HIGH COURT OF AUSTRALIA

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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' SUBMISSIONS

PART I FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

PART II CONCISE STATEMENT OF ISSUE

2. Can the Fair Work **Commission** consider jobs, positions or other tasks a dismissed employee could perform but which, at the time of their dismissal, were being performed by contractors in assessing the reasonableness of redeployment in all the circumstances under s 389(2) of the ***Fair Work Act*** *2009* (Cth)?

3. Is a decision under s 389(2) of the FW Act one to which the *House v The King* standard of appellate review applies or a decision demanding a unique outcome to which the correctness standard applies?

4. If ground 2 to the **Helensburgh** Coal Pty Ltd's notice of appeal is upheld, did the Full Bench of the Commission commit jurisdictional error in circumstances where Helensburgh advanced its appeal on the basis that it needed to demonstrate *House v The King* error and the Full Bench decided the appeal on that basis? Further, was any error by the Full Bench material?

5. In the further alternative if ground 2 is upheld, should relief be refused on discretionary grounds given Helensburgh's position on appeal on the standard of appellate review?

PART III SECTION 78B NOTICE

6. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV MATERIAL FACTS IN DISPUTE

7. The factual background summarised at **AS [7]-[32]** omits several significant underlying factual matters (see [8]-[12] below); and further omits several features of how

Helensburgh ran its case for permission to appeal and its appeal, and how its case was decided by the Full Bench (see [13]-[17] below).

8. *First,* the asserted adverse effects on **Nexus** Mining Pty Ltd and **Menster** Pty Ltd at **AS [21]-[22]** ignore the terms and nature of the contracts under which they were engaged to perform work at the Metropolitan Coal **Mine**.

9. Menster was engaged under a 'Standing Offer Agreement'. There was no obligation on Menster's principal[1] to request that Menster supply services unless and until a purchase order was issued. No minimum number of purchase orders were to be issued to Menster.[2]

10. Nexus' contract expired on 31 July 2020 some 10 days after the respondent employees were dismissed.[3] Its contract was subsequently extended for 12 months.[4] The principal under Nexus' contract had no obligation to obtain services from Nexus.[5] Rather, its services could be obtained on an as needs basis.[6] The principal could direct the suspension of the whole or any part of Nexus' services if necessary for its convenience,[7] and had absolute discretion to terminate the contract, in whole or in part, on one month's notice.[8]

11. *Second,* there were 60 employees of Nexus and Menster performing work which the respondent employees contended they could have been redeployed to perform.[9] Had redeployment occurred, roles would have remained for 38 Nexus and Menster employees:[10] cf **AS [20]**.

12. *Third,* Nexus and Menster's work was not exclusively of a specialist nature and Riordan C found that it could have been performed by the respondent employees.[11]

13. *Fourth,* Helensburgh advanced its appeal against Riordan C's decision of 24 December 2020 (**First Decision**)[12] on the basis that a decision under s 389(2) was of a discretionary

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1 Helensburgh was not the entity charged with managing the mine and was not itself a party to the contracts with Nexus and Menster. The principal was one of its related bodies corporate in the Peabody group. The corporate identity of the principal and operator of the Mine was not an issue before the Commission or Full Court: **FC [9] CAB 147**.
2 **R**espondent **B**ook of **F**urther **M**aterial at 8, clause 1.3(a). See Second Decision [68](a), **CAB 78**.
3 *Bartley v Helensburgh Coal Pty Ltd* [2020] FWC 5756 (**First Decision**) at [2], **CAB 14**.
4 RBFM at 17, Schedule 1. *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 (**Third Decision**) at [68](a) (**CAB 78**) and [104] (**CAB 90**).
5 RBFM 15, clause 1.4. See also Third Decision at [95] **CAB 89**.
6 Third Decision at [68](b), **CAB 78**.
7 RBFM 19, clause 28.1(c).
8 RBFM 22, clause 30.2.
9 Third Decision at [94], **CAB 89**.
10 Third Decision at [94], **CAB 89**.
11 Third Decision at [92] (**CAB 84-88**), and [101]-[102], [104] and [106] (**CAB 90-91**).
12 *Bartley v Helensburgh Coal Pty Ltd* [2020] FWC 5756 (**First Decision**).

nature such that it needed to demonstrate *House v The King* error.[13] The respondent employees also conducted the appeal on this basis.[14] Consistently with the position taken by the parties, the Full Bench (Catanzariti VP and Bissett and Wilson CC) in *Helensburgh Coal Pty Ltd v Bartley* (2021) 306 IR 219 (**Second Decision**) determined that the decision under appeal was of a discretionary nature.[15] The Full Bench held its powers on appeal were dependent on Helensburgh establishing *House v The King* error.[16] The Full Bench granted Helensburgh permission to appeal, finding affirmatively as required by s 400(1) that it was in the public interest to do so. It proceeded to find *House v The King* error.

14. In seeking permission to appeal Riordan C's further decision that the respondent employees' dismissals were not cases of genuine redundancy because of s 389(2) (**Third Decision**)[17], Helensburgh again submitted that a decision under s 389(2) of the FW Act was discretionary and that it needed to demonstrate *House v The King* error.[18] The respondent employees conducted the further appeal on this basis.[19]

15. The same members of the Full Bench who heard and determined Helensburgh's first appeal heard and determined its further appeal. Consistently with the Second Decision and the manner in which Helensburgh put its case, the Full Bench in *Helensburgh Coal Pty Ltd v Neil Bartley* [2022] FWCFB 166 (**Fourth Decision**) again held that a decision under s 389(2) was of a discretionary nature and it was not open for it to substitute its own view of the matter in the absence of *House v The King* error by the Commissioner.[20] The Full Bench granted Helensburgh permission to appeal, finding affirmatively as required by s 400(1) that it was in the public interest to do so.

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13 RBFM at 35-42, Helensburgh's notice of appeal. RBFM at 47 and 51, Helensburgh's outline of submissions on the appeal dated 15 February 2021 at [6.2] and [7.4].

14 RBFM at 56-59,, the respondent employees' outline of submissions on the appeal 10 March 2021 at [6], [9], [11]. See also RBFM at 69-74, the respondent employees' solicitor's oral submissions at the hearing of the appeal on 18/3/2021 at PN203, 207-209, 251-253, 256, 321, 327.

