HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S161/2025
File Title:	Coal Mining Industry (Long Service Leave Funding) Corporati
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	23 Dec 2025

Important Information

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Form 27A—Appellant's submissions

Note: See rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **Coal Mining Industry (Long Service Leave Funding) Corporation**
Appellant

and

Orica Australia Pty Ltd
Respondent

APPELLANT'S SUBMISSIONS

PART I — CERTIFICATION

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

PART II — ISSUES ARISING

2. The issue in the appeal is whether the Respondent's shotfirer employees are "eligible employees" under s 4(1) of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) (**Administration Act**), which turns on the proper construction of that Act, and the meaning of the "black coal mining industry" which, unless the contrary intention appears, has the same meaning as in cl 4 of the Black Coal Mining Industry Award 2010 as in force on 1 January 2010 (the **Award**).[1]

[1] The Award was amended in 2013 with retrospective operation by reason of the decision in *The Australian Industry Group* [2012] FWA 9606.

PART III — SECTION 78B NOTICE

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV — DECISIONS BELOW

4. The judgments of the primary judge are unreported and cited as *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 and *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation (Form of Orders)* [2024] FCA 54.[2]

5. The judgments of the Full Court are unreported and cited as *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 and *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation (No 2)* [2025] FCAFC 90.[3]

PART V — RELEVANT FACTS

6. In open cut black coal mining, "shotfiring" is a collection of activities by which a black coal seam is exposed by the detonation in holes in the ground of high-powered explosives.[4] The activity of shotfiring (and related activities) is directly involved in and significantly integrated into the process of extracting coal.[5]

7. The Respondent conducted a business which involved the supply of shotfiring and explosive services at black coal mine sites in New South Wales and Queensland.[6] In providing such services, the Respondent employed employees, referred to collectively as "shotfirers", who were engaged in several roles involved in the process of shotfiring. The shotfirers worked at the black coal mines to which the Respondent provided its services, formed an integral part of

[2] References to the primary judge are to the judgment in *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515.
[3] References to the Full Court are to the judgments in *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65.
[4] Primary judge at [1]; Core Appeal Book (**CAB**) at 8.
[5] Primary judge at [2]; CAB at 8.
[6] Primary judge at [17]; CAB at 12.

the operation of those mines, and performed duties directly connected to the day to day operation of those mines.[7]

8. There was no relevant change to the shotfiring and explosives part of the Respondent's business during the period of this case. As at 7 July 2021, the Respondent employed 209 shotfirer employees who worked at black coal mines.[8]

9. In 2006, the Respondent purchased a separate business referred to as "Minova". The Minova business was unrelated to the Respondent's shotfiring and explosives business. It was engaged in the installation, repair, maintenance and removal of various kinds of ventilation control devices. From 2006 until 2013, employees of Minova remained employed by Minova Australia Pty Ltd.[9]

10. However, in 2013, the Respondent integrated the Minova business and from March 2013, the employees of Minova became employees of the Respondent. On 28 February 2022, the Respondent divested itself of Minova.[10] When the Respondent owned Minova, employees performing work in the Minova business were employed in the black coal mining industry and were covered by the scheme.[11]

PART VI — ARGUMENT

A. Introduction

11. This case concerns the circumstances in which employees who perform "shotfiring" activities at black coal mines have the benefit of a portable longservice leave scheme in the black coal mining industry.[12] The Appellant, a federal statutory corporation, administers the scheme.

12. The scheme is beneficial legislation for employees in the black coal mining industry, whereby an employee accrues long service leave based on their service

[7] Primary judge at [1], [12], [18]; CAB at 8, 11, 13.
[8] Statement of Agreed Facts (**SOAF**) at [40], [43]; Appellant's Book of Further Material (**ABFM**) at 15-16. The SOAF was initially agreed on 7 July 2021.
[9] SOAF at [21]; ABFM at 10.
[10] Full Court: majority at [51]; CAB at 70.
[11] Primary judge at [52]-[53]; CAB at 22.
[12] The scheme is established by three statutes: the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* (Cth), the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth), and the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth).

in the industry, rather than their length of service with a particular employer.[13] An employee in the industry might be employed successively by several different employers, taking one's accrued entitlement to long service leave to each new employer and, while working with that employer, building upon it.[14] A particular employee's entitlement to long service leave is calculated by reference to the number of weeks worked in the industry for one or more employers.[15] The scheme has existed in various iterations since 1949.[16]

13. The current scheme requires employers to pay levy for each month an eligible employee is employed, with the funds received pooled and used to reimburse employers of eligible employees at the time when long service leave is taken.

