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:	Mining and Energy Union - Form 27C - Intervener's submissio
Filing party:	Intervener
Date filed:	06 Jan 2026

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

and

Orica Australia Pty Ltd
Respondent

SUBMISSIONS OF THE MINING AND ENERGY UNION
SEEKING LEAVE TO INTERVENE OR BE HEARD AS *AMICUS CURIAE*

PART I FORM OF SUBMISSIONS

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

PARTS II AND III BASIS OF INTERVENTION / LEAVE AND REASONS

2. The Mining and Energy Union (**MEU**) seeks leave to intervene in support of the appellant. It is the principal trade union in the black coal mining industry and has constitutional coverage of those performing any work in or in connection with the industry, including shotfirers. This appeal and any cross-appeal have the potential to impact the proper interpretation of the *Black Coal Mining Industry Award 2020* and thus the minimum entitlements of the MEU's members and potential members.[1]

3. Alternatively, the MEU seeks to be heard as *amicus curiae*. Its proposed submissions are confined to the meaning of the BCMI Award having regard to its drafting history before the Australian Industrial Relations Commission (**AIRC**) and so a grant of leave would not add materially to the parties' preparation for the hearing or the length of the oral hearing.[2] Those submissions are capable of significantly assisting the Court in respect of matters not fully addressed by the parties[3] or the courts below. The primary judge referred only briefly to that history at **J[31]-[32] and [35]**. Drafting history is especially important because the interpretation of an award must not proceed "divorced from industrial realities".[4] The MEU is uniquely placed to make submissions on the drafting history of the *Black Coal Mining Industry Award 2010* (the **BCMI Award**), because the MEU's predecessor, the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union, was the principal union party involved in the making of this award.

PART IV PROPOSED SUBMISSIONS

A. HISTORY OF AWARD MODERNISATION

A.1 Pre-modern awards

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1 The *Black Coal Mining Industry Award 2020* contains a relevantly identical coverage clause and definition of the "black coal mining industry" to those in the 1 January 2010 form of the instrument.

2 See *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, [4].

3 See *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, [7].

4 *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426, [57]. See also, eg, *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498, 503-504; *Australian Communication Exchange Ltd v Deputy Federal Commissioner of Taxation* (2003) 77 ALJR 1806, [56]; *New South Wales v Stockwell* [2017] NSWCA 30, [72]; *CFMEU v Australian Industry Group* [2025] FCAFC 187, [21].

4. Awards were originally the outcome of disputes between unions and employers that were determined through conciliation and arbitration,[5] although in practice, unions and employers routinely agreed on much of their content, such that the arbitral tribunal was left to resolve only whatever confined matters remained in dispute.[6] Awards "generally bound only the employers, employer organisations and unions who had been parties to the industrial dispute that gave rise to the making of the award and who were named in the award as 'respondents'".[7] Statutory reforms limited the subject matters that could be dealt with by way of an award, which reduced the utility of awards to some extent, yet there remained over 1,000 awards in force by the time that a formal modernisation project commenced in 2008. Under s 576C of the *Workplace Relations Act 1996* (Cth) as introduced by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth), the Minister could make a request to the President of the AIRC to carry out an award modernisation process. Such a request was duly made on 28 March 2008 and subsequently amended on 16 June 2008.

A.2 Establishing the priority list

5. On 29 April 2008, Giudice J as the President of the AIRC issued a statement on the process for award modernisation.[8] His Honour identified "three priority tasks to be completed by the Commission by 30 June 2008",[9] the first of which was "the establishment of a list of priority industries or occupations for which modern awards are to be made by the end of 2008".[10] The statement included a draft list of priority industries and occupations for the purpose of consultation, and in that list was the "Coal Industry".

6. Between May and June 2008, the AIRC considered which awards it would determine as a matter of priority. Submissions on priority touched upon the question of coverage. The Mining and Energy Division identified itself (the "industry union"), APESMA, the AMWU, the CEPU and (in respect of NSW only) the COA as "[t]he unions which have an involvement in the coal mining industry" and further explained that "[t]he COA represents deputies and shotfirers in NSW" while "[t]he CFMEU-M&E also covers some Deputies in NSW along with the COA, but exclusively covers deputies and shotfirers in

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5 See J Riley et al, *Macken's Law of Employment* (Thomson Reuters, 9th ed (online), 2022), [12.310].

6 A Stewart et al, *Creighton & Stewart's Labour Law* (Federation Press, 7th ed, 2025), [13.04].

7 A Stewart et al, *Creighton & Stewart's Labour Law* (Federation Press, 7th ed, 2025), [13.05].

8 *Award Modernisation – Statement* [2008] AIRC 387.

9 *Award Modernisation – Statement* [2008] AIRC 387, [13].

10 *Award Modernisation – Statement* [2008] AIRC 387, [13].

Queensland and Western Australia".[11] It submitted that the appropriate coverage clause for a proposed priority modern coal industry award was:[12]

> This award will apply to:
>
> - Production, engineering and staff employees in the coal mining industry, excluding construction work;
> - All work involved in connection with the unloading and/ or stock piling and/or loading of coal at designated coal ports/terminals, including coal superintending sampling and;
> - Coke works that are not part of the steel industry,

7. In oral submissions, the Coal Mining Industry Employer Group (**CMIEG**) submitted:[13]

> we contend strongly for a modern award for the coal mining industry to be confined to the coal mining industry as that term has been very widely understood, litigated, has been the subject of decisions of this Commission, of the High Court, for many years the Coal Industry Tribunal, and also has its own legislation in a number of respects. For example there's a long service leave, portable long service leave funding scheme for the coal mining industry that parallels the coal mining industry in its industrial usage as evolved through the jurisdiction of the Coal Industry Tribunal.

