Fair Work Commission

Model Rules: Companion Reader

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This Companion Reader is not legal advice.

It is designed as an aid to assist you in your use of the Model Rules.

While staff of the Registered Organisations Services Branch can provide you with advice and assistance about your rules and any proposed alterations to them, they are not able to provide you with legal advice.

When you are considering altering your rules you should:

- undertake your own examination of your rules and proposed alterations to ensure that they are compliant with the *Fair Work (Registered Organisations) Act 2009* (Cth) as meet your desired outcomes, and
- if you wish to do so, seek your own competent, independent legal advice.

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Rules of registered organisations

Every organisation registered under the *Fair Work (Registered Organisations) Act 2009* (the RO Act) must have a rule book. Your rule book must meet specific and sometimes complex requirements.

The Fair Work Commission (the Commission) has created Model Rules to:

- comply with the requirements of the RO Act and case law
- recognise practical requirements
- embed good governance into organisational practices
- improve efficiencies for organisations and the Commission
- be user-friendly, have a logical structure and use plain language
- have explanations that help people understand the rules, case law and the underlying requirements
- be a living document that is responsive to feedback from stakeholders and future changes to the law.

There are two sets of Model Rules. The rule book you should use will depend on whether your organisation has branches.

- For organisations with branches – refer to the Federated rule book.
- For organisations without branches – refer to the Unitary rule book.

It is important to note that, subject to the requirements of the RO Act:

> '…the content of the rules of a registered organization is primarily a matter for the members.'[1]

The Model Rules are a guide to assist organisations to frame their rules to comply with the RO Act. You are not required to adopt them.

[1] *Municipal Officer's Association of Australia v Lancaster* (1981) 54 FLR 129 at 164.

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Drafting the Model Rules – Thank you

The Model Rules and this Companion Reader are drafted by subject matter experts who have significant experience in the drafting and interpretation of rules of registered organisations, including Peter Punch of Carroll & O'Dea Lawyers. The Model Rules include feedback and assistance from registered organisations, the Registered Organisations Advisory Committee and the Compliance Practitioners' Reference Group, leading experts in the field and the Australian Electoral Commission. The Commission thanks everyone who contributed to this project.

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The Model Rules Guidance Material

There are two significant pieces of guidance material that accompany the Model Rules. They are:

- Model Rules: Companion Reader (this document)
- Model Rules: User Guide

Model Rules: Companion Reader

The Model Rules: Companion Reader provides in-depth information on concepts that underpin, and provide context to, the Model Rules. It will assist you with understanding the Model Rules and rules in general. It is not intended to be, or to replace, legal advice. It contains information on important areas of law that are not included in the annotations to the Model Rules.

How to use this Companion Reader

The Companion Reader on the Model Rules is not designed to be read from start to finish. It is meant to be read by topic, as needed, to better understand the legal and practical issues that surround a particular rule.

It is also designed to be read in conjunction with the annotated Model Rules found here:

- Federated Model Rules
- Unitary Model Rules

Model Rules: User Guide

The Model Rules: User Guide will help you read the Model Rules, including how to:

- interpret the signals and rule descriptions used in the Model Rules
- use the Model Rules for the drafting of rules for a registered organisation
- understand how to read the Model Rules for research, drafting or learning purposes
- consider and obtain a better understanding of the Model Rules published by the General Manager of the Commission.

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A: Branches of an organisation

A1: Branches - General

Branches are a common feature of registered organisations.

Model Rules cross reference

In the federated model rule book, branches are established in Part E and have rules in Parts H to K.

Branches are often arranged on geographical boundaries, such as state and territory lines, but are sometimes based on other criteria – e.g. occupation or area of business.

Once an organisation has branches, those branches have significant regulatory obligations relating to:

- financial reporting
- financial training
- elections
- disclosures.[2]

Branches have regulatory obligations

The decision to establish branches is important, as they can require resources to meet the separate regulatory requirements imposed upon them.

Branches of organisations can have their own rules and elected officers, as well as responsibility for their own affairs, including their financial affairs under those rules and under the RO Act.

[2] RO Act Chapters 7, 8 and 9.

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A1.1 The RO Act

The RO Act regulates and provides for external supervision of branches of organisations.[3] Many of the RO Act's requirements relating to the rules of an organisation are also required of the rules of a branch. The RO Act makes some additional provisions in relation to branches, such as the making of rules by an organisation concerning 'branch autonomy'[4] and 'branch funds'.[5]

A branch of an organisation is a 'reporting unit' for the purposes of the 'Records and Accounts' Chapter of the RO Act, unless the General Manager of the Commission decides otherwise.[6] This means that branches are required to keep financial records, prepare financial statements, ensure they are audited and provide the audited financial reports to its members and to the Commission. Branches have the same financial reporting obligations that the organisation has at the national level. If your rules provide for branches, you must be aware of the regulatory obligations imposed on branches.

A1.1 Can you have divisions that are not branches?

Your rules can divide your members into different groups. If a group or a division of members is purely advisory they are unlikely to be branches; they allow for the sectoring of members but minimise regulatory obligations. The Model Rules do not have advisory divisions, they have branches.

3 For example RO Act sections 189, 190, 198, 200, 234, 237, 242, 252–254, 256, 265–268, 285–290 and 293B–293M.

4 RO Act section 154A.

5 RO Act section 154B.

6 RO Act section 242 (3).

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Advisory divisions and elections

It is possible to draft a rule book that has divisions that are just advisory (even based upon geographical areas). These are unlikely to be branches. This prevents those divisions from attracting the regulatory obligations of branches. If you are seeking to draft advisory structures, please contact the Commission for advice and assistance.

Advisory structures usually **do not have officers,** as they have insufficient management responsibility. Committees in charge of advisory divisions usually do not need to be elected and **cannot** be a tier of a collegiate election.[7]

The Model Rules make extensive provisions for the affairs of a branch within the rule book for a Federated organisation.[8]

The following sections will help you understand when an advisory structure might get sufficient independence and risk becoming a branch.

A2: What is a branch?

Whether an organisation **wants** branches is determined by the organisation. However, whether an organisation **has** branches is determined by an analysis of its rules and the divisions of members that they establish (including their powers and responsibilities). There is no definition of a 'branch' in the RO Act. Case law has provided guidance on the question. Whether something is a branch is not determined by what it is called in the rule book. For a division to be a branch depends on a number of factors and it must have sufficient governance and autonomy to manage its own affairs.[9]

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7 *Sherrif v Townsend* (1980) 48 FLR 20 at 34, 45 and 55; *Municipal Officers' Association of Australian v Lancaster* (1981) 54 FLR 129 at 145 and 154; *Re The Master Plumbers' and Mechanical Services Association of Australia* [2015] FWCD 3951.

8 See Model Rules – Federated rule book – Parts H to K.

9 *Allen v Townsend* (1977) 31 FLR 431; *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Fohmsbee* (1998) 83 FCR 161.

Unintentional branch status change

While it is ultimately up to an organisation whether it wants branches, it is possible for an organisation to unintentionally:

- create branches (and hence branch officers), by giving advisory divisions too much power or autonomy OR
- unmake existing branches (and all the officers), by removing certain powers and reducing autonomy.

A branch immediately attracts the legal obligations under the RO Act. You should draft carefully if you are making changes to the powers and autonomy of advisory divisions. Additionally, if you remove powers from branches to make them less self-governing, you risk undermining their branch status. This can negatively impact a multi-tier electoral structure. You should consider seeking advice and assistance from the Commission.

The following general guidance can assist if you have divisions of members within your organisation and you:

- are unsure as to whether the divisions are branches for the purposes of the RO Act, or
- wish to ensure that divisions either are or are not branches.

You can also seek professional advice.

A2.1: Calling something a ‘branch’

Calling a division of members a ‘branch’ does not automatically make that division a ‘branch’ for the purposes of the RO Act. The division must satisfy the definition of that expression as developed by case law.

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A2.2: The case law

There have been several significant Federal Court decisions that have dealt with the definition of a branch. These decisions are cited and discussed in the decision of the Court that is the main authority on the question – *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Fohmsbee* ('*Fohmsbee*').[10]

In *Fohmsbee,* the three judges[11] were unanimous in their view that the group or section of the relevant union was a branch. However, they differed on how a branch should be defined, with Wilcox J taking a wider view than Northrop and Madgwick JJ.

Wilcox J could see no reason why a locally organised section of the membership, even a subsection that follows a calling, residing within a geographic area called a 'Region', cannot be properly described as a branch of the organisation for the purposes of the definition of 'office'.

Northrop and Madgwick JJ took a narrower view of how a branch is defined. Northrop J said:

> 'It [the word 'branch'] is used to describe a group of members of an organisation which under the rules of the organisation or other lawful authority are formed together for the better management of the affairs and objects of the organisation within the bounds of the authority conferred on that group.'

Madgwick J took a similar view:

> '…whether a body within an organisation is a 'branch' may very well depend on matters of degree. Ephemeral and ad hoc, or insufficiently clearly delimited, collections of union members may not warrant the appellation. Neither may mere divisions of the membership unaccompanied by some substantial power of independent action or some substantial degree of internal self government.'

Over time the case law has outlined that what is a branch is determined by a collection of factors.

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[10] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Fohmsbee* (1998) 83 FCR 161.

[11] Wilcox, Northrop and Madgwick JJ in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Fohmsbee* (1998) 83 FCR 161.

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A2.3: Key factors

Factors indicating that a division of members is a branch include:

- it has autonomy in relation to its own affairs[12]
- its own committee of management for its governance, with a list of powers and duties[13]
- having their own rules governing their affairs[14]
- branch financial members control its committee of management through elections[15]
- it has control and management of property (even though legal title must remain in the name of the organisation)[16]
- it can notify industrial disputes to the Commission where such disputes only concern the members of the branch[17]
- it has autonomy over its involvement in any State industrial relations system.[18]

Not all of the factors listed above need to be satisfied for a division of members to be considered a branch; it is a balance. For example, the divisions of members described as branches in the Model Rules meet most of the factors for being a branch,[19] but they cannot remove their own officers from office or alter any of the Rules of the organisation (including the rules relating to branches).[20] These are outweighed by other factors, such as having an elected committee of management and the ability to manage and control branch funds and property.

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12 *Allen v Townsend* (1977) 31 FLR 431 at 439–441; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Fohmsbee* (1998) 83 FCR 161.

13 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Fohmsbee* (1998) 83 FCR 161 at 187.

14 *Allen v Townsend* (1977) 31 FLR 431 at 441.

15 RO Act section 6, definition of 'direct voting system' and 'collegial electoral system', and section 143.

16 RO Act section 154B; *Williams v Hursey* (1959) 103 CLR 30 at 53-54; *Allen v Townsend* (1977) 31 FLR 431 at 441.

17 *Allen v Townsend* (1977) 31 FLR 431 at 439–441.

18 RO Act section 154A.

19 See Model Rules – Federated rule book, Part E and Parts H to K.

20 See Model Rules – Federated rule book, Part D and Part G.

If a division of members does not meet all of the factors listed above, it will depend on the facts and circumstances as to whether the group is a 'branch' of the organisation or not. One significant matter will be the degree of internal self-governance the division possesses under the rules of the organisation.

A3: What is the legal status of a branch of an organisation?

A branch of a registered organisation has no legal status. It is not separate from the organisation of which it forms part. A branch is an administrative section of a larger legal entity – the organisation.[21]

A branch can:

- have a relative amount of autonomy given to it under the rules
- control its own finances (but it does not own the finances)
- have officers and manage its own affairs.

A branch cannot:

- own property or own bank accounts (although it may control funds, they belong to the organisation)
- sue another person
- exist separate to the organisation as a whole.

The High Court in *Re McJannet* has said:

'A branch of a federal industrial organisation is not a person; it has no existence apart from that of the members of the branch. The word 'branch' in that context is no more than a collective noun which, although singular in form, is used with a plural implication. That was made clear in *Williams v Hursey* by Fullagar J, with whom Dixon CJ and Kitto agreed, when he pointed out that a branch of a federally registered organisation has no corporate character and no separate existence as a juristic person.

…

[21] *Williams v Hursey* (1959) 103 CLR 30 at 54-55; *Re McJannet; Ex parte Minister for Employment Training and Industrial Relations (Qld)* (1995) 184 CLR 620 at 639–640.

> In the present case the words 'branch of an organisation' contained in the definition of 'office' in the Act is used in the sense of a collective noun which although singular in form is used with a plural implication. The word 'branch' is not used as identifying an entity or body. It is used to describe a group of members of an organisation which under the rules of the organisation or other lawful authority are formed together for the better management of the affairs and objects of the organisation within the bounds of the authority conferred upon that group.'[22]

Branches may have their own rules and the ability to manage property and funds but this is for convenience only. Legal ownership of property and funds always remains with the organisation. All authority in the branch flows from the rules of the organisation.[23]

If a branch breaches the RO Act (or any other legal obligation) the organisation is responsible. The organisation will be prosecuted for non-compliance and be liable for any fines or consequences.[24] For this reason, some rule books have less autonomy or more active national control over branches.

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22 *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620, 640–641, citing *Williams v Hursey* (1959) 103 CLR 30 at 54–55.

23 *Williams v Hursey* (1959) 103 CLR 30 at 53–54; confirmed in *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620 at 640–663.

24 See for example, *Registered Organisations Commissioner v Australian Hotels Association* [2019] FCA 1516 and *Communications, Electrical, Electronic, Energy, Information Postal, Plumbing and Allied Services Union of Australia v Registered Organisations Commissioner* [2020] FCAFC 232.

Balance in the Model Rules

The Model Rules balance the tension between national responsibility and state autonomy by:

- keeping removal of officers (including branch officers) at the federal level
- placing express obligations on the Branch Secretary to provide information to the National Secretary
- tying the abolition and creation of branches to the national rule making body
- using universal branch rules that are only able to be altered at the national level
- giving branches management of subscriptions and membership records.

The Federated version of the Model Rules published by the Commission includes extensive rules for branches. Specific rules give more detailed commentary about the legal status of branches in the annotation, especially in connection with the control and management of property and funds.[25]

[25] See Model Rules – Federated rule book – Parts E, F and K.

State associations

A state association is a group of like-minded persons who associate for a common purpose at state-level. References to state associations in the Model Rules and this Companion Reader are references to state-based industrial associations (unions and employer associations). Often state-based unions and employer associations will register under the laws of the state in which they operate (state registered associations).

Sometimes a branch of an organisation registered under the RO Act is a copy or a 'shell' of an existing state association. For example, a NSW branch of an organisation might be a copy or 'shell' of an industrial association registered under NSW laws. The officers in the branch may hold the same offices in the state association. They may have a similar name and have similar members.

The federal branch is not a legal entity – it is only part of the larger national registered organisation.

The state registered association is a legal entity, separate from branch and the national registered organisation.

This means you must be clear which:

- property belongs to the organisation and which to the state association
- bank accounts belong to the organisation and which to the state association
- office is signing documents (or what hat the officer is wearing when they sign)
- committees are meeting.

A common error is to assume that there is a shared 'pool' of assets. The branch cannot own things in its own name, and it usually cannot share the organisation's assets with a separate legal entity.

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A4: Abolishing or creating branches

Once an organisation is established, it may need to abolish or create a branch. This may be the result of:

- changing membership numbers
- changes in the structure of the industry
- efficiency or governance concerns
- a desire to reduce regulatory requirements

An organisation can structure itself however it sees fit.[26] However, if an organisation is planning to abolish or create a branch the decision must be a bona fide decision of the organisation and must not impose oppressive, unreasonable or unjust conditions on members.[27]

The creation of new branches or abolition of existing branches can have an oppressive, unreasonable or unjust impact on members by:

- altering, diluting or increasing the democratic representation of particular members either at branch or federal level[28]
- improving, removing or limiting access for particular members to become officers.

The Model Rules can assist if you are seeking to establish or abolish branches. However, we recommend that you seek advice from the Commission as soon as possible. There are considerable regulatory requirements that may inform your decision. Please also refer to our guidance note on branch changes.

Abolishing or creating a branch will also likely have the effect of abolishing or creating offices. Please see more information below under D: 'Office' under the RO Act.

[26] See *Saint v Australian Postal and Telecommunications Union* (1977) 30 FLR 385 at 393; *Hills v Higgins* (1982) 61 FLR 131 at 143; *Roughan v Coulson* (1982) 3 IR 393 at 396; *Benson v Construction, Forestry, Mining and Energy Union* (1995) 60 IR 394 at 401–402.

[27] *Imlach v Daley* (1985) 7 FCR 457 and *Bramich v Transport Workers Union* (2000) 97 FCR 204.

[28] *Thornton v Mackay* (1946) 56 CAR 561; *Bramich v Transport Workers Union* (2000) 97 FCR 204.

Impact of abolishing branches on elections

If a branch is abolished, or the branch is turned into an advisory body, this will likely result in officers being removed from office. This is because the office has been abolished or changed to a position. Positions can be filled by election or appointment; however, they cannot form part of a college that votes for other officers.

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B: Democratic control

The principles of democratic control by, and participation of members in, an organisation are central to the entire system of registration and accountability of organisations under the RO Act. They are important requirements for the rules of every registered organisation and are frequently mentioned in the Annotations/Notes to specific Model Rules.

