



DECISION

Fair Work (Registered Organisations) Act 2009
s.159—Alteration of other rules of organisation

Australian Education Union (R2022/134)

MURRAY FURLONG

MELBOURNE, 10 MARCH 2023

Alteration of other rules of organisation.

[1] On 21 November 2022 the Australian Education Union, Australian Capital Territory Branch (the Branch) lodged with the Fair Work Commission (the Commission) a notice and declaration setting out particulars of alterations to its Branch rules.

[2] On the information contained in the notice, I am satisfied the alterations have been made under the rules of the organisation.

[3] The particulars propose a new set of Branch rules, which in effect alter most current Branch rules. Among other things, the proposed rules:

- consolidate all existing rules relating to elections into one Part (Part VI) and an election table;
- defer the annual elections of Delegates to Branch Council, sub-Branch positions and Branch TAFE positions from the start of the year to mid-year;
- replace existing rules with similar, equivalent provisions, and introduce minor changes throughout existing provisions; and
- re-order the rules.

[4] Alterations to existing rules of a minor nature include:

- changing the registered address of the Branch (Rule 2);
- changing some definitions, including the definition of “Principal member” and “continuous financial member” (Rule 3);
- removing some of the powers of the Branch, such as the power to build office premises (Rule 4);
- entitling members who are Branch employees, and who are also employed in an area covered by a sub-Branch, to be a member of the relevant sub-Branch and consequently attract the benefits of sub-Branch membership (new Rule 7);
- clarifying how members are assigned to Divisions (new Rule 5);
- changing the notice requirements for the creation, abolition or amalgamation of sub-Branches (new Rule 12);
- changing the procedures for dealing with misconduct of members and officers (new Rules 13 and 14);
- changing the notice and quorum requirements for meetings of Branch Council and Branch Executive (new Rules 9.5, 9,7 and 10.5);

- limiting who can be appointed to fill casual vacancies in the offices of Branch Secretary and Branch President (where the unexpired period of the term is less than 18 months) to Branch Executive members and Branch office staff (new Rule 10.6);
- changing the powers of the Branch to powers of the Branch Executive (new Rule 10.1);
- changing the duties of the Branch Secretary to include the power to deal with industrial disputes on behalf of the Branch (new Rule 32) and the execution of agreements (new rule Rule 22);
- changing the duties of the Branch President to include the power to make public statements on behalf of the Branch, and the power to deal with Branch industrial disputes on behalf of the Branch (new Rules 15.3 and 32);
- clarification of the offices which are elected ex-officio Federal Executive (new Rule 25.6);
- uncapitalise words as necessary; and
- introduce gender neutral language across a number of provisions.

- [5] A number of new rules have been introduced, including:
- new Rule 16 sets out the process to be followed in the event that a Branch member is alleged to have committed an offence and lists the measures the Branch Executive can take if a member is found guilty;
 - new Rule 18 requires the Branch to develop policies and procedures for its expenditure, defines what constitutes the Branch fund and sets out provisions in relation to fund withdrawals and disbursements; and
 - new Rule 29 allows meetings to be held via audio visual technology and the requirements in relation to setting up such meetings.

Alterations to the election of offices and positions

[6] Previous Rules 6, 16, 17, 18, 23, 24, 32, 33, 46 and 47, which relate to the conduct of elections for Branch Council and Executive members, Federal Delegates and Federal Executive members, Sub-Branch positions and Branch TAFE positions, have now been incorporated into a single section (Part VI - Elections). The provisions in Part VI are supplemented by an election table providing information in relation to each office on matters such as eligibility requirements, duration of office and regularity of elections.

- [7] The new Part VI introduces some minor changes, for instance:
- enabling nominations to be withdrawn up to seven days after the list of candidates has been provided to candidates (new Rule 25.5.4);
 - extending the period of a ballot (new Rule 25.6.3);
 - changing the date that certain Division members must be declared elected, though the date when the successful candidates take office is not changed (new Rules 25.4.2, 25.7.2, 25.8.2 and 25.9.2);
 - allowing for candidates for Branch President and Branch Secretary to attend a Branch Council meeting and provide an information sheet when ballot papers are posted to members to promote their candidacy (new Rule 25.2.2);
 - clarifying the tenure of office where the term commences after the date specified in the rules, to facilitate the synchronisation of elections within the Branch (new Rule 24.2); and
 - replacing references to outdated legislation where necessary.

