HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 09 Apr 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S161/2025
File Title:	Coal Mining Industry (Long Service Leave Funding) Corporati
Registry:	Sydney
Document filed:	Form 27F - Appellant's Outline of oral argument
Filing party:	Appellant
Date filed:	09 Apr 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S110 of 2025

BETWEEN:

COAL MINING INDUSTRY (LONG SERVICE LEAVE FUNDING) CORPORATION
Appellant

and

ORICA AUSTRALIA PTY LTD
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of oral argument

1. **Notice of Appeal – Primary Ground:** Long service leave under the scheme is portable. An employee might be employed successively by different employers in the industry, taking one's accrued entitlement to long service leave to each new employer and, while working with that employer, building upon it: PJ [4]; majority FC [1], [11]; *Coal Mining Industry (Long Service Leave Funding) Corp v Hitachi Construction Machinery (Aust) Pty Ltd* (2023) 322 IR 129; [2023] FCA 68 (***Hitachi***) at [172] (Raper J); AS [12].
2. Under s 4(1) of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) (**Administration Act**): under limb (a), an employee who works for an employer engaged in the black coal mining industry does not need to work at or near a black coal mine; and under limb (b), if an employee is employed in the black coal mining industry at or near a black coal mine, it does not matter at all who their employer is or in which industry that employer happens to be engaged: PJ at [13], [21]-[22]: AS [19]-[20], [23].
3. It follows from the structure of s 4(1) that an employee can be in a separate industry to their employer: *Bis Industries Ltd v CFMEU* [2021] FCA 1374 (***Bis Industries***) at [216] (White J); AS [21]-[22].
4. Whether an employee "is employed" in the black coal mining industry is a question of fact and law, involving applying the meaning of "black coal mining industry", and involving consideration of the character of the employee's employment having regard to all the relevant circumstances: *Bis Industries* at [219]; *Hitachi* at [176]-[177].
5. Whether an employer "is engaged" in the industry is a question of fact which depends on an assessment of the "substantial character" of the employer's business, recognising that the employer can carry on two or more industries: *R v Drake-Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51 at 57 (Latham CJ); *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 at 130-131, 135 (Latham CJ); *Bis Industries* at [78]–[79], [281]; *Hitachi* at [245].
6. With respect to the definition of "black coal mining industry" under the *Black Coal Mining Industry Award 2010* (as in force on 1 January 2010) (**Award**), there is no dispute that the work done by Orica's shotfirers necessarily meant that they were

employed in the black coal mining industry at least so far as clause 4.2(d) of the Award is concerned: PJ [19], AS [32]. Further, the exclusions in clause 4.3, being a list of excluded activities, reflect past decisions and historical circumstances: *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008 (Award Modernisation Case (2008))* (2008) 175 IR 120 at [17]-[18]; *Re Request from the Minister for Employment and Workplace Relations – 28 March 2008 (Award Modernisation (AM 2008/1-12))* (2008) 177 IR 364 at [154]; *Bis Industries* at [76](i), [82]; PJ [31]; Hatcher J FC [76]; AS [27]-[29].

7. Some of the exclusions in cl 4.3 are probably unnecessary – in light of the first sentence of cl 4.2 ("has the meaning applied by the courts and industrial tribunals"): PJ [31]; but also in the sense the activity described would never have been included under cl 4.2, so was not required to be excluded under cl 4.3. An obvious example is brown coal mining. They can be seen as included within cl 4.3 for the avoidance of doubt: AS [30].
8. Clause 4.3(g) is intended to reflect the decision of the AIRC in *Dyno Nobel Asia Pacific Ltd v Construction, Forestry, Mining and Energy Union* [2005] AIRC 622 ***(Dyno Nobel)***: *Bis Industries* at [82]; PJ [35]; majority FC [20]; Hatcher J FC [76]; AS [44].
9. In *Dyno Nobel* there is no doubt that some employees were working in the coal mining industry – as the decision acknowledged, a small number of Dyno Nobel employees performed work which could be regarded as work in that industry. However, the question before the Commission concerned whether the business or enterprise conducted by Dyno Nobel was within the coal mining industry (for the purposes of whether there was an industrial dispute under certain union eligibility rules): *Dyno Nobel* at [4]-[7], [16], [51], [59]-[60], [62]-[63]; AS [45]-[50], [55]-[57]; A Reply [8]-[9].
10. The text of cl 4.3(g) is, on its terms, concerned with activities by an employer. The words "by an employer" delimit the clause expressly to those activities by a nominated class of person. If it had been intended that cl 4.3(g) was to apply to the work performed by employees, it would have been easy to say so, in the same way that occurred with clause 4.3(b). Clause 4.3(b) is an exclusion of activities performed by certain employees: "the work of employees employed in head offices…". That sub-

paragraph would not be applied to the question of whether the *employer* was engaged in the black coal mining industry: AS [38]-[42]; A Reply [2]-[5].

11. On its proper construction, cl 4.3(g) of the Award, is directed to the question of whether an employer who is supplying shotfiring or other explosive services is engaged in the black coal mining industry for the purposes of s 4(1)(a) of the Administration Act, not whether an employee is employed in that industry for the purposes of s 4(1)(b): Notice of Appeal [3].
12. **Notice of Appeal – Alternative Ground**: Alternatively, where s 4(1) of the Administration Act provides that the definition of "black coal mining industry" in the Award is "subject to any contrary intention", and the structure of the definition of "eligible employee" in s 4 of the Administration Act gives rise to a clear implication that the character of an employer was not intended to be relevant to s 4(1)(b), the reference to "black coal mining industry" in the phrase "an employee who is employed in the black coal mining industry" in s 4(1)(b) should be read as having the same meaning as it bears in the Award, but without clause 4.3(g): PJ [21]-[24]; AS [70]-[75].
13. **Cross Appeal Ground 1**: On its proper construction, the words in cl 4.3(g), "by an employer not otherwise engaged in the black coal mining industry", do relate to the status or character of the employer, contrary to Ground 1 of the proposed Cross Appeal: see [10] above; A Reply [14].
14. **Cross Appeal Ground 2:** 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*", contrary to Ground 2 of the proposed Cross Appeal: PJ [47]-[48]; majority FC [62]-[63]; Hatcher J [88]; A Reply [15].

Dated: 8 April 2026



Noel Hutley
02 8257 2599
n.hutley@stjames.net.au

Jeremy Clarke
02 9232 3630
jclarke@12thfloor.com.au

Timothy Kane
02 8029 6237
tkane@12thfloor.com