15 Second Decision at [20] **CAB38**. See also at [70] **CAB 48**.

16 Second Decision at [20] **CAB38**. See ***Coal and Allied*** *Operations Pty Limited* ***v A****ustralian* ***I****ndustrial* ***R****elations* ***C****ommission* (2000) 203 CLR 194 at 204 [17] (Gleeson CJ, Gaudron and Hayne JJ).

17 *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 (**Third Decision**). Helensburgh's notice of appeal is at RBFM 75-84.

18 RBFM at 85-86, 88 and 94-95. Appellant's submissions 18/2/2022 at [1.2], [4.3] and [7.1] and [7.7]. RBFM Appellant's oral submissions on the hearing of the appeal on 25/3/2022 at PN13, 140-150, 367-369 and 391.

19 RBFM at 107, 109-110, 114-115, 119 and 125, respondent employees' outline of submissions at [1], [8] (where the respondent employees cited [20] to the Second Decision in support of the proposition a decision under s 389(2) was discretionary in nature), [21]-[23], [40] and [43]. RBFM 126-133, Respondent employees' solicitor's oral submissions at the hearing of the appeal on 25/3/2022 at PN162, 175, 196-207, 219-225, 264-270 and 353-356.

20 Fourth Decision at [28], CAB115.

16. In summary at this point, when the Full Bench considered whether to exercise power under s 400(1) to grant leave to appeal on each of two occasions, it found the public interest required the grant of permission against proposed grounds of appeal that were limited to *House v The King* errors. No appeal on a correctness standard was sought to be advanced by Helensburgh; no leave for a correctness appeal was sought or granted; and the Full Bench, understandably in those circumstances, did not address a correctness appeal in either set of reasons.

17. *Fifth*, in the Fourth Decision, the Full Bench found that Riordan C had committed factual errors, but did not consider that these were 'significant errors of fact' for the purposes of s 400(2) of the FW Act that could establish appealable error.[21] It found error in the Commissioner not giving consideration to the impact of insourcing on the rights and liabilities under Nexus and Menster's contracts or the displacement of Nexus and Menster employees.[22] However, it said that these errors did not raise a sufficient doubt as to the correctness of the Riordan C's decision and were not matters of great weight.[23]

PART V ARGUMENT

A. GROUND 1 – THE CONSTRUCTION OF S 389(2)

A1. Text—the language of s 389(2)

18. Section 385 of the FW Act sets out when a person has been 'unfairly dismissed'. The Commission must find that a person has been 'unfairly dismissed' as a prerequisite to the exercise of its powers to grant remedies of reinstatement or compensation: FW Act, ss 390-392.

19. In order for a person to be 'unfairly dismissed', the Commission must form a state of satisfaction about the four matters detailed by s 385.[24] One of these is that the dismissal is 'harsh, unjust or unreasonable': s 385(b). Another is that the dismissal 'was not a case of genuine redundancy': s 385(d). An employer will be immune from relief for unfair dismissal if the Commission is satisfied that a dismissal was a case of 'genuine redundancy': **FC [55] CAB 163**.

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21 Fourth Decision at [78](2), (4) and (9) **CAB 124-125**. See also: [78](11)-(13) **CAB 126-127** where it was held that the errors alleged were not errors of fact but, even if they were, were not significant errors of fact for the purposes of s 400(2) of the FW Act; and [89], **CAB 129**.

22 Fourth Decision at [73]-[74], **CAB 122-123**.

23 Fourth Decision at [75], **CAB 123**.

24 **E**xplanatory **M**emorandum to the *Fair Work Bill 2008* (Cth) at [1526]-[1527].

20. The concept of 'genuine redundancy' is elaborated in s 389. Section 389(1) sets out when a person's dismissal was a case of genuine redundancy. The Commission must be satisfied of two matters: (a) the employer no longer required the person's 'job' to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and (b) the employer had complied with consultation terms under an applicable modern award or enterprise agreement.[25]

21. The reference in s 389(1)(a) to a person's 'job' captures the functions, duties and responsibilities entrusted to the employee in the context of the employer's organisation.[26] Changes in operational requirements in the employer's enterprise must have had the consequence that the job was no longer be required to be performed: **FC [58] CAB 163**.

22. Section 389(2) creates an exception or qualification to s 389(1). A person's dismissal "was not a case genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within" either "the employer's enterprise" or "the enterprise of an associated entity of the employer".[27]

23. "Enterprise" is defined in broad terms s 12 to the FW Act to mean a "business, activity, project or undertaking".[28] Helensburgh's "business, activity, project or undertaking" was the black coal mining operations at the Mine. There is no warrant for reading "enterprise" as a business, activity, project or undertaking that is in an unalterable state of affairs at the time of a redundant employee's dismissal: cf **AS [35]**. That argument is undercut by Helensburgh's acceptance at **AS [46]** that an employer's enterprise will not be fixed or unchangeable, but dynamic in nature. The term "enterprise" therefore does not create a "fixed standard" as contended at **AS [37]** or otherwise require the Commission to assume that an employer's enterprise (or that of one of its associated entities) is immutable when undertaking the assessment required by s 389(2).

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25 An employer is required to comply with the totality of consultation obligations under any consultation clause in an applicable award or enterprise agreement: *Cameron v Transfield Services (Aust) Pty Ltd* (2012) 220 IR 398 at [63] (Bissett C).

26 *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Co-operative Ltd* (1977) 44 SAIR 1202 at 1205 (Bray CJ) (endorsed by the Full Bench of the Australian Conciliation and Arbitration Commission in *Termination, Change and Redundancy Case* (1984) 8 IR 34 at 55-56); *Jones v Department of Energy and Minerals* (1995) 60 IR 304 at 308 (Ryan J); EM [1548].

