



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 27D - Respondent's submissions
Filing party: Respondent
Date filed: 13 Feb 2026

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Form 27D—Respondent’s submissions

Note: See rule 44.03.3.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S161 of 2025

BETWEEN: **COAL MINING INDUSTRY (LONG SERVICE LEAVE
FUNDING) CORPORATION**
Appellant

and

ORICA AUSTRALIA PTY LTD
Respondent**RESPONDENT’S SUBMISSIONS****Part I: Form of submissions**

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

Part II: Statement of the issues

2. The ultimate issue presented by the appeal is whether employees of the respondent engaged in the supply of shotfiring or other explosive services at black coal mines in New South Wales from 2013 (**relevant employees**) were and are ‘eligible employees’ within subparagraph (b) of the definition in s 4(1) of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) (**Administration Act**) (**subparagraph (b)**).
3. The resolution of that issue turns upon the answers to the following questions:

Question 1: On the proper construction of the *Black Coal Mining Industry Award 2010* (**Award**), can cl 4.3(g) apply in determining whether an employee is employed in the black coal mining industry?

Question 2: On the proper construction of the Administration Act, is cl 4.3(g) of the Award relevant in determining whether an employee is an eligible employee within subparagraph (b)?

Question 3: Did the exclusion in cl 4.3(g) apply with respect to the relevant employees during the period when the respondent also operated the ‘Minova’ business?

This involves the following questions of construction:

- (a) Does cl 4.3(g) apply to the supply of shotfiring or other explosive services if the employer otherwise participates in the black coal mining industry through an enterprise that is entirely separate from the supply of those services?

(b) Alternatively, is it necessary to consider the employer's business as a whole in determining whether it is otherwise engaged in the black coal mining industry for the purposes of cl 4.3(g)?

4. Questions 1 and 2 arise in the appeal. If both are answered 'yes', the appeal must be dismissed. Question 3 arises in the cross-appeal if special leave is granted.

Part III: Section 78B notice

5. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Material facts

6. With one exception, the respondent does not contest the facts set out in [6]-[10] of the appellant's submissions (AS) or chronology. The exception is that in relation to AS [9], the Minova business involved more than the installation, repair, maintenance and removal of various kinds of ventilation control devices. It also involved the provision of geological and/or geotechnical drilling and instrumentation, and secondary ground support services.¹ These can be described collectively as the provision of ground support and geotechnical services.² The respondent has accepted that employees involved in providing those services were covered by the coal mining industry long service leave scheme only on the basis that they fell within subparagraph (b) of the definition of eligible employee, not on the basis that the respondent was an employer engaged in the black coal mining industry by reason of the Minova business: cf AS [10].

Part V: Argument on the appeal

7. The Full Court was correct to conclude³ that cl 4.3(g) applies in determining whether an employee is employed in the black coal mining industry for the purposes of subparagraph (b), because: (a) the Administration Act defines the cohort of eligible employees by reference to the scope of the black coal mining industry under the Award; (b) cl 4.3(g) is essential to how the Award defines the scope of the black coal mining industry; (c) on the proper construction of the Award, the application of cl 4.3(g) is not confined to determining whether the employer is engaged in the black coal mining industry; and (d)

¹ *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 (PJ) at [54]-[58]: Core Appeal Book (CAB) 22-23.

² PJ at [80]: CAB 28.

³ *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 (AJ) at [41]-[43] (Collier and Snaden JJ), [81]-[83] (Hatcher J): CAB 68-69, 80-81.

none of the text, purpose or context of the Administration Act or the Award justify excising cl 4.3(g) for the purposes of applying subparagraph (b).

The cohort of eligible employees is defined by reference to the black coal mining industry under the Award

8. The main object of the Administration Act is ‘to make provision in relation to long service leave *in the black coal mining industry*’: s 3. This is reflected in its long title: ‘An Act to make provision in relation to long service leave *in the black coal mining industry*, and for other purposes’. The specified means of achieving that object include by ‘providing minimum entitlements and rights in respect of long service leave for *eligible employees*’: s 3(ab).
9. Consistent with its main object, the Administration Act uses the ‘black coal mining industry’ to circumscribe the cohort of eligible employees who are entitled to long service leave (s 39A) and otherwise the subject of the long service leave scheme in the Administration Act and its cognate legislation (**coal LSL scheme**). The ‘black coal mining industry’ is a key criterion in every subparagraph of the definition of eligible employee in s 4(1):

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; or
 - (c) an employee permanently employed with a mine rescue service for the purposes of the black coal mining industry; or
 - (d) a prescribed person who is employed in the black coal mining industry;
but does not include a person declared by the regulations not to be an eligible employee for the purposes of this Act.
10. In turn, the ‘black coal mining industry’ is defined to be coextensive with industry definition in the Award (s 4(1)):

black coal mining industry has the same meaning as in the Black Coal Mining Industry Award 2010 as in force on 1 January 2010.

11. The clear implication of these provisions is that eligibility for the coal LSL scheme was intended to conform with the scope of the black coal mining industry as defined by the

Award. That implication is consistent with the legislative history. The current definitions of the black coal mining industry and eligible employee were inserted into the Administration Act by the *Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009* (Cth). That Act commenced on the same date as the Award. The Explanatory Memorandum for the predecessor Bill described the purpose of the amendments as being to ‘ensure that the scheme applies universally in the black coal mining industry from 1 January 2010’: p 1. It also described the definition of the black coal mining industry as ‘aligned with the definition in the [Award]’, which ‘ensures that black coal mining industry has the same meaning in both the [Administration Act] and the [Award], as in force on 1 January 2010’: p 1, [4], [6].

