HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, STEWARD, GLEESON AND JAGOT JJ

COAL MINING INDUSTRY (LONG SERVICE LEAVE FUNDING) CORPORATION APPELLANT

AND

ORICA AUSTRALIA PTY LTD RESPONDENT

Coal Mining Industry (Long Service Leave Funding) Corporation v Orica Australia Pty Ltd
[2026] HCA 30
Date of Hearing: 9 April 2026
Date of Judgment: 9 September 2026
S161/2025

ORDER

1. *Appeal allowed.*

2. *Special leave to cross-appeal is granted and the cross-appeal is dismissed.*

3. *Set aside declarations 1 and 2 and orders 1 to 4 of the Full Court of the Federal Court of Australia made on 17 July 2025 and in lieu thereof order that the appeal be dismissed, with Orica Australia Pty Ltd ("Orica") to pay the costs of the appeal of the Coal Mining Industry (Long Service Leave Funding) Corporation ("the Corporation").*

4. *Orica to pay the costs of the appeal and cross-appeal to this Court of the Corporation.*

On appeal from the Federal Court of Australia

Representation

N C Hutley SC with J R Clarke SC and T J Kane for the appellant (instructed by Corrs Chambers Westgarth)

J D McKenna KC with D K Fuller for the respondent (instructed by MinterEllison)

C J Tran with A M Sage for the Mining and Energy Union, intervening (instructed by Mining and Energy Union)

J E Murdoch KC with T A Spence for Dyno Nobel Asia Pacific Pty Limited, intervening (instructed by Mallesons)

CATCHWORDS

Coal Mining Industry (Long Service Leave Funding) Corporation v Orica Australia Pty Ltd

Industrial law (Cth) – Coal industry – Statutory interpretation – Portable long service leave scheme – Where employers required to make payments in respect of "eligible employees" defined in s 4(1) of *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) – Where respondent provided shotfiring services to black coal mines through employees – Where definition of "eligible employee" bifurcated into "employer limb" and "location limb" – Where location limb required employee be "employed in the black coal mining industry" – Where "black coal mining industry" defined to have meaning in Black Coal Mining Industry Award 2010 ("Award") – Where cl 4.3(g) of Award excluded "supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry" from "black coal mining industry" – Whether cl 4.3(g) of Award applied to location limb – Whether respondent otherwise engaged in black coal mining industry.

Words and phrases – "at or about a place", "award", "award modernisation", "bifurcated limbs", "black coal", "black coal mine", "black coal mining industry", "construction", "contrary intention", "definition", "directly connected with the day to day operation of", "eligible employee", "employed in", "employer limb", "engaged in", "location limb", "not otherwise engaged in", "portable long service leave", "qualifying service", "shotfirer", "shotfiring or other explosive services", "status quo", "substantial character".

Coal Mining Industry (Long Service Leave) Administration Act 1992 (Cth), ss 3, 4(1), 39A(1).
Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009 (Cth).
Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992 (Cth).
Workplace Relations Act 1996 (Cth), s 576C.
Black Coal Mining Industry Award 2010, cll 4.1, 4.2, 4.3, 4.5, 4.6, Sch A.

The appeal and the cross-appeal

1 The appellant, the Coal Mining Industry (Long Service Leave Funding) Corporation ("the Corporation"), is a statutory corporation established under the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) ("the Administration Act"). One principal object of the Administration Act is to give an "eligible employee" an entitlement to long service leave by reference to the employee's qualifying service for "one or more employers". Another is to establish and maintain the Coal Mining Industry (Long Service Leave) Fund. Employers of "eligible employees", who must pay into the Fund, are reimbursed for long service leave payments made to "eligible employees" as required under the Administration Act.[1]

2 The respondent, Orica Australia Pty Ltd ("Orica"), relevantly, employs shotfirers who work at open cut black coal mines in New South Wales ("NSW") and Queensland. Shotfiring involves placing high-powered explosives in holes in the ground which, when detonated, expose a black coal seam, enabling the extraction of the black coal. A dispute arose between the Corporation and Orica as to whether Orica's shotfirers are "eligible employees" under the Administration Act. The resolution of the dispute depends on the proper construction of the definitions of "eligible employee" and "black coal mining industry" in s 4(1) of the Administration Act.

3 The primary judge in the Federal Court of Australia (Perram J), who recorded that it was not in dispute that Orica's shotfirers "performed their duties at black coal mines or that the performance of their duties was directly connected with the day to day operation of a black coal mine",[2] held that Orica's shotfirers were "eligible employees".[3] The Full Court of the Federal Court of Australia (Collier, Snaden and Hatcher JJ) held that Orica's shotfirers were not "eligible employees".[4] Neither the primary judge nor the Full Court, however, had the benefit of the submissions of the Mining and Energy Union ("the MEU"). The

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1 Administration Act, ss 4(1), 39A(1)-(2), 39C-39CE, 40-49.

2 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 at [12].

3 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 at [24].

4 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 at [6].

MEU was granted leave to intervene in the appeal to this Court. In its written submissions and an accompanying affidavit, the MEU provided information relevant to the enactment and amendment of the Administration Act and the history of industrial instruments leading up to the making of the Black Coal Mining Industry Award 2010 ("the 2010 Award"). Provisions of the 2010 Award are relevant because the definition of "eligible employee" in s 4(1) of the Administration Act refers to the "black coal mining industry" and s 4(1) also provides that "***black coal mining industry*** has the same meaning as in the [2010 Award] as in force on 1 January 2010".

4 Once the broader context relevant to the enactment and amendment of the Administration Act and the history of industrial instruments leading up to the making of the 2010 Award is understood, it becomes apparent that the primary judge's conclusion was correct, albeit for reasons which must be expressed differently from those which his Honour gave. It also becomes apparent that if the contentions of Orica and those of another intervener in support, Dyno Nobel Asia Pacific Pty Ltd ("Dyno Nobel"), were accepted, it would undermine the fundamental conceptual underpinning of the Administration Act and the long service leave entitlement it provides to "eligible employees" (as well as the operation of the 2010 Award).

5 As will be explained, since its enactment, the Administration Act has defined an "eligible employee", relevantly, by reference to two bifurcated limbs, one known as the employer limb and the other known as the location limb. Since enactment, the employer limb of the definition of "eligible employee" has required that, in effect, the employee be "employed in the black coal mining industry by an employer engaged in the black coal mining industry" irrespective of the place at which the employee carries out that work, provided that the employee's duties are "directly connected with the day to day operation of a black coal mine". Since enactment, the location limb of the definition of "eligible employee" has required that, in effect, the employee be "employed in the black coal mining industry", provided that the employee's 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".

6 Understood in context, it is the words "by an employer engaged in the black coal mining industry" which are the key to construing the employer limb. It is also the absence of those words from the location limb which is the key to construing the location limb. These are the key words because they mean that the phrase "employed in the black coal mining industry", used in both limbs, refers only to the nature of the activities in fact carried out by the employee and not the substantial industrial or business character of the employer's overall activities. The substantial industrial or business character of the employer's overall activities is therefore relevant to the employer limb only of the definition of "eligible employee", by reason of the presence of the words "by an employer engaged in the

black coal mining industry". As those words are not part of the location limb of the definition of "eligible employee", it is clear that the substantial industrial or business character of the employer's overall activities is irrelevant to that limb. This fundamental aspect of the Administration Act, once recognised, drives the conclusion that the apparently problematic cl 4.3(g) of the 2010 Award, specifying an exclusion from the "black coal mining industry" in terms of "the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry" (the meaning of which understandably vexed the primary judge and the Full Court), is ambiguous but not in fact problematic. Properly construed, cl 4.3(g) applies only to the employer limb of the definition of "eligible employee" in the Administration Act and does not purport to make relevant to the location limb the status of the employer as "engaged in the black coal mining industry" or not.

7 In considering the broader context, it is necessary to keep in mind that, while the precise wording of the two limbs of the definition of "eligible employee" has altered since the enactment of the Administration Act, the substance of the distinct employer limb and location limb has been consistent and has remained. The 2010 Award adopted that same bifurcated criterion of reference in the definition of "coal mining employees".[5] This means that the 2010 Award applies to "coal mining employees" under the location limb of that definition irrespective of the status of their employer as "an employer engaged in the black coal mining industry" or not (a criterion relevant only to the employer limb of the definition of "coal mining employees" in the 2010 Award and the employer limb of "eligible employee" in the Administration Act).

8 On the proper construction of the provisions in dispute, it follows that: (i) Orica's shotfiring employees, whose duties are carried out at or about a place where black coal is mined and who otherwise satisfy the requirements of the location limb, are "eligible employees" as defined in s 4(1) of the Administration Act; and (ii) those employees and Orica in respect of those employees are bound by the 2010 Award.

9 The appeal must therefore be allowed. Special leave to cross-appeal is granted, but the cross-appeal is dismissed. Consequential orders must be made as sought by the Corporation.

The relevant provisions

10 Section 3 of the Administration Act provides that the main object of the Act is to make provision in relation to long service leave in the black coal mining industry by, relevantly, "(ab) providing minimum entitlements and rights in

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5 2010 Award, cl 4.1(b).

respect of long service leave for eligible employees" and "(b) requiring the Corporation to establish and maintain a Coal Mining Industry (Long Service Leave) Fund and to make payments out of the Fund to employers in the industry to reimburse them for payments made in respect of long service leave".

11 Section 4(1) of the Administration Act provides that "[i]n this Act, unless the contrary intention appears", relevantly:

> "***black coal mining industry*** has the same meaning as in the Black Coal Mining Industry Award 2010 as in force on 1 January 2010.
>
> ...
>
> ***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.
>
> ...
>
> ***employee*** means a national system employee as defined in section 13 of the *Fair Work Act 2009*.
>
> ...
>
> ***employer*** means a national system employer as defined in section 14 of the *Fair Work Act 2009*."

12 Section 39A of the Administration Act relevantly provides that:

> "(1) If an eligible employee completes a period of qualifying service that is, or periods of qualifying service that add up to, at least 8 years, the employee is entitled to long service leave under this Part in respect of that period, or those periods, of qualifying service.
>
> ...
>
> (2) A period of ***qualifying service*** by an employee is a period during which the employee is *an eligible employee of* one *or more employers*, but does not include any of the following:
>
> ..." (emphasis added)

13 The 2010 Award, as referred to in the definition of the "black coal mining industry" in s 4(1) of the Administration Act, contains cl 3(1), which provides relevantly that:

> "In this award, unless the contrary intention appears:
>
> **Act** means the *Workplace Relations Act 1996* (Cth)
>
> ...
>
> **employee** has the meaning in the Act
>
> **employer** has the meaning in the Act
>
> **enterprise award** has the meaning in the Act
>
> **mine** means any open cut or underground coal mine, or any operation or establishment, in the black coal mining industry".

14 Clause 4 of the 2010 Award includes these provisions:

> "**4.1** This award applies to:
>
> **(a)** employers of coal mining employees as defined in clause 4.1(b); and
>
> **(b)** coal mining employees.

Coal mining employees are:

(i) employees who are 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 and who are employed in a classification or class of work in Schedule A – Production and Engineering Employees or Schedule B – Staff Employees of this award;

(ii) employees who are 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 and who are employed in a classification or class of work in Schedule A – Production and Engineering Employees or Schedule B – Staff Employees of this award.

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:

(a) the extraction or mining of black coal on a coal mining lease by means of underground or surface mining methods;

(b) the processing of black coal at a coal handling or coal processing plant on or adjacent to a coal mining lease;

(c) the transportation of black coal on a coal mining lease; and

(d) other work on a coal mining lease directly connected with the extraction, mining and processing of black coal.

4.3 The black coal mining industry does not include:

(a) the mining of brown coal in conjunction with the operation of a power station;

(b) the work of employees employed in head offices or corporate administration offices (but excluding work in town offices associated with the day-to-day operation of a local mine or mines) of employers engaged in the black coal mining industry;

(c) the operation of a coal export terminal;

(d) construction work on or adjacent to a coal mine site;

(e) catering and other domestic services;

(f) haulage of coal off a coal mining lease (unless such haulage is to a wash plant or char plant in the vicinity of the mine); or

(g) the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry.

NOTE: See, for example, decision of the Coal Industry Tribunal in [*Re Australian Collieries Staff Association and New South Wales Combined Colliery Proprietors Association*[6]].

4.4 The award does not cover an employee excluded from award coverage by the Act.

4.5 The award does not cover an employer bound by an enterprise award with respect to any employee who is covered by the enterprise award.

..."

15 The classification or class of work in Schedule A – Production and Engineering Employees, as referred to in paras (i) and (ii) of the definition of "coal mining employees" in the 2010 Award, includes "shotfiring" or "shotfirer" as one of the indicative advancement competencies for open cut mines and underground mines.

16 The decision of the Coal Industry Tribunal in the note to cl 4.3 concerned whether employees of coal mining companies who worked in head offices were eligible for membership of the Australian Collieries Staff Association, where eligibility depended on their activities being in the coal mining industry. In its reasons for decision, the Tribunal referred to the long history of the phrase "coal mining industry" and its meaning being "unfortunately indefinite and flexible".[7]

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6 Unreported, Coal Industry Tribunal, 22 February 1982.

7 *Re Australian Collieries Staff Association and New South Wales Combined Colliery Proprietors Association* (unreported, Coal Industry Tribunal, 22 February 1982) at 16, quoting *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 at 140.

Other than in one case, the Tribunal found that the head office employees were not in the coal mining industry.[8] As will become apparent, this history is reflected in the exclusion effected by cl 4.3(b) of the 2010 Award, which is part of the context in which cl 4.3(g) is to be construed.

The competing constructions

17 The Corporation's principal construction, supported by the MEU, is that the context, purpose and text of the Administration Act and the 2010 Award lead to the conclusion that cl 4.3(g) of the 2010 Award is directed solely to the employer limb in the definition of "coal mining employees" in cl 4.1(b)(i) of the 2010 Award and, therefore, the employer limb in the definition of "eligible employee" in s 4(1) of the Administration Act. The Corporation's alternative construction supports the conclusion of the primary judge that cl 4.3(g) of the 2010 Award is inconsistent with the terms of the definition of "eligible employee" in s 4(1) of the Administration Act, so that the qualification in the chapeau to s 4(1) ("unless the contrary intention appears") is engaged. Accordingly, the definition of "black coal mining industry" in s 4(1) of the Administration Act is that "black coal mining industry" has the same meaning as in the 2010 Award excluding cl 4.3(g).

18 Orica's principal construction is that, under cl 4.3(g) of the 2010 Award, 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". That is, "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".

19 Dyno Nobel supported the position of Orica and of the Full Court but submitted also that the purpose of cl 4.3(g) of the 2010 Award was to preserve the outcome in *Construction, Forestry, Mining and Energy Union v Dyno Nobel Asia Pacific Ltd* ("*Dyno Nobel AIRC*").[9] In *Dyno Nobel AIRC*, a Full Bench of the Australian Industrial Relations Commission ("the AIRC") held that shotfirers employed by Dyno Nobel were not eligible to be members of the Construction, Forestry, Mining and Energy Union ("the CFMEU")[10] "such as to enable the

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8 *Re Australian Collieries Staff Association and New South Wales Combined Colliery Proprietors Association* (unreported, Coal Industry Tribunal, 22 February 1982) at 18-22.

9 [2005] AIRC 622.

10 [2005] AIRC 622 at [64].

CFMEU to engage in an industrial dispute about the terms of their employment".[11] As Hatcher J explained in the Full Court, the "Full Bench categorised the relevant part of the CFMEU's eligibility rule, which referred to '… employees engaged in or in connection with the coal and shale industries …', as an 'industry rule' such that the question required to be determined was whether the employer's business could be characterised as being one in or in connection with the coal industry. The Full Bench applied the 'substantial character' test, derived from *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd*[12] to answer this question. Notwithstanding that the Full Bench accepted that the work of the shotfirers was 'an integral part of open cut coal mining' ... it characterised the substantial character of Dyno Nobel's business as being in an industry other than the coal industry."[13]

20 As a result, Dyno Nobel (unlike Orica) was not subsequently listed as a company bound by the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 ("the 1997 Award"), being a predecessor award to the 2010 Award.[14] According to Dyno Nobel, whatever else might be concluded, the terms of cl 4.2 of the 2010 Award, in stating that "[f]or the purposes of this award, black coal mining industry has the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal", must be given effect. The consequence, Dyno Nobel submitted, is that Dyno Nobel, as a person not bound by the predecessor 1997 Award, is also not a person bound by the 2010 Award, irrespective of the position of Orica.

Approach to construction

21 The Administration Act is a Commonwealth statute to which the ordinary principles of statutory construction apply. The applicable principles were recently stated by the Court in *Palmanova Pty Ltd v The Commonwealth*[15] in the following terms:

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11 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 at [77].

12 (1948) 77 CLR 123.

13 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 at [77].

14 Coal Mining Industry (Production & Engineering) Consolidated Award 1997 Roping-in Award No 3 of 2005, Sch A.

15 (2025) 99 ALJR 1362 at 1364-1365 [4]-[5], see also at 1375 [67]; 424 ALR 768 at 769-770, see also at 783 (footnotes omitted).