27 By s 12 of the FW Act, 'associated entity' has the meaning ascribed by s 50AAA of the *Corporations Act 2001* (Cth).

28 See generally as to 'business': *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194 at 212 [39].

24. The phrase 'would have been' in s 389(2) uses the past tense to focus attention on the circumstances extant at the time of dismissal.[29]

25. Redeployed is the past participle of redeploy. Neither redeployed or redeploy are defined in the FW Act. The ordinary meaning of "redeploy" is "to rearrange, reorganise, or transfer (a person, department, military unit, or the like), as in order to promote greater efficiency" or to "carry out a reorganisation or rearrangement"[30] or "to transfer (troops, labour resources, etc.) to a new area; to assign to a new activity or task".[31]

26. The ordinary meaning of "redeployed" is inconsistent with the notion that a particular job, position or task needs to be presently vacant and available for a dismissed employee to be redeployed to at the time of dismissal. Rather, 'redeployment' envisages re-arrangement, re-organisation or transfer and is not limited to an existing vacant job, position or task: cf **AS [37], [43]** and **[45]**.

27. Section 389(2) requires a hypothetical analysis of redeployment within the employer's business, activity, project or undertaking at the time of dismissal. That assessment impels an analysis of whether at a past point in time (when the employee was dismissed), but looking forward: (a) the employee *could* have been redeployed to another job, position or task; and (b) if so, whether this *would* have been reasonable having regard to all the circumstances: **FC [59] CAB 163**. These inquiries necessitate, as Katzmann and Snaden JJ correctly identified at **FC [66] CAB 165**, consideration of the possibilities open to an employer to redeploy an employee dismissed on redundancy grounds. Those possibilities may involve one or other steps which may have a variety of foreseeable consequences. Those consequences, and the merits or otherwise of redeployment, fall to be assessed against the touchstone of 'reasonableness' which involves an evaluative and impressionistic assessment.[32]

28. Section 389(2) does not simply involve deciding whether some past closed series of events satisfies an evaluative standard of '*reasonableness*'.[33] Rather, the Commission is required to look at all the circumstances and ask whether it would have been reasonable

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29 *Ulan Coal Mines Ltd v Honeysett* (2010) 199 IR 363 at 370 [28] (Giudice J, Hamberger SDP and Cambridge C).

30 Macquarie Dictionary, Online Edition.

31 Oxford English Dictionary, Online Edition. See *Technical and Further Education Commision v Pykett* (2014) 240 IR 130 at 136-137 [23]-[25] and 139-140 [35]-[36] (Ross J, Booth DP and Bissett C).

32 Cf *State of New South Wales v Perez* (2013) 84 NSWLR 570 at 575 [19] (Basten JA).

33 Cf *SZVFW* at 562-563 [46] (Gageler J) discussing a statutory prohibition on unconscionable conduct.

"for the person to be redeployed" within the employer's enterprise or that of an associated employer.

29. Nothing in the text of s 389(2) limits an analysis of redeployment to an extant and available job, position or task (**FC [57]-[59]** (Katzmann and Snaden JJ), **CAB 163**; and **[95]** (Raper J), **CAB 171**). Distinctly from s 389(1)(a), the word "job" does not appear in s 389(2). Nor do the terms "enterprise" or "redeployed" restrict the Commission's assessment of reasonableness to the arrangement of work in an employer's enterprise as it existed at the time of dismissal. **AS [46]** accepts, as Helensburgh conceded before the Full Court (**FC [63], CAB 157**), that the Commission can consider whether there might be a future jobs, positions or tasks which an otherwise redundant employee could be redeployed to perform. This exposes contradiction. Helensburgh's construction requires the Commission to assume that the employer's enterprise must be fixed in point of time. Yet it accepts that an employer's enterprise is inherently dynamic and could change or be changed to accommodate the continued employment of an otherwise redundant employee at some future point "in the short term": **AS [46]**. Helensburgh's acceptance that the possibility that there might be future jobs, positions or tasks available which can be considered under s 389(2) also means that it must also accept the example set out in **FC [64], CAB 164**.[34] These examples are fatal to its argument, which hinges on any potential changes to an enterprise being unable to be considered in assessing the reasonableness of redeployment.

A2. CONTEXT

Sections 81, 84 and 391

30. Where FW Act envisages an inquiry focused on the deployment (or redeployment) of an employee into an existing and available job or position in the employer's enterprise, it does so specifically. This undermines Helensburgh's contention that the Commission cannot consider whether an employer could have made changes to its enterprise so a redundant employee could be redeployed to another vacant job, position or task: **AS [45]**.

31. Division 5 of Part 2-1 of the FW Act confers parental leave and related entitlements. Section 81 deals with a pregnant employee who, as a result of risks associated with her

[34] It would also presumably accept that the situation dealt with by the Full Bench in *Skinner v Asciano Services Pty Ltd* (2017) 262 IR 143 could also be one of reasonable redeployment where an employer could have, but failed to, consider the potential for job swaps for redundant employees by offering voluntary redundancies to existing employees.

pregnancy, seeks to be transferred to another job. Where the employee gives the employer evidence that would satisfy a reasonable person she is fit for work but that it is inadvisable for her to continue in her present position due to illness or risks arising from the pregnancy or hazards associated with the position, the employer must transfer the employee to an available 'appropriate safe job': ss 81(1)-(2).[35] Section 81, distinctly from s 389(2), depends on the present existence and availability of a "job".

32. Also included in Division 5 of Part 2-1 is s 84, which confers a "return to work guarantee". It provides that on ending a period of unpaid parental leave an employee is entitled to either to return their: (a) pre-parental leave position;[36] or (b) if that position no longer exists, an 'available position' for which they are qualified and suited. A position will be 'available' if it is or will be open to be filled by the returning employee.[37] Section 84 therefore requires identification of a vacant position.

33. Section 391(1) deals with orders for reinstatement where a dismissal has been found to be unfair. Section 391(1)(a) allows the Commission to reinstate an employee into 'the position' that they occupied immediately before dismissal, whilst s 391(1)(b) permits the Commission to reinstate the employee to 'another position' on terms no less favourable. Section 391(1A) allows for appointment to 'a position' in an associated entity's enterprise. Both ss 391(1)(b) and 391(1A) require identification of a position to which the employee can be reinstated at the time of the order. If there is such a position, then the Commission may exercise the discretion to make the reinstatement order to such position. It may also make orders for continuity of service and lost pay: s 391(2) and (3). If there is no such position, or if the Commission chooses not to make a reinstatement order, there may be orders for compensation: s 390(1) and (3) and s 392.