Model Rules cross reference

Democratic control of the organisation is primarily contained in:

- Part D – National Governance which includes a national executive, national conference, meetings of members and plebiscites.
- Part J – Branch Governance which includes a branch executive, branch conference, meetings of branch members and branch plebiscites (federation only)
- Appendix B – election rules

It is fundamental to a registered organisation that it is democratically controlled and its committees are controlled by members. This is achieved through:

- regular elections of officers
- annual general meetings and plebiscites
- member participation
- transparency and accountability to the members.

A single rule is unlikely to provide for democratic functioning and control. This is achieved through a scheme of rules, as in the Model Rules.[29]

[29] See Model Rules – Federated rule book Parts D, J, L and Appendix B; Unitary rule book – Parts D, E and Appendix B.

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Signpost rules

The Model Rules make use of signpost rules to explain large concepts like democratic control or control of committees by members. For example, Parts D and J and Appendix B start with 'overview' rules. These rules do not contain specific obligations or rights; however, they summarise the scheme of the rules that follow so that a member, officer or other interested person can quickly understand the entire picture of the rules that follow.

B1: The statutory standards

Section 5 of the RO Act sets certain standards that registered organisations must meet. These 'standards' are set out in subsection 5 (3).

Subsection 5 (3) of the RO Act

(a) ensure that employer and employee organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and

(b) encourage members to participate in the affairs of organisations to which they belong; and

(c) encourage the efficient management of organisations and high standards of accountability of organisations to their members; and

(d) provide for the democratic functioning and control of organisations; and

(e) facilitate the registration of a diverse range of employer and employee organisations.

The RO Act contains extensive provisions for the purpose of ensuring registered organisations meet these standards.

B1.1: Encourage participation, democratic functioning and control

In relation to those requirements, two of these standards are of particular significance in the context of the rules of organisations – standards (b) and (d). These are central to the intended operation of the system of registered organisations.

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B1.2: Enforcing the standards

One of the principal ways the RO Act seeks to enforce these standards is through its many provisions relating to mandatory and independent elections within registered organisations.[30]

The RO Act also seeks to foster 'democratic control' and 'member participation' in organisations in the years between elections. The RO Act prescribes:

- what the rules of an organisation must contain on these subjects
- what those rules should not contain.

Firstly, the rules of an organisation must provide for:

- the control of committees of the organisation and its branches respectively by the members of the organisation and its branches.[31]

If it does not, the rules will be in contravention of RO Act subsection 142 (1) (a), which requires rules to provide for the control of committees by members.

Secondly the rules of an organisation 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 (section 5) and the objects of this Act and the FW Act, are oppressive, unreasonable or unjust.[32]

These positive and negative stipulations have been features of the statutory scheme currently found in the RO Act for almost 100 years. They have produced a vast body of case law on what rules may or may not contain. That case law has been concerned with several subjects including:

- imposing conditions on eligibility to stand for an office (see F5: Election rules: qualifications for office)
- criticism of officers and policies (see B2.4: Criticism of the organisation's officers or policies)
- disciplining office holders (see D4: Discipline of officers)

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30 RO Act sections 143–147 and 182–209.

31 RO Act section 141 (1) (b) (iv).

32 RO Act section 142 (1) (c).

- the ability of members to control committees (see B3: Control of committees by members)
- representation of members governing bodies (see B3.6: Control by member representation on committees)

The extensive body of case law on these and other requirements regarding rules have been the subject of substantial academic literature (particularly that of Tracey[33]) which can be consulted for detailed analysis and application to your organisation's rules.

Some of these areas of intense and multiple litigation have been settled by legislative amendments[34] or by judicial determination.[35]

There are, nevertheless, still important aspects of an organisation's rules where you must be careful to ensure they comply with the 'member participation' and 'democratic control' principles.

B2: Member participation

B2.1: Entitlements of members

In addition to promoting member participation through mandatory and independent elections, section 345 of the RO Act stipulates that every financial member of an organisation has the right to vote at any ballot taken for the purpose of submitting a matter to a vote of the members. This right is subject to reasonable provisions in rules in relation to enrolment. For example, only financial members in Victoria would be entitled to vote in a plebiscite of members of the Victorian Branch of an organisation.

The Model Rules divide members into electorates for the purpose of electing representatives to the governing committees.[36] Every financial member within an electorate is entitled to vote for the representative from their electorate, which ensures that the requirements of sections 143 and 345 of the RO Act are met. If your

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33 R.R.S. Tracey, 'The Legal Approach to Democratic Control of Trade Unions' *MULR* 177, 1985; see also W.B. Creighton, W.J. Ford and R.J. Mitchell, *Labour Law – Text and Materials,* Law Book Company, 1993, Chapter 28:944–957.

34 For example, the enactment of RO Act section 145 in relation to maximum terms of office and section 146 in relation to filling casual vacancies.

35 *Wright v McLeod* (1983) 51 ALR 483, a rule permitting a committee of management of an organisation to alter the rules of the organisation without reference to the membership did not contravene the two stipulations.

36 See Model Rules – Federated rule book Parts D and J; Unitary rule book – Part D.

organisation places additional restrictions on members' entitlements to participate in ballots (whether for an election, a plebiscite or at a general meeting of members) that would most likely contravene section 345 of the RO Act. We recommend that you don't place any additional restrictions on members' entitlements to participate in ballots.

What is a member?

An organisation can have many groups of people/employers called 'members'. This can include groups commonly called things like associate members, financial members (and unfinancial members), retired members, student members or honorary members.

The RO Act focuses on members who are individuals or employers **covered by the eligibility rule** of the organisation (members properly defined). The RO Act protects these members and their rights in relation to the organisation.

Members covered by the eligibility rule are divided into financial or unfinancial members. Whether they are financial or unfinancial will depend upon the organisation's rules, but is usually dictated by whether they have paid their membership fees. The RO Act often allows you to treat financial and unfinancial members differently.

In this Companion and the Model Rules, when we use the word members we are referring to members covered by the eligibility rule, and not associate, retired, student or honorary members.

The RO Act is largely unconcerned with how you treat other classes of individuals, even if you have called them 'members'. The exception is that they should not enjoy the full rights of membership (see below).

The RO Act sets out other rights for members which promote participation, including:

- the right to participate in amalgamation and withdrawal from amalgamation ballots[37]
- the ability to apply for an order that the rules are contrary to the Act and the ability to seek an order for the performance of the rules of the organisation[38]
- the right to receive adverse election reports, financial reports, disclosure reports, the rules and a list of offices and office holders.[39]

An organisation needs to ensure that its rules do not displace these entitlements.

B2.2: Restrictions on participation in the affairs of the organisation

In relation to the requirement that organisation rules encourage member participation in the affairs of the organisation courts have found that:

- rules should not place unreasonable restrictions on members standing for office [40]
- rules should not restrict members' ability to criticise the organisation's officers or policies.[41]

B2.3: Restrictions/qualifications for nominating for office

Please see below under F5: Election rules: qualifications for office.

B2.4: Criticism of the organisation's officers or policies

Democratic participation and control requires the ability to criticise or discuss an organisation's officers, decisions and policies.[42] This means that rules aimed at silencing dissent or criticism are likely to conflict with the standards of the RO Act.

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37 RO Act sections 65, 66 and 100.

38 RO Act sections 163 and 164.

39 RO Act sections 198, 265, 293BC, 346 and 347.

40 *Rule v Australian Workers' Union* (1985) 9 FCR 280.

41 *Wiseman v Professional Radio and Electronics Institute* of A/asia (1978) 35 FLR 24.

42 *Egan v Harradine* (1975) 25 FLR 336; *Lasarewitch v Australian Railways Union* (1955) 82 CAR 14.

However, organisations need to protect their interests and some restraints on freedom to express opinions have been found to be justified; the question to be considered is whether the restraint is unreasonable or undue.[43] Rules which totally prohibit expression of opinion have been found to be contrary to law.[44]

Rules are allowed to protect members and other stakeholders from harassment, vilification or discrimination.

Example – bans on social media

The HIJ organisation wants a rule preventing members from saying things on social media that the Executive thinks are intended to damage the organisation's interests or that of a member.

This rule is likely to be held invalid under RO Act section 142 (1) (c) as an unreasonable restriction on a member's participation in the organisation, for two reasons:

- it restricts the right of the member to criticise the leadership of the organisation
- it makes any infringement of the rule dependent on a subjective opinion.

For more on subjective opinion please see below F10: Sanctioning members.

B3: Control of committees by members

B3.1: Subsection 141 (1) (b) (iv)

Subsection 141 (1) (b) (iv) of the RO Act requires rules to provide for the control of committees by members. Normally this ability is not found in one rule, but throughout the rules of the organisation and its branches.[45] For example, control by members can be achieved by a combination of rules which provide for:

- the election of committee members
- terms of office of committee members

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43 *Wishart v Australian Builders Labourers' Federation* (1960) 2 FLR 298.

44 *Wiseman v Professional Radio and Electronics Institute of A/Asia* (1978) 35 FLR 24.

45 *Boland v Munro* (1980) 48 FLR 66; *Wright v McLeod* (1983) 51 ALR 483; *Doyle v Australian Workers' Union* (1986) 12 FCR 197; *Loh v O'Grady* (1991) 42 IR 215.

- how committees make decisions
- how members place checks and restraints on committees
- the rights of members to direct the actions of committees
- the powers of members in general meeting
- the powers of members through a plebiscite.[46]

Of these methods, two effective ways of granting control to members are by general meetings of members and plebiscites of members.[47]

B3.2: What is control?

Control does not mean directly controlling or dictating to the committee of management. It does not require, for example, the members to approve or veto decisions (either in a general meeting or by plebiscite vote) – it means checking, directing and restraining.[48]

Control must be practical, real and not illusory.[49]

For example: rules which provide for a high quorum[50] at a general meeting of members[51] and rules which make it difficult for members to requisition a plebiscite[52] do not provide practical or real control by members.

Control should not be susceptible to obstruction or unreasonable delay.

For example: a rule where the time between a request for and the completion of a plebiscite was very long, that control was found to be 'so long as to be …illusory...'.[53]

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46 *Byrnes v Federated Ironworkers Association of Australia* (1957) 3 FLR 309; *Boland v Munro* (1980) 48 FLR 66; *Wright v McLeod* (1983) 51 ALR 483.

47 *Byrnes v Federated Ironworkers Association of Australia* (1957) 3 FLR 309.

48 *Boland v Munro* (1980) 48 FLR 66; *Mackenzie v Administrative and Clerical Officers' Association, Commonwealth Public Service* (1962) 5 FLR 342.

49 *Ford v Federated Miscellaneous Workers' Union of Australia* (1954) 79 CAR 147.

50 A quorum is the minimum number of voting members that must attend a meeting. Where there is no quorum, there is no meeting and any business transacted is invalid (*Steuart v Oliver (No. 2)* (1971) 18 FLR 83).

51 *Gordon v Carroll* (1975) 27 FLR 129.

52 *Mackenzie v Administrative and Clerical Officers' Association, Commonwealth Public Service* (1962) 5 FLR 342.

53 *Griffiths v Ansett Pilots Association* [2001] FCA 1215 at 38.

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B3.3: Control must be balanced against viability

The Federal Court has repeatedly acknowledged the importance of balancing the ability of members to control their committees against the viability of the organisation.[54] The question of viability often arises when considering rules which provide for a plebiscite of members. A plebiscite can be expensive, cumbersome and time consuming and therefore plebiscites that can be demanded without reasonable limitations may place an unacceptable burden on the organisation.[55]

B3.4: General meetings of members

The ability to call a meeting of members, the quorum required and its powers, all go to the question of control of committees by members. A general meeting rule will not provide sufficient control if:

- it cannot meet without permission of a committee
- its resolutions cannot bind the organisation's committees[56]
- the number or percentage of members that are required to call and to be present at a general meeting of members is too high and therefore impractical, or so small as to enable a small number of members to control the organisation [57]
- the location of the meeting is a barrier.[58]

In *Gordon*,[59] a requirement for 10 percent of financial members to call branch meetings was found to be impractical; later for the same organisation in *Fegan,*[60] a requirement for 200 financial members or five percent of the members of a particular branch was held to enable control of committees by members at general meeting.

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54 *Byrnes v Federated Ironworkers Association of Australia* (1957) 3 FLR 309; *McLeish v Kane* (1978) 36 FLR 80; *Wright v McLeod* (1983) 51 ALR 483; *Griffiths v Ansett Pilots Association* [2001] FCA 1215.

55 *Wright v McLeod* (1983) 51 ALR 483 at 492; *Griffiths v Ansett Pilots Association* [2001] FCA 1215 at 25.

56 *Marine Cooks, Bakers and Butchers' Association of Australasia; Ex parte Snell* (1928) 27 CAR 43.

57 *Gordon v Caroll* (1975) 27 FLR 129; *Byrnes v Federated Ironworkers Association of Australia* (1957) 3 FLR 309.

58 *Griffiths v Ansett Pilots Association* [2001] FCA 1215.

59 *Gordon v Caroll* (1975) 27 FLR 129 at 174.

60 *Fegan v Jackson* (2009) 183 IR 292 at [43].

The number of members

The number of members required to be present at a general meeting of members will depend on the characteristics of the organisation and will vary from case to case.

For example: a requirement for 15 percent of members to be present has been found to provide for control by members,[61] whereas a requirement for five percent has been found to be too high.[62] Whether the number of members required to be present is practical will depend on factors such as the total number of members, the ease with which members can attend meetings, the ease with which members can be contacted and attendance history.[63]

Additionally, the organisation needs to consider that the number of members required should not be so small as to enable a small number of members to control the organisation.[64]

If meetings of members are held at one location and members are so dispersed that it is difficult for them to attend general meetings, that will also likely prevent control of committees by members in general meeting.

For example: a national meeting of pilots at one location was held to be impractical, whereas a meeting of Victorian health workers in central Melbourne did not hinder attendance.[65] The Model Rules removes problems associated with the location of meetings by enabling electronic meetings.[66]

B3.5: Plebiscites

Whether a plebiscite provides for control of committees by members will also depend on the characteristics of the organisation.

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61 *Byrnes v Federated Ironworkers Association of Australia* (1957) 3 FLR 309.

62 *Gordon v Caroll* (1975) 27 FLR 129.

63 *Gordon v Caroll* (1975) 27 FLR 129 at 173.

64 *Byrnes v Federated Ironworkers Association of Australia* (1957) 3 FLR 309.

65 *Griffiths v Ansett Pilots Association* [2001] FCA 1215 at 26; *Fegan v Jackson* (2009) 183 IR 292 at [38].

66 See Model Rules – Federated rule book – Part L; Unitary rule book – Part E.

For example: a requirement that at least ten percent of members are needed to call for a plebiscite provided for control in one organisation,[67] but was found to be too high for another organisation.[68] The majority of the Federal Court has upheld a requirement in an organisation's rules that at least three branches must requisition a plebiscite.[69] For another organisation, the requirement for at least four branches to requisition a plebiscite did not provide for control of committees by members.[70]

In addition to the method by which a plebiscite is called, the number of ballots that must be returned and the required majority have been considered by the courts.

For example: in *Mackenzie*,[71] the requirement that the majority of members in at least four branches must vote in favour of the resolution did not provide for control of committees by members. The view of the Chief Justice was that such a plebiscite rule prevented the will of the majority of members prevailing.

It is important to note that when assessing plebiscite rules, the courts have considered the other rules of the organisation and the extent to which the rules as a whole provide for control of committees.

For example: in *Mackenzie*, the Chief Justice observed that the problem with the plebiscite rule could be remedied by either less onerous restrictions for calling a plebiscite, or by ensuring that the branches were represented on the governing committees by reference to the number of members in each branch.[72]

If a plebiscite rule is impracticable, it will not provide for control of committees by members. However, it may place an unacceptable burden on the organisation if it is too easy for members to call for a plebiscite.[73] When considering plebiscite rules, the viability of the organisation must be considered. A requisition requiring only 5% of financial members with an upper limit is more likely to be compliant with the requirements of the RO Act.

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67 *Crealy v Commonwealth Bank Officers' Association* (1957) 1 FLR 153.

68 *Squires v Stephenson [No 2]* (1983) 4 IR 1.

69 *Spence v Amalgamated Postal Workers Union of Australia* (1955) 81 CAR 115.

70 *Mackenzie v Administrative and Clerical Officers Association, Commonwealth Public Service* (1962) 5 FLR 342.

71 *Mackenzie v Administrative and Clerical Officers Association, Commonwealth Public Service* (1962) 5 FLR 342.

72 *Mackenzie v Administrative and Clerical Officers Association, Commonwealth Public Service* (1962) 5 FLR 342 at 348.

73 *Wright v McLeod* (1983) 51 ALR 483.

Example – Calling for a general meeting or plebiscite

The MNO organisation rules state a Branch Executive has supreme authority to manage and control the affairs of the branch between elections 'subject to any decision of a general meeting of the branch members convened to consider a specified matter or a plebiscite.'

The rules require:

- not less than 15 percent, or 500 of the financial members of the branch, whichever is the lesser, to call a general meeting
- 10 percent of the financial members to requisition a plebiscite.