14. The appeal turns on whether the Respondent's shotfirer employees are "eligible employees" under s 4(1) of the Administration Act. Section 4(1) introduces various concepts including the "black coal mining industry", which is defined in s 4 as having the same meaning as in the Award, unless the contrary intention appears. The case raises specifically the meaning and proper construction of cl 4 of the Award, including one of the exceptions to the "black coal mining industry" in cl 4.3(g) of the Award.

15. The Full Court held that cl 4.3(g) operated to exclude the Respondent's shotfirers from the black coal mining industry for the period of time that the Minova business was not integrated with the Respondent's operations (from 1 March 2013; and after 28 February 2022).[17] The consequence of the Full Court's construction is that the happenstance of the integration and divestment of the Minova business by the Respondent, wholly unrelated to the day to day work of the shotfirers, determined whether the Respondent's shotfirers were employed in the black coal mining industry and entitled to the benefits under the scheme.[18]

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[13] Primary judge at [4]; CAB at 8-9.
[14] *Coal Mining Industry (Long Service Leave Funding) Corp v Commissioner of Taxation* [1999] FCA 249; (1999) 85 FCR 416 (***Coal LSL v Commissioner of Taxation***) at [2] (Hill, Lehane and Hely JJ).
[15] *Coal LSL v Commissioner of Taxation* at [2].
[16] Primary judge at [4]-[5]; CAB at 8-9.
[17] Full Court: majority at [38], [41]-[42]; CAB at 67-69; SOAF at [25]; ABFM at 10.
[18] Primary judge at [92]-[93]; CAB 31-32; Full Court: majority at [61]-[62]; CAB at 73.

16. The construction preferred by the Full Court has the consequence that eligibility under the scheme for employees who perform shotfiring (or related work) at black coal mines, in a manner directly connected with the day to day operation of that mine, depends on their employer's activities that are unrelated to the shotfiring work. The Appellant contends that the Full Court's construction is contrary to the text of the Administration Act (incorporating as it does the meaning of the black coal mining industry in the Award), as well as the purpose of the portable scheme, and produces anamolous results.

B. The definition of "eligible employee"

17. An "eligible employee" is relevantly defined in s 4(1) of the Administration Act in the following terms:[19]

> **eligible employee** means:
>
> (a) an employee who is employed in the black coal mining industry by an employer engaged in the black coal mining industry, whose duties are directly connected with the day to day operation of a black coal mine; or
>
> (b) an employee who is employed in the black coal mining industry, whose duties are carried out at or about a place where black coal is mined and are directly connected with the day to day operation of a black coal mine;
>
> …

18. It was not in dispute that the duties of the Respondent's shotfirers were carried out at or about a place where black coal is mined, and were directly connected with the day-to-day operation of a black coal mine.[20]

19. It is important to note the overlap and the differences between the two limbs. Each limb requires "an employee who is employed in the black coal mining industry", "whose duties are directly connected with the day to day operation of a black coal mine". However, the limbs differ insofar as limb (a) requires the employee to be employed "by an employer engaged in the black coal mining industry"; whereas limb (b) does not contain any reference to the employer but requires that the

[19] Sub-paragraphs (c) and (d) have no relevance to the present proceeding.
[20] Primary judge at [12]; CAB at 11.

employee's "duties are carried out at or about a place where black coal is mined".[21] The primary judge referred to these two limbs, by way of shorthand, as the "employer limb" (limb (a)) and the "location limb" (limb (b)).[22]

20. The structural dichotomy between the two limbs is important. The employer limb requires both that the employee is employed in the black coal mining industry and that the employer is engaged in the black coal mining industry, whereas the location limb requires only that the employee is employed in that industry. Only the employer limb requires the employer to have a particular quality ("engaged in the black coal mining industry"), whereas the location limb does not mention the employer at all but requires instead that the employee work at or near a particular location (a black coal mine).[23] Accordingly, as the primary judge emphasised, to participate in the scheme an employee who works for an employer engaged in the black coal mining industry does not need to work at or near a black coal mine and, if an employee is employed in the black coal mining industry at or near a black coal mine, it does not matter who their employer is or in which industry that employer happens to be engaged.[24]

21. It follows that the question of whether an employee is employed in the black coal mining industry is not synonymous with the question of whether the employer is engaged in that industry. An employee may be employed in the black coal mining industry when their employer is not; the converse may also be true.[25]

22. It is unsurprising that an employee may work in an industry that does not reflect the character of the employer's industry. By way of example, an employee may be a maintenance contractor permanently stationed on a black coal mine, but their employer may not be engaged in the black coal mining industry.[26]

23. Further, as the primary judge emphasised, the structure of the definition of "eligible employee" in s 4(1), specifically the inclusion of disjunctive employer