34. These provisions gainsay Helensburgh's construction that reasonable redeployment under s 389(2) can only be to a vacant or available 'position' or 'job' which is a necessary premise for its argument that the Commission is precluded from considering whether changes could be made to an employer's enterprise to retain a redundant employee. At the stage of deciding whether it is not a case of genuine redundancy, a wide survey is called for into what the employer or associated entity could reasonably do to preserve the

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35 Appropriate safe job is defined in s 81(3).

36 Which was an expression defined in s 83(2) of the FW Act to mean the position the employee held before starting a period of parental leave or if they were transferred to a safe job or had their hours reduced due to the pregnancy, they position they held immediately before the transfer or reduction.

37 *Stanely v Service to Young Council Inc* (2014) 225 FCR 317 at 354 [230]-[231] (White J).

employment relationship. If the employer fails at that hurdle, and the other conditions for unfair dismissal are met, at the remedy stage (reinstatement vs compensation), there may be a likely narrower enquiry into what are available positions to which reinstatement could be effected. The former enquiry must not be collapsed into the latter.

The Commission as a specialist tribunal

35. The task of assessing whether it is reasonable in all the circumstances for an employee to be redeployed within the employer's enterprise is allocated to the Commission as a specialist tribunal.[38] In undertaking that assessment, the Commission may inform itself in relation to any manner it considers appropriate under s 590(1).[39] Amongst other things, it may do so by conducting a conference and directing persons to attend conferences,[40] requiring the production of documents records or information,[41] conducting its own inquiries,[42] or undertaking or commissioning research.[43] In matters arising under Part 3-2 of the FW Act, s 399 determines that the Commission is not to hold a hearing unless it considers it appropriate to do so taking into account the matters under s 399(1).[44]

36. The Commission is not bound by the rules of evidence and procedure under s 591 and is required to perform its functions and exercise its powers in a manner that is, relevantly, fair and just, as well as quick, informal and avoidant of unnecessary technicalities.[45] It must also take into account the equity, good conscience and merits of the matter.[46]

37. The specialist and expert nature of the members of the Commission who are assigned the function of assessing whether redeployment is reasonable in all the circumstances, together with the flexible manner in which it can undertake the assessment and the requirement for it to consider the 'equity, good conscience and merits' of the matter point against any restrictive reading of s 389(2) and the removal of the work of contractors from the Commission's consideration of reasonable redeployment in all the circumstances.

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38 The qualifications of members of the Commission are set out in s 627(1)-(3). See generally *CFMMEU v Anglo American Australia Ltd* (2019) 271 FCR 22 at 64 [126]; *Knowles v BlueScope Steel Ltd* (2021) 284 FCR 118 at 121 [9] (Logan J); *Coal and Allied Operations* at 215-216 [50] (Kirby J).

39 It can do so by one of more of the ways set out in s 590(2)(a)-(i).

40 FW Act, ss 590(2)(a) and (h) and 592.

41 FW Act, s 590(2)(c). See in relation to the provision of 'information' *AMWU v Sublime Infrastructure Pty Ltd* [2024] FWC 2135 at [25]-[28] (Gibian VP).

42 FW Act, s 590(2)(f).

43 FW Act, s 590(2)(g).

44 Section 397 requires the Commission to conduct a conference or hearing if there are contested factual matters. Section 398 deals with conferences which are to be held in private.

45 FW Act, s 577(1)(a)-(b).

46 FW Act, s 578(b).

A.3 LEGISLATIVE HISTORY

38. Unfair dismissal provisions in Part 3-2 of the FW Act entered the federal legislative sphere with the insertion of Division 3 of Part VIA into the ***I**ndustrial **R**elations **Act** 1988* (Cth) by the *Industrial Relations Reform Act 1993* (Cth).[47] State statutory schemes existed at the time of these amendments to the IR Act which provided protections to employees against dismissals that were 'harsh, unjust and unreasonable'.[48] Relevantly, South Australian jurisprudence had held that terminations resulting from genuine redundancies could still be 'harsh, unjust or unreasonable' if there was a failure by the employer to offer alternative employment.[49]

10 39. Section 170DE(1) of the IR Act prohibited an employer from terminating an employee's employment unless there was a valid reason connected with the employee's capacity or conduct, or based on the operational requirements of the undertaking, establishment or service. Section 170DE(2) provided that a reason would not be valid if, having regard to all the circumstances, including operational requirements, the termination was 'harsh, unjust or unreasonable'. If a termination was contrary to ss 170DE(1) or (2) of the IR Act, reinstatement or compensation could be ordered under s 170EE.

40. Section 170DE(2) was struck down as constitutionally invalid in *Victoria v The Commonwealth*.[50] Before *Victoria v Commonwealth,* it had been applied on the basis that a termination of an employee might be harsh, unjust, or unreasonable (and therefore not
20 'valid') if the employee's position was redundant but the employee may have been, but was not, afforded alternative employment with the employer.[51]

41. The unlawful dismissal provisions in the IR Act were replaced by Division 3 to Part VIA to the ***W**orkplace **R**elations **Act** 1996* (Cth).[52] Section 170CH of the WRA Act conferred

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47 See generally Marilyn J Pittard, 'The Age of Reason: Principles of Unfair Dismissals in Australia', in Ron McCallum, Greg McCarry and Paul Ronfeldt (eds), *Employment Security* (Federation Press, 1994).

48 See for instance *Industrial Conciliation and Arbitration Act 1972* (SA) s 31; *Industrial Relations Act 1991* (NSW) s 246.

49 ***Wynn's Winegrowers** Pty Ltd **v Foster*** (1986) 16 IR 381 at 384 (Stanley P, Lee J and Cotton C); *Cockery v General Motors Holdens Ltd* (1986) 53 SAIR 531 at 538 (Stanley J); *Corporation of the Town of Gawler v Day* (1988) 55 SAIR 369 at 383.

50 (1996) 18 CLR 416 at 518-519 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). The majority held that the inclusion of the 'harsh, unjust or unreasonable' criterion went beyond the terms of Article 4 of the Termination of Employment Convention.

51 See for instance *Quality Bakers of Australia Ltd v Goulding* (1995) 60 IR 327 at 334 (Beazley J); *Mitchell-Collins v The LaTrobe Council* (1995) 60 IR 480 at 490 (Spender J).

