



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Geoffrey Lobo

v

Multicultural Futures Inc
(U2023/10151)

DEPUTY PRESIDENT O'KEEFFE

PERTH, 12 FEBRUARY 2024

Unfair dismissal application – jurisdictional objection not a national system employer – jurisdictional objection upheld – application dismissed.

[1] Mr Geoffrey Lobo (the Applicant) made an application to the Fair Work Commission (FWC) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for an order granting a remedy, alleging that he had been unfairly dismissed from his employment with Multicultural Futures Inc. (the Respondent).

[2] The Respondent has objected to the application on the ground that it is not a national system employer as defined in section 14 of the Act.

[3] Before considering the merits of the application, the Commission must be satisfied that the Respondent is a national system employer.

Permission to appear

[4] The Respondent sought permission to be represented. The Applicant did not object to the Respondent being represented.

[5] In its submissions addressing section 596(2) of the Act, the Respondent stated in part as follows (citations removed):

“Representation will allow this matter to be dealt with more efficiently as it will ensure the focus in the proceeding is on the ‘real issues’ and only relevant matters are canvassed. Relevantly, at this stage in the proceedings, this relates solely to the Respondent’s jurisdictional objection that the Respondent is not a national system employer, which necessarily involves consideration of discrete, complex legal issues.”

It is clear that to exercise the discretion afforded to me by the Act, I only need find one of the three situations set out in s596(2) to be applicable. I was persuaded that, given the hearing involved jurisdictional objections relating to coverage of the national system, there would be

sufficient complexity such that the Commission will be assisted by the presence of counsel. In making this decision I relied on s596(2)(a) of the Act.

Witnesses

[6] The Applicant gave evidence on his own behalf.

[7] Ms Kristi Treadgold (Ms Treadgold) the Respondent's Chief Executive Officer gave evidence on behalf of the Respondent.

Legislation

[8] At section 14, the Act defines a national system employer as follows:

“ (1) A *national system employer* is:

(a) a *constitutional corporation*, so far as it employs, or usually employs, an individual; or

(b) the *Commonwealth*, so far as it employs, or usually employs, an individual; or

(c) a *Commonwealth authority*, so far as it employs, or usually employs, an individual; or

(d) a person so far as the person, in connection with *constitutional trade or commerce*, employs, or usually employs, an individual as:

(i) a *flight crew officer*; or

(ii) a *maritime employee*; or

(iii) a *waterside worker*; or

(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in *Australia*, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.”

[9] Sections 30D and 30N of the Act extend the meaning of national system employer in referring states but as Western Australia is not a referring state, those sections have no relevance in this matter. It is clear from the definition of national system employer in section 14 of the Act as set out above that the Respondent does not meet the criteria set out in (b) to (f) inclusive. The question to be determined is thus whether the Respondent is a constitutional corporation. The relevant test in such instances is to determine whether the Respondent is a trading or financial corporation for the purposes of section 51(xx) of the Constitution.

Submissions and Evidence

[10] The Applicant submits that the Respondent is a national system employer because it is a trading corporation which “*generates revenue as ‘reward for goods or services’*”¹. In support of this proposition, the Applicant drew my attention to the Financial Statements in a copy of the Respondent’s Annual Report for 2021-2022 which was entered into evidence. That statement² provided the following breakdown of the Respondent’s income:

<u>Item</u>	<u>Value</u>	<u>Percentage of total income</u>
Grants	\$1,944,264	91.72%
Donations	\$ 11,576	0.55%
Gain on sale of plant & equipment	\$ 22,491	1.06%
Other Revenue	\$ 141,370	6.67%

[11] The Applicant further submitted that the Respondent had gained a “*huge financial windfall*”³ from the sales of its office, providing it with a “*large amount of revenue from which it can make financial and strategic decisions.*”⁴ In support of this, the Applicant directed me to the Annual Report where it was acknowledged that the premises had been sold, albeit that it did not disclose the sale amount, which the Applicant claimed was \$1.42 million.

[12] The Applicant further submitted that the Respondent operations had a commercial nature and commercial intentions, and drew my attention to the following statements in the Annual Report:

*"This enhanced liquidity position provides us the flexibility to properly evaluate and execute strategic initiatives to deliver growth and greater stability to the organisation, key for enduring operations... the team continues to identify avenues for greater operational efficiency through a review of the organisation from a commercial lens."*⁵

The Applicant submitted that the Annual Report also listed “*...the various government agencies providing funding (grants) for MCF's activities. These include MCF's Mental Health, Settlement, and Accommodation programs, and they relate to revenue sources and trading activities... (i)n addition, the Annual Report describes grants that were secured for MCF's World Music Cafe program (Page 16) which included trading activities.*”⁶ The Applicant claimed that these grants ought to be considered in light of the findings of Commissioner Hampton (as he then was) in *Application by Pasalskyj, Marie (Pasalskyj)*⁷ where a provider of rehabilitation services to offenders and former prisoners was held to be a trading corporation. The Commissioner found that the provider’s funding contracts, individual contracts for some activities and its youth housing renovation program, should be treated as trading activities because they generated about \$1.2 million a year for the organisation, 11% of its annual activities. It was also held that activities associated with the direct provision of accommodation services were trading activities. The combined level of trading activities (in excess of 15% of income) was held to be not insubstantial.

[13] The Applicant provided copies of his employment contract as evidence and submitted that the references in that contract to the Social, Community, Home Care and Disability

Services Award, being a modern award, and to the Fair Work Regulations, coupled with the provision of a Fair Work Information statement suggested that the Respondent was in fact a national system employer.

[14] In further submissions, the Applicant proposed that the Respondent had characteristics of a trading corporation, “...such as an ABN, its own bank account(s) and collecting GST. MCF has previously, and continues to actively pursue and renew funding from various government agencies, which are its main sources of revenue. Hence MCF conducts a certain level of trading activities, providing services for reward, enabled by its funding streams. Other MCF trading activities include rental accommodation, training seminars and its Community Ambassador activities.”⁸

[15] The Applicant drew my attention to the Respondent’s Annual Report for 30 June 2022⁹, published on the website of the Australian Charities and Not-for Profits Commission, where the following is stated:

“The incorporated association recognises revenue as follows:

Government grants

Government grants are derived from services and programs performed on behalf of the State, Commonwealth and Local governments, whereby the incorporated association has an obligation to deliver such services and programs. Government grant revenue is recognised in profit or loss when the incorporated association satisfies the performance obligations stated within the funding agreements. If conditions are attached to the grant which must be satisfied before the incorporated association is eligible to retain the contribution, the grant will be recognised in the statement of financial position as a liability until those conditions are satisfied.