Clause 4.3(g) is essential to the industry definition under the Award

12. The Award defines the boundaries of the black coal mining industry using inclusions (in cl 4.2) and exclusions (in cl 4.3). The inclusions in cl 4.2 are expressed to be subject to the meaning applied by the courts and industrial tribunals (in context: when the Award was first made), but not the exclusions in cl 4.3: cf AS [28]. In any event, the words ‘subject to’ indicate that the following list applies unless it is inconsistent with the meaning of the black coal mining industry applied by the courts and industrial tribunals, and is inapplicable only to the extent of any inconsistency.
13. The inclusions in the black coal mining industry in cl 4.2 and the exclusions in cl 4.3 are specified by reference to *activities*, being activities that either have or do not have a sufficient nexus with the enterprise of mining black coal. In some cases, the specification includes an additional characteristic of the circumstances in which the activities are performed that is relevant to that nexus, such as location: for example, ‘the transportation of black coal *on a coal mining lease*’ is included (cl 4.2(c)) while ‘construction work *on or adjacent to a coal mine site*’ is excluded (cl 4.3(d)). In the case of cl 4.3(g), the additional characteristic relates to the employer: ‘the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry’. A characteristic relating to the employer also appears in cl 4.3(b), which excludes the work of employees employed in head offices or corporate administration offices ‘of employers engaged in the black coal mining industry’. Demarcating the black coal mining industry by reference to activities and the circumstances in which they are performed reflects the approach taken by the Coal Industry Tribunal in *Australian*

Collieries Staff Association and Queensland Coal Owners Association,⁴ the case referred to below cl 4.3 of the Award.

14. Because the Award defines the black coal mining industry as a field of particular activity, encompassing a range of included activities but also circumscribed by exclusions, it is necessary to apply all of the exclusions in cl 4.3 together with the inclusions in cl 4.2 (unless inconsistent with the meaning applied by the courts and industrial tribunals) to demarcate the black coal mining industry for the purposes of the Award. Applying only a subset of the exclusions, including by excising cl 4.3(g), would result in a field of activity that is not the ‘black coal mining industry’ as defined by the Award.

Clause 4.3(g) is not limited in its application to the employer (question 1)

15. The proper construction of cl 4.3(g) is that it excludes from the black coal mining industry the activity of supplying shotfiring or other explosive services from the black coal mining industry when it is performed in circumstances where the employer is not otherwise engaged in the black coal mining industry. Construed in this way, the exclusion can be applied without difficulty in determining whether an employee is employed in the black coal mining industry. Whether an employee is ‘employed in’ an industry depends on whether and to what extent they are engaged in the performance of activities falling within the field of activity comprising the industry, as part of their employment.⁵ Applying cl 4.3(g), an employee is not employed in the black coal mining industry by reason of being engaged in the activity of supplying shotfiring or other explosive services in circumstances where their employer is not otherwise engaged in the black coal mining industry. Put another way, an employee whose job is to perform shotfiring or other explosives work is not employed in the black coal mining industry except if their employer is otherwise engaged in that industry.
16. This is the proper construction of 4.3(g) for the following reasons.
17. *First*, construing cl 4.3(g) as being concerned with activities and the circumstances in which they are performed rather than with who performs them conforms with the model of cl 4.2 and cl 4.3, which is to define an *industry* (not the participants in that industry),

⁴ Unreported, Coal Industry Tribunal, 22 February 1982 (No 20 of 1980) at, eg, 1, 2, 17.

⁵ See, eg, *Hitachi Construction Machinery (Australia) Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* (2024) 306 FCR 486 at 501-5 [75]-[95] (Rangiah, Charlesworth and Dowling JJ).

and to define it as a *field of activity* having regard, in some cases, to the circumstances of the specified activities.

18. *Second*, the reference to ‘by an employer’ in cl 4.3(g) does not serve to limit its application to the employer: *contra* AS [38], [60]. There is no meaningful dichotomy between the supply of services by an employer and the work of its employees in supplying those services (*contra* AS [39]): the employer supplies the services by that work. There is no conceptual or linguistic difficulty with the proposition that an employee is engaged in the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry. The purpose of the word ‘by’ in the context of the subclause is not to identify who must perform the activity but to identify the connection between the activity (‘the supply of shotfiring or other explosive services’) and the circumstances in which it is performed (‘by an employer not otherwise engaged in the black coal mining industry’) that is sufficient to take that activity outside the scope of the industry.
19. Subclause 4.3(b) is in a different category from cl 4.3(g) (*contra* AS [40], [61]). It is concerned with a category of case in which the employer is engaged in the industry, but seeks to clarify which activities of its employees fall within the scope of the industry.
20. *Third*, construing cl 4.3(g) as applying with respect to employees as well as the employer is consistent with the history and industrial context of the Award.
21. The Award was the product of the award modernisation process commenced by the Australian Industrial Relations Commission (**Commission**) in 2008. Clause 4.3(g) appeared for the first time at the end of the drafting process, without explanation by the Commission: submissions of the Mining and Energy Union (**MEU**)⁶ (**IS**) [32].⁷ However, the implication from the chronology of the process is that the Commission included it in response to submissions made by Dyno Nobel Asia Pacific Limited (**Dyno Nobel**), after the exposure draft of the Award was released: IS [27]-[31]. The effect of those submissions was that the Award should exclude from its coverage Dyno Nobel’s employees involved in the supply of shotfiring and blast design services on coal mining

⁶ The respondent does not oppose the MEU having leave to intervene and will not object to the MEU reading the affidavit of Alistair McLaren Sage affirmed 6 January 2026 (**Sage**).