The branch currently has 4321 financial members. This means you need 500 financial members to call a general meeting or 432 financial members to call a plebiscite.

These rules may not provide for the control of committees by members because the number of members needed to call a general meeting OR a plebiscite is very high. But it would depend on the history and circumstances of the organisation's membership participation.

B3.6: Control by member representation on committees

The RO Act sets out standards for registered organisations which include that they:

- are representative of their members;
- encourage members to participate in the affairs of the organisation; and
- function and are controlled democratically.[74]

To achieve these standards, the RO Act requires rules of organisations to provide for the election of office holders.[75] Whether officer holders are elected directly by members or through a collegiate electoral system,

[74] RO Act section 5 (3) (c).

[75] RO Act section 143 (1).

the first stage of all elections must be by a direct vote by members.[76] Election of office holders by members is one way that members can control committees.[77]

Direct and collegiate elections

There are two types of elections for officers in a registered organisation.[78]

A **direct election** is when all the financial members in a particular group of members vote for the office – for instance, all the financial members in the Queensland Branch elect the Queensland Branch Committee of Management Members.[79]

A **collegiate election** is when a group of officers elect another officer – for instance, all the officers on the Queensland Branch Committee of Management elect the President of the Queensland Branch. The first tier of every collegiate election must be a direct election. Every tier must be made up of officers.[80]

Model rules cross reference: Election mechanics are in Appendix B to the Model Rules.

If one section or group of the membership has a disproportionate 'voice' on governing bodies within the organisation either without good reason and/or without protections for minority voices, it can sometimes be a denial of 'democratic functioning and control' of an organisation. Such rules have sometimes been challenged on the grounds they do not provide control of committees and/or they place oppressive, unreasonable or unjust conditions on members.[81]

For example: the rules for an organisation which provided for an equal number of representatives from each of the branches on the governing council, despite the branches having very unequal membership, were

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76 RO Act section 6, see the definitions of 'direct voting system' and 'collegiate electoral system'.

77 *McLeish v Kane* (1978) 36 FLR 80 at 87; *Boland v Munro* (1980) 48 FLR 66; *Mackenzie v Administrative and Clerical Officers Association, Commonwealth Public Service* (1962) 5 FLR 342.

78 RO Act section 143 (1) (a).

79 RO Act section 6, definition of 'direct voting system'.

80 RO Act section 6, definition of collegiate electoral system'.

81 *McLeish v Kane* (1978) 36 FLR 80; *Sherrif v Townsend* (1980) 48 FLR 20.

considered by the Federal Court.[82] The Court held that this imposed oppressive, unreasonable or unjust conditions on members having regard to the objects of the Act, and when considering the rules as whole, they failed to provide for control of committees by members.[83]

However, the courts have recognised that some imbalance in member representation is tolerable, especially when there is a perceived need to give a voice to a small group of members.[84] If rules provide for an equal number of representatives from each electorate, smaller electorates could dominate larger ones. On the other hand, if rules provided for votes in strict compliance with membership numbers, then members of the smaller electorates may be swamped by members of the larger ones.[85] Rules need to provide a balance between these two extremes.

For example: larger branches might receive a modest reduction in representation compared to their membership size, while the smaller branches are given representation above their pure numerical strength, as long as the 'uplift' is reasonable.

Any perceived imbalance in the voting strengths of branches or other electorates on an organisation's governing body might be overcome by the presence in the rules for plebiscites by members that can bind the governing body. Such rules would need to be capable of practical use by members.[86]

Also, imbalance in representation may not be an issue in every instance. In *McLeish*,[87] the Federal Court determined that it was appropriate for each branch to be represented on the National Executive with the same voting rights, despite significant discrepancies in the number of members per branch. Because the National Executive was a small body, each Branch was equally entitled to be heard.[88] However, the Court also determined that the disparity in voting rights on the National Council was so great as to be unreasonable, and

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82 *Sherrif v Townsend* (1980) 48 FLR 20.

83 *Sherrif v Townsend* (1980) 48 FLR 20 at 29, 44 and 51. In this matter the relevant Act was the *Conciliation and Arbitration Act 1904*, however the provisions regarding oppressive, unreasonable and unjust rules and the requirement for the control of committees by members were in substantively the same terms as those provisions in the RO Act.

84 *Crealy v Commonwealth Bank Officers' Association* (1957) 1 FLR 153; *McLeish v Kane* (1978) 36 FLR 80; Scott *v Rolfe* (1979) 36 FLR 249; *Cook v Crawford* (1982) 43 ALR 83; *Lawley v Transport Workers Union of Australia* (1987) 22 IR 114; *Pillar v Building Workers Union (Aust)* (1994) 48 FCR 512.

85 *McLeish v Kane* (1978) 36 FLR 80 at 93.

86 *Skourdoumbis v Findlay* [2002] FCA 638 at [40].

87 *McLeish v Kane* (1978) 36 FLR 80.

88 *McLeish v Kane* (1978) 36 FLR 80 at 87.

therefore contrary to the Act on the ground that it imposed unreasonable conditions on members.[89] But when considering the rules of this organisation as a whole, the Full Court decided that, overall, they provided for sufficient control of committees by members.[90]

There is a considerable body of case law on this subject. That case law is well summarised and analysed in the Federal Court decision of Gray J in *Skourdoumbis*.[91] If you are considering this subject in the context of your organisation's existing rules or rule alterations under consideration, you should read the decision of Gray J and seek specialist advice.

Example – Representation of members on a governing committee

The KLM is a federated organisation with about 10,000 members. It is governed by a National Conference where:

- each branch has the same number of delegates, irrespective of the number of members in each branch
- however, the combined voting strength of the delegates for each Branch is proportionate to the number of branch members.

Over 40 percent of the members of KLM are members of the New South Wales Branch. This means that the New South Wales Branch has more than 40 percent of the votes at National Conference. National Conference appears to be dominated by the New South Wales Branch. This may impose oppressive, unreasonable or unjust conditions on members of the other branches. However, it is representative of members and therefore conforms with the principle of 'majority rule' and provides for control by members.

KLM also has a National Executive with responsibility for managing the organisation between meetings of National Conference. National Executive has:

- equal representation from all branches and

89 *McLeish v Kane* (1978) 36 FLR 80 at 93.

90 *McLeish v Kane* (1978) 36 FLR 80 at 89.

91 *Skourdoumbis v Findlay* [2002] FCA 638 at [37]–[47].

- equal voting strength in each executive member.

The smaller branches therefore have a disproportionate voice on National Executive. On its face, the National Executive may result in the imposition of oppressive, unreasonable or unjust conditions on members of the New South Branch, but it does ensure the voices of all branches are heard.

KLM organisation also has a rule which allows five percent or 50 financial members, whichever is lesser, to requisition a general meeting of members. A General Meeting has:

- a low quorum requirement
- the power to direct both the National Conference and the National Executive.

The general meeting rules appear to provide for control of KLM's committees by members.

It is likely that the rules as a whole provide for the control of KLM's committees by members, through both the National Conference and by way of general meetings of members. It is also likely the rules provide an avenue for the voice of smaller branches to be heard, through the National Executive.

B3.7: Control of committees by members in the Model Rules

The Model Rules provide for control of committees by members through:

- general meetings of members:
  - five percent or five members can initiate agenda items for consideration at the Annual General Meeting
  - five percent of financial members can requisition a Special General Meeting of members
  - a quorum requirement of fifteen or five percent of financial members
  - all lawful decisions are binding on the committees
- Plebiscites of members:
  - requisitioned by 10 percent of financial members
  - 10 percent of financial members must cast a vote

  - decisions are binding on committees
- regular two-yearly elections of office holders
- representation of members on the governing committees based on the number of members in each electorate.

Model Rules cross reference

The Model Rules provide for plebiscites and general meetings in:

- the federated model rule book, plebiscites and general meetings are contained in Parts D and J
- the unitary rule book, plebiscites and general meetings are contained in Part D.

These Model Rules may not meet the circumstances of all organisations. It is recommended that organisations seek the guidance of the Commission if drafting rules that differ from the Model Rules to ensure that they provide for the control of committees.

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C: Governance structures

C1: Organisations choose their own structure

An important aspect of democratic functioning in registered organisations is that they are governed by committees elected by members.[92] The RO Act does not prescribe particular governing structures, it only requires organisations to have elected governing committees. It is up to organisations to determine their own structures.[93]

The Model Rules adopt a simple approach to an organisation's structure.[94] For an organisation without branches, members elect an Executive and a National Conference. The office bearers are elected by and from the Executive. For an organisation with branches, this simple structure is replicated at branch level.

Model Rules cross reference

Governance structures are located within the Model Rules in:

- National Governance: Part D (federated and unitary rule books)
- Branch Governance: Part J (federated rule book only).

Many registered organisations have much more complicated structures than the Model Rules provide. The Model Rules cannot replicate the almost infinite variations that organisations might have or wish to have.

When considering a governing structure for your organisation, keep in mind:

- the structure needs to be generally representative of members[95]
- committee members must be elected either by a direct voting system or a collegiate electoral system.[96]

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92 RO Act section 143 (1).

93 *Municipal Officer's Association of Australia v Lancaster* (1981) 54 FLR 129 at 164-165; *Imlach v Daley* (1985) 7 FCR 457 at 462.

94 See Model Rules – Federated rule book - Parts D and J; Unitary rule book – Part D.

95 *McLeish v Kane* (1978) 36 FLR 80; *Skourdoumbis v Findlay* [2002] FCA 638.

96 RO Act section 143 (1).

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C2: Executive

The Model Rules provide for a National Executive and Branch Executives for an organisation with branches, and an Executive for an organisation without branches.[97] These bodies are the committees of management for the organisation or branch.

C2.1 The committee of management

The RO Act defines the committee of management as:

> '…the group or body of persons (however described) that manages the affairs of the organisation…or branch'[98]

C2.2 Powers and duties of Executive

The RO Act imposes several powers and obligations on committees of management, for example:

- responsibilities and obligations in relation to amalgamations and withdrawals from amalgamation[99]
- approve loans, grants or donations[100]
- the preparation of reports[101]
- responsibilities and obligations in relation to financial reporting[102]
- responsibilities in relation to disclosures made by office holders.[103]

Consequently, the committee of management is an important governing body of an organisation or branch, and rules must reflect an appropriate level of power and responsibility.

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97 See Model Rules – Federated rule book – Parts D and J; Unitary rule book – Part D.

98 RO Act section 6 definition of 'committee of management'.

99 RO Act Chapter 3.

100 RO Act section 149.

101 RO Act section 254.

102 RO Act Part 3 of Chapter 8.

103 RO Act Part 2A of Chapter 9.

The RO Act requires the rules of an organisation to provide for the powers and duties of its committees and the manner of summoning meetings. The Model Rules make such provision for the Executive bodies.[104] Importantly the powers set out in the Model Rules reflect the powers expected of committees of management, for example, managing and conducting the affairs of the organisation or branch between meetings of conference.

C2.3 Election of office holders and incompatible offices

The Model Rules also provide that the Executive elects by and from its members the office bearers (President, Vice-President and Secretary) of the organisation or branch. This is a collegiate electoral system. This system is not mandatory; an organisation can elect its office holders by and from its members (via a direct voting system).

Whichever system is chosen, it is recommended that your rules set out whether a person can hold more than one office on Executive.

The Doctrine of Incompatible offices

If the rule book does not expressly state that a person can hold more than one office at a time, then the doctrine of incompatible offices suggests the default position for rules is that a person can only hold one office.[105] If a person has been elected to more than one office, this doctrine implies that the person has resigned from the earlier offices.[106]

If a person has been elected to more than one office your rules should be clear on whether they are still holding the first office.

For example: if you have committee members who are then elected to be office bearers or executive officers.

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[104] See Model Rules – Federated rule book – Parts D, J and L; Unitary rule book – Parts D and E.

[105] *Mellor v Horn* (1988) 25 IR 157; *Egan v Maher* (No 2) (1978) 35 FLR 252; *Sherrif v Townsend* (1980) 48 FLR 20; *Johnson v Beitseen* (1988) 41 IR 395; *Re Cholosznecki* (2006) 151 IR 218.

[106] *Mellor v Horn* (1988) 25 IR 157; *Egan v Maher* (No 2) (1978) 35 FLR 252.

Model Rules cross reference: Incompatible offices and hierarchy rules are contained in Part BB of Appendix B.

The Model Rules expressly provide that if an executive member becomes an office bearer, they retain their executive member office. However, they are entitled to only one vote on Executive which ensures that membership representation ratios are not disturbed.[107]

The Model Rules also provide that the office bearers, that is the President, Vice-President and Secretary, are incompatible offices; a person cannot hold the more than one of these three offices.[108] The Model Rules allow an executive member to nominate for each of these offices and then provides a hierarchy of offices in the election rules to ensure that a person can only be elected to one of the incompatible offices.

The Model Rules provide that no person can hold the office of executive member and conference delegate; these are also incompatible offices.[109] The election rules provide for a hierarchy, such that the executive members are elected first, and then delegates.

This is not the only way to deal with the election of incompatible offices.

For example: an organisation's rules could provide that an eligible member can only nominate for one incompatible office. However, this option limits the ability of members to run for the full range of offices.

The Model Rules also make it clear that for an organisation with branches, offices at a branch level are not incompatible with offices at a national level. For example, under the Model Rules a person can hold the office of both Branch Secretary and National Secretary.

You can decide which offices, if any, are incompatible in your organisation. However, it is highly recommended that office bearers are identified as incompatible offices.

For example: the Vice-President fills the role of the President in the President's absence. This cannot be done if the same person holds both offices. Also, the powers and duties of the President and Secretary are significant, and good governance suggests that one person should not hold all these powers.

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[107] See Model Rules – Federated rule book – Parts D and J; Unitary rule book – Part D.

[108] See Model Rules – Federated rule book – Parts D and J and Appendix B; Unitary rule book – Part D and Appendix B.

[109] See Model Rules – Federated rule book – Parts D and J and Appendix B; Unitary rule book – Part D and Appendix B.

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Whatever your organisation decides, it is important that rules clearly state which offices are incompatible, and which ones are not, and how to deal with the election of incompatible offices.

It is recommended that you contact the Commission when drafting rules regarding incompatible offices.

C3: National conference

The Model Rules establish a national conference for all organisations and branch conferences for organisations with branches.[110] It is not mandatory for an organisation to have a conference at national or branch level. However, a larger body representative of members with overall responsibility for the policy and direction of the organisation or branch is an effective method of providing for democratic functioning, participation of members and control of committees by members.

The composition of the conference (national and branch) is made up of the relevant executive plus delegates elected by members. B3.6: Control by member representation on committees discusses representation of members on governing bodies.

C3.1: Conference ratio and the control of the Executive

A conference made up of member representatives, with the authority to control and direct management committees, serves as a key mechanism for ensuring member control over those committees. The Model Rules establish the various conferences (national and branch) as the supreme governing body of the organisation or the branch, with full power and authority to carry out the objectives of the organisation.[111]

For the conferences in the Model Rules to be a valid form of control of committees by members, it is important that the ratio of conference delegates to executive members favours conference delegates, preferably by a large margin. If not, the conference would likely be controlled by the executive.

For example: if there are equal to or more executive members than there are other conference delegates, they will likely be able to 'rubber stamp' their own decisions if questioned by the membership.

[110] See Model Rules – Federated rule book – Parts D and J: Unitary rule book – Part D.

[111] See Model Rules – Federated rule book – Parts D and J; Unitary rule book – Part D.

The proposed formula for representation of members on executive and on conference in the Model Rules may lead to a predominance of executive members on conference for large organisations. The formula in the Model Rules is more suited to smaller organisations.

If your organisation aims to have a conference that enables membership control of its committees of management, you should ensure that you select an appropriate formula for representation of members on both the conference and other committees. It is recommended that you seek the advice of the Commission when determining a formula.

C3.2: Rotation of offices (half on half off)

The Model Rules provide for two-year terms for both conference and executive. All office holders are elected in the same election year. This is not the only method. Some organisations elect half of the representatives to committees in one election cycle, and half in another election cycle. This may be a more attractive option for organisations that have chosen longer terms of office, for example a four-year term with half of the offices elected every second year.

Alternatively, some organisations choose to have rules that elect members to a conference in one election cycle and then members to the committee of management in another election cycle.

These are matters for the organisation to decide.

C3.3: Top up elections

See below D2.1: Long terms of office and fluctuations in membership.

C4: Standing committees in organisations

It is common practice in most organisations and branches to establish committees to deal with specific subjects. The rules can allow for the establishment of a committee with oversight of a particular subject which then reports to the committee of management, usually with recommendations or suggestions to consider acting on.

The Model Rules empower the executive (national and branch) to establish 'advisory sub committees' and to determine their composition, meeting procedures and scope on a 'sub committee by sub committee' basis.[112]

Alternatively, committees can be established with detailed rules – for example, rules relating to the subject matter of the committee, when and how often it meets, who are its members, what powers it has, and what is its relationship with the committee of management.

While your organisation can choose to have a specific rule in its rule book to establish and regulate committees, the approach in the Model Rules is recommended.

