



DECISION

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

Australian Education Union
(R2019/66, R2019/67 and R2019/70)

MURRAY FURLONG

MELBOURNE, 26 AUGUST 2019

Alteration of other rules of organisation.

Northern Territory Branch

[1] On 30 May 2019 the Australian Education Union’s Northern Territory Branch (the NT Branch) lodged with the Fair Work Commission (the Commission) a notice and declaration setting out particulars of alterations to its Federal Branch Rules (R2019/66).

[2] The particulars set out alterations to Rules:

17 – Powers – Branch Executive
105A – Candidate Statements
129 – Nominations – Withdrawal

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

[4] The alteration to Federal Branch Rule 105A provides for the use of candidate statements during elections. The issue surrounding the use of candidate statements arose during the NT Branch’s 2018 election, where the absence of provisions allowing candidate statements in the NT Branch’s Rules meant that such statements were not authorised. In my view, this alteration directly aligns with the purpose of the Democratic Control provisions in Chapter 7 of the *Fair Work (Registered Organisations) Act 2009* (the Act).

[5] The alteration to Federal Branch Rule 129 provides candidates with a right to withdraw their nomination after nominations have closed. The provision attempts to streamline elections, particularly in circumstances where a candidate nominates for multiple positions.

[6] The alteration to Federal Branch Rule 17 clarifies the powers and duties of the Branch Executive. Under the proposed change, the Branch Executive acts as the Committee of Management when the Branch Conference is not in session.

[7] According to the material which accompanied the application:

This change would establish clearly that Branch Executive is the committee of management of the Branch and thus responsible for financial management, removing any ambiguity that this responsibility might rest with Branch Conference. Other arms of the AEU including the federal union and the NSW Branch have recently made rule changes of this kind. The rationale relates to our financial reporting obligations under the *Fair Work (Registered Organisations) Act*.

Such a change would formalise existing practice - currently the Branch Executive acts as the committee of management in approving our audited financial report which is submitted to the Registered Organisations Commission (ROC). This is allowed under our rules.

All members elected to a role whose duties include financial management of the Branch must undertake training within six months of taking office. This training requirement imposes a significant obligation on both the office and those members requiring training, and potentially severe penalties for non-compliance.

We would like our rules to be very clear on this issue, to avoid a situation in which ROC or its successor might determine that Branch Conference is the body responsible for financial management of the Branch, which would in turn require providing financial management training to all Conference Delegates and members of Executive, a likely impossible task. Clarifying that Executive is the committee of management means only Branch Executive members will need to be trained.

[8] The alteration to Rule 17 is unremarkable. Given the existing scheme of the rules and particularly Rules 7 and 17, it appears that the Branch Executive is already the NT Branch's Committee of Management. There is no reason, however, that this observation should prohibit the alteration to Rule 17 from being certified.

[9] Nevertheless, in my view, the organisation should consider whether this rule change, without more, has achieved the organisation's stated objective for the rule change, namely "[c]larifying that Executive is the committee of management means only Branch Executive members will need to be trained".

[10] The NT Branch's Federal Branch rules presently provide that:

- the Branch Conference is the supreme governing body of the Branch and has the power to superintend, manage and control the NT Branch's affairs, property and funds;¹ and
- the NT Branch funds shall be administered by the Branch Executive and Branch Conference and either body may authorize the expenditure of money from the funds of the Branch for ordinary purposes.²

[11] Those rules were not the subject of any alteration(s) in the present matter.

[12] I accept that the Branch Executive acts as the Committee of Management in approving the audited financial report, which is submitted to the Registered Organisations Commission under Part 3 of Chapter 8 of the RO Act.³ However, the obligation to undertake financial management training does not arise because the officer is a voting member of a collective body that approves financial reports. The obligation to undertake training arises under 293K of the Act.

[13] Section 293K states:

- (1) Unless exempted under section 293M, each officer of an organisation or a branch of an organisation whose duties include duties (financial duties) that relate to the financial management of the organisation or the branch must undertake training:
 - (a) approved by the Commissioner under section 293L; and
 - (b) that covers each of the officer's financial duties.
- (2) The organisation or branch must ensure that the officer completes the training within 6 months after the person begins to hold the office.

[14] Superintending, managing and controlling the NT Branch's property and funds are duties that relate to the financial management of the NT Branch. So too is administering the Branch Fund and authorising the expenditure of money from those funds for ordinary purposes.

