,626.00	\$172,712.54	<b><u>\$410,570.27</u></b>

9. We note that in reviewing its costs for the above exercise, the Respondents identified some costs which they no longer pursue. The entries relating to those costs have been redacted from the enclosed invoices and omitted from the spreadsheets.

**Offer on costs**

10. In order to resolve this matter in a timely manner and to avoid the parties having to incur the expense of going to a taxation of costs, we are instructed to make an offer that the Respondents will agree to costs at 75% of the amount calculated as set out above, being **\$307,927.70**. The Respondents consider this is a fair and reasonable estimation of their costs for which the Intervener should be liable.
11. This offer will remain open until **4pm, 21 June 2022**.
12. This offer is made in accordance with the principles outlined in *Calderbank v Calderbank* [1975] 3 All ER 333.
13. Please note that if this offer is not accepted, and the CFMMEU does not achieve an outcome which is materially better than the terms of the Respondents' offer in any taxation process, the Respondents will produce this letter in support of an application for an order that the Intervener pay the Respondents' costs of, and incidental to, the taxation process on an indemnity basis.

Yours sincerely

**Craig Rawson**  
Senior Executive Lawyer