When considering rules relating to sub committees consider:

- using the expression 'committee' in a rule could be misleading or confusing to members when the RO Act uses the expression 'committee of management' to describe the governing elected body of the organisation. The expression 'advisory sub-committee' avoids any possible confusion with the organisation's 'committee of management' (however actually named)
- having a specific rule that establishes a particular sub-committee and details its membership, scope and procedures reduces flexibility for the organisation. This rule requires the organisation to have such a sub-committee even if it is no longer wanted or required (until the rule is removed or altered). Being in the rule book can give that sub-committee a veneer of authority that might create confusion with the authority of the executive. The Model Rules deliberately give the various Executives flexibility as to a sub committee's composition, scope and membership, and ensures that its authority can never challenge that of the executive itself
- if an organisation does not have a specific rule establishing committees, this does not prevent the executive establishing them and leaving them operating as advisory bodies indefinitely.

It is also important to ensure that any standing committee rule makes it clear that the committee is 'advisory' only. Usually such committees (whether established by the Executive on an ad hoc basis or fixed in the rules) have membership which is not confined to persons holding office in the organisation. For example, a standing committee may have members who are not officers appointed to it or even have other professional advisors to the organisation on it (for example, an accountant). A standing committee so constituted should not have

[112] See Model Rules – Federated rule book – Parts D and J; Unitary rule book – Part D.

any of the powers of the committee of management. If it does, its decisions may be invalid because persons who have not been elected to an 'office' are exercising the powers reserved by the RO Act to officers (see D1.1: The definition of office).

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D: ‘Office’ under the RO Act

D1: What is an office

The Commission’s podcast – who is an officer?

The Commission has a podcast that specialises in Registered Organisations. One of its episodes discusses ‘who is an officer?’ Episode 4: Who is an officer?

The word ‘office’ has special significance in the RO Act.

D1.1: The definition of office

Subsection 9 (1) of the RO Act provides that an ‘office’ in an organisation or branch is:

(a) an office of president, vice president, secretary or assistant secretary of the organisation or branch; or

(b) the office of a voting member of a collective body of the organisation or branch, being a collective body that has power in relation to any of the following functions:

(i) the management of the affairs of the organisation or branch;

(ii) the determination of policy for the organisation or branch;

(iii) the making, alteration or rescission of rules of the organisation or branch;

(iv) the enforcement of rules of the organisation or branch, or the performance of functions in relation to the enforcement of such rules; or

(c) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(i) and (iv), other than an office the holder of which participates only in accordance with directions given by a collective body or another person for the purpose of implementing:

(i) existing policy of the organisation or branch; or

(ii) decisions concerning the organisation or branch; or

(d) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(ii) and (iii); or

(e) the office of a person holding (whether as trustee or otherwise) property:

(i) of the organisation or branch; or

(ii) in which the organisation or branch has a beneficial interest.

An office as defined in the RO Act may only be held by a person who has been elected to that office in accordance with the procedures for elections prescribed in the RO Act.[113] This is a fundamental component of the scheme devised by the Parliament for 'democratic control' of an organisation by its members.

The persons who have the power to control the policy and operations of an organisation, or a branch of it, must be elected by the members of the organisation or branch as the case may be. Elections for office holders must be conducted by the Australian Electoral Commission (AEC) (unless an organisation has been granted an exemption) in accordance with the RO Act and the rules of the organisation.[114]

In the RO Act's scheme for democratic control of organisations by their members, it is clearly very important that those who are in positions that can directly manage the affairs of an organisation and determine policy are elected by the membership of the organisation and is accountable to those members.

D1.2: Positions v offices

A person working in or for the organisation does not hold an 'office' in the organisation simply because they are called an 'officer', either by the organisation or by its rules.

For example: an employed finance officer is unlikely to be the holder of an office.

A person working in or for the organisation can be an office holder even if they hold an employed position in the organisation that is called something other than an 'office'.

For example: the position of managing director might be an office, depending on the duties and powers of that position.

[113] The is subject to a limited exception for the purpose of filing casual vacancies, RO Act section 146.

[114] RO Act sections 182 and 183.

The question as to whether a position in an organisation is an 'office', depends on whether the position falls within the definition of 'office' in section 9 of the RO Act. If it is an office, the holder of that office must be elected in accordance with the RO Act and the rules.

Most of the categories of 'office' in section 9 are reasonably straightforward – particularly paragraphs (a), (b) and (c) of subsection (1). However, paragraphs (d) and (e) can be somewhat more complex as they are directed to situations where a person is not in a position that is obviously that of an officer (for example holding a position with the title of President or Secretary, or being a voting member of a committee of management) but nevertheless they participate directly in at least some of the 'core functions' of an office that should be subject to election.

Example – Angela the senior organiser

Angela is an organiser employed by the NPQ Union. Her role is a senior one, involving mentoring junior organisers as directed by the Secretary and selecting which employers to target for inspection of wages records as per standing union policy that 'members rights to correct wages should be enforced.'

Her position of organiser does not involve her attending committee of management meetings.

She does not sit on the committee of management and her duties, while related to the managing people and the affairs of the Union, they are carried out in accordance with the decisions and policies of the organisation (see paragraph (c) of section 9 (1) – her role falls within the exceptions).

Angela does not hold an 'office' that must be subject to election.

If Angela did have the right to vote in committee of management meetings to a degree where she is directly involved in the determination of union policies, among other things, then she would be an officer. This is because she is directly involved in the determination of union policy – see paragraphs (b) (ii) and (d) of section 9. At this point, all the requirements for elections and other disclosures would apply.

Elected positions can be established in the rules. This does not make them officers under the RO Act.

Example – Mitchell the Chief Executive Officer

Mitchell is employed as Chief Executive Officer of the RST Association. His position is referred to in the rules. Under the rules, he attends all meetings of the committee of management and reports to it on the management of the organisation's affairs, including financial affairs. He does not have the right to vote at committee of management meetings. Under the rules he is required to carry out the committee's decisions.

Mitchell does not hold an 'office' that must be subject to election. He is not a voting member of the committee of management (even though he attends the meetings) and his duties, while related to the management of the affairs of the organisation, are carried out in accordance with the decisions and policies of the organisation (see paragraph (c) of subsection 9 (1) – his role falls within the exceptions).

D1.3: Delegation or implementing?

Organisations often have a rule that allows a committee or an officer to delegate some of their powers to another person such as another officer or employee of the organisation.

For example: in the Model Rules the Executive may delegate to the Secretary the power to appoint and dismiss employees and fix their remuneration and conditions.[115] Exercising such a 'delegation' is to be contrasted with implementing a decision of a higher authority in an organisation:

- when the officer or employee **implements** a decision of a higher authority, they are giving effect to or carrying out what the higher authority has decided, not making the decision themselves
- when the officer or employee is **delegated** a power on a subject by a higher authority that officer makes the decision on that subject themselves.

The standards of accountability of organisations to their members fundamentally requires that essential management powers are exclusively vested in those who are directly accountable to the members via election. This standard is undermined when the exercise of management powers is delegated to persons who are not

[115] See Model Rules – Federated rule book – Parts D and J; Unitary rule book – Part D.

directly accountable in that manner. Further, the RO Act expressly confers a number of obligations on office holders that cannot be delegated, for example making declarations or certifying documents.[116]

Some powers of a committee or an office holder may be capable of being delegated to persons who do not hold office. For example, the Model Rules confer the power to determine the time and place of meetings on the Secretary.[117] This is likely to be an administrative task and capable of being delegated to a person who is not an office holder. However, a rule which allows a committee of management or an office holder to generally delegate the responsibility for their powers to an employee will be carefully scrutinised by the General Manager or Delegate.

The Model Rules limit delegations by committees and office holders, to ensure that essential management powers are exclusively in the hands of office holders.

For example: the Model Rules allow the Secretary to delegate functions that are not required by law to be performed by that office to employees.[118] There are two provisos: the employee shall be under the supervision and direction of the Secretary or Executive, and the Secretary remains responsible. In this way the Model Rules ensure the accountability to members remains with office holders.

If your organisation seeks wider ranging delegation powers, it is recommended that you seek the advice of the Commission.

D2: The 'term' of an office

The Rules of every organisation (including any branch rules) must provide 'terms of office' which is the period of time a person holds an office before another election is required. Terms must not exceed four (4) years without re-election.[119]

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[116] RO Act sections 52, 104, 192, 198, 233, 236, 237, 268 and 270 and RO Regulations 34, 35, 37, 123, 124, 125D, 125F, 126, 133, 138, 153, 155, 166 and 182.

[117] See Model Rules – Federated rule book – Parts D and J; Unitary rule book – Part D.

[118] See Model Rules – Federated rule book – Parts D and J; Unitary rule book – Part D.

[119] RO Act section 145 (1).

There are some minor exceptions, namely:

- for the purpose of synchronising elections in an organisation or a branch [120]
- continuing to hold office as part of an amalgamation of organisations.[121]

The Model Rules make provision for two-year terms of office for all offices. [122]

Why has the Model Rules used two-year terms?

The approach in the Model Rules is a suggestion to users, and not a recommendation. In the context of drafting the Model Rules, the two-year term for all offices has the benefit of:

- simplicity in relation to the election of Conference delegates and Executive members
- consistency for casual vacancies
- responsive to changes in membership size and composition
- avoids annual elections which may be inefficient, disruptive or resource intensive
- balances efficiency, accountability and experience gained through longevity
- being achievable in a two-tier election structure.

However, every organisation can choose the length of the terms of its office holders by reference to its circumstances, up to the four-year limit. Many choose four-year terms, particularly for the members of their committee of management. There are often good reasons for that approach, including continuity and attracting candidates for paid positions.

120 RO Act section 145 (2).

121 RO Act section 45.

122 See Model Rules – Federated rule book – Parts D and J; Unitary rule book – Part D.

D2.1: Long terms of office and fluctuations in membership

If your organisation has long terms of office, you will need to take into account whether fluctuations in membership will result in disproportionate representation of members on your committees. If it does, your rules may not provide for democratic functioning and control of your organisation.[123]

For example, if delegates were elected for a four-year term, it is possible for an electorate's membership to decline or increase to such an extent that the number of delegates is excessively disproportionate. This potential problem could be avoided:

- if the term of office for these delegates was shorter for example two years, or
- if the rules provide for mid-term or annual 'top-up' elections for electorates where the entitlement has increased, noting that if an electorate's entitlement has decreased delegates cannot be removed from office as they are entitled to serve their four-year term.[124]

D3: Creating or abolishing offices

An organisation has the right to mould its internal structures as it sees fit, which includes the right to create and abolish offices, provided it complies with the requirements of the RO Act.[125]

A relevant requirement of the RO Act is that rules must not impose conditions, obligations or restrictions that, having regard to, among other things, Parliament's intentions and the objects of the Act, are oppressive, unreasonable or unjust.[126] In this respect, regard must be had to, among other things, the ability of members to participate in the affairs, the democratic functioning of the organisation, and the ability of the organisation to operate effectively and efficiently.[127]

D3.1: Abolition of offices

When it comes to the abolition of officers, authorities suggest that:

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123 RO Act sections 141 (1) (b) (iv) and 142 (1) (c).

124 *Beeson v Blayney* (1966) 8 FLR 292.

125 *Imlach v Daley* (1985) 7 FCR 457 at 462.

126 RO Act section 142 (1) (c) of the Act.

127 RO Act section 5 (3) of the Act.

- office holders generally have the right to fulfil their term of office.[128] However, this presumption can be rebutted where:
  - there is an express or implied intention to apply the alteration to current terms of office;[129] and
  - the rule does not have harsh effects or interfere with vested interests or accrued rights.[130]
- an office may be abolished if the abolition is bona fide[131]
- the abolition is not oppressive, unreasonable or unjust within the meaning of the Act.[132]

If an organisation is altering it rules with the effect that offices will be abolished, the Commission will expect the organisation to provide a submission:

- detailing the reasons behind the abolition decision in order to demonstrate its bona fides
- addressing the question of whether the abolition will impose oppressive, unreasonable or unjust conditions on members.

Transitional rules are strongly recommended when you are abolishing offices to ensure that it is clear when the office will be abolished and what happens to any incumbent officers. For more information see H3.1: Removing officers.

Abolition of a vacant office

The presumption concerning current office holders continuing in their offices does not apply when the office is vacant. In this case offices that are abolished will, by default, take effect immediately when the rule is certified.

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128 *Beeson v Blayney* (1966) 8 FLR 292 at 294.

129 *Re Mellor; Re Federated Liquor and Allied Industries Employees Union of Australia* (1987) 18 IR 350 at 353.

130 *Re Mellor; Re Federated Liquor and Allied Industries Employees Union of Australia* (1987) 18 IR 350 at 353.

131 *Saint v Australian Postal and Telecommunications Union* (1977) 30 FLR 385 at 393.

132 *Roughan v Australasian Meat Industry Employees' Union* (1992) 36 FCR 536 at 539–541.

Example – Abolishing vacant offices

TWA's committee of management consists of 10 officers elected by and from their members. With the changes in the industry and a declining of membership, TWA has experienced difficulties in filling the positions. TWA has made alterations to rules which abolish two positions on the committee and has lodged a submission with Commission explaining the reason for the abolition.

The alteration would be certifiable because,

- the decision appears bona fide: it was made for the efficient management of the organisation in response to declining membership
- no member will be adversely affected because the positions were vacant.

However, if the committee members were elected from ten different electorates, then that would impose oppressive, unreasonable or unjust conditions on the members as members in two electorates would have no opportunity to be represented on the committee.

Termination through significant change

It is possible to abolish an office by making significant changes to the powers and duties, even though the organisation intends to keep an office by the same name (and often, keep the same person in it).

If you are:

- removing key components or responsibilities of the office
- altering the powers of a collective body that the office holds a vote on
- adding significant responsibilities and powers to the office

you should speak to the Commission about whether this is the same office as it is currently. If the office is abolished and a new one created it will trigger an unexpected election and may cause disruption for the organisation.

Example – significant changes to an office

XYZ organisation cannot fill the office of Treasurer. It has determined that it will abolish the role of Treasurer and transfer all the powers to the Secretary.

XYZ makes rule alterations which:

- moves all the duties and responsibilities of the Treasurer into the list of powers of the Secretary
- deletes the word Treasurer wherever it appears
- inserts a transitional rule making it clear it is intended to take effect immediately
- does not change the title of Secretary.

It is likely that the Treasurer's office will be abolished immediately upon certification. However, it is possible that the existing office of Secretary may be abolished as well. This is because the office of Secretary that exists after the rule alteration is entirely different to the office that was filled in the last election. This may result in the current Secretary losing office and a new election being called. If the organisation has regular election cycles, the election for the new Secretary may be out of synch with the rest of the elections. See D3.2: Creation of offices.

D3.2: Creation of offices

The key provision in relation to the creation of offices is subsection 143 (1) (a) of the RO Act. It requires all officers to be elected. Therefore, when a new office is created, it must be filled by election as soon as practicable.

By default, an office is considered created at the time of certification of the rule alterations. However, it is often procedurally inconvenient to conduct an election immediately after the certification. In these circumstances, it may be wise for the organisation to insert a transitional rule specifying that the new office will take effect at a later time. For information on transitional rules see H3.2: Creating offices.

Care should also be taken as to whether the creation of the new office has changed the representation of members on governing committees to such an extent that there is an unacceptable imbalance in representation levels (see B3.6: Control by member representation on committees).

D4: Discipline of officers

Once an officer is elected to an office, they can only be removed from office under limited circumstances. The grounds for removal specified in the Act are:[133]

- when the person has been found guilty of:
  - misappropriation of the funds of the organisation
  - a substantial breach of the rules of the organisation
  - gross misbehaviour or gross neglect of duty
- or when the person has ceased to be eligible to hold office.

Common mistakes

It is common for organisations to want additional reasons to remove officers from office, however this is a complete and exhaustive list of reasons that your rules may provide.[134]

A wider variety of reasons is available if the consequences do not include removal from office.

However, the rules must ensure that the reason for sanctioning the officer is an objective finding of fact and not an opinion of a collective body (see F10: Sanctioning members).

Model Rules cross reference: the process for discipline of officers (both national and branch) is contained in Part D of the Model Rules.

[133] RO Act section 141 (1) (c).

[134] *Hawkins v Willis* (1981) 58 FLR 364.

Rules can provide for other types of sanctions on office holders for a variety of offences, as long as they do not place oppressive, unreasonable or unjust conditions on members.

For example: suspension from office is one such sanction.[135] As explained by Fitzgerald J in *Hills*[136] suspension from office is distinguishable from removal of office. Removal from office occurs if the officer holder is 'totally, permanently and irreversibly deprived of office', whereas if an officer is suspended they continue to occupy the office but are **temporarily** unable to exercise the powers of that office. Therefore, it is possible to have rules which enable the suspension from office **temporarily** for reasons other than those set out in subsection 141 (1) (c) of the RO Act.

Rules without defined limits on the period of suspension have been found to impose oppressive, unreasonable or unjust conditions on members.[137] The duration of suspension is an important consideration. Suspension from office potentially denies the democratic representation of some members in their governing bodies, albeit temporarily. However, democratic principles must be weighed against the effective operation and efficient management of the organisation. The Delegate of the General Manager of the Commission has certified rules which provide for suspension from office for up to 12 months.[138] But it should not be presumed that rules which provide for suspension for up to 12 months will be certified as a matter of course; it will depend on the circumstances of the organisation.