> "Statutory construction is the process of attributing meaning to statutory text. The construction of a statutory provision begins and ends with the statutory text understood in context and in light of the statutory purpose – being what the provision is designed to achieve in fact – insofar as that purpose is discernible from the statutory text and context. In the construction of a provision of a Commonwealth statute, the meaning that would best achieve the statutory purpose so discerned is to be preferred to each alternative meaning.
>
> That being the nature of the task to which the process is directed, the 'modern approach' to statutory construction, as was explained nearly 30 years ago in *CIC Insurance Ltd v Bankstown Football Club Ltd* [(1997) 187 CLR 384 at 408] in a statement repeated and endorsed many times since: '(a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ... , one may discern the statute was intended to remedy'. Use of extrinsic material in the construction of a provision of a Commonwealth statute is guided but not governed by a non-exhaustive list of categories of material statutorily recognised to have potential to illuminate the statutory context."

22 Here the context is of critical importance given that, as noted, the definition of "black coal mining industry" in s 4(1) of the Administration Act, which forms part of the definition of "eligible employee", refers to the "meaning" of that term in the 2010 Award. It must be taken that the legislature recognised that awards are a species of industrial instrument with a long history of disputed interpretation in Australian law. Within that long history of disputation, the approach of Street J in *Geo A Bond & Co Ltd (In liq) v McKenzie*[16] is orthodox. His Honour said:[17]

> "Now speaking generally, awards are to be interpreted as any other enactment is interpreted. ... But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result ... from an agreement between parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore, in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of

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16 [1929] AR (NSW) 498.

17 [1929] AR (NSW) 498 at 503-504.

the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award."

23 Similarly, as Madgwick J put it in the frequently cited decision of *Kucks v CSR Ltd*:[18]

> "It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand."

24 Thereafter, amongst many others, French J applied *Kucks v CSR Ltd* in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*,[19] saying "[t]here is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned ... It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies."[20]

25 Tracey J subsequently reviewed the orthodox approach in *Transport Workers' Union of Australia v Linfox Australia Pty Ltd*,[21] referring with approval to *Kucks v CSR Ltd*, and saying that "[a]s is often the case with industrial awards and agreements which have been drafted by non-lawyers, the drafting of the

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18 (1996) 66 IR 182 at 184. See also *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at 271 [96], 282-283 [129].

19 (2006) 153 IR 426.

20 (2006) 153 IR 426 at 440 [57], referring to *Geo A Bond & Co Ltd (In liq) v McKenzie* [1929] AR (NSW) 498 at 503-504.

21 (2014) 318 ALR 54 at 58-61 [29]-[41].

instruments presently under consideration lack the precision and clarity which one would expect to find in a commercial contract".[22]

26 As more recently stated by Wheelahan, Jackson and Dowling JJ:[23]

> "The words of an industrial instrument are not to be interpreted in a vacuum divorced from industrial realities. The language used is frequently couched in terms intelligible to the framers of the instrument without careful attention to form and draftsmanship that one expects to find in a statute. The framers of such documents may be more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, such that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced".

27 While the 2010 Award was a product of a decision of the Full Bench of the AIRC, the AIRC's reasons for decision expose that the 2010 Award was a product of the AIRC "generally revert[ing] to the form of words in the draft clause agreed by the main coal industry parties" and "reflect[ing] as closely as possible the status quo".[24] With this in mind, the orthodox principles generally applicable to awards are apt to be applied to the 2010 Award. Considering these principles, it can safely be said that an interpretation of the meaning of "black coal mining industry" in the 2010 Award which would undermine the manifest and long-standing fundamental object or purpose of the Administration Act – to ensure that persons working in that industry may be "eligible employees" under either limb of the definition of "eligible employee" (the employer limb or the location limb) – is to be avoided if possible.

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22 (2014) 318 ALR 54 at 58 [29].

23 *Construction, Forestry and Maritime Employees Union v Australian Industry Group* (2025) 314 FCR 187 at 193 [21].

24 *Re Request from the Minister for Employment and Workplace Relations – 28 March 2008 – Award Modernisation* (2008) 177 IR 364 at 403-404 [156]-[157].

Considerations of context, purpose and text

Context

The Administration Act

28 As the primary judge recorded, the "black coal mining industry has, over a long period, been the subject of industrial disputation and complex regulation".[25] One of the concessions that miners obtained after the enactment of the *National Emergency (Coal Strike) Act 1949* (Cth) was a "portable long service leave benefit which operated by reference to the length of service in the black coal mining industry rather than the length of service with an employer".[26] That scheme "has been through several iterations".[27] The Administration Act is the most recent of those iterations.

29 On its enactment in 1992, the Administration Act defined "eligible employee" in s 4(1) as, relevantly, meaning: "(a) a person employed in the black coal mining industry under a relevant industrial instrument the duties of whose employment are carried out at or about a place where black coal is mined" (the location limb); or "(b) a person employed by a company that mines black coal the duties of whose employment (wherever they are carried out) are directly connected with the day to day operation of a black coal mine" (the employer limb). Immediately before the coming into force on 1 January 2010 of the *Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009* (Cth) ("the 2009 Amendment Act"), the definition of "eligible employee" remained in these terms except that the location limb referred to "a relevant industrial instrument, or the National Employment Standards".[28] The Administration Act did not define "black coal mining industry" before the coming into force of the 2009 Amendment Act.

30 The 2009 Amendment Act repealed this definition of "eligible employee" and inserted the new definition of "eligible employee", which continues to contain the location limb and the employer limb (albeit their order is now reversed). It also inserted the new definition of "black coal mining industry". As will be explained, the purpose of the 2009 Amendment Act was limited to ensuring consistency in

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25 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 at [3].

26 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 at [4].

27 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 at [5].

28 The National Employment Standards are contained in the *Fair Work Act 2009* (Cth).

the terms of the legislative regime and did not extend to the making of any material change to the continued function of the employer limb and the location limb in the Administration Act. As will also be explained, it is important that the basic scheme of the 2010 Award, in all its various earlier iterations and as made, reflects the operation of the pre-existing Administration Act. In everyday parlance, the pre-existing Administration Act was the "dog" and the 2010 Award's definition of "black coal mining industry" adopted in the Administration Act was the "tail". Accordingly, no construction of "black coal mining industry" should be adopted by which the tail ends up wagging the dog.

The 2010 Award

31 In 2008, under a new power provided by s 576C of the *Workplace Relations Act 1996* (Cth), the President of the AIRC announced a process for the modernisation of awards in response to a request by the Minister for Employment and Workplace Relations.[29] Before the legislative amendments to the *Workplace Relations Act* enabling the AIRC to undertake this modernisation at the request of the Minister, awards were negotiated between the parties to the award in a process of conciliation and arbitration and "generally bound only the employers, employer organisations and unions who had been parties to the industrial dispute that gave rise to the making of the award and who were named in the award as 'respondents'".[30] As recorded by the AIRC in response to the Minister's request, "modern awards" (to be made at the end of the AIRC process) were not intended to "result in the modification of enterprise awards".[31]

32 The AIRC decided that one of the priority industries for award modernisation was to be the coal industry.[32] The AIRC identified the awards relevant to the coal industry as including the 1997 Award (to which Orica was an employer respondent) and the Coal Mining Industry Award (Deputies and

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29 *Request from the Minister for Employment and Workplace Relations – 28 March 2008 – Award Modernisation – Statement* [2008] AIRC 387 at [1], referring to *Workplace Relations Act*, s 576C(1).

30 Stewart et al, *Creighton & Stewart's Labour Law*, 7th ed (2025) at 369 [13.05].

31 *Request from the Minister for Employment and Workplace Relations – 28 March 2008 – Award Modernisation – Statement* [2008] AIRC 387 at [3]. An "enterprise award" was defined in s 576U of the *Workplace Relations Act* to mean an "award that regulates the terms and conditions of employment in a single business only (being the single business specified in the award)".

32 *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008 – Award Modernisation Case* (2008) 175 IR 120 at 129 [15].

Shotfirers) 2002.[33] The Coal Mining Industry Award (Deputies and Shotfirers) 2002 provided that "'[d]eputies' and 'shotfirers' means persons whose duties are prescribed by 'The Coal Mines Regulation Act 1982 New South Wales'".[34] By cl 4(b) and (c) the Coal Mining Industry Award (Deputies and Shotfirers) 2002 was binding on, relevantly, "the coal industry employers represented by the NSW Coal Association" and "all employees employed by the respondent employers under this award as deputies or shotfirers in the State of New South Wales".

33 The Coal Mining Industry Employer Group ("the CMIEG") was a collection of coal mining companies jointly participating in the proceedings before the AIRC. The CMIEG "contend[ed] strongly for a modern award for the coal mining industry to be confined to the coal mining industry as that term has been very widely understood, litigated, has been the subject of decisions of this Commission, of the High Court, for many years the Coal Industry Tribunal, and also has its own legislation in a number of respects".[35]

34 The CMIEG submitted a draft award to the AIRC.[36] Clause 3 of the CMIEG draft award was, relevantly, in these terms:

"**COVERAGE**

3.1 This award applies to:

3.1.1 Employers of coal mining employees as defined in clause 3.1.2;

3.1.2 Coal mining employees. Coal mining employees are:

3.1.2.1 employees who are 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 and who are employed in a classification or class of work in Schedule A or B of this award;

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33 *Re Request from the Minister for Employment and Industrial Relations – 28 March 2008 – Award Modernisation Case* (2008) 175 IR 120 at 142 [98] and Attachment B at 164.

34 Coal Mining Industry Award (Deputies and Shotfirers) 2002, cl 3(p).

35 Transcript of Proceedings, *AM2008/1* (AIRC, Full Bench, 28 May 2008) at PN1755.

36 CMIEG, *Submission on Behalf of Coal Mining Industry Employer Group* (2008) ("CMIEG submission"), Annexure A (Draft Award).

> **3.1.2.2** employees who are 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 and who are employed in a classification or class of work in Schedule A or B of this award; and
>
> **3.1.2.3** employees permanently employed in connection with a mines rescue service in Schedule C of this award (to be finalised)".

35 Schedule A to the CMIEG draft award identified, amongst others, shotfirers.

36 The CMIEG draft award also contained proposed exclusions from coverage including "employers and employees to whom an enterprise award (as defined in s 576U of the [*Workplace Relations Act*[37]]) applies".[38]

37 The CMIEG draft award defined the "black coal mining industry" as having "the meaning applied by courts and industrial tribunals, including the former Coal Industry Tribunal", which, "[s]ubject to the foregoing", included "the extraction or mining of black coal on a coal mining lease by means of underground or surface mining methods" and "other work on a coal mining lease directly connected with the extraction, mining and processing of black coal" but which excluded, for example, "the work of employees employed in head offices and corporate administration offices of employers engaged in the coal mining industry".[39]

38 According to the CMIEG in accompanying submissions, the terms of the CMIEG draft award provided for "appropriate congruence between the application of the modern award and the application of the Federal legislated coal mining industry long service leave scheme".[40] The "Federal legislated coal mining industry long service leave scheme" was the Administration Act as in force in 2008, before the coming into force on 1 January 2010 of the 2009 Amendment Act. The CMIEG submission also explained that "[d]eputies and shotfirers, for whom there is presently a pre-reform award, operative only in NSW [ie the Coal

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37 See fn 31.

38 CMIEG submission, Annexure A (Draft Award), cl 3.2.1.

39 CMIEG submission, Annexure A (Draft Award), cl 3.3.

40 CMIEG submission at 4.

Mining Industry Award (Deputies and Shotfirers) 2002], have been provided for in Schedule A: Production & Engineering of the draft award".[41]

39 One union, the Communications, Electrical and Plumbing Union ("the CEPU"), submitted to the AIRC in response to the CMIEG draft award that the proposed coverage appeared to be based on the industry of the employee rather than that of the employer.[42] This was a reference to the location limb in cl 3.1.2.2 of the CMIEG draft award, which, as noted, was itself based on the location limb of the definition of "eligible employee" in the Administration Act. The submissions of the Australian Manufacturing Workers' Union ("the AMWU") included a re-draft of cl 3.1 under which the award would apply to an employee only if the employee was employed by an employer engaged in the coal mining industry (that is, coverage would be confined to the employer limb in cl 3.1.2.1 of the CMIEG draft award).[43] Accordingly, it was recognised from the outset that the inclusion of the location limb in the 2010 Award mirroring the location limb in the definition of "eligible employee" in the Administration Act would mean that the status of the employer (as "engaged in the black coal mining industry" or not) was irrelevant to the location limb (and therefore to the application of the 2010 Award to employers of employees within the scope of the location limb).

40 In oral hearings before the AIRC, the AMWU reiterated its view that the proposed modern award should apply to employees by reference to their employment by an employer "engaged in the black coal mining industry".[44] The CMIEG responded that in the CMIEG draft award it had "departed in a very measured respect from the way the cases have defined or appear to have defined the coal mining industry by requiring both the employer and the employee to be employed in the coal mining industry, but it's a very measured approach".[45] The CMIEG said that "[t]here is an important point of distinction between [cll] 3.1.2.1 and [3.1.2.2]. In [cl] 3.1.2.2, it's not necessary that the employer be engaged in the

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41 CMIEG submission at 6.

42 CEPU, *Submission of the Communications, Electrical and Plumbing Union (CEPU) – In relation to the award modernisation of the: Coal Mining Industry* (2008) at [8]-[12], [24].

43 AMWU, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Submission to Award Modernisation Consultation* (2008) at [8].

44 Transcript of Proceedings, *AM2008/6* (AIRC, Harrison SDP, 7 August 2008) at PN60; Transcript of Proceedings, *AM2008/10* (AIRC, Watson VP, 7 August 2008) at PN36.

45 Transcript of Proceedings, *AM2008/2* (AIRC, Lawler VP, 8 August 2008) at PN122.

coal mining industry as the cases have ruled you determine that question. However, in distinction or in contrast with the previous subclause, their duties must be carried out at or about a place where black coal is mined and directly connected with the day to day operation of a coal mine and in a classification in the award."[46] The CMIEG said that this drafting "had regard to the definition of eligible employee in the [Administration Act]", which "hinges entitlement to long service leave by reason of employee service in the coal mining industry".[47]

41 In an initial response to these submissions, the AIRC said that it did not agree to defining the "black coal mining industry" by reference to "the meaning applied by courts and industrial tribunals, including the former Coal Industry Tribunal" as this was "apt to confuse or intimidate lay readers of the award".[48] The AIRC, in an exposure draft of an award which it released ("the AIRC exposure draft"), instead proposed a coverage provision in accordance with the CMIEG's draft award but with a definition of "black coal mining industry" which said simply that to "avoid doubt, the black coal mining industry includes" the items the CMIEG proposed and excludes the items the CMIEG proposed as well as additional items of no significance for the present case.[49] That is, the reference to the "black coal mining industry" having its meaning in past court and tribunal decisions was omitted.[50] One of the exclusions in the AIRC exposure draft remained in substance as the CMIEG had proposed, cl 4.4(b) providing that the award "does not bind an employer who is bound by an enterprise award with respect to an employee to whom the enterprise award applies".

42 The CMIEG then made a further submission emphasising that the definition of the "black coal mining industry" in the CMIEG draft award by reference to previous court and tribunal decisions was "supported jointly by the employer group and the CFMEU".[51] The CMIEG, accordingly, urged the AIRC to reconsider its position in this regard and to adopt the definition of "black coal mining industry"

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46 Transcript of Proceedings, *AM2008/2* (AIRC, Lawler VP, 8 August 2008) at PN138.

47 Transcript of Proceedings, *AM2008/2* (AIRC, Lawler VP, 8 August 2008) at PN122.

48 *Re Request from the Minister for Employment and Workplace Relations – 28 March 2008 – Award Modernisation Statement* (2008) 177 IR 8 at 16 [37]-[38].

49 AIRC, *Exposure Draft (September 2008) – Coal Mining Industry Award 2010* (2008) at 4-5 [4.2]-[4.3].

50 *Re Request from the Minister for Employment and Workplace Relations – 28 March 2008 – Award Modernisation Statement* (2008) 177 IR 8 at 16 [38].

51 CMIEG, *Further Submission on behalf of Coal Mining Industry Employer Group* (2008) ("CMIEG further submission") at 1-2 [3]-[11].

in the CMIEG draft award. Consistently with the information in the CMIEG submission, part of this further submission from the CMIEG noted that:[52]

> "One specific matter affects deputies and shotfirers, for whom there is presently a pre-reform award operative only in New South Wales. Provision has been made for them in Schedule A. It is not necessary to provide separate classifications for deputies and shotfirers within the classification structure in Schedule A as they already fall within the existing classification structure. This approach will result, in New South Wales only, in the minimum weekly wage rate for a deputy being higher than that prescribed in the current pre-reform award for deputies and shotfirers. This increase will more than offset the omission of certain allowances currently paid to deputies in New South Wales under the deputies and shotfirers pre-reform award. These changes are proposed by the employer group as practical and convenient and do not reduce the total monetary entitlements of deputies and shotfirers."

43 Dyno Nobel made a submission to the AIRC referring to *Dyno Nobel AIRC*.[53] Dyno Nobel submitted that in this decision the AIRC held that "Dyno Nobel was not engaged in or in connection with the coal industry, meaning that the CFMEU could not represent the interests of any employees of Dyno Nobel".[54] According to Dyno Nobel, despite the CMIEG and the CFMEU proposing that they did not intend to expand the coverage of the coal mining industry and instead intended to preserve the status quo, the definition of "coal mining employees" in the CMIEG draft award as adopted in the AIRC exposure draft, which focused on "the activities of the employees of Dyno Nobel to the exclusion of the industry of Dyno Nobel as an employer", "may potentially have the unintended consequence of expanding the coverage or application of awards applying to the coal mining industry".[55] Dyno Nobel sought an exemption from the proposed 2010 Award in terms that the Award "does not apply to employees covered under the Explosives

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52 CMIEG further submission at 10 [51].