8. On 20 June 2008, the AIRC decided to include an award for the "coal mining industry" in its priority list.[14] In doing so, the AIRC rejected the inclusion of coal ports and terminals or coke plants in this award.[15] Its reasons on priority stated:[16]

> We received a number of submissions concerning the scope of the relevant industry. In particular the parties joined issue on whether the coal industry should be confined to coal mining for the purposes of inclusion on the priority list or whether it should extend to coal ports/terminals and coke works. We are not persuaded by the arguments advanced by the CFMEU (Mining and Energy Division) that coal ports and terminals or coke plants should be covered by a coal industry modern award. Established union coverage is not a sufficient basis for their inclusion. Such a criterion is not specified in Pt 10A of the WR Act or in the Minister's request. That is not to say that the Commission will ignore union coverage issues in determining the scope of modern awards. Rather, coverage is one of potentially many factors that may affect a decision as to the scope of a modern award. The fact that all but one of the coal ports and terminals are operated

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11 Mining and Energy Division of the CFMEU, 'CFMEU Submissions to AIRC regarding Priority List', Submission in AM2008/1, 6 June 2008, [9]-[12].

12 Mining and Energy Division of the CFMEU, 'CFMEU Submissions to AIRC regarding Priority List', Submission in AM2008/1, 6 June 2008, [2].

13 Transcript, AIRC (AM2008/1), Full Bench, 28 May 2008, PN1755. The CMIEG was not an employer association but rather a collection of coal mining companies jointly participating in the proceedings.

14 *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008 (Award Modernisation Case (2008))* (2008) 175 IR 120, [15]-[18].

15 The Mining and Energy Division had submitted that coal ports and coke works should be included within the scope of the coal industry as is apparent from the passage of its submissions quoted at [7] above, but this was contentious and disputed by other unions as well as by the CMIEG.

16 *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008 (Award Modernisation Case (2008))* (2008) 175 IR 120, [17].

by entities owned by coal mining companies is not a matter to which we attach substantial weight. Rather, we note that the operation of a coal port and terminal has much more in common with the operation of ports and terminals more generally than it does with the mining of coal. Similarly, a coke works has more in common with other manufacturing enterprises that process particular materials than it does with the mining of coal. Our decision to exclude ports, terminals and coke works does not pre-empt any later consideration of the appropriate award coverage for such operations. We are deciding only to exclude them from the priority list.

9. The AIRC's reasons also contained a "list of awards and NAPSAs [Notional Agreements Preserving State Awards] relevant to each of the industries/occupations on its list.[17] The list for the coal mining industry included the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* (to which Orica Australia Pty Ltd was an employer respondent[18]) and the *Coal Mining Industry Award (Deputies and Shotfirers) 2002* among several others.

A.4 Drafting of the coal mining award

10. Throughout July and August 2008, the AIRC undertook a process of pre-exposure draft consultations seeking submissions from interested parties.

A.4.1 The CMIEG draft award

11. On 31 July 2008, the CMIEG submitted a draft award on behalf of employer interests. Clause 3 dealt with coverage of the award. Clause 3.1 provided:[19]

> **3. COVERAGE**
>
> 3.1 This award applies to:
>
> 3.1.1 Employers of coal mining employees as defined in clause 3.1.2;
>
> 3.1.2 Coal mining employees. Coal mining employees are:
>
> 3.1.2.1 employees who are 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 and who are employed in a classification or class of work in Schedule A or B of this award;
>
> 3.1.2.2 employees who are 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

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17 *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008 (Award Modernisation Case (2008))* (2008) 175 IR 120, [98].

18 By operation of two roping-in awards, the *Coal Mining Industry (Production & Engineering) Consolidated Award 1997 Roping-in Award (No 3) 2005* and the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997 Roping-in Award (No 1) 2002*.

19 CMIEG, 'Submission on Behalf of Coal Mining Industry Employer Group', Submission in AM2008/1, 31 July 2008, Annexure A (Draft Award) (**CMIEG Submission**).

and who are employed in a classification or class of work in Schedule A or B of this award; and

3.1.2.3 employees permanently employed in connection with a mines rescue service in Schedule C of this award (to be finalised);

12. Clauses 3.1.3 to 3.1.7 identified the unions which the award was to cover and are not of present relevance. Clause 3.2 also identified possible exclusions from the award:

3.2 Despite anything in clause 3.1, this award does not apply to:

3.2.1 employers and employees to whom an enterprise award (as defined in s576U of the Act) applies;

3.2.2 (higher income employees as provided for in the Act);

3.2.3 employers in respect of their employees in char plants; and

3.2.4 (other exclusions in favour of relevant other awards - to be finalised after consultations with the Commission).

13. It defined "black coal mining industry" in cl 3.3 as follows:

3.3 For the purposes of this award, "black coal mining industry" has the meaning applied by courts and industrial tribunals, including the former Coal Industry Tribunal.

Subject to the foregoing, the black coal mining industry includes:

- the extraction or mining of black coal on a coal mining lease by means of underground or surface mining methods;
- the processing of black coal at a coal handling or coal processing plant on or adjacent to a coal mining lease;
- the transportation of black coal on a coal mining lease; and
- other work on a coal mining lease directly connected with the extraction, mining and processing of black coal;

and does not include:

- the work of employees employed in head offices and corporate administration offices of employers engaged in the coal mining industry;
- the operation of a coal export terminal;
- construction work on or adjacent to a coal mine site;
- catering and other domestic services; or
- haulage of coal off a coal mining lease.

(Note: see, for example, decision of the Coal Industry Tribunal in Australian Collieries Staff Association and NSW Combined Colliery Proprietors Association and Queensland Coal Owners Association – No.20 of 1980; 22 February 1982 (Print CR2997)).

14. The CMIEG explained its drafting in accompanying submissions:[20]

> Clause 3 as a whole has been carefully drafted to ensure that
>
> - the application of the new award matches properly the application of the current coal mining industry awards. That is, it is designed to ensure that the application of the new modern award does not include classes of employers and employees to whom existing coal mining industry awards and NAPSAs do not properly apply and does not exclude classes of employers and employees to whom existing coal mining industry awards and NAPSAs do apply; and
> - there is appropriate congruence between the application of the modern award and the application of the Federal legislated coal mining industry long service leave scheme.
>
> […]
>
> Clause 3.3 provides for "coal mining industry" to have the meaning applied by courts and industrial tribunals in the past. The references in clause 3.3 to what the black coal mining industry includes and does not include are intended to provide a guide to the activities and work that are included in the coal mining industry and those that are not. These references are not intended as an exhaustive definition of the coal mining industry. The "note" at the end of the clause 3.3 is included in order to assist interpretation of the application of the award.