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[21] See *Coal Mining Industry (Long Service Leave Funding) Corp v Hitachi Construction Machinery (Australia) Pty Ltd* [2023] FCA 68; (2023) 322 IR 129 (***Hitachi***) at [161] (Raper J).
[22] The primary judge used the terminology that Raper J used in *Hitachi* at [161].
[23] Primary judge at [13]; CAB at 11.
[24] Primary judge at [13]; CAB at 11.
[25] *Bis Industries Ltd v CFMMEU* [2021] FCA 1374 (***Bis Industries***) at [216] (White J).
[26] See the facts in *Hitachi*.

and location limbs, gives rise to a clear implication that the character of an employer was not intended to be relevant to the location limb.[27] Not only is this "structural imperative"[28] key to the proper construction of the relevant provisions, it is consistent with a critical feature of the scheme that it be portable: an employee that meets the location limb remains eligible irrespective of a change in their employer (or in the nature or character of their employer).

C. The "black coal mining industry"

24. For the purposes of the scheme, the "black coal mining industry" is defined in s 4(1) of the Administration Act, "unless the contrary intention appears", to have the same meaning as in the Award.

25. Under cl 4.2 of the Award, "black coal mining industry has the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal"; and subject to that, cl 4.2 then contains a series of inclusions; and cl 4.3 contains a series of exclusions.

26. There are a number of important points in respect of this definition being by reference to the "meaning applied by the courts and industrial tribunals".

27. *First*, there are a number of court and tribunal decisions which have considered the term "black coal mining industry" or a cognate expression, most of which occur in a particular industrial context.[29] For example, some cases have considered the application of union rules, and whether an employer is "in" the industry for that purpose.[30] In *Bis Industries Ltd v CFMMEU* [2021] FCA 1374 (***Bis Industries***), White J reviewed many of the authorities and set out a series of

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[27] Primary judge at [21]; CAB at 13.
[28] Primary judge at [23]; CAB at 14.
[29] The authorities are discussed by White J in *Bis Industries* at [43]-[76]; and see *Hitachi* at [25]. One of those decisions is the High Court's decision in *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123, in which Latham CJ said that it was "*a question of fact depending upon all the circumstances of the case whether a particular employer or employee is engaged in the coal-mining industry*": at 130-131; and see White J in *Bis Industries* at [52] ff and [81].
[29] *Bis Industries* at [43]-[76].
[30] See, for example, *Dyno Nobel Asia Pacific Ltd v Construction, Forestry, Mining and Energy Union* [2005] AIRC 622 (***Dyno Nobel***), discussed further below.

conclusions which may be drawn from them regarding the meaning of the "black coal mining industry".[31]

28. *Second*, the express inclusions listed in cl 4.2, and (by implication) the exclusions listed in cl 4.3, remain subject to the meaning applied by the courts and industrial tribunals (up to the date of the Award). That is, the meaning applied by the various courts and tribunals prevails. In *Bis Industries* at [38], White J identified that the inclusion of specified activities was qualified by any contrary view in the decisions of courts and tribunals.

29. *Third*, it is apparent that the various inclusions and exclusions derive from the cases which have interpreted the meaning of the black coal mining industry (or the coal industry, as the case may be), as discussed by White J in *Bis Industries*.[32] It follows that the listed exclusions should be seen as examples of specific cases that have previously considered the relevant meaning of the black coal mining industry.

30. *Fourth*, given that the definition of the "black coal mining industry" in cl 4 is already defined by reference to the meaning applied by the various courts and industrial tribunals, it follows that the list of specific inclusions and exclusions was not strictly necessary. The draftsperson has attempted to encapsulate in concise written form a reflection of the historical decisions which give the black coal mining industry its meaning. Moreover, some of the exclusions were not required because, even without the exclusion, the activity would never have fallen within the included activities – e.g., the exclusion of brown coal mining in cl 4.3(a), in circumstances where brown coal mining is not black coal mining per se. Such an exclusion is more in the nature of "for the avoidance of any doubt".

31. *Fifth*, whilst "black coal mining industry" is a term used in each of the two limbs of the relevant definition of "eligible employee", the context in which the term "black coal mining industry" is used is specifically as to whether an employee is *in* that industry or an employer is *in* that industry. It follows that the purpose of

[31] *Bis Industries* at [43]-[67].

[32] White J noted that the clauses which seem to reflect the existing case law includes, for example, cl 4.2(a) (at [45], [76](b)); cl 4.2(c) and cl 4.3(f) (at [49]-[50] and [76](d) and (i)); cl 4.3(e) (at [76](i), sub-para (iii)); and cl 4.3(g) (at [82]).

the definition of the "black coal mining industry" is to determine whether an employee is employed in that industry (even if the employee's employer is not engaged in the industry), and/or whether an employer is engaged in that industry.

