HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY NO. S119 OF 2024

BETWEEN: **HELENSBURGH COAL PTY LTD**

Appellant

NEIL BARTLEY AND OTHERS NAMED IN THE SCHEDULE TO THE NOTICE OF APPEAL

Respondents

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of submissions is in a form suitable for publication on the internet.

Part II: Outline of argument

Ground 1 of Appeal

2. ***Structure of FWA 2009 Part 3.2.*** Noting the object in 381, under s 385 a person has been unfairly dismissed if the FWC is '*satisfied*' of four matters then elaborated in ss 386-389. Satisfaction occurs *within* the FWC's jurisdiction, rather than as jurisdictional facts[1]. If the dismissal is unfair, ss 390-393 empower the FWC to order (primarily) reinstatement or (alternatively) compensation, based upon its '*satisfaction*' or its *'consideration'* of what is *'appropriate'* in relation to broadly described matters. Reinstatement under s 391(1)(b) can be to a position which the employer will choose how to create: **RS 18, 19, 34**; **AR 8** correcting **RS 33**.

3. ***Section 389(1).*** Section 389(1) creates two positive requirements, from the *factual world*, which must be met for a genuine redundancy. The first focuses on *requirements*, rather than merely reasons, and must be such that the changes in the operational requirements of the employer's enterprise mean that the employer no longer requires the employee's job to be performed *by anyone.* The second, consultation, as per a modern award or enterprise agreement, is a significant addition. If there is no consultation as required, the FWC moves straight to the s 385(b) question and if satisfied of it moves to remedy, which could include an order which requires the employer to create a position: **RS 20, 21**.

4. ***Section 389(2).*** **(1)** Section 389(2) operates as a *qualification* to the prima facie *defence* or *immunity* from the claim for unfair dismissal (J[55]-[57]). **(2)** There is a *logical* relationship between s 389(1) and (2). If, but only if, each of the conditions from s 389(1) are met, then 389(2) creates a circumstance in which what would otherwise be a genuine redundancy, taking the case outside unfair dismissal under s 385(d), will cease to be so. **(3)** The two provisions pose two different kinds of enquiries each at the date of the dismissal. The first is an enquiry from the *factual world*. The second is an *evaluative counterfactual enquiry* whether: (a) the employer, instead of the dismissal which in fact occurred, *could* have redeployed the employee within the employer's enterprise; (b) if so, whether it would have been '*reasonable in all the circumstances*' for the employer to do so (J[59]): **RS 27**.

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[1] *Villani v Holcim (Australia) Pty Ltd* (2011) 198 FCR 81 at [16] (Full Court).

5. ***The Appellant's core limitation should be rejected.*** The Appellant's core limitation (**AS 46)** that the employer's *'enterprise'* is limited to positions which actually exist at the date of dismissal or which are then free or known or predicted to become free in the near future:

(1) Is inconsistent with the breadth of the relevant terms *'redeploy'* (which includes to transfer labour or resources to a new area or assign to a new activity or task); *'enterprise'* (as defined in s 12); and *'in all of the circumstances'*: **RS 23-27**.

(2) Rests upon an unstable distinction between *"organic change"* and its supposed inverse: cf **AR 7**.

(3) Is inconsistent with the breadth of the power of reinstatement under s 391(1)(b): cf **AR 8** which correctly notes the breadth of the power but incorrectly says it has no bearing on the scope of s 389(2).

(4) Fails to give full weight to the FWC as a specialist tribunal: **RS 35-37**.

6. ***Temporal sequence?*** **(1)** Contra **AR 3-6**, ss 389(1) and (2) are not united by a *'temporal sequence'*. The decisions which the employer makes in the factual world are assessed under s 389(1). Such decisions do not delimit the scope of the employer's *'enterprise'*, and the possibilities for *'redeployment'* within it, which are the subject of the counter-factual s 389(2) enquiry. **(2)** At the date of dismissal, there could be a wide range of barriers to the employer effecting a redeployment; e.g. existing alternative positions are currently filled by other employees; pre-existing occupation of roles by contractors; need for retraining etc: cf J [64]). That the employer has decided in the factual world *not* to overcome such barriers does not terminate the s 389(2) enquiry; rather it is one of the circumstances to be considered under it: **RS 27-29**.

7. ***Legislative history.*** **(1)** The balance between protecting the employee from an unfair dismissal and respecting an employer's *'business judgment'* has been dealt with in different ways under different regimes. **(2)** The present regime has significantly rebalanced the position in favour of the employee, by bringing the employer's *'business judgment'* under tighter scrutiny: **RS 45, 46**. **(3)** Contra **AS 44** and **AR 10**, the current regime is not a reversion to the pre-*Work Choices* regime; nor is it accepted that under that regime, but via a different route, the present result could not have been achieved: **RS 38-44, 47,48**.

8. ***The present case.*** **(1)** The facts (**RS 8-10**) demonstrate that the Appellant's distinction is neither principled nor workable. **(2)** Under s 389(1) the FWC was entitled to form the necessary satisfaction. **(3)** Under s 389(2) the FWC was confronted with the fact

that the Nexus contract was about to expire 10 days later; and the Appellant would have no further liability to Menster unless it chose to issue further purchase orders under the Menster SOA. **(4)** The Nexus position falls within the last sentence of **J [63]**, which is not challenged. Why is Menster different? **RS 27**.

Ground 2 of the Appeal

9. ***The question posed by s 389.*** Whether it would have been reasonable in all the circumstances to redeploy an employee in the employer's enterprise involves a hypothetical, multi-dimensional evaluative assessment that requires the making of value judgments and does not call for a unique outcome: **RS 55**. That assessment is dependent on the Commission's satisfaction and undertaken by it as a specialist tribunal required to have regard to the equity, good conscience and merits of the matter: **RS 58-59, 64**.

10. ***Sections 400, 604(1) and 607.*** The permission gateway under s 400(1) involves the Commission making a threshold discretionary decision about whether it is in the public interest to entertain the appeal: **RS 67**. The capacity of the Commission to intervene on questions of fact is circumscribed by s 400(2) to questions of significant fact, evincing legislature toleration for factual errors at first instance so long as those errors are not significant: **RS 68-69**.

Notice of Contention

11. If Ground 2 succeeds, relief should be denied: **(1)** The Full Bench correctly conceived that the appeal was by way of rehearing and its powers were contingent on the identification of error. It dealt with each of the errors as contended for by the Appellant. **(2)** Any error about the standard of review was immaterial as, having conducted a real review on rehearing, the Full Bench concluded that there was no sufficient reason to doubt the correctness of the Commissioner's decision and affirmed that decision under s 607(3)(a). **(3)** Relief would properly have been refused on discretionary grounds as the Respondents should not be put to a fifth hearing in this matter to meet an argument of error on a non-*House v R* standard never before raised and as yet not particularized in a draft notice of appeal: **RS [70]-[77]**.

6 March 2025

Justin Gleeson SC