⁷ See also exposure draft *Coal Mining Industry Award 2010* dated 12 September 2008, cl 4.3 (Sage, exhibit AMS13, 167); submissions on behalf of Dyno Nobel Asia Pacific Limited dated 31 October 2008 (**Dyno Nobel AMOD submissions**) at [36] (Sage, exhibit AMS15, 212-13); *Re Request from the Minister for Employment and Workplace Relations—28 March 2008 (Award Modernisation (AM 2008/1-12))* (2008) 177 IR 364 at 403-4 [154]-[157].

leases, and therefore also should not cover Dyno Nobel with respect to those employees.⁸ This was because: (a) Dyno Nobel ‘operates a single integrated business’ of manufacturing and supplying explosives, to which shotfiring and those other explosive services were an adjunct or incident, such that it was properly characterised as being in the explosives or chemical industry;⁹ (b) Dyno Nobel anticipated that it and its employees involved in providing shotfiring and blast design services outside of coal mines would be covered by a different award, as they were currently;¹⁰ and (c) it would not be appropriate for Dyno Nobel to be covered by two different awards with respect to its cohort of shotfirers and blast design employees depending on where they worked.¹¹

22. In support of these submissions, Dyno Nobel relied on the decision of the Commission in *Construction, Forestry, Mining and Energy Union v Dyno Nobel Asia Pacific Limited (CFMEU v Dyno Nobel)*.¹² That case concerned whether shotfirers employed by Dyno Nobel were eligible to be union members pursuant to an eligibility rule articulated by reference to the industry in which *employees* were engaged (‘employees engaged in or in connection with the coal and shale industries’): *contra* AS [45]-[46], [50]; IS [35(a)].¹³ Consistent with longstanding authority in this Court,¹⁴ the Commission answered that question by reference to the trade or business of the *employer*.¹⁵ The Commission concluded that Dyno Nobel’s shotfiring and other explosive services employees were not engaged in or in connection with the black coal mining industry for the purposes of the eligibility rule.¹⁶
23. Dyno Nobel relied on this outcome to submit that it would not be appropriate for the Commission in the modernisation process to ‘focus on the activities of the employees of Dyno Nobel to the exclusion of the industry of Dyno Nobel as an employer’.¹⁷ Dyno Nobel’s proposed exclusion extended to both employees and employers, and with respect to employees referred both to the services provided by those employees (‘employees who

⁸ Dyno Nobel AMOD submissions at [29], [35]-[36] (Sage, exhibit AMS15, 211-12).

⁹ Dyno Nobel AMOD submissions at [29] (Sage, exhibit AMS15, 211).

¹⁰ Dyno Nobel AMOD submissions at [30], [35] (Sage, exhibit AMS15, 211-12).

¹¹ Dyno Nobel AMOD submissions at [30]-[34] (Sage, exhibit AMS15, 211-12); transcript of Commission hearing on 24 November 2008 at PN28-PN29 (Sage, exhibit AMS16, 227-28).

¹² [2005] AIRC 622. See Dyno Nobel AMOD submissions at [27] (Sage, exhibit AMS15, 210).

¹³ [2005] AIRC 622 at [5].

¹⁴ See, eg, *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1921) 29 CLR 290 at 296-98; *Re Federated Liquor and Allied Industries Employees’ Union of Australia; Ex parte Australian Workers’ Union (Poon Bros Case)* (1976) 51 ALJR 266 at 268.

¹⁵ [2005] AIRC 622 at [16].

¹⁶ [2005] AIRC 622 at [64].

¹⁷ Dyno Nobel AMOD submissions at [27] (Sage, exhibit AMS15, 210).

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 to the business of the employer (‘whose business is independent of the client’).¹⁸

24. On the premise that cl 4.3(g) was inserted to accommodate the matters raised in Dyno Nobel’s submissions, including the outcome in *CFMEU v Dyno Nobel*, this context supports applying cl 4.3(g) in determining whether an employee is employed in the black coal mining industry: *contra* AS [55]-[56]; IS [35]-[36]. Dyno Nobel’s concern was to avoid being covered by the Award with respect to its shotfiring and other explosive services employees working on black coal mines, who were determined not to be in the black coal mining industry because Dyno Nobel was not in that industry. A construction that does not apply cl 4.3(g) in determining whether an employee is employed in the black coal mining industry would have the contrary result. Without cl 4.3(g), Dyno Nobel’s shotfiring and blast design employees would be employed in the black coal mining industry because they would be engaged in the performance of activities falling within cl 4.2 as part of their employment; their duties would be carried out at or about a place where black coal is mined and directly connected with the day to day operation of a black coal mine; and they would fall within one of the classifications in Sch A of the Award: cl 4.1(b)(ii). The Award in turn would cover Dyno Nobel with respect to those employees, because coverage of the employer with respect to an employee is the corollary of coverage of the employee: cl 4.1(a). In contrast, applying cl 4.3(g) in determining whether an employee is employed in the black coal mining industry would produce a result consistent with Dyno Nobel’s submission and the outcome in *CFMEU v Dyno Nobel*, because its shotfiring and blast design employees were engaged in the supply of shotfiring or other explosive services and Dyno Nobel was not otherwise engaged in the black coal mining industry such that cl 4.3(g) would exclude them from being employed in the industry.
25. The inclusion of shotfiring in the Award classification structure (IS [34]) still has work to do on this construction when the shotfirer is employed by an employer otherwise engaged in the black coal mining industry such that cl 4.3(g) is not engaged. While the Commission did not adopt the precise formulation of the exclusion sought by Dyno Nobel (IS [35(b)]), the inclusion of cl 4.3(g) cannot be explained other than as a response to its submissions, and the formulation in cl 4.3(g) has features of Dyno Nobel’s, including the reference to the business of the employer. The Mining and Energy Division of the

¹⁸ Dyno Nobel AMOD submissions at [36] (Sage, exhibit AMS15, 212-13).

