# HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD AND BEECH-JONES JJ

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HELENSBURGH COAL PTY LTD APPELLANT

AND

NEIL BARTLEY AND OTHERS NAMED
IN THE SCHEDULE RESPONDENTS

*Helensburgh Coal Pty Ltd v Bartley*

[2025] HCA 29
*Date of Hearing: 6 March 2025*

*Date of Judgment: 6 August 2025*

S119/2024

**ORDER**

*Appeal dismissed.*

On appeal from the Federal Court of Australia

**Representation**

B W Walker SC with A M Pomerenke KC and P M Zielinski for the appellant (instructed by MinterEllison)

J T Gleeson SC with P A Boncardo for the first to twenty-second respondents (instructed by Mining and Energy Union)

Submitting appearance for the twenty-third respondent

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**CATCHWORDS**

**Helensburgh Coal Pty Ltd v Bartley**

Industrial law (Cth) – Unfair dismissal – Genuine redundancy – Where employer dismissed employees because of changes in operational requirements of employer's enterprise – Where employer continued to deploy contractors to perform work in employer's enterprise – Where s 389(2) of *Fair Work Act 2009* (Cth) provides dismissal not genuine redundancy if it would have been reasonable in all circumstances for person to be redeployed within employer's enterprise – Whether Fair Work Commission, in undertaking s 389(2) inquiry, permitted to inquire into whether employer could have made changes to its enterprise to create or make available position for otherwise redundant employee.

Appeals – Standard of appellate review – Where Full Bench of Fair Work Commission applied *House v The King* standard of appellate review to review of decision that dismissals were not cases of genuine redundancy under s 389 of *Fair Work Act* – Whether *House v The King* appropriate standard of appellate review – Whether application of wrong standard of appellate review would constitute jurisdictional error.

Words and phrases – "affording latitude", "all the circumstances", "appeal by way of rehearing", "appellate restraint", "business, activity, project or undertaking", "case of genuine redundancy", "contractors", "correctness standard", "counter-factual", "discretionary decision", "employer's enterprise", "employment", "enterprise", "error within jurisdiction", "Fair Work Commission", "genuine redundancy", "*House v The King*", "hypothetical", "insourcing", "job", "judicial review", "jurisdictional error", "nature of the employer's enterprise", "operational requirements", "position", "reasonable in all the circumstances", "redeploy", "reinstatement", "restructure", "standard of appellate review", "termination", "unfair dismissal", "work", "would have been reasonable".

*Fair Work Act 2009* (Cth), ss 385, 389.

1 GAGELER CJ, GORDON AND BEECH-JONES JJ. The first to twenty-second respondents[1] ("the Employees") worked at the Metropolitan Coal Mine ("the Mine") operated by the appellant, Helensburgh Coal Pty Ltd ("Helensburgh").[2] Two companies, Nexus Mining Pty Ltd ("Nexus") and Mentser Pty Ltd ("Mentser"), were engaged, in 2018 and 2019 respectively, to provide various services at the Mine. Nexus and Mentser engaged contractors to provide those services (collectively, "the Contractors").

2 The COVID-19 pandemic significantly reduced the demand for the coking coal extracted at the Mine. As a result, in May 2020, Helensburgh gave notice to employees that it had resolved to restructure its operations at the Mine by reducing the number of crews and reducing the number of days per week worked, thereby requiring fewer workers.

3 During consultations with workforce representatives, Helensburgh was asked to mitigate the impact of the restructure on employees by reducing its reliance on the Contractors. Helensburgh agreed to some "insourcing" but did not agree to terminate the arrangements with Nexus and Mentser. The restructure resulted in the number of the Contractors falling by approximately 40 per cent and the number of employees being reduced by 90, with 47 forced redundancies. On 24 June 2020, the Employees were dismissed from their employment. On or about 10 July 2020, the Employees applied to the Fair Work Commission ("the FWC") for remedies for unfair dismissal under s 394 of the *Fair Work Act 2009* (Cth) ("the FW Act"). Helensburgh objected to the applications on the basis that the terminations were cases of "genuine redundancy" under s 389 of the FW Act.

4 The issue for determination before the FWC was whether it would have been reasonable in all the circumstances for the Employees to be redeployed within Helensburgh's enterprise for the purposes of s 389(2) of the FW Act. If it would have been reasonable, the dismissal of each Employee was not a case of genuine redundancy and each could have their unfair dismissal claim heard on the merits.

5 Through a series of four decisions, including two first instance decisions and two appeals, the FWC ultimately held that the terminations were not cases of "genuine redundancy" because it would have been reasonable in all the circumstances for the Employees to be redeployed to perform the work that was being performed by the Contractors. Helensburgh applied to the Full Court of the Federal Court of Australia for a writ of certiorari quashing all four

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**1** The twenty-third respondent is the Fair Work Commission.

**2** Although the Mine is also operated by other companies, and Helensburgh is not charged exclusively with managing the Mine, there is no issue in this matter about corporate identity.

FWC decisions and a writ of prohibition to compel the FWC to cease dealing further with all the unfair dismissal applications. The Full Federal Court refused relief and dismissed Helensburgh's application.

6 The principal issue before this Court concerns the scope of the inquiry mandated by s 389(2); in undertaking the inquiry of whether it would have been reasonable in all the circumstances for a person to be redeployed within the employer's enterprise, can the FWC consider whether the employer could have made changes to how the employer uses its workforce to operate its enterprise? Helensburgh contended that, properly construed, s 389(2) does not permit the FWC to consider changes to the ways in which it might have conducted its enterprise, including by replacing the Contractors with the Employees.

7 The question as to whether the FWC may consider other ways an employer might use its workforce to operate its enterprise, as part of the inquiry under s 389(2), turns on the correct construction of that provision. Addressing that issue does not require this Court to determine whether the FWC's conclusion about the reasonableness of redeployment was correct. For the reasons which follow, the FWC was permitted by s 389(2) to inquire into whether Helensburgh could have made changes to how it uses its workforce to operate its enterprise.

8 The second issue raised by Helensburgh in this Court – namely, is the decision of whether a dismissal is a "genuine redundancy" a discretionary decision, such that *House v The King*[3] applies – does not need to be addressed.

9 For the reasons that follow, the appeal should be dismissed.

**Legislative framework**

10 Chapter 3 of the FW Act addresses the "Rights and responsibilities of employees, employers, organisations etc". Part 3-2 addresses "Unfair dismissal". Section 381(1) states the object of Pt 3-2 is threefold: (a) to establish a framework for dealing with unfair dismissal that balances the needs of business (including small business) and the needs of employees; (b) to establish procedures for dealing with unfair dismissal that are quick, flexible and informal and address the needs of employers and employees; and (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement. Those procedures and remedies, "and the manner

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**3** (1936) 55 CLR 499.

of deciding on and working out such remedies, are intended to ensure that a 'fair go all round' is accorded to both the employer and employee concerned".[4]

11 Section 385 defines what it means for a person to have been "unfairly dismissed". There are four elements, each of which must be satisfied. Importantly for this appeal, in order for a person to be unfairly dismissed, the dismissal must not have been a case of "genuine redundancy".[5] Section 389 defines "genuine redundancy" positively and negatively as follows:

> "(1) A person's dismissal was a case of ***genuine redundancy*** if:
>
> (a) the person's 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 has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
>
> (2) A person's dismissal was not a case of ***genuine redundancy*** if it would have been reasonable in all the circumstances for the person to be redeployed within:
>
> (a) the employer's enterprise; or
>
> (b) the enterprise of an associated entity of the employer."

The most important part of s 389 for the purposes of this appeal is s 389(2) – namely, "[a] person's dismissal was not a case of ***genuine redundancy*** if it would have been reasonable in all the circumstances for the person to be redeployed within ... the employer's enterprise".[6] The FW Act defines "enterprise" to mean "a business, activity, project or undertaking".[7] The FW Act does not define what it means for a "person to be redeployed".

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**4** FW Act, s 381(2).

**5** FW Act, s 385(d).

**6** FW Act, s 389(2)(a).

**7** FW Act, s 12 definition of "enterprise".

12 Division 4 of Pt 3-2 of the FW Act contains the remedies for unfair dismissal. Division 4 commences with s 390, which provides that the FWC may order remedies for unfair dismissal, including reinstatement or the payment of compensation, if, among other things, the person has been unfairly dismissed. Significantly, reinstatement is the primary remedy for unfair dismissal: s 390(3) provides that the FWC must not order the payment of compensation to the person unless it is satisfied that reinstatement of the person is inappropriate and an order for payment of compensation is appropriate in all the circumstances of the case.

13 Section 391 deals with reinstatement. It provides that an order for a person's reinstatement must be an order that the person's employer at the time of dismissal reinstate the person by reappointing the person to the position in which the person was employed immediately before the dismissal *or* appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal. Section 391(1A) provides that, if the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal and that position, or an equivalent position, is a position with an associated entity of the employer, the order for reinstatement may be an order to the associated entity.

14 Two procedural provisions in Div 5 are important. Section 394 confers upon a "person who has been dismissed" the right to apply to the FWC for an order under Div 4 of Pt 3-2. Section 396 provides that the FWC, before considering the merits of an application for unfair dismissal, must decide, among other things, "whether the dismissal was a case of genuine redundancy". It is because s 396 isolates this inquiry as a separate, and preliminary, question that this appeal, and the decisions below, are only concerned with the question of whether the terminations were genuine redundancies. This appeal will not resolve the ultimate question of whether the Employees were unfairly dismissed.

**FWC decisions**

*First Commissioner Riordan decision*

15 On or about 10 July 2020, the Employees applied to the FWC for remedies for unfair dismissal, pursuant to s 394 of the FW Act. Helensburgh objected to the applications, submitting that the FWC did not have jurisdiction under s 396 of the FW Act to consider the merits of the applications because each termination was a genuine redundancy within the meaning of s 389 of the FW Act.

16 The Employees argued that the terminations were not genuine redundancies because Helensburgh should have taken steps to redeploy the Employees to perform work that was performed by the Contractors. Helensburgh argued that the work that was performed by the Contractors was specialist work. Helensburgh submitted that s 389(2) of the FW Act did not

oblige it to structure its enterprise to create roles for redundant employees and that it would not have been reasonable to remove all the Contractors in order to redeploy the Employees.