53 [2005] AIRC 622.

54 Dyno Nobel, *Submission on behalf of Dyno Nobel Asia Pacific Limited* (2008) at [22].

55 Dyno Nobel, *Submission on behalf of Dyno Nobel Asia Pacific Limited* (2008) at [22]-[28].

Award [ie the Federal Explosives Manufacturing and Distribution (AWU) Award 2000]".[56]

44 In a subsequent oral hearing before the AIRC, Dyno Nobel reiterated its position as described in its written submission. The representative of the CFMEU (Mining and Energy Division), in oral submissions to the AIRC, noted that Orica, which like Dyno Nobel provided explosives to the general mining and coal mining industries in Australia and was also in the fertilisers and chemical industry, was already a respondent to the 1997 Award and would be covered by the drafting of the CMIEG draft award and the AIRC exposure draft. The CFMEU representative explained that:[57]

> "the manufacture of explosives doesn't concern us at all when it's done in factories where essentially they're providing fertiliser to farmers and explosives and feedstock for explosives. ... [O]ur concern ... with explosives is when we have people employed to work on a coal mining site for up to [ten] years going to a drill pattern in overburden or inter burden and loading the shot holes that have been drilled by coal mining industry people, loading them up with explosives, having a shot fire, fire the shot and having the overburden removed or the inter burden removed which is an intrinsic and essential part of coal mining to expose the coal, that's where we have a concern with what's being called explosives work or the explosives industry by people such as Dyno Nobel but in fact it's part of the continuing process of coal mining."

45 Senior Deputy President Acton responded:[58]

> "So you say they're currently proposed to be covered by the [2010] Award. You have a concern that they [being the Orica shotfirers described above] may be covered by a separate Chemical Award or the Manufacturing Award."

46 The CFMEU representative also explained in this hearing that the Federal Explosives Manufacturing and Distribution (AWU) Award 2000, to which Dyno

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56 Dyno Nobel, *Submission on behalf of Dyno Nobel Asia Pacific Limited* (2008) at [29]-[37].

57 Transcript of Proceedings, *AM2008/19* (AIRC, Acton SDP, 24 November 2008) at PN405.

58 Transcript of Proceedings, *AM2008/19* (AIRC, Acton SDP, 24 November 2008) at PN406.

Nobel was a party, was "a single union, single employer award".[59] This submission was correct. The only respondent nominated in Sch A to the Federal Explosives Manufacturing and Distribution (AWU) Award 2000 as bound by that Award is Dyno Nobel. That is, the Federal Explosives Manufacturing and Distribution (AWU) Award 2000 was within the meaning of an "enterprise award" in s 576U of the *Workplace Relations Act*. The CFMEU representative was also correct in her further submission that, as a result, cl 4.4(b) of the AIRC exposure draft would exclude application of the proposed 2010 Award to Dyno Nobel (but not Orica) as cl 4.4(b) provided that the Award did not "bind an employer who is bound by an enterprise award with respect to an employee to whom the enterprise award applies". In response to these submissions, Senior Deputy President Acton said that "[i]f they're [ie Dyno Nobel and its employees] covered by an enterprise award, they're excluded from coverage under this award, however there is the broader question about, let's say, new entrants to the industry which award they would be covered by".[60]

47 The CFMEU representative and Senior Deputy President Acton had this exchange:[61]

> "[CFMEU REPRESENTATIVE]: We note that Dyno Nobel isn't listed as the respondent to the Artificial Fertilisers Chemical Industry Award although the other half of the duopoly of that work in Australia Orica is. That's no doubt because the AWU [Australian Workers' Union] and Dyno Nobel did a separate enterprise award to cover that work across Australia.
>
> SENIOR DEPUTY PRESIDENT: Can I just pursue that a bit more? If they're [ie Dyno Nobel and its employees] covered by an enterprise award, they're excluded from coverage under this award, however there is the broader question about, let's say, new entrants to the industry which award they would be covered by, which presumably AIG [Australian Industry Group] would argue that's the reason for including the scope of the Artificial Fertilisers and Chemical Industry Award in here, if that be the case your concern still is that the exclusion of that scope leads to some potential

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59 Transcript of Proceedings, *AM2008/19* (AIRC, Acton SDP, 24 November 2008) at PN409.

60 Transcript of Proceedings, *AM2008/19* (AIRC, Acton SDP, 24 November 2008) at PN418.

61 Transcript of Proceedings, *AM2008/19* (AIRC, Acton SDP, 24 November 2008) at PN417-PN418.

confusion about whether they're covered by the coal mining industry or this award?"

48 To understand the "broader question" which was of concern to the AIRC, it is necessary to explain that Orica was, as the CFMEU representative said, a party to the Artificial Fertilizers and Chemical Industry Award 2001 [Transitional] (and Dyno Nobel was not a party to that award because Dyno Nobel and each of its employees were bound by the enterprise award specific to them, the Federal Explosives Manufacturing and Distribution (AWU) Award 2000). At the time of the AIRC's consideration, for any new entrant employer whose employees included but were not limited to those the CFMEU representative had described as working at a coal mining site setting explosives to remove overburden and expose coal seams, who were "an intrinsic and essential part of coal mining", there may have arisen a question as to the dividing line determining whether such employees should be subject to the 2010 Award or, for example, the Artificial Fertilizers and Chemical Industry Award 2001 [Transitional].

49 The CFMEU representative indicated to the AIRC in the hearing that the CFMEU would be willing to "prepare a draft amendment to the scope clause and draft exclusions".[62] The subsequent submissions filed by the CFMEU and Dyno Nobel did not address that question, however.[63]

50 The AIRC subsequently made the 2010 Award, giving reasons for doing so. The reasons explain that:[64]

> "*Coal mining industry*
>
> The award will cover all black coal mining in Australia but not brown coal mining. ...
>
> We note again a particular circumstance relevant to the approach we have adopted to this award. All of the major coal mining companies in Australia were jointly represented and presented submissions as the [CMIEG]. The [CFMEU] is the key union that represents production employees in the industry. The Association of Professional Engineers,

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62 Transcript of Proceedings, *AM2008/19* (AIRC, Acton SDP, 24 November 2008) at PN419.

63 Dyno Nobel, *Further Submission on behalf of Dyno Nobel Asia Pacific Limited* (2009).

64 *Re Request from the Minister for Employment and Workplace Relations – 28 March 2008 – Award Modernisation* (2008) 177 IR 364 at 403-404 [154]-[157].

Scientists and Managers, Australia (APESMA) is the key union representing staff employees in the industry. The CMIEG, CFMEU and APESMA substantially agreed on the terms of a draft award for the black coal mining industry. A number of the changes to the exposure draft were agreed by relevant parties.

Coverage

We have, at this stage, acceded to the main submissions of the CFMEU and the CMIEG in relation to the coverage clause in the exposure draft and have generally reverted to the form of words in the draft clause agreed by the main coal industry parties. We note that the stated goal of the CFMEU and the CMIEG was to achieve a coverage clause that as closely as possible reflects the status quo in terms of the existing application of the key federal pre-reform awards both in relation to the kinds of employers to whom those awards apply and the extent to which the awards apply to such employers. We agree with that goal and intend that the award we have made should neither expand nor contract the reach of the key pre-reform awards both in relation to the kinds of employers to whom those awards apply and the extent to which the awards apply to such employers. It follows that we reject submissions that sought to have mechanical and electrical contractors invariably covered by awards other than the modern award for the black coal mining industry.

However, we are concerned that the clause as drafted is not simple to understand nor easy to apply. In particular, contractors who perform some work at or about coal mines may have difficulty in determining whether the award covers them. We acknowledge that significant attempts were made by the parties to agree on a form of words that described the industry in a clear and direct way. We intend to vary cl 4 before the award commences so that it contains a clearer description of the black coal mining industry albeit a description that reflects as closely as possible the status quo. We recognise that the difficulties in developing such a description are substantial and that this should not be done without further consultation with interested parties."

51 The 2010 Award as made contained cl 4.3(g), not previously part of any draft award or the subject of submissions to the AIRC. Despite indicating that it intended to vary "cl 4 before the award commences so that it contains a clearer description of the black coal mining industry", in consultation with the parties, this did not occur and the 2010 Award came into force on 1 January 2010.

Purpose

52 A principal purpose of the Administration Act is clear and has remained unchanged since enactment. It is to provide "eligible employees" with a right to accrue long service leave based on the employee's continuing employment in the "black coal mining industry" irrespective of any change in employer of the employee. As noted, s 39A(1) of the Administration Act gives an "eligible employee" the right to long service leave by periods of qualifying service that add up to at least eight years by reference to "qualifying service", which s 39A(2) defines as "a period during which the employee is an eligible employee of one or more employers". An "eligible employee" therefore remains an "eligible employee" accruing qualifying service whether the employee is within the employer limb or the location limb of the definition of "eligible employee" or, over time, changes from one such limb to the other such limb.

53 It is also relevant that the location limb in the definition of "eligible employee" in the Administration Act, at the time the 2010 Award was made, referred to "a person employed in the black coal mining industry under a relevant industrial instrument ... the duties of whose employment are carried out at or about a place where black coal is mined". As noted, the 1997 Award binding Orica and the Coal Mining Industry Award (Deputies and Shotfirers) 2002 binding employers of shotfirers in NSW were both expressly recognised throughout the drafting process of the 2010 Award as being "relevant industrial instrument[s]" as referred to in the location limb of the definition of "eligible employee" in the Administration Act.

54 The principal purpose of the introduction of the definition of "black coal mining industry" in the Administration Act by the 2009 Amendment Act is also clear. The purpose was confined. It was to provide in the Administration Act a convenient shorthand reference to the meaning of "black coal mining industry", as appearing in the definition of "eligible employee", by reference to the meaning of that term in the 2010 Award.

55 The Explanatory Memorandum for the *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009* (Cth) (enacted as the 2009 Amendment Act) confirms this purpose, stating that:[65]

> "Employees in the coal mining industry are entitled to long service leave on the basis of service in the industry, rather than their service with a particular employe[r]. ...

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65 Australia, House of Representatives, *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009*, Explanatory Memorandum at 1.

...

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

- the definition of 'black coal mining industry' in the [Administration] Act (which flows through to related legislation) will be aligned with the definition in the [2010] Award; ..." (emphasis added)

56 The Explanatory Memorandum, in referring to the definition of "eligible employee" in s 4(1) of the Administration Act, records that:[66]

"This item amends the definition of 'eligible employee' in the [Administration] Act. The new definition is consistent with the definition of a coal mining employee in the [2010] Award (see clause 4.1(b) of the [2010] Award)."

57 In achieving a consistency of definition of "black coal mining industry" with the 2010 Award, it is relevant that: (i) as noted, the definition of "black coal mining industry" was new, the relevant definitional provisions in s 4(1) of the Administration Act having previously been confined to the location limb and the employer limb of the definition of "eligible employee"; (ii) nothing in the Explanatory Memorandum suggested any intention that the 2009 Amendment Act materially alter the status of any "eligible employee", including shotfirers; (iii) reflecting this intention, the amended version of the definition of "eligible employee" continued to contain a location limb and an employer limb; and (iv) the context to the amendment of the definitions in s 4(1) of the Administration Act includes the stated objective of the AIRC in making the 2010 Award to accept the joint position of the CMIEG and the CFMEU as to coverage, which attempted to retain the status quo by reference to "the existing application of the key federal pre-reform awards".[67] The "key federal pre-reform awards", as noted, were the 1997 Award, which bound Orica in respect of Orica's shotfirers, and the Coal Mining Industry Award (Deputies and Shotfirers) 2002, which bound employers of shotfirers in NSW. Otherwise, the Federal Explosives Manufacturing and Distribution (AWU) Award 2000, an enterprise award, bound only Dyno Nobel and its employees and, therefore, was beside the point given that enterprise awards were never intended to be affected by the award modernisation process.

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66 Australia, House of Representatives, *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009*, Explanatory Memorandum at 3 [6].

67 *Re Request from the Minister for Employment and Workplace Relations – 28 March 2008 – Award Modernisation* (2008) 177 IR 364 at 403 [156].

58 In this context, it is impossible to conclude that merely by the 2009 Amendment Act inserting a new definition of "black coal mining industry" into the Administration Act by reference to the meaning of that term in the 2010 Award, it was intended that shotfirers who were within the location limb of the previous definition of "eligible employee" would thereby cease to be an "eligible employee". The consequence of such a conclusion would be that, for example, a shotfirer who had seven years and 364 days of qualifying service immediately before 1 January 2010, and who would have accrued an entitlement to long service leave in accordance with s 39A of the Administration Act on 2 January 2010, would not accrue that right.[68] This would be in circumstances where: (i) such a shotfirer would have been within the definition of "eligible employee" since at least the coming into force of the 1997 Award; (ii) the object of defining "black coal mining industry" in the Administration Act by reference to the meaning of that term in the 2010 Award was merely to achieve consistency across the industry and not to change the scope of the definition of "eligible employee"; and (iii) the definition of "eligible employee" by the AIRC was intended to reflect the agreed position of the CMIEG and the CFMEU, which itself had been intended to reflect the application of the Administration Act and, in particular, that a person, including a shotfirer, would be an "eligible employee" under either the employer limb or the location limb, moving freely between the two limbs and between employers "engaged in the black coal mining industry" without risk to the accrual of qualifying service.

59 As to Dyno Nobel's position, that cl 4.3(g) was intended to protect it (with a consequential benefit to Orica), the necessary response is that no such purpose can be ascertained. As a party to an enterprise award, the Federal Explosives Manufacturing and Distribution (AWU) Award 2000 (which was in force as at 1 January 2010), the proposed modern award was never intended to apply to Dyno Nobel and the 2010 Award (by cl 4.5, which said that the award did not apply to employers and employees bound by an enterprise award) ensured that to be so. It is also clear from the hearing before Senior Deputy President Acton that the AIRC had been made aware of this fact. Senior Deputy President Acton remained a member of the Full Bench of the AIRC at the time it made the 2010 Award. Finally in this regard, cl 4.3(g) bears no resemblance to the position for which Dyno Nobel advocated before the AIRC, which was that the 2010 Award should include a provision that it does not apply to employees covered under the Federal Explosives Manufacturing and Distribution (AWU) Award 2000. In these circumstances, it is

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68 See *Acts Interpretation Act 1901* (Cth), s 7(2)(c).

clear that cl 4.3(g) had nothing to do with the submissions made by or the position of Dyno Nobel.[69]

60 In these circumstances, construing the definition of "black coal mining industry" in s 4(1) of the Administration Act as if cl 4.3(g) of the 2010 Award alters the application of that Act by confining the location limb of the definition of "eligible employee" would be untenable. If so construed: (i) the extremely limited and minor purpose overall of achieving consistent definitions across the legislative spectrum that the insertion of the definition of "black coal mining industry" in s 4(1) of the Administration Act was intended to achieve; and (ii) the mere avoidance of potential confusion that cl 4.3(g) of the 2010 Award was intended to achieve, would result in something altogether different. The result would be a radical confining of the location limb of the definition of "eligible employee" by excluding from that limb not only all Orica shotfirers but all future shotfirers who would otherwise have come within the location limb of the definition of "eligible employee" before the insertion of the definition of "black coal mining industry" in the Administration Act.

61 As the following discussion in respect of the text of the relevant provisions discloses, the definition of "black coal mining industry" in s 4(1) of the Administration Act can be construed consistently with its extremely limited and minor purpose (of achieving consistent definitions across the legislative spectrum) and cl 4.3(g) of the 2010 Award can be construed consistently with its extremely limited and minor purpose (of avoiding potential confusion). No radical alteration of the scope of the location limb of the definition of "eligible employee", which has been part of the Administration Act since its enactment, is called for or results from this interpretation.

Text

62 That cl 4.1(b) of the 2010 Award in the definition of "coal mining employees" mirrors s 4(1) of the Administration Act in the definition of "eligible

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69 The question whether Dyno Nobel's employees are "eligible employee[s]" within the scope of the definition in s 4(1) of the Administration Act does not arise for decision in the appeal. While it is clear that the 2010 Award does not apply to Dyno Nobel for so long as it and its employees are bound by an enterprise award, the definition of "eligible employee" in s 4(1) of the Administration Act does not depend on the 2010 Award applying to the employee. Dyno Nobel's argument that the words in cl 4.2 of the 2010 Award ("[f]or the purposes of this award, black coal mining industry has the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal") mean that it is thereby excluded from the meaning of "black coal mining industry" is superfluous to the determination of the appeal and therefore should not be determined in the appeal.

employee" indicates that "coal mining employees" as defined are intended to be "eligible employees" as defined and to have the benefit of the long service leave rights given to "eligible employees" by s 39A of the Administration Act. This reflects the historical context that the 2010 Award was drafted by reference to the provisions of the Administration Act, including the definition of "eligible employee" containing both the location limb and the employer limb, before the enactment of the 2009 Amendment Act.

63 The definition of "black coal mining industry" in s 4(1) of the Administration Act operates in that Act for the purpose of giving meaning to that term as used in the definition of "eligible employee". The manifest decoupling of the location limb from the status of the employer as "engaged in the black coal mining industry" or not was and remains of fundamental importance to the operation of the Administration Act. As noted, it enables employees to change employers within and between the employer limb and the location limb without any interruption to their period of qualifying service for the accrual of their entitlement to long service leave.