15. The reference to "the Federal legislated coal mining industry long service leave scheme" was to the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) as in force on 31 July 2008, which defined an "eligible employee" in s 4(1) as follows:

> ***eligible employee*** means:
>
> (a) a person employed in the black coal mining industry under a relevant industrial instrument, or the National Employment Standards, the duties of whose employment are carried out at or about a place where black coal is mined; or
>
> (b) a person employed by a company that mines black coal the duties of whose employment (wherever they are carried out) are directly connected with the day to day operation of a black coal mine; or
>
> (c) a person permanently employed on a full-time basis in connection with a mines rescue service for the purposes of the black coal mining industry the duties of whose employment require him or her to be located at a mines rescue station; or
>
> (d) any prescribed person who is, or is any person who is included in a prescribed class of persons who are, employed in the black coal mining industry;
>
> but does not include:
>
> (e) a person the duties of whose employment are performed in South Australia; or
>
> (f) a person who is, or a person who is included in a class of person who are, declared by the regulations not to be an eligible employee or eligible employees for the purposes of this Act.

[20] CMIEG Submission, p 4.

16. The CMIEG's draft dealt with wages in clause 11. Clause 11.1 provided:

> 11.1 The wages and allowances which an employee is to be paid are specified in the following schedules to this award:
>
> - Schedule A: Production and Engineering
> - Schedule B: Staff
> - Schedule C: Mines Rescue

17. Earlier tribunal decisions reflect that shotfirers had been understood as within the coal mining industry.[21] It was not surprise, therefore, that shotfirers were referred to in Schedules A and B. The CMIEG's submissions explained:[22]

> Deputies and shotfirers, for whom there is presently a pre-reform award, operative only in NSW, have been provided for in Schedule A: Production & Engineering of the draft award. It is not necessary to provide separate classifications for deputies and shotfirers within the classification structure in Schedule A as they already fall within the existing classification structure in Schedule A. In NSW only, this approach will result in the minimum weekly wage rate for a deputy being higher than that prescribed in the current pre-reform award for deputies and shotfirers. This increase will more than offset the omission of certain allowances currently paid to deputies in NSW under the deputies and shotfirers pro-reform award. These changes are proposed by the Group as being practical and convenient and do not reduce the total monetary entitlements of deputies and shotfirers.

A.4.2 Union submissions and draft award

18. On 1 August 2008, the Mining and Energy Division filed a submission and draft coal mining award as agreed between it and the other interested unions (being the AMWU, the CEPU, the COA, APESMA), save that the AMWU and CEPU had "some concern with the coverage clause in so far as the broader contracting interests are concerned" and APESMA "preferred [different] wording in respect to mining company administration offices".[23] Clause 3 on coverage was the same as the CMIEG's proposal save in respect of the exclusions in clause 3.2. The unions proposed a sole exclusion: "Despite anything in sub-clause 3.1, this award does not apply to employers and employees to whom an enterprise award (as defined in s576U of the Act) applies".

19. The CEPU's written submissions raised a concern that the CMIEG draft appeared to provide for coverage on the basis of the industry of the employee rather than that of the

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21 See, eg, *Australasian Coal and Shale Employees Federation v NSW Combined Colliery Proprietors Association* [1975] ACIndT 2452, a case involving a dispute over the rate of pay for shotfirers.

22 CMIEG Submission, pp 6-7.

23 Mining and Energy Division of the CFMEU, 'Pre-Drafting Outline of Submissions of the CFMEU', Submission in AM2008/2, 1 August 2008, [4].

employer, and that such a proposal was inconsistent with the Minister's award modernisation request.[24] The AMWU's written submissions proposed a coverage clause that would have resulted in the award applying to an employee only if they were employed by an employer engaged in the coal mining industry. Its submission said:[25]

> … the AMWU proposes the following alterations to the CFMEU's proposal:
>
> **3. COVERAGE**
>
> 3.1 This award applies to:
>
> 3.1.1 Employers engaged in the coal mining industry as defined in clause 3.3;
>
> 3.1.2 Employees employed by an employer described by 3.1.1, whose duties are directly connected with the day to day operation of a black coal mine and who are employed in a classification in Schedule A or B of this award and employees permanently employed in connection with a mines rescue service in Schedule E of this Award.

A.4.3 Oral submissions

20. In oral submissions to the AIRC on a range of awards, the AMWU maintained that award coverage for employees should depend on the industry of their employer. In one session, the AMWU representative submitted that established principles "really use the industry of the employer as one of the points of reckoning in determining the industry of the employees' work".[26] In another session, the AWMU representative submitted:[27]

> The form basically is that employers are bound with respect to the industry that they are engaged in and the employees are bound with respect to employees who are employees of the employers already bound by the award and with respect to classifications described in the modern award. So in that sense the words, in or in or in connection with, are not necessarily an issue so long as employees are bound into it with respect to their relationship to the employer already bound and also with respect to classifications already described in the modern award.

21. The CMIEG representative said that "we have departed in a very measured respect from the way the cases have defined or appear to have defined the coal mining industry by requiring both the employer and the employee to be employed in the coal mining industry, but it's a very measured approach".[28] In answer to a question about whether clause 3.1.2.2

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24 CEPU, 'Submission of the Communications, Electrical and Plumbing Union (CEPU)', Submission in AM2008/2, 1 August 2008, [8]-[12], [24].

25 AMWU, 'Submission to Award Modernisation Consultation: AM2008/2 Coal Mining Industry', Submission in AM2008/2, 1 August 2008, [8].