Like sanctions on members, offences that may result in sanctions on office holders must not be so vague or uncertain as to impose oppressive, unreasonable or unjust conditions on members, the offence must have been knowingly performed by the office holder, and the office holder is entitled to procedural fairness in disciplinary proceedings. The case law applicable to members equally applies to imposing sanctions on office holders, see F10: Sanctioning members.

For example, in *Wright*[139] rules that have provided for suspension from office for breach of the rules or for being in arrears for membership subscriptions were found not to impose oppressive, unreasonable or unjust

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135 *Wright v Australian Workers' Union* (1965) 7 FLR 148; *Hills v Higgins* (1982) 61 FLR 131.

136 *Hills v Higgins* (1982) 61 FLR 131 at 143.

137 *O'Donoghue v Amalgamated Society of Carpenters and Joiners of Australia* (1979) 41 FLR 197.

138 *Re Australian and International Pilots Association* [2024] FWCD 1007.

139 *Wright v Australian Workers' Union* (1965) 7 FLR 148.

conditions on members. Whereas in *Wishart*[140] a rule which provided for suspension of an office holder whose continuance in office would, in the opinion of the majority of the Committee of Management, be detrimental to the interests of the organisation was so vague and uncertain as to impose unreasonable and unjust conditions on members.

D5: Ex officio

The ability to hold an office ex officio means that as a result of being elected to one office, a person also holds another office(s).

For example: if you are elected as Branch Secretary you also hold the office of National Executive member. It is well-established that rules which provide for holding an office ex-officio provide for the election of the holder of each office.[141]

It is important to note that members know at the time of the election to one office, the successful candidate will hold another office ex-officio. An elector may vote for a candidate because they thought the candidate would be a good administrator on a committee of management but may decide not to vote for the same candidate on a policy making body.[142] For this reason, altering rules so that an office holder is appointed to another office ex-officio after the election are unlikely to be certified.[143]

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[140] *Wishart v Australian Builders Labourers' Federation* (1960) 2 FLR 298.

[141] *Re Airline Hostesses' Association* (1980) 48 FLR 214*; Allen v Townsend* (1977) 31 FLR 431.

[142] *Re Airline Hostesses' Association* (1980) 48 FLR 214 at 256.

[143] An exception to this occurred in *Re Shop, Distributive and Allied Employees Association* [2025] FWCD 1014. The alterations to the rules under consideration in this matter changed the nature of the committees, such that the body to which office holders were appointed ex-officio was in effect the same body that they originally elected to.

Fair Work Commission

Model Rules cross reference

The Model Rules provide that members of the Executive are ex-officio members of Conference at both national and branch level.[144]

The Model Rules have endeavoured to be written in plain language and avoid complex or unnecessary legal language. The term 'ex officio' is one of the only **Latin terms** in the Model Rules as it is a complicated concept that is understood when rules use this specific phrase.

This appears in Parts D (federated and unitary) and J (federated only) of the Model Rules.

D6: 'Non-member' appointees

As readily appears from the above commentary, every person holding an 'office' in a registered organisation as defined in the RO Act must be elected to that role, subject to limited exceptions related to filling casual vacancies.[145]

Sometimes, however, an organisation may wish to include a provision in its rules for additional persons appointed to the committee of management, in effect as an 'independent non-voting director'. It might be considered appropriate to have a person on the committee or board who stands at 'arm's length' to the elected members, all of whom have a direct connection to the industries or occupations the organisation represents. It might also be that the person brings specific skills, knowledge or experience to the committee or board. In this case, the independent non-voting director is not an elected office holder and therefore is not entitled to vote. The role of independent non-voting director must be advisory in nature.

This is not common and is not included in the Model Rules.

If you wish to have such a rule you need to take special care to ensure the rule you draft does not contravene any of the provisions of the RO Act, particularly those relating to office holding and elections for such positions. Most particularly:

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[144] See Model Rules – Federated rule book – Parts D and J; Unitary rule book – Part D.

[145] RO Act sections 143 (1) and 146.

- If the rule gives the 'non-member' director the right to vote at meetings of the committee or board to which they are appointed, the person concerned would be holding an 'office' within the meaning of section 9 (1) (b) of the RO Act
- If the rule gives the 'non-member' the right to participate in the management of the affairs, the person concerned would be holding an 'office' within the meaning of section 9 (1) (c) of the RO Act.

The consequence of this would be that the rule does not comply with the RO Act unless the person concerned had been elected to the office in accordance with the RO Act.

If you are considering having a non-member appointed director on your committee or board, consider:

- making sure the rule says the position is 'advisory only' with no voting rights
- other alternatives, such as engaging a suitable consultant to advise the committee or board, rather than including a rule in the rule book for the position.

Non-member elected officers

It is possible to have elected officers on your committee or board that are not members. It is extremely rare. The Model Rules **do not** have non-member elected officers.

While these types of rules are capable of certification in limited circumstances, they are not always able to be certified, especially if they result in the committee being controlled by non-members. It would depend entirely upon the facts of your organisation and its specific situation.

Rules like this will require individual drafting and submissions to be made to the Commission specific to your organisation. Consequently, the Model Rules do not include them as a recommended or optional rule.

If you were considering the concept, you should speak to the Commission and seek advice. It would include considerations like:

- the proportion of member officers to non-member officers
- the rights and powers of non-member officers
- the class of people able to nominate for or be nominated to the position
- the impact on members and their ability to be represented on the management body
- the requirement to be controlled by members
- the requirement to be elected by, and accountable to, the members
- the purpose and objects of the RO Act.

D7: Reserving offices for particular types of member and the risk of discrimination

It is possible to reserve an office for a particular class of member to improve the situation of a particular group or groups within the organisation that have historically experienced discrimination, by for example providing programmes or initiatives that assist to overcome that discrimination.

While such action could relate to many disadvantaged groups, it is most commonly encountered in Australia in the context of endeavours to promote equal employment for women in the workforce as well as access for Aboriginal and Torres Strait Islander people. In this regard, Australia has legislation to assist in overcoming discrimination in employment.[146]

As a result, many major government and non-government organisations (whether commercial or not for profit) have implemented measures that are designed to foster equal opportunity for women and for Aboriginal and Torres Strait Islander people.

One of the measures that registered organisations have sought to implement is alterations to their rules to reserve one or more leadership positions in the organisation for female or indigenous candidates only – usually this is by way of reserving offices on a committee of management for which only certain people are eligible to be elected. These types of rules have more recently expanded to reserve positions for persons who identify as LGBTQIA+, people with a disability and young adults.[147]

Model Rules cross reference

The Model Rules **do not** reserve any offices for specified groups of people.

While these types of rules are capable of certification in limited circumstances, they are not always able to be certified. It would depend entirely upon the facts of your organisation and its history of member participation.

Rules like this will require individual drafting and submissions to be made to the Commission specific to your organisation. Consequently, the Model Rules do not include them as a recommended or optional rule.

Please seek advice from the Commission or a legal representative.

Alterations to an organisation's rules to provide this type of measure can be certified, but the circumstances of an organisation's membership and its history of participation of the relevant class of members (or non-

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[146] See *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth), now superseded by the *Workplace Gender Equality Act 2012* (Cth), and affirmative measures in the *Racial Discrimination Act* 1975 (Cth).

[147] See *Re Finance Sector Union of Australia* [2022] FWCG 59.

participation) in the organisation's leadership are very important considerations in each case. For example, and without being exhaustive, does the proposed rule:

- contravene the RO Act by imposing conditions or restrictions on members that are 'oppressive, unreasonable or unjust' having regard to the statutory objectives of the RO Act and the *Fair Work Act 2009* (Cth) (FW Act)
- discriminate against a member on the basis of any of the attributes in subsection 142 (1) (d) of the RO Act
- constitute a special measure for the purpose of achieving substantive equality
- reflect an identified need for action in the contemporary circumstances of the organisation?[148]

If you wish to introduce such a rule into your rule book, you will need professional advice on the matter specific to your organisation's circumstances, including what type of provisions are appropriate to meet the identified need.

Every case will depend on its own circumstances, so please seek professional advice on the matter.

D8: Workplace delegates

Workplace delegates are a common position in rules of unions. They are frequently positions and rarely officers.

Model Rules cross reference

Rules about workplace delegates are a recommended rule for employee organisations. The Model Rules contain a facilitative rule that leaves much of the process to the organisation through policy. The rule is located in:

- Part H – other matters in the unitary rules
- Part M – other matters in the federated rules.

[148] See the general discussion of these issues in *Re Mining and Energy Union* [2024] FWCD 1022, particularly [17]–[26], including cases cited therein.

Fair Work Commission

D8.1: What is a workplace delegate

A workplace delegate is a person appointed or elected under the rules of an employee organisation to be a representative for members in a particular enterprise or regulated business.[149] Workplace delegates have the right to represent the industrial interests of members, and persons eligible to be members, at the enterprise or regulated workplace at which they work and are entitled to reasonable communication with those persons.[150] Workplace delegates are also afforded protections, including protections from unreasonable hindrance or obstruction in the exercise of their rights.[151] Consequently, many employee organisations require rules which provide for the appointment or election of workplace delegates.

D8.2: Rules regarding workplace delegate

The Model Rules regarding workplace delegates do not set out prescriptive requirements for the election or appointment of workplace delegates. Instead, the Model Rules are facilitative; they allow for the development and implementation of policy regarding the appointment or election of workplace delegates.[152] This allows an organisation to adopt policy and procedures suitable to the organisation, and to change them as circumstances change. However, an organisation can set out specific procedures in its rules if it so wants.

If an organisation wants to have rules which set who can be a workplace delegate and what their rights and responsibilities, it must ensure that such rules do not conflict with the requirements of the FW Act. In particular:

- rules cannot extend the rights of workplace delegates to persons who would not be so entitled under the FW Act
- additional rights can be endowed on workplace delegates by an employee organisation's rules, but such rights can only extend to the relationship between the delegate and the employee organisation and not to external third parties.

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149 FW Act section 350C.

150 FW Act sections 350C (2) and (3).

151 FW Act section 350A.

152 See Model Rules - Federated rule book - Part M; Unitary rule book - Part H.

D8.3: Rules cannot extend workplace delegates rights to persons outside the scheme

Though not explicitly stated in the FW Act, workplace delegates are, in the view of the Delegate of the General Manager of the Commission, limited to persons who work at the enterprise or regulated business.[153] Consequently, rules which endow the rights and protections afforded by the FW Act on persons who do not work at the enterprise or regulated business would likely be considered contrary to the FW Act.

This is not to say that rules cannot provide for delegates or representatives who do not work at the relevant enterprise or regulated workplace. Employee organisations have the right to determine who their delegates and representatives are.[154] However, those delegates are different to the statutory delegates recognised by the FW Act and if the rules purported to extend the statutory rights and protections to persons who are not so employed, such rules would likely be considered contrary to the FW Act.

D8.4: Endowing workplace delegates with additional rights

The FW Act affords workplace delegates a number of rights and protections. An organisation's rules can provide additional rights and duties to its delegates. However, rules cannot impose obligations and duties on parties who are not bound by the rules; the rules of an organisation are a compact between the members of the organisation.[155]

Rules of organisations do not bind employers, and therefore they cannot impose duties or obligations on the employer at the enterprise or regulated business. But the rules can provide workplace delegates with additional rights and duties as long as they are limited to matters that regulate the relationship within the organisation.[156] For example: rules which require workplace delegates to promote the employee organisation and its policies to members and eligible persons at the relevant enterprise have been considered as going to the internal affairs of the organisation.[157]

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153 *Re Independent Education Union of Australia* [2024] FWCD 1019 at [23]–[37].

154 *Re Independent Education Union of Australia* [2024] FWCD 1019 at [22].

155 *Re Australian Municipal, Administrative, Clerical and Services Union* [2024] FWCD 1042 at [22], drawing from *Gordon v Caroll* (1975) 27 FLR 129 at 155.

156 *Re Australian Municipal, Administrative, Clerical and Services Union* [2024] FWCD 1042 at [22], drawing from *Gordon v Caroll* (1975) 27 FLR 129 at 155.

157 *Re National Tertiary Education Industry Union* [2024] FWCD 1051 at [28]–[32].

Fair Work Commission

E: Members

E1: The right to become and remain a member

If a person is eligible to join a registered organisation, they are entitled to become and remain a member.[158] It does not matter what an eligible person's motives for joining might be, as long as they are eligible they are entitled to join.[159] Even if a member has been expelled for a valid reason, they are still entitled to rejoin the organisation.[160]

Model Rules cross reference

Membership is dealt with in Part C of both sets of the Model Rules.

However, rules that determine who is eligible to join an organisation are called **eligibility rules** and they are a special class of rules. Model Rules have placed eligibility rules in Appendix A. This separates them from the other rules and reduces the likelihood that they may be altered in error.

Alterations to eligibility rules are subject to a different approval process, see G2: Alterations to eligibility rules.

Rules of organisations cannot prohibit an eligible person from joining or from remaining a member. If they do, they have no effect.[161]

For example: rules which required a special meeting of members to consider readmittance of expelled members have been found to be of no effect.[162]

Rules which restrict eligible people from joining an organisation are unlikely to be certified by the Commission.

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158 RO Act section 166.

159 *Cahill v Sheet Metal Working, Agricultural Implement and Stovemaking Industrial Union of Australia* (1956) 84 CAR 22.

160 *Henry v Professional Divers Association of A/asia* (1987) 22 IR 171.

161 RO Act section 166 (6). See also *Zimmer-Vorhaus v Australian Institute of Marine and Power Engineers* (1966) 8 FLR 468.

162 *Henry v Professional Divers Association of A/asia* (1987) 22 IR 171.

For example: rules which require applicants to achieve professional standards before admittance to full membership have not been certified.[163] Also, the courts have observed that membership cannot be conditional on endorsement by the Committee of Management.[164]

E2: Exceptions to the right to become and remain a member

There are some exceptions to the right to become and remain a member. These rights are subject to any modern award or order of the Commission and subject to payment of amounts properly payable in relation to membership.[165] Also, a natural person of E4: General Bad Character not so entitled and a body corporate whose constituent documents are inconsistent with an employer organisation is not entitled to join or remain a member of that organisation.[166] Importantly, the ability to remain a member is subject to complying with the rules of the organisation.[167]

A person is entitled to remain a member even if they are no longer eligible to join, unless the rules of the organisation do not permit them to remain a member.[168]

For example: an employee working in a different industry can stay a member, unless the organisation's rules do not permit them to remain a member. That said, if a member is no longer of the type required for an association to be registered, then that person's membership immediately ceases.[169]

For example: if a member of an employee organisation has permanently ceased to be an employee, independent contractor or an officer, their membership immediately ceases.[170]

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163 For example, *Re Screen Producers Association of Australia* [2014] FWCD 1821.

164 *Re Australian Glass Workers' Union* (1973) 22 FLR 17.

165 RO Act sections 166(1) and (4).

166 RO Act sections 166 (1) and (5).

167 RO Act sections 166 (1) (b) and (4) (b).

168 RO Act sections 166(2) and (5)(b). See also Moore J in *Australian Education Union v Lawler* (2008) 169 FCR 327 at [7] and *Turner v Australasian Coal and Shale Employees Federatio*n (1984) 6 FCR 177.

169 RO Act section 171A and see sections 18A (3) and 18B (3) for the types of members that bar an association from registration.

170 RO Act section 171A and see section 18B (3) for the types of members that bar an association from registration as an employee association.

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E3: Amounts properly payable in relation to membership

The payment of a joining fee as well as the first subscription have been held to be amounts properly payable in relation to membership.[171] However, rules which permit the amount to be determined on a case-by-case basis have been found to be contrary to the requirements of the predecessor to the current Act, the then *Conciliation and Arbitration Act 1904* (Cth) (C&A Act).[172] Finally, the amounts payable cannot be so exorbitant as to place oppressive, unreasonable or unjust conditions on members having regard to the objects of the relevant Act.[173]

E4: General Bad Character

A person otherwise eligible may be excluded from membership if they are of general bad character. This is a different test to whether a person is of good character and applicants for membership are not required to show themselves to be of good character.[174] Consequently, rules which require the attainment of certain standards before an applicant can be admitted to full membership have been found to be contrary the RO Act.[175]

The question of whether an applicant is of general bad character is not a question dealt with by the rules. Instead, it involves an examination of the reputation, disposition and general pattern of behaviour of a notorious person seeking membership.[176] The onus for establishing whether an applicant for membership is of general bad character lies with the organisation.[177]

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171 *Mackenzie v Administrative and Clerical Officers' Association, Commonwealth Public Service* (1962) 5 FLR 342 at 352.

172 *Mackenzie v Administrative and Clerical Officers' Association, Commonwealth Public Service* (1962) 5 FLR 342 at 352, noting that the relevant provisions of the RO Act are in substantively the same terms as the provisions under discussion in *Mackenzie.*

173 See *Roberts v Building Workers' Industrial Union* [1988] FCA 417.

174 *Pickersgill v Seamen's Union of Australian* (1990) 21 FCR 289 at 292–293.