32. In the present case, it was not in dispute that:

(a) the operators of the black coal mines to whom the Respondent was providing shotfiring and explosive services were engaged in the black coal mining industry for the purposes of cl 4.2;[33]

(b) further, the provision by the Respondent of its shotfiring services amounted to work "on a coal mining lease directly connected with the extraction, mining and processing of black coal" within the meaning of cl 4.2(d);[34] and

(c) finally, the work done by the Respondent's shotfirers necessarily meant that they were employed in the black coal mining industry at least so far as cl 4.2(d) is concerned (subject to the application of cl 4.3(g)).[35]

33. Rather, the issue was whether cl 4.3(g) of the Award nevertheless operates to exclude the shotfirers from the black coal mining industry.[36]

34. Put another way, the issue was whether cl 4.3(g) should be construed in a way which has the effect of changing what is otherwise obvious and plain – i.e. the Respondent's shotfirers were employed in the black coal mining industry; or whether, as the primary judge identified, such an argument is "implausible", resulting in an outcome which is, if not "off the rails", means that "the rails are only indistinctly visible in the rear vision mirror",[37] and which would have the consequence that an employee located on a black coal mine who would otherwise be plainly in the black coal mining industry may fall within or outside of the industry (and therefore the beneficial scheme) because of some entirely unrelated business of his or her employer.

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[33] Primary judge at [17]; CAB at 12.
[34] Primary judge at [19] ("there was no shadow of a doubt"); CAB at 13.
[35] Primary judge at [19]; CAB at 13. Subject to cl 4.3(g), that work was "obviously" in that industry, "because the uncovering of a coal seam by the detonation of explosives is a part of the actual process by which coal is mined and, hence, part of the mining operation itself": primary judge at [42]; CAB at 19-20.
[36] Primary judge at [20]; CAB at 13.
[37] Primary judge at [14]; CAB at 11.

D. Clause 4.3(g) of the Award

35. Clause 4.3(g) of the Award, when read with the chapeau to cl 4.3, provides that: "The black coal mining industry does not include: … (g) the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry."

36. There are important textual and contextual indications as to the proper construction of cl 4, and cl 4.3(g) in particular.

37. *First*, each of the sub-paragraphs of cl 4.3 refer to an activity, which is thereby excluded from the scope of the "black coal mining industry".

38. *Second*, whilst some of the sub-paragraphs of cl 4.3 are silent as to the person or entity who performs such activity, the text of cl 4.3(g) is plainly concerned with the activities of an employer. The express inclusion of the words "*by an employer*" delimits the sub-paragraph expressly to those activities by a nominated class of person. The use of "by" is significant: expressly identifying the person who performs the activity, and may be contrasted with "on behalf of"; it suggests the clause is not directed to the employee. None of the other sub-paragraphs use this language. If it had been intended that cl 4.3(g) was to apply to the work performed by the employees, it would have been easy to say so.

39. *Third*, the text of cl 4.3(g) further confirms that it is the employer's activity that is the subject of the exclusion. The language of "the supply" of relevant shotfiring services and the issue of being "engaged" in the industry, is language expressly referable to the employer's activities (even if did not contain the express words "by an employer"). Moreover, the language of the text that an employer be "engaged in" the black coal mining industry mirrors the language in the employer limbs. In contradistinction, the location limb refers to an employee who is "employed in" the black coal mining industry. It follows that, on its face, cl 4.3(g) refers to an employer's activity, i.e. whether the employer is engaged in the black coal mining industry; a factor only relevant to the employer limb.

40. Similarly, cl 4.3(b) identifies that it is an exclusion of activities performed by certain employees: "the work of employees employed in head offices …". It is

not possible to apply this sub-paragraph to the question of whether the employer of such employees is in the black coal mining industry.

41. *Fourth*, cl 4.3(g) involves two enquiries concerning the employer: (i) whether the employer supplies shotfiring services; and (ii) whether it is otherwise engaged in the black coal mining industry. The mere fact that the employer supplies shotfiring services does not, without more, determine whether such supply is within the black coal mining industry. It depends on whether the employer is "otherwise engaged in the black coal mining industry". In this context, the primary judge was correct to read "otherwise" as "in any event".[38] The primary judge's construction preserves what is obvious in the black coal mining industry – that shotfiring and explosives services performed on a black coal mine is directly connected with the extraction, mining and processing of black coal.[39] Indeed, the Award lists "blasting" and "shotfiring" as indicative competencies in the Award.[40] *Dyno Nobel* (discussed below) recognises that such activities fall within the black coal mining industry.

