HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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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 REPLY

## PART I: CERTIFICATION

1. These reply submissions are in a form suitable for publication on the internet.

## PART II: REPLY TO THE RESPONDENTS' ARGUMENTS

### Grounds 1(a) and 1(b): the proper construction of s 389

2. The essence of the respondent employees' argument is that s 389(2) calls for "a wide survey … into what the employer or associated entity could reasonably do to preserve the employment relationship" (**RS [34]**), and that this "wide survey" includes going behind the business judgment of the employer as to how it should respond to changes in its operational requirements by considering whether:

   (a) other "changes could be made to an employer's enterprise to retain a redundant employee" (**RS [34]**);

   (b) there were other "steps the employer could have taken (including re-arranging or re-allocating work) to maintain the employee's employment in its enterprise" (**RS [50]**);

   (c) 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" (**RS [64]**).

3. The respondents' argument fails to respect the distinction between the following matters (in temporal sequence):

(a) *first*, the change in operational requirements affecting the employer's enterprise;

(b) *secondly*, the employer's business judgment as to how it should respond to the change which manifests in the rearrangement of its enterprise;

(c) *finally*, the statutory question posed by s 389(2), *viz.* whether instead of dismissal, it would have been reasonable in all the circumstances for the person to be redeployed within the employer's enterprise or that of an associated entity.

4. There is no warrant in the text, context or purpose of the provision for the statutory question to reach back into the two anterior stages.

5. **Text**. The respondents accept that the text directs attention to the time of dismissal (**RS [24]**). Yet they do not accept that this entails taking the enterprise as it was at that time (post rearrangement to accommodate the change in operational requirements).

6. They rely upon what they assert is the ordinary meaning of "redeploy" (**RS [25]-[26]**). Of the dictionary definitions noted by the respondents, the relevant meaning is "transfer". The notion of it being reasonable to redeploy or transfer a person assumes that there is room within the enterprise for the transfer to occur. The notion does not strike at the anterior stage to encompass the *hypothetical creation* of room so as to permit redeployment or transfer. Rather, it takes the enterprise *as it existed in fact* at the time of dismissal, and asks a straightforward question about redeployment or transfer within that enterprise. It does not assist the respondents to point out that one dictionary definition extends beyond "transfer" to "rearrange" or "reorganise". The object of the verb in s 389(2) is the person, not the enterprise.

7. **RS [23]** and **RS [29]** misstate the appellant's argument. The appellant does not contend that the "enterprise" should be limited to "an unalterable state of affairs at the time of a redundant employee's dismissal", or that it "must be fixed in point of time" (emphasis added). Instead, the appellant recognises that "enterprise" captures a

dynamic state of affairs (**AS [46]**).[1] Contrary to the respondents' submissions, this is in no way fatal to the appellant's argument. The point is that the existing state of affairs will or may be one that is inherently subject to organic change. Where that is so, known or predicted changes are within the purview of the existing enterprise at the date of dismissal and may be considered as part of the statutory question. This is fundamentally different from the kind of hypothetical change urged by the respondents, which posits a hypothetical intervention by management which alters or dislocates the existing structure and organic processes of the enterprise.

8. **Context**. 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). Sections 81 and 84 are not concerned with dismissal at all. Section 391 is directed to remedies after a dismissal has been found to be unfair. Moreover, contrary to **RS [33]**, the remedy of reinstatement does not depend on identification of a position to which the employee can be reinstated at the time of the order. To remedy the wrong, the FWC has the power to order reinstatement without identifying a position to which the employee should be reinstated, or where that order would require the creation of a position.[2] In a normative sense, this reflects the fact the employer has been found to be a wrongdoer and thus should not benefit from its own wrongdoing by being permitted to deny reinstatement.

9. The characterisation of the FWC as a "specialist tribunal" does not support the broad ranging construction urged by the respondents (**RS [35]-[37]**). The expertise of the members of the FWC does not extend to making business judgments of the kind made by directors and officers of employers when determining how to respond to changes in operational requirements. The members of the FWC are not to be equated with, or authorised to act in substitution of, such directors and officers.

10. **Legislative history**. **RS [48]** misstates the point made by the appellant in **AS [44]** and footnote 17. The point was not that there had been a wholesale reversion to the pre-*WorkChoices* position. Rather, as explained in footnote 17, the reversion concerned the ability of the FWC to consider actual or foreseeable redeployment opportunities. The appellant's point is that addressing that mischief did not require or entail

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[1] Cf. Hoffmann J's invocation of the "dynamic status quo" in *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 at 681F-H and 685E-G.