26 Transcript, AIRC (AM2008/6), 7 August 2008, Melbourne, Harrison SDP, PN60.

27 Transcript, AIRC (AM2008/10), 7 August 2008, Melbourne, Watson VP, PN36.

28 Transcript, AIRC (AM2008/2), 8 August 2008, Sydney, Lawler VP, PN122.

of the draft "focuses on the occupation of the employee, what it is that the employee is doing rather than the industry of the employer",[29] the CMIEG representative said:[30]

> There is an important point of distinction between 3.1.2.1 and 2.2. In 3.1.2.2, it's not necessary that the employer be engaged in the coal mining industry as the cases have ruled you determine that question. However, in distinction or in contrast with the previous subclause, their duties must be carried out at or about a place where black coal is mined and directly connected with the day to day operation of a coal mine and in a classification in the award.

22. The CMIEG representative reiterated that, in drafting these clauses, it "had regard to the definition of eligible employee in the Coal Mining Industry Long Service Leave Funding Act" which the CMIEG said "hinges entitlement to long service leave by reason of employee service in the coal mining industry".[31]

A.4 Exposure draft

23. On 12 September 2008, the AIRC published an exposure draft of the Coal Mining Industry Award 2010, which followed the form agreed by the CMIEG and the Mining and Energy Division save that it omitted two matters explained by the AIRC as follows:[32]

> The draft application clause agreed between the CFMEU and the coal mining employers makes use of the description "black coal mining industry". The draft included the following clause
>
> > 4.2 In this award "black coal mining industry" has the meaning applied by courts and industrial tribunals, including the former Coal Industry Tribunal.
>
> We have decided not to include this clause because, from a legal perspective, it adds nothing and is apt to confuse or intimidate lay readers of the award. Our draft is based on the assumption that the Commission, its successor body or any Court will give the expression "black coal mining industry" the meaning applied by courts and industrial tribunals, including the former Coal Industry Tribunal, subject to any express inclusions or exclusions in the application clause of the coal mining award.
>
> The definition of black coal mining in the draft awards prepared by the CFMEU and the coal mining employers was accompanied by the following agreed note:
>
> > (Note: see, for example, decision of the Coal Industry Tribunal in Australian Collieries Staff Association and NSW Combined Colliery Proprietors Association and Queensland Coal Owners Association — No.20 of 1980; 22 February 1982 (Print CR2997)).

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29 Transcript, AIRC (AM2008/2), 8 August 2008, Sydney, Lawler VP, PN129, PN135.

30 Transcript, AIRC (AM2008/2), 8 August 2008, Sydney, Lawler VP, PN138.

31 Transcript, AIRC (AM2008/2), 8 August 2008, Sydney, Lawler VP, PN122.

32 *Re Request from the Minister for Employment and Workplace Relations – 28 March 2008 (Award Modernisation Statement (AM 2008/1-12))* (2008) 177 IR 8, [37]-[39]. See AIRC, 'Exposure Draft - Coal Mining Industry Award 2010' in AM2008/1-12, 12 September 2008.

We have not included the note but accept that the decision referred to is relevant to the proper meaning of the expression "black coal mining industry."

24. The coverage clause in this exposure draft provided:

> **4 Application**
>
> 4.1 This award applies to:
>
> (a) Employers of coal mining employees as defined in clause 4.1(b);
>
> (b) **Coal mining employees**
>
> Coal mining employees are:
>
> (i) employees who are 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 and who are employed in a classification or class of work in Schedules A or B;
>
> (ii) employees who are 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 and who are employed in a classification or class of work in Schedules A or B of this award; and
>
> (iii) employees permanently employed in connection with a mines rescue service in Schedule C of this award.
>
> 4.2 To avoid doubt, the black coal mining industry includes:
>
> (a) the extraction or mining of black coal on a coal mining lease by means of underground or surface mining methods;
>
> (b) the processing of black coal at a coal handling or coal processing plant on or adjacent to a coal mining lease;
>
> (c) the transportation of black coal on a coal mining lease; and
>
> (d) other work on a coal mining lease directly connected with the extraction, mining and processing of black coal.
>
> 4.3 To avoid doubt, the black coal mining industry does not include:
>
> (a) the mining of brown coal in conjunction with the operation of a power station;
>
> (b) the work of employees employed in head offices or corporate administration offices of employers engaged in the black coal mining industry;
>
> (c) the operation of a coal export terminal;
>
> (d) construction work on or adjacent to a coal mine site;
>
> (e) catering and other domestic services; and
>
> (f) haulage of coal off a coal mining lease (unless such haulage is to a wash plant or char plant in the vicinity of the mine).

4.4 This award is binding on employers and employees to whom it applies but, notwithstanding anything in clause 4.1, this award:

(a) does not apply to an employee excluded from award coverage by the Act; and

(b) does not bind an employer who is bound by an enterprise award with respect to an employee to whom the enterprise award applies.

4.5 Subject to clause 4.1, where an employer is engaged in more than one industry to which an industry award applies an employee of that employer will be deemed to be in the classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work, regardless of the industry award in which the classification appears.

25. On 10 October 2008, the CMIEG made a written submission on the exposure draft that dealt with coverage in the following terms:[33]

Clause 4 - Application

3. This clause deletes the definition of the expression black coal mining industry and the annotations giving a link to historical decisions about this. The inclusion of these provisions was supported jointly by the employer group and the CFMEU.

4. Clause 4.5 is a provision introduced by the Award Modernisation Full Bench in order to help deal with the intersection of the *black coal mining industry* with other industries.

5. The employer group, and indeed other parties, wish to avoid an outcome whereby employers and their employees who are currently not covered by coal mining industry awards and NAPSAs become bound by the Coal Mining Industry Award. Among other consequences, such an outcome may result in a significant increase in costs for those employers.

6. The employer group notes with appreciation the indications in paragraphs 37 to 39 of its 12 September 2008 Statement of the Commission's expectation that courts and tribunals will give the expression *black coal mining industry* its historical meaning subject to the express words of clause 4.

7. Nevertheless, and given the central importance of these matters, the employer group submits and urges that further consideration be given to inclusion of the agreed definitions in the manner sought by the parties.

8. While acknowledging the Full Bench's preliminary view about the inclusion of annotations, and noting that it would be an exceptional approach, the employer group submits that this is now a common approach in legislative drafting and one which will be particularly valuable in this instance. See, for example, the annotation accompanying section 420(1) of the *Workplace Relations Act 1996* and the significance it was accorded by the Full Bench of the Commission in *CFMEU v Coal and Allied Mining Services Pty Ltd* [2008] AIRCFB 1159, at paragraphs 10 to 13.

