DECISION

Fair Work Act 2009
s.185—Enterprise agreement

City of Stirling
(AG2022/5068)

DEPUTY PRESIDENT BEAUMONT PERTH, 7 FEBRUARY 2023

Application for approval of the City of Stirling Inside Workforce Agreement 2022

[1] The City of Stirling (the **Applicant**) has made an application for the approval of an enterprise agreement known as the *City of Stirling Inside Workforce Agreement 2022* (the **Agreement**). The application was made under s 185 of the *Fair Work Act 2009* (Cth) (the **FW Act**). The Agreement is a single enterprise agreement.

[2] The application was made on 2 December 2022 and initially allocated to the Chambers of Commissioner Lee. At that time, the Australian Municipal, Administrative, Clerical and Services Union (**ASU**) had not filed its Form F18.[1] However, on 9 December 2022, the Form F18 was filed, and it listed a litany of objections to the Agreement's approval. Because of objections raised, the Commissioner sought to have the file reallocated, having formed the view that a hearing of the matter would be the most efficient way of dealing with the ASU objections and the issues identified by the Commission.

[3] On 16 December 2022, the application was reallocated to my Chambers. Having reviewed the materials filed, on 19 December 2022, the parties were informed of the directions for filing further materials and both the Applicant and the ASU were informed that the matter would proceed to a hearing on 7 and 8 February 2023.

[4] Later that same day, the Applicant wrote to the Commission outlining, amongst other matters:

> As a WA Local Government, the City will move to the State Industrial Relations System on and from 1 January 2023. From this date the FW Act will no longer apply to the City and the FWC will no longer have jurisdiction to deal with matters under the FW Act involving the City. Instead the Industrial Relations Act 1979 (WA) (IR Act) will apply to the City.
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> While the City had for some time anticipated the move to the State Industrial Relation System, the date of the move (1 January 2023) was only announced by the State Government on 1 November 2022. The City has therefore had limited time to conclude bargaining, make an enterprise agreement with relevant employees and have the Agreement approved by the FWC.
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> It is the City's understanding that unless the Agreement is approved by the FWC by 1 January 2023, it will not operate (despite being voted up by employees) as it will not have become an enterprise agreement made under the FW Act and will not therefore transfer into the State

> Industrial Relations System as a new State instrument (see section 80BB of the IR Act). Further, it is the City's understanding that the FWC will not have jurisdiction to deal with the application to approve the Agreement after 1 January 2023 and therefore there is no utility in listing the matter for a hearing to deal with the application to approve the Agreement in February 2023.

[5] The Applicant pressed that the Commission allow it to file written submissions in reply to the ASU objections by the following day, and that I determine the matter on the papers thereafter.

[6] Shortly stated, I declined to do so noting that an accession to the Applicant's request would render any potential determination procedurally unfair given the extent of the ASU's objections and the issues already identified by the Commission.

[7] Thereafter, the Applicant wrote to the Acting President of the Commission requesting, in effect, that the procedural directions be revisited. It stated, amongst other matters:

> As a result of the City and other local governments in Western Australia being declared not to be national system employers (see regulation 7 of the *Industrial Relations (General) Regulations 1997)*, the *Fair Work Act 2009* (Cth) (FW Act) will no longer apply to the City from 1 January 2023 and the Commission will no longer have jurisdiction to deal with the Application. Clause 6.07F(5) of Schedule 1 of the *Fair Work Amendment (Transitional Arrangements - Western Australian Local Government Employers and Employees) Regulations 2022* (Cth) which provides that from 1 January 2023, the Application will become a 'non-preserved matter' which the Commission is required to discontinue and not consider from 1 January 2023.
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> This means the directions issued by Deputy President Beaumont will have no effect. Deputy President Beaumont was advised of this on 19 December 2022 and the City respectfully requested that the Application be dealt with by the Commission before 1 January 2023. That request was denied by Deputy President Beaumont on the basis that expediting the approval process would be procedurally unfair.
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> The effect of denying the City's request to have the Application considered by the Commission prior to 1 January 2023 is that Application cannot be approved by the Commission before the City moves to the State Industrial Relations System on 1 January 2023 and the Agreement cannot become a "new State instrument" under the *Industrial Relations Act 1979* (WA) (IR Act) from 1 January 2023. That is, the Agreement which has been voted up by a majority of employees, will not operate if not approved prior to 1 January 2023.