42. *Fifth*, it follows that, as cl 4.3(g) is drafted in language "engaged in the black coal mining industry", it left open that an employee may still be employed in the black coal mining industry despite the character of their employer. The draftsperson intended there be two separate limbs to the definition of "eligible employee". The relationship between the two limbs demonstrates that Parliament intended the qualities of the employer were to be irrelevant to the location limb.[41]

43. For the reasons set out above, cl 4.3(g) of the Award is only directed to the enquiry required by the employer limb in s 4(1)(a) of the definition.

E. The decision in *Dyno Nobel*

44. As noted above, cl 4.3(g) is accepted as being an exclusion that intended to cover the circumstances that arose in the decision of the Full Bench in *Dyno Nobel*.[42]

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[38] Primary judge at [43]; CAB at 20.
[39] Primary judge at [42]; CAB at 19-20.
[40] For example, Award at Schedule A, A.5.1.
[41] Primary judge at [22]; CAB at 13-14.
[42] Primary judge at [32], [35]; Full Court: Hatcher J at [79]; CAB at 17-18, 28; and see *Bis Industries* at [82].

45. *Dyno Nobel* involved whether an "industrial dispute" existed between the CFMEU and Dyno Nobel, for the purpose of the CFMEU's eligibility rules, which involved a consideration of the industry of the employer in respect of certain employees performing work on or near coal mining leases. The work of the particular employees included shotfiring and related activities. The central issue was whether the industry of the employer viz. those employees was in or in connection with the "coal mining industry" under the CFMEU eligibility rules.

46. It was not in dispute that the union "industry" eligibility rules were construed by reference to the industry of the employer, in particular by reference to the "substantial character" of the employer in respect of the employees whose eligibility for membership in accordance with the rules was under consideration.[43]

47. Accordingly, the Full Bench stated that the discrimen of eligibility under such a rule was the industry of the employer; which was determined by the "substantial character" of the trade or business of the employer and required a consideration of the business of the employer as a whole (at [51]).

48. The Full Bench concluded that Dyno Nobel operated a single integrated business (at [56]) and that the "predominant purpose of the single integrated business … is the manufacture and supply of explosives" (at [59]). Ultimately, it was held that Dyno Nobel's shotfiring activities to the black coal mining industry were too marginal a part of its more general explosives business to have the effect that it was engaged in the coal industry.[44] In reaching that finding, the Full Bench used similar language to that now found in cl 4.3(g): the relevant shotfiring activities of Dyno Nobel were "properly to be seen as the supply of a service to employers in one industry by an employer whose business is in another industry" (at [59]).

49. Significantly, in *Dyno Nobel*, the Full Bench accepted that a "small number of Dyno Nobel employees perform some work that can be regarded as work in the coal industry", but that did not answer the question which arose in the case, which was confined to the "substantial character" of the employer's business, where the "fact that some employees perform work that, viewed in isolation, may be

[43] See *R v Moore; Ex parte Federated of Miscellaneous Workers' Union of Australia* [1978] HCA 51; (1978) 140 CLR 470 at 485 (Aickin J).
[44] Primary judge at [33]; CAB at 17.

characterised as being in a given industry" will not necessarily be determinative of the "substantial character" of the business of the employer (at [59]-[60]).

50. It follows that, viewed in this light, *Dyno Nobel* was concerned only with the question of whether the business or enterprise conducted by Dyno Nobel (i.e. the employer) was within the coal mining industry, for the purposes of whether there was an industrial dispute under certain union eligibility rules. It was not concerned with an evaluation of the duties of the employees and their connection with the day to day operations of black coal mines, separate to the consideration of the employer's industry. It has relevance to whether the employer is engaged in the black coal mining industry (i.e. the employer limb), not whether the employee is, separately, employed in the black coal mining industry (i.e. the location limb).

51. Importantly, to the extent that cl 4.3(g) is construed as going further than the result in *Dyno Nobel*, then the chapeau in cl 4.2 applies: the meaning applied by the courts and industrial tribunals (as at the date of the Award) prevails, and the inclusions and exclusions in cll 4.2 and 4.3 remain "subject to" that meaning.