[15] I note that Federal Branch Rule 6 allows the Branch Conference to delegate its powers to the Branch Executive, subject to an exception that is not presently relevant. This does not assist the Branch. Even if the Branch Conference delegated all the duties which relate to financial management, its members would still be captured by section 293K. Delegation is distinguishable from a transfer of power and cannot amount to a denudation or parting of power or authority by the delegator.⁴

[16] I recommend the NT Branch consider further alterations to its Federal Branch Rules should it wish to place the sub Branch Delegates to Branch Conference beyond the remit of section 293K. An example of such changes can be found in the alterations to the Federal Rules which are discussed below.

Regulation 126(1)(b)

[17] Regulation 126(1)(b) of the *Fair Work (Registered Organisations) Regulations 2009* (the Regulations) requires the organisation to publish a notice on its web site, within 35 days of the alterations being made, that the alterations have been lodged with the Commission. The particulars of alterations lodged with the Commission made no reference to any such notice.

[18] On 4 July 2019 staff of the Commission emailed the NT Branch to determine whether the notice had been published. Later that day, the NT Branch confirmed – via telephone – that the notice had not been uploaded to its web site.

[19] In light of this, staff of the Commission recommended that the NT Branch, as soon as practicable, post the relevant notice on their web site. The notice was posted on the NT Branch's web site on 5 July 2019.

[20] On the same day the NT Branch provided a written submission to the Commission requesting an extension of time in relation to the notice.

[21] Regulation 126(1) provides me with the discretion to allow any additional period for the publication of the notice. The granting of an additional period is not as of right. It is incumbent on registered organisations to comply with the obligations set down in the Act. I note that the NT Branch made a bona fide attempt to remedy the situation and complied with the Commission's instructions in a timely manner. I therefore allow an additional period, until 5 July 2019, for the notice requirement.

Federal Office

[22] On 3 June 2019 the Australian Education Union's Federal Office lodged with the Commission a notice and declaration setting out particulars of alterations to its rules (R2019/67).

[23] The particulars set out alterations to Federal Rules:

- 26 – Powers of Federal Conference
- 30 – Election of Federal Delegates
- 34 – Federal Executive
- 35 – Constitution of Federal Executive
- 35A – Election of the Aboriginal and Torres Strait Islander Federal Executive Member
- 35B – Election of the National Principal Federal Executive Member
- 35C – Election of the Early Childhood Educator Federal Executive Member
- 38 – Election of Federal Officers
- 61 – Federal Fund
- 63 – Loans Grants and Donations
- 65 – Auditor
- 70 – Registered Office
- 73 – National Aboriginal and Torres Strait Islander Education Committee (General Division)
- 74 – National Aboriginal and Torres Strait Islander Education Committee (TAFE division)
- 75 – National Principals' Committee

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

[25] Following discussions with the organisation's Federal Secretary, on 3 July 2019, the proposed alterations to Federal Rule 30 were requested to be deferred – pending further rule alterations by the organisation and its respective Branches. This occurred at the request of Ms Susan Hopgood.

[26] The alterations to Federal Rules 26, 34 61, 63 and 65 operate as a package. Taken together, they are intended to ensure that only members of the Federal Executive have financial duties within the meaning of section 293K of the Act. Presently, both Federal Executive and Federal Conference members have financial duties.

[27] The Federal Conference is the supreme governing authority of the union.⁵ It consists of the Federal President; the Deputy Federal President; Federal Delegates representing the General Division and the TAFE Division; and Aboriginal and Torres Strait Islander Federal Delegates.⁶ Delegates are elected by and from the members attached to the union's Branches, based on a membership size formula,⁷ every two years.⁸ At present it comprises almost one hundred persons.⁹ Federal Conference meets annually or when summoned.¹⁰

[28] The Federal Executive is the Committee of Management of the union.¹¹ It consists of the Federal President, Federal Deputy President, Federal TAFE President and Delegates elected from the collective bodies of the union's Branches based on a membership sized based formula,¹² as well as Delegates elected from particular membership groups.¹³ At present it comprises around twenty persons.¹⁴ Federal Executive has at least four regular meetings each year and also meets when it determines to do so or it is summoned.¹⁵

[29] The alteration to Federal Rule 26 makes it clear that the Federal Conference has no powers associated with the financial management of the organisation.

[30] The alteration to Federal Rule 34 extends the powers of the Federal Executive in relation to the financial management of the organisation.

[31] The alterations to Federal Rule 61, 63 and 65 ensure the Federal Executive is the body that undertakes the organisation's financial management and that the Federal Conference has no role in that regard.