[8] In response to the Applicant's letter, the Acting President, having similarly perused the materials filed, informed the Applicant that he could not identify any procedurally fair or legally sound way in which the application might be heard and determined prior to 1 January 2023, noting that there were only four working days between the date of the Applicant's letter to his Chambers and 1 January 2023. However, the Acting President noted that the Commission was willing to conduct a conciliation conference with a view to seeing whether the ASU's objections could be resolved by agreement.

[9] Whilst the parties were offered a conciliation conference, the ASU notified the Commission that its concerns could be not resolved via conciliation and therefore there would be limited utility in convening a conference. In summary, the ASU further submitted it:

a) agreed with the Applicant's assertion that unless the Agreement was approved by the Commission by 1 January 2023, it would not operate (despite being voted up by employees) as it would not have become an enterprise agreement made under the *FW Act* and would not therefore transfer into the State industrial relations system as a new State instrument (see s 80BB of the *Industrial Relations Act 1979* (WA) (**IR Act**));
b) agreed with the Applicant's assertion that the Commission would not have jurisdiction to deal with the application to approve the Agreement after 1 January 2023 and therefore there was no utility in listing the matter for a hearing to deal with the application to approve the Agreement in February 2023;
c) observed s 80BB of the *IR Act* provides that on the day of transition, industrial instruments (i.e. *FW Act* enterprise bargaining agreements) that apply to declared employers and declared employees (such as the Applicant and its employees) will be recognised in the State system as new State instruments. As the Agreement would not be in operation until seven days after its approval, the Agreement must have been approved seven days before 31 December, which was Saturday, 24 December 2022. It followed that as there was only one day before this deadline, the ASU did not wish to waste the valuable time and resources of the Commission in convening a conciliation conference for a matter that simply could not be determined satisfactorily in time.

[10] On 3 January 2023, the parties were informed that the Commission would, on its own initiative, consider the dismissal of the application under s 587 of the *FW Act*.

[11] In response to the aforementioned correspondence, the Applicant advised on 5 January 2023 that it was not going to discontinue its application and that its understanding of the effect Schedule 1, regulation 6.07F(5) of the *Fair Work Amendment (Transitional Arrangements - Western Australian Local Government Employers and Employees) Regulations 2022* (Cth) (the **Transitional Regulations**) was that the Commission would no longer be able to deal with the application, including considering the dismissal of the Application and the issuing directions.

[12] Notwithstanding the Applicant's assertion, on 20 January 2023 directions were issued regarding whether to dismiss the application for the approval of the Agreement under s 587 of the *FW Act*. Having filed their materials, the parties informed Chambers that they were content to have the potential dismissal of the application determined on the papers. As the justiciable issue did not encompass a dispute on the facts, I decided this was the appropriate course.

[13] For the following reasons, I am satisfied that the Applicant's application has no reasonable prospects of success and, therefore, the application is dismissed under s 587(1)(c) of the *FW Act*. An Order[2] to this effect is issued concurrently.

The statutory framework

[14] On 16 December 2021, the Western Australian Parliament passed the *Industrial Relations Legislation Amendment Act 2021* (WA). This Act amended the *IR Act* to (among other things) enable Western Australian local governments to be declared not to be national system employers for the purpose of the *FW Act*.

[15] On 22 June 2022, regulation 7 was inserted into the *Industrial Relations (General) Regulations 1997* (WA) (**IR Regulations**) declaring that each of the Western Australian local

governments listed in Schedule 4 to the *IR Regulations* (which includes the Applicant) is not to be a national system employer for the purposes of the *FW Act* from the 'relevant day' (**Declaration**). At this stage, the 'relevant day' for the purpose of the Declaration had not been fixed. Regulation 7 of the *IR Regulations* stated:

> **7. Employers declared not to be national system employers (Act s. 80A(2))**
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> For the purposes of section 80A(2)(a) of the Act, each employer specified in Schedule 4 is declared not to be a national system employer for the purposes of the FW Act.

[16] Section 80A(2) of the *IR Act* provides that the regulations may declare an employer not to be a national system employer for the purposes of the Act. As noted, Schedule 4 Division 1 sets out that the Applicant is one such employer.