F. The primary judge's approach to the Appellant's construction

52. The primary judge's approach gave precedence to the structural dichotomy in s 4 of the Administration Act, and accepted that cl 4.3(g) of the Award is not relevant to the location limb, on the basis that it is apparent from the structure of the definition of "eligible employee" that the character of an employer is not intended to be relevant to the location limb; and the effect of cl 4.3(g) of the Award would be to make qualities of the employer inopportunely appear as requirements in the location limb, and therefore cannot be reconciled with the location limb.[45]

53. As developed further below, the primary judge concluded that cl 4.3(g) does not apply to the location limb because the definitions in s 4(1) of the Administration Act are expressed not to apply if "the contrary intention appears" from the face of the statute, and found that here a contrary intention appears: cl 4.3(g) is therefore not relevant to the location limb, and since the shotfirers are plainly

[45] Primary judge at [21]-[22]; CAB at 13-14.

employed in the black coal mining industry defined in the Award when cl 4.3(g) is disregarded, they are necessarily eligible employees under the location limb.[46]

54. While the primary judge reached the same end result as the Appellant's preferred construction, his Honour found against that construction on the basis that he considered that it was inconsistent with the outcome in *Dyno Nobel*, because the shotfirers would then be covered by the Award under cl 4.1(a), which the primary judge said was "a result which cl 4.3(g) appears to have been intended to avoid".[47] The primary judge concluded that cl 4.3(g) should be read in a way which "preserves the result in *Dyno Nobel*".[48]

55. The Appellant's construction does not undermine *Dyno Nobel* or the effect of that decision. As explained above, *Dyno Nobel* was concerned with whether the employer's business, i.e. the enterprise conducted by Dyno Nobel, was within the coal mining industry for the purposes of union eligibility rules, not an evaluation of the duties of the employees and their connection with the day to day operations of black coal mines, nor whether employees were "covered by the Award".

56. Clause 4.3(g) can be construed as according with the decision in *Dyno Nobel* in the sense that the decision is relevant to whether Dyno Nobel is an employer engaged in the industry for the purposes of the employer limb. But it does not follow that employees of Dyno Nobel cannot be employed in the industry for the purposes of the location limb (or for that matter, for the purposes of the very similar coverage provisions of the Award which were the subject of consideration in *Bis Industries*), even where their employer is not engaged in the industry.

57. The primary judge's consideration of *Dyno Nobel* in a different context would appear to support this analysis – i.e. that the true focus of *Dyno Nobel* was on the character of the employer – as the decision related to "whether, because a small number of Dyno Nobel employees perform some work that can be regarded as work in the coal industry…the single integrated business of Dyno Nobel also has a 'substantial character' that places it in or in connection with the coal industry".[49]

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[46] Primary judge at [23]-[24]; CAB at 14.
[47] Primary judge at [35]; CAB at 17-18.
[48] Primary judge at [43]; CAB at 20.
[49] Primary judge at [41]; CAB at 19.

G. The Full Court's erroneous approach to construction

58. The Full Court reasoned that, as cl 4.3(g) of the Award was part of a series of inclusions and exclusions that were used to define the "black coal mining industry" in the Award, which was a term that was used in both cll 4.1(b)(i) and (ii) of the Award and equally in s 4(1)(a) and (b) of the Administration Act in the meaning of "eligible employee", it followed that cl 4.3(g), as part of the definition of the black coal mining industry, was equally applicable to each of the employer and the location limb.[50]

59. The Full Court further held that, whilst the activities excluded from the black coal mining industry, in cl 4.3(g), are identified "partly" by reference to the character of an employee's employer, the exclusion in cl 4.3(g) also excluded the work performed by the employees who perform the shotfiring services for their employer.[51] In other words, the Full Court found that the exclusion of the supply of shotfiring services by the employer necessarily included the work of the shotfiring employees. However, the Appellant submits that this construction is contrary to the text, context and purpose of the relevant provisions.

60. *First*, the Full Court's decision makes no reference to the plain language of cl 4.3(g), being concerned with the activities of the employer, or the significance of the express words "by an employer". Other sub-paras of cl 4.3 are silent in this respect, but they are not expressly limited to activities "by an employer".

61. *Second*, the Full Court did not refer to other sub-paragraphs of cl 4.3, and the textual indications that may be derived therefrom. In cl 4.3(b), the exception expressly distinguishes between the work of employees and the business of the employer. On its face, cl 4.3(b) can only be an exclusion of that identified work of an employee.

62. *Third*, the Full Court did not refer to the primary judge's observations that, leaving cl 4.3(g) to one side, it is "obvious" that the shotfirer employees were employed in the black coal mining industry,[52] "because the uncovering of a coal

[50] Full Court: majority at [36], [39]; Hatcher J at [83]; CAB at 67-68, 81.
[51] Full Court: majority at [40]-[41]; CAB at 68.
[52] Primary judge at [19]; CAB at 13.

seam by the detonation of explosives is a part of the actual process by which coal is mined and, hence, part of the mining operation itself".[53]

63. *Fourth*, and critically, the majority in the Full Court failed to engage with the structural imperative of the distinction between the location limb and the employer limb,[54] which was specifically outlined by the primary judge, and which is evident in the definition of "eligible employee" in s 4(1) of the Administration Act, and replicated in cl 4.1 of the Award.