CFMEU was heard on Dyno Nobel's submissions,¹⁹ in a context where 14 priority awards were due to be made by the end of 2008:²⁰ *contra* IS [35(c)], [36]. The concern raised by Dyno Nobel was not resolved by the clause dealing with coverage by multiple awards (*contra* IS [35(d)]), because that clause looks not only to the work performed by the employee but also to 'the environment in which the employee normally performs the work', and a large part of Dyno Nobel's concern was different awards covering its shotfirers and blast design employees based on the location of their work. In any event, the substance of the 'overlap' clause was included in the exposure draft,²¹ if the Commission thought it addressed the concern, it would not have added cl 4.3(g) later.

26. The Commission's evident intention to maintain the status quo in terms of award coverage²² does not require a different conclusion. The outcome of *CFMEU v Dyno Nobel* formed part of the status quo. The Mining and Energy Division's position was that Dyno Nobel was a respondent to one of the relevant pre-modern awards (as was the respondent),²³ but it acknowledged the tension between that circumstance and *CFMEU v Dyno Nobel*.²⁴ The inference to be drawn from the inclusion of cl 4.3(g) is that the Commission came down on the side of giving effect to the outcome in *CFMEU v Dyno Nobel*. The need to consider the employer's industry if cl 4.3(g) is applied to determining whether an employee is employed in the black coal mining industry, in contrast to the usual uncoupling of those concepts in cl 4.1(b)(i) of the Award, also is not a sufficient reason to adopt a contrary construction when that reflects the approach and outcome in *CFMEU v Dyno Nobel* and for which Dyno Nobel advocated and cl 4.3(g) was formulated as a particular response to those matters: *contra* IS [36].
27. For the same reasons, even if the qualifier in cl 4.2 as to the meaning applied by the courts and industrial tribunals were construed as extending to cl 4.3, that would support the outcome contended for by the respondent, not the appellant or the MEU. Leaving aside Minova, the respondent is in the same position as Dyno Nobel was.

¹⁹ Transcript of Commission hearing on 24 November 2008 at PN402ff (Sage, exhibit AMS16, 229-31).

²⁰ *Award Modernisation – Statement* [2008] AIRC 387 at [13]; *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008 (Award Modernisation Case (2008))* (2008) 175 IR 120 at 162-63.

²¹ Exposure draft *Coal Mining Industry Award 2010* dated 12 September 2008, cl 4.5 (Sage, exhibit AMS13, 167).

²² *Re Request from the Minister for Employment and Workplace Relations—28 March 2008 (Award Modernisation (AM 2008/1-12))* (2008) 177 IR 364 at 403 [156].

²³ Roping-In Award No. 3 of 2005, Sch A (Sage, exhibit AMS17, 316).

²⁴ Transcript of Commission hearing on 24 November 2008 at PN423 (Sage, exhibit AMS16, 229-31).

28. *Fourth*, the appellant’s construction is not assisted by pointing out the ‘obvious’ fact that shotfirers working on a black coal mine site would be regarded as employed in the black coal mining industry if not for the exclusion in cl 4.3(g): AS [34], [41], [62]. That is the reason for the exclusion.
29. *Fifth*, the appellant’s construction gives cl 4.3(g) no work to do: *contra* AS [67]-[69]; IS [36]. If ‘otherwise’ in that subclause is construed as ‘in any event’ as the appellant contends (AS [41]), then an employer that is ‘not otherwise engaged in the black coal mining industry’ — a necessary condition to trigger the exclusion in cl 4.3(g) — could never be an ‘employer engaged in the black coal mining industry’ for the purposes of cl 4.1(b)(i) of the Award (or subparagraph (a) of the Administration Act). Taking the example of Dyno Nobel, based on the outcome in *CFMEU v Dyno Nobel*, Dyno Nobel was not an employer engaged in the black coal mining industry on any view; cl 4.3(g) was irrelevant to that conclusion. Accordingly, on the appellant’s construction, cl 4.3(g) ‘would have no application to the only part of the definition [of eligible employee] to which its application is said to be limited’: AJ [38] (Collier and Snaden JJ).
30. The respondent contends that ‘otherwise’ should instead be construed as meaning ‘other than by reason of the employer’s shotfiring and other explosive services activities’. That construction conforms with the ordinary meaning of ‘otherwise’ and is a straightforward means of achieving the outcome sought by Dyno Nobel that is more easily applied in practice than a substantial character analysis, consistent with construing the Award as a practical industrial instrument: *contra* AJ [79] (CAB 79). If ‘otherwise’ is construed in this way, then cl 4.3(g) may have some work to do on the employer side if the employer would have been in the black coal mining industry by reason of its shotfiring or other explosive services on a conventional substantial character analysis. But the fact that cl 4.3(g) may be capable of applying to some employers in limited circumstances on the appellant’s construction is not a reason to construe it as applying only to employers, contrary to its text, context and purpose.
31. For these reasons, the appellant’s construction of cl 4.3(g) should be rejected, as it was by the primary judge (PJ [26], [35]: CAB 14, 17-18) and the Full Court (AJ [43], [81]: CAB 69, 80).