[17] On 1 November 2022, the Western Australian Minister for Industrial Relations announced the relevant day would be 1 January 2023 and on 18 November 2022, the *IR Regulations* were amended to provide the day fixed for the purposes of the Declaration was 1 January 2023. The endorsement of the Declaration by the Federal Minister for Employment and Workplace Relations (**Federal Minister**) required by s 14(2)(c) of the *FW Act* occurred on 6 December 2022. On this date, the *Fair Work (State Declarations – employers not to be national system employers) Endorsement 2022 (No. 1)* (Cth) (**Endorsement**) was made under s 14(4)(a) of the *FW Act* with effect from 1 January 2023.

[18] On 15 December 2022, the *Transitional Regulations* were made setting out transitional arrangements for a limited number of *FW Act* matters. After the *Transitional Regulations* were made, it was clear that the Commission would only be able to deal with a limited range of matters (involving individual employment rights) relating to Western Australian local governments. Regulation 6.07F states:

> **6.07F Transitional—FWC matters**
> *Applications after the transition time*
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> (1) A preserved affected person may make a preserved FWC application after the transition time in relation to conduct occurring before that time.
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> Note: Conduct includes an omission: see the definition of conduct in section 12 of the Act.
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> (2) The FWC may dismiss a preserved FWC application if the FWC is satisfied that:
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> (a) an application (the other application) has been made to another body in relation to the same conduct; and
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> (b) in dealing with the other application, the other body:
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> (i) is or will be dealing with the same, or substantially the same, matters as the matters that the FWC would be likely to deal with if the preserved FWC application were not dismissed; and
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> (ii) has available to it the same, or substantially the same, remedies that the FWC would be likely to apply in respect of the preserved FWC application if that application were not dismissed.
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> (3) Subregulation (2) does not limit when the FWC may dismiss a preserved FWC application.
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> Note 1: For other powers of the FWC to dismiss applications, see section 587 of the Act.

> Note 2: An application may be dismissed on the initiative of the FWC or on application: see subsection 587(3) of the Act.
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> *Continuing matters*
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> (4) After the transition time, the FWC may, in accordance with the Act, deal with or continue to deal with:
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> (a) a matter commenced by a preserved FWC application in relation to conduct occurring before that time (whether the application was made before or after the transition time); or
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> (b) an appeal under section 604 of the Act in respect of such a matter; or
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> (c) a review under section 605 of the Act of a decision in respect of such a matter; or
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> (d) a matter that is relevant to a preserved affected person in the person's capacity (at the time of the conduct that is relevant to the matter), or in respect of another person's capacity (at the time of the conduct that is relevant to the matter), as a national system employer or national system employee, in respect of which:
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> (i) a question of law has been referred to the Federal Court under subsection 608(1) of the Act (whether the referral occurs before or after the transition time); or
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> (ii) a court has exercised jurisdiction under section 562 of the Act, section 39B of the Judiciary Act 1903 or paragraph 75(v) of the Constitution (whether the jurisdiction is first exercised before or after the transition time).
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> Note: Paragraph (d) of this subregulation covers matters commenced by any kind of application or referral including, but not limited to, preserved FWC applications.
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> *Discontinuing matters*
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> (5) After the transition time, the FWC must not deal with or continue to deal with a matter that is commenced by a non-preserved FWC application (whether the application was made before or after the transition time), other than a matter mentioned in paragraph (4)(d).

[19] The Explanatory Statement to the *Transitional Regulations* set out the following with respect to the purpose of regulation 6.07F(5):

> 20. Subregulation (5) prohibits the FWC from dealing with, or continuing to deal with, a matter commenced by a non-preserved FWC application (whether the application was made before or after the transition time) other than a matter mentioned in paragraph (3)(d).
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> 21. This provision is intended to ensure that Commonwealth resources are not unnecessarily applied to dealing with matters concerning employers and employees who are no longer covered by the national system. Paragraph 4(d) ensures that court processes are not interfered with in respect of these matters.

Applicant's submissions

[20] It should be evident by now that the Applicant holds the view that the Commission can no longer deal with the application under s 185 of the *FW Act* for approval of the Agreement, including considering the dismissal of the application under s 587 of the *FW Act*.

