HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 06 Mar 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S119/2024
File Title:	Helensburgh Coal Pty Ltd v. Bartley & Ors
Registry:	Sydney
Document filed:	Form 27F - Appellant's Outline of oral argument
Filing party:	Appellant
Date filed:	06 Mar 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HELENSBURGH COAL PTY LTD**
Appellant

and

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

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: INTERNET PUBLICATION

This outline of oral argument is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1: The proper construction of s 389

1. Section 389(2) of the *Fair Work Act 2009* (Cth) (**FW Act**) is directed to the date of the employee's dismissal, and to the employer's enterprise as it existed as at that date (after the change in operational requirements affecting the enterprise and after the employer's rearrangement of its enterprise in response to that change). The question it poses is whether it would have been reasonable in all the circumstances for the otherwise redundant employee to be redeployed within the employer's enterprise (or that of an associated entity) as it existed as at that date **(AS [35], [45]; ASR [3]-[5])**.

2. It does not authorise the Fair Work Commission (**FWC**) to inquire into other changes that the employer could have made to its enterprise in response to the change in operational requirements so as to create room within its enterprise to redeploy the otherwise redundant employee. The section requires the FWC to take the enterprise as it found it, not as the FWC might have reorganised it **(AS[38]-[46]); ASR [6])**.

3. The construction accepted by the Full Court:

   (a) wrongly treats the important jurisdictional question posed by the section as "untethered from fixed standards" **(AS [37])**;

   (b) failed to treat the objective standard of "reasonable", the objective business organisation in "redeployed" and the objective particular business organisation referred to by "the employer's enterprise", all within s 389(2), as part and parcel of the judicial exercise requiring regard to "all the circumstances" **(AS [33]-[37])**;

   (c) is contrary to an express legislative object of Part 3-2 of the FW Act, namely that of "establish[ing] procedures for dealing with unfair dismissal that … are quick, flexible and informal" **(AS [44])**;

   (d) impermissibly intrudes upon the recognised responsibility of the employer to rearrange its own organisational structure **(AS [39]-[41])**;

   (e) impermissibly authorises the FWC to go behind the business judgment made by the employer (in the case of a corporation as required as a matter of company law) as to how best to rearrange its enterprise in response to the change in its operational requirements and to substitute its own judgment for that of the employer (a step which cannot be justified by characterising the FWC as a "specialist tribunal") **(ASR [9])**;

   (f) impermissibly authorises the FWC to decide which workers ought to have been dismissed or displaced contrary to the clear legislative contemplation evident from the explanatory memorandum **(AS [42]-[43]; ASR [12])**.

4. The appellant's argument is not hindered by its recognition that an enterprise is an inherently dynamic state of affairs subject to organic change (such that if there were vacancies that were known or foreseen at the time of a dismissal, that would be a matter capable of informing the assessment required by s 389(2)). That does not justify the respondent employees' approach, which posits a hypothetical intervention by management that alters the existing structure of the enterprise **(AS [46], ASR [7])**.

5. Sections 81, 84 and 391 of the FW Act are dealing with different issues and do not assist in the construction of s 389(2) **(ASR [8])**. An object of Part 3-2 is to balance between the positions of business and employees **(ASR 11)**.

6. It was an aspect of the enterprise that some Nexus or Mentser employees would continue to be deployed. The real character of the respondent employees' argument was that that aspect of the enterprise should be radically altered **(AS [18]-[19]; ASR [13])**.

Ground 2: The appropriate test for appellate review

7. The Full Court erred in finding that s 389(2) invited "no uniquely correct answer" and rested upon "value judgments or opinions that are untethered from fixed standards" (**CAB 161 [78] and [80]**) **(AS [48]-[59]; ASR [14]-[16])**.

Draft notice of contention

8. The extension of time should be refused because the grounds identified are not capable of supporting the decision below (**ASR [17]**).

Dated: 5 March 2025

…….
Bret Walker