



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

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

- and -

Orica Australia Pty Ltd
 Respondent

RESPONDENT’S OUTLINE OF ORAL SUBMISSIONS

Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

2. **“Black Coal Mining Industry”** The statutory concept of a “coal mining industry” has given rise to long-standing difficulties of definition, because of the wide variety of activities and operations potentially involved. Historically, the courts have sought to overcome these difficulties, not by adopting rigid definitional rules, but by adopting a multi-factorial approach to the analysis of the facts of any particular case. However, when developing a modern award for the black coal mining industry, efforts were made to simplify this approach, by introducing clearer exclusionary rules which were qualified by a limited number of relevant factors.
3. **Modern Award and Statute – Purposes** The new language and concepts created by the modern award were later adopted by amendments to the statute governing long service leave. Accordingly, there are two main instruments to be construed – the modern award and the amended statute. Each was made at a different time and with materially different purposes in view. The modern award was seeking to achieve the broader purposes of award modernisation, including simplification, whilst maintaining “as closely as possible” the coverage provided by pre-existing awards. The amended statute was relevantly seeking to adopt the language and concepts of the modern award.

- 4. Conceptual Framework** The framework of both instruments is based upon the concept of a “black coal mining industry” – a concept which defines a range of operations which have a sufficient nexus to the mining of coal. This definition is then used as a common reference point, to identify categories of employment which have a specified nexus to this reference point (eg “employed in”, “engaged in”). In each phase of this conceptual framework, similar factors are used to further define the relevant nexus involved (eg location of activity, directness of connection etc). *Respondent’s submissions dated 13 February 2026 (RS) [8]-[14].*
- 5. Extrinsic Material** Extrinsic material assists in establishing the context in which this modern award was made, the issues it sought to address, and its purposes. Most significantly, this material establishes that clause 4.3(g) was specifically introduced to maintain the status quo in relation to explosives suppliers, such as Dyno Nobel. That is because: (a) an expressed purpose of the Australian Industrial Relations Commission (AIRC) was to maintain “as closely as possible” the application of pre-existing awards in the industry and the kinds of employers to which those awards applied; (b) in 2005, Dyno Nobel had successfully resisted being subjected to the pre-existing black coal mining industry award through contested proceedings in the AIRC; (c) Dyno Nobel raised concerns that the new second limb of the coverage clause (clause 4.1(b)(ii)) would change the status quo and subject it to two materially different awards; and (d) in response to these concerns, the exclusion in clause 4.3(g) was introduced. This purpose is significant because, if either of the Appellant’s constructions were correct, an employer in the position of Dyno Nobel would fall within the second limb of the coverage clause – and so the apparent purpose for introducing clause 4.3(g) would be defeated. *RS [20]-[27].*
- 6. Award – Clause 4.3(g)** Clause 4.3(g) should be given its natural meaning. It creates a rule which excludes from the scope of the black coal mining industry “the supply of shotfiring or other explosive services”, provided that the supplier is an employer which is not otherwise “engaged in the black coal mining industry” (eg as a miner). This meaning is consistent with the conceptual structure, surrounding provisions, extrinsic evidence, and the apparent purpose of the provision. A contrary construction would defeat the Commission’s apparent purpose of maintaining the

status quo for suppliers like Dyno Nobel, so that their operations could be covered by a more appropriate award. *RS [15]-[31]*.

7. **Act – “Eligible Employee”** The parallel definitions of “coal mining employee” (Award) and “eligible employee” (Act) should also be given their natural meaning. This requires that all their nexus tests be governed by the same reference point – being the whole of the “black coal mining industry” as defined, and not some subset of this definition. This reading is again consistent with the conceptual structure, surrounding provisions, extrinsic evidence, and the apparent purpose of the provision. A contrary construction would have the same adverse consequences as those noted above. *RS [32]-[44]*.
8. **Award – Clause 4.3(g) – “Engaged in the Black Coal Mining Industry”** Special leave is sought to cross-appeal in relation to a related issue concerning clause 4.3(g) of the modern award – the meaning of the phrase “engaged in the black coal mining industry”. This phrase again adopts a nexus requirement, concerning the relationship between an employer and the industry. Nexus requirements are conventionally construed so as to reflect their context and purpose. In the present case, the immediate purpose of the nexus requirement is to define when “the supply of shotfiring or other explosive services” is properly to be regarded as an activity within the black coal mining industry – and not merely the supply of specialised explosive services. This then facilitates the proper characterisation of particular employment relationships. In this context, the existence of such a nexus cannot be relevantly affected by *every* minor, transitory or unrelated engagement by an employer in the black coal mining industry (eg the acquisition of a small, unrelated, service provider to the industry). Were it otherwise, the scheme would vary in its application by reason of transitory and extraneous events. For this reason, the nexus must have some sufficient relevance to the supply of shotfiring or explosive services. In the present case, the Minova business was not of this character and was not sufficient to render the exclusion in clause 4.3(g) inoperative. *RS [48]-[61]*.

Dated: 8 April 2026



John McKenna KC