DECISION

Fair Work (Registered Organisations) Act 2009
Sections 43, 44 and 61 RO Act - Applications for community of interest declaration, approval for submission of amalgamation to ballot, and for permission to alter scheme

Australian Retailers Association and National Retail Association Limited, Union of Employers

(D2025/5)

DEPUTY PRESIDENT COLMAN MELBOURNE, 29 AUGUST 2025

Proposed amalgamation of employer organisations

[1] The Australian Retailers Association (ARA) and the National Retail Association Limited, Union of Employers (NRA) are organisations of employers that are registered under the *Fair Work (Registered Organisations) Act 2009* (RO Act) and which are presently concerned in a proposed amalgamation. The two organisations have jointly made three related applications that pertain to their proposed amalgamation: an application under s 43 of the RO Act for a *'community of interest'* declaration; an application under s 44 for the Commission's approval for the submission of the amalgamation to ballot; and an application under s 61 for permission to alter paragraph 4 of the scheme of arrangement.

[2] The ss 43 and 44 applications were allocated to my chambers on 18 August 2025. The following day, I fixed a time and place for hearing submissions in relation to the applications, and took steps to ensure that all registered organisations were notified of the time and place of the hearing (see ss 53(a) and (b)). The s 61 application, which was filed on 21 August 2025, was listed concurrently with the other applications. The ARA and the NRA attended the hearing before me today and made submissions in support of the applications. No other registered organisations sought to be heard.

Community of interest declaration – s 43 of the RO Act

[3] Section 43(1) provides that the organisations concerned in a proposed amalgamation may jointly lodge with the Commission an application for a community of interest declaration. The significance of such a declaration is that less onerous requirements apply in relation to the return of member votes in the amalgamation ballot. If a declaration under s 43 is in force, the members of an existing organisation concerned in an amalgamation approve the amalgamation if more than 50% of the formal votes cast in the ballot are in favour of the amalgamation. Otherwise, there is an additional requirement that at least 25% of the members on the roll of voters must cast a vote in the ballot (see s 66).

[4] Section 43(4) of the RO Act provides that if, at the conclusion of a hearing arranged under s 53, the Commission is satisfied that there is a *'community of interest between the existing organisations in relation to their industrial interests'*, the Commission must declare that it is so satisfied. Section 43(6) concerns amalgamations of employer organisations. It provides as follows:

> "(6) The FWC must be satisfied, for the purposes of subsection (4), that there is a community of interest between organisations of employers in relation to their industrial interests if the FWC is satisfied that a substantial number of members of one of the organisations are:
>
> (a) eligible to become members of the other organisation or each of the other organisations; or
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> (b) engaged in the same industry or in aspects of the same industry or similar industries as members of the other organisation or each of the other organisations; or
>
> (c) covered by the same modern awards as members of the other organisation or each of the other organisations; or
>
> (d) engaged in industries in relation to which there is a community of interest with members of the other organisation or each of the other organisations."

[5] The various matters in s 43(6) are to be assessed by reference to whether there exists a *'substantial number of members'*. As to the meaning of this expression, see *Re Australian Hotels Association and Accommodation Association of Australia* [2022] FWC 3313 at [5]. It is a sufficient condition, for the Commission to conclude that there is a community of interest between two organisations, that the Commission is satisfied that any one of the circumstances in s 43(6) exists. In such a case, the Commission must be satisfied that there is a community of interest. However, the matters in s 43(6) do not limit the circumstances in which the Commission may be satisfied that there is a community of interest between organisations for the purposes of s 43(4) (see s 43(7)).

[6] The joint application of the two organisations under s 43 meets the formal requirements of regulation 39 of the *Fair Work (Registered Organisations) Regulations 2009*. The application contended that the Commission should be satisfied that each of the circumstances in ss 43(6)(a) to (d) is present in this case. I am so satisfied. For convenience, I have decided to address only the matters in ss 43(6)(a) and (c) in this decision.