Donations

Income recognised at the time the incorporated association obtains control of the contributions or the contractual right to the contribution. Except for when a donation or bequest gives rise to related amounts of a contribution by owners, lease liability, financial liability, or a provision.

Interest income

Interest revenue is recognised as interest accrues using the effective interest method. This is a method of calculating the amortised cost of a financial asset and allocating the interest income over the relevant period using the effective interest rate, which is the rate that exactly discounts estimated future cash receipts through the expected life of the financial asset to the net carrying amount of the financial asset.”¹⁰

[16] In other submissions, the Applicant claimed that the Respondent “...has produced branded merchandise (including its logo) such as pens and fridge magnets, which it freely distributes to the wider community and at various events to increase its profile and promote its services”¹¹ and “has leased motor vehicles to some of its senior staff for work and personal use”.¹²

[17] The Applicant made further submissions regarding the structure and staffing of the Respondent but it was unclear as to how these submissions advanced the argument that the Respondent was a trading corporation. The Applicant's final area of submission was that the Respondent had "...contract liabilities that represent its obligation to transfer a service or program to a customer on behalf of a funding provider".¹³ It would appear that in making this statement the Applicant was attempting to characterise the funding arrangements as akin to a contract for services as opposed to a grant to provide some service or amenity to the public.

[18] The Applicant expanded on this notion in his reply submissions. He noted that:

*"Funding from government agencies has and continues to form the main source of MCF's revenue base. This is not simply a formality or a given, but requires extensive and ongoing efforts by Not-For-Profit (NFP) organisations to maintain and manage their funding. This applies to MCF, and in recent years it has been put forward by some, that all such activities - related to funding - are trading activities in and of themselves, because they constitute a competitive process for NFPs to continue to have a revenue base and be viable."*¹⁴

[19] The Applicant's reply submissions go on to propose as follows:

"As described above, all of MCF's activities relating to its funding should be regarded as trading activities. These activities secure MCF's revenues for it to be remunerated, and to continue as a viable entity. And in MCF securing such contracts, it should be seen that the relevant government funding bodies have purchased services from MCF for MCF to deliver to the community - on behalf of those government bodies. The fact that funding contracts are paid in advance (or in instalments periodically) does not change the fact that MCF has secured revenue to deliver targeted services under agreed terms and conditions of each funding body and contract.

Apart from its main funding streams, MCF has actively applied for many other smaller or one-off grants and funding opportunities for many years now. This includes short one-off grants, funding partnerships with other service providers, and being a stakeholder in consortium projects. MCF has not always been successful with these tenders/applications, but this nonetheless demonstrates its willingness to secure new opportunities in service provision and community engagement - where funding is being offered. Recent examples (just from the MCF Mental Health service) include NDIS Access grants, COVID-19 education grants, Cyrenian House partnership, FDV Armadale partnership, and Suicide Prevention partnership with Neami. This demonstrates the enterprising and commercial nature of such activities by MCF.

In summary, all of MCF's activities and decisions relating to funding, should be regarded as trading activities. This is because MCF must continually strive to secure funding to be a viable organisation that provides services to the community. The funding is MCF's main revenue base and it remunerates the organisation for the provision of services. MCF's very existence is dependent on its main funding streams. The nature of all these funding-related activities characterises MCF as a trading corporation."

[20] In his reply submissions, the Applicant also again sought to emphasize the commercial nature of the Respondent, again citing the statement made in its 2021-2022 financial statements as set out in paragraph 12 above. However, in his reply submissions the Applicant further submitted that the review detailed in those statements, which was conducted by the Respondent, led to a restructure of its operations that resulted in some positions being made redundant. In the Applicant's submission, such an exercise was commercial in nature and designed to improve the Respondent's financial position. The Applicant's reply submissions also repeated the claim that the sale of the Respondent's premises was a substantial financial activity such that it was indicative of the Respondent being a trading corporation.

[21] The Applicant further submitted¹⁵ that the Respondent's:

"...very existence depends on its ability and success in securing funding, so that it is remunerated and continues to provide services."

As such, it should be considered a trading corporation. This contention was drawn from a report prepared by the Western Australian Council of Social Services (WACOSS), an extract of which was appended to the Applicant's submissions. The report¹⁶ cited the finding of the Full Court of the Federal Court in *Bankstown Handicapped Children's Centre Association Inc v Hillman*, and drew the following conclusion:

"the Federal Court held that though the activities of the Association were the "provision of public welfare services" at a cost recovery basis, that did not "detract from the essentially commercial nature of the activities" in part because "its continued existence depended on its success in placing itself in a position in which it would continue to (be) remunerated by continuing to provide those services"."

[22] Further to this, the Applicant submitted that I should be mindful of a statement in an article published on the website www.mondaq.com as follows:

"The FWC will take a broad view as to what constitutes a "trading" activity for not-for-profits in Western Australia and this will capture many modern funding arrangements and service models adopted by not-for-profits, including where the services provided have been wholly funded and/or are provided to clients at no cost."¹⁷

[23] In his further reply submissions¹⁸, the Applicant also stated as follows:

"It is common knowledge within MCF internally that for several years now, around 15% of all of MCF's funding revenue is kept aside as an 'administration fee', to pay for certain staff salaries and other outgoings such as rent, insurance and utilities. These staff salaries include that of the CEO, Accounts Officer, Accountant (P/T) and former Receptionist, as they are not directly funded through MCF's main funding streams. This 'administration fee' has fluctuated over the years between 12% and 17% of funding revenue, as determined by the MCF Board and leadership team. These activities and decisions characterise MCF as a trading corporation."

[24] The Applicant also sought to use the Respondent's former activities with respect to what he characterised as a social enterprise. He stated as¹⁹ follows:

“World Music Cafe (WMC) was a social enterprise co-founded and fully supported by MCF in 2019. It operated under the auspices of MCF until mid-2023 when it “transitioned to a new home”. See Pages 16-17 of the MCF Annual Report 2021-2022 for more details about WMC. The WMC Social Enterprise Facilitator was remunerated by MCF. All the features of WMC are consistent with conducting trading activities and being commercial in nature. It shows another aspect of MCF being a trading corporation.”

