



## DECISION

*Fair Work (Registered Organisations) Act 2009*  
s.43(1) RO Act—Amalgamation of organisations

**National Union of Workers**  
**and**  
**United Voice**  
(D2019/6)

DEPUTY PRESIDENT GOSTENCNIK

SYDNEY, 5 JUNE 2019

*Community of interest declaration – joint application by the National Union of Workers and United Voice – satisfied there is a community of interest between the Applicants in relation to their industrial interests – declaration issued.*

[1] The National Union of Workers (NUW) and United Voice (UV) (collectively “the Applicants”) are employee organisations registered under the *Fair Work (Registered Organisations) Act 2009* (RO Act). Between them the Applicants represent approximately 155,000 members working in over 188 industries. Since 2017, the Applicants have been in discussions to amalgamate into a single registered organisation.<sup>1</sup> In August 2017, the Applicants entered into a Memorandum of Understanding to develop a proposal for a new organisation.<sup>2</sup> The Applicants resolved to commence the process of amalgamation under Part 2 of the RO Act. In late August 2018, the National Council of each Applicant passed a resolution supporting the amalgamation.<sup>3</sup> In December 2018, the National Executive of UV and the National Committee of Management of the NUW resolved to jointly make an application to the Fair Work Commission (Commission) for a declaration under s.43 of the RO Act that there is a community of interest between them in relation to their industrial interests.<sup>4</sup> The joint application was lodged on 9 April 2019.

[2] Section 43 of the RO Act provides:

**Community of interest declaration**

*Existing organisations may apply for declaration*

- (1) The existing organisations concerned in a proposed amalgamation may jointly lodge with the FWC an application for a declaration under this section in relation to the amalgamation.

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<sup>1</sup> Exhibits 1 and 2 at [4].

<sup>2</sup> Ibid at [78] and attachments JS5 and TK5.

<sup>3</sup> Ibid at [5]–[6] and attachments JS1 and TK1.

<sup>4</sup> Ibid at [7]–[8] and attachments JS2 and TK2.

- (2) The application must be lodged:
- (a) before an application has been lodged under section 44 in relation to the amalgamation; or
  - (b) with the application that is lodged under section 44 in relation to the amalgamation.
- (3) If the application is lodged before an application has been lodged under section 44 in relation to the amalgamation, the FWC:
- (a) must immediately fix a time and place for hearing submissions in relation to the making of the declaration; and
  - (b) must ensure that all organisations are promptly notified of the time and place of the hearing; and
  - (c) may inform any other person who is likely to be interested of the time and place of the hearing.

*Making of declaration*

- (4) If, at the conclusion of the hearing arranged under subsection (3) or section 53 in relation to the proposed amalgamation, the FWC is satisfied that there is a community of interest between the existing organisations in relation to their industrial interests, the FWC must declare that it is so satisfied.

*Pre-conditions to making of declaration*

- (5) The FWC must be satisfied, for the purposes of subsection (4), that there is a community of interest between organisations of employees 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
  - (b) engaged in the same work or in aspects of the same or similar work 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) employed in the same or similar work by employers engaged in the same industry as members of the other organisation or each of the other organisations; or

- (e) engaged in work, or in industries, in relation to which there is a community of interest with members of the other organisation or each of the other organisations.
- (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
  - (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.
- (7) Subsections (5) and (6) do not limit by implication the circumstances in which the FWC may be satisfied, for the purposes of subsection (4), that there is a community of interest between organisations in relation to their industrial interests.

*Circumstances in which declaration ceases to be in force*

- (8) If:
- (a) an application for a declaration under this section in relation to a proposed amalgamation is lodged before an application has been lodged under section 44 in relation to the amalgamation; and
  - (b) a declaration is made under this section in relation to the amalgamation; and
  - (c) an application is not lodged under section 44 in relation to the amalgamation within 6 months after the declaration is made;
  - (d) the declaration ceases to be in force.
- (9) The FWC may revoke a declaration under this section if the FWC is satisfied that there is no longer a community of interest between the organisations concerned in relation to their industrial interests.
- (10) However, before the FWC revokes the declaration, it must:
- (a) give reasonable notice of its intention to revoke to each of the organisations that applied for the declaration; and

(b) give each of those organisations an opportunity to be heard.

