



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 27E - Reply
Filing party: Appellant
Date filed: 06 Mar 2026

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Form 27E – Appellant’s reply

Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

and

Orica Australia Pty Ltd
Respondent

APPELLANT’S REPLY**PART I: CERTIFICATION**

1. These submissions in reply to the Respondent’s Submissions (**RS**) are in a form suitable for publication on the internet.

PART II: ARGUMENT***Appeal***

2. The Appellant makes the following points in reply. *First*, whilst the Respondent accepts that cls 4.2 and 4.3 set out various *activities* within or outside the black coal mining industry and also accepts that cl 4.3(g) contains an *additional* characteristic which “*relates to the employer*” (**RS [13]**), the Respondent then submits that the words “by an employer” do not “*identify who must perform the activity*” (**RS [18]**).
3. The word “by” identifies the relevant person (the employer) who must perform the activity. Properly construed, cl 4.3(g) contains two parts, and the words “*by an employer*” apply to each: the clause provides for the exclusion of the activity of “*the supply of shotfiring or other explosive services by an employer*”, except in circumstances where that supply is “*by an employer not otherwise engaged in the black coal mining industry*”. The plain and literal meaning of cl 4.3(g) is to exclude the activity by an employer (subject to the exception contained in the balance of the

clause). (Similarly, cl 4.3(b) excludes certain activities of employees, but not the employer: cf. and see **RS [19]**).

4. If it had been intended that the work of the *employees* performing such shotfiring or explosive services was also to be excluded, cl 4.3(g) could have used a form of words similar to the exclusion in cl 4.3(b) (“*the work of employees employed in ...*”) and not expressly limited the activity to the “*supply*” of services “*by an employer*”.
5. *Second*, the Appellant’s primary argument does not involve excising or excluding cl 4.3(g) from the definition of the black coal mining industry (cf. **RS [14]**). Rather, cl 4.3(g), on its plain and literal meaning, applies to exclude an activity *by an employer* from being within the meaning of the black coal mining industry. Each of cl 4.1(b)(ii) of the Award and s 4(1)(b) of the Administration Act only require consideration of whether the *employee* is in the black coal mining industry. The activity that is excluded by cl 4.3(g) is an activity by an *employer*. That construction is not premised on “reading out” cl 4.3(g), or part of the definition of black coal mining industry from the Administration Act (cf. **RS [44]**). The submission that the Appellant’s construction involves “[a]pplying only a subset of the exclusions, including by excising cl 4.3(g)” (**RS [14]**), is wrong.
6. *Third*, whilst it is obvious that the legislative intention was for all employees subject to the Award to be entitled to the benefits of the scheme (**RS [11]**), the cohort of “eligible employees” under the Administration Act is wider than the persons who are employees in the industry under the Award. That is because, whilst the definition of “coal mining employee” under cl 4.1(b) of the Award is in similar terms to that of “eligible employee” under the Administration Act, the Award limits the relevant employees to those within stated classifications,¹ and, importantly, subject to cl 4.6.²
7. The stated object of the Administration Act, to make provision in relation to long service leave in the black coal mining industry (**RS [8]**), supports the Appellant’s construction because, as the primary judge identified, there is “*no shadow of a doubt*” that the extraction of black coal by the shotfirers amounted to working at a black coal mine in a manner directly connected with the extraction, mining and processing of black coal, within the definition of “black coal mining industry” in cl 4.2(d) of the

¹ See Award, cl 4.1(b)(i)-(ii).

² Cl 4.6 stated: “Subject to clauses 4.1 and 4.2, where an employer 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.”

Award.³ The shotfirers were *plainly* employed in the black coal mining industry, subject to the proper construction of cl 4.3(g).⁴ The object of the scheme would be derailed if an employee located on a black coal mine who would otherwise be plainly in the black coal mining industry, was to fall outside of that industry (and therefore a beneficial scheme) because of some entirely unrelated business of his or her employer. Each of the Appellant's primary and alternate constructions (that found by the primary judge) are based on the structural imperative that the scheme was meant to apply to employees in the industry irrespective of a change in their employer, or decisions made by their employer unrelated to their day-to-day work.

8. *Fourth*, contrary to **RS [20]-[27]**, whilst *Dyno Nobel* was concerned with whether employees were “*engaged in or in connection with*” the coal industry for the purposes of union eligibility rules, the industry of the *employer* was the relevant discrimen that determined the application of those rules. The Administration Act specifically contemplates that an employee may be in a *different* industry to that of the employer.
9. As to the employees in *Dyno Nobel*, in that case the majority concluded at [62]-[63] that the trial judge had “*approached the task of characterisation [of Dyno Nobel's industry] on the basis that if work performed by a group of employees of Dyno Nobel was work that could be characterised as being in or in connection with the coal industry then the coal industry is an industry that Dyno Nobel operates in*”. But the majority rejected that approach: “*focussing only on the work performed by a small number of Dyno Nobel's employees and failing to have regard to the totality of the business of Dyno Nobel led her Honour to ask herself the wrong question in determining the “substantial character” of the business of Dyno Nobel*”. The majority rejected the approach (adopted at first instance) that: “*the fact that work performed by a small number of employees is work in a particular industry necessarily brings the business or enterprise of the employer within that industry*”. Even if some of the employees were performing work in the coal mining industry, that did not mean the employer, *Dyno Nobel*, was operating in that industry, for the purposes of the relevant question before the Commission. The question was only whether the employer was, as a whole, engaged in that industry.⁵

³ Primary judge at [19].