[7] First, I am satisfied that a substantial number of members of the NRA are eligible to become members of the ARA. Rule 6 of the registered rules of the ARA extends membership eligibility to any employer anywhere in Australia that carries on a business in the retail trading industry, subject to various exceptions in rule 7. The exceptions include entities that operate only in a State or Territory in respect of which the ARA has no formed division. Queensland is the only State or Territory in which the ARA has no division. The registered rules of the NRA extend membership eligibility to employers carrying on a business in the retail trading industry

in Queensland (rule 7). Each organisation has filed statutory declarations in support of the application under s 43. The declarations were made by Nicole Sheffield, President of the ARA, and Antony Moore, Chairperson of the NRA. Mr Moore stated that 4,925 of the NRA's total membership of 6,400 carry on business in Queensland and in at least one other State or Territory. They are therefore not excluded from membership of the ARA by rule 7 of the ARA Rules. My satisfaction as to the matter in s 43(6)(a) is a sufficient basis to compel a conclusion that the two organisations have a community of interest.

[8] Further, I accept the applicants' submission that a substantial number of the members of the ARA and the NRA are covered by the *General Retail Industry Award 2020* (Award). Clause 4 of the Award states that it covers employers in the general retail industry throughout Australia. The industry definition in the Award is found in clause 4.2, which I note without reciting. Having reviewed the registered rules of the ARA and the NRA, as well as the statutory declarations, I am satisfied that a substantial number of members of the two organisations are covered by the Award.

[9] For the above reasons, and pursuant to s 43(4), I declare that I am satisfied that there is a community of interest between the ARA and the NRA in relation to their industrial interests.

Submission of amalgamation to ballot – s 44 of the RO Act

[10] The ARA and NRA have made a joint application under s 44 of the RO Act for approval for submission of the proposed amalgamation to ballot. In accordance with s 44(2), the application was accompanied by a copy of the scheme for the amalgamation and a written outline of the scheme. I am satisfied that the scheme meets the requirements of s 40(2). In particular, it contains a general statement of the nature of the amalgamation identifying the existing organisations concerned and indicating that one of the existing organisations (the ARA) is the proposed amalgamated organisation. It also identifies the proposed deregistering organisation (the NRA). The scheme sets out particulars of the proposed alterations to the rules of the ARA as the 'host' organisation, including particulars of proposed alterations to its eligibility rules that will consolidate, but not expand, the coverage of the two amalgamating organisations. I note that the scheme includes a number of other provisions which are permitted by the Act, such as in relation to interim officeholders and staff arrangements.

[11] The scheme was approved by a resolution of the committee of management of each organisation concerned in the amalgamation, as required by s 42 of the RO Act. Attached to the application under s 44 were resolutions of the ARA Council and the NRA Board, each dated 15 April 2025, approving the scheme of amalgamation, the outline of the scheme, and the 'yes' case. A copy of the 'yes' case has been lodged, as contemplated by s 48 of the RO Act. The resolutions also record approval for the use of the form F63 as the form of the amalgamation ballot paper.

[12] I am also satisfied that the written outline of the scheme meets the requirements of s 44(3) of the RO Act, as it contains no more than 3000 words, and provides sufficient information on the scheme to enable members of the existing organisations to make informed decisions in relation to the scheme.

[13] Pursuant to the amalgamation proposed by the parties, the ARA will continue as a registered employer organisation under the RO Act and will be the host organisation, and the NRA will be deregistered. The name of the organisation will be the Australian Retail Council. The scheme provides that all existing members of the ARA and the NRA will become members of the amalgamated organisation on the amalgamation date without payment of entrance fees. Persons who were not eligible for membership of either organisation will not become eligible for membership of the amalgamated organisation. The present combined membership of the two organisations will be reflected in the eligibility rule of the amalgamated organisation, which will be in the terms of the current rules 6 and 7 of the ARA Rules. The scheme is accompanied by a new form of rules that will regulate the amalgamated organisation.