17 Commissioner Riordan was not satisfied that the work performed by the Contractors was specialist work. Commissioner Riordan held that, therefore, it would have been reasonable in all the circumstances to redeploy the Employees into the roles performed by the Contractors. Commissioner Riordan held that the Employees' terminations did not satisfy s 389(2)(a) of the FW Act and dismissed Helensburgh's jurisdictional objection.

*First appeal decision*

18 Helensburgh appealed the first Commissioner Riordan decision to the Full Bench of the FWC. The Full Bench rejected Helensburgh's contention that the work of the Contractors was not part of Helensburgh's "enterprise" and was therefore excluded from consideration under s 389(2)(a). The Full Bench reasoned that "there are no binding principles that attach to a consideration of whether redeployment within the enterprise is 'reasonable in all of the circumstances'" and did not consider it reasonable "to establish a rule, as suggested by [Helensburgh], as to what contracted work it might be feasible to consider and what should be automatically discounted in considering the reasonableness or otherwise of redeployment".

19 The Full Bench agreed with Helensburgh that, in making his assessment, Commissioner Riordan was required to consider the feasibility, from the employer's perspective, of insourcing the Contractors' work *in addition* to considering the nature of that work, including whether or not it was specialised. The Full Bench held that Commissioner Riordan was required to consider whether it was reasonable, in all the circumstances, to redeploy the Employees, and that the Commissioner had failed to do so because he had considered only whether the Employees could perform the Contractors' work. The Full Bench allowed the appeal and remitted the matter to Commissioner Riordan.

*Second Commissioner Riordan decision*

20 Again, the issue was whether the terminations were cases of "genuine redundancy" – specifically, whether it would have been reasonable in all the circumstances for the Employees to be redeployed. Helensburgh accepted that some of the work performed by the Contractors could have been performed by the Employees, but submitted that the removal of the Contractors would have represented a "fundamental change" to its operations at the Mine and that it would have been "operationally impracticable" to redeploy the Employees in the work performed by the Contractors.

21 Commissioner Riordan held that it was feasible for Helensburgh to insource some of the work of the Contractors. Commissioner Riordan did not agree that doing so was

"operationally impracticable", reasoning, in effect, that Helensburgh could work around any inconveniences associated with insourcing. Commissioner Riordan held that much of the work performed by Nexus was not specialist work, and that there was "no easily identifiable reason why [the Employees] could not be performing this work". Commissioner Riordan held that the terminations of the Employees were not cases of genuine redundancy.

*Second appeal decision*

22 Helensburgh appealed the second Commissioner Riordan decision to the Full Bench of the FWC. The Full Bench stated that, just because the Employees had the necessary skills to undertake the work of the Contractors, that was not sufficient to conclude that it would have been feasible to insource the work of the Contractors. The Full Bench held that, following a consideration of the feasibility of insourcing the work of the Contractors and a determination of whether the Employees had the necessary skills to undertake that work, Commissioner Riordan needed to return to the question he was required to answer – namely, whether it was reasonable in all the circumstances to redeploy the Employees.

23 Nonetheless, the Full Bench "[did] not agree that the Commissioner applied the wrong test or that he failed to take into account relevant considerations in reaching his decision". The Full Bench said, "A full and fair reading of the [second Commissioner Riordan decision] indicates that ... the Commissioner turned his attention to the matters identified in the first appeal decision as being relevant matters to consider in deciding if insourcing was feasible." And, "[t]he Commissioner was not narrowly focussed in his investigation and, having considered all of the circumstances, including the feasibility of insourcing, concluded that redeployment was reasonable in all of those circumstances". The Full Bench dismissed the appeal.

**Full Federal Court decision**

24 Helensburgh applied to the Full Federal Court for a writ of certiorari quashing all four FWC decisions and a writ of prohibition to compel the FWC to cease dealing further with all of the unfair dismissal applications. The relief sought by Helensburgh was only available if the challenged decisions were affected by jurisdictional error. It is only necessary to address the first three of Helensburgh's grounds of review.

25 Grounds 1 and 2 contended that, insofar as s 389(2) of the FW Act contemplates a dismissed employee's potential for redeployment, s 389(2) does not authorise consideration of potential redeployment to roles that are already filled by others. Katzmann and Snaden JJ held that s 389(2) contemplates a "qualification of some width: specifically, redeployment that 'in all [of] the circumstances' would have been 'reasonable'". Their Honours reasoned that the phrase "'would have been' reasonable ... necessarily envisages some analysis of the measures that

an employer *could* have taken in order to redeploy an otherwise redundant employee" (emphasis in original). Their Honours then held that:

> "Given the undeniable width of the text in which the exemption is couched, there is no reason to excise from 'all [of] the circumstances' the possibility that an employer might free up work for its employees by reducing its reliance upon external providers. The existence of that possibility in any given case is a circumstance that is capable of informing whether redeployment 'would have been reasonable'."

26 Katzmann and Snaden JJ also held that the unavailability of a position to which a redundant employee could have been conveniently redeployed "is a circumstance that, in any given case, might well favour a conclusion that redeployment would not have been reasonable. Whether that is so, however, will depend upon 'all [of] the circumstances'." Their Honours held that it is for the FWC to determine, within the "wide bounds of what is legally reasonable", whether redeployment would have been reasonable in any given case, and that that is what occurred in the decisions below. Katzmann and Snaden JJ dismissed grounds 1 and 2.

27 Raper J did not disagree with their Honours' reasons on grounds 1 and 2 but gave additional reasons. Her Honour said that although "[t]here is an apparent attractiveness to the construction of s 389(2) urged upon this Court by [Helensburgh] ... s 389(2) does not confine redeployment to a particular (vacant) position – the text does not constrain it". Her Honour concluded that:

> "It is not insignificant that the effect of the Full Bench's reasoning is that there does not need to be a vacant position in the enterprise for redeployment to be 'reasonable in all the circumstances'. A consequence is that the [FWC], satisfied that there is not a 'genuine redundancy' may enter the fray, as part of the unfair dismissal proceedings and, by operation of s 391, order reinstatement which will require the creation of a new position and potentially as is the case here, lead to the termination of third-party contractual arrangements and a fundamental change of the employer's business model. It would be a rare case indeed where an applicant (seeking to avail him or herself of unfair dismissal protections) could satisfy the [FWC], under this provision, that redeployment in such circumstances, was reasonable."

Raper J held that the rightness or wrongness of the ultimate conclusion was beyond the Full Federal Court's remit, and that it was possible that the consequences just identified would be the subject of argument as to the appropriate relief under s 391 at the end of the unfair dismissal proceedings.

28 Ground 3 contended that the Full Bench incorrectly considered Commissioner Riordan's second decision to be discretionary and thus subject to the *House v The King* standard

of appellate review. Katzmann and Snaden JJ relevantly held that, even if the Full Bench "wrongly arrived at its conclusion that Commissioner Riordan's decision was untainted by error", the Full Bench's error would have been an error within jurisdiction, as opposed to an error as to the nature of the FWC's jurisdiction, and therefore not a jurisdictional error. Their Honours dismissed ground 3. Raper J agreed with their Honours' reasons in relation to ground 3.

**Grounds of appeal**

29 Helensburgh pursued essentially two appeal grounds in this Court. The first concerned the correct construction of s 389(2). Helensburgh again submitted that the language of s 389(2) does not permit the FWC to inquire into whether an employer could have made changes to its enterprise so as to create or make available a position for an employee who would otherwise have been redundant. It also submitted that the "enterprise" referred to in s 389(2) is the actual enterprise of the employer at the date of dismissal, and not some other enterprise conceived of in the mind of the FWC. By its second ground of appeal, Helensburgh once again contended that the correctness standard of review was applicable before the Full Bench of the FWC.

*Ground 1 – nature of inquiry under s 389(2)*

30 Section 389(1) of the FW Act defines "genuine redundancy". Unless that provision is satisfied, s 389(2) is not reached. Although there was no dispute that s 389(1)(a) and (b) was satisfied in this case, it is necessary to say something further about s 389(1)(a). It is a factual inquiry about what happened. The first part of s 389(1)(a) turns on the existence of a decision in fact made by an employer. It is the employer's decision to no longer require a person's job to be performed by anyone. The provision does not look to whether the employee's *position*, in terms of job title, was no longer required, but whether their "job", in the sense of the nature of the work they performed, was no longer required. Section 389(1) refers to a decision by the employer and no one else.

31 The second part of s 389(1)(a) provides that the job must have ceased to be needed "because of changes in the operational requirements of the employer's enterprise". An employer determines what those changes might be or if they are needed. There is no reasonableness inquiry in s 389(1). Therefore, the fact that the employer, due to changes in operational requirements, no longer required the work to be performed by anyone need not have been reasonable.

32 Section 389(2) then provides a protection for the dismissed employee and provides that protection by posing a "counter-factual". It provides that notwithstanding that the employer no longer required the dismissed employee's job, namely their work or their duties, to be performed by anyone because of changes in the operational requirements of the employer's enterprise, the person's dismissal was nonetheless *not* a case of genuine redundancy "if it would

have been *reasonable in all the circumstances* for the person to be redeployed within ... the *employer's enterprise*" (emphasis added).[8]

33 Unlike s 389(1), s 389(2) is qualified by a requirement of reasonableness. A person's dismissal was not a case of genuine redundancy "if it would have been reasonable in all the circumstances for the person to be redeployed". The language is broad.[9]

34 Nonetheless, the range of the inquiry permitted by s 389(2) is limited in the sense that the inquiry is in respect of the employer's (or an associated entity's) "enterprise" and that the redeployment of the person must have been reasonable "in all the circumstances". It is useful to address each element of the inquiry under s 389(2).

35 First, the employer's "enterprise" in s 389(2) is its "business, activity, project or undertaking".[10] This provides the scope of the inquiry under s 389(2). It is not appropriate for the FWC to disregard the very nature of the employer's enterprise. It cannot, for example, change the nature of the business, activity, project or undertaking of the employer's enterprise. The nature of the employer's "enterprise", however, is not defined by reference to how the employer uses its workforce to operate its enterprise, or why it does so in that manner.[11] Such circumstances are not the "business, activity, project or undertaking".