[25] The Respondent submitted that it was not a national system employer as it is not a trading or financial corporation, as:

- (a) the Respondent is not engaged in financial activities;*
- (b) the Respondent is a not-for-profit organisation existing only to further its altruistic purposes, deriving over 95% of its revenue from government funding, which is not characterised as a trading activity in this context; and*
- (c) the remaining revenue sources of the Respondent cannot be described as trading activities, particularly as the vast majority of these are incidental to provision of its services and do not ‘form a sufficiently significant proportion of its overall activities to merit its description as a trading corporation’. (citing R v Federal Court of Australia; Ex parte WA National Football League (“Western Australia Football case”) [1979] HCA 6 at [31])²⁰*

[26] The Respondent further clarified its submissions by noting that it was not a corporation “which borrows, lends or otherwise deals in finance as its principal or characteristic activity”, citing *Ku-Ring-Gai Co-operative Building Society*²¹.

[27] As regards being classified as a trading corporation, the Respondent drew my attention to the principles outlined in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)*²² where the Western Australian Industrial Appeal Court stated as follows:

- (a) a corporation may be a trading corporation even though trading is not its predominant activity;*
- (b) trading must be a substantial and not merely a peripheral activity;*
- (c) in this context, ‘trading’ is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services;*
- (d) the making of a profit is not an essential prerequisite to trade, but it is a usual concomitant;*
- (e) the ends which a corporation seeks to serve by trading are irrelevant to its description, and, consequently, the fact that the trading activities are conducted is*

the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as ‘trade’;

(f) whether the trading activities of an incorporated body are sufficient to justify its categorisations as a ‘trading corporation’ is a question of fact and degree;

(g) the current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade; and

(h) the commercial nature of an activity is an element in deciding whether the activity is in trade or trading.”

[28] The Respondent submits, based on the considerations in *Lawrence*, that it is not a trading corporation because its activities and purpose are not sufficient to justify its categorisation as a trading corporation. It submitted that its predominant activity of is to provide support services to its clients under and in accordance with contracts between it and the Western Australian and Commonwealth governments, in accordance with its constitution.

[29] The Respondent did not dispute that the provision of services pursuant to a contract is generally considered a trading activity but submitted that despite its services essentially being ‘purchased’ by the government bodies, because the Respondent:

- (a) provides its services completely free of charge to its clients without making a profit, for altruistic purposes, which is a feature not shared by ordinary commercial enterprises, in accordance with its constitution which provides that the Respondent act only in order to promote these altruistic purposes; and
- (b) engages in a public welfare activity pursuant to agreements with government bodies under which it is reimbursed for its costs to provide these services, and providing public welfare services is not appropriately described as the conduct of ‘trade’; and
- (c) engages in activities which lack a commercial aspect,

it cannot be said, when assessing these factors taken together as a whole, that the Respondent’s activities and purpose are such that it can properly be characterised as a trading corporation for the purpose of determining whether it is a national system employer.

[30] The Respondent further submits that as the revenue derived from the Respondent’s funding from government bodies forms such a significant and substantial part of its total revenue, which is not a trading activity for the reasons set out above, it follows that its incidental activities which form the remainder of its revenue and are, in any event, directly linked to its government funding, are nothing more than ‘*peripheral [activities] generating minor sundry income*’ (citing *Collins v Lower Great Southern Family Support Association* [2014] FWC 3383 at [86]) even if these could be considered commercial activities.

[31] Ms Treadgold’s evidence on behalf of the Respondent supported the submissions made by the Respondent with respect to the nature of the organisation, its operations and the sources of its funding. Ms Treadgold appended to her witness statement the June 2023 Annual Report for the Respondent, which showed that 98.8% of its funding came from grants from government.

[32] In its reply submissions, and supported by the evidence of Ms Treadgold, the Respondent rejected the Applicant’s contentions regarding the sale of its office, on the basis that it was a once-off discrete event, the Respondent was not engaged in the activity of buying and selling property and owned no other property in any case.

[33] With respect to the issue of the government grants, the Respondent rejected the Applicant’s contention that the situation was analogous to that in *Pasalskyj*²³. The Respondent cited that case as follows, with the Respondent’s emphasis retained:

“The decisions discussed earlier in this decision suggest that there is a dichotomy between activities that are undertaken by organisations similar to Outcare where the government pays for a service to be provided. Typically, these involve the delivery of services to government (often in the form of services available to the community) that result from competitive tendering processes where the Government is seeking specific services at competitive rates, and where payment is made for the actual services provided. That is, the “State” effectively purchases the services. In most cases, these activities are either undertaken for profit, or at least to generate revenue to support other activities or the organisation as a whole. The OOHC service in Bankstown is an example of this form of trading activity. Activities of this nature are considered to be trading activities for present purposes.

*Alternatively, there are activities that are undertaken by organisations similar to Outcare that are the subject of government payments whereby governments subsidise the services provided by the organisation. Typically, these involve the provision of bulk grants that might be linked to performance requirements and benchmarks, but do not involve fee for service in the conventional sense. These services lack the character of buying and selling between the organisation and the funding agency, and are often provided gratuitously to the public and are considered to be an end in themselves. That is, the purpose of the service is not to generate income but rather, to provide the service itself. The provision of blood products by the Red Cross in *E v Red Cross* is an example of this form of non-trading activity. Activities of this nature are not considered to be trading activities for present purposes.”*

[34] The Respondent submitted that its activities fell within the scope of those set out in the second paragraph above. Once again citing *Pasalskyji*, the Respondent stated as follows:

“(a) the Respondent is subject only to the types of contracts, as defined in that case which are

“more consistent with the concept of non-trading activities” and “do not have the character of commercial trade in services or elements of exchange or other indicia so as to be characterised as trading activities” because:

- (i) *these contracts operate under a service agreement which specifies the conditions, services and standards required;*
- (ii) *a 'block' of funding is provided for a particular purpose, and the payment is not linked to a particular number of clients or individuals' services;*
- (iii) *the contracts contain, however, KPI's that include the required achievement of some or all of the required targets;*
- (iv) *payments are generally made in agreed 'blocks' or instalments in advance upon receipt of a Recipient Created Tax Invoice issued by the funding body;*
- (v) *the contracts have been in place for many years and have continued pursuant to variations without any form of tendering process;*
- (vi) *the contracts require that the funding is spent exclusively on the services stated in the particular contract, with any surplus funds to be returned to the funding body;*
- (vii) *the general terms of these contracts are not intended, or able to be used, by the Respondent to fund other activities of the organisation and must be used to meet its fundamental objectives; and*
- (viii) *the activities resulting from these arrangements are provided to the community without charge;”²⁴*

[35] The Respondent further submitted²⁵ as follows, based on the principles in *Pasalskyji*:

“it is not subject to the types of contracts which could be characterised as being commercial in nature and therefore trading, as defined in that case, particularly because the Respondent is unable to retain any surplus funds to then be used to fund alternative programs or services;

it is not a party to any individual contracts which provide revenue;

the accommodation services provided by the Respondent are similarly provided free of charge to its clients; and

while the Respondent has one training program that it has recently commenced providing to other organisations for a fee, the Respondent receives extremely minimal revenue for this.”

I note that the submissions in the second to fourth paragraph above were supported by the witness evidence of Ms Treadgold.

[36] The Respondent, in addition, submitted that the reference to a modern award in the Applicant's employment contract was not determinative of whether the Respondent was a national system employer, and that the merchandise and community ambassador programs referenced by the Applicant in his submissions were, as per the witness evidence of Ms Treadgold, provided free of charge and thus not trading activities.

Consideration

[37] In the first instance, I will deal with the submissions made by the Applicant that I find are not relevant to the consideration of whether the Respondent can be said to be a trading corporation. I turn first to the issue of the sale of the Respondent's office. I firstly note that this occurred in a financial year that ended some sixteen months prior to the Applicant's termination. I note this because the Respondent contends that it was a one-off event and I accept that this is a correct assessment. The Annual Report for the financial year ended 30 June 2023 was in evidence and made it clear that there were no such transactions in the 2022-2023 financial year. Further, the evidence is that the Respondent does not own any property and as such, is not in a position to engage in any further sales of property. As such I find that the sale of the Respondent's office was a discrete event that does not change the fundamental nature of the organisation.

[38] The Applicant further contends that the Respondent's operations have a commercial nature and commercial intentions. I do not regard this as being a relevant consideration. The question is whether the Respondent engages in trading activities, not whether it might be subjectively viewed as acting in a manner consistent with commercial principles, which I note are not clearly defined or explained in the Applicant's submissions. If it is the case that the Applicant is submitting, based on his own assessment, that the Respondent is somehow corporate in its intent, then even if true this is not a persuasive argument that the Respondent is therefore a trading corporation in the absence of evidence that it is actually engaging in trading activities. I note that I find, consistent with this notion, that the review of operations the Applicant claims was undertaken by the Respondent which resulted in some redundancies, does not change the nature of the Respondent and make it a trading corporation. Organisations of all kinds make staffing decisions that are consistent with their assessment of their financial health. To do so does not confer upon the organisation the character of a trading corporation.

[39] I take a similar view of the Applicant's contentions that the Respondent has characteristics of a trading corporation, "...such as an ABN, its own bank account(s) and collecting GST. MCF has previously, and continues to actively pursue and renew funding from various government agencies, which are its main sources of revenue. Hence MCF conducts a certain level of trading activities, providing services for reward, enabled by its funding streams. Other MCF trading activities include rental accommodation, training seminars and its Community Ambassador activities." In the first instance, having an ABN does not confer the status of trading corporation. As noted in *Pasalskyj*²⁶:

"The fact that an ABN is used by an employer cannot of itself mean it is a corporation. Amongst other reasons, non-corporations can apply and be granted an ABN."

It is also not the case that having a bank account can confer upon an organisation the status of trading corporation. While the Annual Reports allow the Commission to conclude that the Respondent does indeed maintain a bank account or accounts, it is reasonable to expect that

most if not all organisations which are not trading corporations will nonetheless operate bank accounts for the purposes of conducting basic activities such as paying bills and wages and receiving grants and donations. As such, the holding of a bank account does not make the Respondent a trading corporation. Nor does the collection of GST. I note that the Applicant merely asserts that the Respondent collects GST and gives no indication of which services provided by the Respondent attract GST or indeed the amount of GST collected. It is the case that not-for-profit organisations in Australia who have a GST turnover in excess of \$150,000 must collect GST. The mere collection of GST does not make these organisations trading corporations. As such, I do not find that, even if the Respondent does collect GST, that this indicates that it is a trading corporation.

[40] I also reject the Applicant's contention drawn from the WACOSS submission to the Western Australian government. As is perhaps usual in a submission from a partisan entity, that submission seeks to achieve an end and advance its cause and I do not in any way criticise it for doing so. However, it makes some "worst case" assumptions and, in my view, mischaracterises the finding in *Bankstown Handicapped Children's Centre Association Inc v Hillman*.²⁷ The WACOSS report implies that the Court found that because the organisation in continued existence was contingent upon it continuing to secure funding, it was therefore a trading corporation. This is not the case. The Court had already determined that the organisation was a trading corporation and was noting that given it had placed itself into a position where it had invested heavily in capacity to provide its trading activities. As such, those activities formed such a large part of its operations that it would need to continue being remunerated to provide those services if it wanted to survive in its new form.

[41] I was also unpersuaded by the Applicant's article from the Mondaq website. That article was a very general piece of advice, written with disclaimers that it was of that nature and the portion of it submitted by the Applicant came under the heading of "Lessons" in the original document. It was perhaps not as partisan as the WACOSS submission, but was nonetheless in the manner of a warning to not-for-profit organisations that trouble may have been brewing.

[42] I was also not persuaded by the Applicant's claim, unsupported by evidence, as follows:

"It is common knowledge within MCF internally that for several years now, around 15% of all of MCF's funding revenue is kept aside as an 'administration fee', to pay for certain staff salaries and other outgoings such as rent, insurance and utilities..."

Even if this were the case, it is not unusual that an organisation would, in providing a service that was not a trading activity, nevertheless have some overheads that would form part of its costs in providing its services. The fact that in providing services the Respondent has staff who need a payroll service to pay them, and a base of operations from which to operate and has utilities to pay does not point to the organisation's activities being trading activities.