64. The effect of the Full Court's approach is that for time periods where the Respondent did not happen to integrate the Minova business (which was engaged in the black coal mining industry, but unrelated to its shotfiring business[55]), its shotfirers were not "eligible employees", despite there being no change to the shotfirers' duties, work or location of work.

65. The consequence of the Full Court's construction is that the scheme and its obligations may be avoided by the employer for shotfirers, depending on the business structure adopted for the employing of shotfirers. It would be antithetical to the portable scheme for eligibility of the employee to be dependent on the activities of the employer: an employee may be employed to provide shotfiring work at the same black coal mine for decades, engaged by multiple employers, but only be the subject of the scheme for those periods where their employer was otherwise in the industry.

H. The Full Court's erroneous approach to operation

66. The Full Court also held that, upon its proper construction, the exclusion in cl 4.3(g) had no work to do if limited to the employer limb, because it was stated that the exclusion only applied if the services were provided by an employer "not otherwise engaged in the black coal mining industry", but if that was the case then the employer would not be "engaged in the black coal mining industry".[56]

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[53] Primary judge at [42]; CAB at 19-20.
[54] Full Court: majority at [32]-[43]; CAB at 66-69.
[55] The Respondent has always accepted that the Minova employees "were employed in the black coal minng industry" and has never sought to challenge that position: primary judge at [53]-[54]; see also, Full Court: majority at [59].
[56] Full Court: majority at [38]; Hatcher J at [81]; CAB at 67-68, 80.

67. The Full Court's conclusion that cl 4.3(g) can have no work to do with respect to the employer limb, i.e. s 4(1)(a), is flawed. Clause 4.3(g) contains both an exclusion, and an exception to that exclusion.[57] In the absence of the clause, the shotfiring activities would not be excluded, and they would fall within the inclusions in cl 4.2[58] which is directly referable to the question of whether the employer is engaged in the industry for the purposes of the employer limb.[59] When the exclusion is applicable, the clause applies by excluding the supply of shotfiring services by the employer that would have been within cl 4.2 but for the exclusion. Further, if the exception also applies (i.e. an employer provides shotfiring and explosive services, and the employer is otherwise engaged in the black coal mining industry), then the clause clarifies that the provision of shotfiring services does not remove the employer from the black coal mining industry. In the absence of the exception, it may have been unclear whether the employer who was otherwise engaged in the industry was nevertheless "in" the industry. Each of these are respectively applications of the clause to the employer limb in s 4(1)(a).

68. To apply the facts of *Dyno Nobel* to the definition of "eligible employee" as an illustrative example, in that case the exclusion would apply (i.e. the employer was supplying shotfiring services), and the exception to the exclusion would not apply (i.e. the employer was not otherwise engaged in the black coal mining industry) – and so the employer would not be in the black coal mining industry. That does not mean the clause has no work to do when applied to the employer limb, and it says nothing about the location limb.

69. Clause 4.3(g) recognises that an employer supplying shotfiring and explosive services may operate in different industries. The exception to the exclusion clarifies that an employer who supplies shotfiring and explosives services may in any event be engaged in the black coal mining industry. If the employer's supply of shotfiring and explosives services to the black coal mining industry is minimal, cl 4.3(g) confirms that the employer is not in the industry (in the same way as the exclusions at cl 4.3(a) also make clear that brown coal mining is not within the

[57] Full Court: majority at [38]; Hatcher J at [81]; CAB at 67-68, 80.
[58] Primary judge at [19]; CAB at 13.
[59] A determination of that question would require an application of the "substantial character" test.

black coal mining industry). An employer may in any event be engaged in the black coal mining industry by reason of its shotfiring services where the supply of such services to the black coal mining industry means that it can properly be characterised as having the substantial character of being engaged in the black coal mining industry (consistent with the reasoning in *Dyno Nobel)*.

I. The alternative construction as preferred by the primary judge

70. Alternatively, the way the primary judge resolved the tension between cl 4.3(g) and the structural imperative underpinning the employer and location limb was to rely on the "contrary intention" (i.e. the words "unless the contrary intention appears" in s 4 of the Administration Act).

71. The primary judge held that, to the extent that the definition in s 4(1) of the Administration Act of the 'black coal mining industry' includes cl 4.3(g), it cannot be reconciled with the location limb in the definition of 'eligible employee' in s 4(1). Consequently, a contrary intention is demonstrated on the face of the location limb, and the "black coal mining industry" referred to in that limb cannot be the black coal mining industry defined in the Award. The primary judge considered that although s 4(1) clearly shows that Parliament intended the legislative scheme to operate by reference to the same black coal mining industry as the Award does, one must give effect to the structural imperatives of the location limb, and the conflict may be reconciled by reading the reference to "black coal mining industry" as having the same meaning as it bears in the Award but without cl 4.3(g)", and so the shotfirers were eligible employees under the location limb.[60]

72. Whilst the Appellant's primary position is that cl 4.3(g) is only applicable to the employer limb, to the extent that is not accepted as the proper construction, the Appellant adopts the primary judge's approach.