52 See [7.2] to the **E**xplanatory **M**emorandum, **W**orkplace **R**elations and Other Legislation Amendment **Bill** 1996 (Cth). To the extent the provisions permitted the Commission to grant relief on the ground termination was 'harsh, unjust or unreasonable', the constitutional basis for the provisions were

power on the **A**ustralian **I**ndustrial **R**elations **C**ommission to grant remedies including reinstatement (s 170CH(3)) or compensation in lieu of reinstatement (s 170CH(6)) if it had found that a dismissal was 'harsh, unjust or unreasonable'.

42. Section 170CG(3) of the WR Act set out factors the Commission was required to take into account in determining whether a dismissal was harsh, unjust or unreasonable. These included whether there was a valid reason for termination relating to the capacity or conduct of the employee or to the 'operational requirements of the employer's undertaking, establishment or service': s 170CG(3)(a).[53] The Commission could also have regard to any other matters it considered relevant: s 170CG(3)(e).[54]

10 43. In assessing whether terminations were 'harsh, unjust or unreasonable' in cases where there was a valid reason for termination relating to operational requirements, the AIRC could consider as a relevant matter under s 170CG(3)(e) whether redeployment was available and had been offered to an employee.[55] It could also take into account whether consultation had occurred with employees whose positions were proposed to be made redundant, including to explore redeployment opportunities.[56]

44. There was no impediment under the WR Act to a finding that a termination was "harsh, unjust or unreasonable" if the dismissal was the result of a genuine redundancy. Whether the redundancy was "genuine" was a relevant consideration under s 170CG(3)(a), whilst the potential for redeployment could be a factor relevant under s 170CG(3)(e).

20 45. That position was markedly altered by amendments to the WR Act wrought by the *Workplace Relations Amendment (**Work Choices**) Act 2005* (Cth) (see **FC [95] CAB 171** (Raper J). The phrase "operational requirements" was excised from the valid reason consideration in s 653(3)(a).[57] Significantly, the ability of an employee to apply for relief under s 643(1)(a) to the WRA Act on the ground the termination was "harsh, unjust or

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detailed in s 170CB(1), with 'federal award employees' captured by the corporations power: Explanatory Memorandum at [7.23].

53 Whether there was a 'valid reason' was no longer critical to whether the dismissal was 'unfair' as the principal question was whether termination was harsh, unjust or unreasonable. Rather, it was one of several factors: *Windsor Smith v Liu* (1998) 140 IR 398 at 404 (Giudice J, Polites SDP and Gay C).

54 EM WR Bill at [7.42]-[7.43].

55 See for instance *Rajaratnum v Australian Nuclear Science and Technology Organisation* [2005] AIRC 143 at [72] (Lawler VP); *Russo and Borg v Australia Pacific Airports (Melbourne) Pty Ltd* [2002] AIRC 1281 at [158]-[159] (Ives DP); *Panaretos v Northern Land Council* [2000] AIRC 805 at [60] (Gay C).

56 *Windsor Smith v Liu* at 407.

57 See Esther Stern, *From 'Valid Reason' to 'Genuine Redundancy' Redundancy Selection: A Question of (Im)Balance',* UNSW Law Journal, 35(1) 70, pp 96-97.

unreasonable" was subject to exceptions, one of which was if the employee's employment was terminated for 'genuine operational reasons'[58]: s 643(8). "Operational reasons" were defined expansively in s 648(9) to include "reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or part of it". Section 649(1)-(2) of the WRA Act imposed a duty on the AIRC to hold a preliminary hearing on whether a termination was due to operational reasons before taking any further action. If satisfied the operational reasons were genuine, the AIRC was required to dismiss the application. Operational reasons were thus erected as a jurisdictional bar to an application.

46. The FW Act significantly ameliorated this position and changed the manner in which redundancy based dismissals were dealt with. Section 389 had dual purposes of permitting employees to seek relief for unfair dismissal where they had been terminated on redundancy grounds, but restricting access to dismissals that satisfied the criteria in ss 389(1)(a)-(b) and in relation to which the exception in s 389(2) was not satisfied.[59]

47. Distinctly from the former s 170CG(3)(a) of the WRA Act, a dismissal on the grounds of redundancy' was no longer a 'valid reason' under s 387(a) of the FW Act for the purposes of assessing whether a dismissal was 'harsh, unjust or unreasonable'. Rather, whether a dismissal was for an 'operational reason' was to be considered as a threshold jurisdictional matter: ss 385(d), 389(1)(a) and 396(d). The procedural fairness of a redundancy-based dismissal based could be considered in a limited way as a threshold jurisdictional matter if a consultation requirement in an award or enterprise agreement applied to the employment. If such consultation requirements existed and were met, the employee could not otherwise challenge the procedural fairness of the dismissal under s 387(b) in contrast to the position under s 170CG(3)(b) of the WR Act.

48. The argument at **AS [44]**[60] that the purpose of ss 385(d) and 389 was to reinstate the pre-*WorkChoices* position is incorrect.[61] Section s 389(2)'s focus on redeployment was unique

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58 Or 'for reasons that included genuine operational reasons'. The phrase 'operational reasons' was in contradistinction to more restrictive phrase 'operational requirements': see *Nettleford v Kym Smoker Pty Ltd* (1996) 69 IR 370 at 373 and Anthony Forsyth, 'Australian Regulation of Economic Dismissals: Before, During and After "Work Choices" (2008), 30 *Sydney Law Review* 506, 518.

59 *Fair Work Bill 2008* (Cth), Second Reading Speech Julia Gillard Acting Prime Minister, Hansard 25 November 2008, p 11194.

60 See in particular footnote 17.

61 **AS [42]** also accepts that the pre-*Work Choices* position that selection for redundancy could be challenged also does not apply under s 389(1)(a).

and had not appeared in an Australian industrial statute before.[62] The FW Act provisions effected a wholesale change to the manner in which applications for relief for unfair dismissal from redundancy-based dismissal were to be considered and assessed.[63]

49. Contrary to **AS [39]-[42]**, that industrial tribunals do not consider the reasonableness of a change in operational requirements that led to a redundancy does not assist Helensburgh's construction. Selection of one or more employees for redundancy from a group of employees where several positions are no longer required to be performed relates to the reasoning of the employer in determining which employees are to be made redundant.[64] This is irrelevant to whether it was reasonable to redeploy a redundant employee in the employer's enterprise or that of an associated entity.