36 Second, the inquiry is whether it would have been reasonable in all the circumstances for the person to be "redeployed" within the employer's enterprise. "Redeployed" does not require there to be a vacant position. The word "redeploy" does not, by its ordinary meaning, exclude or prohibit some change to how an employer uses its workforce to operate its enterprise that facilitates redeployment. Indeed, the ordinary meaning of "redeploy" – "to rearrange, reorganise, or transfer"[12] – envisages some reorganisation or rearrangement. In other words, it does not mean that it would only have been reasonable to redeploy the person if there was a vacant position in the enterprise. This is reinforced by the fact that, unlike s 389(1), s 389(2) does not refer to a "job". The text of s 389(2) therefore does not, on its face, assume that a job is readily available. Rather, "redeployed" looks to whether there was work, or a demand for

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**8** Or the enterprise of an associated entity of the employer.

**9** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 606 [62].

**10** FW Act, s 12 definition of "enterprise".

**11** See [40] below.

**12** *Macquarie Dictionary*, online, definition of "redeploy".

work, within the employer's enterprise or an associated entity's enterprise that could have been performed by the otherwise redundant employee.

37 Third, the inquiry is whether redeployment "would have been reasonable". The words "*would have been*" direct the FWC to consider a hypothetical situation. A hypothetical is inherently a consideration of a situation *changed* from what it was. The use of the past tense directs attention to the situation at the time of the dismissal. The hypothetical inquiry under s 389(2) therefore asks what, at the time of the dismissal, could have been done to redeploy the employee within the employer's enterprise.[13] In other words, would it, at the time of the dismissal, have been reasonable to redeploy the employee to perform other work within the employer's enterprise.

38 Fourth, the inquiry is a reasonableness inquiry. Reasonableness is an objective question to be determined by the FWC. The inquiry does not look to reasonableness only from the point of view of the employer, or only from the point of view of the employee (although they are relevant). It is an inquiry as to reasonableness in the context of the employer's enterprise, with regard to the nature of that enterprise.

39 Fifth, the inquiry is whether redeployment would have been reasonable in "all the circumstances". The words "all the circumstances" are unmistakably broad; they point against the existence of binding rules concerning the application of s 389(2) in all cases irrespective of the circumstances of each particular case. If there were circumstances that were intended to inform whether, in any given case, redeployment would have been reasonable, the legislature would not have used the qualifying phrase "in all the circumstances".

40 "[A]ll the circumstances" can include the attributes of the otherwise redundant employee, such as their skill set, experience, training and competencies. "[A]ll the circumstances" can also include those attributes of the employer's enterprise that concern its workforce, such as: its policies, including appetite for risk; plans; processes; procedures; business choices, such as a decision to terminate a contract in the future and a decision to persist with using contractors; decisions regarding the nature of its workforce, such as whether it has a blended workforce of both employees and contractors; contract terms, such as whether they are "as needs" contracts and whether the contractors are on daily work orders or on some long-term fixed commitment; practical concerns, such as whether redeployment would require the employee to undergo further training; and anticipated changes, such as another employee going on parental leave or retiring, a contract expiring, or a position being performed by a contractor while waiting for an employee to be hired. These are "circumstances" of how an employer uses its workforce to operate its enterprise, or why it does so in that manner, which can, depending on the circumstances of the

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**13** Or the enterprise of an associated entity of the employer.

case, bear on whether it would have been reasonable to redeploy an employee within the enterprise. These circumstances are not directed at the size, scope or nature of the enterprise, which are fixed at the date of dismissal.

41 That approach to s 389(2) and the nature of the inquiry to be conducted under s 389(2) further an object of the unfair dismissal scheme under Pt 3-2 of the FW Act, which is to establish a framework for dealing with unfair dismissal that balances the needs of business and the needs of employees.[14] The language of s 389 does not prohibit asking whether an employer could have made changes to how it uses its workforce to operate its enterprise so as to create or make available a position for a person who would otherwise have been redundant. None of the statutory language, context or purpose supports such a proscriptive rule. Yet that was the very proposition of law upon which Helensburgh based ground 1 of its appeal. That proposition must be rejected. Moreover, Helensburgh's distinction between "organic" and "inorganic" change to the enterprise, the former being within the scope of the inquiry under s 389(2) and the latter being outside it, is not apparent from the text of s 389(2), which directs the FWC to consider "all the circumstances".

42 The statutory context, including the objects of Pt 3-2, compels no contrary conclusion. For example, s 389(1) does not exclude considering changes to how the employer uses its workforce to operate its enterprise from the FWC's inquiry under s 389(2). Section 391(1)(b) concerns the remedy of reinstatement and provides that an order for reinstatement can be an order appointing the dismissed person to another position. It has been held that, upon being ordered to reinstate the dismissed person, the employer may create a new position for the purpose of doing so and that "it will not be to the point that, in the absence of the order, the employer might not have created the position".[15]

43 Moreover, the extrinsic materials do not support the limitation proposed by Helensburgh. The statement from the Explanatory Memorandum,[16] relied on by Helensburgh, that an example of redeployment not being reasonable is where there are "no positions available for which the employee has suitable qualifications or experience" is no more than a high-level and undetailed example of "circumstances" where redeployment might not be possible; it cannot be

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**14** FW Act, s 381(1)(a).

**15** *Technical and Further Education Commission v Pykett* (2014) 240 IR 130 at 143-144 [47], quoting *Anthony Smith & Associates Pty Ltd v Sinclair* (1996) 67 IR 240 at 244.

**16** Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 247 [1552].

read as a clear statement of Parliament's intention that the FWC cannot consider whether the employer could have made changes to how it uses its workforce to operate its enterprise in order to make a position available. The statement says nothing about the meaning of the employer's "enterprise".

44 The further statement from the Explanatory Memorandum[17] that "[w]hether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy" does not suggest that the FWC cannot consider how the employer uses its workforce to operate its enterprise, or why it does so in that manner, as part of "all the circumstances" under s 389(2); rather, the FWC cannot consider the *process* for selecting individuals for redundancy.

45 The Explanatory Memorandum[18] provides a fictional scenario of a restaurant – referred to as an "[i]llustrative example" – where, due to reduced profits, the restaurant makes two employees redundant. In the scenario, "[t]here are no redeployment opportunities ... as [the restaurant] only employs a small number of staff", and the redundancy is therefore a genuine redundancy.[19] The illustrative example is a short and fact-deficient example which says nothing about whether the FWC could consider whether, in a different scenario, changes could have been made to how the employer uses its workforce to operate its enterprise in order to free up work.

46 Similarly, the legislative history of s 389 does not justify reading into s 389(2) the limitation proposed by Helensburgh. Prior to the FW Act and the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), the Australian Industrial Relations Commission was required to consider, in determining whether a termination was harsh, unjust or unreasonable, "whether there was a valid reason for the termination related to ... the operational requirements of the employer's undertaking"[20] and, among other things, "any other matters that the Commission

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**17** Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 247 [1553].

**18** Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 247.

**19** Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 247.

**20** *Workplace Relations Act 1996* (Cth), s 170CG(3)(a), prior to the enactment of the *Workplace Relations Amendment (Work Choices) Act*.

considers relevant".[21] There was no express ability to consider redeployment, although that could potentially have been considered under "any other matters that the Commission considers relevant".

47 After the enactment of the *Workplace Relations Amendment (Work Choices) Act*, an employee could not apply for relief for "harsh, unjust or unreasonable" termination if their employment was terminated for "genuine operational reasons".[22] "[O]perational reasons" were defined expansively.[23] Redeployment opportunities were generally treated as irrelevant to "genuine operational reasons".[24] Under the legislation, there was no ability for the Australian Industrial Relations Commission to consider the type of question found in s 389(2).

48 Section 389 of the FW Act is a significant change in Australian workplace relations legislation. Unlike the *Workplace Relations Act 1996* (Cth), s 389 of the FW Act expressly requires the FWC to consider redeployment opportunities. There has therefore been a significant rebalance in favour of employees since the enactment of the FW Act.

49 This appeal confirms the authority of the FWC to make a particular type of inquiry. Because the FWC was permitted to make the inquiry into whether an employer could have made changes to how it uses its workforce to operate its enterprise so as to create or make available a position for an employee who would otherwise have been redundant, ground 1 is rejected.

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**21** *Workplace Relations Act*, s 170CG(3)(e), prior to the enactment of the *Workplace Relations Amendment (Work Choices) Act*.

**22** *Workplace Relations Act*, s 643(8), after the enactment of the *Workplace Relations Amendment (Work Choices) Act*.

**23** *Workplace Relations Act*, s 643(9), after the enactment of the *Workplace Relations Amendment (Work Choices) Act*. See also Shi, "A Tiger With No Teeth: Genuine Redundancy and Reasonable Redeployment Under the *Fair Work Act*" (2012) 31(1) *University of Queensland Law Journal* 101 at 105.

**24** *Carter v Village Cinemas Australia Pty Ltd* (2007) 158 IR 137 at 145 [28].

*Ground 2 – standard of review*

50 In both appeal decisions, the Full Bench of the FWC said that the decision under appeal was of a discretionary nature and could therefore only be challenged on appeal if there was a *House v The King*[25] error.

51 It is ultimately unnecessary for this Court to decide whether the Full Bench was wrong to apply the *House v The King* standard of appellate review. That is because, even if the appropriate standard of appellate review for a decision as to whether a dismissal was a genuine redundancy for the purposes of s 385(d) of the FW Act is the correctness standard, the Full Bench's application of the wrong standard of appellate review would have been an error within jurisdiction, not a jurisdictional error.

52 There would only have been jurisdictional error on the part of the Full Bench if it had misconceived its role, misunderstood the nature of its jurisdiction, misconceived its duty, failed to apply itself to the question required of it, or misunderstood the nature of the opinion which it was required to form.[26] It did not do so.

53 The appeals to the Full Bench were appeals by way of rehearing.[27] The Full Bench properly understood that it could only exercise its powers on appeal if there was an error on the part of Commissioner Riordan in his decisions that the dismissals of the Employees were not cases of genuine redundancy.[28] In other words, the Full Bench's function or "role" on appeal was to determine whether there was an error on the part of Commissioner Riordan.