[33] CMIEG, 'Further Submission on Behalf of Coal Mining Industry Employer Group', Submission in AM2008/2, 10 October 2008, [3]-[11] (**CMIEG Further Submission**).

9. Further, the Commission's draft formulation changes the focus of the definition. In the formulation proposed by the employer group, greater prominence was given to the long standing meaning applied by courts and industrial tribunals with the nominated inclusions and exclusions having a subsidiary role. In the Commission's draft formulation, this is reversed with the nominated inclusions and exclusions becoming a primary reference point.

10. For these reasons, the employer group urges that clause 4 be altered in the manner set out in Attachment 1 to this Submission, consistently with the agreed clause originally advanced.

11. Moreover, the employer group urges that it be made clear that the substance of the annotations – whether appearing in the modern award or an associated statement – is applicable to the whole of clause 4, including the resolution of any issue under clause 4.5 in the Exposure Draft, and that the aim of the express words selected is neither to add to nor detract from the historical application of coal mining award provisions to the *black coal mining industry*.

26. The CMIEG's submission addressed shotfirers in the context of addressing Schedule A to the exposure draft modern award on production and engineering classifications in terms similar to those in its original submissions as quoted at [17] above:[34]

> One specific matter affects deputies and shotfirers, for whom there is presently a pre-reform award operative only in New South Wales. Provision has been made for them in Schedule A. It is not necessary to provide separate classifications for deputies and shotfirers within the classification structure in Schedule A as they already fall within the existing classification structure. This approach will result, in New South Wales only, in the minimum weekly wage rate for a deputy being higher than that prescribed in the current pre-reform award for deputies and shotfirers. This increase will more than offset the omission of certain allowances currently paid to deputies in New South Wales under the deputies and shotfirers pre-reform award. These changes are proposed by the employer group as practical and convenient and do not reduce the total monetary entitlements of deputies and shotfirers.

A.5 Dyno Nobel

27. On 31 October 2008, Dyno Nobel Asia Pacific Limited (**Dyno Nobel**) made a submission to the AIRC about industries including the coal mining industry. It referred to the AIRC's decision in *CFMEU v Dyno Nobel Asia Pacific Ltd* (***Dyno Nobel***),[35] submitting that the AIRC held that "Dyno Nobel was not engaged in or in connection with the coal industry, meaning that the CFMEU could not represent the interests of any employees of Dyno

[34] CMIEG Further Submission, [51].

[35] [2005] AIRC 622.

Nobel. Therefore, it could not bring an application to make Dyno Nobel a respondent to the P & E Award".[36] It then drew attention to the definition of coal mining employees:[37]

> 25 The CFMEU and the Coal Mining Industry Employer Group have both indicated that they have no intention of expanding the coverage of the coal mining industry awards or that the application of the Draft CMIA represents the 'status quo' …
>
> 26 Despite this, sub-paragraph (ii) of the draft definition of 'coal mining employees' focuses on the location and type of activities of employees to the exclusion of the relevant industry of their employer. This may have the effect that, because of the location and types of activities performed by a very small fraction of Dyno Nobel's workforce, it may become bound by the modern award which results from the Draft CMIA where it is not currently bound by the P&E Award.
>
> 27 Dyno Nobel submits that the application or coverage of the Draft CMIA should not be broader than that of the P&E Award. Given the Full Bench Decision that Dyno Nobel was not engaged in the coal industry (referred to at paragraph 22), any focus on the activities of the employees of Dyno Nobel to the exclusion of the industry of Dyno Nobel as an employer may potentially have the unintended consequence of expanding the coverage or application of awards applying to the coal mining industry.

28. Dyno Nobel advocated for an exclusion from the coal mining industry award as follows:[38]

> 29 Dyno Nobel operates a single integrated business. The supply of shot firing and blast design services to the coal industry (or to the mining industry generally) cannot be characterised as operating a separate business or enterprise in relation to the supply of such services. Shot firing, for example is an adjunct service or incidence to the manufacturing of explosives. The proper predominant purpose of the single integrated business operated by Dyno Nobel is the manufacture and supply of explosives. This places Dyno Nobel in the explosives industry or, more generally, the chemical industry.
>
> 30 Dyno Nobel is a respondent to the Explosives Award, which is specifically tailored to the nature of the work performed by Dyno Nobel. If the *Coal Mining Industry Award 2010* was also to apply to Dyno Nobel, in relation to employees who perform work on or about coal mining leases, for example, then Dyno Nobel would be bound by two different awards in relation to that group of employees depending on where they perform their work.
>
> 31 Although Dyno Nobel employees may perform some work on coal mining leases that could be regarded as work in the coal industry, such as shot firing, this does not change the fact that the substantial character of Dyno Nobel's integrated business is not in or in connection with the coal industry.
>
> 32 The Award Modernisation Request states at paragraph l(a) that modern awards 'must reduce the regulatory burden on business' and must not 'increase costs for employers'.

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[36] Dyno Nobel, 'Submission on Behalf of Dyno Nobel Asia Pacific Limited', Submission in AM2008/2, 31 October 2008, [22] (**Dyno Nobel Submission**).

[37] Dyno Nobel Submission, [25]-[27].

[38] Dyno Nobel Submission, [29]-[36].

33 If Dyno Nobel is required to apply coal mining industry conditions, this would result in substantial increases, due to the conditions being far more generous that the current Explosives Award (as discussed at paragraph 23). Requiring Dyno Nobel to be covered by two awards conflicts with Julia Gillard's Award Modernisation Request. Applying two awards would involve an increase in administrative costs through having to apply different awards for work carried out for different clients.

34 Additionally, it makes no sense for Dyno Nobel, as a participant in the chemical industry (an industry historically treated by the Commission as separate and distinct from that of its clients), to potentially be covered by an award applicable to that of its clients in another industry. This could potentially lead to a situation where some employees of Dyno Nobel could be covered by a number of different modern awards, depending solely on the location of their duties, where currently they are only covered by the Explosives Award.