[43] It is appropriate that I comment here on the Applicant's assertions regarding rental accommodation, training seminars and Community Ambassador activities. The evidence from the Respondent is that it does not receive payment for rental accommodation, as it does not rent premises to its clients but rather acts as a broker to assist the client to find accommodation and this service is provided at no charge. The Respondent's evidence is also that its Community Ambassador program is provided free of charge. While the Applicant sought to make

something of the Ambassadors themselves being paid I do not find this is relevant. With respect to its training program, the Respondent admits that a nominal fee is charged for this service, but its evidence is that the proceeds from this program are very small. Based on the evidence, it would appear that such proceeds represented 0.3% of total income for the financial year ended 30 June 2023.

[44] The Applicant also submits that the Respondents use of marketing material such as pens and fridge magnets is indicative of a trading corporation. The evidence of the Respondent is that these products are provided free of charge and as such I find that they are not part of trading activities. Finally, the Applicant notes the reference to various national system instruments in his employment contract and contends that this is evidence that the Respondent is a national system employer. I do find this to be the case. Whether the Respondent is a national system employer depends on its being deemed to be a trading corporation. Representations made in an employment contract cannot in my view fundamentally alter the nature of the organisation. The reference may have been intentional, or it may have been in error. Nevertheless, whether the Respondent is truly a national system employer is not a question of what it – in effect – says it is in an employment contract. In Western Australia, a national system employer could not become a state system employer by virtue of stating in an employment contract that the employee was covered by an award of the Western Australian Industrial Relations Commission. While I am uncertain as to why the Respondent has referred to national system instruments in its employment contract with the Applicant, I am nonetheless not persuaded that such reference does anything to change the fundamental nature of the organisation.

[45] I find that the issue of the Respondent's nature will require an examination of the sorts of funding arrangements that it has in place with various governments. I note that the Applicant has made some submissions on this, primarily to the effect that these are trading activities. I do not accept that they can be so easily categorised, particularly in the absence of any evidence from the Applicant as to their actual nature. As set out in paragraph 26 above, the types of funding arrangements fall broadly into a dichotomy of those which are a fee-for-service arrangement, where the services then are properly categorised as trading activities, and those where the government essentially subsidises activities and there is no fee-for-services in the conventional sense, which are properly categorised as non-trading activities. Having determined into which category the various activities fall, it is then necessary to conduct an analysis of the percentage of the organisation's activities that may be said to be trading activities, and from this determine whether those activities are substantial or merely peripheral. This is a process that has seen various courts and tribunals adopt a number of different approaches. As stated in *Pasalsky*²⁸:

“In terms of the assessment of trading activities as substantial and not merely peripheral, the approaches do vary to a degree.

In Bankstown, the Full Court observed that “there is no bright line that determines what proportion of trading activities is “substantial”.

[46] In the first instance I note that the latest Annual Report available, being that for June 2023, shows that 98.8% of the Respondent's income came from government grants. As such, the other activities in which the Respondent engages, even if they are trading activities, only account for 1.2% of income. This of itself is clearly not substantial. In terms of the government

grants that make up 98.8% of income, it is the submission of the Respondent that these grants should be regarded as falling into the second category identified in *Pasalskyj*, for the reasons set out above in paragraph 27.

[47] At the hearing, I formed the view that the evidence submitted and the further verbal evidence that Ms Treadgold was able to provide was insufficient to allow the FWC to make a considered decision on the nature of the funding arrangements the Respondent has with the various government departments with which it deals. As such, I directed the Respondent to provide me with a witness statement setting out what I believe are the relevant details with respect to each funding arrangement the Respondent currently has in place. That evidence²⁹ is as follows:

Homeless Accommodation Support

- 5 *This service is funded by the Department of Communities (WA) (DOCS).*
- 6 *The nature of this service is to assist people from migrant and refugee backgrounds living in crisis and supported transitional accommodation, to transition into longer term public or community housing, and it is provided free of charge to our clients.*
- 7 *MCF is currently set to receive \$162,608 in total for the 2023/2024 financial year from DOCS which is paid in set, quarterly instalments. This lump sum fee is subject to certain general KPIs and reporting requirements, but is not provided on the basis of individual billing per client/ service.*
- 8 *This contract prohibits MCF from using any of the funding received for any other purpose other than for the purpose listed at paragraph 6 above. That is, MCF is unable to use the funding to fund any other service or activity.*
- 9 *If there is a surplus of \$5,000 or less at the end of the funding period, MCF is able to rollover that surplus into the next funding period under the contract. Any surplus funds more than \$5,000 must be returned to the DOCS.*
- 10 *MCF initially secured this funding through an open tender process to commence delivery in 2011, and has received continuing extensions, meaning that MCF has not had to re-apply or engage in any form of tender process since the initial tender.*
- 11 *This contract currently expires on 30 June 2024, however, DOCS has communicated their intent to extend the contract until 30 June 2027, but MCF has yet to receive the formal contract extension letter.*

Children in Homelessness

- 12 *This service is also funded by DOCS.*
- 13 *The nature of this service is to assist children up to 16 years old, who are from non-English speaking backgrounds and are living in supported accommodation as a result of experiencing homelessness. This service aims to work with these children and their*

families to create a supportive home environment, addressing the child's specific needs and promoting resilience to improve their emotional, social and behavioural needs by providing:

- (a) educational and therapeutic support; and*
- (b) access social, sporting and community opportunities;*

- 14 *This service is provided free of charge to MCF's clients.*
- 15 *MCF is currently set to receive \$162,608 in total for the 2023/2024 financial year from DOCS which is paid in set, quarterly instalments. This lump sum fee is subject to certain general KPIs and reporting requirements, but is not provided on the basis of individual billing per client/ service.*
- 16 *This contract prohibits MCF from using any of the funding received for any other purpose other than for the purpose listed at paragraph 13 above. That is, MCF is unable to use the funding to fund any other service or activity.*
- 17 *If there is a surplus of \$5,000 or less at the end of the funding period, MCF is able to rollover that surplus into the next funding period under the contract. Any surplus funds more than \$5,000 must be returned to DOCS.*
- 18 *MCF initially secured this funding through an open tender process to commence delivery in 2011, and has received continuing extensions, meaning that MCF has not had to re-apply or engage in any form of tender process since the initial tender.*
- 19 *This contract currently expires on 30 June 2024, however, DOCS has communicated their intent to extend the contract until 30 June 2027, but MCF has yet to receive the formal contract extension letter.*