[21] The Applicant contends that *Transitional Regulations* which amended the *Fair Work Regulations 2009* (Cth) provide the Commission may only deal with or continue to deal with a

matter commenced by a 'preserved FWC application'. The application is not a 'preserved FWC application'. It is a 'non-preserved FWC application'.

[22] According to the Applicant, the *Transitional Regulations* prohibit the Commission from dealing with or continuing to deal with a matter that is commenced by a 'non-preserved FWC application', such as the present application. The Applicant argues that this prohibition extends to considering the dismissal of the application under s 587 of the *FW Act* for want of jurisdiction or otherwise.

[23] In the alternative, the Applicant submits that regulation 6.07F(5) of the *Transitional Regulations* had the effect of discontinuing the application on 1 January 2023 and there is, therefore, no application for the Commission to dismiss under s 587 of the *FW Act* or otherwise.

[24] Expanding upon these submissions further, the Applicant acknowledges that under s 587 of the *FW Act*, the Commission can on its own initiative 'dismiss an application'. This would include dismissing an application 'for want of jurisdiction'.

[25] However, the Applicant contends:

a) there is no application before the Commission for it to dismiss under s 587 as the present application was discontinued by the *Transitional Regulations* with effect from 1 January 2023;
b) as a result of the *Declaration* and the *Endorsement*, from 1 January 2023, the *FW Act* no longer applies to the Applicant or its employees. This means from 1 January 2023, the Commission has no jurisdiction over the Applicant or its employees. It is the Western Australian Industrial Relations Commission (under the *IR Act*) that now has jurisdiction over the Applicant and its employees;
c) except for preserved FWC applications, the Commission no longer has any powers under the *FW Act* or otherwise to make decisions in relation to the Applicant or its employees. This includes making a decision relating to the present application such as a decision to dismiss the application;
d) the ASU in its submissions has misunderstood the effect of the *Declaration*, *Endorsement* and *Transitional Regulations* which is essentially to prohibit the Commission from dealing with matters (other than a preserved FWC application) relating to Western Australian local governments after 1 January 2023. It is certainly not the case that the Commission is required to keep 'non-preserved FWC applications' open. This would be contrary to the *Transitional Regulations*;
e) it is clear from the *Acts Interpretation Act 1901* (Cth) (**AI Act**) that when interpreting the provisions of a statute (the same principles are applied to delegated legislation), headings in the statute can be used to aid interpretation. The heading relating to the relevant regulation (regulation 6.07F(5)) could not be clearer. That heading is 'Discontinuing matters'; and
f) the ASU contends that if the Commission cannot dismiss a matter for want of jurisdiction, this would create an absurd result. The Applicant argues that if notwithstanding the *Declaration*, the *Endorsement* and the *Transitional Regulations*, the Commission continued to deal with a non-preserved FWC application just to dismiss it, this would be an 'absurd result'.

ASU's submissions

[26] The ASU agreed with the Applicant that the application is no longer within the Commission's jurisdiction and cannot be progressed further. However, it highlighted that the disagreement now centred on whether the Commission may deal (or not deal) with the matter.

[27] The ASU maintained that the Commission retains the power to deal with a relevant matter insofar as it comes to dismissing it for want of jurisdiction.

[28] The ASU said that it disagreed with the Applicant's interpretation of regulation 6.07F(5) of the *Transitional Regulations* that as of 1 January 2023 any 'non-preserved FWC application' was discontinued. Instead, it supported the Commission's provisional view that its power to dismiss the application under s 587 of the *FW Act* at its own initiative for want of jurisdiction is unfettered by regulation 6.07F(5) of the *Transitional Regulations*.

[29] The ASU agreed with the Applicant that the same principles of interpretation and the *AI Act* apply equally to regulations or subsidiary legislation as they do to statutes.

[30] The ASU observed that pursuant to s 15AA of the *AI Act*, an interpretation that would best achieve the purpose or object of regulation 6.07F(5) of the *Transitional Regulations* should be preferred to each other interpretation. A purposive construction in this context would also resolve doubts as to whether it was the intention of the Federal Minister to discontinue all 'non-preserved FWC applications' as of 1 January 2023 or to prohibit the Commission from dealing with them any further without impairing the right of the Commission to dismiss 'non-preserved FWC applications'.