[3] As is clear from the provisions reproduced above, if, at the conclusion of the hearing arranged to deal with this application, I am satisfied that there is a community of interest between the NUW and UV in relation to their industrial interests, then I must declare that I am so satisfied. Satisfaction that there is a relevant community of interest *vis-a-vis* employee organisations is reached if there is satisfaction about one or more of the various matters in s.43(5) of the RO Act. However, s.43(5) does not limit the circumstances in which the Commission may be satisfied for the purposes of s.43(4) that there is a community of interest between the Applicants in relation to their industrial interests.

[4] There are terms in s.43(4) of the RO Act about which brief observations should be made. First, the assessment whether there is a community of interest between the Applicants is not at large; rather it must relate to their industrial interests. Secondly, the phrase “industrial interests” is not defined, but it has a long history forming part of the compound phrase “entitled to represent the industrial interests” of particular employees.<sup>5</sup> I accept, as the Applicants contended, the qualifier “industrial” is, in this context, to be understood in the broad sense of relating to employment of persons eligible for membership of a registered organisation.

[5] As to the matters in s.43(5) of the RO Act, each of the matters is to be assessed by reference to whether the matter identified pertains to a substantial number of members of one of the organisations concerned in the proposed amalgamation. In this connection, being concerned with number of members, I doubt that it is controversial that “substantial” means considerable, real, material, weighty, sizeable or non-trivial. A number may be substantial without it being a majority or the predominate number. In *Re Federated Australian University Staff Association*<sup>6</sup> Williams SDP considered the meaning of “substantial number of members” in s.241(5) of the *Industrial Relations Act 1988* which was in essence the same as s.43(5) of the RO Act save for the words “covered by the same modern awards” in s.43(5)(c), which in s.241(5)(c) read as “bound by the same awards”. His Honour said that a substantial number of members “does not mean a majority of members, but means a number of members that is of real importance or considerable as opposed to insubstantial or nominal when looked at in light of the total membership of the organisation concerned.”<sup>7</sup>

[6] Whether a thing is “substantial” may be assessed in absolute or relative terms. In the context of s.43(5) of the Act, “substantial” appears likely to require assessment in an absolute sense as seems clear from its use in the subsection which requires “a substantial number of members of one of the organisations” meeting one of the criteria in s.43(5)(a) to (e). A relative assessment might also be relevant. It seems to me that Williams SDP had such an assessment in mind in *Re Federated Australian University Staff Association*, given His Honour’s reference to the number of members being “looked at in light of the total membership of the organisation”.<sup>8</sup> This is a proportionate exercise or assessment.

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<sup>5</sup> See *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 at [16].

<sup>6</sup> (1991) 38 IR 108.

<sup>7</sup> *Ibid* at [112].

<sup>8</sup> *Ibid*.

[7] This must be correct. For example, an organisation of 100 members might have 40 that meet one of the criteria in s.43(5). In absolute terms 40 may not be a “significant number”, but in relative or proportionate terms it would be 40 per cent of the whole.

[8] It should also be clear from the text of s.43(5), arriving at a state of satisfaction as to any one of the matters in s.43(5) will be sufficient and it is plainly unnecessary to establish that a substantial number of members of one or of both organisations meet more than one of the characteristics in s.43(5)(a) to (e). Thus, if the Commission is satisfied that a substantial number of members of one of the organisations is characterised by one of the matters in s.43(5), it must make the community of interest declaration.<sup>9</sup>

[9] Each of the Applicants has broad eligibility coverage under its registered rules and a diverse membership working in multiple industries and occupations.<sup>10</sup> The number of industries in connection with which the respective Applicants are registered is, in the case of UV, 131<sup>11</sup> and in the case of the NUW, 57.<sup>12</sup> The NUW had 55,280 industrial members, 41 life members, 88 retired members, and 431 community members as at 30 January 2019.<sup>13</sup> UV had 100,605 industrial members, 280 life members, and 226 associate members as at 28 February 2019.<sup>14</sup>

[10] The Applicants contend that there is a community of interest between them in relation to their industrial interests on multiple grounds in s.43(5) of the RO Act. I agree for reasons that follow.