54 There is a distinction between the nature of the appeal and the standard of appellate review applicable to a particular decision at first instance.[29] The former goes to

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**25** (1936) 55 CLR 499.

**26** *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208-209 [31].

**27** See *Coal and Allied* (2000) 203 CLR 194 at 203 [14], 204 [17].

**28** See *Coal and Allied* (2000) 203 CLR 194 at 203 [14], 204 [17].

**29** See *Coal and Allied* (2000) 203 CLR 194 at 208-209 [30]-[31]; *Steven Moore (a pseudonym) v The King* (2024) 98 ALJR 1119 at 1127 [25]; 419 ALR 169 at 177.

jurisdiction, the latter does not.[30] The standards of appellate review are concerned, in essence, with the nature of an appeal – that is, the nature of the error of the primary decision-maker that the appellate court or tribunal is required to identify in order to uphold the appeal. Under the correctness standard, the appellable error is that the primary decision-maker made the wrong decision. Under *House v The King*, the appellable error is that the primary decision-maker made an error of the kind described in *House v The King*.[31] Fundamentally, however, both standards of appellate review are concerned with identifying error.

55 Therefore, a failure to apply the correct standard of appellate review on the part of the Full Bench would not amount to a misunderstanding of its role. It properly understood the nature of its function and that its role was to identify error. The failure would be that the Full Bench identified the *wrong* error or identified error in the wrong way. To do so would be to make an error within jurisdiction. But that would not be to misunderstand the fundamental duty required of the Full Bench.

56 This conclusion is consistent with the decision of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*, where their Honours held:[32]

> "In [the President of the Commission's] reasons for decision, [the President] proceeded on the basis that the Full Bench could intervene only if there was error on the part of [the primary decision-maker]. In this his Honour was correct. [The President] held that there was error on the part of [the primary decision-maker]. If [the President] was wrong in that view ... that was an error within jurisdiction not an error as to the nature of the jurisdiction which the Full Bench was required to exercise under ... the Act."

57 For those reasons, ground 2 should be rejected.

**Orders**

58 This appeal should be dismissed.

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**30** *Coal and Allied* (2000) 203 CLR 194 at 208-209 [30]-[31].

**31** (1936) 55 CLR 499 at 504-505.

**32** (2000) 203 CLR 194 at 209 [32].

EDELMAN J.

**Introduction**

59 One requirement of s 385 of the *Fair Work Act 2009* (Cth), which must be met before the Fair Work Commission can be satisfied that a person has been unfairly dismissed, is that "the dismissal was not a case of genuine redundancy".[33] One requirement for a "genuine redundancy" is that "the person's 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".[34] A further requirement for a genuine redundancy, contained in s 389(2) of the *Fair Work Act*, is that it would not have been "reasonable in all the circumstances for the person [who was dismissed from employment] to be redeployed within: (a) the employer's enterprise; or (b) the enterprise of an associated entity of the employer". It is that further requirement that is central to this appeal. Since no issue arises on this appeal about any associated entity of the relevant employer, it is convenient in these reasons simply to refer to the employer's enterprise.

60 The first question on this appeal concerns the matters that are relevant to the application of that requirement for a genuine redundancy by the Fair Work Commission. The second question concerns the appellate standard of review for the application of that requirement if an appeal is brought to the Full Bench of the Fair Work Commission.

61 During the COVID-19 pandemic there was a worldwide collapse in demand for coking coal. The appellant coal mining company ("Helensburgh Coal") reduced its production. This reduction led to a restructure of the enterprise and consequently resulted in Helensburgh Coal decreasing its contractor workforce by around 40 per cent and dismissing 90 of its employees. There was no longer any need for the jobs at Helensburgh Coal that were performed by the first 22 respondents ("the former employees"). Helensburgh Coal had, and continued to have, work that was not allocated to any employee and which was ongoing and "sustaining" (in the sense that it did not fall within a specialist skill set). The majority of that unallocated work included "basic black coal work" that could be performed by the former employees.

62 The unallocated work was performed after the restructure by around 60 workers who were supplied by two contractor companies on an "as needs" basis. At least 50 of the workers were supplied by one of those contractor companies, Nexus Mining Pty Ltd ("Nexus"). There were enough ongoing jobs performed intermittently by workers supplied by Nexus for all of the former employees to be redeployed. Under the contracts with the contractor companies, Helensburgh Coal was not obliged to request any workers from the contractor companies.

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**33** *Fair Work Act 2009* (Cth), s 385(d).

**34** *Fair Work Act 2009* (Cth), s 389(1)(a).

Although, as the Commissioner found,[35] there is greater flexibility afforded to an enterprise by engaging contractors, there was no evidence that Helensburgh Coal had any policy, or (at least in relation to the Nexus workers) had made any formal or informal business decision or given any commitment, to use available workers from the contractor companies to perform jobs in preference to its own employees. The Full Bench held that there was "little evidence of substance" of the asserted difference in cost to Helensburgh Coal between engaging its employees and the workers supplied by the contractor companies.

63 The history of this proceeding is described in the reasons of Steward J. Relevantly, following the remitter by the Full Bench and the re-making of the Commissioner's decision, the Full Bench, applying a standard of review involving appellate restraint (affording latitude to the Commissioner in the making of his decision) without any submission by any party to the contrary,[36] dismissed an appeal from the finding of the Commissioner that the dismissal of the former employees was not a genuine redundancy due to s 389(2) of the *Fair Work Act*.[37] Helensburgh Coal sought, among other remedies, a writ of certiorari in the Federal Court of Australia to quash all the decisions in this proceeding.

64 In the Federal Court, one ground of the application was that s 389(2) does not "permit[] or contemplate[] the redeployment of an employee to a role, within the relevant enterprise, which was already filled at the relevant time by others whose services were provided under a contract". Another ground was that by applying a standard of review of appellate restraint rather than a correctness standard the Full Bench made a jurisdictional error. The Full Court of the Federal Court (Katzmann and Snaden JJ, Raper J agreeing), exercising original jurisdiction, dismissed the application.

65 On appeal to this Court from the decision of the Full Court of the Federal Court, Helensburgh Coal relied again upon the two grounds described above. Neither ground should be accepted. The appeal to this Court must be dismissed.

**The relevant considerations in applying s 389(2) of the *Fair Work Act***

66 Section 389(2) of the *Fair Work Act* does not contain any express restrictions upon the considerations relevant to whether it would have been reasonable in all the circumstances for the person who was dismissed to be redeployed within the employer's enterprise. Instead, the reference to "all the circumstances" permits the Fair Work Commission to have regard to a wide

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**35** *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 at [68(i)].

**36** *Helensburgh Coal Pty Ltd v Bartley* [2022] FWCFB 166 at [28], quoting *House v The King* (1936) 55 CLR 499 at 504-505; see also at [30].

**37** *Helensburgh Coal Pty Ltd v Bartley* [2022] FWCFB 166 at [86], [90].

range of considerations. Nevertheless, there are limits to the considerations to which the Commission may have regard.

67 One limit to the matters to which the Fair Work Commission may have regard under s 389(2) derives from the reference to "the employer's enterprise". "[E]nterprise" is defined as "a business, activity, project or undertaking".[38] As Steward J explains, when the Fair Work Commission assesses whether the employee could have been redeployed within the employer's enterprise the Commission may have regard only to the state of the employer's enterprise at the time of the employee's dismissal.[39]

68 A point can be reached at which the circumstances in which an employee asserts that redeployment should occur would involve changing the nature of the enterprise, where the enterprise (business, activity, project or undertaking) is characterised at a level of generality that is neither too general (eg, "coal mining") nor too particular (eg, "coal mining in accordance with every one of the precise processes and procedures presently adopted"). At the right level of generality which focuses upon the essential or important facets of the enterprise, I agree with Steward J[40] that the "employer's enterprise" in s 389(2) includes the "policies, processes, procedures, strategies and business choices of the enterprise, including any plans it had for the future", at least where those matters are important aspects of the employer's enterprise.

69 In particular, as Steward J explains, the employer's enterprise includes the employer's "policies and practices in relation to the use of labour, including as to whether to use permanent employees, independent contractors, casual labour, or contractors".[41] The Commission has no authority to consider the reasonableness of a redeployment that would involve any significant change to any of these matters such that there would be a change in the enterprise, properly characterised, at the date of dismissal.

70 Helensburgh Coal effectively submitted that a consideration of potential redeployment to perform jobs that are already performed by others involves an assessment that is other than in accordance with the conditions of the existing enterprise at the date of dismissal. As an absolute proposition, that submission could not be accepted. Indeed, Helensburgh Coal properly accepted as much. A simple example might be an employee who was dismissed from an enterprise in which another employee, performing an identical job, was to retire the next day. In those circumstances, it would be open to the Commission to consider whether, on the state of the employer's enterprise, the dismissed employee could have been redeployed to perform the job

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**38** *Fair Work Act 2009* (Cth), s 12.

**39** Reasons of Steward J at [131]-[132].

**40** Reasons of Steward J at [131].

**41** Reasons of Steward J at [131].

that would have been vacant the next day. All other things being equal, the natural conclusion in such circumstances would be that redeployment would have been reasonable. Hence, it could sometimes be reasonable, in all the circumstances of the employer's enterprise at the time of dismissal, for an employee to be redeployed within the employer's enterprise even if there were no vacant job at that time.

71 On the other hand, if there were no jobs available, or imminently available, within the employer's enterprise, then it could require a change to the employer's enterprise, as properly characterised, for a new job to be created to which the dismissed employee could be redeployed. In such cases, it is irrelevant whether the creation of a new job would be "reasonable in all the circumstances". The point is that the Commission would be in error by engaging in such a reasonableness enquiry because it would not be doing so by reference to the essential nature of the "employer's enterprise" as it existed at the date of dismissal. The exercise would be performed by reference to a different and hypothetical enterprise with a vacant job.