Crisis Accommodation Support

- 20 *This service is also funded by DOCS.*
- 21 *The nature of this service is to assist families from migrant or refugee backgrounds who are homeless, or are at risk of becoming homeless to transition into long term, affordable and sustainable accommodation through:*
- (a) case management;*
 - (b) assisting to secure short – medium term accommodation;*
 - (c) advocacy; and*
 - (d) provision of referral pathways.*
- 22 *This service is provided free of charge to MCF's clients.*
- 23 *MCF is currently set to receive \$156,874 in total for the 2023/2024 financial year from DOCS which is paid in set, quarterly instalments. This lump sum fee is subject to*

certain general KPIs and reporting requirements, but is not provided on the basis of individual billing per client/ service.

- 24 *This contract prohibits MCF from using any of the funding received for any other purpose other than for the purpose listed at paragraph 21 above. That is, MCF is unable to use the funding to fund any other service or activity.*
- 25 *If there is a surplus of \$5,000 or less at the end of the funding period, MCF is able to rollover that surplus into the next funding period under the contract. Any surplus funds more than \$5,000 must be returned to DOCS.*
- 26 *MCF initially secured this funding through an open tender process to commence in 2011, and has received continuing extensions, meaning that MCF has not had to re-apply or engage in any form of tender process since the initial tender.*
- 27 *This contract currently expires on 30 June 2024, however, DOCS has communicated their intent to extend the contract until 30 December 2026, but MCF has yet to receive the formal contract extension letter.*

Settlement Services – Individual (includes Youth Settlement and Digital Literacy)

- 28 *This service is funded by the Department of Home Affairs (**Home Affairs**).*
- 29 *The nature of this service is to:*
- (a) *in respect of the youth settlement component – support young people from migrant and refugee backgrounds with a variety of settlement issues, in partnership with the North Lake Senior Campus, through provision of medium-intensity individualised case management on campus and includes:*
 - (i) *a needs assessment;*
 - (ii) *goal setting;*
 - (iii) *action planning;*
 - (iv) *information;*
 - (v) *referral; and*
 - (vi) *advocacy, and*
 - (b) *in respect of digital literacy – MCF runs a program known as the ‘Inspire Me’ Digital Literacy Course for Employability Skills, which has been designed to address digital literacy barriers for humanitarian entrants and other vulnerable migrants in their first 5 years in Australia.*
- 30 *This service is provided free of charge to MCF’s clients.*
- 31 *MCF is currently set to receive \$266,277 in total for the 2023/2024 financial year from Home Affairs which is paid in set, quarterly instalments. This lump sum fee is subject to certain general KPIs and reporting requirements, but is not provided on the basis of individual billing per client/ service.*

32 *This contract prohibits MCF from using any of the funding received for any other purpose other than for the purpose listed at paragraph 29 above. That is, MCF is unable to use the funding to fund any other service or activity.*

33 *Any surplus funding at the end of the funding term must be returned to Home Affairs.*

34 *MCF initially secured this funding through an open tender process to commence in 2020, and was successful in obtaining a grant for 3 years, which is due to expire on 30 June 2024.*

35 *MCF has submitted a tender application for further funding to commence 1 July 2024 and expire on 30 June 2026, however, MCF will not be informed about whether it has been successful until March 2024.*

Settlement Services – Capacity Building

36 *This service is also funded by Home Affairs.*

37 *The nature of this service is to support new and emerging organisations and communities work towards collectively increasing the social participation, economic and personal wellbeing of community members to ensure that positive settlement outcomes for people from migrant and refugee backgrounds are sustained in the long-term.*

38 *This service is provided free of charge to MCF’s clients.*

39 *MCF is currently set to receive \$79,420 in total for the 2023/2024 financial year from Home Affairs which is paid in set, quarterly instalments. This lump sum fee is subject to certain general KPIs and reporting requirements, but is not provided on the basis of individual billing per client/ service.*

40 *This contract prohibits MCF from using any of the funding received for any other purpose other than for the purpose listed at paragraph 37 above. That is, MCF is unable to use the funding to fund any other service or activity.*

41 *Any surplus funding at the end of the funding term must be returned to Home Affairs.*

42 *MCF initially secured this funding through an open tender process in 2019/2020, and was successful in obtaining a grant for 3 years, which is due to expire on 30 June 2024. Once expired, this contract is not to be renewed. MCF has factored the costs for this service into the Settlement Services – Individual tender application, rather than receiving a separate grant.*

See Me See You (Cultural Competency Training)

43 *This service is funded by the Office of Multicultural Interests (OMI).*

- 44 *Cultural competency training is delivered by MCF in order to give people who work for, volunteer at or serve on the board of not-for-profit organisations operating in Western Australia the opportunity to upskill their cultural competency skills in order to improve their engagement and connection with people from a migrant or refugee backgrounds.*
- 45 *Training delivered using this funding is provided free of charge. However, as I have outlined in my previous witness statements, MCF has recently started being approached by for profit organisations and government departments in Western Australian who had heard of our program and requested this training directly from MCF. We charge a fee for this service to these for profit organisations and departments.*
- 46 *MCF is set to receive \$138,502 in total for the 2023/2024 financial year from OMI which is paid annually at the beginning of each financial year. This lump sum fee is subject to certain general KPIs and reporting requirements, but is not provided on the basis of individual billing per client/ service.*
- 47 *This contract prohibits MCF from using any of the funding received for any other purpose other than for the purpose listed at paragraph 44 above. That is, MCF is unable to use the funding to fund any other service or activity.*
- 48 *This funding contract does not specify what should be done in the event there is surplus funding, however, MCF have never reported there being any surplus funds at the conclusion of the funding term.*
- 49 *MCF initially secured this funding through an open tender process in 2019/2020, and was successful in obtaining a grant for 3 years with 2 rights of 1 year extensions. MCF is currently in the middle of the first year extension, meaning that MCF has not had to re-apply or engage in any form of tender process since the initial tender.*