64 As also noted, s 4(1) of the Administration Act in the definition of "eligible employee" and cl 4.1(b) of the 2010 Award in the definition of "coal mining employees" both use the expression "an employee who is employed in the black coal mining industry".[70] They do so, however, in circumstances where the status of the employer is expressly relevant to the employer limb of each definition by the presence of the words "by an employer engaged in the black coal mining industry" but those words are absent from the location limb of each definition. This is a clear indicator that the phrase "an employee who is employed in the black coal mining industry" does not operate to make relevant to the location limb the very matter omitted from that limb, being the status of the employer as "engaged in the black coal mining industry" or not. If it were otherwise, the location limb would not perform its function of ensuring that "eligible employees" could change employers and thereby move within and between the employer limb and the location limb of the definition of "eligible employee" and thereby continue to accrue qualifying service. That being a key part of the fundamental object and operation of the Administration Act, any construction having the effect of undermining that object and operation is to be avoided if possible.

65 That s 4(1) of the Administration Act in the definition of "eligible employee" and cl 4.1(b) of the 2010 Award in the definition of "coal mining employees" both use the expression "directly connected with the day to day operation of a black coal mine" is also relevant. Consistently with the historical context described above, the use of this phrase exposes that the rights of long service leave provided by the Administration Act and the rights and obligations

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70 Noting that the expression is in the plural in the 2010 Award.

given and imposed by the 2010 Award were not intended to be rights of persons, for example, working in an office distant from a mining site performing functions only indirectly connected with the black coal mining function. That intended limitation is also reflected in both: (i) cl 4.3(b) of the 2010 Award, which expressly excludes from the "black coal mining industry" "the work of employees employed in head offices or corporate administration offices (but excluding work in town offices associated with the day-to-day operation of a local mine or mines) of employers engaged in the black coal mining industry"; and (ii) cl 4.2(d) of the 2010 Award, which expressly includes within the meaning of the "black coal mining industry" "other work on a coal mining lease directly connected with the extraction, mining and processing of black coal". The function of the word "other" in cl 4.2(d) is to distinguish such work from the work referred to in cl 4.2(a)-(c), involving the extraction or mining of black coal on a coal mining lease, the processing of black coal at a coal handling or coal processing plant on or adjacent to a coal mining lease, and the transportation of black coal on a coal mining lease.

66 There can be no doubt that a shotfirer working at a black coal mine setting explosives to remove overburden and expose coal seams, that being "an intrinsic and essential part of coal mining", as the CFMEU representative described, would be within the scope of cl 4.2(d) of the 2010 Award. Leaving aside cl 4.3(g), such a person also would be: (i) within the employer limb of the definition of "eligible employee" in the Administration Act if their employer was "engaged in the black coal mining industry"; or (ii) within the location limb of the definition in the Administration Act irrespective of their employer being "engaged in the black coal mining industry" or not.

67 Clause 4.3(g) of the 2010 Award is to be construed in the overall context as described above.

68 The terms of cl 4.3(g) ("the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry") use the formula "not otherwise engaged in the black coal mining industry", which would appear to be the negative of the formula used in the employer limb of the definition of "eligible employee" in s 4(1) of the Administration Act and the definition of "coal mining employees" in the 2010 Award, which both refer to "an employer engaged in the black coal mining industry". In the Full Court of the Federal Court, Hatcher J took this to mean that cl 4.3(g) could not be directed at the employer limb of these definitions so that it must be directed at the location limb of these definitions.[71] However, it was the meaning of "eligible employee" as earlier appearing in the Administration Act which the meaning of "coal mining employees" in the 2010 Award was intended to reflect, rather than the reverse.

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71 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 at [81].

Moreover, the requirements of the employer limb and the location limb of the definitions ("coal mining employees" in cl 4.1(b) of the 2010 Award and "eligible employee" in s 4(1) of the Administration Act) are not identical. The location limb contains a requirement, "whose duties are carried out at or about a place where black coal is mined", which is not part of the employer limb, just as the employer limb contains a requirement, "an employer engaged in the black coal mining industry", which is not part of the location limb.

69 Construed in its broader context, it is also apparent that cl 4.3(g) of the 2010 Award is a provision in which certain underlying concepts arising from the history of the preparation of the 2010 Award are assumed, as a consequence of which the drafting of the provision has been compressed. Understood in its full context, cl 4.3(g) is not expressing a stipulation ("an employer [not] engaged in the black coal mining industry") that is the opposite of the employer limb ("an employer engaged in the black coal mining industry"). Clause 4.3(g), rather, assumes that an employer supplying shotfiring or other explosive services to a black coal mine is "an employer engaged in the black coal mining industry" by reason of and in respect of that activity of supply. In referring to that employer being "not *otherwise* engaged in the black coal mining industry",[72] what cl 4.3(g) means is that the employer also conducts other activities which do not involve any supply of shotfiring or other explosive services to a black coal mine.

70 Such an employer necessarily will employ two relevant classes of employees: (i) employees providing the shotfiring or other explosive services to a black coal mine; and (ii) other employees not providing the shotfiring or other explosive services to a black coal mine. Clause 4.3(g) assumes that in respect of class (i) the employer is "an employer engaged in the black coal mining industry" and in respect of class (ii) the employer is "an employer not otherwise engaged in the black coal mining industry". The purpose and operation of cl 4.3(g) is to ensure that employees within class (i) do not become "coal mining employees" by being brought within the employer limb of that definition (and therefore are not "eligible employees" within the Administration Act). Such employees can be "coal mining employees" within the location limb only of that definition (and therefore "eligible employees" within the Administration Act), which requires, relevantly, that the duties of these employees be both "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". If it were otherwise these class (i) employees would be "coal mining employees" within the employer limb of that definition (and therefore "eligible employees" within the Administration Act) merely if, relevantly, their duties were "directly connected with the day to day operation of a black coal mine" rather than also being "carried out at or about a place where black coal is mined".

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72 Emphasis added.

71 That cl 4.3(g) is concerned only with the employer limb of the definition of "coal mining employees" in cl 4.1(b) of the 2010 Award (and the employer limb of the definition of "eligible employee" in the Administration Act) follows from the fact that the status of the employer is relevant only to the employer limb of those definitions and not to the location limb. To purport to apply to the location limb of these definitions the status of the employer would collapse the fundamental distinction the Administration Act draws (and the 2010 Award mirrors) between the bifurcated limbs of the definition in which, in the location limb, the activities of the employee are decoupled from any notion of the substantial character of the activities overall of the employer.

72 This construction also accords with other aspects of the text in that: (i) other than cl 4.3(b) and (g), cll 4.2 and 4.3 of the 2010 Award are concerned with activities only; (ii) cl 4.3(b) provides that the work done by an employee of an "employer[] engaged in the black coal mining industry" – that is, within the employer limb of the definitions – is not included in the "black coal mining industry" if that work is "in head offices or corporate administration offices" as described; and (iii) cl 4.3(g) provides that the work done by an employee of an employer who is "engaged in the black coal mining industry" because the employer supplies through employees shotfiring or other explosive services to a black coal mine – that is, within the employer limb of the definitions – in addition to the employer undertaking activities in another industry or industries, is not for that reason alone included in the "black coal mining industry". That is, both cl 4.3(b) and (g) are directed solely at the employer limb of the definition of "coal mining employees" in cl 4.1(b) of the 2010 Award (and the employer limb of the definition of "eligible employee" in the Administration Act).

73 This construction of cl 4.3(g) not only accords with the context, purpose and text of the relevant provisions. It also makes practical sense. The function or activity of shotfiring is brought within the definition of "black coal mining industry" at least by cl 4.2(d) of the 2010 Award. By excluding the supply of shotfiring services from the employer limb definition, cl 4.3(g) prevents employees involved in the upstream supply of shotfiring services (eg storage, transportation, planning) from being "eligible employees", leaving those employees who actually do the shotfiring "at or about a place where black coal is mined" covered by the location limb. This construction also accords with the status quo in that Dyno Nobel, for so long as it is bound by an enterprise award, is not a person to which the 2010 Award applies. Orica was bound by the 1997 Award and is bound by the 2010 Award in respect of its shotfirers, who were and are "eligible employees" under the Administration Act. Any new entrant in the same position as Orica will also be in the same position under the 2010 Award and the Administration Act.

74 For these reasons, the appeal must be allowed and the cross-appeal dismissed. Orders should be made in these terms:

(1) Appeal allowed.

(2) Special leave to cross-appeal is granted and the cross-appeal is dismissed.

(3) Set aside declarations 1 and 2 and orders 1 to 4 of the Full Court of the Federal Court made on 17 July 2025 and in lieu thereof order that the appeal be dismissed, with Orica Australia Pty Ltd ("Orica") to pay the costs of the appeal of the Coal Mining Industry (Long Service Leave Funding) Corporation ("the Corporation").

(4) Orica to pay the costs of the appeal and cross-appeal to this Court of the Corporation.

75 GORDON J. The *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) ("the Administration Act") forms part of a scheme[73] by which "eligible employees" in the black coal mining industry are entitled to portable long service leave based on their length of service in the industry, rather than with a particular employer. Under this scheme, employers make payments to the appellant, the Coal Mining Industry (Long Service Leave Funding) Corporation ("the CMIC"),[74] based on the number of "eligible employees" they employ.

76 "Eligible employee" is relevantly defined in the Administration Act[75] to include both: "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" ("the employer limb");[76] and "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" ("the location limb").[77]

77 This appeal concerns the liability of the respondent, Orica Australia Pty Ltd ("Orica"), under the scheme as and from 2013 to make payments to the CMIC in respect of long service leave entitlements for its shotfirer employees and, in particular, whether its shotfirer employees are "eligible employees" under the location limb.

78 In turn, that liability depends on whether Orica's shotfirer employees are "employed in the black coal mining industry". The "black coal mining industry" is defined in the Administration Act,[78] unless the contrary intention appears, to have the "same meaning as in the Black Coal Mining Industry Award 2010"[79] ("the Award"). Clause 4.3(g) of the Award excludes from the "black coal mining

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73 The Administration Act operates together with the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* (Cth) and the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth).

74 The CMIC is a statutory corporation established under Pt 2 of the Administration Act.

75 Administration Act, s 4(1) definition of "eligible employee".

76 Administration Act, s 4(1) para (a) of the definition of "eligible employee".

77 Administration Act, s 4(1) para (b) of the definition of "eligible employee".

78 Administration Act, s 4(1) definition of "black coal mining industry".

79 As in force on 1 January 2010.

industry" the "supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry".

79 The central issue in this appeal then is whether, on the proper construction of the scheme, cl 4.3(g) of the Award applies to the location limb of the definition of "eligible employee" in the Administration Act. For the reasons below, the answer is "no". I agree with the orders proposed by Gageler CJ and Jagot J.

Administration Act and Award

80 The main object of the Administration Act is "to make provision in relation to long service leave in the black coal mining industry"[80] by, among other things, "providing minimum entitlements and rights in respect of long service leave for eligible employees".[81]

81 Section 4(1) of the Administration Act defines an "eligible employee" to mean:

> "(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; [*the employer limb*] 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; [*the location limb*] 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." (emphasis added)

80 Administration Act, s 3. See also long title.

81 Administration Act, s 3(ab).

That definition[82] was intended to be "consistent with the definition of a coal mining employee in [the Award] (see clause 4.1(b) of [the Award])".[83]

82 The Award had been adopted by the Australian Industrial Relations Commission ("the AIRC") on 19 December 2008, as a result of a national award modernisation process preceding the commencement of the *Fair Work Act 2009* (Cth).[84] By cl 4.1, the Award applies to:

> "(a) employers of coal mining employees as defined in clause 4.1(b); and
>
> (b) coal mining employees.
>
> **Coal mining employees** are:
>
> (i) employees who are 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 and who are employed in a classification or class of work in Schedule A – Production and Engineering Employees or Schedule B – Staff Employees of this award;
>
> (ii) employees who are 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 and who are employed in a classification or class of work in Schedule A – Production and Engineering Employees or Schedule B – Staff Employees of this award."[85]

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82 The definition was inserted into the Administration Act by the *Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009* (Cth) ("the 2009 Amendment Act"), which commenced on the same date as the Award.

83 Australia, House of Representatives, *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009*, Explanatory Memorandum at 3.

84 *Re Request from the Minister for Employment and Workplace Relations − 28 March 2008 (Award Modernisation (AM 2008/1-12))* ("*AIRC's Final Decision*") (2008) 177 IR 364. See generally *Coal Mining Industry (Long Service Leave Funding) Corp v Hitachi Construction Machinery (Aust) Pty Ltd* (2023) 322 IR 129 at 141 [17]-[19].

85 Schedules A and B each contain references to "shotfiring" or "shotfirers".

As is self-evident, the employer limb and location limb in the definition of "eligible employee" in the Administration Act closely reflect the two-limb definition of "coal mining employees" in cl 4.1(b) of the Award.

83 The term "black coal mining industry" is used throughout the definition of "eligible employee" in the Administration Act. The Administration Act adopts the meaning of the "black coal mining industry" in the Award, which applies "unless the contrary intention appears".[86] The reason: to ensure that the term "applies universally in relation to the legislation governing long service leave in the coal mining industry".[87]

84 The Award defines the "black coal mining industry" by reference to a list of inclusions (cl 4.2) and exclusions (cl 4.3). In terms of inclusions, cl 4.2 of the Award relevantly provides:

> "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:
>
> ...
>
> (d) other work on a coal mining lease directly connected with the extraction, mining and processing of black coal."

85 In terms of exclusions, cl 4.3 of the Award provides that the "black coal mining industry does *not* include":[88]

> "(a) the mining of brown coal in conjunction with the operation of a power station;
>
> (b) the work of employees employed in head offices or corporate administration offices (but excluding work in town offices associated with the day-to-day operation of a local mine or mines) of employers engaged in the black coal mining industry;

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86 Administration Act, s 4(1) definition of "black coal mining industry". This definition was also inserted into the Administration Act by the 2009 Amendment Act. See Australia, House of Representatives, *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009*, Explanatory Memorandum at 1, 3.

87 Australia, House of Representatives, *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009*, Explanatory Memorandum at 3.

88 Emphasis added.

(c) the operation of a coal export terminal;

(d) construction work on or adjacent to a coal mine site;

(e) catering and other domestic services;

(f) haulage of coal off a coal mining lease (unless such haulage is to a wash plant or char plant in the vicinity of the mine); or

(g) the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry."

Background

86 In May 2019, the CMIC issued Orica with a notice under s 52A of the Administration Act,[89] which was premised on a belief that Orica held information and documents relating to "eligible employees", specifically shotfirers at black coal mines in New South Wales and Queensland. In response, Orica commenced proceedings in the Federal Court of Australia seeking declarations that its shotfirer employees working at open cut black coal mines in New South Wales were not "eligible employees" for the purposes of the Administration Act. The CMIC cross-claimed, seeking declarations to the opposite effect.

Federal Court of Australia

87 There was no dispute before the primary judge that, for the purposes of the location limb of the definition of "eligible employee", Orica's shotfirers carry out duties "at or about a place where black coal is mined" and those duties are "directly connected with the day to day operation of a black coal mine". The only question was whether the shotfirers were "employed in the black coal mining industry". In this respect, his Honour found that Orica's shotfirers performed "work on a coal mining lease directly connected with the extraction, mining and processing of black coal" within the meaning of cl 4.2(d) of the Award. That finding is not challenged on appeal in this Court.

88 The determinative issue before the primary judge, which is the subject of this appeal, was whether cl 4.3(g) applied to exclude Orica's shotfirers from the "black coal mining industry". The primary judge rejected the CMIC's primary

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89 Administration Act, s 52A(1)(a) and (2). Section 52A of the Administration Act relevantly empowers the CMIC to issue a notice to provide information or produce a document containing information "relating to the employment of an eligible employee", if the CMIC believes on reasonable grounds that a person has such information or such a document.

submission that, properly construed, cl 4.3(g) does not apply to the question of whether an employee is "employed in the black coal mining industry" for the purposes of the location limb. His Honour held that cl 4.3(g) was inserted into the Award to reflect the decision of the AIRC in *Construction, Forestry, Mining and Energy Union v Dyno Nobel Asia Pacific Ltd* ("*CFMEU v Dyno Nobel*")[90] and that the CMIC's construction was inconsistent with *CFMEU v Dyno Nobel*, which was "a result which cl 4.3(g) appears to have been intended to avoid".

89 However, his Honour held that "[t]he structure of the definition of 'eligible employee' in s 4(1), specifically the inclusion of disjunctive employer and location limbs", gave rise to a contrary intention − that "the character of an employer was not intended to be relevant to the location limb". Having reached that conclusion, the primary judge relevantly made a declaration, the form of which was agreed between the parties, that "[e]mployees of [Orica] who perform or performed shotfiring and related services at black coal mines in New South Wales as and from 2013 are eligible employees within the meaning of [the location limb]".

90 The primary judge went on to consider whether if, contrary to his conclusion, cl 4.3(g) did apply to the location limb, Orica was "otherwise engaged in the black coal mining industry" for the purposes of cl 4.3(g). Since 2006, Orica's parent company had owned a business unrelated to its shotfiring services known as "Minova", which focused exclusively upon the provision of services to underground black coal mining businesses.[91] In March 2013, Orica integrated the Minova business and, from that point until Orica divested itself of the business on 28 February 2022, employees of Minova were employed by Orica. His Honour's obiter conclusion was that, by reason of the Minova business, Orica was "otherwise engaged in the black coal mining industry" so that even if cl 4.3(g) applied, the exclusion was not enlivened.