[14] Pursuant to s 55 of the RO Act, the Commission must approve the submission of the proposed amalgamation to ballot if, at the conclusion of the hearing arranged under s 53, it is satisfied of various matters. On the basis of the material before me, and the submissions of the parties, I am satisfied of the following. First, the amalgamation does not involve registration of an association as an organisation (s 55(1)(a)). Secondly, a person who is not eligible for membership of either of the organisations that are concerned in the amalgamation will not be eligible for membership of the proposed amalgamated organisation immediately after the amalgamation takes effect (s 55(1)(b)). Thirdly, the proposed alteration of the name of the ARA, as the new amalgamated organisation, will not result in the organisation having a name that is the same as the name of another organisation or is so similar to the name of another organisation as to be likely to cause confusion (s 55(1)(c)). Fourthly, the proposed alteration of the rules of the ARA is not contrary to the RO Act, the *Fair Work Act 2009*, or any modern award or enterprise agreement, and is not contrary to law (s 55(1)(d)). Further, the proposed deregistration of the NRA is consistent with the RO Act and is not otherwise contrary to law. It follows, given my satisfaction as to these matters, that I am required by s 55 to approve the submission of the amalgamation to a ballot, and I do so.

[15] Section 58(2)(b) requires the Commission, after consulting with the Australian Electoral Commission (AEC), to fix commencement and closing dates for the ballot. The AEC has advised that, for reasons set out in correspondence to the Commission and which I accept, it requires the ballot to commence no earlier than 28 days after the Commission's approval of the scheme. At the hearing, the ARA and NRA expressed a preference for the ballot to remain open for four weeks, which, if the applications were approved today, would see the vote commence on 26 September 2025 and close on Thursday 23 October 2025 (the Friday being a public holiday in Tasmania). The AEC stated that it was content with these dates. It is appropriate to proceed accordingly.

Application for permission to alter scheme for amalgamation – s 61 of the RO Act

[16] The ARA and NRA have jointly applied under s 61 of the RO Act for permission to alter the scheme for amalgamation as set out in Attachment A to the application. The variation is a technical one that affects paragraph 4 of the body of the scheme, which addresses the proposed eligibility rule of the amalgamated organisation. The parties submit that it has always been their intention that the amalgamated organisation will have eligibility for membership that extends to the limits of the eligibility rules of each of the amalgamation partners but not further, and that until recently, their joint understanding had been that rule 6 of the rules of the ARA constituted its eligibility rule, whereas in fact rules 6 and 7 comprise the eligibility rule. The

amalgamated organisation's rules are to be based on the current rules of the ARA. The proposed variation to the scheme seeks simply to incorporate references to rule 7 of the ARA as appropriate.

[17] The proposed alteration is a sensible one. It is appropriate to grant permission to alter the scheme and I do so. I note that no consequential application was made to vary the registered rules for the amalgamated organisation, nor is one necessary because rule 7 already forms part of those rules. (I note that the amalgamated organisation would have a division in Queensland, and that those members of the NRA currently operating only in that State would not be excluded from membership by rule 7.) The parties have filed a copy of the altered scheme which has been placed on the Commission's file.

Other matters

[18] The ARA and NRA have each elected to use a ballot paper in a specified form in respect of the amalgamation ballot for their respective organisations. The election concerns the form of the question to be put to members. I am satisfied that the requirements of regulation 60 have been met. In particular, the applicants have submitted a statement from the authorised officers of their organisations stating that the committee of management of their organisations approved the form of the ballot.

Summary of conclusions and next steps

[19] I am satisfied that there is a community of interest between the ARA and the NRA in relation to their industrial interests. I have determined to approve the submission of the proposed amalgamation to ballot. I have fixed Friday 26 September 2025 as the commencement date for the ballot and Thursday 23 October 2025 as the closing date.

[20] Members of the ARA and the NRA will approve the amalgamation in accordance with s 66(a) of the RO Act if more than 50% of the formal votes cast in the ballot in each organisation are in favour of the amalgamation. If the amalgamation is approved, I will list for hearing the question of whether the requirements of s 73 of the RO Act have been met, such that the Commission is required to fix a day on which the amalgamation is to take effect and the date on which the NRA will be deregistered. The hearing date will be at least 30 days after the declaration of the ballot results (see ss 69(1) and 73(1)).

DEPUTY PRESIDENT

Appearances:
P. Punch for the Australian Retailers Association
J. Kennedy for the National Retail Association Limited, Union of Employers

Hearing details:

2025
Melbourne
29 August

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