175 Re *Screen Producers Association of Australia* [2014] FWCD 1821.

176 *Pickersgill v Seamen's Union of Australian* (1990) 21 FCR 289; Re *Keogh and Federated Clerks Union of Australia*; Ex parte Linehan (1979) 40 FLR 445; *Cahill v Sheet Metal Working Industrial Union of Australia* (1956) 84 CAR 22; *Owens v Australian Building Construction Employees and Building Labourers Federation* (1978) 19 ALR 569.

177 *Owens v Australian Building Construction Employees and Building Labourers Federation* (1978) 19 ALR 569.

Excluding members for bad character

Rules that seek to exclude members for bad character are only applicable to natural persons – they cannot be used against legal entities like companies. The Model Rules **do not** include rules of this nature.

Rules of this kind have resulted in significant cases before the Federal Court.

Registered organisations are membership organisations by definition with strong protections for members. A specific organisation is often the only organisation the member can join, by virtue of carefully negotiated demarcation agreements and complex eligibility rules.

The Commission recommends against these types of rules and you should seek advice prior to making alterations.

E5: Qualified to be employed

It is important to note subsection 166(3) of the RO Act entitles persons who are qualified and seek to be employed in the relevant occupation to join unions. A similar provision in the C&A Act was discussed in *Owens*[178] where the Court stated that 'qualified' means 'has the necessary skills or qualifications', and for building workers that was determined to be 'physical capacity'.

E6: Removing members

Rules can provide for the expulsion of members under disciplinary procedures. See F10: Sanctioning members.

In addition to removing members in such circumstances, the RO Act requires unfinancial members to be removed from the register of members.[179]

In effect, a member cannot remain a member if they have been continuously unfinancial for three years. Rules can provide for earlier removal of unfinancial members, that is a matter for the organisation. However, rules

[178] *Owens v Australian Building Construction Employees and Building Labourers Federation* (1978) 19 ALR 569.

[179] RO Act section 172.

that provide for very short periods of 'unfinanciality' before a member is removed are likely to impose oppressive, unreasonable and unjust conditions on member having regard to Parliament's intentions and the objects of the RO Act and FW Act.[180] Also members are entitled to be notified and be given the opportunity to be heard prior to being removed from the register of members.[181]

It is therefore very important to have clear rules that set out when a member becomes unfinancial. Part C of the Model Rules set out a process that attempts to ensure that members have a reasonable opportunity to pay their membership subscriptions before they are deemed to be unfinancial. Part C also provides for the removal of members in line with the requirements of the RO Act.

[180] RO Act section 142 (1) (c).

[181] *Re An Election of Offices In the Federated Liquor and Allied Industries Employees' Union of Australia South Australian Branch v Re An Application By Dianne June Kenward of An Enquiry Into the Said Election* [1989] FCA 250.

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F: Oppressive unreasonable or unjust

Section 142 of the RO Act sets out general requirements of rules, including the requirement that they '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 FW Act, are oppressive, unreasonable or unjust.'[182]

This proscription has existed in predecessor legislation in substantially the same terms as in the RO Act[183] and consequently there is an extensive body of case law on this subject. For ease of reading, this Part of the Companion Reader will refer to this entire legislative proscription as 'imposing oppressive, unreasonable or unjust conditions on members.'

Getting rules certified by the Delegate of the General Manager

Alterations do not take effect until certified by the General Manager or their Delegate. As part of this process the Commission will consider whether the proposed rules impose oppressive, unreasonable or unjust conditions on members.

See G3: Obtaining 'certification' of alterations to 'other rules'.

F1: The meaning of oppressive, unreasonable and unjust

The meaning of the words 'oppressive', 'unreasonable' and 'unjust' were considered by Deane J in *Lancaster.*[184] In his view, these words should be given their 'ordinary strong meaning' and he defined them as follows:

[182] RO Act section 142 (1) (c).

[183] Subsection 140 (1) (c) of the *Conciliation and Arbitration Act 1904*, section 196 (c) of the *Industrial Relations Act 1988*, section 142 (1) (c) of Schedule 1 of the *Workplace Relations Act 1996*.

[184] *Municipal Officers' Association of Australia v Lancaster* (1981) 54 FLR 129.

> 'To be oppressive, a condition, obligation or restriction must be burdensome, harsh and wrongful…To be unreasonable, it must be immoderate and inappropriate. To be unjust, it must be contrary to right and justice and to ordinary standards of fair play…' [185]

F2: Must not be imposed on applicants for membership or members

It is important to note that the RO Act is not concerned with rules that are generally oppressive, unreasonable or unjust. It deals with rules and rule alterations that impose conditions, obligations or restrictions on applicants or members that are oppressive, unreasonable or unjust (having regard to the requisite matters).

The Federal Court has interpreted this to mean that the condition, obligation or restriction is not one imposed on an individual member (or applicant), but on members generally in their capacity as members.

For example: in *Roughan*[186], Wilcox J considered rules which abolished an office. The question was not whether the abolition of the office imposed oppressive, unreasonable or unjust conditions, obligations or restrictions on the person who held the office, but whether it imposed on members generally (not office holders).

F3: Conditions, obligations or restrictions

Rules by their very nature impose conditions, obligations or restriction on those who are bound by them. Under subsection 142 (1) (c) of the RO Act, it is not a question of whether the rules impose conditions, obligations or restrictions on members. The question is whether they impose conditions, obligations or restrictions on members and applicants that are oppressive, unreasonable or unjust. The mere imposition by the rules of conditions, obligations or restrictions is not evidence that they are oppressive, unreasonable or unjust.[187]

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185 *Municipal Officers' Association of Australia v Lancaster* (1981) 54 FLR 129 at 165.

186 *Roughan v Australasian Meat Industry Employees' Union* (1992) 36 FCR 536.

187 *Doyle v Australian Workers' Union* (1986) 12 FCR 197 at 205–206.

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F4: Having regard to Parliament's intentions and the objects of the Act

When considering whether a rule imposes oppressive, unreasonable or unjust conditions on members regard must be had to Parliament's intentions in enacting the RO Act and the objects of the RO Act and the FW Act. The words 'having regard to' mean that it is necessary to take these into consideration and that they be given due weight, but they are not determinative.[188] Rules do not have to 'serve or be consistent with' Parliament's intentions and the objects of the Acts, but merely that the intentions and objects are taken into account.[189] The duty to protect members from oppression, unreasonableness and injustice is the paramount consideration and is not to be abrogated by Parliament's intentions and the objects of the RO Act.[190]

In this respect, regard must be had to:

- the ability of members to participate in the affairs of the organisation
- the democratic functioning and control of the organisation
- the organisation is representative of its members
- the organisation's accountability to its members
- the ability of the organisation to operate effectively
- the efficient management of the organisation.[191]

[188] *Municipal Officers' Association of Australia v Lancaster* (1981) 54 FLR 129 at 152.

[189] *Municipal Officers' Association of Australia v Lancaster* (1981) 54 FLR 129 at 166.

[190] *Cassidy v Amalgamated Postal Workers' Union of Australia* (1967) 11 FLR 124.

[191] RO Act section 5 (3).

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F5: Election rules: qualifications for office

An important aspect of democratic functioning is the right to run for office. Restricting a member's right to run for office runs counter to this principle and reduces the ability of some members to participate in the affairs of their organisation. Rules which restrict members ability to run for office may impose oppressive, unreasonable or unjust conditions on members. As stated by Joske J in *MacDonald*:[192]

> 'The right to be a member must surely involve a right to take one's share in the management and control of the body of which one is a member and include as an attribute of membership the right to vote and the right to stand for and be elected to the representative offices of the body. These rights are inherent in the very notion of membership of a representative body, and if they are absent the body is not a truly representative body.'[193]

In *Allen*[194] Smithers J agreed that qualifications on running for office restrict the opportunity for some members to participate in their organisation, but concluded that conditions can be placed on a member's right to nominate for office if the conditions are reasonable:

> '...a member who is excluded from the right to stand for any office in a union is to that extent excluded from full participation in the affairs of the organization, and that in such a case one of the chief objects of the Act is not achieved. It is not said that certain conditions may not be imposed upon participation...but that the reasonableness of conditions which do so must be assessed...'[195]

However, they cannot deprive a large number of members from nominating for office. Such rules have been found to impose oppressive, unreasonable or unjust conditions on members.[196]

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192 *MacDonald v The Amalgamated Engineering Union (Australian Section)* (1962) 3 FLR 446.

193 *MacDonald v The Amalgamated Engineering Union (Australian Section)* (1962) 3 FLR 446 at 449.

194 *Allen v Townsend* (1977) 31 FLR 431.

195 *Allen v Townsend* (1977) 31 FLR 431 at 455.

196 *Riordan v Federated Clarks Union of Australia* (1952) 74 CAR 5; *Leveridge v Shop Distributive and Allied Employees' Association* (1977) 31 FLR 385; *MacDonald v The Amalgamated Engineering Union (Australian Section)* (1962) 3 FLR 466; *Re Stapleton* (1983) 5 IR 341.

A number of authorities have considered restrictions which aim to ensure that committees of management are composed of members with an appropriate level of expertise or experience to manage the organisation.[197] As stated by Spicer CJ in *Cameron*[198], such restrictions seek to ensure that:

> 'those who undertake the tasks of administration of the organization have more than a fleeting interest and experience of its character and objectives.'

Unreasonable qualifications

Qualifications that have been found to be unreasonable include:

- restrictions which exclude a large number of members[199]
- lengthy qualification periods[200]
- requirements for nominees to sign a declaration that they are in no manner associated with certain types of political parties [201]
- whether a branch meeting of members accepts a nominee's reasons for non-attendance at meetings.[202]

When considering the reasonableness of such restrictions, factors that have been taken into consideration include:

- the scope of the restriction
- the prevailing characteristics of the membership

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[197] *Cameron v Australian Workers' Union* (1959) 2 FLR 45; *Leveridge v Shop Distributive and Allied Employees' Association* (1977) 31 FLR 385; *Allen v Townsend* (1977) 31 FLR 431; *Lovell v Federated Liquor and Allied Industries Employees' Union of Australia* (1978) 35 FLR 72.

[198] *Cameron v Australian Workers' Union* (1959) 2 FLR 45 at 59.

[199] *MacDonald v The Amalgamated Engineering Union (Australian Section)* (1962) 3 FLR 466 at 449; *Leveridge v Shop Distributive and Allied Employees' Association* (1977) 31 FLR 385; *Rule v Australian Workers' Union* (1985) 9 FCR 280.

[200] *Allen v Townsend* (1977) 31 FLR 431; *Re Stapleton* (1983) 5 IR 341 at 352; *Rule v Australian Workers' Union* (1985) 9 FCR 280.

[201] *Little v Flockhart* (1951) 73 CAR 18.

[202] *Moffitt v The Vehicle Builders Employees' Federation of Australia* (1985) 11 IR 174.

- the proportion of members excluded from office[203]
- impediments to the effectiveness and efficiency of the organisation.[204]

For example, in *Re Stapleton*[205] Evatt J had regard to the high turnover of membership in an organisation and held that one-year continuous financial membership imposed unreasonable and unjust conditions on the members of that organisation. Whereas Wilcox J in *Rule* observed that:

> 'In the case of a one-year qualification period it is unlikely that the proportion of members excluded from candidature will be so great as to make unreasonable the imposition of the restriction…'[206]

In *Lovell*[207] Smithers and Evatt JJ determined that in the circumstances where continuity of financial membership was difficult to achieve because of the methods of collecting subscriptions, the requirement for continuous financial membership imposed oppressive, unreasonable and unjust conditions on members. Whereas in *Bucknell*[208] Toohey J was satisfied that a three-year qualifying period did not offend against the relevant statutory provisions because members were unlikely to fall into arrears without knowing it.

Also, restrictions appropriate to higher offices might be onerous when applied to other offices. For example, a lengthy period to qualify for the office of Secretary may be reasonable, but unreasonable for branch and national conference members.[209]

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[203] *Cameron v Australian Workers' Union* (1959) 2 FLR 45; *Leveridge v Shop Distributive and Allied Employees' Association* (1977) 31 FLR 385; *Allen v Townsend* (1977) 31 FLR 431; *Lovell v Federated Liquor and Allied Industries Employees' Union of Australia* (1978) 35 FLR 72.

[204] *Kayne v Australian Broadcasting Commission Staff Association* (1978) 34 FLR 104 at 109.

[205] *Re Stapleton* (1983) 5 IR 341 at 352.

[206] *Rule v Australian Workers' Union* (1985) 9 FCR 280 at 294.

[207] *Lovell v Federated Liquor and Allied Industries Employees' Union of Australia* (1978) 35 FLR 72 at 84–85.

[208] *Bucknell v Printing and Kindred Industries Union* (1981) 52 FLR 258 at 264.

[209] *Leveridge v Shop, Distributive and Allied Employees' Association* (1977) 31 FLR 385 at 403; *Moffitt v The Vehicle Builders Employees' Federation of Australia* (1985) 11 IR 174.

Example – Inserting a qualification period of two years

The UVW union covers industries with transient workforces and therefore has a high membership turnover rate. The union proposes to introduce a new rule which provides that only members who have been financial members for two years can nominate for conference delegate.

Because a large proportion of members will be excluded from taking their share in the management and control of their organisation, this proposed restriction is likely to be considered as contrary to the principles of democratic functioning and participation of members in the affairs of their organisation.

On the other hand, the restriction of two years might be reasonable for the office of Federal Secretary, on the basis that this office requires greater experience and knowledge of the industry.

This can be contrasted with the example below.

Example – Inserting a qualification period of three years

The XYZ Association is an employer association that has been established for many years and has a majority of members that are long term. A survey of their membership register shows that the majority of members have been financial for more than five years. The rules provide that no member (or member representative) may stand for the office of President unless the person concerned has completed three years continuous membership prior to nominating.

This restriction on member participation in the organisation **may** be valid – the 'profile' of the membership and the importance of the office in the organisation support the argument that the three year qualification for office is not unreasonable.

Rules setting out qualifications to run for office are very organisation-specific. Therefore, the Model Rules do not set out any qualifications to run for conference delegate or executive member, other than being a financial member of the relevant electorate.

If you want to place additional qualifications to run for an office in your organisation you must ensure they do not impose oppressive, unreasonable or unjust conditions on members. It is recommended you seek the advice of the Commission. You may need to make a submission in support of your proposed alteration for it be certified. See below transitional rules H3.3: Changes to qualifications for office.

F6: Election rules: nominating

Section 143 of the RO Act requires rules of organisations to provide for the election of office holders, including, among other things, the manner in which persons become candidates for office.[210] It is a matter for the organisation to determine the procedures for nominating for office, provided that the procedures do not impose oppressive, unreasonable or unjust conditions on members. The procedures for nominating for office were considered in *Mawbey*[211] and, in this case, the procedures were found to be easy to comply with and therefore did not impose oppressive, unreasonable or unjust conditions on members.

The Model Rules set out standard processes for nominating for office which are considered easy to comply with. If you want to have different processes for nominating for offices in your organisation, make sure simple steps which are easy to comply with are clearly set out in the rules. It is recommended that you seek the advice of Commission.

F7: Election rules: acceptance of nominations

The right to run for office means that the acceptance or rejection of a nomination is not discretionary. The nomination of a member who meets the qualification and procedural requirements must be accepted. Likewise, there is no discretion to accept a nomination of a member who does not meet the qualification requirements.

For example: a rule which gave the governing body the discretion to allow nominations from members not otherwise qualified 'in special circumstances' was held to impose unreasonable conditions on members.[212]

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[210] RO Act section 143 (1) (d) (i).

[211] *Mawbey v Thone* (1969) 15 FLR 161.

[212] *Riordan v Federated Clerks Union of Australia* (1952) 74 CAR 5.

Your rules must not allow discretion over the acceptance or rejection of valid nominations. If they do, they will not comply with the RO Act.

F8: Election rules: campaigning

It is important for voters to have access to information about the candidates so that they can make informed choices. Rules that prohibit campaigning by candidates for office have been found to impose oppressive, unreasonable or unjust conditions on members.[213]

For example: in *Tripp*[214] rules which restricted the opportunities of candidates to fairly place their claims before members and which enabled a committee of management to determine the form of a candidate's approach to members were found to be oppressive.

This does not mean that rules cannot place restrictions on how campaigning is undertaken.

For example: in *Shearer*[215] stringent restrictions which limited campaign materials to being distributed at meetings or posted to members who applied for a postal vote were upheld. Whether restrictions on campaigning impose oppressive, unreasonable or unjust conditions on members will depend on the characteristics of the organisation and the ballot method.

For example: in *Marantelli,*[216] limiting campaigning to personal canvassing where the electorate was small and in one geographic location was held not to be unreasonable.

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213 *Cameron v Australian Workers' Union* (1959) 2 FLR 45.

214 *Tripp v Australian Society of Engineers* (1953) 78 CAR 149.

215 *Shearer v Amalgamated Engineering Union* (1960) 1 FLR 436.

216 *Marantelli v Amalgamated Engineering Union (Australian Section)* (1960) 4 FLR 335.