[11] There appears to me to be a substantial number of members of each Applicant who are eligible to become members of the other, as is evident from the following:

- as at 30 January 2019, approximately 5,921 members or 10.71 per cent of all members of the NUW were eligible to join UV;<sup>15</sup> and
- as at 28 February 2019, 2,736 members or 2.7 per cent of all members of UV were eligible to join the NUW.<sup>16</sup>

[12] It seems plain that whether assessed in absolute or relative terms, a substantial number of members of the NUW are eligible to become members of UV, and I am so satisfied. Though lower in number the same conclusion may be reached about members of UV *vis-a-vis* NUW eligibility. The number is not inconsequential or trivial.

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<sup>9</sup> See also *Printing Industries Association of Australia and Graphic Arts Services Association of Australia* [2012] FWA 8474 at [7] in relation to the counterpart but otherwise identically structured provision in s.43(6) concerning members of registered employer organisations.

<sup>10</sup> Exhibits 1 and 2 at [14] and attachments JS3 and TK3.

<sup>11</sup> Exhibit 1 and attachment JS3.

<sup>12</sup> Exhibit 2 and attachment TK3.

<sup>13</sup> *Ibid* at [11].

<sup>14</sup> Exhibit 1 at [11].

<sup>15</sup> Exhibit 3 at [10].

<sup>16</sup> Exhibit 1 at [20].

[13] There also appears to me to be a substantial number of members of one Applicant engaged in the same work or aspects of the same or similar work as members of the other. This is evident from the following. Ms Jo-anne Schofield is the National Secretary of UV. Mr Timothy Kennedy is the General Secretary of the NUW. Both gave evidence in the proceeding and said that they are aware of the nature of the work performed by their members.<sup>17</sup> There is no reason to suppose otherwise.

[14] Both Ms Schofield and Mr Kennedy gave evidence that there are substantial numbers of members of each Applicant engaged in aspects of the same or similar work in which members of the other Applicant are engaged. Ms Schofield said that she estimates that there are 15,243 members of UV (or approximately 15 per cent) who are engaged in aspects of the same or similar work as members of the NUW.<sup>18</sup> Mr Kennedy said that he estimates that there are 11,075 members of the NUW (or approximately 32.5 per cent) who are engaged in aspects of the same or similar work as members of UV. The number of members identified by approximation of each Applicant engaged in the same work or aspects of the same or similar work as members of the other is on any view a substantial number and I am so satisfied.

[15] As to whether there is a substantial number of members of one Applicant covered by the same modern awards as members of the other Applicant, there are eight modern awards that cover both UV and the NUW members. The awards where there is overlapping coverage and members in both Applicants are the *Food, Beverage and Tobacco Manufacturing Award*, the *Wine Industry Award*, the *Manufacturing and Associated Industries and Occupations Award*, the *Supported Employment Services Award*, and the *Horticultural Award*. As to these:

- the NUW has 16,925 members or 30.6 per cent, covered by modern awards that also cover UV members; and
- UV has 4,889 members or 4.9 per cent, covered by the same modern awards that also cover NUW members.<sup>19</sup>

[16] The number of members of the NUW covered by modern awards that also cover UV members is in my view a substantial number, whether assessed in absolute terms or in relative terms as a proportion of its membership viewed as a whole. The number of members of UV covered by awards that also cover the NUW members is a smaller number, however it is not insignificant and certainly is not trivial. Additionally, the NUW has 4,730 members or 8.5 per cent of its membership, covered by three awards who are also eligible to become members of UV. These are the *Poultry Processing Award*, the *Seafood Processing Award*, and the *Vehicle Manufacturing, Repair, Service and Retail Award*.<sup>20</sup> This fact is not relevant here, but I take it into account later in this decision. Accordingly I am satisfied that there is a substantial number of members of the NUW covered by the same modern awards as members of UV. Though lesser in number the same conclusion may be reached about members of UV *vis-a-vis* NUW members and overlapping modern award coverage.