35 Given the breadth of the potential application of the Coal Mining Industry Award 2010 and its particularly generous conditions, Dyno Nobel seeks an exemption from the application of its coverage for employees covered by whatever award replaces the existing Explosives Award.

36 Accordingly, Dyno Nobel seeks the following exemption to be included in the Coal Mining Industry Award 2010:

(a) This award does not apply to employees covered under the Explosives Award. Without limiting the generality of the forgoing exemption, this award does not apply to employees who provide services associated with the manufacture, supply and service of explosive products to a client or clients in the mining industry, on a contract basis, and whose business is independent of the client.

(b) This award does not apply to employees of employers in the chemical industry who:

(i) manufacture, supply and service explosive products throughout Australia; or

(ii) carry out work which is preparatory to, or for rendering complete, work in (i).

29. Dyno Nobel expanded on its position in oral submissions to the AIRC:[39]

> The process of award modernisation appears to be developing in such a way that Dyno Nobel may end up on present indications, for reasons that are set out in the written submission, being something of a victim of the process rather than achieve any benefit from it, in the sense that a number of it's employees are being sought to be cut off to be carried off into other awards. So that for the reasons that are set out in the written submission there is a prospect of a number of the employees being carved off to be covered by the Coal Mining Award.
>
> A number of employees to be carved off to be covered by the Metal Industries Mining Award, and yet still another group of employees who would appear to be taken from the industry specific Explosives Award to be covered in a broad church Manufacturing

[39] Transcript, AIRC (AM2008/19), 24 November 2008, Melbourne, Acton SDP, PN25-PN33.

Award in a way that as presently advised it is going to require a substantial amount of inclusion material in the broad church Manufacturing Award to deal with the industry specific requirements of a business which is involved in what can be a very dangerous activity and dealing with the explosives which are it's stock in trade.

There is a substantial risk if fences are not constructed around the Dyno Nobel operation if it is not brought specifically under the coverage of a single award that it will, as I say, be carved off into two or three different awards. The difficulty with that is, as has been mentioned in the submission, is that the question as to whether employees engaged in magazine storage activities and/or shot firing activities on a mining site, the question of the award under which they are covered depends on the nature of the product being extracted by the customer, whether it be a coal miner, a medallist miner or some civil operation, in each case the suggestion seems to be in relation to those other awards that if there are Dyno Nobel personnel on site who are engaged in shot firing and/or magazine activities on that site, then they are to be covered by that award.

The difficulty with that is the same employees of Dyno Nobel will go from being covered by a single Explosives Award to being covered by one of two other awards and if and when they are transferred from one side to another they will pass from one award to anther award, as I say depending on the product being extracted by their clients or by their customer, none of which appears to make any particular sense and all of which appears to be a considerable reduction in the benefits and efficiencies that were achieved by the making of a single arbitrated Explosives Award about a decade ago.

For that reason it is submitted in the written submission, and I again urge the Commission in looking at this matter, to ensure that if it is not within the province of the Commission to make or to replicate a stand alone Explosives Award because of the general thrust of the rationalisation which is occurring, and if it is thought advisable to bring a company such as Dyno Nobel under a broad manufacturing type award, that great care will need to be taken to ensure that the sorts of classifications and competencies which are currently contained in the explosives award are brought across because one would have thought they had no parallel in any of the other general Manufacturing Awards because there are a number of classifications and competencies dealt with in the award concerning shot firing and explosive management and misfire management and detonator testing and a range of other things of that kind which have very industry specific requirements. And it may well be that again if there is not the capacity under the award modernisation process to have a stand alone Explosives Award in the context procedures, then the Manufacturing Award will need to have a schedule or an annexe or some special allowance for the industry specific requirements.

In addition to that the submission has been made that walls will need to be constructed around the operations of a company like Dyno Nobel, so that it's employees are not moved from pillar to post, as it were, from the coverage on one award to another to another, depending upon whether they are actually working within my client's primary manufacturing premises or whether they are working on a coal mine or whether they are working on a medallist mine or whether they are working on a civil construction site, there is the capacity under the current processes for a single employee engaged in that kind of work and with those kind of competencies that they can go out into the field to be covered by four different awards, depending on their geographical location.

Again, that is not a situation that applies now and given the intended scope and purpose of the award modernisation process, it is not a situation which ought to be imposed upon this company by reason of the current award modernisation processes. As the written

submission makes clear, that will require there to be an exemption added to the Coal Mining Award and that has been dealt with in written submission, I won't deal with that here. It appears that it may require an express exemption in the Mining Award. But in any event it will require that the Manufacturing Award contain a very clear statement, if that is to be the award which is to cover the operations of Dyno Nobel going forward, it would be appropriate for there to be a very clear statement within the Manufacturing Award and that part of the award which is intended to deal with this particular part of the chemical industry, that companies engaged in that kind of chemical manufacturing and their employees are not to be covered by any other award, merely by virtue of the fact that particular employees may actually carry out their employment with the company at a particular geographical location which might have some proximity to another industry.

For all the reasons that I have mentioned that could lead to all sorts of anomalous results that employees will move from award to award to award, and the company would be in a very disadvantageous position in relation to knowing from time to time what award applies, but certainly being able to have a coherent safety net for the purpose of enterprise bargaining going forward.

30. The Mining and Energy Division addressed Dyno Nobel's position in oral submissions:[40]

… We have concerns with the Artificial Fertilisers and Chemical Workers Award insofar as the respondents also include Orica. Orica along with Dyno Nobel provide the explosives to the general mining and coal mining industries in Australia. Certainly in coal Orica is a respondent to the Production and Engineering Coal Mining Industry Award and in the - - -

THE SENIOR DEPUTY PRESIDENT: Just on that then, as you understand the proposed scope, be it from the exposure draft or subsequent agreement between yourselves and the relevant employer regarding the Coal Mining Award, would that exposure draft of the Coal Mining Award or subsequent discussions you've had cover Orica?

MS GRAY: Yes.