Mental Health Advocacy

- 50 *This service is funded by the Mental Health Commission (**MH Commission**).*
- 51 *The nature of this service is to improve access to mental health services for people of culturally and linguistically diverse backgrounds who are experiencing difficulties and concerns with mental health and emotional wellbeing through partnerships with other providers.*
- 52 *This service is provided free of charge to MCF's clients.*
- 53 *MCF is set to receive \$721,900 in total for the 2023/2024 financial year from the MH Commission which is paid in set, quarterly instalments. This lump sum fee is subject to certain general KPIs and reporting requirements, but is not provided on the basis of individual billing per client/ service.*

- 54 *This contract prohibits MCF from using any of the funding received for any other purpose other than for the purpose listed at paragraph 51 above. That is, MCF is unable to use the funding to fund any other service or activity.*
- 55 *If there is surplus funding at the end of the funding period, MCF is able to roll these funds over into the new funding period to put towards delivering this service.*
- 56 *MCF initially secured this funding through an open tender process in 2013 for a contract term expiring on 30 June 2018. Since that time, MCF has received ongoing contract extensions, meaning that MCF has not had to re-apply or engage in any form of tender process since the initial tender.*
- 57 *The current extension is due to expire on 30 June 2024 and the MH Commission has advised MCF of its intent to provide a further extension until 30 June 2026, but MCF is yet to receive the formal extension letter.*

Culturally and Linguistically Diverse Counselling

- 58 *This service is funded by the Western Australian Primary Health Alliance (**Primary Health**).*
- 59 *The nature of this program is to assist people from culturally and linguistically diverse backgrounds who are affected by mental health concerns through screening, brief intervention, counselling and referrals.*
- 60 *This service is provided free of charge to MCF clients.*
- 61 *MCF is set to receive \$122,789 in total for the 2023/2024 financial year from Primary Health which is paid in quarterly instalments. This lump sum fee is subject to certain general KPIs and reporting requirements, but is not provided on the basis of individual billing per client/ service.*
- 62 *This contract prohibits MCF from using any of the funding received for any other purpose other than for the purpose listed at paragraph 59 above. That is, MCF is unable to use the funding to fund any other service or activity.*
- 63 *Any surplus funding at the conclusion of the funding term must be returned to Primary Health.*
- 64 *Unfortunately, I do not know and am unable to ascertain through MCF's systems when and how MCF originally commenced receiving this funding, that is, whether it was through an open tender process. However, this service is currently being funded pursuant to a 6th contract extension which is due to expire on 30 June 2025. MCF has been offered a 7th contract variation, but MCF is choosing not to continue to provide this service as it is no longer culturally appropriate."*

[48] In summary, the Respondent has eight separate funding arrangements in total for eight separate programs. All eight programs are provided by the Respondent free of charge to its

clients, with the exception of a very small number of “for-profit” organisations who are charged a small fee for accessing the “See Me See You” training program. As set out above at paragraph 41 the amount received for this training was insubstantial. All eight programs were funded by lump sum payments made by the various government departments and not provided on the basis of individual billing per client, albeit that the services were subject to certain key performance indicators. In three of the eight programs, any surplus at the end of a funding period that is less than \$5000 can be rolled over into the new funding period and used to assist in providing the agreed services and any amount of surplus over \$5000 must be returned to the funder. In another three cases, any surplus is required to be returned to the funder. In one case, any surplus can be rolled into the new funding period and using to assist in providing the agreed services. In the final case, there is no specific arrangement as to what happens to the surplus but the Respondent’s evidence is that there has never been a surplus and so the issue has not been required to be addressed.

[49] With respect to the process by which the funds were and are secured, in seven of the eight programs it was initially through an open tender process where the Respondent was the successful bidder, and in the final case the Respondent had been unable to determine how the funding was initially secured. In three programs, the funding was secured in 2011, but extensions have continued to be granted without the need to tender for funds, and in each of the three cases the Respondent has been advised that further extensions, again without tendering, will be granted this year. In one program, funding expires on 30 June 2024 and the Respondent is tendering for further funds. In one program, funding expires on 30 June 2024 but the Respondent has resolved not to tender for further funds. In one program the initial period of funding has expired but the Respondent is in the middle of the first of two one year options to extend. In one program funding began in 2013 for a five year period, however, extensions have been granted without the need to tender and the Respondent has been advised that another extension will be granted. The final program is the program where the process of securing initial funding was unable to be determined. The program has been provided with six funding extensions and was offered a seventh extension, but the Respondent has chosen to discontinue the service as it deems it no longer culturally appropriate.

[50] As the Respondent had been asked to provide these additional submissions, I invited the Applicant to comment on them in further submissions of his own. The Applicant initially focused his attention on the Mental Health Advocacy Program, which he correctly describes as the biggest single source of funds for the Respondent. The Applicant took issue with the assertion that surplus funds at the end of a funding period could be rolled over into the next period under this program’s funding arrangements. The Applicant claimed that the Respondent had provided no evidence of this, that there was no mention of this in previous documentation provided, and that the 15% administration fund he had previously referenced meant that the Respondent was possibly in breach of the funding requirements in respect of them only being able to be spent for the purposes specified. The Applicant further submitted that he had:

“...spoken extensively with the former Manager of the MCF Mental Health team (Marina Korica, who resigned in September 2023), and she has stated that she has never been involved in, nor had any knowledge about any MHC surplus funding being rolled over during her lengthy period in office at MCF.”

[51] The Applicant also took issue with the Respondent seeming:

“...to imply that contract extensions since 2018 simply happened as a matter of course. In fact, Marina Korica explained to me that she was deeply involved in making those successful contract extensions happen, right up to the current contract. Marina spent considerable time and effort on an ongoing basis, in talks, discussions and paperwork with the Contract Manager(s) at the MHC, lobbying for and justifying the importance of the MCF Mental Health services - else those extensions may well not have been granted.”

The Applicant further claimed as follows:

“...this highlights my previous submission notes about "Funding/Grants" and that such activities by Marina (for example) constitute "trading activities in and of themselves", because they resulted in the MHC (i.e. government) continuing to purchase specific and targeted services from MCF, to deliver to the community on its behalf.”