Extension of term of office

[8] The provisions which were previously contained under Rules 11, 12, 16 and 46 dealing with the election of Branch Council Delegates, sub-Branch positions and Branch TAFE positions have been condensed across new Rules 12 and 25 and are also included in the new election table. The alterations defer the commencement of the elections for these offices and positions until after the start of the school year, with the term of office commencing on 1 July, instead of 15 March, in each year. This group of alterations will, in effect, extend a term of the office or position by over three months. The Branch has advised Commission staff that the 2023 elections have already commenced.

[9] There is a presumption that an alteration cannot retrospectively apply to past matters or events which have commenced but are incomplete at the time of the amendment. In *Beeson v Blayney*,¹ Joske J (with Spicer CJ and Eggleston J concurring) stated:

...there is a prima facie principle of construction that unless it appears expressly or by implication in rules as amended that they are intended in their amended form to apply to past matters or events, including matters commenced before but not completed at the time of the amendment, the amendments do not apply to the past or uncompleted matters.

[10] Consequently, the alterations which delay the commencement of the elections cannot apply to the elections currently underway. The term of the offices and positions currently subject to election will be subject to the provisions in the current rules.

Expulsion of members

[11] New Rule 16.1 relates to offences committed by Branch members and sets out the actions which can be taken by Branch Executive where such offences are found to have been committed, including, among other things, expulsion from membership. The new rule defines an offence as knowingly committing a breach of the rules, or willingly acting in a manner that is contrary to a decision of either Council or Executive.

[12] I note that current Rule 13 provides that, although not defined as an offence, members can be expelled from membership if found to have knowingly committed a breach of the rules, or to have willingly acted in a manner that is contrary to a decision of either Council or Executive.

[13] In my view Rule 13 has not been altered as part of these changes. In this regard I note the decision of the Full Bench of the Australian Industrial Relations Commission in relation to a similar issue of assessing rule alterations in *Re Australian Transport Officers Federation (ATOF)* where the Full Bench stated:²

The designated presidential member is obliged to form an opinion with respect to each alteration...It is appropriate to have regard to the substance of an extension or contraction of eligibility coverage made in the resolution of an organisation to alter its rules rather than to the form of the amending resolution. The ATOF amendment in this instance took the form of deleting the existing eligibility rule entirely and inserting a new sub-rule with changes to the existing rule incorporated. That form of amendment does not of itself render the whole of the proposed new sub-rule an alteration within the meaning of s 204. The words added to the aggregation of words which constitute the existing rule are the alteration...

[14] In the alterations currently before me, current Rule 13 is re-numbered and the actions for which a member may be expelled are framed as offences. That part of the rule which identifies behaviours that could result in expulsion has not been altered. Drawing from the reasoning in *ATOF*, the question of whether that part of new Rule 16.1 is capable of certification is not a matter for my consideration.

[15] If I am incorrect in my reasoning and that part of new Rule 16.1 is an alteration, I must consider whether this alteration complies with the *Fair Work (Registered Organisations) Act 2009* (the Act).

[16] Rules must provide for the times when and the terms on which persons cease to be members (other than by resignation).³ When considering alterations to rules which provide for the terms on which persons cease to be members, regard must be had to subsection 142(1)(c) of the Act, that is the alterations must not impose conditions, obligations or restrictions that, having regard to Parliament's intentions and the objects of the Act, are oppressive, unreasonable or unjust.⁴

[17] Removal from membership for failing to comply with resolutions of an organisation's committee of management has been found to be so vague and uncertain as to impose an unreasonable condition on members.⁵ However a rule providing for removal for refusing to abide by a resolution was held to be valid as the notion of 'refusal' required the resolution be brought to the attention of the member.⁶

[18] Proposed Rule 16.1 provides that removal from membership can only occur in the instance of *willingly* acting in a manner that is contrary to a decision of either Council or Executive. I have had regard to the use of the word "willingly", which is somewhat ambiguous. This term could equally apply to the simple carrying out of an action according to will without knowledge of the decision, as it could to knowingly acting contrary to a decision.

[19] Whilst the first interpretation could arguably bring about an outcome which could be considered oppressive, unjust or unreasonable to a member, harsh application of a rule does not make the rule oppressive, unreasonable or unjust.⁷ In considering new Rule 16.1 I have reached the conclusion that there must necessarily be a mental component requiring conscious will to act in manner contrary to such a decision, and that “willingly”, should on its face, be interpreted in this instance to have such a meaning.

[20] Further, new Rule 16 sets out a process which incorporates the principles of procedural justice and which must be followed before a person can be removed from membership under proposed Rule 16.1.

[21] In these circumstances I am satisfied that new Rule 16.1 does not impose conditions, obligations or restrictions that, having regard to Parliament’s intentions and the objects of the Act, are oppressive, unreasonable or unjust.