Model Rules cross reference

Election rules are dealt with in Appendix B to the Model Rules.

The Model Rules **do not** place any restrictions on how campaigning is undertaken, though they do set stipulations regarding candidate statements distributed by the Returning Officer. These stipulations provide candidates with clear guidance when producing their statements and enable efficient distribution to all voting members.

Contact the Commission if your organisation seeks additional restrictions regarding campaigning by candidates. It is important that any such rules do not enable union resources to be used to assist one candidate over another.[217]

F9: Election rules: generally

The RO Act requires the rules of organisations to provide for a number of matters in relation to the election of office holders. Of importance:

- ballots for the election of office holders must be secret[218], and
- for direct voting systems, ballots must be postal (unless an exemption is granted).[219]

Though not required to be in rules, elections for office holders must be conducted by the AEC, unless an exemption is granted.[220]

Other requirements for rules include:

- elections must be by a direct voting system or a collegiate electoral system
- the duties and qualifications of the returning officer
- the ability to remedy defective nominations

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[217] RO Act section 190.

[218] RO Act section 143 (1) (e).

[219] RO Act section 144.

[220] RO Act sections 182 and 183.

- how to nominate for office
- the day that the roll of voters closes
- the conduct of the ballot
- absent voting
- scrutineers.[221]

The actual rules for each of these requirements are generally left to the discretion of the organisation.

For example: it is up to the organisation to decide how absent voting occurs. The RO Act merely requires that the rules provide for these things.

However, care must be taken that the election rules do not impose oppressive, unreasonable or unjust conditions on members.

For example: rules with short turn-around times for the conduct of a ballot may impose oppressive, unreasonable or unjust conditions on members in remote areas. Their vote may not be able to be returned before the ballot closes.

Also, the election rules must ensure that, as far as practicable, no irregularities can occur.[222]

For example: rules must set out the method of counting votes. If not, that may lead to an irregularity.[223] The model election rules meet the requirements of sections 143-145 of the RO Act, if you wish to depart from these, seek the advice of the Commission.

F10: Sanctioning members

The Courts have recognised the ability for organisations to sanction members when appropriate is essential for good governance and effective functioning.[224] When considering rules which impose sanctions on members,

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221 RO Act sections 143, 144 and 145.

222 RO Act section 143 (1) (f).

223 *Re Inquiry relating to Election for offices in United Firefighters' Union of Australia. Victorian Branch; Re Churchill* (2001) 107 IR 31.

224 *Thorton v Mackay* (1946) 56 CAR 561, *O'Sullivan v Australian Workers' Union* (1938) 39 CAR 323; Cameron *Australian Workers' Union* (1959) 2 FLR 45; *Wishart v Australian Builders Labourers' Federation* (1960) 2 FLR 298; *Cassidy v Amalgamated Postal Workers' Union of Australian* (1967) 11 FLR 124.

regard must be had to whether oppressive, unreasonable or unjust conditions are imposed. A rule which empowers a disciplinary body to expel members does not in of itself impose oppressive, unreasonable or unjust conditions on members;[225] it is the nature of the offence committed by the member and the processes leading to expulsion that must be considered.

Three significant principles appear:

- the offences for which sanctions can be imposed cannot be so vague and uncertain so that a member cannot know what action might result in a sanction
- acts which may result in the imposition of a sanction must be intentional
- a member is entitled to procedural fairness before the imposition of a sanction.

The following offences have been found to be so vague and uncertain to the extent that they impose oppressive, unreasonable or unjust conditions on members:

- acting detrimentally to the interests of the organisation[226]
- conduct inimical to the interests of the organisation[227]
- bringing the organisation into disrepute[228]
- distributing material detrimental to the organisation[229]
- any act likely to weaken, injure or destroy the federation[230]
- acting against the best interests of the organisation[231]
- to not promote the welfare of members[232]

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225 *O'Sullivan v Australian Workers' Union* (1938) 39 CAR 323.

226 *Cassidy v Amalgamated Postal Workers' Union of Australian* (1967) 11 FLR 124.

227 *Kenney v Operative Painters and Decorators Union of Australia* (1955) 81 CAR 166; *Mackenzie v Administrative and Clerical Officers Association, Commonwealth Public Service* (1962) 5 FLR 342.

228 *Kenney v Operative Painters and Decorators Union of Australia* (1955) 81 CAR 166.

229 *Wiseman v Professional Radio and Electronics Institute* of A/asia (1978) 35 FLR 24.

230 *Lasarewitch v Australian Railways Union* (1955) 82 CAR 14; *Wishart v Australian Builders Labourers' Federation* (1960) 2 FLR 298.

231 *Thorton v Mackay* (1946) 56 CAR 561.

232 *Maxwell v Boilermakers Society of Australia* (1964) 7 FLR 155.

- to not serve and safeguard the interests of the organisation.[233]

Misconduct as an offence liable to sanction is not viewed as so vague or uncertain as to be oppressive, unreasonable to unjust, but is construed as limited to misconduct associated with continuance as a member.[234] In Bowden[235] Kelly J gave disregard of a member's obligations to fellow-members and to the organisation as examples of such misconduct.

Rules subject to an opinion

Acts that are subject to the opinion of a governing body have been found to impose oppressive, unreasonable or unjust conditions on members. This is because the rule should be an objective test as to whether the act actually occurred, not a subjective test as to whether a disciplinary body formed an opinion.[236]

The following rules have been found to impose oppressive, unreasonable or unjust conditions on members:

- doing anything which in the opinion of the governing body is contrary to union principles[237]
- act in a way which in the opinion of the governing committee is contrary to the best interests of the organisation or any members[238]
- conduct which in the opinion of members is detrimental to the interests of the organisation[239]

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233 *Egan v Harradine* (1975) 25 FLR 336.

234 *Bowden v Australian Workers' Union* (1946) 56 CAR 530; *Cameron v Australian Workers' Union* (1959) 2 FLR 45.

235 *Bowden v Australian Workers' Union* (1946) 56 CAR 530 at 532.

236 *Australian Workers' Union v Bowen No.2* (1948) 77 CLR 601.

237 *Cameron v Australian Workers' Union* (1959) 2 FLR 45.

238 *Hardiman v Transport Workers Union of Australia* (1954) 80 CAR 232.

239 *Wright v Australian Workers' Union* (1965) 7 FLR 148.

- divulge any business of the organisation which in the opinion of the governing committee was of such a confidential nature as to render disclosure detrimental to the interest of the organisation[240]
- commit any misdemeanour which in the opinion of members are prejudicial to the best interests of the organisation.[241]

Rules that render members liable for unintentional acts are likely to impose oppressive, unreasonable or unjust conditions on members.

For example:

- divulging union business[242]
- acting contrary to resolutions of governing bodies[243]
- acting contrary to the policies of the organisation.[244]

Members are deemed to know the rules of their organisation, and therefore rules that provide for removal for contravention of rules do not impose oppressive, unreasonable or unjust conditions on members.[245]

Failing to abide by policy or resolutions would impose oppressive, unreasonable or unjust conditions of members, unless the member was aware of the policy or resolution and intentionally refused to abide by it. **For example:** a rule providing for expulsion from membership for refusing to abide by a resolution has been held to be valid as the notion of 'refusal' required the resolution be brought to the attention of the member

240 *McKay v Australian Workers' Union* (1968) 12 FLR 182.

241 *Maxwell v Boilermakers Society of Australia* (1964) 7 FLR 155.

242 *Ford v Federated Miscellaneous Workers' Union of Australia* (1954) 79 CAR 147; *O'Neill v Printing Industry Employees Union of Australia* (1965) 6 FLR 488.

243 *Cassidy v Amalgamated Postal Workers' Union of Australian* (1967) 11 FLR 124.

244 *Cameron v Australian Workers' Union* (1959) 2 FLR 45.

245 *Hardiman v* Transport Workers Union of Australia (1954) 80 CAR 232; *Cassidy v Amalgamated Postal Workers' Union of Australian* (1967) 11 FLR 124.

and the member's failure was intentional.[246] Consequently the General Manager of the Commission has certified rules which provide for sanctions if the offence is knowingly committed.[247]

Before a member is sanctioned, they must be afforded procedural fairness.[248] However, the rules do not have to set out the procedural requirements; if the rules do not include such rules they will be implied into the rules by the Courts.[249]

Principles of procedural fairness require that the person against whom allegations have been made is informed of the allegations and is entitled to be heard prior to a decision being made.[250] The member should be afforded sufficient time to prepare a defence.[251] The Model Rules provide for such a process before a member can be sanctioned. Your organisation is not required to have such a rule, but such rules are highly recommended so that the procedures are known to disciplinary bodies and to members against whom allegations have been made.

F11: Penalties

The courts have upheld rules which provide for a range of penalties, from conviction without imposing a penalty, to fines, suspension and all the way through to expulsion from membership.[252] It has been determined that discipline committees must approach the imposition of penalties in a reasonable manner, and if they don't that would be evidence of denial of natural justice.[253] The Model Rules set out a range of penalties, allowing an appropriate penalty to be imposed according to the circumstances of a particular case.[254]

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246 *Holmes v Federated Clarks Union of Australia* (1956) 1 FLR 1.

247 *Re Finance Sector Union of Australia* [2022] FWCG 59; *Re Australian Education Union* [2023] FWCG 1.

248 *Rochfort v Dowdell and Ryan* (1965) 8 FLR 283; *Egan v Harradine* (1975) 25 FLR 336.

249 *Thorton v Mackay* (1946) 56 CAR 561; *Egan v Harradine* (1975) 25 FLR 336.

250 *Rochfort v Dowdell and Ryan* (1965) 8 FLR 283.

251 *Egan v Harradine* (1975) 25 FLR 336.

252 *Gordon v Caroll* (1975) 27 FLR 129.

253 *Gordon v Caroll* (1975) 27 FLR 129 at 168.

254 See Model Rules Part C.

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F12: Financial arrangements

A branch of a registered organisation has no legal status. It is not separate from the organisation, it is an administrative section of a larger legal entity – the organisation.[255] The organisation is a body corporate with perpetual succession.[256] Consequently all funds and property are legally owned by the organisation.

Model Rules cross reference

The Model Rules deals with financial matters predominantly in Part F.

Branch financials, within the federated rules, are dealt with in Part K.

However, it is usual for organisations with branches to divide the custody, control and management of funds between the national and branch levels.[257] The RO Act expressly recognises that each branch is a reporting unit for the purpose of financial reporting.[258] Unless other exemptions are obtained, every reporting unit must prepare and distribute an audited financial report every year.[259] The Model Rules replicate these standard financial arrangements by providing for national funds and branch funds.[260]

An organisation is not required to follow this financial arrangement. An organisation can vest the national body with all financial control if it so chooses. However, even if financial control is vested in the national body, a branch is still a reporting unit, unless the General Manger of the Commission has issued a certificate stating that the organisation is divided into reporting units on an alternative basis.[261]

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255 *Williams v Hursey* (1959) 103 CLR 30 at 54–55; *Re McJannet; Ex parte Minister for Employment Training and Industrial Relations (Qld)* (1995) 184 CLR 620 at 639–640.

256 RO Act section 27.

257 *Rohner v Waterside Workers' Federation of Australia* (1988) 90 FLR 370.

258 Unless the General Manager of the Commission has issued a certificate stating that the organisation is divided into reporting units on an alternative basis under section 245 of the RO Act.

259 RO Act Part 3 of Chapter 8.

260 See Model Rules – Federated rule book – Parts F & K; Unitary rule book – Part F.

261 RO Act sections 242, 245 and 246.

Irrespective of which arrangement is adopted, rules must provide for the management and control of funds and property and the conditions under which funds are spent.[262] Rules must also require the organisation and each of its branches to develop and implement policies in relation to expenditure.[263]

It is important to also specify how funds flow between the national body and branches. The Model Rules enable Branches to collect subscriptions and pay the national body an amount based on the number of financial members, as determined by the National Executive.[264]

Even if rules are clear about arrangements for the management and control of funds and property within an organisation, they can be challenged on the grounds that they impose oppressive, unreasonable or unjust conditions on members.

For example: in *Jolly*[265] it was alleged that the rules imposed such conditions on members because they failed to guarantee a level of funding to district branches adequate for the conduct of their operation. The court observed that the rules provide for a process for determining funding arrangements and that Branch officers are under a duty to exercise funding decisions in good faith and for a proper purpose. The court concluded that the rules do not need to guarantee a minimum level of funding and if they don't, they do not impose oppressive, unreasonable or unjust conditions on members.[266]

Rules can provide that branches become unfinancial if they do not pay the amounts required by the rules to the national body and as a consequence are deprived of entitlements, such as representation on national bodies.[267] Such rules have been found not to impose oppressive, unreasonable or unjust conditions on members.

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262 RO Act sections 141 (1) (b) (ix) and (xi).

263 RO Act section 141 (1) (ca).

264 See Model Rules – Federated rule book - Parts C and E; Unitary rule book – Part C.

265 *Jolly v Sharma* [2025] FCAFC 20.

266 *Jolly v Sharma* [2025] FCAFC 20 at [104]–[117].

267 *Geneff v Clothing & Allied Trades Union* [1984] FCA 208.

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F13: Subscriptions

The rules of organisations do not have to specify the membership fees, but they need to provide a means by which fees are set. They should be set by a governing committee and must be uniform within membership categories.[268]

Model Rules cross reference

Part C of both sets of the Model Rules provide that the Executive determines subscriptions and entrance fees, when and how payment is made, and when and how a member becomes unfinancial.

Rules requiring advance payment of membership subscriptions have been challenged and found not to have imposed oppressive, unreasonable or unjust conditions on members.[269] However, retrospective increases in subscriptions have been held to impose such conditions.[270] Further, an organisation cannot demand a one-off payment from an individual as a condition particular to that person for admittance to membership.[271]

F14: Capricious or objectionable use

It is important to note that if a rule is applied in an oppressive, unreasonable or unjust manner, that does not mean that the rule itself imposes oppressive, unreasonable or unjust conditions on members.[272]

For example: a branch may disburse funds capriciously, and not in accordance with the objects or the best interests of the organisation. But in this example, it is not the rule that gives the branch the power to disburse funds that imposes oppressive, unreasonable or unjust conditions on members. It is the capricious use of that

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268 *Mackenzie v Administrative and Clerical Officers Association, Commonwealth Public Service* (1962) 5 FLR 342; noting that section 142(2) of the Act recognises that membership fees may be based on members' rates of pay, including when those rates of pay are set by reference to a person's age.

269 *Murray v Operative Painters and Decorators Union* (1989) AILR 244.

270 *Allen v Laragy* (1975) 7 ALR 261.

271 *Roberts v Building Workers' Industrial Union* [1988] FCA 417.

272 *O'Sullivan v Australian Workers' Union* (1938) 39 CAR 323; *Allshorn v Stapleton* (1984) 4 FCR 236; *Hodder v Australian Workers' Union* (1985) 70 ALR 489; *Lewis v Maynes* (1988) 27 IR 113; *Jolly v Sharma* [2025] FCAFC 20.

power.[273] Likewise, the power to expel a member may be used harshly or unjustly, but that does not make the rule enabling the expulsion unreasonable or unjust.[274] If an officer or a governing committee misapplies a rule or acts in a manner that breaches the rules, a member can seek relief from the Federal Court.[275]

[273] *Lewis v Maynes* (1988) 27 IR 113 at 122.

[274] *O'Sullivan v Australian Workers' Union* (1938) 39 CAR 323 at 325.

[275] RO Act sections 164 and 164A.

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G: The process of altering rules – and 'certification'

From time to time every organisation will have cause to make, amend, vary, replace, rescind, repeal or delete ('alter') one or more of its existing rules.

Every organisation must have a rule providing for how its rules are to be altered.

Model Rules cross reference

Part G of both sets of the Model Rules provide a rule altering procedure.

The statutory and regulatory processes that an organisation must comply with in order to successfully alter its rules are significant. Information about these matters can be found on the Commission's website – go to Change the rules of a union or employer association.

This Companion Reader will not repeat all of this readily available information. Instead, it provides the following supplementary information for readers considering or intending to use the Model Rules.

G1: General matters

The RO Act distinguishes between two types of rule alterations, namely:

- alterations to an organisation's name or eligibility rule[276]
- an alteration to any other rules of the organisation.[277]

G2: Alterations to eligibility rules

Alterations to eligibility rules are a significant matter for an organisation. After making alterations to its eligibility rules:

[276] RO Act section 158; RO Regulations 121 to 125H inclusive.

[277] RO Act section 159; RO Regulation 126.

- the organisation must apply to Commission for its consent,
- the General Manager must notify the proposed alterations in the Commonwealth Government Gazette
- interested parties may lodge objections to the proposed alterations,
- after the objection period has closed, the Commission will usually hold a public hearing
- the Commission will determine whether the alterations should be given the Commission's consent.

The reasons for this process are further explained in the Annotations/Notes to Appendix 'A' of each of the rule books for the Model Rules. See also on the Commission's website Apply to change the eligibility rules of a employer association or a union (Form F68).

The alteration of other rules is a much more common occurrence for organisations, and the following paragraphs are concerned with these types of alterations.

G3: Obtaining 'certification' of alterations to 'other rules'

G3.1: What is certification?