THE SENIOR DEPUTY PRESIDENT: But your concern is by including the term explosives, is it, in the Manufacturing Award that they may be covered by both?

MS GRAY: Your Honour, the manufacture of explosives doesn't concern us at all when it's done in factories where essentially they're providing fertiliser to farmers and explosives and feedstock for explosives. What our concern is with explosives is when we have people employed to work on a coal mining site for up to 10 years going to a drill pattern in overburden or inter burden and loading the shot holes that have been drilled by coal mining industry people, loading them up with explosives, having a shot fire, fire the shot and having the overburden removed or the inter burden removed which is an intrinsic and essential part of coal mining to expose the coal, that's where we have a concern with what's being called explosives work or the explosives industry by people such as Dyno Nobel but in fact it's part of the continuing process of coal mining.

THE SENIOR DEPUTY PRESIDENT: So you say they're currently proposed to be covered by the Coal Mining Award. You have a concern that they may be covered by a separate Chemical Award or the Manufacturing Award.

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[40] Transcript, AIRC (AM2008/19), 24 November 2008, Melbourne, Acton SDP, PN401-419.

MS GRAY: Yes.

THE SENIOR DEPUTY PRESIDENT: Because of the reference to explosives in 4.4AA is it?

MS GRAY: Yes, your Honour, and because of the sort of submissions that have been made on behalf of Dyno by Mr Herbert. Your Honour, the Dyno Nobel Award or the federal Explosives Manufacturing and Distribution AWU Award 2000 is in fact only a single union, single employer award. Dyno Nobel is the only respondent to it so I think it's an enterprise award and - - -

THE SENIOR DEPUTY PRESIDENT: It's starting to sound like it, isn't it?

MS GRAY: Yes. So again Mr Herbert's comments that competencies from this award should be transferred into the chemical industry part of the Manufacturing Award we would be firmly opposed to because there are those competencies currently in the Mining Award and encompassed in the Coal Mining Industry Awards. If a company which is respondent to an enterprise award seeks to have those transferred into a general Chemical Award within the Manufacturing Award then what work would they have to do other than perhaps very, very cut price coal mining industry work.

THE SENIOR DEPUTY PRESIDENT: So you say and I'm sure Mr Herbert will read this transcript, that Dyno Nobel is covered by an enterprise award.

MS GRAY: Yes.

THE SENIOR DEPUTY PRESIDENT: So they needn't be concerned about anything that's done and indeed the task they're doing they needn't do.

MS GRAY: I'm sorry, what was the - - -

THE SENIOR DEPUTY PRESIDENT: The task that Mr Herbert at my instruction asked for them to do, they needn't do.

MS GRAY: Yes, your Honour, that's our view. We note that Dyno Nobel isn't listed as the respondent to the Artificial Fertilisers Chemical Industry Award although the other half of the duopoly of that work in Australia Orica is. That's no doubt because the AWU and Dyno Nobel did a separate enterprise award to cover that work across Australia.

THE SENIOR DEPUTY PRESIDENT: Can I just pursue that a bit more? If they're covered by an enterprise award, they're excluded from coverage under this award, however there is the broader question about, let's say, new entrants to the industry which award they would be covered by, which presumably AIG would argue that's the reason for including the scope of the Artificial Fertilisers and Chemical Industry Award in here, if that be the case your concern still is that the exclusion of that scope leads to some potential confusion about whether they're covered by the coal mining industry or this award?

MS GRAY: Yes, your Honour, and having heard what your Honour has said earlier today, we would certainly prepare a draft amendment to the scope clause and draft exclusions within the next two weeks to reflect what we seek to get out of it. I hope today to be able to cover some of the points which justify our objections, your Honour.

31. The Mining and Energy Division and Dyno Nobel subsequently filed written submissions on the scope of the Manufacturing Award which are not of present relevance.

A.6 Final award

32. On 19 December 2008, the AIRC made the BCMI Award. Its coverage clause is in the same form as at 1 January 2010, and contained for the first time the shotfirer provision at clause 4.3(g). The AIRC's accompanying reasons said:[41]

> The award will cover all black coal mining in Australia but not brown coal mining. The only brown coal mined in Australia is mined in Victoria and South Australia where all such mining is undertaken as an adjunct to power generation. We have changed the name of the relevant award to make explicit reference to black coal. The award will be the Black Coal Mining Industry Award 2010.
>
> We note again a particular circumstance relevant to the approach we have adopted to this award. All of the major coal mining companies in Australia were jointly represented and presented submissions as the coal mining industry employer group (CMIEG). The Construction, Forestry, Mining and Energy Union (CFMEU) is the key union that represents production employees in the industry. The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) is the key union representing staff employees in the industry. The CMIEG, CFMEU and APESMA substantially agreed on the terms of a draft award for the black coal mining industry. A number of the changes to the exposure draft were agreed by relevant parties.
>
> *Coverage*
>
> We have, at this stage, acceded to the main submissions of the CFMEU and the CMIEG in relation to the coverage clause in the exposure draft and have generally reverted to the form of words in the draft clause agreed by the main coal industry parties. We note that the stated goal of the CFMEU and the CMIEG was to achieve a coverage clause that as closely as possible reflects the status quo in terms of the existing application of the key federal pre-reform awards both in relation to the kinds of employers to whom those awards apply and the extent to which the awards apply to such employers. We agree with that goal and intend that the award we have made should neither expand nor contract the reach of the key pre-reform awards both in relation to the kinds of employers to whom those awards apply and the extent to which the awards apply to such employers. It follows that we reject submissions that sought to have mechanical and electrical contractors invariably covered by awards other than the modern award for the black coal mining industry.
>
> However, we are concerned that the clause as drafted is not simple to understand nor easy to apply. In particular, contractors who perform some work at or about coal mines may have difficulty in determining whether the award covers them. We acknowledge that significant attempts were made by the parties to agree on a form of words that described the industry in a clear and direct way. We intend to vary cl.4 before the award commences so that it contains a clearer description of the black coal mining industry albeit a description that reflects as closely as possible the status quo. We recognise that the difficulties in developing such a description are substantial and that this should not be done without further consultation with interested parties.[42]

B. SUBMISSIONS ON THE MEANING OF CLAUSE 4 OF THE AWARD

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41 *Re Request from the Minister for Employment and Workplace Relations—28 March 2008 (Award Modernisation (AM 2008/1-12))* (2008) 177 IR 364, [154]-[157].