[31] The ASU submitted that as the purpose or object of regulation 6.07F(5) is not expressed plainly in the text, reference to the extrinsic materials to resolve any ambiguity as to the purpose of object of regulation 6.07F(5) is authorised by s 15AB(1)(b)(i) of the *AI Act*.

[32] According to the ASU, the Explanatory Statement of the Federal Minister that accompanies the *Transitional Regulations* is extrinsic material that can be relied upon to resolve any ambiguity of the purpose or object of regulation 6.07F(5).

[33] The ASU contends that it is the purpose or object of regulation 6.07F(5) that the Commission's resources are not unnecessarily applied to dealing with matters concerning employers and employees who are no longer covered by the national system. The ASU contends that its interpretation that the Commission is prohibited from dealing with the application after 1 January 2023, but not precluded from dismissing the application on its own initiative for want of jurisdiction, is a construction that best achieves this purpose.

[34] Despite the use of the heading 'Discontinuing matters' (which the ASU agrees can be also considered extrinsic material) for regulation 6.07F(5), the ASU contends that the effect of the present participle in 'discontinuing' means that the application has not been discontinued by force of the *Transitional Regulations*. The use of 'discontinuing' is consistent with the prohibition on dealing with the application without any prohibition on the Commission's right to dismiss the application for want of jurisdiction.

[35] In the alternative, it is the ASU's position that it is clear from the Applicant's submissions that it has discontinued the application in accordance with s 588 of the *FW Act* and therefore the Commission merely has to acknowledge and affirm the discontinuance.

Consideration

[36] As a result of local governments in Western Australia being declared not to be national system employers (*see* the *Endorsement* and regulation 7 of the *IR Regulations*), the *FW Act* has not applied to local governments since 1 January 2023.

[37] There are some matters that the Commission can continue to deal with such as preserved FWC applications (unfair dismissals, National Employment Standards, stand downs and dealing with disputes (Part 6-2)). However, the application for the approval of an enterprise agreement is not a preserved FWC application. Regulation 6.07F(5) of the *Transitional Regulations* provides that from 1 January 2023, the application I have before me, made by the Applicant, became a 'non-preserved matter'.

[38] Regarding the application, the Applicant initially contended that the Commission was obliged to discontinue the application and thereafter argued I was not permitted to dismiss the application and it declined to discontinue the application. The Applicant has formed the view that regulation 6.07F(5) of the *Transitional Regulations* means that the Commission cannot deal with its application at all – including issuing any directions for dismissing the application.

[39] Effectively, the Applicant has argued that regulation 6.07F(5) of the *Transitional Regulations* prohibits the Commission from exercising its powers under ss 587, 590 and potentially 589. Section 590 of the Act allows the Commission, amongst other things, to invite oral or written submissions and to hold a hearing. Section 589 permits the Commission to make decisions as to how, when and where a matter is to be dealt with, and of course s 587 allows the Commission to dismiss an application in specified circumstances.

[40] The enabling legislation of the *Transitional Regulations* is the *FW Act* (s 3 of the *Transitional Regulations*). If enabling legislation confers on a person the power to make a legislative instrument or notifiable instrument, then, unless the contrary intention appears, any instrument made is to be read and construed subject to the enabling legislation as in force from time to time, and so as not to exceed the power of the person to make the instrument.[3] In this case, the *Transitional Regulations* are a 'legislative instrument' – a term defined in s 8 of the *Legislation Act 2003* (Cth).

[41] It is accepted that subordinate legislation must not be repugnant with the Act which empowers it. In *Plaintiff M47/2012 v Director-General of* Security, Kiefel J expressed that regulations must not conflict with or override the provisions of their enabling Act unless the enabling Act so provides.[4] It was an opinion shared by the remainder of the High Court,[5] the dictum of French CJ at [54] reading:

> Regulations made under s 504 [of the Migration Act 1958 (Cth)] must be "not inconsistent with" the Migration Act. Even without that expressed constraint delegated legislation cannot be repugnant to the Act which confers the power to make it.