Full Court of the Federal Court of Australia

91 Orica appealed to the Full Court of the Federal Court of Australia (Collier, Snaden and Hatcher JJ) on several bases, including that the primary judge erred by construing the location limb in a way that ignored cl 4.3(g). The Full Court unanimously held that the primary judge was right to reject the CMIC's primary submission that cl 4.3(g) did not, as a matter of statutory construction, apply to the location limb. Collier and Snaden JJ considered that such a submission would involve accepting "that consecutive provisions in [the Award] that employ

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90 [2005] AIRC 622.

91 Specifically, drilling and instrumentation services, the installation, repair, maintenance and removal of ventilation control devices and the provision of secondary ground support services.

precisely the same terminology ('employed in the black coal mining industry') ... were, nonetheless, intended to convey different meanings".

92 However, the Full Court overturned the primary judge's conclusion that the structure of the definition of "eligible employee" evidenced a "contrary intention" sufficient to exclude cl 4.3(g) of the definition of the "black coal mining industry" in the Award from the location limb. Their Honours considered that such a construction would render cl 4.3(g) otiose. That is, an employer "engaged in the black coal mining industry" for the purposes of the employer limb would always be "otherwise engaged in the black coal mining industry" for the purposes of cl 4.3(g), so that the exclusion could only operate as an exception to the location limb.

93 Having found that cl 4.3(g) applied to the location limb, the Full Court went on to determine whether the exclusion was enlivened in Orica's case. The Full Court, like the primary judge, concluded that Orica was "otherwise engaged in the black coal mining industry" by reason of the Minova business, so that the exclusion in cl 4.3(g) did not apply from the date of Minova's integration (1 March 2013) until its divestment (on 28 February 2022). The Full Court allowed the appeal in part to reflect its finding that Orica's shotfirers were "eligible employees" *only* during this period (rather than "as and from 2013").

Appeal and cross-appeal

94 In this Court, the CMIC[92] contends that the Full Court erred in holding that cl 4.3(g) of the Award applies to the question of whether an employee is "employed in the black coal mining industry" for the purposes of the location limb.

95 As in the courts below, the CMIC's primary submission is that, properly construed, cl 4.3(g) "is not relevant" to whether an employee is "employed in the black coal mining industry" for the purposes of the location limb and the Full Court and the primary judge erred in rejecting that argument. Alternatively, the CMIC submits that cl 4.3(g) does not apply to the location limb because the definitions in s 4(1) are expressed not to apply if "the contrary intention appears",[93] and a contrary intention is demonstrated. It follows, the CMIC submits, that the Full Court erred in overturning the primary judge's decision on this latter question.

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92 Supported by the Mining and Energy Union ("MEU"), intervening.

93 See the chapeau to s 4(1) of the Administration Act.

96 Orica[94] contends that both of the CMIC's submissions should be rejected. In addition, Orica seeks special leave to cross-appeal to contend that the Full Court erred in determining that Orica was "otherwise engaged in the black coal mining industry" for the purposes of cl 4.3(g) of the Award by reason of its Minova business.

Statutory construction

97 This appeal raises an issue of statutory construction. The starting point must be the text of the Administration Act, including any provisions of the Award it incorporates, although it must be read in context, including by reference to its general purpose and policy or the mischief it is seeking to remedy.[95] While relevant, "[h]istorical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text".[96] Moreover, despite definitions from the Award being incorporated into the Administration Act, the Award is a statutory instrument made by the AIRC,[97] which cannot alter the operation of the Administration Act in a way that is inconsistent with the text, structure and purpose of the Administration Act. So much is reinforced by the fact that the definitions in s 4(1) apply "unless the contrary intention appears".

Eligible employee

98 The definition of "eligible employee" in the Administration Act contains four limbs. Satisfaction of any one limb is sufficient to bring a person within the definition of "eligible employee". Each paragraph of the definition is intended to serve a different purpose.

99 It is necessary to start with the location limb. To fall within the scope of the location limb, an employee must be "employed in the black coal mining industry", their duties must be "directly connected with the day to day operation of a black coal mine" and, critically, their duties must be "carried out at or about

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94 Supported by Dyno Nobel Asia Pacific Pty Limited ("Dyno Nobel"), intervening.

95 *Palmanova Pty Ltd v The Commonwealth* (2025) 99 ALJR 1362 at 1364-1365 [4]-[5]; see also 1375 [67]; 424 ALR 768 at 769-770; see also 783. See also *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388 [23], citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47].

96 *Cross* (2012) 248 CLR 378 at 388 [23], citing *Alcan* (2009) 239 CLR 27 at 46-47 [47].

97 For principles concerning the construction of awards, see generally *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at 271 [96], 282-283 [129].

a place where black coal is mined". For this reason, the primary judge aptly characterised para (b) as the "location limb". It is, in its terms, directed at the activities of an employee and where those activities are undertaken; it says nothing about the industry of the employer.

100 This stands in contrast with para (a) of the definition, which the primary judge also aptly referred to as the "employer limb". Like the location limb, it applies to an employee who is "employed in the black coal mining industry" and "whose duties are directly connected with the day to day operation of a black coal mine". However, unlike the location limb, it requires that an employee be employed by "an employer engaged in the black coal mining industry" and does *not* require that the employee's "duties are carried out at or about a place where black coal is mined".

101 The contrast between the employer limb and the location limb reflects that Parliament intended that the industry of an employer should be relevant to whether a person was an "eligible employee" for the purposes of the employer limb, but not the location limb. In other words, the scheme contemplates that an employee can be an "eligible employee" under the employer limb if they work for an employer "engaged in the black coal mining industry", regardless of the location of their work; or under the location limb, if they work "at or about" a black coal mine, regardless of the industry in which their employer happens to be engaged. And it must be recalled that in either case, the employee's duties must be "directly connected with the day to day operation of a black coal mine".

102 The corollary is that the Administration Act contemplates that an employee may be "employed in the black coal mining industry" even if their employer is not "engaged in the black coal mining industry". If it were otherwise, the location limb would be otiose. In sum, by the introduction of the location limb, the legislature deliberately *uncoupled* the employee's industry from the industry of their employer.

103 That construction is reinforced by the history of the Administration Act and the Award. As we have seen, the employer and location limbs of the definition of "eligible employee" in the Administration Act closely reflect the two-limb definition of "coal mining employees" in cl 4.1(b) of the Award. That consistency was intended.[98] When adopting cl 4.1(b) of the Award, the AIRC itself deliberately *uncoupled* the employee's activities or industry from the industry of their employer through the inclusion of cl 4.1(b)(ii). That last statement needs some explanation.

104 The relevant previous award, the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 ("the 1997 Award"), applied to employees who were: (a) employed in a class of work or classification covered by

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98 See [81]-[82] above.

the eligibility rules of a specified union[99] (which depended, at least in the case of the CFMEU, on the industry of the employer[100]); or (b) employed by an employer listed in Sch A.[101] The definition of "eligible employee" in the *Coal Mining Industry (Long Service Leave Funding) Act 1992* (Cth) ("the Coal Act")[102] (as the Administration Act was then called) required, by para (a), that a person be "employed in the black coal mining industry under a relevant industrial instrument". The 1997 Award was a "relevant industrial instrument" for the purposes of para (a) of this definition.[103]

105 As part of the award modernisation process, the Coal Mining Industry Employer Group ("CMIEG") proposed a draft award to the AIRC[104] one provision of which later became the current cl 4.1 in the Award. Two unions (the Communications, Electrical and Plumbing Union ("the CEPU") and the Australian Manufacturing Workers' Union ("the AMWU")) raised concerns that the CMIEG draft appeared to provide for coverage based on the industry of the employee rather than the employer. The CEPU's written submissions to the AIRC raised concerns that "the employer draft scope clause is in substantial part based upon the industry of *employees*"[105] and that what became cl 4.1(b)(ii) "appears to intend to bind employees to the award whose employers are not in the black coal mining industry". The AMWU's written submissions proposed instead a coverage clause that would have resulted in the award applying

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99 1997 Award, cl 3.2.1. The Award also replaced a number of other awards, including the Coal Mining Industry Award (Deputies and Shotfirers) 2002: see *Re Request from the Minister for Employment and Industrial Relations −28 March 2008 (Award Modernisation Case (2008))* ("*AIRC's Scope of Industry Decision*") (2008) 175 IR 120 at 164.

100 *CFMEU v Dyno Nobel* [2005] AIRC 622 at [5]. See [116] below.

101 1997 Award, cl 3.2.4. While Orica was listed in Sch A, Dyno Nobel was not.

102 As in force from 28 March 2008 to 30 June 2009. Section 4(1) of the Coal Act relevantly defined an "eligible employee" as: "(a) a person employed in the black coal mining industry *under a relevant industrial instrument* ... the duties of whose employment are carried out at or about a place where black coal is mined; or (b) a person employed by a company that mines black coal the duties of whose employment (wherever they are carried out) are directly connected with the day to day operation of a black coal mine" (emphasis added).

103 Coal Act, s 4(1) definition of "relevant industrial instrument".

104 Schedule A to CMIEG's draft award identified shotfirers.

105 Emphasis in original.

to an employee only if they were employed by an employer engaged in the coal mining industry.

106 In oral submissions before the AIRC, the AMWU maintained that award coverage should depend upon the industry of the employer, submitting that this was consistent with established authorities in the area.[106] The CMIEG representative acknowledged that the coverage clause "departed in a very measured respect from the way the cases have defined or appear to have defined the coal mining industry by requiring both the employer and the employee to be employed in the coal mining industry".[107] The Vice President of the AIRC asked if the CMIEG representative would "accept that the effect of the clause[] [as] drafted is ... that it focuses on the occupation of the employee, what it is that the employee is doing rather than the industry of the employer".[108] The CMIEG representative accepted this and explained that what became cl 4.1(b)(i) required that "both the employee and the employer must be in the black coal mining industry", whereas for what became cl 4.1(b)(ii) "it's not necessary that the employer be engaged in the coal mining industry".[109] The AIRC published an exposure draft of the Award which relevantly included what became cl 4.1(a) and (b)(i) and (ii).[110] This can only be described as a deliberate decision to adopt CMIEG's draft over the objection of the CEPU and the AMWU.

107 The introduction of cl 4.1(b) of the Award marked a substantive change to the pre-existing law, despite the AIRC's statement that it intended that the Award "should neither expand nor contract the reach of the key pre-reform awards both in relation to the kinds of employers to whom those awards apply and the extent to which the awards apply to such employers".[111] That change by the AIRC was to deliberately *uncouple* the employee's activities or industry from the industry of their employer through the inclusion of cl 4.1(b)(ii), which was picked up and

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106 Transcript of Proceedings, AM2008/6 (AIRC, Harrison SDP, 7 August 2008) at PN60.

107 Transcript of Proceedings, AM2008/2 (AIRC, Lawler VP, 8 August 2008) at PN122.

108 Transcript of Proceedings, AM2008/2 (AIRC, Lawler VP, 8 August 2008) at PN129.

109 Transcript of Proceedings, AM2008/2 (AIRC, Lawler VP, 8 August 2008) at PN132, PN138.

110 The draft clause included an additional proposed cl 4.1(b)(iii) referring to employees "permanently employed in connection with a mines rescue service in Schedule C of this award" which was not included in the final form of the clause.

111 *AIRC's Final Decision* (2008) 177 IR 364 at 403 [156].

adopted by Parliament through the introduction of the current definition of "eligible employee" in the Administration Act.[112]

Black coal mining industry

108 Having identified the deliberate uncoupling of the employer limb and the location limb in the definition of "eligible employee" in the Administration Act, it is necessary to turn to the definition of "black coal mining industry" and, in that context, the proper construction of cl 4.3(g). As noted, the "black coal mining industry" has the same meaning as in the Award "unless the contrary intention appears"[113] and the Award defines the "black coal mining industry" by reference to a list of inclusions (cl 4.2) and exclusions (cl 4.3).[114]

109 Clause 4.2 is in two parts. First, it provides that "[f]or the purposes of this award, black coal mining industry has the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal".[115] Second, it provides that, "[s]ubject to the foregoing", the matters listed in paragraphs (a) to (d) are included in the black coal mining industry. Subject to cl 4.3(g), it was common ground that Orica's shotfirers would fall within the definition of the "black coal mining industry" in cl 4.2(d) on the basis that they perform "other work on a coal mining lease directly connected with the extraction, mining and processing of black coal".

110 The critical provision is therefore cl 4.3(g). As will be explained, the better view is that cl 4.3(g) does not apply as an exclusion to the location limb. The following aspects of cl 4.3(g) are important. First, cl 4.3(g) is expressly concerned with "the supply" of shotfiring services "by an employer". Contrary to Orica's submission, there is a meaningful distinction between "the supply" of services by an employer and the work of its employees in supplying those services. That distinction is inherent in the text and structure of the definition of "eligible employee", which recognises that an employee may be "employed in" the black coal mining industry even if their employer is not itself "engaged in" that industry. Further, Orica's submission that the words "by an employer" were merely included because it was "more natural" in the context of the verb

112 See [81] above.

113 Administration Act, s 4(1).

114 See [84]-[85] above.

115 This is reinforced by the note at the end of cl 4.3, which refers to a previous decision of the Coal Industry Tribunal.

"supply", and that those words should not be given any weight, must be rejected. Every word is important.[116]

111 Second, cl 4.3(g) refers to an employer being "engaged in" the black coal mining industry, which reflects the language in the employer limb of the definition of "eligible employee" in the Administration Act and cl 4.1(b)(i) of the Award. Third, while some of the paragraphs in cl 4.3 are silent about the identity of the person or entity who performs the activity, cl 4.3(b) expressly excludes from the black coal mining industry "the work of *employees* employed in head offices or corporate administration offices … of employers engaged in the black coal mining industry" (emphasis added). The plain language of this paragraph concerns activities performed by certain *employees*. It applies where an employer is "engaged in the black coal mining industry". There is nothing in the text to support Orica's submission that cl 4.3(b) is "in a different category" to cl 4.3(g) because cl 4.3(b) is concerned with a category of case where "the employer is engaged in the industry, but seeks to clarify which activities of its employees fall within the scope of the industry" or that cl 4.3(b) should be interpreted as excluding both the work of the employees described and the employers who employ such persons. Rather, cl 4.3(b) reinforces that not all of the exclusions in cl 4.3 are relevant both to whether an employee is "employed in" the black coal mining industry and to whether an employer is "engaged in" that industry.

112 In sum, cl 4.3(g) is relevant to whether an employer is "engaged in the black coal mining industry" for the purposes of the employer limb of the definition of "eligible employee". Clause 4.3(g) is not relevant to whether an employee is "employed in" that industry for the purposes of the location limb.

113 That construction of cl 4.3(g) of the Award is consistent with the fact that the Administration Act and the Award deliberately *uncoupled* the employee's activities or industry from the industry of their employer. That is, if cl 4.3(g) were construed as applying to both limbs, it would make the identity of a shotfirer's employer relevant to their eligibility under the location limb. That would be contrary to the intention of both the Administration Act and the Award to uncouple the activities or industry of the employee from the industry of the employer. Put in different terms, it would read into the location limb a requirement of the employer limb which is absent, namely that an employee be employed by "an employer engaged in the black coal mining industry".

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116 See generally *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71].

CFMEU v Dyno Nobel

114 Given the direction in the chapeau to cl 4.2 of the Award,[117] it is both necessary and appropriate to consider the pre-existing case law in interpreting the Award, although that case law cannot be used to justify an interpretation of the "black coal mining industry" that is inconsistent with the text, structure and purpose of the Administration Act.

115 The parties and the courts below accepted that cl 4.3(g) was inserted in response to the AIRC's decision in *CFMEU v Dyno Nobel*.[118] However, the parties disagree about the consequences of this fact. In particular, the parties disagree about whether the CMIC's proposed construction is inconsistent with the result in *CFMEU v Dyno Nobel*.

116 The issue in *CFMEU v Dyno Nobel* was whether there was an "industrial dispute" between the CFMEU and Dyno Nobel within the meaning of the *Workplace Relations Act 1996* (Cth),[119] which depended on whether Dyno Nobel's employees were eligible for membership under the CFMEU's rules.[120] The eligibility rule required employees to be "engaged in or in connection with the coal and shale industries".[121] The rule was an "industry rule", so eligibility turned on the industry of the employer's business, not the particular work performed by employees.[122] Whether Dyno Nobel's business was "in or in connection with" the coal industry was a question of fact determined by the "substantial character" of the business as a whole.[123] The AIRC held that the predominant purpose of Dyno Nobel's business was the manufacture and supply of explosives, conferring a "substantial character" that placed it in the explosives industry or, more generally, the chemical industry.[124] Limited shotfiring work by a small number of employees at coal mines did not

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117 See [84] above.

118 [2005] AIRC 622. See generally *Bis Industries Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCA 1374 at [82].

119 *CFMEU v Dyno Nobel* [2005] AIRC 622 at [4].

120 *CFMEU v Dyno Nobel* [2005] AIRC 622 at [4].

121 *CFMEU v Dyno Nobel* [2005] AIRC 622 at [5].

122 *CFMEU v Dyno Nobel* [2005] AIRC 622 at [13]-[16]. See also *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1921) 29 CLR 290.

123 *CFMEU v Dyno Nobel* [2005] AIRC 622 at [51].