50. There is also no logical inconsistency in the Commission assessing under s 389(1)(a) whether an employee's job is no longer required to be performed by anyone as a result of changes in the operational requirements of the employer's enterprise and an assessment of whether there were steps the employer could have taken (including re-arranging or re-allocating work) to maintain the employee's employment in its enterprise: cf **AS [41]**. Whether an employee's position is redundant does not exclude consideration of whether there was other work or tasks the employee could reasonably be redeployed to perform.

A5. PURPOSE

51. Section 389(2) is a beneficial provision whose purpose is to allow an otherwise redundant employee to bring an application for relief from unfair dismissal if the employer could reasonably have retained them in employment rather than dismissing them. It is a unique provision in Australian industrial law and seeks to encourage redeployment where it would be reasonable in all the circumstances.

52. The respondent employees' construction is consistent with the object of Part 3-2 set out in s 381(1)(a) of establishing a framework that balances the needs of business (by ensuring that a redundant employee who cannot reasonably be redeployed cannot bring an unfair dismissal claim) and those of employees (by permitting a redundant employee

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62 Shi, Elizabeth 'A Tiger With No Teeth: Genuine Redundancy and Reasonable Redeployment' (2012) 31(1) University of Queensland Law Journal 101 at 110.

63 There is no support for Helensburgh's submissions position in the extrinsic materials: **E**xplanatory **M**emorandum to the *Fair Work Bill 2008* (Cth) at [1546]-[1553].

64 See EM [1553].

who could reasonably have been redeployed to maintain a for relief from unfair dismissal).

53. **AS [44]** should not be accepted, as there is nothing inevitably complex about an assessment of whether work could reasonably be re-allocated from contractors to employees. The practical difficulties that may arise in the atypical hypothetical situation posited at **AS [43]** do not provide support for Helensburgh's construction.[65]

54. Contrary to **AS [42],** the **E**xplanatory **M**emorandum to the *Fair Work Bill 2008* (Cth) does not provide a 'clear legislative contemplation' supportive of Helensburgh's construction. Helensburgh places sole and overwhelming reliance on the single example at EM [1552]. That approach is misconceived. The example is non-exhaustive, as the first sentence of EM [1552] makes clear. Further, it provides no appreciable support for construing s 389(2) in a manner that removes work performed by contractors from the assessment of the reasonableness of redeployment.[66] Indeed, nothing in the EM provides support for the notion that the Parliament intended that the Commission's assessment of the reasonableness of redeployment is restricted or limited in any way.

B. GROUND 2—standard of appellate review

B.1 Section 389(2)

55. Section 389(2) requires the Commission to consider the circumstances current at the time of dismissal and engage in a forward-looking analysis of a hypothetical redeployment. The Commission must determine whether redeployment could theoretically have happened and, by reference to the touchstone of reasonableness,[67] form a value judgment about the reasonableness of a possible redeployment. This hypothetical and evaluative assessment is necessarily multi-factorial, given that "all the circumstances" must be considered in the assessment of reasonableness.

56. The nature of the assessment impelled by s 389(2) opens up a range of possible actions the employer might have taken by way of redeployment, each of which may have their own set of foreseeable consequences. Whether those possibilities are reasonable, in the sense of "agreeable to reason or sound judgment" invites an open textured and value-

65 Cf *ABCC v CFMEU* (2018) 262 CLR 157 at 188 [94] (Keane, Nettle and Gordon JJ).
66 *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495 at 524 [72]-[73] (Gageler J).
67 Which is not a concept that can be subjected to inflexible categorisation: *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [30] (Gleeson CJ and Gummow J).

laden assessment that is a matter of impression and opinion.[68] No consideration or combination of considerations will necessarily be determinative of the reasonableness of a possible hypothetical redeployment.[69]

57. The criterion set by s 389(2) does not prescribe a contestable factual question which demands a unique answer. Nor does it involve the application to a past set of facts of a legal standard.[70] Rather, it posits a decision-making task that requires the making of a value judgment about a hypothetical about which there will be necessarily be room for reasonable differences of opinion.[71]

58. This is reinforced by the fact that the assessment depends on the Commission reaching a state of satisfaction.[72] That 'satisfaction' is built into s 389 by the precondition under s 385(d), together with s 390(1)(b), and necessarily imports a range of permissible outcomes.

59. It is further supported by the allocation of the task to the Commission as a specialist tribunal[73] which is clothed with an array of powers and has flexibility in informing itself in order to achieve the state of satisfaction.[74] It must also make this assessment having regard to the equity, good conscience and merits of the matter: see [37]-[39] above.

60. Contrary to **AS [55]** there is no basis to distinguish the discretionary nature of the decision required to be made under s 389(2) of the FW Act from that required by s 170MW(1) and (3) of the WR Act, which were considered by this Court in *Coal and Allied.*[75] Section 170MW(1) conferred a discretionary power on the AIRC to suspend or terminate a bargaining period if satisfied any of the circumstances set out in ss 170MW(2)-(7) exist or existed. Section 170MW(3)[76] specified such a circumstance to include where industrial action that was being taken was threatening either (a) to endanger the life, personal safety or health or welfare of the population or part of it; or (b) to cause significant damage to the Australian economy or an important part of it. Whether the industrial action was

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68 See generally *Buck v Bavone* (1976) 135 CLR 110 at 118-119 (Gibbs J).
69 *Coal and Allied v AIRC* at 205 [19] (Gleeson CJ, Gaudron and Hayne JJ).
70 Cf *Warren v Coombes* (1979) 142 CLR 531 at 551-553 (Gibbs CJ, Jacobs and Murphy JJ).
71 *Singer v Berghouse* (1994) 181 CLR 201 at 211 (Mason CJ, Deane and McHugh JJ); *Norbis v Norbis* (1986) 161 CLR 513 at 518 (Mason and Deane JJ); cf *Moore (a pseudonym) v The King* (2024) 98 ALJR 1119 at 1124-1125 [16]-[21].
72 Cf *Deputy Commissioner of Taxation v Shi* (2020) 277 FCR 1 at 31 [89] (Lee J).
73 *SZVFW* at 593 [153] (Edelman J).
74 See generally *Minister for Industrial Relations (Vic) v Esso Australia Pty Ltd* (2019) 268 FCR 520 at 37 [34].
75 Above FN 17.
76 The analogue to this provision in the FW Act is s 424.

causative of a threat of a requisite kind was to be determined by reference to the facts and circumstances attending the industrial action.[77] The AIRC needed to assess whether the industrial action was productive of, or likely to be productive of, the endangerment detailed in s 170MW(3)(a) or the damage contemplated by s 170MW(3)(b).[78] That judgment was held to be discretionary as it involved a degree of subjectivity.[79] It was a decision about which the AIRC had some latitude and to which there was no uniquely correct answer. That conclusion was not, as **AS [55] and [58]** assert, influenced or dependent upon by the two-stage nature of the process under s 170MW(1).