Clause 4.3(g) cannot be excised for the purposes of subparagraph (b) (question 2)

32. Because the Administration Act sets the boundaries of the coal LSL scheme using the Award definition of the black coal mining industry, and all of the exclusions in cl 4.3 of

the Award form an essential part of that definition, the starting point must be that the exclusion in cl 4.3(g) applies in determining whether someone is ‘an employee who is employed in the black coal mining industry’ for the purposes of subparagraph (b). The chosen means of specifying the key criterion of eligibility in subparagraph (b) was by reference to that defined term. To construe the reference to the ‘black coal mining industry’ in that subparagraph as meaning something different from its express definition in the Administration Act would involve a large departure from the natural and ordinary meaning of the subparagraph. That could only be done if ‘the contrary intention appears’ such as to enliven the express exception in the chapeau of s 4(1) (as the primary judge held), or if it is plain that Parliament intended subparagraph (b) to have a different meaning despite its terms.²⁵ Neither is the case.

33. *First*, applying the full Award definition of the black coal mining industry for the purposes of subparagraph (b) reflects the objects of the Act and conforms with the other subparagraphs of the definition of eligible employee, each of which is also bounded by the Award definition of the industry.
34. *Second*, excising cl 4.3(g) for the purposes only of subparagraph (b) (or only of determining whether an employee is employed in the black coal mining industry) when the ‘black coal mining industry’ is a key criterion used in every subparagraph of the definition of eligible employee would have the result that Parliament used the same term to mean different things in consecutive parts of the same definition. And Parliament would have done so notwithstanding that the relevant term was expressly defined. Far from being plain, it is implausible that Parliament intended this.
35. *Third*, the reference to ‘an employer engaged in the black coal mining industry’ in subparagraph (a) of the definition of eligible employee, but not subparagraph (b), is not a ‘structural imperative’ dictating the excision of cl 4.3(g) for the purposes of subparagraph (b): *contra* AS [23], [63], [71]; see also IS [33] in the context of the corresponding language in cl 4.1 of the Award.
36. Each subparagraph in the definition of eligible employee specifies a set of elements that, if satisfied, makes the employee an eligible employee for the purposes of the Administration Act. The employer being engaged in the black coal mining industry is not

²⁵ See, eg, *Esso Australia Pty Ltd v Australian Workers’ Union* (2017) 263 CLR 551 at 582 [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).

specified as an element of subparagraph (b), which means it is not necessary to satisfy that requirement as a discrete element in every case for the employee to be an eligible employee. In contrast, it is necessary to satisfy that requirement as a discrete element in every case under subparagraph (a).

37. It may be accepted that the reference to ‘an employer engaged in the black coal mining industry’ in subparagraph (a) but not subparagraph (b) implies that Parliament contemplated the possibility of employees being employed in the black coal mining industry even if their employer was not engaged in that industry: AS [21]. It may also be accepted that the juxtaposition in subparagraph (a) of that criterion with the criterion that ‘an employee ... is employed in the black coal mining industry’ implies that Parliament did not intend for the criterion of an employee being employed in the black coal mining industry to be wholly coextensive with, and invariably determined by, whether the employer was engaged in that industry. However, it is not necessary to excise cl 4.3(g) from the Award definition for the purposes of subparagraph (b) in order to conform with these intentions. This is because none of the inclusions or exclusions in cl 4.2 and 4.3 of the Award other than cl 4.3(b) and (g) refers to the employer’s industry. Except where one of those two exclusions is relevant, it is possible to determine that an employee is employed in the black coal mining industry independently of the employer’s industry. The distinction between those elements is therefore consequential in most cases. But it is not possible to discern from the text of subparagraphs (a) and (b) an intention — certainly not a plain intention — that the character of the employer would *never* be relevant in applying subparagraph (b): *contra* AS [23].
38. That is enough to deny that there is an imperative to excise cl 4.3(g) in the structure of subparagraphs (a) and (b). Anything short of an imperative is not sufficient to justify a departure from the natural and ordinary meaning of subparagraph (b).²⁶
39. *Fourth*, there is no conceptual difficulty in applying the full Award definition of the black coal mining industry, including cl 4.3(g), in determining whether an employee is employed in that industry when cl 4.3(g) is properly construed as not being limited to the employer’s activities. While this means it is necessary to assess the employer’s industry in order to determine whether an employee is employed in the black coal mining industry when applying the exclusion in cl 4.3(g), this contrast with the usual position under the

²⁶ See also, eg, *Minogue v Victoria* (2018) 264 CLR 252 at 269 [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

Award and the Administration Act results from the contrast in the express language of that subclause referring to the employer's industry when the other inclusions and exclusions in cl 4.2 and 4.3 do not (other than cl 4.3(b)).