[42] Section 796 of the *FW Act* sets out that the Governor General may make regulations prescribing matters: (a) required or permitted by the *FW Act* to be prescribed; or (b) necessary or convenient to be prescribed for carrying out or giving effect to the *FW Act*. The regulations made under the *FW Act* are said to prevail over procedural rules made under the *FW Act* to the extent of any inconsistency.

[43] My provisional view, as expressed to the parties, was that regulation 6.07F(5) did not preclude the Commission from issuing directions, conducting a hearing, or otherwise determining whether the application under s 185 should be dismissed.

[44] Section 588 allows a 'person' who has applied to the Commission to discontinue an application in accordance with the procedural rules (albeit they may be waived) and whether or not the matter has been settled. It is not the Commission that 'orders' the discontinuance, but rather the applicant who has discretion to take that path. Section 588 of the Act is the only provision that deals with 'discontinuance', and it is only the applicant that has standing to discontinue a matter.

[45] Regulation 6.07F(5) is titled 'Discontinuing matters'. The Applicant contends that headings in a statute can be used to aid interpretation and that the heading to regulation 6.07F(5) could not be clearer. However, the content of regulation 6.07F(5) is also clear. The regulation proscribes that the Commission must not deal with or continue to deal with a matter that is commenced by a non-preserved FWC application. The regulation does not, however, refer to an application having been discontinued or provide for an 'automatic' discontinuance. To do so would evidently be contrary to s 588, which imbues only applicants with standing to discontinue their applications.

[46] The *FW Act* sets out that the Governor General may make regulations prescribing certain matters. Seemingly, there is no express obligation to make regulations that are not inconsistent with the *FW Act*. However, it is accepted that a delegation of legislative power should be narrowly construed unless the Parliament has, by express provision or necessary intendment, revealed a contrary intention.[6]

[47] The interpretation of regulation 6.07F(5), as pressed by the Applicant, would result in a variation or departure from the positive provisions made by the *FW Act*, with the Commission's powers under ss 587, 589 and 590 being fettered. Further, it would effectively require the Commission to read into regulation 6.07F(5) that a non-preserved FWC application was to be kept in abeyance (given the Commission is purportedly paralysed in its dealing with it) or that the regulation operated to give rise to an automatic discontinuance. Neither avenue is expressly provided for in the regulation.

[48] The Explanatory Statement to the *Transitional Regulations* explains that intention behind regulation 6.07F(5) is to ensure that Commonwealth resources are not unnecessarily applied to dealing with matters concerning employers and employees who are no longer covered by the national system. There is no reference in the Explanatory Statement that the intention behind the provision is, for example, to keep in abeyance an application which might otherwise be carried over into the jurisdiction of the Western Australian Industrial Relations Commission – as referenced by the Applicant in its correspondence of 5 January 2023 (*see* s 80BD of the *IR Act*).

[49] In my view, regulation 6.07F(5) relays to both applicant and Commission that after the transition time, a matter commenced by a non-preserved FWC application is unable to be dealt with, or continued to be dealt with, by the Commission. Section 587 sets out that the Commission may dismiss an application if the application has no reasonable prospects of success. Where the Commission is precluded from further dealing with an application, it would necessarily follow that the same application has no reasonable prospect for success and can

simply be dismissed under s 587(1)(c) of the *FW Act* – absent the requirement for parties to be heard.

Conclusion

[50] Whilst expressing that the application is capable of dismissal under s 587(1)(c) of the *FW Act*, if I am wrong on this point then I accept the Applicant's submission that regulation 6.07F(5) of the *Transitional Regulations* had the effect of discontinuing the application on 1 January 2023 and there is, therefore, no application for the Commission to dismiss under s 587 of the *FW Act* or otherwise.

DEPUTY PRESIDENT

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<PR750241>

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[1] Form F18 – Declaration of employee organisation in relation to an application for approval of an enterprise agreement (other than a greenfields agreement) **(Form F18)**.

[2] PR750240.

[3] *Legislation Act 2003* (Cth) s 13(1)(c).

[4] (2012) 251 CLR 1 (2012) 251 CLR 1, 162–3 [434].

[5] Ibid 41 [54] (French CJ); 77 [174] (Hayne J); 147–8 [382] (Crennan J).

[6] *South Australia v Tanner* (1989) 166 CLR 161, 174 (Brennan J).