⁴ Primary judge at [24].

⁵ In circumstances where *Dyno Nobel* was engaged in only one enterprise, this included consideration of the services provided by the shotfirers as well as the balance of the employer's enterprise: see *Hatcher J* at [79].

10. As to the Respondent’s submission that the drafting of cl 4.3(g) can only be explained (“by implication”) as an attempt to take into account Dyno Nobel’s submissions to the Commission (**RS [21]-[25]**), the Commission did not accept Dyno Nobel’s proposed drafting to expressly exclude the shotfiring employees (see **RS [23]**), which suggests the final form was intended to operate differently to that proposed by Dyno Nobel. Contrary to **RS [25]**, there is a better explanation for the Commission’s approach – the Commission was capturing the decision in *Dyno Nobel*, which was directed at the industry of the employer.
11. As to the question of maintaining the pre-Award status quo (**RS [26]**), the Respondent *was* subject to one of the relevant pre-modern awards.⁶ In any event, the Commission’s aim was to maintain the status quo “as closely as possible”, and not to expand or contract the reach of the “kinds of employers” to whom the pre-reform awards applied, while also recognising that the clause as drafted was “not simple to understand nor easy to apply”, particularly for contractors working at or about a mine.⁷
12. *Fifth*, contrary to **RS [41]**, the Full Court’s construction is contrary to the scheme’s portability. The Respondent’s shotfiring employees, doing the exact same work at the same location can be out of the scheme, then in the scheme, and then out again; merely because the Respondent acquired, then integrated, then offloaded, its Minova business, without any change to the shotfiring employees’ work. The effect of the Full Court’s construction is that whether a shotfiring employee is an eligible employee turns on the activities in which their *employer* is engaged, and not on the nature of the activities of the *employee*. That may be because of happenstance (as in the present case), or it may be deliberate by adopting a different business structure (cf. **RS [43]**).

Proposed Cross Appeal

13. The Respondent seeks special leave to appeal in respect of two grounds (**RS [46]-[47]**).
14. The first ground is on a question of statutory construction and proceeds on the basis that the words in cl 4.3(g), “*by an employer not otherwise engaged in the black coal mining industry*”, do not relate to the “status or character of the employer” (**RS [49]-[50]**). This is a new argument not put to the Full Court. However, the words “*not*

⁶ The Respondent became bound by the terms of the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* on or about 28 October 2002 and July 2005: SOAF at [58].

⁷ *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]-[157]. See the Note under cl 4.3. The effect of cl 4.6 is also relevant to the position that applies under the Award.

otherwise engaged in the black coal mining industry” qualify the employer, and specifically here, whether the employer is engaged in the black coal mining industry in a way “otherwise” than by the supply of shotfiring (which the Respondent was, as found by the primary judge and the Full Court). The Respondent’s construction places a gloss on the plain language of the provision, seeking to avoid the anomalous result that otherwise arises from the Respondent’s (and the Full Court’s) construction of cl 4.3(g), but in circumstances where there is no textual basis for reading in the words now sought to be read in by the Respondent to limit its plain meaning. If the word “otherwise” is to have any work to do, it must require (at a minimum)⁸ consideration of the employer’s engagement in the industry in ways *other than* by its shotfiring activities. Special leave should be refused in respect of this ground.

15. The second ground relates to the Respondent’s Minova business, which was a separate business to its provision of shotfiring services,⁹ but which was involved in the underground mining of black coal, and through which the Respondent *was* engaged in the black coal mining industry.¹⁰ The complaint is that the primary judge should have taken into account how substantial the Minova business was in comparison to the Respondent’s other business activities (**RS [63]**). The primary judge rejected this approach,¹¹ as did the Full Court.¹² Once it is accepted that an employer may engage in more than one business enterprise, and so be in more than one industry, there is no basis in principle to assess the employer overall, “*as a whole*” (**RS [63]**). No point of principle arises, the conclusion turns on its own facts and special leave ought to be refused.

Dated 6 March 2026



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⁸ The Appellant says the proper construction of “otherwise” goes further: Appellant’s Submissions at [69].

⁹ Primary judge at J [37]; unchallenged on appeal.

¹⁰ SOAF [34](d)-(e); Primary judge at J [48]-[80], esp [56]-[57].

¹¹ Primary judge, J [47], noting *R v Drake-Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51 at 57 (Latham CJ): “A single employer may carry on two or more industries”.

¹² Full Court at [62]-[63], [88].