73. On this approach, a contrary intention is demonstrated on the face of the location limb and the "black coal mining industry" referred to in that limb cannot be the black coal mining industry defined in the Award.[61] Read that way, the excision in

[60] Primary judge at [23]-[24]; CAB at 14.
[61] Primary judge at [23]; CAB at 14.

cl 4.3(g) is not relevant to the location limb. Since the shotfirers are plainly employed in the black coal mining industry defined in the Award when cl 4.3(g) is disregarded, and are so employed at black coal mines in direct connection with the day to day operation of those mines, they are necessarily eligible employees under the location limb.[62]

74. The Full Court rejected the primary judge's approach on the basis that the legislative intention was for the meaning of "Coal mining employees" under cl 4.1 of the Award to have the same meaning as under s 4(1) of the Administration Act.[63] Such an approach addresses the issue from the wrong direction: the Award does not drive the intention of the Act.

75. Moreover, whilst it may be accepted that the Administration Act and the Award were intended to operate in harmony, there is nothing incongruous or inharmonious per se with employees being eligible employees under the scheme, while not being subject to the Award.[64] An employee does not need to be "covered" by the Award in order to fall within the scheme.[65] There are differences between the question of whether an employee is a "coal mining employee" under the Award, and the test for "eligible employees" under the scheme: e.g., the coverage provisions under the Award require that the employee fall within certain classifications, but those provisions have not been incorporated into s 4(1).[66]

J. The proposed Cross Appeal

76. By its proposed Cross Appeal, the Respondent contends that the Full Court erred in determining that the Respondent was "otherwise engaged in the black coal mining industry" for the purposes of cl 4.3(g) by reason of its Minova business. As the Full Court identified, the primary judge's analysis of the Minova business and its significance to cl 4.3(g) was orthodox and correct.[67] The Appellant

[62] Primary judge at [24]; CAB at 14.
[63] Full Court: majority at [37]-[38] and [43]; Hatcher J at [82]-[83]; CAB at 67-68, 80-81.
[64] In *Bis Industries*, the employees subject to that decision would be eligible employees for the purposes of the scheme, even though ultimately it was held that a classification in the Manufacturing Award was most appropriate to their work and that they were covered by that Award: see [316]-[317].
[65] *Hitachi* at [178].
[66] *Hitachi* at [187]; see the different language as to "coverage" in clause 4.1 of the Award, particularly as to the express classifications referred to. Note also clause 4.6 of the Award as to potential coverage under other Awards. See also primary judge at [29]-[30]; CAB at 15-16.
[67] Full Court: majority at [65]; Hatcher J at [88]; CAB at 74, 83.

otherwise intends to address this ground in reply (and orally should leave be granted).

PART VII — ORDERS

77. The Appellant seeks the following orders:

(a) Appeal allowed.

(b) Set aside orders 1 to 4 of the Full Court made on 17 July 2025 and in lieu thereof order:

i. Appeal dismissed;

ii. Notice of contention filed by the Respondent be upheld;

iii. The Appellant pay the Respondent's costs of the appeal to the Full Court.

(c) The Respondent pay the Appellant's costs of appeal to this Court.

PART VIII — TIME ESTIMATE

78. The Appellant estimates that it will need up to 2 hours for oral submissions in chief and up to 30 minutes for oral submissions in reply (responding to the Notice of Cross Appeal).

Dated 23 December 2025

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	*Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth)	Compilation No. 20 (6 November 2018 to 31 August 2021)	Section 4(1), Part 5A	Act in force at the time the proceeding commenced.	Proceeding commencement date.
2.	*Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* (Cth)	Version currently in force.	N/A	Act in force at the time the proceeding commenced.	Proceeding commencement date.
3.	*Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth)	Compilation No. 7 (6 November 2018 to 31 August 2021).	N/A	Act in force at the time the proceeding commenced.	Proceeding commencement date.
4.	Black Coal Mining Industry Award 2010	Version as in force on 1 January 2010	Clause 4 and Schedule A.5.1	Date of Award referred to in Administration Act.	1 January 2010 being date of the Award as referred to in the Administration Act.
5.	Black Coal Mining Industry Award 2010	Version as in force on 30 November 2012	Clause 4 and Schedule A.5.1	Version which has retrospective operation from 1 January 2010.	1 January 2010 being date of the Award as referred to in the Administration Act.