Entitlement to become a member

[22] Subsection 166(1) of the Act provides:

- (1) Subject to any modern award or order of the FWC, a person who is eligible to become a member of an organisation of employees under the eligibility rules of the organisation that relate to the occupations in which, or the industry or enterprise in relation to which, members are to be employed is, unless of general bad character, entitled, subject to payment of any amount properly payable in relation to membership:
 - (a) to be admitted as a member of the organisation; and
 - (b) to remain a member so long as the person complies with the rules of the organisation.

[23] Proposed Rule 16.8 provides that any expelled member shall not be readmitted to membership. Subsection 166(1) provides that any eligible person is entitled to join the union, unless of general bad character or have not paid any amount properly payable in relation to membership. In my view proposed Rule 16.8 does not comply with subsection 166(1) of the Act.

[24] Proposed Rule 16.8, which deals with readmittance of expelled members, differs from the other parts of proposed Rule 16. These deal with the process to be followed when an allegation of misconduct is made and the potential penalties if a finding of guilt is made. I am satisfied that proposed Rule 16.8 is severable from the other alterations in light of the principles set out by the majority in *Re Food Preservers’ Union of Australia* (1988) 79 ALR 138. In particular, I am satisfied that the remaining alterations operate independently of proposed Rule 16.8 and severance will not affect the meaning and effect of the remaining alterations.

[25] On 1 March 2023, Patrick Judge, Branch Secretary, gave consent, under subsection 159(2) of the Act, for me make various amendments to the alterations for the purpose of correcting typographical, clerical or formal errors. Accordingly, the following corrections have been made:

- At proposed Rule 10.3.3(a) the words ‘(excluding school assistants)’ are to be added following the words ‘eight public school sector of the ACT delegates’.

[26] In my opinion, with the exception of proposed Rule 16.8, the alterations comply with and are not contrary to the Act, the *Fair Work Act 2009*, modern awards and enterprise agreements, and are not otherwise contrary to law. I certify accordingly under subsection 159(1) of the Act.



GENERAL MANAGER

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¹ (1966) 8 FLR 292; Spicer CJ, Joske, Eggleston JJ, per Joske J at 294.

² *Re Australian Transport Officers Federation; Re Australian Shipping & Travel Officers Association* (1990) 35 IR 29 at 304

³ Subsection 141(1)(b)(ii) requires that rules:

...

(b) must provide for:

...

(vii) the times when, and the terms on which, persons become or cease (otherwise than by resignation) to be members

⁴ Subsection 142(1)(c) provides that rules:

must not impose on applicants for membership, or members, of the organisation, conditions, obligations or restrictions that, having regard to Parliament's intention in enacting this Act (see section 5) and the objects of this Act and the Fair Work Act, are oppressive, unreasonable or unjust

⁵ *Hardiman v Transport Workers Union of Australia* (1954) 80 CAR 232 at 236

⁶ *Holmes v Federated Clarks Union of Australia* (1956) 1 FLR 1 at 3

⁷ See *O'Sullivan v AWU* (1938) 39 CAR 323; *Allshorn v Stapleton & Ors* (1984) 4 FCR 236

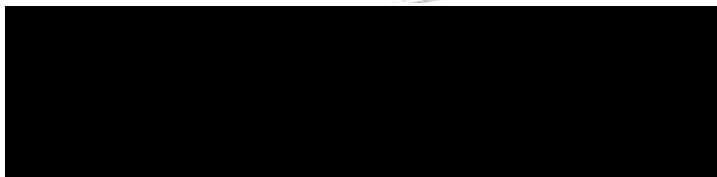
CONSENT OF AUTHORISED OFFICER in accordance with Section 159(2) of the *Fair Work (Registered Organisations) Act 2009*

I, Patrick Judge of Level 1, 71 Leichhardt Street Kingston am the Branch Secretary of the Australian Education Union – Australian Capital Territory Branch and am authorised to give consent under section 159(2) of the *Fair Work (Registered Organisations) Act 2009* to the General Manager (or his Delegate) to amend the alteration for the purpose of correcting a typographical, clerical or formal error.

Alterations to the rules of the Australian Education Union – Australian Capital Territory Branch were notified to the Fair Work Commission on 21 November 2022. I give consent for the General Manager to amend the alterations for the purpose of correcting the following typographical, clerical or formal errors:

1. At new Rule 10.3.3(a) the words '(excluding school assistants)' are to be added following the words 'eight public school sector of the ACT delegates'.

Signed and dated by an officer authorised to give consent.