[2] See, for example, *Technical and Further Education Commission (t/as TAFE NSW) v Pykett* (2014) 240 IR 130 at [44]-[53] (Ross P, Booth DP and Bissett C).

empowering the FWC to unwind the employer's business judgment as to how to respond to any changes in operational requirements.

11. **Purpose**. Contrary to **RS [51]-[52]**, it is not appropriate to characterise s 389(2) as having a remedial or beneficial purpose. As s 381 makes clear, the object of Part 3-2 is more nuanced in seeking to balance the needs of business with the needs of employees.[3] The language of s 389 should not be strained[4] so as to give licence to the FWC to render its own judgment as to how an employer should respond changes in operational requirements, or to set the employer's own business judgment at nought.

12. **RS [53]** does not adequately address the appellant's point. The scenario in **AS [43]** raises a realistic[5] prospect that applies wherever multiple unfair dismissal applications are heard together in the context of redundancies involving more than one employee.

13. **Additional facts and application**. If the appellant's construction is accepted, the additional facts referred to in **RS [8]-[12]** cannot affect the outcome. Even if the appellant or its associated entity might have been *legally entitled* to withdraw work from Nexus and Mentser, the undisputed premise was that, as a result of a business judgment, the remaining Nexus and Mentser employees were going to continue their work at the Mine for the foreseeable future. That is why the respondents' argument was (and remains) that the Nexus and Mentser employees ought to have been removed from their work at the Mine and the respondent employees redeployed in their place.

**Ground 2: The appropriate test for appellate review**

14. The respondents' submission that there is no uniquely correct answer to the statutory question of whether the dismissal was "a case of genuine redundancy" should be rejected. The norm of objective reasonableness supports the proposition that there is or should be but one legally permissible answer: see **AS [57]-[58]**.

15. The respondents wrongly submit that the exercise is "forward looking" (**RD [55]**) and "invites an open textured and value-laden assessment" (**RD [56]**) of "a possible hypothetical redeployment" (**RC [56]**). The exercise is much simpler. It involves the

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3 Cf. *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at 16 [29] (French CJ, Crennan, Kiefel and Keane JJ).

4 *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638 (Mason, Brennan, Deane and Dawson JJ) and *IW v City of Perth* (1997) 191 CLR 1 at 12 (Brennan and McHugh JJ).

5 Cf. *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at 188 [94] (Keane, Nettle and Gordon JJ).

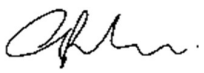
application of a legal standard to a concrete factual situation. It does not invite the equivalent of judicial prophesy or speculation,[6] regardless of whether the FWC is to be regarded as a specialist tribunal (cf. **RS [59]**).

16. The respondents' submissions concerning s 400 of the FW Act conflate the constraints on when an appeal may be brought or when permission to appeal may be granted with the standard of appellate review that applies once permission has been granted (**RS [66]-[68]**): compare this Court's ruling in *Moore*.[7] The relevant appellate standard is determined by the nature of the decision under review.

**PART III: DRAFT NOTICE OF CONTENTION**

17. The grounds identified in the draft notice of contention are not capable of supporting the decision below. The extension of time should be refused on this basis. *First*, an error as to the nature of the test of appellate review to be applied is a jurisdictional error, not a mere error within jurisdiction: see **AS [52]**, **[59]**. *Secondly*, the error was material in the sense explained in *LPDT*: see **AS [59]**. There is a realistic possibility that the decision could have been different if the Full Bench, applying the correctness standard, had put into the scales the serious impact on the employees of Nexus and Mentser. *Thirdly*, the discretionary factors that the respondents point to do not warrant this Court declining to correct the error in the Full Bench's approach below and granting the relief necessary to ensure that the parties' rights and obligations are determined in accordance with law.[8] The application of the correctness standard was raised squarely by the appellant before the Full Court of the Federal Court, where the respondent employees urged the repetition of the error.

Dated: 9 December 2024



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6 Cf. *Wright v De Kauwe (No 2)* [2024] WASCA 51 at [218]-[219] (Mitchell JA).
7 At [21]-[27], and particularly [25].
8 Cf. *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 397-398 [30]-[33] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).