42 The AIRC did not ultimately vary the coverage clause as foreshadowed in this paragraph.

33. In light of the above drafting history, the MEU advances the following propositions. *First*, clause 4.1(b)(ii) did not require the employer to be in the black coal mining industry. Rather, it looks solely to the industry in which the employee is working.[43] This is apparent from reading clause 4.1(b)(ii) in the context of clause 4.1(b)(i). Paragraph (i) refers to both an employee who is "employed in the black coal mining industry" and to an "employer engaged in the black coal mining industry", thereby requiring both the employer and the employee to be in that industry, whereas paragraph (ii) refers only to the employee. This construction is confirmed by the drafting history. It was a deliberate choice for clause 4.1(b)(ii) to apply irrespective of the industry of the employer, which was made following extensive submissions on the issue and which was endorsed by the CMIEG and the Mining and Energy Division and resisted unsuccessfully by other unions.

34. *Second*, shotfirers were originally intended to be covered by the BCMI Award. That is apparent from at least the following: (a) one of the pre-reform awards replaced by the BCMI Award was the *Coal Mining Industry Award (Deputies and Shotfirers) 2002*; (b) the pre-modern award applying to production and engineering employees, the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997*, included "Shotfirer" as an advancement competency at clause 18.8.2; (c) two of the interested unions were the COA, which represented deputies and shotfirers, and the Mining and Energy Division, which had general industry coverage and noted that it was the exclusive union representing shotfirers in other States; (d) the CMIEG's draft upon which the BCMI Award was ultimately based was prepared on the basis that shotfirers were to be dealt with as part of the Production and Engineering employee classifications in Schedule A.

35. *Third*, clause 4.3(g) should not be interpreted to exclude shotfirers from coverage unless their employer was itself in the black coal mining industry. (a) *Dyno Nobel* was a case that was only about the industry of the employer while the BCMI Award was deliberately drafted to cover employees in the industry who were not employed by an employer in the industry; (b) excluding shotfirers from coverage unless their employer was itself in the black coal mining industry is not what Dyno Nobel proposed to the AIRC (and in any event, the AIRC did not adopt Dyno Nobel's drafting); (c) discriminating against shotfirers (by requiring them alone to be employed by an employer in the black coal mining industry) would have been the subject of consultation had that been intended,

[43] See also *Bis Industries Ltd v CFMEU* [2021] FCA 1374, [216].

given: (i) the innovative extension intended by clause 4.1(b)(ii); and (ii) the specific interests of the COA and the Mining and Energy Division in respect of shotfirers. Further, (d) clause 4.8 of the BCMI Award provides that "where an employee is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work". This deals with the specific concern raised by Dyno Nobel about its employees being governed by multiple awards (see [29] above). This clause, which has no analogue in the pre-modern awards, confines the application of the award in a way that cautions against reading down its coverage.[44]

36. *Fourth*, the better construction is that clause 4.3(g) reflects what the AIRC held in *Dyno Nobel*: it confirms that an employer is not in the black coal industry merely because it supplies shotfiring services to a black coal mine, albeit it could still be in the black coal industry if, having regard to its business as a whole, it is in any event in the black coal mining industry. That ties clause 4.3(g) to what *Dyno Nobel* stands for without doing violence to the underlying and entirely deliberate structure of clause 4.1 and without prejudicing the interests of the COA and the Mining and Energy Division and those they represented without proper consultation. Further, making it clear that an employer is not in the black coal mining industry has utility and significance because it means that its employees who have duties that "are directly connected with the day to day operation of a black coal mine and who are employed in a classification or class of work in [Schedule A or Schedule B of the BCMI Award]" will not be coal mining employees within clause 4.1(b)(i), albeit its employees whose duties are also "carried out at or about a place where black coal is mined" will be within clause 4.1(b)(ii). This construction does not, therefore, give clause 4.3(g) no work to do: cf **FCAFC [38], [83]**.

PART V ESTIMATE OF TIME FOR ORAL ARGUMENT

37. The MEU would respectfully request 15 minutes for any oral argument.

Dated: 6 January 2026

Christopher Tran
Fifth Floor St James' Hall
P: (02) 8257 2579
E: christopher.tran@stjames.net.au

Alistair Sage
National Legal Director, MEU
P: (02) 9267 1035
E: asage@meu.org.au

[44] See, eg, *Bis Industries Ltd v CFMEU* [2021] FCA 1374, [9], [12], [27], [283]-[286], [295]-[315].

ANNEXURE TO INTERVENER'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.	*Workplace Relations Act 1996* (Cth)	Version as in force at 28 March 2008	Section 576C	Act as in force at the commencement of award modernisation, including amendments made by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*	28 March 2008 (date of Minister's award modernisation request) to 19 December 2008 (date of making the BCMI Award)
2.	*Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth)	Version as in force at 31 July 2008	Section 4(1)	Version of Act referred to during award modernisation process	31 July 2008 (date of CMIEG submissions referring to statute)
3.	*Black Coal Mining Industry Award 2020*	Version currently in force	No specific provision	Version of the Award to which the intervener's industrial interests presently relate	6 January 2025 (date on which leave to intervene is sought)
4.	*Black Coal Mining Industry Award 2010*	Version as in force on 1 January 2010	Clause 4	Date of Award as referred to in the *Coal Mining Industry (Long Service Leave) Administration 1992* (Cth) as in force at the time the proceeding commenced.	1 January 2010
5.	*Coal Mining Industry (Production and Engineering) Consolidated Award 1997*	25 September 2008	Clause 18.8.2	Version of award in effect at time BCMI Award was made	19 December 2008
6.	*Coal Mining Industry Award (Deputies and Shotfirers) 2002*	6 October 2005	No specific provision	Version of award in effect at time BCMI Award was made	19 December 2008