When an organisation has gone through the internal process of altering its rules it must then:

- lodge a notice with the Commission setting out particulars of the alteration, including the complete terms of the alteration and the process the organisation followed to make the alteration in accordance with its rules
- publish a notice on its website advising that the notice concerning the alteration has been lodged with the Commission.[278]

NOTE: If there is a typographical, clerical or formal error in the particulars that have been lodged, the General Manager of the Commission may correct such error with the consent of the organisation.[279]

[278] RO Regulation 126 (1).

[279] RO Act section 159 (2).

When considering whether to certify the alterations the General Manager of the Commission (or that person's Delegate) must be satisfied that the alteration:

- complies with, and is not contrary to the RO Act, the FW Act, modern awards and enterprise agreements
- is not otherwise contrary to law
- has been made under the rules of the organisation.[280]

If so satisfied, the General Manager issues a decision which certifies to that effect.

An alteration to an organisation's rules that has been certified takes effect on the day of the certification.[281]

Rules must remain compliant over time

An organisation must be vigilant to ensure that its rules comply with the RO Act when registered and ongoing. If the RO Act is amended to impose further rules obligations on organisations, your organisation must take action to alter its rules to ensure they comply.

Example: The RO Act was amended to require that rules provide for the keeping of minute books of the proceedings and resolutions of committee of management meetings[282] and requiring the development of policies relating to expenditure.[283] If an organisation did not already have a rule that complied with these requirements, it was required to alter its rules to make such provisions.

Sometimes rules that are compliant at one time may become non-compliant for other reasons – for example, changes to the term of office of your officers may make your casual vacancy rule non-compliant.

[280] RO Act section 159 (1) (a)–(c).

[281] RO Act section 159 (3).

[282] RO Act section 141 (1) (b) (iia).

[283] RO Act section 141 (1) (ca).

When considering whether to certify alterations to rules, the General Manager or Delegate gives close consideration to all the statutory requirements for the altering of an organisation's rules, but most particularly will consider:

- whether the alteration results in a rule or rules that do not comply with any of the prohibitions on rules section 142 of the RO Act (see F: Oppressive unreasonable or unjust) and D7: Reserving offices for particular types of member and the risk of discrimination)
- whether the organisation has complied with its rules in making the alteration.

G4: Complying with the rules when altering them

You must give particular attention to ensuring that the rule or rules of the organisation that specify how the rules are to be altered are carefully and completely followed. Full and clear details of what was done to alter the rules must be set out in the particulars filed with the Commission for certification of those alterations.

The rules relating to the alteration of an organisation's rules, and compliance with those rules, have long been regarded as very significant components of the governance system for registered organisations. That is, one way in which an organisation complies with the statutory standard of 'democratic functioning and control of organisations'[284] is by complying with its rules in relation to altering those rules.

In the past, the significance of this duty on an organisation has resulted in courts taking the view that compliance by an organisation with its rule altering processes was mandatory.[285] Hence even minor blemishes in that process would result in the alteration being either ruled invalid by the court hearing the matter or denied certification by the relevant statutory officer at the time.

In more recent times, a slightly less stringent test has been applied to deciding whether an organisation has validly altered its rules even though there has not been 'strict' compliance with its rule altering rule or rules. That is, in every case where there has been a failure to strictly comply with the rules, is whether the failure is

[284] RO Act section 5 (3) (d).

[285] *Re Lawrence v Porter* (1988) 30 IR 38.

of no effect. In deciding that question the relevant decision maker must have regard to the language, purpose, scope and object of the relevant provisions of the rules.[286]

This revised test may result in an instance of minor non-compliance if the facts disclose that the non-compliance is not of substance and not intended by the rules to preclude certification of the relevant alteration.[287] Notwithstanding these more recent authorities, you should always make every effort to always follow each step of your organisation's rule alteration process.

Plan your rule altering process carefully

Non-compliance with the process of changing the rules is a frequent issue with alterations lodged with the Commission.

You choose your own process, which should be a balance between simplicity, efficiency, effectiveness and democratic control. However, once you have chosen your process you are required to follow it.

Things like special majorities, multiple approvals, long notice periods, veto processes and other complicated steps can be written into the amendment process, but they can make achieving an alteration more difficult in practice.

[286] *Re Australian Education Union v Australian Principals Federation* [2006] AIRCFB PR973525; *Master Builders' Construction and Housing Association of the Australian Capital Territory* [2013] FWCD 3600.

[287] *Re Shop, Distributive and Allied Employees Association* [2024] FWCD 1017.

Fair Work Commission

H: ‘Transitional rules’

‘Transitional rules’ are a common feature of organisations’ rule books. Transitional rules are not a subject covered by the Model Rules. This is because all such rules are ‘ad hoc’ or ‘one off’, designed to assist in the understanding, application or implementation of particular substantive rules of an organisation.

H1: What is a ‘transitional rule’?

A ‘transitional rule’ is a rule, or a sub-rule, in an organisation’s rule book that has the purpose of avoiding any unintended consequences, or misunderstandings or uncertainties, that might arise from the introduction of either:

- a substantive alteration to the rules of an organisation (or a branch)
- the first set of rules for an organisation upon its registration commencing
- the rules that will apply to an organisation following its amalgamation with another organisation or other organisations.

H2: Why might a transitional rule be needed, and when?

Transitional rules can cover a wide range of circumstances, but they are most commonly found in rule books when an organisation makes or alters rules that affect existing office holders in the organisation.

As is clear from G3: Obtaining ‘certification’ of alterations to ‘other rules’ alterations to the rules of an organisation do not take effect until they are ‘certified’ by the General Manager of the Commission.[288] But that does not mean the rule has operational effect from that date.[289] A rule that comes into effect on the day that it is certified can specify that it has operational effect on another date.[290]

[288] RO Act section 159 (3).

[289] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Registered Organisations Commission* [2018] FWCFB 16 at [24].

[290] *Re Australian International Pilots Association* [2024] FWCD 1007 at [29]–[34]; *Health Services Union* [2024] FWCD 1076.

Generally operational effect cannot be 'retrospective' (i.e. a date before the date that the act of certification takes place).[291] The general principle is that they cannot be altered or introduced into a rule book in such a way that they alter accrued rights or create uncertainty as to whether such rights are affected.[292]

The presumption against retrospectivity

There is a general rule of statutory interpretation to the effect that a change in the law is not meant to have retrospective effect or to adversely affect existing rights unless the clearest of words are used.[293]

This principle has been applied to amendments to the rules of registered organisations.[294] It is therefore recommended to spell out the intended effect of the new rule for members and officers of an organisation.

This is especially true if you are abolishing or creating offices.

A transitional rule can create clarity or a temporary situation that smooths the new rule alteration into the rule book.

When you are altering a rule that might affect the existing rights of a person in the organisation (either an officer or a member) you need to consider whether the subject alteration might either:

- remove or prejudice a person's existing rights
- create uncertainty about when it takes effect
- create uncertainty as to how it impacts a member or officer.

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[291] *Higgins v McGrane* (1961) 5 FLR 82 at 85; *Beeson v Blayney* (1966) 8 FLR 292; *Re Mellor; Re Federated Liquor and Allied Industries Employees Union of Australia* (1987) 18 IR 350.

[292] *Re Mellor; Re Federated Liquor and Allied Industries Employees Union of Australia* (1987) 18 IR 350.

[293] *Maxwell v Murphy* (1957) 96 CLR 261; *Murrihy v Betezy.com.au P/L (no 2)* (2013) 221 FCR 118; *Registered Organisations Commission v Australian Hotels Association* [2019] FCA 1516 [91]–[99].

[294] *Higgins v McGrane* (1961) 5 FLR 82 at 85; *Beeson v Blayney* (1966) 8 FLR 292; *Re Mellor; Re Federated Liquor and Allied Industries Employees Union of Australia* (1987) 18 IR 350.

If a proposed rule was to have that effect then, depending on its terms, it might not comply with the RO Act and thus not be capable of certification by the General Manager of the Commission (see F: Oppressive unreasonable or unjust).

H2.1: Drafting and removing transitional rules

Transitional rules are often very technical, and it is recommended that you speak to the Commission about your proposed draft.

Transitional rules are also often only required for a short period of time; however, they do not disappear once they have finished working. A transitional rule cannot be removed until:

- it has ceased to be relevant or operational
- you make a further rule alteration to remove it

The next time you change your rules, you should consider whether any existing transitional rule is still required and whether you can delete it from the rules. It is not uncommon to see organisations replace the same transitional rule every time they do a significant change, deleting the old one that has ceased to work and inserting a new one tailored to the new rule alteration.

H.3: Common transitional rules

H3.1: Removing officers

For information on when and how an organisation can remove officers please see D3.1: Abolition of offices.

As identified above, if there is a person holding the office there is a rebuttable presumption that the officer will continue to hold the office until their existing term expires. This is why it is recommended that you have a transitional rule that makes it clear when the abolition takes effect.

Common choices include expressly identifying that the office:

- is intended to end on certification of the rule
- is preserved until a particular time, for instance at the end of the existing term or otherwise becoming vacant (because the incumbent resigns from office, is removed on misconduct grounds or dies).

If you choose the second option, you should consider including words that preserve the existing powers of the office and what should happen in the case of a casual vacancy.

Example – Abolishing a vice president

OAN organisation has four Vice Presidents and a President. Each person has a two-year term. None of the offices are vacant.

In the last few years, their membership has decreased, and they no longer believe it is necessary to have four Vice Presidents.

OAN makes amendments to its rules that:

On and from the election to be held in 2028, the executive will consist of the President and three Vice Presidents.

If the rules are silent, the presumption against retrospectivity suggests that the abolition will take effect when the term of office expires. But this might not be clear. For example, it may be abolished on the day the rule was certified if that's what the organisation intended.[295]

For these reasons, it is very important to have a transitional rule which explicitly sets out when the office is abolished.

H3.2: Creating offices

When an office is created in an organisation, by default it will be created immediately upon certification of the rule which creates the office.

This will require an election to be arranged immediately to fill the office. This can be inconvenient and, if the organisation has standard election cycles, may cause subsequent elections for the new office to be continually out of synch.

[295] *Higgins v McGrane* (1961) 5 FLR 82 at 85; *Roughan v Day* (1991) 32 FCR 581.

Common ways of dealing with this situation include having a transitional rule that:

- delays the new office taking effect until the next election cycle
- gives the inaugural office a truncated (or shorter) term so it aligns with the exiting offices.

Example – Creating a new electorate for the Committee of Management

Due to a recent membership drive, BBY organisation has doubled the number of members in Western Australia. The existing branch in WA only has two offices on the Committee of Management. There have been complaints that members in the country have different needs to members located near Perth.

BBY decides to create two electorates in WA. One for all the regional members and one for Perth. Each electorate will elect two representatives on the Committee of Management. The next election for the Committee of Management across the whole country is in three years but BBY does not want to wait that long for the changes to take effect or to have to keep electing two of the officers from WA three years before the rest of the Committee.

It includes a rule which provides as follows:

- sets out the new electorates in WA which take effect immediately on certification of the rules
- each of the electorates in WA will be entitled to one representative on the Committee of Management for the period from certification of the transitional rule to the end of the next scheduled election for the Committee of Management, and from the next scheduled election each electorate will be entitled to two representatives on the Committee of Management.
- the existing WA representatives on the Committee of Management will continue to hold office until the conclusion of the scheduled election, unless they resign, die or removed from office (in accordance with the removal from office rule).
- that an election for the two new offices will take place as soon as practicable after certification

- the successful candidates for the two new offices will take up office on the first business day following declaration of their election.
- the inaugural term of the two new offices will end with the next scheduled election of the Committee of Management.
- from the next scheduled election, the term of office will be as per the rule which sets out the term of office for Committee of Management members.

H3.3: Changes to qualifications for office

When you make an alteration that introduces new or greater qualifications for nominating for office, you may need a transitional rule to ensure that the qualification does not impose oppressive. unreasonable or unjust conditions on members.

In *Riordan*[296] the Court was of the view that a rule which introduced a qualification for office immediately prior to an election imposed an unreasonable condition on members. This was because:

- it had retrospective operation and deprived members from remedying their incapacity to run for office
- a significant number of members would be rendered ineligible to run for office
- members were not informed of the intended new rules.

Example – Qualifying period

LMNO organisation has a big quadrennial election coming in less than 12 months. Currently, any financial member can nominate to be on the National Executive.

The LMNO wanted to ensure greater experience on its National Executive. It made a rule alteration that would require members to have one year of financial membership before they would be eligible to nominate for the National Executive.

The notice on the website of the lodgement with the Commission was the first any of the members were aware of the intended change to qualifications.

[296] *Riordan v Federated Clerks Union of Australia* (1952) 74 CAR 5.

> There is not enough time for existing members to fix any eligibility problems before the next election which is less than one year away.
>
> **Transitional rule:** To help this rule be certified, the LMNO also made a rule stating that:
>
> The requirement for one-year financial membership in rule X will apply from the scheduled election due to be held in [four years].

If you want to change the qualifications to run for an office in your organisation, it is highly recommended that:

- you consider the characteristics of your membership and ensure that the new qualifications will not impose oppressive, unreasonable or unjust conditions on members
- the changes take effect at a future election and give members sufficient time to ensure that they meet the new qualification requirements
- the new qualifications are communicated to members clearly and in a way that will reach members interested in nominating for office in sufficient time to allow them to meet the new requirements
- you seek the advice of the Commission before making the changes.

H3.4: Altering branches

When you alter, merge, create or abolish branches this can require several different transitional rules including rules relating to:

- where members are now attached
- where assets and obligations were transferred
- who is responsible for continued reporting requirements (like financial reporting)
- temporary changes to collective bodies to ensure that members remain appropriately represented
- who will be the officers in the new branch and how will they come to hold their office.

It is a complicated process, and it is highly recommended that you meet with the Commission's regulatory experts to discuss not just rules, but also elections, finances and notifications of change.

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Example – Too few members!

The Northern Territory Branch of the ZZAC has dropped to only a few hundred members. The organisation has decided that the Northern Territory Branch will be merged with the South Australian Branch.

Alterations are passed that rename the South Australian Branch the SA/NT Branch and describe the area of membership as being everyone eligible to join who is located in SA or the NT.

Having spoken to the Commission, transitional rules are also put in place to:

- empower the newly named SA/NT branch to sign off and lodge the financial reports of the old NT branch
- transfer the assets and liabilities of the old NT branch to the new SA/NT branch
- delay the new electorate structure until the next election
- create a temporary officer on the SA/NT board that is elected by and from the members who live in the NT which will be in place until the new electorates take effect in the next election
- create a second temporary office on the national board for the SA/NT branch members who live in the NT.

Transitional rules are very specific to your particular alteration so please seek advice prior to making alterations.

H3.5: New organisations

In 2026 the Commission is intending to publish a second *Model Rules: Companion for new organisations* to support new applications for registration.

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H3.6: Changes to the financial year

A rule alteration which changes the financial year of an organisation can only have prospective effect.[297] This means that the new financial year commences in the future and does not apply to the financial year in progress when the rule is certified by the Commission.

- you cannot shorten or extend the existing financial year.
- you cannot write a transitional rule that impacts on how the new financial year takes effect because it is controlled by section 240 of the RO Act.

If you alter your rules to change your financial year, then:

- the financial year you are currently in carries on unaffected by the rule alterations. You must prepare, have audited, distribute and present a financial report for that financial year in the ordinary way
- there will an intervening period between the end of the current financial year and the start of the new financial year. This period will always be less than twelve months. The Act treats that intervening period as a "financial year", even though it is less than a year long. You must prepare, have audited, distribute and present a financial report covering that intervening period in the ordinary way
- the first time the date set out in the rule alterations ticks over the new financial year kicks in. From that point onwards you must prepare, have audited, distribute and present a financial report every twelve months in the ordinary way.

The RO Act does not permit any other course, see section 240 & *Re CEPU*.[298]

A common misunderstanding is that the 'intervening financial year' applies to the financial year that is in progress when the alteration is certified. **This is incorrect**. It commences after the alteration has been certified.

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[297] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Registered Organisations Commission* [2018] FWCFB 16 at [24].

[298] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Registered Organisations Commission* [2018] FWCFB 16 at [23]–[26].

Example – Changing the financial year

The FGU's financial year starts on 1 January and ends on 31 December each year. On 1 December 2024 it altered its rules to change the financial year to run from 1 July to 30 June. On 31 March 2025, the Commission certified this alteration. This means that:

- the current financial year is not affected and ends on 31 December 2025
- the 'intervening financial year' commences on 1 January 2026 and ends on 30 June 2026
- the first financial year that runs from 1 July to 30 June commences on 1 July 2026.

Note:

- the alteration must be certified before the change takes effect; it doesn't matter that FGU had its meeting on 1 December 2024 because the alteration was not certified until 31 March 2025. Make sure you lodge early enough that it can be certified before your next financial year starts
- the intervening financial year can count as a financial year for your auditor rotation requirements
- the rules cannot allow for an 18-month intervening financial year, as this would be contrary to section 240.

If you want to change your financial year:

- make sure you plan well in advance
- seek the advice of the Commission regarding financial reporting obligations arising from the change.