124 *CFMEU v Dyno Nobel* [2005] AIRC 622 at [59].

give the business an additional "substantial character" in the coal industry.[125] This had the consequence that Dyno Nobel was not bound by the 1997 Award.[126]

117 However, it was never disputed that shotfiring, as an activity, took place within the coal mining industry. *CFMEU v Dyno Nobel* was therefore concerned only with whether the business of Dyno Nobel was "in or in connection with" the coal industry, not whether the work of its employees was in that industry. On that footing, treating cl 4.3(g) as relevant only to whether an employer is "engaged in" the black coal mining industry, and not to whether an employee is "employed in" that industry, is consistent with the decision in *CFMEU v Dyno Nobel*. The primary judge erred in finding otherwise.

118 Orica emphasised that cl 4.3(g) was introduced into the Award in response to submissions made by Dyno Nobel. In response to an exposure draft of the Award released by the AIRC, which did not contain cl 4.3(g) or a clause similar to it, Dyno Nobel raised concerns that the proposed location limb did not accurately reflect the position in *CFMEU v Dyno Nobel*. In the course of those submissions, Dyno Nobel accepted that the proposed location limb "may have the effect that, because of the location and types of activities performed by a very small fraction of Dyno Nobel's workforce, it may become bound by the modern award which results from the [draft Award] where it is not currently bound by the [1997 Award]".

119 Dyno Nobel also expressed concerns that it would be covered by multiple awards, as it was already covered by the Federal Explosives Manufacturing and Distribution (AWU) Award 2000 ("the Explosives Award").[127] To address that concern, Dyno Nobel advocated for the insertion of a new exemption, providing that the Award does not apply relevantly to "employees covered under the Explosives Award" or "employees of employers in the chemical industry" who "manufacture, supply and service explosive products". During oral submissions, the CFMEU expressed concerns that "what's being called explosives work or the explosives industry by people such as Dyno Nobel [is in fact] part of the continuing process of coal mining", explaining that "we have people employed to work on ... coal mining site[s] for up to 10 years ... loading the shot holes that have been drilled by coal mining industry people ... which is an intrinsic and

125 *CFMEU v Dyno Nobel* [2005] AIRC 622 at [59]-[60].

126 See [104] above. The decision meant that Dyno Nobel's employees did not fall within the scope of cl 3.2.1 of the 1997 Award. Dyno Nobel was not otherwise bound by cl 3.2.4 of the 1997 Award because it was not listed in Sch A.

127 Dyno Nobel was the only respondent to the Explosives Award: see Sch A.

essential part of coal mining to expose the coal".[128] The AIRC also pointed out that Dyno Nobel's concern about being covered by multiple awards was unfounded because the Explosives Award was an "enterprise award" within the meaning of s 576U of the *Workplace Relations Act* and cl 4.4(b) of the exposure draft specified that the Award did not "bind an employer who is bound by an enterprise award with respect to an employee to whom the enterprise award applies".[129] The short point is that cl 4.3(g) of the Award did not reflect the exemption advocated for by Dyno Nobel.

120 When the AIRC made the Award and published its final reasons, the AIRC did not explain why cl 4.3(g) had now been included or why the particular wording was selected.[130] However, the following facts and matters provide important context for its decision. First, it is apparent that the AIRC was more concerned with the scope of pre-reform awards than with prior union rules. It declined to extend the coverage of the Award to workers at coal ports, coal terminals and coke plants even though they were historically included in union coverage, noting that, while relevant, "[e]stablished union coverage is not a sufficient basis for their inclusion".[131] Second, as already noted, the AIRC deliberately uncoupled the employee's industry from that of their employer through the inclusion of cl 4.1(b)(ii). Third, the AIRC did not adopt the drafting proposed by Dyno Nobel. On any view, the AIRC intended cl 4.3(g) to have a different effect to the exclusion Dyno Nobel had sought. Fourth, the AIRC's express intention in making the Award was to capture the existing case law.[132] There is nothing to suggest that the AIRC intended to include an exemption that was broader than that required to reflect the outcome in *CFMEU v Dyno Nobel*, which was concerned with the industry of the employer.

Purpose

121 That cl 4.3(g) of the Award applies only to the employer limb and does not apply to the location limb of the definition of "eligible employee" is also consistent with the stated purpose of the Administration Act,[133] which is to create a unique

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128 Transcript of Proceedings, AM2008/19 (AIRC, Acton SDP, 24 November 2008) at PN405.

129 Transcript of Proceedings, AM2008/19 (AIRC, Acton SDP, 24 November 2008) at PN418. An equivalent clause was ultimately included as cl 4.5 of the Award.

130 *AIRC's Final Decision* (2008) 177 IR 364.

131 *AIRC's Scope of Industry Decision* (2008) 175 IR 120 at 129 [17].

132 *AIRC's Final Decision* (2008) 177 IR 364 at 403-404 [154]-[157].

133 See [80] above.

portable long service leave scheme allowing employees to accrue long service leave based on their service in the black coal mining industry, rather than their service with a particular employer.[134]

122 As the CMIC submits, Orica's construction would not be consistent with that purpose. It would mean that Orica's shotfirers would not be "eligible employees" entitled to the benefit of the scheme, at least for the period after the divestment of the Minova business, even though an employee doing the same job for a different employer (for example, a shotfirer employed by a mining company) would be an "eligible employee". That there would be differential consequences for shotfirers (and other employees engaged in explosive services) only reinforces the anomalous results produced by Orica's construction. So, for example, it would mean that the eligibility of a shotfirer might depend on the manner in which the employer is structured.

Other matters raised by Orica

123 Orica submits that the Administration Act is concerned with a "common reference point" − the "black coal mining industry" − and that the construction adopted in these reasons would result in two different concepts of that industry. This was a factor that Collier and Snaden JJ emphasised in the Full Court. However, Orica's submission assumes the conclusion: that cl 4.3(g) is relevant to the question of whether an employee is "employed in the black coal mining industry". The black coal mining industry is made up of those activities of employers and employees that are included by operation of cll 4.2 and 4.3 of the Award. Shotfirer employees are deemed to be within that industry by the operation of cl 4.2(d), unless cl 4.3(g) applies. Whether or not cl 4.3(g) applies, there is only one "black coal mining industry".

124 Orica also submits that the Full Court was correct to hold that cl 4.3(g) would have no work to do if it was limited to the employer limb. That submission is rejected. On the construction adopted, cl 4.3(g) would operate in relation to the employer limb to prevent an employer from being "engaged in the black coal mining industry" if it is engaged in the "supply of shotfiring or other explosive services" and "not otherwise engaged in the black coal mining industry".[135] The employees of such an employer would therefore not be "eligible employees" for the purposes of the employer limb, although they might still be "eligible employees" under the location limb if their duties are carried out "at or about a place where black coal is mined".

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134 *Hitachi* (2023) 322 IR 129 at 137 [3].

135 The supply of such services would otherwise fall within the scope of the black coal mining industry by reason of cl 4.2(d).

Conclusions and orders

125 For those reasons, cl 4.3(g) of the Award does not apply to whether an employee is "employed in the black coal mining industry" for the purposes of the location limb. In light of that conclusion, the issues raised by the cross-appeal do not arise.

126 I agree with the orders proposed by Gageler CJ and Jagot J.

127 STEWARD J. The issue for determination is whether those employees of Orica Australia Pty Ltd ("Orica") who are provided by Orica to black coal mines to undertake shotfiring services are employed in the black coal mining industry for the purposes of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) ("the Leave Act"). For the reasons which follow, the text and the history of the applicable legislation and award compel a clear answer: that answer is "no" after 28 February 2022. Otherwise, I very gratefully adopt the description of the facts and the relevant legislative regime set out in the reasons of Gageler CJ and Jagot J. I also generally agree with the reasons of Gleeson J in respect of the appeal. This appeal and cross-appeal must be dismissed.

The "black coal mining industry"

128 The term "black coal mining industry" is defined in s 4(1) of the Leave Act by reference to the meaning of that term in the Black Coal Mining Industry Award 2010 ("the Award"). That definition is set out in cl 4 of the Award and is relevantly reproduced in the reasons of Gageler CJ and Jagot J. For convenience, cl 4.3 of the Award, which prescribes what the black coal mining industry does *not* include, is set out below:

> "The black coal mining industry does not include:
>
> (a) the mining of brown coal in conjunction with the operation of a power station;
>
> (b) the work of employees employed in head offices or corporate administration offices (but excluding work in town offices associated with the day-to-day operation of a local mine or mines) of employers engaged in the black coal mining industry;
>
> (c) the operation of a coal export terminal;
>
> (d) construction work on or adjacent to a coal mine site;
>
> (e) catering and other domestic services;
>
> (f) haulage of coal off a coal mining lease (unless such haulage is to a wash plant or char plant in the vicinity of the mine); or
>
> (g) the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry.
>
> 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.

..."[136]

129 It is cl 4.3(g), and its interaction with the Leave Act and the Award, which is in issue.

Legislative and Award history

130 The legislative and Award history assumes great importance in this matter. One commences with the 2005 decision of the Australian Industrial Relations Commission ("the Commission") in *Construction, Forestry, Mining and Energy Union v Dyno Nobel Asia Pacific Ltd*.[137] In 2002, the Construction, Forestry, Mining and Energy Union ("the CFMEU") commenced proceedings in the Commission to make employees of Dyno Nobel Asia Pacific Limited ("Dyno Nobel") – which manufactures and supplies explosives – subject to an award applicable to the coal industry. Dyno Nobel opposed that application on the basis that the CFMEU could not represent employees of Dyno Nobel. The issue was whether shotfirers sent to mines to undertake shotfiring services by Dyno Nobel were eligible to become members of the CFMEU. That question turned upon the proper construction of the rules concerning eligibility for membership of the CFMEU. Rule 2D relevantly provided that the CFMEU's membership included "employees engaged in or in connection with the coal and shale industries".[138] The question of whether or not employees of Dyno Nobel were so engaged turned upon whether Dyno Nobel's business was "in or in connection with" the coal industry.

131 The Full Bench of the Commission decided that Dyno Nobel operated a single integrated business with its predominant purpose being the manufacture and supply of explosives. The business of Dyno Nobel therefore had a "substantial character" in the explosives industry. The fact that a small number of its employees undertook shotfiring services at mines for the coal industry did not give Dyno Nobel's business in the explosives industry an additional "substantial character" as a business in or in connection with the coal industry. Rather, as part of its business in the explosives industry, Dyno Nobel supplied shotfiring services to employers in another industry, namely the coal industry.[139]

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136 This part of the note was substituted by PR531393 on 30 November 2012 with retrospective effect: *The Australian Industry Group* [2012] FWA 9606 at [18].

137 [2005] AIRC 622.

138 [2005] AIRC 622 at [5].

139 [2005] AIRC 622 at [59].

Award modernisation

132 The Award in this matter is the product of the award modernisation process undertaken by the Commission from 2008. In September 2008, the Commission released a draft exposure award ("the Exposure Award"). It defined "coal mining employees" in proposed cl 4.1 in broad terms, such that it would likely have included Dyno Nobel employees who provided shotfiring services "at or about a place where black coal is mined" under proposed cl 4.1(b)(ii). Proposed cl 4.3, which set out "[t]o avoid doubt" what the coal mining industry did *not* include, was in materially similar terms to cl 4.3 of the Award, save that it included no equivalent to cl 4.3(g). This drafting in the Exposure Award would have contradicted the Commission's earlier decision concerning Dyno Nobel.

133 Dyno Nobel reacted. Its lawyers sent a submission to the Commission on 31 October 2008. That submission explained that Dyno Nobel's employees had historically been covered by a single award that was specific to the explosives industry, and that they had not been covered by awards applicable to Dyno Nobel's clients, such as coal miners. It referred to the earlier attempt by the CFMEU to have certain Dyno Nobel employees subject to an award applicable to the coal mining industry, and to the decision of the Commission described above. It submitted that the proposed definition of "coal mining employees" in the Exposure Award might have the effect of now including Dyno Nobel's employees who work at coal mines. This, it was said, was contrary to indications from the CFMEU and the Coal Mining Industry Employer Group ("the CMIEG") that they did not intend to expand coverage of the coal mining industry awards. It would also expose Dyno Nobel to being bound by two different awards depending on where its employees worked. It was contended that this offended a policy objective of award modernisation – namely, avoiding overlapping awards, and minimising the number of awards that may apply to a particular employer or employee.[140] Dyno Nobel thus submitted that the Award should include the following exemption:

> "This award does not apply to employees covered under the Explosives Award. Without limiting the generality of the for[e]going exemption, this award does not apply to employees who 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 whose business is independent of the client."

134 The Commission did not adopt that exemption in the form suggested by Dyno Nobel. However, cl 4.3(g) was included for the first time in the Award as ordered into law. Importantly, in its reasons for decision the Commission stated

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140 See Gillard, Minister for Employment and Workplace Relations, Award Modernisation Request under s 576C(1) of the *Workplace Relations Act 1996* (Cth) (9 November 2009) (consolidated version) at 4 [9].

that it agreed with the goal of the CFMEU and the CMIEG that the coverage of the Award should reflect "as closely as possible" the "status quo".[141] The Commission thus reasoned:[142]

> "We agree with that goal and intend that the award we have made should neither expand nor contract the reach of the key pre-reform awards both in relation to the kinds of employers to whom those awards apply and the extent to which the awards apply to such employers. ...
>
> We acknowledge that significant attempts were made by the parties to agree on a form of words that described the industry in a clear and direct way. We intend to vary cl.4 before the award commences so that it contains a clearer description of the black coal mining industry albeit a description that reflects as closely as possible the status quo."

135 The "status quo" plainly included the exclusion of Dyno Nobel's shotfirers from the previous award which covered the coal mining industry. The foregoing history obliges the drawing of the only sensible inference – that the Commission inserted cl 4.3(g) to address the submission of Dyno Nobel.

The language of cl 4.3(g)

136 The language of cl 4.3(g) amply reflects the foregoing history. Clause 4.3(g) addresses specifically the supply of shotfiring or other explosive services by an employer that is not otherwise engaged in the black coal mining industry. That describes precisely the position of Dyno Nobel. In that respect, I accept Orica's submission that the phrase "otherwise" in cl 4.3(g) should be construed as meaning "other than by reason of the employer's shotfiring and other explosive services activities". That reading is consistent with the conclusion reached by Collier and Snaden JJ in the Full Court of the Federal Court of Australia as follows:[143]

> "An employer that is 'not otherwise engaged in the black coal mining industry' for the purposes of cl 4.3(g) is one whose employees are not 'employed by an employer engaged in the black coal mining industry' and

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141 *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].

142 *Re Request from the Minister for Employment and Workplace Relations—28 March 2008 (Award Modernisation (AM 2008/1-12))* (2008) 177 IR 364 at 403-404 [156]-[157].

143 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 at [38].

cannot, therefore, qualify as 'eligible employee[s]' under sub-para (a) of the [Leave Act] definition."

137 What employer would supply shotfiring or other explosive services to the black coal mining industry, without itself being in that industry save for the provision of those services? The answer is self-evident: an enterprise that is in the explosives industry, such as Dyno Nobel.

Alternative constructions are untenable

138 The contention that cl 4.3(g) must be read as being limited to the supply of shotfiring services by an employer rather than by an employee who is at a coal mine site, with respect, cannot be sustained. Clause 4.3(g) is plainly concerned with the supply of specialist labour by an enterprise to a coal mine. That labour – the act of shotfiring – will not, of course, be performed personally by the employer. If the employer is an incorporated entity – as is likely – then it can only act by its officers, employees or agents.[144] In other words, what cl 4.3(g) refers to by "the supply of shotfiring ... services" is shotfiring itself; no service could be so characterised unless it included as its *raison d'être* the physical act of shotfiring. That labour will be undertaken, in the context of the Award, only by employees. However, as a legal reality, the supply will be made contractually by the employer providing its employees who will supply shotfiring to the mining company.[145]

139 The contention that cl 4.3(g) must be read down, by reason of cl 4.1(a) and (b)(ii) of the Award (the latter of which mirrors para (b) of the definition of "eligible employee" in s 4(1) of the Leave Act), so that it is limited to "back-office" shotfiring services is also, with respect, misconceived. The proposition is that a reading down is mandated in order to reconcile the width of cl 4.1(b)(ii) with cl 4.3(g). For convenience, cl 4.1 is set out below:

"This award applies to:

(a) employers of coal mining employees as defined in clause 4.1(b); and

(b) coal mining employees.

Coal mining employees are:

(i) employees who are employed in the black coal mining industry by an employer engaged in the black coal mining

144 See *Federal Commissioner of Taxation v Casuarina Pty Ltd* (1970) 127 CLR 62 at 77.

145 cf *Accident Compensation Commission v Odco Pty Ltd* (1990) 64 ALJR 606; 95 ALR 641.

industry, whose duties are directly connected with the day to day operation of a black coal mine ...;

(ii) employees who are 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 ..."