1 MARCH 2023

PATRICK JUDGE, BRANCH SECRETARY

[PLEASE NOTE: This Consent Form must contain details of the errors to be corrected and the correction that is being consented to; a failure to identify and explain the corrections is likely to be insufficient to allow the General Manager or his Delegate to alter the particulars. This Consent Form can be emailed back to the ros@fwc.gov.au email address or sent directly to the action officer handling your matter.]

DECLARATION OF AUTHORISED OFFICER in accordance with Regulation 126 *Fair Work (Registered Organisations) Regulations 2009*

ALTERATION OF OTHER RULES OF ORGANISATIONS in accordance with section 159 of the *Fair Work (Registered Organisations) Act 2009*

I, PATRICK JUDGE of LEVEL 1, UNIT 16, 71 LEICHHARDT STREET, KINGSTON, AUSTRALIAN CAPITAL TERRITORY am the BRANCH SECRETARY of the AUSTRALIAN EDUCATION UNION ACT BRANCH and am authorised to give this notice of particulars of alterations to the rules of AUSTRALIAN EDUCATION UNION ACT BRANCH and to make this declaration as required by Regulation 126 of the *Fair Work (Registered Organisations) Regulations 2009*.

1. I declare that the alterations were made in accordance with the rules of the AUSTRALIAN EDUCATION UNION ACT BRANCH.
2. The particulars of the rule alterations are attached to this declaration and labelled 'Schedule A'.
3. The altered rules are attached to this declaration and labelled 'Schedule B'.
4. The actions taken under the rules to make these alterations were as follows:
 - (a) Pursuant to rule 40 of the Branch Rules, the proposed alteration of rules must be proposed by Branch Executive and presented and agreed to by Branch Council.
 - (b) On 10 August 2022, the Branch Secretary, in accordance with rule 25(A), gave notice to each Branch Executive Member of proposed rule alterations to be considered at the next Branch Executive meeting on 17 August 2022.
 - (c) At the Branch Executive meeting on 17 August 2022, it was agreed by the Branch Executive to not vote on approving the proposed rule alterations and to consider the proposed rule alterations at the next Branch Executive meeting on 14 September 2022. The reason for this was to provide further time to Branch Executive members time to review the proposed rule alterations.
 - (d) On 7 September 2022, the Branch Secretary, in accordance with rule 25(A), gave notice to each Branch Executive Member of the proposed rule alterations to be considered at the next Branch Executive meeting on 14 September 2022.
 - (e) At the Branch Executive meeting on 14 September 2022, the proposed rule alterations were presented to the Branch Executive.
 - (f) 13 Branch Executive Members were in-attendance of a possible 15 on 14 September 2022. Pursuant to rule 26, the Branch Executive meeting was quorate.
 - (g) During discussion of the proposed rule alterations, the Branch Executive sought to amend the proposed rule alterations by removing the words "Branch Officers" from the proposed rule 15.2.5. Members of the Branch Executive also requested further

information regarding the role of Branch Vice President as contained in the proposed rules 15.4 and 15.5. Branch Executive requested that the Branch Secretary take these matters on notice for further discussion at the next Branch Executive meeting on 19 October 2022.

(h) The Branch Executive moved the following motion:

That Branch Executive recommends that Council adopt the new set of Branch Rules as presented.

- (i) 13 voted in support of the motion. There were 0 votes against and 0 abstentions. The motion to recommend the proposed rules to Branch Council was, therefore, carried.
- (j) On 14 October 2022, the Branch President provided notice, pursuant to rule 19(B), to Branch Councillors of a Branch Council meeting to be held on 22 October 2022. Included in that notice was a copy of the proposed rule alterations recommended by Branch Executive, pursuant to rule 40(b).
- (k) On 22 October 2022, the Branch Council meeting was held. 89 Branch Councillors were present of a total of 214 Branch Councillor eligible to attend and vote. Pursuant to Branch Rule 21, the meeting was quorate as there were more than 30% of Branch Councillors in attendance who were eligible to attend and vote.
- (l) An amendment to the proposed rules was moved from the floor of Branch Council, following a recommendation from the Branch Executive following their meeting on 19 October 2022. The amendment moved by Branch Council was in relation to proposed rules 15.2.5, 15.4 and 15.5. The amendments related to powers and responsibilities of the Branch Secretary to include direction and control of Branch Officers in the context of the administration of the Branch, as well as including additional responsibilities to the positions of Branch Vice President (public school sector) and Branch Vice President (public vocational education and training sector).
- (m) The amendments to the proposed rules moved were as follow as follows:

Amendment to rule 15.2.5 to read as follows:

15.2.5 be responsible for the administration of the Branch, the direction and control of Branch Officers, staff and other employees;

Amendment to rules 15.4 and 15.5 to read as follows:

15.4. The Branch Vice Presidents (public school sector):

15.4.1 will assist the Branch President in the execution of their duties;

15.4.2. will carry out the instructions of the Branch Council, Branch Executive, Branch President or Branch Secretary;

15.4.3. will represent the Union as required;

15.4.4. will be honorary positions;

15.4.5. may, in the absence of the Branch President, chair Branch Council and Branch Executive and exercise the same powers the Branch President would in presiding over the meeting.