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<sup>17</sup> Exhibits 1 and 2 at [20].

<sup>18</sup> Exhibit 1 at [20].

<sup>19</sup> Exhibits 1 and 2 at [21].

<sup>20</sup> *Ibid* at [23].

[17] Turning next to whether a substantial number of members of one of the Applicants are employed in the same or similar work by employers engaged in the same industry as members of the other Applicant.

[18] On the evidence there appears to be a number of members of each Applicant employed by the same employers who are contractors engaged under contracts with the Department of Defence to provide services to the Australian Defence Forces.<sup>21</sup> These employers are Broadspectrum (Australia), Compass Catering, Linfox Australia, the Menzies Group, Serco Australia Group, and Spotless Facilities.<sup>22</sup> These employers employ 251 UV members and 826 NUW members to perform the contracted work.<sup>23</sup> The work performed by UV members and the NUW members under those contracts is not identical, however these members are said to perform similar work in the sense that they offer support services (storage, cleaning, equipment management, ground maintenance, etc.) to the Australian Defence Forces. These members work side-by-side in the course of performing the work for the relevant employers.<sup>24</sup>

[19] The evidence also discloses that UV and the NUW are together involved in industrial negotiations concerning the terms under which these employers tender for work with the Department of Defence.<sup>25</sup> UV and the NUW have bargained and concluded two enterprise agreements covering the Applicants and are presently bargaining for a third enterprise agreement.<sup>26</sup> The Applicants have implemented a joint membership initiative at defence bases in South East Queensland whereby employees join one union but are treated as a member of both for the purposes of bargaining, industrial representation and assistance with workplace grievances.<sup>27</sup> As at 7 December 2018, there are 137 employees who are members of both UV and the NUW working at defence bases in Queensland under this arrangement.<sup>28</sup>

[20] There are some members of both Applicants employed to perform work by employers engaged in the same industry as members of the other Applicant, however I am not persuaded on the evidence that either number is substantial or that the work undertaken by them is the same or similar. At its highest the evidence discloses that these members perform work that is required by the contracts under which their employers are engaged. The evidence says little about the actual work undertaken or the common features of that work.

[21] I turn next to consider whether a substantial number of members of one of the Applicants are engaged in work, or in industries in relation to which there is a community of interest with members of the other Applicant. The Applicants contend that there are substantial members of both Applicants engaged in industries in relation to which there is a community of interest with members of the other Applicant.

[22] In support of this contention the Applicants prepared tables setting out the major areas of overlap of, among other matters, the industries in which members of each Applicant

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<sup>21</sup> Ibid at [27].

<sup>22</sup> Ibid at [28].

<sup>23</sup> Ibid at [30].

<sup>24</sup> Ibid at [31].

<sup>25</sup> Ibid at [33].

<sup>26</sup> Ibid at [34]–[35].

<sup>27</sup> Ibid at [36].

<sup>28</sup> Ibid at [37].

work.<sup>29</sup> The tables use the industry classifications from the Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006. There are four levels in the ANZSIC structure: division (letter), subdivision (two digit), group (three digit), and class (four digit).<sup>30</sup> The industries in the table are primarily denoted by subdivision and group. The number of members of each Applicant working in each industry fall within the following ANZSIC divisions and subdivisions:

ANZSIC Division and Subdivisions	ANZSIC Group (three digit) included in the tables at TK4 and JS4	Members working in the industries in TK4 and JS4	
		NUW	UV
<b><i>Division C - Manufacturing</i></b>		<b><i>17,627</i></b>	<b><i>2,747</i></b>
Subdivision 11 - Food Product Manufacturing	111 - Meat and Meat Processing	4,184	0
	112 - Seafood Processing	29	0
	113 - Dairy Product Manufacturing	4,483	120
	114 - Fruit and Vegetable Processing	542	5
	115 - Oil and Fat Manufacturing	80	0
	116 - Grain Mill and Cereal Product Manufacturing	1,799	12
	117 - Bakery Products Manufacturing	1,431	1,463
	118 - Sugar and Confectionary Manufacturing	104	1
	119 - Other Food Product Manufacturing	1,879	247
Subdivision 13 - Textile, Leather, Clothing, and Footwear Manufacturing	132 - Leather Tanning, Fur Dressing and Leather Product Manufacturing	58	263
Subdivision 18 - Basic Chemical and Chemical Product Manufacturing	182 - Basic Polymer Manufacturing	485	5
Subdivision 19 - Polymer Product and Rubber	191 - Polymer Manufacturing	2,553	631

<sup>29</sup> Ibid at [39] and attachments JS4 and TK4.

<sup>30</sup> Australian Bureau of Statistics, *Australian and New Zealand Industrial Classification 2006 (ANZSIC) (Revision 2.0)*, Catalogue 1292.0, at [1.21].



<b>ANZSIC Division and Subdivisions</b>	<b>ANZSIC Group (three digit) included in the tables at TK4 and JS4</b>	<b>Members working in the industries in TK4 and JS4</b>	
Product Manufacturing			
<b><i>Division F - Wholesale Trade</i></b>		<b><i>185</i></b>	<b><i>0</i></b>
Subdivision 36 - Grocery, Liquor and Tobacco Product Wholesaling	360 - Grocery, Liquor and Tobacco Product Wholesaling	185	0
<b><i>Division G - Retail Trade</i></b>		<b><i>147</i></b>	<b><i>1</i></b>
Subdivision 39 - Motor Vehicle and Motor Vehicle Parts Retailing	392 - Motor Vehicle Products and Tyre Retailing	147	1
<b><i>Division Q - Healthcare and Social Assistance</i></b>		<b><i>21</i></b>	<b><i>12,685</i></b>
Subdivision 84 - Hospitals	840 - Hospitals	21	12,685

[23] The evidence above discloses that in the manufacturing industry:

- the NUW has 19,680 members employed or 36 per cent of its membership;<sup>31</sup>
- UV has 4,573 members employed or 4 per cent of its membership;<sup>32</sup>
- the NUW has 17,627 or 32 per cent of its members employed in sub-sectors of the manufacturing industry in which members of UV are employed;<sup>33</sup>
- there is a high degree of overlap between members of both UV and the NUW working in the food products manufacturing sub-sector of the manufacturing industry;<sup>34</sup> and
- a high degree of overlap between members of both Applicants working in the polymer manufacturing sub-sector of the manufacturing industry.<sup>35</sup>

[24] It seems clear enough from the material above that a substantial number of members of one of the Applicants are engaged in some industries in relation to which there is a

<sup>31</sup> Exhibit 2 at [41].

<sup>32</sup> Exhibit 1 at [41].

<sup>33</sup> See table - Division C – Manufacturing.

<sup>34</sup> See table - Subdivision 11 and Exhibits 1 and 2 at [44]–[46].

<sup>35</sup> See table - Subdivisions 18 and 19 and Exhibits 1 and 2 at [47]–[49].

community of interest with members of the other Applicant. This is most evident in the manufacturing industry and the various subdivisions thereof. The community of interest between the members of the Applicants engaged in the manufacturing industry would include relevant modern award coverage as earlier noted. I am so satisfied.

[25] As earlier noted, s.43(7) provides, inter alia, that s.43(5) does not limit by implication the circumstances in which the Commission may be satisfied that there is a community of interest between the Applicants in relation to their industrial interests. I turn to consider some of the other matters raised by the Applicants as relevant to showing a community of interest between them in relation to their industrial interests.

[26] There is some authority for the proposition that a community of interest between registered employee organisations concerned in a proposed amalgamation in relation to their industrial interests may exist where the proposed amalgamation is designed to and would promote the rationalisation and effectiveness of union coverage and representation in a particular industry.<sup>36</sup> For the purposes of dealing with this issue I am prepared to accept that the proposition is correct.