140 It was submitted that the concern of cl 4.1(b)(i) is with those individuals who are employed by an employer "engaged in the black coal mining industry" – that is, mining companies – and that the concern of cl 4.1(b)(ii) is with those individuals who are not employed by such companies, but who nonetheless carry out their duties "at or about a place where black coal is mined" and whose duties "are directly connected with the day to day operation of a black coal mine". It was said that Orica's shotfirers who worked at a mine fell within cl 4.1(b)(ii), but that the purpose of cl 4.3(g) was to exclude from the Award those employees of Orica who form part of a supply of shotfiring or other explosive services, yet do so away from the mine (and thus fall outside the reach of cl 4.1(b)(ii)). That conclusion finds no support in the legislative history and, with respect, is difficult to accept. Moreover, and in any event, head office or corporate administration office employees in the coal mining industry are expressly excluded from the Award by cl 4.3(b). Clause 4.3(b) excludes all coal mining employees "employed in head offices or corporate administration offices (but excluding work in town offices associated with the day-to-day operation of a local mine or mines)". That being so, what work does cl 4.3(g) then do? It was suggested that cl 4.3(g) did the work of excluding those employees who participate in the supply of shotfiring or other explosive services who are located somewhere *in between* the head office and the mine and town offices. For example, Senior Counsel for the appellant contended that the employee at the Orica yard who oversaw the loading of explosives onto a truck would be captured by cl 4.3(g), but not necessarily cl 4.3(b). But what would be the point of that?

141 The better view – as articulated by King's Counsel for Orica – is that cl 4.1(b) draws a distinction between traditional employees of a coal mining company whose duties are directly connected with the day-to-day operation of a black coal mine (addressed by cl 4.1(b)(i)) and employees of non-mining companies who supply specialist external services to mines (addressed by cl 4.1(b)(ii)). The same distinction necessarily appears in the definition of "eligible employee" in the Leave Act. But textually, the reach of cl 4.1 must be read subject to cl 4.3, which prescribes expressly what the "black coal mining industry does not include". Clause 4.3 of the Award thus forms part of the definition of "black coal mining industry" in s 4(1) of the Leave Act. That industry simply does not include the supply of shotfiring services by an employer not otherwise engaged in the black coal mining industry.

142 This leaves for consideration the alternative conclusion reached by the primary judge below. Perram J reasoned as follows:[146]

> "In my view, cl 4.3(g) has no application in this case. The definitions in s 4(1), including that of the black coal mining industry, do not apply if the contrary intention appears from the face of the statute ('In this Act, unless the contrary intention appears:'). The structure of the definition of 'eligible employee' in s 4(1), specifically the inclusion of disjunctive employer and location limbs, gives rise to a clear implication that the character of an employer was not intended to be relevant to the location limb."

143 His Honour's reference to the "employer limb" and the "location limb" was to paras (a) and (b) of the definition of "eligible employee" in s 4(1) of the Leave Act, respectively. His Honour perceived that to the extent that the definition of "black coal mining industry" in s 4(1) of the Leave Act included cl 4.3(g) of the Award, there was an irreconcilable conflict with the location limb in the definition of "eligible employee" in s 4(1). That conflict was to be resolved "by reading the reference to the 'black coal mining industry' in the location limb as having the same meaning as it bears in the Award but without cl 4.3(g)".[147]

144 With respect, on a plain reading of the Leave Act and the Award, there is no such conflict, particularly when regard is had to the legislative and Award history and once the function of cl 4.3(g) is appreciated. The function of cl 4.3(g) is to preserve the "status quo" for companies in the explosives business who may supply shotfiring or other explosive services to black coal mines from time to time. The employees of such companies are covered by a different award.

Application of cl 4.3(g)

145 It was not in dispute that in 2006 Orica Ltd (the parent company of Orica) acquired a business known as "Minova" and from 2013 integrated Minova within its operations. Between 2006 and 2013, employees of Minova continued to be employed by Minova Australia Pty Ltd, and from March 2013 employees of Minova became employees of Orica. Orica divested this business on 28 February 2022. The business focused exclusively upon the provision of services to underground black coal mining businesses (specifically, drilling and instrumentation services, the installation, repair, maintenance and removal of ventilation control devices, and the provision of secondary ground support

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146 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 at [21].

147 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 at [23].

services).[148] It did not involve the provision of "shotfiring or other explosive services". The Full Court concluded that when Orica owned the Minova business and Minova employees were employed by Orica, cl 4.3(g) did not apply to it. That is because, during that period, Orica, through its Minova business, was otherwise engaged in the black coal mining industry for a reason other than by the supply of shotfiring services.[149] That conclusion is correct.

Cross-appeal

146 It was contended by way of cross-appeal that the Full Court had erred because the Minova business was a distinct operation within Orica, and because cl 4.3(g) should be read as not applying only when an employer supplies shotfiring or other explosive services as part of, or in the context of, activities that otherwise engage the employer in the black coal mining industry. It was argued that where the supply of shotfiring or other explosive services is entirely separate from the other activities of the employer in the black coal mining industry, the exclusion is then engaged. That was the case here at all relevant times, and in particular when Orica owned the Minova business. Alternatively, it was submitted that cl 4.3(g) should be construed as referring only to an employer that – taken as a whole – has a substantial character in the black coal mining industry. If that construction were to be preferred, Orica submitted that the proceeding would need to be remitted to the Federal Court for it to determine the substantial character of Orica's business.

147 Neither construction of cl 4.3(g) is sustainable. The term "employer" is defined in cl 3.1 of the Award by reference to the meaning that the word had in the *Workplace Relations Act 1996* (Cth). Section 6(1) of that Act relevantly defined an employer to include a "constitutional corporation" so far as it employs, or usually employs, an individual. Section 4(1) defined a constitutional corporation to mean a corporation to which s 51(xx) of the *Constitution* applies. The same definition of "employer" relevantly applies in the Leave Act.[150] It is not in doubt that Orica is a constitutional corporation.

148 It follows that when cl 4.3(g) refers to "an employer" it is relevantly referring to a corporation, and more particularly to a corporation that supplies shotfiring or other explosive services via its employees. That is Orica as a juridic entity. The question then posed by cl 4.3(g) is whether it can be said that Orica was

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148 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 at [10].

149 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 at [62]-[63].

150 Leave Act, s 4(1); *Fair Work Act 2009* (Cth), s 12 (definition of "constitutional corporation"), s 14.

"engaged in the black coal mining industry" other than by reason of its supply of shotfiring services. The answer to that question is that while Orica – as a juridic entity – carried on the black coal mining activities which comprised the Minova business it had purchased, it did. The exclusion contained in cl 4.3(g) is not posed by reference to divisions within an employer – whether run independently or not. Nor does cl 4.3(g) pose as the applicable question a determination of the substantial character of a business. The word "substantial" is not used in the Award. Clause 4.3(g) asks whether an employer is "not otherwise engaged in" an industry. In that respect, the industrial relations cases relied upon by Orica concern different tests.[151]

149 For the foregoing reasons, cl 4.3(g) applies to exclude Orica's employees from the application of the Leave Act, but relevantly only from the time when it sold the Minova business.

Disposition

150 The appeal should be dismissed. Special leave to cross-appeal is granted, but the cross-appeal should be dismissed. Each party is to bear its own costs of the appeal and cross-appeal given that each has had a measure of success.

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151 cf *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 at 135; *Health Services Union v Catering Industries (NSW) Pty Ltd* (2023) 412 ALR 18 at 30 [60]-[61].

GLEESON J.

Introduction

151 This case concerns whether those employees of the respondent ("Orica") through whom Orica has supplied shotfiring and related services at black coal mines in New South Wales since 1 March 2013 were and are "employed in the black coal mining industry" for the purposes of the definition of "eligible employee" in s 4(1) of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) ("the Administration Act"). Such eligible employees are entitled to participate in a scheme of portable long service leave that has, in various iterations, benefited employees in the black coal mining industry since 1949. Portable long service leave benefits are calculated by reference to the length of service in the industry rather than the length of service with an employer. Employers are required to pay levies to the appellant ("the Corporation") imposed by the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* (Cth) ("the Payroll Levy Act") in respect of eligible employees. Those levies contribute to the Coal Mining Industry (Long Service Leave) Fund established by the Corporation under s 40 of the Administration Act. The fund supports the payment of portable long service leave benefits under Pt 7 of the Administration Act.

152 During the period from 1 March 2013 onwards, Orica's involvement in black coal mining in New South Wales has had two aspects. Firstly, at all relevant times, Orica has supplied shotfiring and related services to open cut mines, using its employees. Secondly, between 1 March 2013 and 28 February 2022, Orica owned a business ("the Minova business") that was involved in the underground mining of black coal. The Minova business did not supply or conduct shotfiring or other explosive services.

153 The Full Court of the Federal Court of Australia (Collier and Snaden JJ; Hatcher J agreeing in part) made declarations to the effect that Orica employees who performed shotfiring and related services at black coal mines in New South Wales from 1 March 2013 to 28 February 2022 were eligible employees, and that Orica failed to pay levies to the Corporation imposed by s 4 of the Payroll Levy Act in respect of the eligible wages of those employees for that period, pursuant to s 6 of that Act. In this Court, the Corporation argues that the Full Court erred in confining its conclusion to the period ending on 28 February 2022, and contends that Orica employees who have performed the relevant work at black coal mines in New South Wales from 1 March 2022 have been and continue to be eligible employees, as the primary judge (Perram J) found.

154 Orica contends that its relevant employees were not and are not eligible employees. For the reasons which follow, Orica's contention is correct. The appeal should be dismissed and the cross-appeal allowed, together with orders made for the final determination of the proceeding, as set out at the conclusion of this judgment.

Statutory text: "eligible employee" and the "black coal mining industry"

"Eligible employee"

155 The main object of the Administration Act is "to make provision in relation to long service leave in the black coal mining industry", including by "providing minimum entitlements and rights in respect of long service leave for eligible employees".[152] As expressed, this object refers to the black coal mining industry as the relevant area of economic activity and eligible employees as the class of individuals who may benefit from the Act's provisions for long service leave. Consequently, many substantive provisions of the Administration Act hinge upon the term "eligible employee", defined in s 4(1) as follows:

> "***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."

156 This definition was substituted in the Administration Act by the *Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009* (Cth) ("the 2009 Act"), which commenced on 1 January 2010, coinciding with the commencement of the Black Coal Mining Industry Award 2010 ("the 2010 Award"),[153] made pursuant to the award modernisation process governed by Pt 10A of the *Workplace Relations Act 1996* (Cth).

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152 Administration Act, s 3(ab).

153 2010 Award, cl 2.1.

157 Paragraph (a) of the definition of "eligible employee" ("the employer limb") makes it clear that an employee's employment in the black coal mining industry is distinct from their employer's engagement in the industry. The different language of being "employed in" or "engaged in" the industry reflects the different connections that exist between employees and an industry on the one hand, and employers and an industry on the other. Whether an employee is employed in the black coal mining industry for the purposes of the definition of "eligible employee" is a question of fact and law, concerning the terms of the relevant employment relationship. That relationship, principally based in contract, may be affected by statutory provisions and by awards made under statutes.[154] Whether an employer is "engaged in the black coal mining industry" for the purposes of the employer limb is a question of fact which depends on the "substantial character" of the employer's business, recognising that an employer can be engaged in two or more industries.[155]

Black coal mining industry

158 The meaning of the "black coal mining industry" is central to the meaning of "eligible employee" in the Administration Act, being included in every limb of that defined term. The term is expressed in s 4(1) of the Administration Act to have the same meaning as in the 2010 Award, as in force on 1 January 2010. Prior to the 2009 Act, the Administration Act contained no definition of the "black coal mining industry".

159 The evident aim of the 2009 Act is to adopt the language and concepts of the 2010 Award. The Explanatory Memorandum to the 2009 Act states that the definition of "black coal mining industry" was aligned with the definition in the 2010 Award to ensure that the scheme established by the Administration Act applies "universally in the black coal mining industry from 1 January 2010".[156] The Explanatory Memorandum also states that, for the same purpose, the long service leave entitlements in the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 ("the 1997 Award") would "be extended to all eligible employees who do not otherwise have an award-derived long service

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154 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at 186 [41].

155 *R v Drake-Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51 at 57; *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 at 130-131, 135.

156 Australia, House of Representatives, *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009*, Explanatory Memorandum at 1.

leave entitlement".[157] This statement of purpose begs the question of the scope of the black coal mining industry. However, it is relevant to note that the Corporation did not suggest that any employee of Orica who was not an eligible employee within the meaning of the Administration Act would not otherwise have an award-derived long service leave entitlement.

160 While s 4(1) of the Administration Act is expressed to provide definitions "unless the contrary intention appears", the repeated use of the term "black coal mining industry" in the definition of "eligible employee" reveals no such contrary intention. In particular, there is nothing to suggest different meanings in the expression "employed in the black coal mining industry" as it appears in the first, second and fourth limbs of the definition. This is sufficient to reject the Corporation's alternative contention that the Full Court erred in failing to adopt the primary judge's construction of the definition of "eligible employee", namely that the phrase "an employee who is employed in the black coal mining industry" in para (b) of the definition ("the location limb") should be read without reference to cl 4.3(g) of the 2010 Award.[158]

161 The 2010 Award as in force on 1 January 2010 covers employers of coal mining employees (as defined by cl 4.1(b)) and coal mining employees themselves.[159] The definition of "black coal mining industry" in cll 4.2 and 4.3 is used to define the term "coal mining employees" in cl 4.1(b). The employer and location limbs of "eligible employee" in the Administration Act are materially the same as the two limbs of the definition of "coal mining employees" in the 2010 Award.

162 The definition of the "black coal mining industry" in the 2010 Award comprises two elements: an inclusive meaning set out in cl 4.2, and a list of exclusions in cl 4.3. This approach to the definition of the industry was apparently intended to clarify the coverage of the 2010 Award.[160] Relevantly, the black coal mining industry includes, by cl 4.2(d), "other work on a coal mining lease directly connected with the extraction, mining and processing of black coal". Subject to any exclusion, there is no dispute that shotfiring work on a coal mining lease of

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157 Australia, House of Representatives, *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009*, Explanatory Memorandum at 1.

158 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515 at [21]-[24].

159 2010 Award, cl 4.1.

160 *Re Request from the Minister for Employment and Workplace Relations—28 March 2008* ("*Award Modernisation*") (2008) 177 IR 364 at 373 [14].

the kind supplied by Orica using its employees falls within the scope of this inclusion. Clause 4.3 then provides:

> "The black coal mining industry does not include:
>
> (a) the mining of brown coal in conjunction with the operation of a power station;
>
> (b) the work of employees employed in head offices or corporate administration offices (but excluding work in town offices associated with the day-to-day operation of a local mine or mines) of employers engaged in the black coal mining industry;
>
> (c) the operation of a coal export terminal;
>
> (d) construction work on or adjacent to a coal mine site;
>
> (e) catering and other domestic services;
>
> (f) haulage of coal off a coal mining lease (unless such haulage is to a wash plant or char plant in the vicinity of the mine); or
>
> (g) the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry."

163 It is cl 4.3(g) which is in issue. On its face, cl 4.3(g) excludes a class of activities from the black coal mining industry, being the supply of shotfiring or other explosive services. When read into the definition of eligible employee in accordance with the usual approach that a substantive enactment containing a defined term is construed after the defined term is read into the enactment,[161] "an employee who is employed in the black coal mining industry" does not include an employee who is employed in "the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry". Similarly, "an employer engaged in the black coal mining industry" does not include an employer who is engaged in "the supply of shotfiring or other explosive services [and is] not otherwise engaged in the black coal mining industry".

164 Putting aside the Minova business, which is addressed below in relation to Orica's cross-appeal,[162] the Corporation did not contend that the relevant Orica employees were eligible employees within the employer limb by reason of Orica

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161 *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103]; *Qantas Airways Ltd v Transport Workers' Union of Australia* (2023) 278 CLR 571 at 608 [80]; *Farshchi v The King* (2025) 100 ALJR 6 at 22 [59]; 426 ALR 185 at 202.

162 See from [185] below.

being "engaged in the black coal mining industry". Additionally, the third and fourth limbs of the definition of "eligible employee" are not presently relevant. The location limb is therefore the focus of the dispute.

165 The "supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry" in cl 4.3(g) can be read in two ways. One construction, propounded by the Corporation, is that the subject is the employer. On that construction, cl 4.3(g) excludes from the scope of the industry the activities of employers comprising the supply of the described services and says nothing to negate the inclusion within the industry, by cl 4.2(d), of the activities of the employees by which services are supplied. The alternate construction, propounded by Orica, is that cl 4.3(g) excludes the described services from the scope of the industry, where those services are supplied by an employer having the requisite characteristic in that paragraph.

166 When the definition of "black coal mining industry" (including cl 4.3(g)) is read into the location limb, on the first construction, an employee who performs shotfiring or other explosive services for their employer at a black coal mine will be "employed in" the black coal mining industry and will fall within the location limb, notwithstanding that their employer is, because of cl 4.3(g), not "engaged in the black coal mining industry". The duties of such an employee 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. The cl 4.3(g) exclusion has no relevant operation in respect of the location limb.

167 On the second construction, an employee who is employed in the provision of the relevant services in cl 4.3(g), where they are supplied by an employer having the requisite characteristic in that paragraph, is not employed in the industry. On that construction, the location limb is not satisfied.

168 In my view, the second construction is correct for the following reasons. Firstly, the ordinary concept of an industry broadly comprises a range of operations or activities. That concept is reflected in the inclusive definition in cl 4.2 of the 2010 Award, which sets out three specific kinds of operations and a fourth broad category, "other work on a coal mining lease directly connected with the extraction, mining and processing of black coal", which, as already noted, covers shotfiring work done by Orica's employees at black coal mines in New South Wales. Similarly, the other paragraphs of cl 4.3 exclude from the scope of the industry specific activities or operations engaged in through the performance of work by one or more employees. On the second construction, cl 4.3(g) operates as a limited exclusion from the location limb, affecting employees through whom shotfiring or other explosive services are supplied by an employer who is "not otherwise engaged in the black coal mining industry" because the only services that the employer provides in the industry are the shotfiring or other explosive services. The location limb covers employees doing other kinds of work in the industry, where those 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. It does not matter that, having regard to the substantial character of the employer's business activities, their employer is not engaged in the industry. That is, the second construction respects the dichotomy that appears in the employer limb between an employee's employment in the industry and an employer's engagement in the industry.