72 In the circumstances of this case, there were jobs imminently available to which the former employees could have been redeployed. The relevant contractors were supplied by the contracting companies on an "as needs" basis to do work that was ongoing and sustaining, without any continuing obligation upon Helensburgh Coal to request the provision of those contractors. The only obligations imposed on Helensburgh Coal concerned those contractors who were engaged under existing purchase orders, such as the purchase orders made under cl 1.4(b) of the contract with Nexus which was before the Court. Although there was no clear evidence before this Court as to whether those purchase order contracts were day-to-day or week-to-week contracts, the premise of the parties' submissions was that the contractors could be replaced quickly, if not immediately. Indeed, the contract with Nexus under which the contractor workers were supplied was itself due to expire shortly after the former employees were dismissed. In other words, the premise of the parties' submissions was that the jobs being performed by the contractors were constantly becoming available and being renewed by new purchase orders.

73 Not only was there no suggestion of any legal obligation upon Helensburgh Coal to re-engage contractors to perform the desired work but there was no evidence that Helensburgh Coal had any enterprise policy or practice that the jobs performed by contractors at the time of the dismissal of the former employees should be performed only by contractors and not by employees. Indeed, in his initial decision, the Commissioner found that Helensburgh Coal was "not philosophically opposed to 'insourc[ing]' work [to employees] by removing contractors from the Mine".[42] An appeal from that decision was upheld by the Full Bench, with the Full Bench casting doubt upon the basis of that finding and correctly concluding that the relevant enquiry was the reasonableness of redeployment, not the reasonableness of insourcing.[43] Nevertheless, on remitter the Commissioner repeated and justified his earlier finding that Helensburgh Coal was

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**42** *Bartley v Helensburgh Coal Pty Ltd* [2020] FWC 5756 at [37].

**43** *Helensburgh Coal Pty Ltd v Bartley* (2021) 306 IR 219 at 239 [89]-[91].

not philosophically opposed to insourcing.[44] That conclusion was not doubted on the further appeal to the Full Bench.[45]

74 For these reasons, there were jobs imminently available to which the former employees could have been redeployed without any change in any essential or important facets of the enterprise. It was, therefore, open to the Commissioner and the Full Bench to consider whether redeployment of the former employees within Helensburgh Coal's enterprise would have been reasonable in all the circumstances.

**The standard of appellate review on appeal to the Full Bench**

75 The second ground of appeal by Helensburgh Coal is that the Full Court of the Federal Court erred by treating the assessment of whether there is a genuine redundancy under ss 385(d) and 389(2) of the *Fair Work Act* as "a 'discretionary' decision which can be interfered with on appeal only in accordance with the test in *House v [The] King*[46]". In other words, Helensburgh Coal submitted that the appellate standard of review that should have been applied by the Full Bench was one of "correctness", not one in which "[i]t must appear that some error has been made in exercising the discretion" so that "[i]t is not enough that the [decision-makers] composing the appellate court consider that, if they had been in the position of the primary [decision-maker], they would have taken a different course".[47]

76 In *House v The King*, this Court described the appellate standard of review in which latitude is afforded to a primary decision-maker as a standard which attaches to "discretion[ary]" decisions.[48] That label is frequently used. But it is unfortunate. Since "discretion" can connote "the exercise of judgment in making choices",[49] the danger of that label is that it can encourage the view that latitude should be afforded to a primary decision-maker for

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**44** *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 at [67].

**45** See *Helensburgh Coal Pty Ltd v Bartley* [2022] FWCFB 166 at [14].

**46** (1936) 55 CLR 499.

**47** *House v The King* (1936) 55 CLR 499 at 504-505.

**48** *House v The King* (1936) 55 CLR 499 at 503, 504-505. See also *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 589-591 [146]-[149].

**49** *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 138 [37], quoting *Carty v Croydon London Borough Council* [2005] 1 WLR 2312 at 2319 [25]; [2005] 2 All ER 517 at 524.

all decisions involving evaluative judgment.[50] That view is wrong. It is now established that a correctness standard can apply even if the issue is one requiring evaluation upon which reasonable minds might differ.[51]

77 In *Steven Moore (a pseudonym) v The King*,[52] this Court said that the determination of whether the appellate standard of review is a correctness standard or a standard in which latitude is afforded to a primary decision-maker:

> "turns on whether the legal criterion to be applied 'demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies'".

78 On one view, this statement is nothing more than a description of the difference between a standard that requires correctness ("demands a unique outcome") and a standard which affords latitude to a primary decision-maker ("tolerates a range of outcomes"). But the reference to "turns on" has rightly also been understood as pointing to the uniqueness of an outcome or the toleration of a range of outcomes as being an important factor in deciding which appellate standard of review applies.[53]

79 Although the question of whether the legal criterion requires a unique outcome or tolerates a range of possible outcomes is an important factor in determining the standard of review to be applied, it is not an exclusive test.[54] There are instances where the legal criterion to be applied demands a unique outcome but where the *House v The King* standard, or an equivalent

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**50** *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 589-590 [147].

**51** *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 563 [49], 591 [150]; *R v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56 at 88-89 [61]; *Steven Moore (a pseudonym) v The King* (2024) 98 ALJR 1119 at 1124 [15]; 419 ALR 169 at 174.

**52** (2024) 98 ALJR 1119 at 1124 [15]; 419 ALR 169 at 174, quoting *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 563 [49].

**53** *White v Redding* (2019) 99 NSWLR 605 at 628 [99]; *Council of the Law Society of New South Wales v Zhukovska* (2020) 102 NSWLR 655 at 679 [94]; *Augusta Pool 1 UK Ltd v Williamson* (2023) 111 NSWLR 378 at 381 [9]-[10], 394 [76]-[77], 412-413 [168].

**54** See *White v Redding* (2019) 99 NSWLR 605 at 628 [99].

standard, of appellate restraint applies. Many decisions on practice and procedure are examples.[55] For instance, an application for an adjournment may have a unique outcome but latitude must be given in assessing the adjournment decision on appeal,[56] just as it is given on judicial review.[57] There are also instances where the legal criterion to be applied tolerates a range of outcomes but the correctness standard applies. For instance, a statutory phrase may be open to multiple reasonable interpretations but only one will be correct.[58]

80 The reference by this Court in *Moore* to the legal standard "turn[ing] on" whether there is a unique outcome or a range of possible outcomes must be understood as pointing only to one important factor in determining the intention of Parliament, particularly where the unique outcome concerns a matter of fact or the application of fixed legal rules to facts.[59] Another important factor, upon which emphasis is placed in many cases, is the breadth (including the subjectivity) of any evaluative power afforded to the primary decision-maker.[60] Ultimately, however, just as the nature of a right of appeal "must ultimately depend on the terms of the statute conferring the right",[61] so too the standard of appellate review must depend upon what was

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**55** See *State Government Insurance Office (Q) v Biemann* (1983) 154 CLR 539 at 549; *Em v The Queen* (2007) 232 CLR 67 at 128 [199].

**56** *Bloch v Bloch* (1981) 180 CLR 390 at 395-396; *Sali v SPC Ltd* (1993) 67 ALJR 841 at 843-844; 116 ALR 625 at 628-629.

**57** *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 366 [75].

**58** *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 591 [150]. See also *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 151-152 [40]-[41].

**59** *Warren v Coombes* (1979) 142 CLR 531 at 552.

**60** *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505; *Lovell v Lovell* (1950) 81 CLR 513 at 525; *Norbis v Norbis* (1986) 161 CLR 513 at 540; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81-82 [22]-[23]; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 204-205 [19]-[21]; *McGarry v The Queen* (2001) 207 CLR 121 at 145-147 [72]-[76]; *U v U* (2002) 211 CLR 238 at 262 [90]; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 86 [82]; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 592 [152].

**61** *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 273-274, citing *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622.

intended by Parliament.[62] In the usual circumstance where Parliament has made no express provision for the standard of appellate review, the legislative presupposition of the standard of review will be identified by, and will turn on, matters including: whether there is a unique outcome or a range of outcomes; the breadth of any evaluative power afforded to the primary decision-maker; the nature of the legal relations in issue, including whether the decision is one of practice and procedure; whether the adjudication concerns individual rights or the general public interest; the manner in which the issue has historically been adjudicated; and the expertise of the primary decision-making body in the area of adjudication.

81 The leading decision on the discernment of the proper standard of appellate review is that of this Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*.[63] That case involved a decision by a member of the Australian Industrial Relations Commission (Boulton J) to make orders under s 170MW of the *Workplace Relations Act 1996* (Cth) terminating a bargaining period, during which industrial action had taken place, and declaring a period within which no new bargaining period could commence.[64] An appeal was brought to the Full Bench of the Australian Industrial Relations Commission under s 45 of the *Workplace Relations Act* as an appeal by way of rehearing.[65] The Full Court of the Federal Court, exercising original jurisdiction, held that the Full Bench had made a jurisdictional error and had constructively failed to exercise its jurisdiction.[66] On appeal to this Court, it was held that any error by the Full Bench would have been an error within jurisdiction, not a jurisdictional error.

82 In their joint judgment in *Coal and Allied Operations Pty Ltd*, Gleeson CJ, Gaudron and Hayne JJ said that the decision by Boulton J to terminate the bargaining period under s 170MW involved "two discretionary decisions". The first was his Honour's "satisfaction" that the industrial action being pursued posed a threat for the purposes of that section which "involved a degree of subjectivity". The second was "a further discretionary decision as to whether the

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**62** *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 592 [151].

**63** (2000) 203 CLR 194.

**64** See *Workplace Relations Act 1996* (Cth), s 170MW(1), (3); *Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd* (1997) 77 IR 269 at 284-285.

**65** *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 204 [17]. See *Coal and Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1998) 80 IR 14.

**66** *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1998) 89 FCR 200 at 245.

bargaining period should be terminated".[67] Their Honours concluded that the correctness of those decisions could "only be challenged by showing error in the decision-making process", consistent with *House v The King*.[68]

83 Like the appeal to the Full Bench of the Australian Industrial Relations Commission under s 45 of the *Workplace Relations Act*, considered in *Coal and Allied Operations Pty Ltd*, an appeal to the Full Bench of the Fair Work Commission under s 604 of the *Fair Work Act* is also an appeal by way of rehearing.[69] In such cases, as the joint judgment explained in *Coal and Allied Operations Pty Ltd*, the usual position is that, without further evidence or a change in the law, an appellant will need to show an error of law in the decision from which the appeal is brought.[70]

84 Although the satisfaction of the Commission that a dismissal "was not a case of genuine redundancy" requires a unique outcome, it is not a unique outcome concerning a matter of fact or the application of fixed legal rules to facts. Further, almost every other indicium of the standard of appellate review on an appeal under s 604 of the *Fair Work Act* concerning ss 385(d) and 389(2) points to the appellate review by the Full Bench being one in which latitude should be afforded to the Commission in the making of the primary decision.