[32] Deciding whether the alterations to Federal Rule 61, 63 and 65 impose conditions, obligations or restrictions that are oppressive, unreasonable or unjust, having regard to Parliament's intention in enacting the Act and the objects of the Act and the *Fair Work Act 2009*, requires me to weigh a number of the Parliament's stated intentions.¹⁶

[33] On the one hand, the union's managerial obligations are being transferred away from the broader and more representative group (Branch Conference) to the Committee of Management. That centralisation does not neatly align with the objective of providing for the democratic control of the organisation.¹⁷

[34] On the other hand, it is costly to provide training to a large group of people. This is exacerbated where the group is geographically dispersed and the cohort will change regularly; either because casual vacancies arise and are filled or as a result of biennial scheduled elections. In addition, the efficacy of the training may be called into question if the financial duties are rarely performed after the training occurs, because the body seldom meets. The quality of financial management decision making is likely to be enhanced if the people performing the duties are both properly trained and experienced in performing the relevant duties.

[35] As a consequence, placing the financial management duties in the hands of the Federal Executive alone is likely to foster operational effectiveness,¹⁸ efficient management of the organisation and high standards of accountability.¹⁹

[36] On balance, the alterations to Federal Branch Rules 26, 34 61, 63 and 65 are consistent with the words, placed in their proper context, in the Act.

[37] The alteration to Federal Rule 35 ensures consistency between the Federal Branch rules and the Tasmanian Branch rules.

[38] The alterations to Federal Rules 35A, 35B and 35C are identical and operate to remove some of the notice deadlines during Federal Executive nominations.

[39] The alteration to Federal Rule 38 corrects a grammatical error.

[40] The alteration to Federal Rule 70 ensures that the organisation's registered office is correctly enunciated in the rulebook.

[41] The alteration to Federal Rules 73, 74 and 75 are identical and change the deadline for Branches to elect various committee members.

Regulation 126(1)

[42] Regulation 126(1)(a) of the Regulations requires the organisation, within 35 days after the alteration is made, to lodge with the Commission a notice setting out the particulars of the alteration.

[43] The alterations were made at an Annual Federal Conference meeting held on 24 February 2019. The notice of particulars were lodged with the Commission on 3 June 2019, at least 98 days after the alterations were made. On 3 July 2019, the Federal Office provided a written submission explaining why the notice was lodged out of time.

[44] It was submitted that the notice was lodged outside the 35 day timeframe due to an 'administrative oversight'. It was also submitted that recently the Federal Office had undertaken a review of their internal processes to ensure future compliance with this Regulation.

[45] Regulation 126(1) provides me with a discretion to allow any additional period of the lodgement of the notification. The granting of an additional period is not as of right. It is incumbent on registered organisations to comply with the obligations in the Act. I note that the Federal Office does not appear to have a history of lodging notice out of time. I therefore allow an additional period, until 3 June 2019, for the lodgment of the alterations. However, I remind the organisation that the granting of an additional period is at my discretion and that it is incumbent on registered organisations to comply with the legislative obligations.

New South Wales Teachers Federation Branch

[46] On 6 June 2019 the Australian Education Union – New South Wales Teachers Federation Branch (the NSWTF Branch) lodged with the Commission a notice and declaration setting out particulars of alterations to its Federal Branch Rules (R2019/70).

[47] The particulars set out an alteration to Federal Branch Rule 36 – Election of Association Representatives on Branch Council.

Were the alterations made under the rules of the organisation?

[48] Under section 159(1)(c) of the Act, I must be satisfied that the alteration has been made under the rules of the organisation.

[49] NSWTF Branch Federal Branch Rule 64(3)(a) states:

The Branch Secretary shall give notice of the proposed amendments to each association and all members of the Branch Council not less than 14 days prior to the meeting at which the proposal is to be considered.

[50] The Declaration that accompanied the notice of particulars in this matter submits, amongst other things, that:

The Deputy Branch Secretary sent notice to eligible members on 8 May 2019 and included a copy of the proposed rule change. This was in accordance with Rule 64(3)(a) which requires notice of not less than 14 days prior to the meeting.

[51] As a Deputy Branch Secretary was the one who sent the notice under Rule 64(3)(a), not the Branch Secretary, a question arises as to whether the alterations were made under the rules of the organisation.

[52] On 8 July 2019 the NSWTF Branch submitted, via telephone, that a Deputy Branch Secretary is empowered to issue notices (of the kind discussed above) because of Federal Branch Rule 23(2)(a). Federal Branch Rule 23(2)(a) relevantly provides that a Deputy Branch Secretary shall “[a]ssist the Branch Secretary in the performance of his or her duties.”

[53] I am inclined to reject this argument. Two points can be made to demonstrate this conclusion:

- The language which has actually been employed in the text of a rule is the surest guide to its meaning. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision.²⁰ The term “assist”, given its ordinary meaning, refers to doing a share of the relevant work. It is largely analogous with the term – “help”. Federal Branch Rule 23(3)(a) has been transacted with the purpose of reducing the tasks imposed on the Branch Secretary. In my view, “assist” in this context does not allow Deputy Branch Secretaries to complete tasks on behalf of the Branch Secretary. Instead, it is limited to assisting or helping them.
- The delegation provision contained within Federal Branch Rule 22 supports the proposition that the appropriate mechanism for the NSWTF Branch to disperse the Branch Secretaries’ “duties” is via delegation – not Federal Branch Rule 23(2)(a).