40. *Fifth*, the history of the Award is inconsistent with excising cl 4.3(g) for the purposes of subparagraph (b) for the same reasons why it is inconsistent with limiting the application of cl 4.3(g) to the employer. For the same reasons, it would be inconsistent with the outcome in *CFMEU v Dyno Nobel* and the submissions advanced by Dyno Nobel to which that exclusion responded to excise cl 4.3(g) in determining whether an employee is employed in the black coal mining industry for the purposes of Award coverage under cl 4.1(b)(ii). In turn, it would be inconsistent with Parliament's intention to construe the reference to an employee employed in the black coal mining industry in subparagraph (b) differently from the same language in cl 4.1(b)(i) of the Award: *contra* AS [75]. Subparagraphs (a) and (b) use identical language to cl 4.1(b)(i) and (ii) apart from the references in the latter to Award classifications. It *was* the clear intention that the Award drove the Act in this regard (*contra* AS [74]): the 2009 amendments, which coincided with the commencement of the Award, were designed to make the definition of eligible employee 'consistent with the definition of a coal mining employee in the [Award]'.²⁷
41. *Sixth*, the appellant's reliance on the intended portability of the coal LSL scheme (AS [15]-[16], [23], [65]) assumes that Parliament intended the benefits of the scheme to extend to employees whose activities fall outside the boundaries of the black coal mining industry as defined by the Award. That assumption is wrong for the reasons in paragraph 11 above. For the same reasons, it would not be 'antithetical to the portable scheme for eligibility of the employee to be dependent on the activities of the employer' (AS [65]) in those limited circumstances where consideration of the employer's activities is necessary to determine whether the employee is employed in the black coal mining industry in accordance with the express terms of the Award definition, which is the touchstone of the intended portability.
42. The practical consequences of the construction advanced by the respondent and accepted by the Full Court are typically straightforward. Shotfirers and other explosive services employees are eligible employees when their employers are coal miners or otherwise in the business of coal mining, and not eligible employees when their employers are third

²⁷ Explanatory Memorandum for the *Coal Mining Industry (Long Service Leave Funding) Bill 2009* (Cth) at [6].

parties in the business of supplying explosive products and services to a range of industries, such as Dyno Nobel and the respondent leaving aside Minova. There is nothing inherently unfair or inappropriate about this. It reflects a judgment by the drafters of the Award, picked up by the drafters of the Administration Act, about which activities in what circumstances have a sufficient nexus with black coal mining to situate them within the black coal mining industry. It also reflects the outcome in *CFMEU v Dyno Nobel*, and it is sufficiently certain.

43. The Full Court’s construction does not make it realistic that employers will be able to avoid the operation of the coal LSL scheme by adopting a particular business structure: *contra* AS [65]. That is not what happened in the respondent’s case. It was common ground at first instance that the only basis on which the respondent could have been ‘otherwise engaged in the black coal mining industry’ was by reason of Minova: PJ [36]-[37], [40] (CAB 18, 19); AJ [22], [52] (CAB 63, 71). But for the respondent acquiring Minova and integrating its employees into its corporate structure, it was not in contest that the respondent would *not* have been otherwise engaged in the black coal mining industry. Assuming cl 4.3(g) applied, the relevant employees (who were engaged in the supply of shotfiring or other explosive services) therefore would *not* have been eligible employees but for the acquisition and integration of Minova. When the respondent disposed of that business, the relevant employees returned to the status they would otherwise have had. On the Full Court’s approach, the employees were only ever eligible by the sidewind of Minova.
44. It is only in marginal circumstances, of the kind in which the respondent found itself by reason of Minova, that the Full Court’s construction results in any complexity. But it is not an appropriate response to those situations — or, in any event, a textually available one — to read cl 4.3(g) down or out of the Award definition of the black coal mining industry for the purposes of subparagraph (b). The respondent’s situation is addressed by giving further attention to the proper construction of cl 4.3(g), which is the subject of the proposed cross-appeal.

Conclusion on the appeal

45. For these reasons, the appeal must be dismissed.

Part VI: Argument on the cross-appeal

46. The appellant seeks special leave to cross-appeal from the Full Court’s conclusion that the respondent was ‘otherwise engaged in the black coal mining industry’ for the purposes of cl 4.3(g) of the Award by reason of *Minova*: AJ [54]-[64], [88] (CAB 71-74, 83). That conclusion is affected by error because the Full Court should have held that, on the proper construction of the Award, the supply of shotfiring or other explosive services is only in the black coal mining industry if the employer is engaged in the industry by reason of activities with which the shotfiring or explosives services are associated (for example, a coal mine operator employing shotfirers in that enterprise). Alternatively, the Full Court should have held that it was necessary to consider the whole of the respondent’s business — including the size and characteristics of *Minova* relative to, and its relationship with, other parts of that business — in determining whether the respondent was otherwise engaged in the black coal mining industry.
47. Special leave should be granted because: (a) the issues raised on the cross-appeal concern the proper construction of cl 4.3(g) of the Award, and are therefore closely related to issues that arise on the appeal, for which special leave has been granted; and (b) the construction advanced by the respondent on the cross-appeal is a means of resolving concerns raised by the appellant in the appeal about the stability of the coal LSL scheme.

Clause 4.3(g) applies if there is no connection between shotfiring or other explosive services and the employer’s other engagement in the industry (question 3(a))

48. Clause 4.3(g) contains an ambiguity as to the nature of the connection between the employer and the black coal mining industry that will disengage the exclusion.
49. One possibility is that the intended connection is very broad: ‘the supply of shotfiring or other explosive services by an employer *that is* not otherwise engaged *in any way* in the black coal mining industry’. On that reading, the phrase ‘not otherwise engaged in the black coal mining industry’ relates to the status or character of the employer. The Full Court implicitly adopted this construction: AJ [61] (CAB 73).
50. The other possibility is that the phrase ‘not otherwise engaged in the black coal mining industry’ relates to the context or circumstances in which the activity of supplying shotfiring or other explosive services is performed. If the shotfiring or other explosive services are not supplied in the context of activities that otherwise engage the employer in the black coal mining industry — that is, the supply of the shotfiring or other explosive

services is entirely separate from those other activities — then the exclusion in cl 4.3(g) is engaged because what is occurring is the supply of shotfiring or other explosive services by an employer *when* (or *insofar as it is*) not otherwise engaged in the black coal mining industry.