85 First, the appeal is significantly circumscribed with an emphasis upon allowing latitude to the Commission. An appeal under s 604 can only be considered after a broad assessment of the public interest. Appeals to the Fair Work Commission, including the appeals brought in this case to the Full Bench, require leave which must be given if the Commission is satisfied that it is in the public interest to do so.[71] That enquiry encompasses a wide range of considerations that are not independent of the merits of the case. Further, an appeal can only be

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**67** *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 205 [20].

**68** *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 205 [21].

**69** *ALDI Foods Pty Ltd v Shop, Distributive and Allied Employees Association* (2017) 262 CLR 593 at 621 [100].

**70** *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203 [14]. See also *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111]; *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [23].

**71** *Fair Work Act 2009* (Cth), s 604(2).

brought in relation to factual matters arising under Pt 3-2 of the *Fair Work Act* (including matters arising under ss 385 and 389) if the "decision involved a significant error of fact".[72]

86 Secondly, the Commission is a specialist tribunal afforded extremely broad powers with which to determine whether a dismissal is a genuine redundancy. The exercise of its powers, including in relation to such a determination, must take into account "equity, good conscience and the merits of the matter".[73] The Commission is not bound by rules of evidence and procedure[74] and has powers to "inform itself in relation to any matter before it in such manner as it considers appropriate".[75]

87 Thirdly, like s 170MW of the *Workplace Relations Act* that was considered in *Coal and Allied Operations Pty Ltd*, the criteria in ss 385(d) and 389(2) of the *Fair Work Act* are open-textured, involving a significant level of discretion. Section 385(d) is concerned with whether the Commission is "satisfied" that the dismissal was not a case of genuine redundancy.[76] And the meaning of a "genuine redundancy" in s 389(2), for the purposes of s 385(d), is concerned with whether redeployment within the employer's enterprise "would have been reasonable in all the circumstances".

88 In *Klein v Domus Pty Ltd*,[77] in the context of a power to grant an extension of time, Dixon CJ considered the statutory words "if he is satisfied that sufficient cause has been shown, or that having regard to all the circumstances of the case, it would be reasonable so to do". In remarks which might be echoed in relation to ss 385(d) and 389(2) of the *Fair Work Act*, his Honour noted that there was "not a little difficulty in knowing how the words 'it would be reasonable so to do' march with the words 'if he is satisfied that sufficient cause has been shown'".[78] Nevertheless, Dixon CJ concluded that "the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the

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**72** *Fair Work Act 2009* (Cth), s 400(2).

**73** *Fair Work Act 2009* (Cth), s 578(b).

**74** *Fair Work Act 2009* (Cth), s 591.

**75** *Fair Work Act 2009* (Cth), s 590(1).

**76** See *Buck v Bavone* (1976) 135 CLR 110 at 118-119.

**77** (1963) 109 CLR 467.

**78** *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 472.

general purpose of the enactment to give effect to his view of the justice of the case".[79] In other words, a standard of review of appellate restraint applies.

89 Fourthly, although there are no precise historical analogues, a comparison can be drawn with the provisions of the *Workplace Relations Act* considered in *Coal and Allied Operations Pty Ltd* which, as explained above, involved a significant level of discretion and were held to require appellate restraint on an appeal to the Full Bench on a matter of law.

90 Fifthly, and perhaps most fundamentally, in relation to the provision in s 604 for the appeal of decisions from the Commission to the Full Bench, the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) provided:[80]

> "This provision is modelled on the appeal provisions contained in the [*Workplace Relations Act*] and its predecessors, and is intended to maintain the existing jurisprudence in relation to AIRC appeals, in particular the decision of the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 ...
>
> Where the original decision has involved the exercise of a significant level of discretion, the Full Bench should only intervene on the limited grounds set out in *House v The King* (1936) 55 CLR 488".

91 For these reasons, an acceptance of Helensburgh Coal's submission that the correctness standard of appellate review applies to ss 385(d) and 389(2) would require the rejection of the plain intention of the Commonwealth Parliament. The consequence is that the Full Bench was not in error in affording latitude in the assessment of whether there was error in the decision of the Commissioner. Without error, the Full Bench could not have made any jurisdictional error. Nevertheless, like Steward J, I agree with the reasons of Gageler CJ, Gordon and Beech-Jones JJ that any error by the Full Bench in this respect would not have been jurisdictional.

**Conclusion**

92 The Full Court of the Federal Court of Australia was correct in relation to both of the grounds of appeal reagitated in this Court. The appeal should be dismissed.

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**79** *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473.

**80** Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 353 [2320], 354 [2323].

93 STEWARD J. On 24 June 2020, 22 of the appellant's employees ("the Employees"), the first to twenty-second respondents to this appeal,[81] were dismissed as a result of changes in the operational requirements of the appellant's enterprise. The appellant operates a mine in the Illawarra region of New South Wales. The issue for determination before the Fair Work Commission ("the FW Commission") had been whether it would have been reasonable in all the circumstances for the Employees to have been redeployed within the appellant's enterprise for the purposes of s 389(2) of the *Fair Work Act 2009* (Cth) ("the FW Act"). If it had been so reasonable, it would follow that the dismissal of each of the Employees was not a case of genuine redundancy and that, in the circumstances here, each had been unfairly dismissed for the purposes of s 386 of the FW Act.

94 The issue before this Court only concerns the scope of the inquiry mandated by s 389(2). The FW Commission determined that it would have been reasonable to redeploy the Employees within the appellant's enterprise because those individuals could have been used to undertake other work performed at the time by staff of two existing contractors. It practically decided that it would have been reasonable to have terminated the services of those contractors, thus rendering the Employees suitable candidates for redeployment. The appellant contends that, properly construed, s 389(2) does not authorise the FW Commission to inquire into other ways in which the appellant might have conducted its enterprise, including by replacing contractors with employees.

95 The question as to whether the FW Commission is authorised to inquire into other ways an employer might structure its enterprise, as part of the task required by s 389(2), turns on the correct construction of that provision. Addressing that issue does not require this Court to determine whether the FW Commission's conclusion about the reasonableness of redeployment was or was not correct. The appellant did not otherwise challenge that conclusion. For the reasons which follow, the FW Commission was authorised by s 389(2) to inquire into whether the appellant could have made alternative changes to its enterprise.

**Applicable legislation**

96 Part 3-2 of the FW Act is headed "Unfair dismissal". Section 381 of that Act states that one of the objects of Pt 3-2 is to establish a framework for dealing with unfair dismissal that "balances" the "needs of business" and the "needs of employees". Another stated object is to establish procedures for dealing with unfair dismissal that, amongst other things, are "quick, flexible and informal".

97 Section 385 of the FW Act defines when a person has been unfairly dismissed. Unfair dismissal has four elements, each of which must be satisfied. It is sufficient to note for the purposes of this appeal the last element; a person will not have been unfairly dismissed if the

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**81** The twenty-third respondent is the Fair Work Commission, which filed a submitting appearance in the proceedings.

dismissal "was ... a case of genuine redundancy".[82] The term "genuine redundancy" is defined in s 389 as follows:

> "(1) A person's dismissal was a case of ***genuine redundancy*** if:
>
> (a) the person's 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 has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
>
> (2) A person's dismissal was not a case of ***genuine redundancy*** if it would have been reasonable in all the circumstances for the person to be redeployed within:
>
> (a) the employer's enterprise; or
>
> (b) the enterprise of an associated entity of the employer."

98 The terms "enterprise" and "associated entity" are defined in the FW Act.[83] Relevantly for this appeal, the term "enterprise" is defined to mean "a business, activity, project or undertaking".

99 Division 4 of Pt 3-2 of the FW Act addresses the remedies for unfair dismissal. Pursuant to s 390, the FW Commission has the power to order a person's reinstatement or to make an order for the payment of compensation. Pursuant to s 390(3), the FW Commission must not make an order for compensation unless, amongst other things, it is satisfied that the "reinstatement of the person is inappropriate". Section 391 addresses the topic of reinstatement within an employer's enterprise or within the enterprise of an associated entity. Section 391(1A) provides that an order for reinstatement to an associated entity may be made if:

> "(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and
>
> (b) that position, or an equivalent position, is a position with an associated entity of the employer".

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**82** FW Act, s 385(d).

**83** FW Act, s 12.

100 Pursuant to s 604 of the FW Act, a person may appeal a decision of a Fair Work Commissioner to the Full Bench of the FW Commission. This requires the permission of the FW Commission. Pursuant to s 400(1), permission must not be granted unless the FW Commission considers that it is in the public interest to do so. Permission was here granted by the Full Bench. For the reasons set out below, it is otherwise unnecessary to consider the function and purpose of the Full Bench of the FW Commission in hearing appeals.

**Facts**

101 The facts are not in dispute. The appellant operates the Metropolitan Coal Mine in the Illawarra region of New South Wales ("the Mine") which produces coking coal. For that purpose, it had employees, including the first to twenty-second respondents. It also used contractors. In 2018 it engaged Nexus Mining Pty Ltd ("Nexus") to provide services at the Mine on an as needs basis. The relevant contract with Nexus, which was for a period of two years (with an ability to extend this for another 12 months), remained in force when the Employees were dismissed on 24 June 2020. Following a fire at the Mine, in 2019 the appellant engaged Mentser Pty Ltd ("Mentser") to provide servicing, inspection, auditing and rectification of the Mine's underground conveyor systems. This contract was for a period of up to five years. It was a "Standing Offer Agreement" whereby Mentser would only supply services when required. The contract with Mentser also remained in force when the Employees were dismissed.