[27] As to the evidence:

- the Applicants have substantial numbers of members working in common or aligned industries. There are 4,700 members or 8.5 per cent of members of the NUW who are employed in the supermarkets logistics supply chain, which is aligned with the food product manufacturing industry, in which approximately 2,000 members of UV are employed;<sup>37</sup>
- there are common enterprise agreements that cover members of the Applicants. There are eight enterprise agreements that cover 284 members of the NUW and 1,008 members of UV;<sup>38</sup>
- there is an apparent shared history and current practice with respect to the use of the organising model of trade unionism;<sup>39</sup>
- the Applicants share affiliations in political and industrial organisations including the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association, and Union Aid Abroad/APHEDA;<sup>40</sup>
- the Applicants share the right to nominate a joint director to the board of Manufacturing Skills Australia, an industry skills council responsible for the oversight and accreditation of vocational education and training;<sup>41</sup>

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<sup>36</sup> See *Australian Postal and Telecommunications Union and Australian Telecommunications Employees' Association/Australian Telephone and Phonogram Officers' Association* [1992] AIRC 193, [Print K K2276], per Williams SDP relying on the equivalent provision in the then s.241(7) of the Industrial Relations Act 1988 [His Honour erroneously refers to s.242(7) in his decision but this is clearly a typographical error].

<sup>37</sup> Exhibits 1 and 2 at [55].

<sup>38</sup> *Ibid* at [57].

<sup>39</sup> *Ibid* at [58]–[66].

<sup>40</sup> *Ibid* at [67]–[75].

- the Applicants participate in the same political and industrial campaigns;<sup>42</sup>
- the memberships of the Applicants share several socioeconomic and industrial characteristics (high numbers of low-paid members [two thirds of UV members and one third of NUW members]), which supports a view that the Applicants share a common industrial interest;<sup>43</sup>
- the Applicants have similar proportions of members:
  - from non-English speaking migrant backgrounds (approximately one third);<sup>44</sup>
  - employed on a part-time or casual basis (approximately one quarter);<sup>45</sup>
  - employed in contracted or labour hire industries (approximately one quarter);<sup>46</sup>
- a number of members of the Applicants work in industries where there is concern about high levels of workplace exploitation through sham contracting, wage underpayment, and cash-in-hand payment arrangements;<sup>47</sup> and
- both Applicants consider the biggest challenges facing their members to be job insecurity and low wages.<sup>48</sup>

**[28]** Taken together I consider that these matters show there is a community of interest between the Applicants in relation to their industrial interests and I am so satisfied.

**[29]** Pursuant to s.43(3)(b) I took steps to ensure that all registered organisations knew of the time and place for the hearing of this application. I also informed some other persons who I considered would likely be interested in the application of the time and place for the hearing. I issued directions for the filing of submissions and other materials. No submissions or other materials, other than those of the Applicants were filed. No person has indicated any opposition to the making of a declaration that is sought by the Applicants.

**[30]** As should be evident from these reasons I am satisfied on several bases that there is a community of interest between the Applicants in relation to their industrial interests. Consequently, I will make the required declaration.

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<sup>41</sup> Ibid at [73].

<sup>42</sup> Ibid at [80]–[82].

<sup>43</sup> Ibid at [76(a)].

<sup>44</sup> Ibid at [76(b)].

<sup>45</sup> Ibid at [76(c)].

<sup>46</sup> Ibid at [76(d)].

<sup>47</sup> Ibid at [76(e)] and [76(f)].

<sup>48</sup> Ibid at [77].

**Declaration**

[31] For the reasons stated and pursuant to s.43(4) of the *Fair Work (Registered Organisations) Act 2009* I am satisfied that there is a community of interest between the National Union of Workers and United Voice in relation to their industrial interests.



DEPUTY PRESIDENT

*Appearances:*

*Mr W Friend QC with Mr Y Bakri of Counsel for the Applicants.*

*Hearing details:*

2019.  
Melbourne:  
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5 June 2019

*Written submissions:*

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