169 The second construction is not inconsistent with the inclusion of shotfiring in the 2010 Award,[163] a role that was performed historically by employees of employers engaged in the industry, such as mining operators.[164] Nor is it inconsistent with the parties' agreement that the work done by Orica's shotfirers necessarily meant that they fell within the inclusive definition in cl 4.2(d) of the 2010 Award. Rather, cl 4.3(g) operates to exclude from the industry the activities of employees whose work would otherwise have fallen within the scope of the industry. In that way, cl 4.3(g) goes further than some of the other exclusions in cl 4.3, which are evidently for the avoidance of doubt only. An example of the latter is cl 4.3(a), which excludes from the industry "the mining of brown coal in conjunction with the operation of a power station". There was no suggestion that cl 4.3(g) has an operation that is only for the avoidance of doubt, and in fact the words "[t]o avoid doubt", which were present in the September 2008 Exposure Draft of the 2010 Award ("the Exposure Award"), were removed from the chapeau to cl 4.3 in the final version, while cl 4.3(g) was added.[165]

170 Secondly, the second construction addresses a particular issue raised with the Australian Industrial Relations Commission ("the Commission") after the publication of the Exposure Award and before the 2010 Award was finalised. At that time, there were two employers who supplied services of the kind described in cl 4.3(g): Orica and Dyno Nobel Asia Pacific Ltd ("Dyno Nobel"). On the second construction, the cl 4.3(g) exclusion was intended to exclude Orica and Dyno Nobel and their respective employees from the coverage of the 2010 Award, together with any future competitor in the market for the supply of shotfiring and related services in the black coal mining industry. As explained below,[166] that intention is congruent both with Dyno Nobel's submission to the Commission that the status quo established by the Commission's decision in *Construction, Forestry, Mining and Energy Union v Dyno Nobel Asia Pacific Ltd* ("*Dyno Nobel AIRC*") should be preserved, so that Dyno Nobel's employees would remain outside the

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163 See 2010 Award, Sch A, cll A.5.1, A.5.2.

164 *Construction, Forestry, Mining and Energy Union v Dyno Nobel Asia Pacific Ltd* [2005] AIRC 622 at [53].

165 See further below at [180].

166 At [174]-[177].

2010 Award, and with the stated intention of the Commission in devising the 2010 Award to maintain the status quo as far as possible and to treat like employers alike.

171 Thirdly, in the 2010 Award, the expression "black coal mining industry" is used to define the term "coal mining employees". The definition of the industry by reference to the activities of employees is logical in that context. In the definition of "coal mining employees", the industry is referred to on three occasions: twice in the phrase "employees who are employed in the black coal mining industry" and once in the phrase "an employer engaged in the black coal mining industry". The cl 4.3(g) exclusion would have no operation in the former phrase if its subject were only employers. It is unlikely that cl 4.3(g) is intended to operate in relation to only one of the three occasions in which the expression "black coal mining industry" is used substantively in the definition of "coal mining employees".

172 Fourthly, the Corporation's contention that cl 4.3(g) is relevant only to the employer limb of the definition of "eligible employee" in the Administration Act (as a logical extension of its application only to cl 4.1(b)(i) of the 2010 Award) confuses the scope of the industry with the relationship between an employer and the industry. The argument was that the purpose of cl 4.3(g) is to exclude from the definition of "coal mining employees" in cl 4.1(b)(i) of the 2010 Award those employees who, although employed in the provision of shotfiring services, do not perform their duties "at or about a place where black coal is mined". Since shotfiring work generally falls within the inclusive definition of the industry, the mechanism for achieving that result was to narrow the scope of the phrase "an employer engaged in the black coal mining industry" by excluding the employer's supply of services without excluding the work by which the services are supplied. The distinction is artificial because the employer's supply of services is necessarily undertaken by the work of employees. This artificiality is underscored by the language of cl 4.3(g), which implies that an employer who supplies shotfiring or other explosive services is engaged in the industry, at least to that extent.

173 Additionally, if the concern was to exclude the identified class of off-site employees from the scope of coal mining employees, it is more likely that the Commission would have identified them by reference to the relevant kinds of work or kinds of workplaces in a similar way to: cl 4.3(b), which excludes from the industry the work of certain employees employed in head offices and corporate administration offices; cl 4.3(d), which excludes construction work "on or adjacent to a coal mine site"; or cl 4.3(f), which excludes haulage of coal, except to a wash plant or a char plant "in the vicinity of the mine". Clause 4.3(g) is a poor fit with the purpose asserted by the Corporation.

Dyno Nobel AIRC

174 There is no doubt that cl 4.3(g) responds to the *Dyno Nobel AIRC* decision. In my view, the inference to be drawn is that, faced with conflicting goals of

consistency of treatment of employers and preservation of the status quo, the Commission chose to preserve the pre-existing position of Dyno Nobel as an employer who was not subject to the pre-existing federal awards, by excluding its specialist activities in the black coal mining industry from the industry itself. In the interests of consistency, the Commission included cl 4.3(g) in the 2010 Award to treat other employers who provided similar services to the industry, namely Orica and other future entrants into the market in which Dyno Nobel and Orica competed, in the same way.

175 The *Dyno Nobel AIRC* decision concerned whether the Construction, Forestry, Mining and Energy Union ("the CFMEU") could represent employees of Dyno Nobel as employees engaged in or in connection with the coal industry. The decision turned upon the construction of the CFMEU's rules concerning membership eligibility. Rule 2D of those rules relevantly provided that the CFMEU's membership included "employees engaged in or in connection with the coal and shale industries".[167] Whether or not employees of Dyno Nobel fell within the scope of rule 2D depended on whether Dyno Nobel's business was "in or in connection with" the coal industry in accordance with this Court's approach to the proper construction of union eligibility rules characterised as "industry rules". On that approach, an industry is comprised of trades or businesses and the discrimen of employees "engaged in or in connection with" a specified industry is the trade or business of the employer.[168]

176 The Commission noted the first instance finding that explosives work in coal mining, historically performed by direct mine site employees, was, by that time, "predominantly performed by the contractors who supply the explosives, such as Orica and Dyno Nobel".[169] The Commission decided that Dyno Nobel operated a single integrated business comprising the manufacture and supply of explosives.[170] Applying this Court's conclusion in *R v Isaac; Ex parte Transport Workers' Union of Australia* that the mere supply of goods or services to an industry is not, of itself, sufficient to render the supplier's business one that is "in connection with" the industry of the business supplied, even if those goods are

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167 *Dyno Nobel AIRC* [2005] AIRC 622 at [5].

168 *Dyno Nobel AIRC* [2005] AIRC 622 at [51], citing *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1921) 29 CLR 290 at 297 and *Re Federated Liquor and Allied Industries Employees' Union of Australia; Ex parte Australian Workers' Union* (1976) 51 ALJR 266 at 268; 11 ALR 449 at 453-455.

169 *Dyno Nobel AIRC* [2005] AIRC 622 at [10].

170 *Dyno Nobel AIRC* [2005] AIRC 622 at [59].

essential to the operation of that business,[171] the Commission found that the small number of employees who undertook shotfiring services for the coal industry at mines did not give Dyno Nobel's business an additional "substantial character" as a business also in or in connection with the coal industry. Rather, Dyno Nobel supplied shotfiring services to employers in the coal mining industry, as part of its business in the explosives industry.[172] The Commission explicitly declined to place significant weight on Dyno Nobel's certified agreements with the CFMEU to cover the work it performed in Queensland or the fact that Dyno Nobel's competitor, Orica, was covered by the 1997 Award.[173] These facts were considered to reflect a "practical industrial relations reality" but to be of little relevance to the proper construction of the eligibility rule.[174]

177 As counsel for the Mining and Energy Union observed in this Court, intervening in support of the Corporation, the text of cl 4.3(g) closely reflects the Commission's conclusion, three years before it embarked on the award modernisation process that led to the 2010 Award, that Dyno Nobel's provision of shotfiring services to coal mines did not place it in or in connection with the coal mining industry. In reaching that conclusion, the Commission explained that the relevant "activities [were] properly to be seen as the supply of a service to employers in one industry by an employer whose business is in another industry".[175] As the union eligibility rule was an "industry rule", there was no room for a conclusion that Dyno Nobel employees were "engaged in or in connection with the coal industry" while Dyno Nobel itself was not.[176]

Development of the 2010 Award as in force on 1 January 2010

178 As explained by Steward J,[177] the 2010 Award is the product of the award modernisation process undertaken by the Commission from March 2008 onwards,

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171 (1985) 159 CLR 323 at 333. See *Dyno Nobel AIRC* [2005] AIRC 622 at [37], [51].

172 *Dyno Nobel AIRC* [2005] AIRC 622 at [59].

173 Pursuant to the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 Roping-in Award No 1, 2002, Sch A and the Coal Mining Industry (Production & Engineering) Consolidated Award 1997 Roping-in Award No 3 of 2005, Sch A.

174 *Dyno Nobel AIRC* [2005] AIRC 622 at [58].

175 *Dyno Nobel AIRC* [2005] AIRC 622 at [59].

176 *Dyno Nobel AIRC* [2005] AIRC 622 at [16], [64], citing *Hibble* (1921) 29 CLR 290.

177 See [132].

culminating in the commencement of 122 "modern awards" on 1 January 2010.[178] On its face, proposed cl 4.1(b)(ii) did not tether the employee's industry to that of their employer. This result was in apparent tension with the *Dyno Nobel AIRC* decision and led to Dyno Nobel's submission to the Commission on 31 October 2008, described by Steward J.[179]

179 On 24 November 2008, the Commission heard oral submissions on behalf of Dyno Nobel to the effect that certain of its employees should not be "carved off" to be included in the scope of the 2010 Award. The submissions included that Dyno Nobel's employees should not be covered by different awards "depend[ing] on the nature of the product being extracted by the customer". In response, the CFMEU noted that "the other half of the duopoly of that work in Australia", namely Orica, was covered by the 1997 Award. In response to a question from the Commission, the CFMEU acknowledged that new entrants to the industry may be affected by "potential confusion" about whether they would be covered by the 2010 Award or instead the Artificial Fertilizers and Chemical Industry Award 2001 if Dyno Nobel's proposed exclusion from the scope of the 2010 Award was not accepted.

180 In the 2010 Award ultimately ordered into law by the Commission, first made on 19 December 2008, cl 4.3(g) appears for the first time. Steward J records relevant aspects of the Commission's reasons for its decision to make the 2010 Award.[180]

181 As to the "kinds of employers" to which the relevant pre-reform award applied – that is, the 1997 Award – Orica and Dyno Nobel were the only two employers who supplied services of the kind that fell within cl 4.3(g). However, the Commission had previously made the decision in *Dyno Nobel AIRC* to the effect that the 1997 Award did not apply to Dyno Nobel. In that decision, the Commission gave little weight to Orica's inclusion in the 1997 Award in deciding the scope of the "coal industry".[181] Accordingly, it is plausible that the status quo that the Commission considered important to preserve was that which was established by its decision in *Dyno Nobel AIRC*. Conversely, there is nothing in the reasons for the 2010 Award to suggest that cl 4.3(g) was included for the purpose posited by the Corporation.

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178 See *OS ACPM Pty Ltd v Mining and Energy Union* [2026] FCAFC 59 at [36].

179 See [133].

180 See [134]-[135].

181 See [176] above.

182 Dyno Nobel is also excluded from the 2010 Award by cl 4.5, which provides that the 2010 Award does not cover "any employee who is covered by [an] enterprise award". However, cl 4.5 was included in the Exposure Award (as cl 4.4(b)), that is, prior to Dyno Nobel's 31 October 2008 submissions. Similarly, cl 4.6 of the 2010 Award, which addresses the problem of employees governed by multiple awards, was included in the Exposure Award (as cl 4.5).

183 In my view, therefore, cl 4.3(g) reflects the Commission's stated intention to produce a clearer description of the black coal mining industry in a manner that reflected the status quo in relation to Dyno Nobel. This altered the status quo only for Orica and its shotfirer employees, in the interests of treating like employers alike. That intent is responsive to the historically acknowledged difficulties in defining the industry and the simplification aim of the award modernisation process.

184 Accordingly, the Full Court was correct to conclude that, by the operation of the cl 4.3(g) exclusion, shotfirers who are employed by an employer whose other activities are "wholly external" to the 2010 Award definition of "black coal mining industry" (as at 1 January 2010) do not qualify either as "coal mining employees" within the meaning of the 2010 Award or as "eligible employees" within the meaning of the Administration Act.[182] The appeal must be dismissed.

Cross-appeal: relevance of Orica's Minova business to whether Orica was engaged in the black coal mining industry

185 By its cross-appeal, Orica contended that the Full Court erred in finding that Orica was "otherwise engaged in the black coal mining industry" for the purposes of cl 4.3(g) by reason of the Minova business. The relevant facts are set out in the reasons of Steward J.[183]

186 The Full Court concluded that, while Orica owned the Minova business, the relevant employees were "employed in the black coal mining industry" because the cl 4.3(g) exclusion did not operate to exclude Orica from the industry. That is, while Orica owned the Minova business, Orica was otherwise engaged in the black coal mining industry through that discrete business.

187 Orica made two arguments in support of its cross-appeal. The first argument was that, as a matter of construction, cl 4.3(g) implies a connection between the employer's shotfiring or other explosive services and the employer's other engagement in the industry. The phrase "not otherwise engaged" in the industry

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182 *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 at [42].

183 See [145].

was said to refer to the context or circumstances in which the activity of supplying shotfiring or other explosive services is performed. Orica observed that, in the absence of such a connection, cl 4.3(g) is capable of producing arbitrary results as demonstrated by the result in the Full Court. On the Full Court's approach, whether an Orica shotfirer was an eligible employee depended on the happenstance of Orica's ownership of a business that operated in a different segment of the black coal mining industry. In other words, whether such an employee was an eligible employee depended upon Orica's entirely unrelated business activities.

188 The argument fails in the absence of any textual basis for the posited connection. The words "otherwise" and "engaged" require consideration of the employer's participation in the industry in ways apart from the supply of shotfiring or other explosive services. The words of cl 4.3(g) do not preclude the possibility that an employer may be "otherwise engaged in the black coal mining industry" as a result of activities that have no particular connection with shotfiring or other explosive services.

189 The second argument was that, in determining whether an employer is "not otherwise engaged" in the industry for cl 4.3(g), it is necessary to consider the substantial character of the whole of the employer's business, and that it is insufficient to find that the employer is "otherwise engaged" by reference to a small, incidental or discrete business operated by the employer which is entirely unrelated to the activities of the employees in question, namely the employees who may, depending on the application of cl 4.3(g), be "coal mining employees" as defined in cl 4.1(b).[184] This approach to cl 4.3(g) coheres with its evident purpose, which is to delineate the black coal mining industry by identifying who are "coal mining employees" in the special case of the supply of certain shotfiring or other explosive services by an employer who operates in one or more other industries. Exclusion from the industry, with the consequential inability of an employee to satisfy one of the limbs of "coal mining employees", should not depend on matters that are irrelevant to the activities of the employees, such as an employer's small, incidental or discrete business that is unrelated to the activities of the employee in question. Whether an employer's activities situate the employer as "otherwise engaged" in the industry is a question of fact to be decided by reference to the nature and position of the enterprise relative to the remainder of the employer's business.[185] Accordingly, the expression "not otherwise engaged" should be understood to mean not otherwise engaged having regard to the whole of the employer's business.

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184 And, by reason of the definition of "black coal mining industry" in s 4(1) of the Administration Act, also "eligible employees" under that Act.

185 *Ex parte Thiess* (1948) 77 CLR 123 at 135.

190 It follows that the proceeding should be remitted to the Federal Court of Australia to decide whether Orica was otherwise engaged in the black coal mining industry during the period of its ownership of the Minova business, in the sense described above.

Disposition

191 The following orders should be made:

(1) Appeal dismissed.

(2) Special leave to cross-appeal granted and the cross-appeal allowed.

(3) Set aside the declarations of the Full Court of the Federal Court of Australia made on 17 July 2025.

(4) Vary order 2 of the Full Court of the Federal Court of Australia made on 17 July 2025 to also set aside declarations 2 and 3 of the Federal Court of Australia made on 6 February 2024.

(5) Declare that employees of Orica who performed shotfiring and related services at black coal mines in New South Wales during the period from 1 March 2022 onwards were not "employed in the black coal mining industry" within para (b) of the definition of "eligible employee" in s 4(1) of the Administration Act.

(6) Remit the proceeding to the Federal Court of Australia to determine, according to law, whether employees of Orica who performed shotfiring and related services at black coal mines in New South Wales during the period from 1 March 2013 until 28 February 2022 were "employed in the black coal mining industry" within para (b) of the definition of "eligible employee" in s 4(1) of the Administration Act because, during that period, Orica was "otherwise engaged in the black coal mining industry" within the meaning of cl 4.3(g) of the 2010 Award.

(7) No order as to costs.