



HIGH COURT OF AUSTRALIA

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File Number: S161/2025
File Title: Coal Mining Industry (Long Service Leave Funding) Corporati
Registry: Sydney
Document filed: Dyno Nobel - Form 27C - Intervener's submissions (seeking l
Filing party: Intervener
Date filed: 27 Feb 2026

Important Information

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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

OUTLINE OF SUBMISSIONS

PART I - FORM OF SUBMISSIONS

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

PARTS II & III - BASIS OF INTERVENTION / LEAVE AND REASONS

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2. Dyno Nobel seeks to be heard as an intervenor.
3. It has interests which may be adversely affected by a decision in these proceedings.
4. Dyno Nobel was granted leave to intervene¹ before the full Federal Court after having been presented with a letter of demand by the appellant following the appellant's success against Orica before the primary judge.
5. In respect to the interpretation of the exclusions in clause 4.3(g) of the Black Coal Mining Industry Award 2020 (**Award**), Dyno Nobel's position is that the majority in the full Federal Court² correctly construed the relevant provisions of the Coal Mining Industry

¹ *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2024] FCA 1104.

² *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65.

- 10 (Long Service Leave) Administration Act 1992 (Cth) (**Administration Act**) and the Award. In these Proceedings it supports the submissions of the Respondent and also seeks to enlarge on some aspects of those submissions and specifically as to the proper construction of the Award clauses material to the exclusion in clause 4.3(g) of the Award.
6. The Mining and Energy Union (**MEU**), which seeks to intervene in the matter before this Honourable Court, seeks to narrowly and selectively traverse parts of decisions in the industrial relations history of coverage, over a period of years, which culminated in the exclusion in clause 4.3(g) of the current Award.
7. If this Honourable Court were to endorse the views expressed in paragraph [36] of the MEU submissions³ as to the proper construction of the definition of “coal mining employees” in clause 4.1(b) of the Award, Dyno Nobel employees engaged in its supply of shotfiring or other explosive services may, as consequence be held by lower courts to be subject to the Award, and Dyno Nobel obliged to pay to the Appellant, the payroll levy paid by employers pursuant to the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth).
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PART IV - PROPOSED SUBMISSIONS

A. Response to MEU

- 30 8. The intervenor’s business is the manufacture and supply of explosive services to clients in the coal mining industry, the metalliferous mining industry and the civil engineering industry,⁴ of which shotfiring is only one component. Its business is described in the published reasons of:
- a. The Full Bench of the Australian Industrial Relations Commission in the *Dyno Nobel Case* at [53] to [59];

³ Document 8, p. 22, [36].

⁴ *CFMEU v Dyno Nobel* [2005] AIRC 622 at [57] (*‘Dyno Nobel Case’*) (unreported but attached to the Joint Book of Authorities).

- 10 b. Perram J in the decision at first instance: *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 at [33] referring to the decision of *Dyno Nobel Case* at [54] and [59];
- c. Hatcher J in *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 at [77].
9. The MEU submissions⁵ submit, among other things:
- “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 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
- 20 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.” (our underlining)
10. The MEU submission underlined, fails to recognize that clause 4.1(b)(ii) of the Award, which is part of the definition of “Coal mining employees” is a sub paragraph with more than one qualifying element. In particular, the commencing words of (ii) which are “employees who are employed in the black coal mining industry,...” (our underlining).
11. In this regard, the exclusion included in clause 4.3(g) of the Award has direct application to the wording of that element, in that it prescribes:
- 30 “4.3 The black coal mining industry does not include:
- ...
- (g) the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry.”
12. When the exclusion of the activity described in clause 4.3(g) is read into clause 4.1(b)(ii) of the Award, the inevitable conclusion is that clause 4.1(b)(ii) does not bring shotfiring and other explosive services within the definition of “black coal mining industry” when the relevant employer is not otherwise engaged in the black coal mining industry.

⁵ Document 8, p. 22, [36].

- 10 13. In so far as clause 4.1(b)(ii) of the Award is concerned, employment in the black coal mining industry is an essential element. By reason of the exclusion contained in clause 4.3(g), that essential element cannot be satisfied.
14. Again, when paragraph [36] of the MEU submission advances their proposition as one that reflects what the AIRC said in the *Dyno Nobel Case*, the submission is inconsistent with the clear wording of the Award clause 4.1(b)(ii), clause 4.3(g) and the rationale of the *Dyno Nobel Case*. The MEU's contended construction is also inconsistent with the well settled legal principles regarding Award interpretation, in particular, the interpretation of an industrial instrument turns on the language of the industrial instrument, understood in the light of its industrial context and purpose.⁶
- 20 15. The MEU submission appears to accept⁷ that the exceptions in clause 4.3(g) of the Award was a consequence of the Full Bench decision of the AIRC, because the introductory words of paragraph [36] say:

“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.”

16. It should be noted that the Award clause 4.2 provides:

4.2 For the purposes of this award, **black coal mining industry** has the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal. **Subject to the foregoing**, the black coal mining industry includes..... (our emphasis).

17. We refer also to the note to clause 4.3 of the Award the definition, which provides:

NOTE: The coverage clause is intended to reflect the status quo which existed under key pre-modern awards in relation to the kinds of employers and employees to whom those awards applied and the extent to which the awards applied to such employers and employees.

⁶ *Ancor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [2] (Gleeson CJ and McHugh J).

⁷ Document 8, p. 22, [36].

10 18. The decision of the Full Bench of the AIRC in the *Dyno Nobel Case*⁸ is one of the cases setting the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal. No party, including the submission of the MEU intervenor has suggested to the contrary.