61. The decision required under s 389(2) of the FW Act is akin to that mandated by s 170MW(3). Both require a hypothetical assessment of something which either did not occur but which might have occurred (in the case of s 389(2)), or which has not occurred but may occur (in the case of s 170MW(3)). Both assessments are undertaken by reference to facts and circumstances existing at a particular point time. They are both forward-looking. Both assessments are dependent on a specialist and expert decision-maker's state of satisfaction.

62. Katzmann and Snaden JJ were also correct (**FC [80] CAB 168**) to discern an analogy between the decision under s 385(d) and the decision in a testator's maintenance case as to whether the testator made 'adequate' and 'proper' provision for eligible persons. This was explained by Gibbs CJ in *Goodman v Windeyer*[80] to be an evaluative determination resting on value judgments or opinions not tethered to fixed standards. Gibbs CJ detailed that the words 'adequate' and 'proper' were always relative and no fixed standards were prescribed, such that it was left to the Court to form opinions on the basis of its general knowledge and experience of current conditions and standards to determine whether adequate and proper provision had been made.

63. The decision under s 389(2) uses words and concepts that are both broad and open ended. What an employer might be expected to do by way of redeployment will not only be highly fact specific, but may change over time depending upon societal and industrial standards. So much is apparent from the requirement for the Commission to consider the equity, good conscience and merits of the matter.

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77 *Coal and Allied v AIRC* at 205 [20] (Gleeson CJ, Gaudron and Hayne JJ).
78 *Coal and Allied Operations v CFMEU* (1998) 80 IR 14 at 32 (Giudice J).
79 *Coal and Allied v AIRC* at 205 [20] (Gleeson CJ, Gaudron and Hayne JJ).
80 (1980) 144 CLR 490 at 502, adopted and approved in *Singer v Berghouse* (1994) 181 CLR 201 at 212. See *Frank v Angell* [2024] NSWCA 264 at [4] (Gleeson JA) and [62]-[66].

64. In the present case, one of the issues was whether the employer should, under the standard of reasonableness, have gone further by way of keeping the respondent employees employed in its enterprise, even if at a cost of interference with independent contracting arrangements. That issue necessarily involved consideration of how the presence of independent contractors has emerged and changed over time, as well as a close examination on the facts of how great that cost might be. The facts recited at [8]-[12] above suggested that the cost might be small. But the task of assessment was reposed in a specialist tribunal which was required to bring a practical and expert perspective to a question that was inherently multi-dimensional.

10 **B2. The Commission's appellate jurisdiction**

65. Section 604(1) of the FW Act allows a person aggrieved by a decision to appeal with permission. An appeal must, by s 613(1), be decided by a Full Bench constituted in accordance with s 618. The Full Bench is required by s 613(1)(a) to decide first whether to grant permission to appeal. Only if it decides to grant permission must it hear the appeal: s 613(1)(b). The grant of permission is a precondition to the hearing of an appeal and to the exercise of the Full Bench's powers under ss 607(2)-(3) on the appeal.[81]

66. The Commission must grant permission under s 604(2) if satisfied it is in the public interest to do so. However, appeals in relation to unfair dismissal applications are subject to further constraints imposed by s 400. Section 400(1) prohibits the Commission
20 granting permission unless it considers it is in the public interest to do so. This is a jurisdictional fact or criterion that must be satisfied before an appeal is heard.[82] In determining whether it is in the public interest to appeal, the Full Bench makes a discretionary value judgment.[83] The concept of 'public interest' is predicated on fact-value complexes and not mere facts,[84] and does not require consideration of any particular matter.[85]

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81 *Australian Postal Corporation v D'Rozario* (2014) 222 FCR 303 at 307 [7] (Besanko J).
82 Ibid., at [14] (Besanko J).
83 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 at 353 [39] (French CJ, Crennan and Bell JJ) and 377 [127] (Gageler J).
84 *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320 at [14] (French CJ, Gummow and Bell JJ).
85 *Jones v Commonwealth of Australia* (2023) 97 ALJR 936 at 956 [93] (Gordon J).

67. This immediately introduces a discretion at the initial stage which necessarily encompasses the range of issues and arguments that might be raised in the appeal itself.[86] This is a distinguishing feature from a conventional appeal by way of re-hearing such as in *Warren v Coombes*[87] which is not (at least in most cases) subject to a 'permission' or 'leave' requirement. The absence of a right to appeal also conveys that it is unlikely that the correctness standard is applicable.

68. Section 400(2) deals with circumstances where permission to appeal has been granted and qualifies the general right of appeal. It is a jurisdictional provision in the sense that it delineates the functions and powers of the Full Bench in hearing an unfair dismissal appeal.[88] It provides that appeals on questions of fact can only be made on the ground the decision involved a significant error of fact.[89] If the Full Bench grants permission to appeal, it must draw distinctions between grounds of error of fact and grounds of error of law; and if in the fact category, it must form an assessment that the alleged error of fact is significant as opposed to non-significant. Whether an error of fact is significant involves an evaluative and impressionistic judgment.[90] The decision-maker is therefore by s 400(2) allowed the latitude to make decisions which involve what might be regarded as errors of fact, provided those errors are not significant. An appeal of an unfair dismissal decision is one in which is not concerned with the correction of errors of fact unless those surmount a threshold of 'significance' and the review a Full Bench conducts is so limited.[91] This immediately removes the Full Bench a distance from the observations of Gageler J in *SZVFW*[92] which identify the correctness standard under *Warren v Coombes*.