102 In 2020, the COVID-19 pandemic caused the price of coking coal to fall. The appellant decided to reduce its production of coal and, as a result, it needed fewer employees. There followed a process of consultation with the appellant's employees in accordance with the requirements of s 389(1)(b). The appellant decided that it would agree to insource some of the work carried out by contractors. It reduced its direct workforce of employees by 90 (47 of whom were subject to a forced redundancy; these included the first to twenty-second respondents); it also reduced the number of contractor staff by 40 per cent. The dismissal of the Employees was the result of a decision made by the appellant to reorganise the performance of work at the Mine.

103 It was not in dispute that, for the purposes of s 389(1), due to COVID-19, the appellant no longer required the jobs of each Employee to be performed because of changes in the operational requirements of the appellant's enterprise.

104 It was also not in dispute that at the time of the dismissal of the Employees, there was no vacant role within the appellant's enterprise to which any of them might be redeployed. Nor was it foreseeable that such a vacancy might arise. The only way to redeploy the Employees would have been to demobilise the workers engaged by either Nexus or Mentser.

105 At the time of the dismissal of the Employees, eight Mentser employees and around 90 Nexus employees worked at the Mine. If the eight Mentser employees had been removed and replaced by eight of the Employees, this would have had a significant adverse impact on Mentser's business and would have resulted in the almost inevitable dismissal of the eight Mentser workers. Similarly, if the Nexus employees had been replaced by the Employees, it was

accepted that the vast majority of the replaced Nexus employees would also have been dismissed. This would have led to the loss of core expertise which would have been difficult for Nexus to replace.

106 Whilst it is accepted that the appellant had a blended workforce of permanent employees and contract workers, during oral argument the appellant was unable to point in the evidence to any business decision to use this blended workforce in any particular proportion.

107 In July 2020 each of the Employees filed an application in the FW Commission claiming that they had been unfairly dismissed for the purposes of Pt 3-2 of the FW Act.

**The decisions of the FW Commission**

108 There were four decisions of the FW Commission.

109 At first instance, a Commissioner decided that because the work undertaken by the Nexus and Mentser workers was not specialised labour,[84] because the work of those individuals fell within the skills and competencies of the permanent workforce,[85] and because the work was "ongoing and sustaining"[86] it was reasonable in all the circumstances to redeploy the Employees into the jobs performed by the contract workers.[87] In that respect, and based only upon another earlier decision of the FW Commission,[88] the Commissioner formed the view that the appellant was not "philosophically opposed" to insourcing work undertaken by contractors.[89]

110 That decision was appealed to the Full Bench of the FW Commission.[90] The Full Bench quashed the decision and remitted it back for determination.[91] The appeal proceeded on the basis that the appellant was obliged to demonstrate that the Commissioner's reasons contained

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**84** *Bartley v Helensburgh Coal Pty Ltd* [2020] FWC 5756 at [58].

**85** *Bartley v Helensburgh Coal Pty Ltd* [2020] FWC 5756 at [58].

**86** *Bartley v Helensburgh Coal Pty Ltd* [2020] FWC 5756 at [59].

**87** *Bartley v Helensburgh Coal Pty Ltd* [2020] FWC 5756 at [63].

**88** *Construction, Forestry, Maritime, Mining and Energy Union v Peabody CHPP Pty Ltd* [2020] FWC 6287.

**89** *Bartley v Helensburgh Coal Pty Ltd* [2020] FWC 5756 at [37].

**90** *Helensburgh Coal Pty Ltd v Bartley* (2021) 306 IR 219.

**91** *Helensburgh Coal Pty Ltd v Bartley* (2021) 306 IR 219 at 240 [95].

an error of law, in the sense described in *House v The King*.[92] The Full Bench decided that there was no evidence to support the finding that the appellant was not opposed to insourcing; the earlier decision of the FW Commission, relied upon by the Commissioner, did not supply such evidence.[93] The Commissioner had thereby erred. It also held that there were no "binding principles" which regulate what is or is not reasonable in deciding whether a worker can be redeployed and that, accordingly, the replacement of a contract worker with a permanent employee could not be "automatically excluded" from consideration.[94] Relevant factors included the degree of control over the work of the contractor by the employer, the length of the contract, any requirement to change the employer's business strategy, the history of contracting the work in question, the rights of third parties, that positions cannot be created where there are none, and that displacing existing occupants of positions may not be appropriate.[95] The Full Bench also decided that the reasonableness of insourcing labour was not the correct question to pose for the purposes of s 389(2).[96]

111 On remittal, it appears that the Commissioner did not accept that he had erred and in parts preferred his own views, rather than relying on the evidence before him. He stated, for example, that the Full Bench "obviously did not understand the background" to the earlier FW Commission decision he had relied upon.[97] In relation to the appellant's use of Mentser following the fire, he said that instead of using that contractor "it could be argued that a change in the culture of Management was all that was needed".[98] However, the appellant made no specific complaints about those observations before this Court.

112 Nonetheless, the Commissioner did go on to apply the factors identified by the Full Bench as set out above.[99] It is unnecessary to set out the findings that were made, save that when it came to considering the appellant's business strategy, the Commissioner confined himself to the utility of using Mentser and Nexus without any apparent consideration as to whether the

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**92** (1936) 55 CLR 499.

**93** *Helensburgh Coal Pty Ltd v Bartley* (2021) 306 IR 219 at 239 [90].

**94** *Helensburgh Coal Pty Ltd v Bartley* (2021) 306 IR 219 at 235 [68].

**95** *Helensburgh Coal Pty Ltd v Bartley* (2021) 306 IR 219 at 236 [69].

**96** *Helensburgh Coal Pty Ltd v Bartley* (2021) 306 IR 219 at 239 [91].

**97** *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 at [67].

**98** *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 at [68(c)].

**99** See at [110] above.

appellant had policies or practices concerning the use of those contractors or the use of contractors more generally.[100]

113 When it came to considering the principle that it is not appropriate simply to create positions where none exist – a very grave consideration in this matter for the reasons expressed below – the Commissioner merely observed that there were in excess of 60 employees of Nexus and Mentser who continued to be employed at the Mine after the restructure.[101] There was no consideration at all of the Full Bench's statement that it may not be appropriate to displace existing occupants of positions. Again, no specific complaint was made before this Court about these matters.

114 After considering the factors identified by the Full Bench, as well as further factors pertaining to whether Nexus and Mentser performed specialist work, the Commissioner concluded that it was "feasible for the [appellant] to insource some of the work of the contractors".[102] In that respect, it was found that there was sufficient basic black coal work to gainfully employ all of the Employees.[103]

115 On appeal yet again to the Full Bench, it was accepted that the Commissioner had made two errors. First, it was said that the Commissioner failed to consider whether, having regard to the terms of the agreements that had been entered into with each of Mentser and Nexus, there might have been an "impediment to insourcing the work".[104] Secondly, it was submitted that the Commissioner had failed to consider the effect of insourcing on the employees of Mentser and Nexus when considering the appropriateness of displacing individuals.[105] However, the Full Bench considered that these two matters "were not matters of great weight in the evidence or submissions of the Appellant".[106] It followed that these factors did not demonstrate that the decision of the Commissioner was otherwise incorrect, especially given all the other factors that had been taken into account.[107] For the reasons given below, in a case such as this, those two

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**100** *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 at [68(c)].

**101** *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 at [68(g)].

**102** *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 at [95].

**103** *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 at [95].

**104** *Helensburgh Coal Pty Ltd v Bartley* [2022] FWCFB 166 at [73].

**105** *Helensburgh Coal Pty Ltd v Bartley* [2022] FWCFB 166 at [74].

**106** *Helensburgh Coal Pty Ltd v Bartley* [2022] FWCFB 166 at [75].

**107** *Helensburgh Coal Pty Ltd v Bartley* [2022] FWCFB 166 at [75].

matters should have been given "great weight" by the appellant in leading evidence and making submissions.

**The decision of the Full Court of the Federal Court**

116 The appellant made an application for judicial review of all four FW Commission decisions in the Federal Court of Australia. It sought orders quashing all four decisions.

117 Citing this Court's decision in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*,[108] the Full Court considered that its task was to discern whether the second Full Bench decision was the product of jurisdictional error.[109] The appellant relied upon essentially three grounds said to establish such error. The first error was that s 389(2) did not authorise the FW Commission to consider the redeployment of an employee to a position already filled by another. This was expressed as an inflexible proposition mandated by the language of the section. The second error was that the Full Bench misunderstood the applicable standard of appellate review. That review, it was contended, was not to be governed by an application of *House v The King*, but, rather, was to be carried out using the correctness standard. The third error was that the errors identified by the Full Bench in the second decision of the Commissioner were not immaterial.

118 For the reasons given below, it is unnecessary to address the Full Court's reasoning concerning the second alleged error, and the third alleged error was not pursued in this Court. As to the first alleged error, the appellant contended: that the word "redeploy" necessarily meant to deploy to a position which is vacant or available; that the language of s 389(2) did not contemplate the creation of new positions or different business structures; that the legislative history did not support any power of reconstruction of the appellant's enterprise; and finally that the approach of the Full Bench was inconsistent with the object of Pt 3-2 to establish procedures which are quick, flexible and informal.[110]

119 In dismissing these contentions, Katzmann and Snaden JJ emphasised that s 389(2) requires analysis of what measures an employer could have taken to redeploy an otherwise redundant employee. Given the "undeniable width of the text" of s 389(2), their Honours observed that there was no reason to exclude, as a possibly reasonable outcome, the freeing up of positions by reducing reliance on contract labour.[111] If that introduced a measure of

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**108** (2000) 203 CLR 194.