51. Which construction is correct must be determined by reference to the context and purpose of cl 4.3(g). For the following reasons, the context and purpose of cl 4.3(g) support the second construction.
52. *First*, that construction conforms with the general model of cl 4.3, which is to specify exclusions based on activities and, in some cases, the circumstances in which those activities are performed.
53. *Second*, the evident purpose of the inclusions in cl 4.2 and the exclusions in cl 4.3 is to identify a field of activity having a sufficient nexus with the enterprise of mining black coal. In the case of shotfiring and other explosive services, the other activities conducted by an employer as part of the enterprise in which those services are provided inform the nexus between those activities and the enterprise of mining black coal. The supply of shotfiring or other explosive services has a different complexion when it is performed, for example, as part of an enterprise of manufacturing and supplying explosives in a range of different industries compared with when it is performed by a black coal miner. In the former case the activity is connected to and in furtherance of an explosives business; in the latter, a coal mining business. This was one of the points made by Dyno Nobel in its submissions to the Commission in the modernisation process.²⁸
54. On the other hand, the fact that an employer is engaged in the black coal mining industry in a way that is unrelated to the supply of shotfiring or other explosive services does not inform the nexus between that activity and the enterprise of black coal mining. It accords with common sense that, in circumstances where cl 4.3(g) makes the employer's industry relevant to whether an activity is in the black coal mining industry, what would be relevant is the industry of the employer's enterprise in which that activity is conducted, not some unrelated enterprise.
55. *Third*, a construction that requires considering whether there is a connection between the supply of shotfiring or other explosive services and the way in which the employer is

²⁸ Dyno Nobel AMOD submissions at [29] (Sage, exhibit AMS15, 211).

otherwise engaged in the black coal mining industry is consistent with the historical approach to determining the scope of the coal mining industry.

56. For example, in *R v Drake-Brockman; Ex parte National Oil Pty Ltd*,²⁹ the employer conducted two enterprises: shale mining, and the conduct of manufacturing operations to produce crude oil from that shale. The ‘shale mining industry’ was included in the definition of the ‘coal mining industry’ for the purposes of regulations that established the jurisdiction of the Coal Mining Industry Central Reference Board. The majority of the High Court held that the employer’s enterprise comprising the manufacturing operations was not in the shale mining industry, and so the employees working in that part of its operations were not in the shale mining industry, nor the employer with respect to them.³⁰ Latham CJ expressed that conclusion in this way:³¹

‘A single employer may carry on two or more industries. The same man may be a farmer and a miller and a baker, but there is a distinction between the industry which produces wheat, the industry which produces flour, and the industry which produces bread. The applicant company in this case conducts two industries. One is an industry the product of which is shale, and the other is an industry the products of which are oil and petroleum coke.

The fact that two industries are carried on at the same place does not abolish the distinction between them. If a single company mined coal and then used the coal to manufacture gas in works alongside the mine, it would nevertheless still be the case that two industries were carried on by that company, one the mining of coal and the other the manufacture of gas. The manufacture of gas would not become “coal mining” because one company was engaged in both enterprises. Nor would the industry of gas manufacturing for that reason become a part of the industry of coal mining.

Accordingly, in my opinion, the employees engaged in what is described as the manufacturing section of the company's works are not engaged in the shale-mining industry and an industrial dispute with respect to their wages or conditions of labour is not an industrial dispute in that industry or a matter affecting industrial relations in that industry. Such employees, and the company in relation to those employees, are not subject to the jurisdiction of the Central Reference Board.’

57. The industry in which the employees were engaged was therefore determined by reference to the part of the employer’s business in which they were employed and not by a distinct part of that business in which they were not employed.

²⁹ (1943) 68 CLR 51.

³⁰ (1943) 68 CLR 51 at 56-58 (Latham CJ), 58 (Rich J), 65-66 (Williams J).

³¹ (1943) 68 CLR 51 at 57.

58. Similarly, in *Australian Collieries Staff Association and Queensland Coal Owners Association* (the case referenced in the Award), the requirement for being in the coal mining industry was expressed as being that ‘*a relationship of employer and employee must have some connection with the activity of coal mining*’.³² The Tribunal considered the particular context of the relationship between the relevant cohorts of employees and the employer, including the particular locations where the relevant employees were engaged to work, in determining whether that requirement was satisfied.³³
59. *Fourth*, the construction advanced by the respondent supports the stability of the coal LSL scheme by avoiding the result that shotfiring or other explosive services employees may gain or lose eligibility by reason of the employer acquiring or disposing of an unrelated business: *cf* AS [15]-[16]. It also avoids the arbitrary result that activities which would otherwise be excluded from the black coal mining industry are brought into that industry by the sidewind of a small, discrete and unrelated part of an employer’s business. An interpretation producing that result is not a practical one that avoids inconvenience or injustice.³⁴
60. The appellant accepts that Minova was unrelated to the respondent’s shotfiring business (eg AS [15]-[16], [64]), and has not contended that the respondent was engaged in the black coal mining industry in respect of that business or its broader explosives business (which is analogous to Dyno Nobel’s). In those circumstances, the relevant employees were engaged as part of their employment in the supply of shotfiring or other explosive services by the respondent *when or insofar as it was* not otherwise engaged in the black coal mining industry. By reason of cl 4.3(g), they were therefore not employees who were employed in the black coal mining industry for the purposes of subparagraph (b), regardless of Minova.
61. The cross-appeal should be allowed on this basis. The Court should declare that the relevant employees were not eligible employees within subparagraph (b) at any time from 1 March 2013 (the date when Minova employees became employed by Orica).³⁵ The Court should also declare that the purported notice to produce issued by the appellant on

³² Unreported, Coal Industry Tribunal, 22 February 1982 (No 20 of 1980) at 17; see also at 15 (‘whether or not the *relations* of employers and employees ... at particular locations in Queensland are relations between employers and employees in the coal mining industry’).