69. The Commission member at first instance is, by the express terms of s 400(2), allowed the latitude to make decisions which involve what might be regarded as errors of fact, provided those errors are not significant. This further supports the standard of review not being the correctness standard. Further, that an appeal is by way of rehearing rather than

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86 The Full Bench will consider and assess the argument raised to assess whether they trigger the public interest: *Bartlett v Ingleburn Bus Services Pty Ltd* (2020 303 IR 1 4 at [8]. It will not be in the public interest to grant permission unless an arguable case of appealable error is shown: *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481 at 489 [30].

87 CLR 537, *Supreme Court Act 1970* (NSW) s 75A.

88 *Australian Postal Corporation v Gorman* (2011) 196 FCR 126 at 136 [44] (Besanko J); ***Knowles v BlueScope** Steel Ltd* (2021) 284 FCR 118 at 127 [28] (Flick J)

89 A significant error of fact is one which vitiates the ultimate exercise of a discretion *Gelgotis v Esso Australia Pty Ltd* [2018] FWCFB 6092 at [43].

90 *Knowles v BlueScope* at 135 [46] (Flick J).

91 Cf a conventional appeal by way of rehearing as described by Gageler in *SZVFW* at 555-556 at [30].

92 *Minister for Immigration and Border Protection v **SZVFW*** (2018) 264 CLR 541 at 559-560 [41].

a hearing *de novo* also points to the standard of review not being the correctness standard.[93]

PART VI NOTICE OF CONTENTION

70. The respondent seeks an extension of time to file a notice of contention.

71. **Ground 1:** The Full Bench correctly understood that its powers on appeal were enlivened only if there was error on the part of Riordan C.[94] Any error about the nature of the error it was required to find would have been an error within jurisdiction.[95]

72. On the assumption that the Commission's state of satisfaction under s 389(2) was one to which there was a single unique answer, the Full Bench did not, in the circumstances, fall into jurisdictional error. Helensburgh's case was that Riordan C made errors of the kind described in *House v The King* and that it needed to demonstrate error in the decision-making process in order for the Full Bench to intervene. That was the case that the Full Bench granted permission under s 400(1) in the public interest to be advanced (see [16] above). It is the case that it decided. The Full Bench did not misapprehend the nature of its jurisdiction, misconceive its duty or fail to apply itself to the question s 604(1) prescribed or misunderstand the nature of the opinion it was required to form determining the appeal as advanced by Helensburgh.

73. **Ground 2:** The Full Bench identified error in the Commissioner's decision by failing to take into account the impact of insourcing on Menster and Nexus but determined that this error did not raise sufficient doubt about the correctness of his decision as a whole.[96] It otherwise found that no significant errors of fact were made by the Commissioner.[97] Given the Full Bench endorsed and adopted the Commissioner's decision as correct, on the assumption that the Full Bench committed jurisdictional error in applying the *House v The King* standard, there is no realistic possibility that the Full Bench decision could have been different had it approached the appeal on the basis of that correctness standard applied. The threshold of materiality is therefore not surmounted.[98]

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93 *SZVFW* at 593 [153] (Edelman J).
94 *Coal and Allied* at 204 [17] and 209 [32] (Gleeson CJ, Gaudron and Hayne JJ).
95 Ibid at 208-209 [29]-[32].
96 Fourth Decision **[72]-[75] CAB 122-123**.
97 Fourth Decision **[76](2), (5), (9), (11)-(13) CAB 124-127**.
98 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & anor* (2004) 98 ALJR 610 at [7].

74. **Ground 3:** In the further alternative, certiorari and mandamus should be refused as a matter of discretion.[99] It is not in the interests of the administration of justice for an applicant for constitutional writs to run a new case on judicial review and impugn the Full Bench's decision as infected by jurisdictional error on a basis inconsistent with the manner in which it sought and obtained permission to appeal and then conducted its case before the Full Bench.[100] That is especially so where an applicant alleges that the Full Bench committed jurisdictional error by approaching the discharge of its task in precisely the way the applicant contended for[101] and given that the Full Bench determined it was in the public interest to grant permission to appeal on the appeal as framed by Helensburgh.

75. There are 3 additional points to this discretionary argument. *First*, Helensburgh does not even now propound the full form of the amended notice of appeal which it would seek to advance on the correctness standard. (At most, there is footnote [57] to its submissions.)

76. *Second*, Helensburgh passes over why the Full Bench should conclude that the putative amended notice of appeal would pass the public interest test in s 400(1).

77. *Third*, the employees have been required to litigate through 4 decisions over a three year period. They have succeeded before the Full Bench, on the case which Helensburgh choose to run over the 3-year period. If, which is not shown, there is some as yet unpleaded ground of appeal on a correctness standard which falls outside the case Helensburgh has chosen to run to date, the loss of the ability to run that case should fall on Helensburgh (and its advisors) rather than subject the employees to a further round of litigation.

PART VII DISPOSITION

PART VIII ESTIMATE OF TIME FOR ORAL ARGUMENT

78. The respondent will require a total of 2.25 hours to present its argument.

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99 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ)

100 *D&D Traffic Management Pty Ltd v The Australian Workers' Union* [2022] FCAFC 113 at [73].

101 Cf *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 320 (Lord Denning MR).

Dated: 18 November 2024

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

HELENSBURGH COAL PTY LTD
Appellant

NEIL BARTLEY AND THERS NAMED IN THE SCHEDULE TO THE NOTICE OF APPEAL
Respondents

10 **ANNEXURE TO THE FIRST TO TWENTY-SECOND RESPONDENTS' SUBMISSIONS**

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the respondent sets out below a list of the particular statutes and Conventions referred to in these submissions.

No	Description	Version	Provision(s)
1.	*Fair Work Act 2009 (Cth)*	Compilation No. 37, as at 9 April 2020	ss 3, 81, 83-84, 379, 381, 385-392, 394, 396, 604, 607, 613, 615, 617, 626-627
2.	*Workplace Relations Act 1996* (Cth)	Act No. 86 of 1988, dated 20 January 1997	ss 45, 170CE-CH, 170MW,
3.	*Workplace Relations Act 1996* (Cth)	Act No. 86 of 1988, dated 26 March 2006	ss 643, 648 Act No. 86 of 1988, -649, 653
4.	*Industrial Relations Act 1988* (Cth)	Act No. 86 of 1988, dated 1 April 1994	ss 173DE, 173EE