[52] The Applicant provided further submissions but these were beyond the remit of the directions and sought to agitate issues that related to previous submissions of the Respondent, which were included in the court book, and could have been challenged at hearing. I have had no regard for those additional submissions. With respect to the matters outlined above, I will deal firstly with the Mental Health Advocacy program. The Applicant claims the Respondent has provided no evidence of the rollover arrangements. With respect, the sworn statement of the CEO Ms Treadgold is evidence. The further complaint that this was not raised earlier is not compelling: as I noted above, I was concerned that I did not have sufficient detail of the funding arrangements and so I directed the Respondent to provide me with the specific details I felt I needed. That this information arose through that process is the exact point of the process. As regards the alleged 15% administration fee, I have dealt with this submission above at paragraph 40 and I do not propose to address it again.

[53] As regards the hearsay evidence of Ms Korica, I do not find it has any value in making this decision. In the first instance, I am not persuaded to give any weight to hearsay evidence presented in further submissions without giving the Respondent a right of reply. However, even if I were to consider the statements allegedly made by Ms Korica, they do not appear to be capable of assisting my deliberations. In the first instance, Ms Korica allegedly claims she had no knowledge of funding being rolled over and that might be the case. But I cannot assume that Ms Korica would be aware of any surpluses or indeed if there were any surpluses during her tenure. As to the assertions about the activities engaged in by Ms Korica as regards renewal of funding, this is a mixture of speculation and vague assertions. As to the final part of the Applications submissions in reply, I do not accept the contention that is made. The Applicant's contentions about activities involved with securing funding being trading activities in and of themselves is drawn from the WACOSS submission I have referenced earlier, where a peak body is making a submission to government to further its own ends. I do not regard the conclusions proffered in such a document to be necessarily compelling, and certainly not precedent that I am bound to follow.

[54] Instead, I look to the distinction made in *Pasalskyj* as set out in paragraph 33 above. The second of those paragraphs states as follows:

*“Alternatively, there are activities that are undertaken by organisations similar to Outcare that are the subject of government payments whereby governments subsidise the services provided by the organisation. Typically, these involve the provision of bulk grants that might be linked to performance requirements and benchmarks, but do not involve fee for service in the conventional sense. These services lack the character of buying and selling between the organisation and the funding agency, and are often provided gratuitously to the public and are considered to be an end in themselves. That is, the purpose of the service is not to generate income but rather, to provide the service itself. The provision of blood products by the Red Cross in *E v Red Cross* is an example of this form of non-trading activity. Activities of this nature are not considered to be trading activities for present purposes.”³⁰*

[55] If I look at the character of the services provided by the Respondent, I conclude that they most neatly fit the character of those set out in the paragraph above. There is no fee for service type of payment but rather funding is in bulk but subject to some performance benchmarks. The services are all, with one very minor exception, provided free of charge. The work is done not to generate income but to provide the service as an end in itself, consistent with the purpose of the organisation. I further find that albeit that there is some element of tendering for the funds, the services lack the character of buying and selling between the Respondent and the funding agency. In all but one case – where the fate of a surplus is unknown - the funds provided are returned to the funder if not used or rolled into the next funding period to be used to provide the agreed services. I find that this does not speak to a trading arrangement. Finally, the government funding for these programs represented, for the last completed financial year, 98.8% of the Respondent’s total income. As such, as noted earlier, even if the remaining 1.2% were to come from trading activities, it would not be a sufficient proportion to determine that the Respondent was a trading corporation.

[56] For the reasons set out above, I find that the Respondent is not a trading corporation. As a consequence, the Respondent is not a national system employer and therefore the Applicant was not a national system employee. In these circumstances, the FWC does not have jurisdiction to deal with the Applicant’s unfair dismissal claim, and that claim will be dismissed.

The image shows the official seal of the Fair Work Commission, which is circular and contains the text 'THE FAIR WORK COMMISSION' around the perimeter. Overlaid on the seal is a handwritten signature in black ink.

DEPUTY PRESIDENT

Appearances:

G Lobo, Applicant.
H Rheinberger of Edge Legal for the Respondent.

Hearing details:

2024.
Perth (via Microsoft Teams):
January 29.

Final written submissions:

Applicant, 6 February 2024
Respondent, 2 February 2024.

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¹ Applicant submissions, 16 December 2023, dot point 1.

² Multicultural Futures Annual Report 2021-2022, page 21.

³ Applicant submissions, 16 December 2023, dot point 2.

⁴ Ibid.

⁵ Multicultural Futures Annual Report 2021-2022, page 20.

⁶ Applicant submissions, 16 December 2023, dot point 5.

⁷ *Application by Pasalskyj, Marie* [\[2015\] FWC 7309](#).

⁸ Applicant submissions, 16 December 2023, dot point 8.

⁹ Multicultural Futures Inc. Annual Report for 30 June 2022, page 8.

¹⁰ Ibid.

¹¹ Applicant submissions, 16 December 2023, dot point 10.

¹² Ibid, dot point 11.

¹³ Ibid, dot point 17.

¹⁴ Applicant further submissions, 24 January 2024, page 1 paragraph 2.

¹⁵ Ibid, page 2 paragraph 4.

¹⁶ WACOSS Submission to the Ministerial Review of the State Industrial Relations System 24 November 2017, page 2 paragraph 2.

¹⁷ Applicant further submissions, 24 January 2024, page 2 paragraph 9.

¹⁸ Ibid, page 4 paragraph 3.

¹⁹ Ibid, page 5 paragraph 6.

²⁰ Respondent submissions, 11 December 2023, [3].

²¹ *Re: Ku-Ring-Gai Co-operative Building Society (No.12) Ltd* [1978] FCA at [138].

²² *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254 at [68].

²³ *Application by Pasalskyj, Marie* [\[2015\] FWC 7309](#) at [57 – 58].

²⁴ Ibid, [64-69].

²⁵ Respondent submissions, 11 December 2023, [5].

²⁶ *Application by Pasalskyj, Marie* [\[2015\] FWC 7309](#) at [54].

²⁷ *Bankstown Handicapped Children’s Centre Association Inc v Hillman* [2010] FCAFC 11 at [54].

²⁸ *Application by Pasalskyj, Marie* [\[2015\] FWC 7309](#) at [50 - 51].

²⁹ Witness Statement of Kristi Treadgold, 2 February 2024, pages 1-7.

³⁰ *Application by Pasalskyj, Marie* [\[2015\] FWC 7309](#) at [58].