³³ Unreported, Coal Industry Tribunal, 22 February 1982 (No 20 of 1980) at, eg, 17, 18-19, 20-21.

³⁴ See, eg, *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 (Madgwick J).

³⁵ Statement of agreed facts at [24]: Applicant’s book of further material at 10.

21 May 2019³⁶ was invalid, in whole or alternatively in part, because: (a) the appellant was empowered to issue such a notice only if it believed on reasonable grounds that the respondent had information or a document containing information relating to the employment or an employer of an eligible employee or that was reasonably necessary to enable it to exercise its functions under s 7 of the Administration Act (s 52A(1)); (b) the reasonable grounds which the appellant purported to have were premised on the respondent having eligible employees within the meaning of subparagraph (b);³⁷ (c) if the cross-appeal is allowed on the basis advanced above, the respondent's only eligible employees within the meaning of subparagraph (b) were its Minova employees; and (d) the notice sought information relating to all employees of the respondent who performed any duties at or about an open cut black coal mine in NSW or Queensland, not just Minova employees.

Alternatively, the relationship between Minova and the rest of the respondent's business should have been considered (question 3(b))

62. If, contrary to the respondent's submissions, the phrase 'not otherwise engaged in the black coal mining industry' in cl 4.3(g) is instead construed as concerned with the status or character of the employer, the Full Court made an error for a different reason.
63. Like the primary judge (PJ [46]-[47]: CAB 20-21), the Full Court held it was sufficient for the respondent to have the character of being otherwise engaged in the black coal mining industry that it had one discrete enterprise (Minova) which was so engaged: AJ [62]-[63], [88] (CAB 73, 83). However, on this construction of cl 4.3(g), what matters is the status or character of the *employer*: that is, the entity as a whole.³⁸ While it is uncontroversial that an employer may be engaged in more than one enterprise, whether the engagement in an enterprise is sufficient to situate the employer *as a whole* in an industry must depend on the nature and position of that enterprise relative to the remainder of the employer's business. It cannot be determined by asking whether that enterprise, if viewed in isolation (or, in other words, if it constituted the whole of the employer's business), would be engaged in the relevant industry. This is consistent with

³⁶ Respondent's book of further material at 4.

³⁷ Respondent's book of further material at 4.

³⁸ See also, eg, *Central West Group Apprentices Ltd v Coal Mines Insurance Ltd* [2008] NSWCA 348 at [50]-[52] (Allsop P, Giles and Bell JJA).

the ordinary way of working out whether an employer is ‘in’ an industry in industrial law, which is to ask what is the (or a) substantial character of its business.³⁹

64. The contrary approach taken by the Full Court and the primary judge is liable to produce illogical results in the context of a construction of cl 4.3(g) that conditions the exclusion of shotfiring or other explosive services activities on the status or character of the employer. If all that is required for the employer to be otherwise engaged in the black coal mining industry is that it operates an enterprise which, viewed in isolation, would be engaged in that industry, then activities which would otherwise be excluded from the black coal mining industry could be included by reason of a small, discrete and unrelated enterprise that is not significant enough to confer a substantial character on the employer’s business viewed as a whole. That would not be consistent with the structure or purpose of cl 4.2 and 4.3 because it would make the inclusion or exclusion of an activity from the field defined as constituting the black coal mining industry depend on a matter irrelevant to the nexus between that activity and the enterprise of black coal mining.
65. If the cross-appeal were allowed on this alternative basis, it would be appropriate to remit the issue of whether the relevant employees were eligible employees within subparagraph (b) prior to the respondent’s disposal of Minova, because neither the primary judge nor the Full Court considered the characteristics of Minova relative to the remainder of the respondent’s business (including, for example, its relative size).

Part VII: Estimate

66. Noting the appellant’s and MEU’s estimates, the respondent estimates that it will require 1 hour and 45 minutes to present its oral argument, including on the cross-appeal.

Dated 13 February 2026



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³⁹ See, eg, *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 at 135 (Latham CJ); *Health Services Union v Catering Industries (NSW) Pty Ltd* (2023) 412 ALR 18 at 30 [60]-[61] (Katzmann, Snaden and Raper JJ).

ANNEXURE TO RESPONDENT'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.	<i>Coal Mining Industry (Long Service Leave) Administration Act 1992 (Cth)</i>	Compilation No. 20 (6 November 2018 to 31 August 2021).	Sections 3, 4(1), 7, Part 5A, 52A(1)	Version of the Act in force on the date of the notice to produce issued by the applicant to the respondent, and the commencement of the proceeding.	21 May 2019 (notice to produce) 1 March 2021 (commencement of proceeding)
2.	<i>Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009 (Cth)</i>	Compilation No. 1 (1 January 2010 to 31 December 2011).	Schedule 1 Item 2	Version of the Act in force on the date of its commencement.	1 January 2010
3.	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 ⁴⁰

⁴⁰ The respondent does not accept that the amendments made to the Award after 1 January 2010 but given retrospective effect by the Fair Work Commission are relevant. Rather, the words 'as in force' in the definition of 'black coal mining industry' in s 4 of the Administration Act refer to the version of the Award in fact in force on 1 January 2010.