Can the Branch Secretary delegate power to the Deputy Branch Secretary?

[54] Federal Branch Rule 22 outlines the duties of the Branch Secretary. Federal Branch Rule 22(2) relevantly provides that “[i]n addition to the duties imposed on the Branch Secretary by these rules, the Branch Secretary shall perform the following duties.” Federal Branch Rule 22(2) proceeds to outline a number of “duties” the Branch Secretary “shall” perform.

[55] This includes, by virtue of Federal Branch Rule 22(2)(d), the duty to “[c]all meetings of the Branch Conference, Branch Council and Branch Executive in accordance with [the] rules.” Undoubtedly, Federal Branch Rule 22(2)(d) encapsulates the requirement outlined in Federal Branch Rule 64(3)(a).

[56] Federal Branch Rule 22(2)(o) provides the Branch Secretary with a power of delegation. It states that the Branch Secretary can “[d]elegate any duty under this rule to any Branch Professional Officer other than the power to delegate or a duty required by statute to be performed by the Branch Secretary or an elected officer.”

Has the Branch Secretary delegated power to the Deputy Branch Secretary?

[57] On 31 July 2019 the NSWTF Branch submitted that the Branch Secretary had delegated to the Deputy Branch Secretary the responsibility of calling meetings. This submission, on its face, satisfies the requirement in Federal Branch Rule 22(2)(o). As Federal Branch Rule 22(2)(o) imposes no strict requirements for how power ought to be delegated, I accept the NSWTF Branch’s submission.

[58] On the information contained in the notice and for the reasons detailed above, I am satisfied the alterations have been made under the rules of the organisation.

[59] The alteration to Rule 36 explains the procedure the organisation will adopt when it receives insufficient nominations to conduct an election for the Association Representatives on the Branch Council.

[60] In my opinion, other than the alteration to Federal Rule 30 which has not been considered, the alterations to the Federal Rules, the Federal Branch Rules of the New South Wales Teachers Federation Branch and the Northern Territory Branch comply with and are not contrary to the Act, the *Fair Work Act 2009*, modern awards and enterprise agreements, and are not otherwise contrary to law. I certify accordingly under subsection 159(1) of the Act.



DELEGATE OF THE GENERAL MANAGER

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¹ Federal Branch Rule 6

² Federal Branch Rule 99

³ See for instance subsection 266(3) of the Act and Federal Branch Rule 27A

⁴ See *Forest Marsh Pty Ltd v Resource Planning and Development* [2007] TASSC 50 (27 June 2007) – see also in general *Huth v Clarke* 25 Q.B.D 391; and *Bayly v Municipal Council of Sydney* 1927 28 NSW SR 149

⁵ Federal Rules 23(1), 26

⁶ Federal Rule 24(1)

⁷ Federal Rule 24(2) – (4A)

⁸ Federal Rule 24(5)

⁹ See for instance [AR2018/90](#)

¹⁰ Federal Rule 23

¹¹ Federal Rule 34(1)

¹² Federal Rule 35(2)

¹³ Federal Rule 35(1)(f) – (i)

¹⁴ See for instance [AR2018/90](#)

¹⁵ Federal Rule 34(2)

¹⁶ See section 142(1)(c) of the Act.

¹⁷ See section 5(3)(d) of the Act

¹⁸ See section 5(3)(a) of the Act

¹⁹ See section 5(3)(c) of the Act

²⁰ *Alcan (NT) v Commissioner of Territory Revenue* (2009) CLR 27 at 46-47 (Hayne, Heydon, Crennan and Kiefel JJ); See also, *Commissioner of Taxation v BHP Billiton Limited* (2011) 85 ALJR 638 at 646 [77] (French CJ, Heydon, Crennan and Bell JJ).



FairWork
Commission

Copy of Signed Decision

Notification of alterations to rules

Title of Matter: Application/Notification by Australian Education Union
Section: s.159(1) RO Act - Notification of alterations of other rules
Subject: s.159(1) RO Act - Notification of alterations of other rules
Matter Number(s): R2019/66, R2019/67 & R2019/70

A copy of the Delegate's decision in relation to the above matters is attached for your information.

The updated rulebook will be uploaded to the Fair Work Commission's [website](#) in due course.

Inquiries:

If you have any queries relating to this matter please contact Cameron Kaye
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27 AUGUST 2019