19. Further, it is well established that where words in an Act have received a judicial construction it is presumed that they have the same construction when used in a subsequent Act dealing with the same subject.⁹ That is especially the case in specialized fields,¹⁰ such as that of industrial relations:¹¹ *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 (*'Electrolux'*), per McHugh J at [81]:

20 “81. ...The principle that the re enactment of a rule after judicial consideration is to be regarded as an endorsement of its judicial interpretation has been criticised, and the principle may not apply to provisions re-enacted in “replacement” legislation¹². However, industrial relations is a specialised and politically sensitive field with a designated Minister and Department of State. It is no fiction to attribute to the Minister and his or her Department and, through them, the Parliament, knowledge of court decisions — or at all events decisions of this Court — dealing with that portfolio. Indeed, it would be astonishing if the Department, its officers and those advising on the drafting of the Act would have been unaware of *Re Alcan.*” (emphasis added) (citations in original)

30 20. In *Electrolux*, per Gummow, Hayne and Heydon JJ at [162]:

“162... The field of industrial relations legislation in Australia is not one where the Parliament may readily be taken to have legislated without awareness of the

⁸ *Construction, Forestry, Mining and Energy Union v Dyno Nobel Asia Pacific Limited* [2005] AIRC 622 (*Dyno Nobel Case*).

⁹ Perry Herzfeld and Thomas Prince, *Interpretation* (Lawbook, 3rd ed, 2024) 186 [8.60]; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, [7] to [8] (Gleeson CJ), [81] (McHugh J), [161] to [162] (Gummow, Hayne and Heydon JJ); *Brisbane City Council v Amos* (2019) 266 CLR 593, [24] (Kiefel CJ and Edelman J), [45] (Gageler J), [48]–[49] (Keane J), [55] (Nettle J).

¹⁰ Herzfeld and Prince (n 6)186 [8.60]; *DPP (Vic) Reference No 1 of 2019* (2021) 274 CLR 177, [16], [32] (Kiefel CJ, Keane and Gleeson JJ), [51] (Gageler, Gordon and Steward JJ).

¹¹ Herzfeld and Prince (n 6)186 [8.60]; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, [81] (McHugh J), [162] (Gummow, Hayne and Heydon JJ).

¹² See, eg, *Flaherty v Girgis* (1987) 162 CLR 574 at 594, per Mason A-CJ, Wilson and Dawson JJ; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329, per Toohey, McHugh and Gummow JJ.

10 interpretation placed by this Court on pivotal definitions¹³... (citations in original)
(emphasis added)

21. When these principles are applied in the context of this matter, this Honourable Court can be satisfied that the MEU's contented construction of the definition of "coal mining employees" in clause 4.1(b) and the exclusion in clause 4.3(g) of the Award is without merit.

B. The Exclusions

20 22. Dyno Nobel submits that the Court at first instance fell into error in considering the definitions contained in s 4 "Interpretation" of the Administration Act, specifically the definition of "eligible employee" contained in s 4(1), where (b) relevantly states (subparagraph (b)):

" "eligible employee" means:

...

(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;

..."

30 23. The analysis undertaken by the Court at first instance failed to give precedence to the introductory words in subparagraph (b) namely, "*an employee who is employed in the black coal mining industry*". The decision of the majority of the Full Federal Court corrected the error.

C. Elaboration

24. In *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave) Funding Corporation* [2023] FCA 1515 (*Orica*), the Court was called upon to construe provisions of the Administration Act and the Award.

25. The definitions contained in s 4(1) of the Administration Act are all prefaced by the words "*In this Act, unless the contrary intention appears...*".

26. An 'eligible employee' is defined in s 4(1) of the Administration Act in these terms:

¹³ cf *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 328-329.

10 “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

but does not include a person declared by the regulations not to be an eligible employee for the purposes of this Act.” (emphasis added and subclauses (c) and (d) excluded as not relevant to these proceedings).

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27. Section 4(1) of the Administration Act defines “black coal mining industry” in the following terms:

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

28. The current definition of “*black coal mining industry*” in s 4(1) of the Administration Act has its origin in the *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009 (Bill)*. Prior to 1 January 2012 the Administration Act was called the *Coal Mining Industry (Long Service Leave Funding) Act 1992*.

29. The Explanatory Memorandum for the Bill (**Explanatory Memorandum**) says the following:

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“From 1 January 2010, the present industry awards prescribing long service leave will be superseded by modern awards under the Fair Work Act 2009 (the FW Act). Modern awards will not include long service leave entitlements. Rather, existing award based entitlements will be preserved as a statutory entitlement under the National Employment Standards, pending development of national long service leave arrangements.

...

This Bill also contains the following amendments to ensure that the scheme applies universally in the black coal mining industry from 1 January 2010:

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- the definition of ‘black coal mining industry’ in the Funding Act (which flows through to related legislation) will be aligned with the definition in the Coal Award; and
 - the current long service leave entitlements in The Coal Mining Industry (Production and Engineering) Consolidated Award 1997 (the main industry award) will be extended to all eligible employees who do not otherwise have an award-derived long service leave entitlement.”

D. Conclusion

30. Dyno Nobel submits:

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- (1) the majority of the Full Court did not fall into error.
 - (2) the MEU argument, particularly in paragraph 36, has no merit.

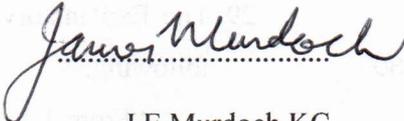
PART V - ESTIMATE OF TIME FOR ORAL ARGUMENT

Estimate of time for Oral Argument

31. Dyno Nobel respectfully requests 15 minutes for oral argument.

Dated 27 February 2026

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