**109** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 602-603 [41].

**110** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 603-604 [46]-[51].

**111** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 605 [60].

complexity, then that was necessarily intended.[112] Moreover, the reference in s 389(2) to "in *all* [of] the circumstances" meant that the inquiry could not constrained by an absolute rule of the kind contended for by the appellant.[113] Ultimately, the plurality determined that all that controlled the inquiry mandated by s 389(2) is what "would have been reasonable in all the circumstances". Those words did not necessarily exclude the approach of the FW Commission. Katzmann and Snaden JJ concluded that the Full Bench of the FW Commission had not misunderstood the language of s 389(2), and thus did not err.[114]

120 Raper J agreed with Katzmann and Snaden JJ.[115] Her Honour acknowledged the attractiveness of the appellant's construction of s 389(2).[116] But she accepted that the language of s 389(2) could not confine the concept of redeployment to a "particular (vacant) position".[117] Having said that, Raper J observed, correctly, that it would be a "rare case indeed" in which it could be concluded that it would be reasonable to require the creation of new positions and a fundamental change to an employer's business model.[118]

**The grounds of appeal**

121 The appellant pursued two grounds of appeal in this Court. The first concerned the correct construction of s 389(2). The appellant again submitted that the language of s 389(2) did not authorise the FW Commission to inquire into whether an employer could make changes to its enterprise so as to create or make available a position for an employee who is otherwise redundant. It also submitted that the "enterprise" referred to in s 389(2) is the actual enterprise of the employer at the date of dismissal, and not some other enterprise conceived of in the mind of the FW Commission.

122 By its second ground of appeal, the appellant once again contended that the correctness standard of review was applicable before the Full Bench.

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**112** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 605-606 [61].

**113** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 606 [62].

**114** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 607 [67].

**115** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 611 [93].

**116** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 611 [94].

**117** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 611 [95].

**118** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 611 [96].

**Ground one – no right of reconstruction**

*The appellant's contentions*

123 The essential foundation of the appellant's case was that an "employer's enterprise" in s 389(2) is an objective fact as at the date of dismissal which cannot be altered by the FW Commission. The question posed by s 389(2), it was said, is not an abstract inquiry but rather is one fixed by reference to that enterprise. It was thus not open for the Commissioner to second-guess a business decision made by an employer about its enterprise. It submitted that the word "redeployed" did not mean "replaced".

124 The appellant also relied upon the Explanatory Memorandum[119] which accompanied the introduction of the *Fair Work Bill 2008* (Cth), and which gives an example of when it would not be reasonable to redeploy a person. That example was when there are "no positions available" for that former employee. The appellant submitted that if there are in fact no available jobs to be filled, it was not open to the FW Commission to restructure an enterprise to create such positions for the first time. That was especially so if this restructure necessarily involved the termination of another person's employment. The FW Commission could not pick and choose as to who must go and who may stay. The FW Commission did that here, it was said, when it decided that the Employees should be given the jobs of the contract workers.

125 The foregoing was said to be supported by s 391(1A) of the FW Act, which provides for redeployment to an associated entity, but only if the person's position with the employer no longer exists. In other words, it was contended that provision assumes that one cannot be redeployed with an employer if at the date of dismissal there are no vacancies to fill, and no such vacancies are otherwise expected in the future.

126 The foregoing was also said to be supported by the objects of Pt 3-2 of the FW Act and in particular by the need that there be procedures which are "quick, flexible and informal". If the FW Commission has a broad power to reconstruct an enterprise, it was said that the proceedings before it will be unable to be of this kind. They will be both complex and protracted. The appellant submitted that this could not have been what Parliament intended.

*Disposition of ground one*

127 Much, but not all, of what the appellant submitted may be accepted. One commences with a consideration of s 389(1). Unless that provision is satisfied, one will not need to consider s 389(2). Section 389(1) has two limbs. The first, found in para (a), is the more

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**119** Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 247 [1552].

relevant to this matter. The second, found in para (b), is concerned with consultation by an employer and is not in dispute.

128 Section 389(1)(a) has two parts. The first turns on the existence of a decision in fact made by an employer. It is the decision to no longer require a person's job to be performed by anyone. That is a choice which cannot be set aside or second-guessed. It is one reserved to the employer to make and no-one else. But it can only be made for a particular reason.

129 The second part of s 389(1)(a) supplies that reason. It is that the job has ceased to be needed "because of changes in the operational requirements of the employer's enterprise". However, an employer is at liberty to determine what those changes might be, or if they are needed. That is because it is the employer's "enterprise" which is in issue. The decision to make changes is not qualified by any requirement of reasonableness, and it cannot otherwise be challenged in the FW Commission, assuming it to be genuine. It is in that sense that the capacity to render a position redundant has been likened to an employer's "prerogative". As Ryan J observed in *Jones v Department of Energy and Minerals*:[120]

> "[I]t is within the employer's prerogative to rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions."

130 In contrast, s 389(2) is qualified by a requirement of reasonableness. A person's dismissal will not be a case of genuine redundancy "if it would have been reasonable in all the circumstances for the person to be redeployed". As Katzmann and Snaden JJ observed, this language is broad.[121] But the breadth of the inquiry authorised by s 389(2) is controlled by the fact that it is posed in respect of the employer's (or associated entity's) "enterprise" and that it is directed to reasonableness "in all the circumstances". The word "in", in this context means, "in

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**120** (1995) 60 IR 304 at 308. See also *ICI Australia Operations Pty Ltd v Hutton* (1993) 47 IR 288 at 296-297; *Short v F W Hercus Pty Ltd* (1993) 40 FCR 511 at 520-521; *Quality Bakers of Australia Ltd v Goulding* (1995) 60 IR 327 at 332-333; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2001) 111 IR 241 at 269-275 [70]-[81]; *Dibb v Commissioner of Taxation* (2004) 136 FCR 388 at 401-405 [33]-[44].

**121** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 606 [62].

accordance with". And the word "enterprise" must bear the same meaning in s 389(2) as it does in s 389(1).[122]

131 In the context of the privilege afforded to employers by s 389(1), the phrase "employer's enterprise" in s 389(2) is a reference to the actual enterprise of an employer as at the date of dismissal. In other words, the FW Commission must take the enterprise as it in fact was on that day. That includes, for example, all of the actual policies, processes, procedures, strategies and business choices of the enterprise, including any plans it had for the future. It includes the composition of the enterprise's actual labour force, as well as any vacant positions which existed at that time, or which were expected to arise. It includes the approach of the business to issues such as risk-taking, its corporate governance practices and its methods of carrying on a business. It includes its policies and practices in relation to the use of labour, including as to whether to use permanent employees, independent contractors, casual labour, or contractors. It also includes the actual practices and policies of the enterprise in relation to labour relations. The FW Commission, subject to any issues of proof, must accept all of this in applying s 389(2) of the FW Act.

132 The "circumstances" are again all of the actual circumstances which in fact existed as at the date of dismissal, and which are relevant to the issue of redeployment. They include all of the above. They also include the "changes in the operational requirements" of the enterprise, the decision of the employer that a particular job is no longer needed, the actual and expected prevailing economic and market conditions, and any other fact as at the date of dismissal that might be relevant to the inquiry mandated by s 389(2).

133 It is in these circumstances that the question must be posed as to whether it would have been reasonable for a person who has been dismissed to be redeployed in the employer's enterprise, or in an associated entity's enterprise. The answer to that question takes the enterprise as it finds it on the date of dismissal in the sense described above. That is why the two matters found by the Full Bench to have been overlooked by the Commissioner should have been given great weight in the submissions and evidence of the appellant.

134 But the language of s 389 does not otherwise limit how the FW Commission is to answer that question. It certainly does not in every case prohibit asking whether an employer could have made changes to its enterprise so as to create or make available a position to a person who would otherwise have been made redundant. Neither the statutory language, context or purpose supports such a proscriptive rule. Yet that was the very proposition of law upon which the appellant based ground one of its appeal. That proposition must be rejected.

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**122** *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at 326-327 [136]; 408 ALR 684 at 716; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at 39 [25], quoting *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618.

135 The statutory context, including the objects of Pt 3-2 as well as s 391(1A), compels no contrary conclusion. This appeal merely confirms the authority of the FW Commission to make a particular type of inquiry in a given case. Whether that results in greater complexity may be doubted; but more importantly, and in any event, as Raper J observed, cases mandating such an inquiry will be rare.[123] As for s 391(1A), it merely reflects the more typical case where redeployment is not possible in an enterprise because there are no vacancies which are available.

136 Given the content of the first ground of appeal, this Court is not on this occasion concerned with the legal merit of the conclusion about the reasonableness of redeployment reached below. Having said that, it must be accepted that it would be difficult to conclude that redeployment is reasonable if that meant that another person with a job, for which there is a business need, has to make way for someone else whose job was no longer needed. It would make very little sense in the ordinary case to conclude that it was reasonable to redeploy a person by terminating the permanent employment of another person. No different conclusion might be expected if the other person were employed by a contractor, or if they were themselves independent contractors or casual labourers. Redeployment of a person at the expense of another person's position would be a very grave step to take and would be unlikely to be a reasonable outcome.

137 The foregoing reflects an earlier decision of the FW Commission that states the following in relation to s 389(2):[124]

(a) positions cannot be created where there are none;

(b) displacing existing occupants of positions is not appropriate; and

(c) a requirement that there be a complete change in the employer's employment strategy is not appropriate.

138 The Full Bench in that matter observed that the foregoing propositions are not "binding principles applicable to every case",[125] and that is so. But they are an expression of what the measure of reasonableness should demand in an ordinary case. The passage in the Explanatory Memorandum, relied upon by the appellant, reflects that fact.

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**123** *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 at 611 [96].

**124** *Teterin v Resource Pacific Pty Ltd t/a Ravensworth Underground Mine* [2014] FWC 1578 at [112].

**125** *Teterin v Resource Pacific Pty Ltd t/a Ravensworth Underground Mine* (2014) 244 IR 252 at 266 [35].

139 Moreover, if it were clear from the evidence that any postulated change to an enterprise would be inconsistent with the nature of the actual enterprise, or with any of its actual practices, policies, procedures, strategies or plans, then it is likely that any such change could not be reasonable. But there may also be cases – although they are likely to be rare – where the evidence nonetheless supports the relevance of making an inquiry into whether an enterprise could reasonably have been altered to create new jobs, or to make other jobs available to be filled. These are issues which will ultimately turn on the evidence adduced before the FW Commission.

140 Because the FW Commission was authorised to make the inquiry into whether an employer could make changes to its enterprise so as to create or make available a position for an employee who is otherwise redundant, ground one is rejected.

**Ground two – the standard of review**

141 I respectfully agree with and adopt the reasons of Gageler CJ, Gordon and Beech-Jones JJ in relation to ground two.

**Disposition**

142 This appeal should be dismissed.