15.5. The Branch Vice President (public vocational education and training sector) will:

15.5.1 will assist the Branch President in the execution of their duties;

15.5.2. will carry out the instructions of the Branch Council, Branch Executive, Branch President or Branch Secretary;

15.5.3. represent the Union as required;

15.5.4. chair meetings of the Branch TAFE Council; and

15.5.5. be an honorary position.

(n) 89 voted in support of the motion to include the amendments to the proposed rules as contained in paragraph (m) above. There were 0 votes against and 0 abstentions. Therefore, the amendments were included into the proposed rule alterations to be considered by Branch Council.

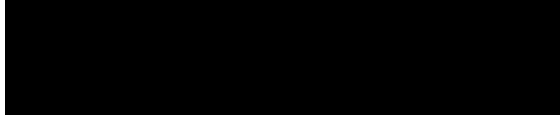
(o) Branch Council then moved the following motion in relation to the proposed rules presented to them with the amendments as contained above:

Council adopt the new set of Federal Branch Rules in relation to the ACT Branch as proposed by Branch Executive and as presented to Council. Council instructs the Branch Secretary to lodge these changes with the Fair Work Commission.

(p) 89 voted in support of the motion. There were 0 votes against and 0 abstentions. The motion to adopt the proposed rules was, therefore, carried.

5. I declare that the particulars set out in this notice are true and correct to the best of my knowledge and belief.

Date: 21/11/2022



Patrick Judge
Branch Secretary
Australian Education Union ACT Branch

Schedule A

A summary of the rule changes change be found below:

Former Rule/s	Proposed Rule/s	Nature of change
Rules 6, 16, 17, 18, 23, 24, 32, 33, 46 & 47 – all relating to elections	Contained in section VI and in the Election Table.	Consolidate rules regarding elections currently spread throughout existing rules into a new 'Section VI Elections' and places detail in an Election Table.
Rules 11, 16 & 46	Rules 25.3.1 and Election Table.	It is proposed that these elections be moved from the beginning of the year to the middle of the year. The one year term of office would be 1 July – 30 June. This enables sub-branch lists to be updated following major staff movements at the beginning of the year. Sub-branch representative training will occur in the second half of the year noting that reps make significant decisions (eg Enterprise Agreement Implementation Plan) in the first half of the year. It is proposed that the same timing be used for TAFE subbranches and TAFE Council.
Rules 13 & 14	Rule 15.7	Replaces these two rules with a new rule 'Resignation and Removal from Office' that gives Branch Executive authority to make decisions regarding the suspension and removal of a Branch Officer in certain circumstances. Removes the ambiguity in previous rule 13 as well as the multiple part process involving a rules committee, then Branch Executive and potentially Council in making decisions about suspension or dismissal from office.
Rule 27	Rule 10.6.2	Changed to create a specific process for dealing with a casual vacancy in the office of Branch Secretary or Branch President.
N/A	Rule 4	This is the addition of a new rule to provide clarity on aspects of the rules.
Rule 4	Distributed to various rules, including rules 9.1, 10.1 & 13.5.	The previous rule 4 defined the powers of various parts of the Branch. The proposal is to distribute the powers distributed among the governance bodies with responsibilities for those specific powers.
Rule 7	Section II - Membership	Replaced by new Section II 'Membership' that is largely unchanged except for the inclusion of reference to members being assigned to a Division, as required by the Federal Rules.

N/A	Rule 15.1	This clarifies that the Branch Officers are the Branch Secretary, Branch President and Vice-Presidents. Minor changes have been made to the roles of the Branch Secretary and Branch President.
N/A	Rule 25.2.2	Changed to provide for candidates of the positions of Branch Secretary and Branch President to provide an information sheet that is included in the ballot envelope.
N/A	Rule 25.6	Changed to specify that the Branch President shall hold the first Federal Executive position and specifies a process for electing further positions if the Branch becomes entitled to them.
References to sub-branches	Various	Global change to 'sub-branch', or 'sub-branches' throughout, not Sub-branch or Sub-Branch.
Gender neutral language	Various	He/She, him/her pronouns changed throughout to be gender neutral.