



# DECISION

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

## **Australian Education Union** (R2023/137)

CHRIS ENRIGHT

MELBOURNE, 28 MARCH 2024

*Alteration of other rules of organisation.*

[1] On 12 December 2023 the New South Wales Teachers Federation Branch (the Branch) of the Australian Education Union lodged with the Fair Work Commission (the Commission) a notice and declaration setting out particulars of alterations to its Branch rules. Further information in support of the alterations was provided on 30 January 2024 and 5 February 2024.

[2] The Branch seeks certification of the alterations under s.159 of the *Fair Work (Registered Organisations) Act 2009* (the Act).

[3] The particulars set out alterations to the following Branch rules:

- Rule 3 – Arrangement of Membership; and
- Rule 4 – Subscriptions and Levies.

[4] On the information contained in the lodgement materials and further information provided, I am satisfied the alterations have been made under the rules of the Branch.

### **Merger of Associations**

[5] The alterations to rule 3 seek, among other things, to abolish the Corrective Service Teacher Association and reallocate its members to the Technical and Further Education Teacher's Association.

[6] An organisation has the right to mould its internal structures as it sees fit, provided it complies with the requirements of the legislation.<sup>1</sup> This includes the right to change how members are grouped and represented within the organisation. A relevant requirement of the 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.<sup>2</sup> When considering whether conditions imposed on members are oppressive, unreasonable or unjust, regard must be had to, among other things, the democratic functioning and control of the organisation.<sup>3</sup>

[7] The Branch allocates its members to Associations based on their places of employment. Each association elects delegates to the Branch Conference, which is the highest governing authority of the Branch, and representatives to the Branch Council, which is the body that controls and manages the business and affairs of the Branch. The number of delegates and

representatives elected by an association is based on a numerical formula.<sup>4</sup> The more members are attached to an association, the more delegates/representatives are entitled to be elected.

[8] A question arises as to whether the merger of the two associations impose oppressive, unreasonable or unjust conditions on members, having regard to the objects of the Act.

[9] The Corrective Service Teacher Association and the Technical and Further Education Teacher's Association are small associations consisting of a small portion of members in the Branch.<sup>5</sup> The number of delegates and representatives entitled to be elected by the merged association is generally proportionate to the number electable by the two existing associations. As a consequence, members' entitlement to be represented at the branch level is unlikely to be significantly affected after the merger.

[10] On the basis of the material before me, I am satisfied that the merger does not impose oppressive, unreasonable or unjust conditions on members.

### **Retrospective Decrease of Fees**

[11] The alterations to rule 4 propose to insert a new subrule 4(3)(g), which creates a new subscription rate of one-tenth of the annual membership subscriptions for members employed as Saturday School teachers or Musical Examiners. This new subrule fixed 1 January 2024 as the date on which the new amount became payable.

[12] If I certify the proposed alterations, they take effect on the day of certification – see s.159(3) of the Act.

[13] Section 159(3) of the Act was considered by a Full Bench of the Commission in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Registered Organisations Commission (ROC)*.<sup>6</sup>

[14] The Full Bench observed:

“Section 159(3) provides that a rules alteration takes effect on the day of certification. However that only means that a rules alteration takes effect *according to its terms* on that day, not necessarily that it has an operational effect from that day.”<sup>7</sup>

[15] Therefore, given the terms of the proposed alterations, the new subrule 4(3)(g) has an issue of retrospective operation.

[16] There is a rebuttable presumption that a rule alteration cannot apply retrospectively. In *Beeson v Blayney*<sup>8</sup>, Joske J stated:

“In any event, in my view there is a *prima facie* principle of construction that unless it appears expressly or by implication in rules as amended that they are intended in their amended form to apply to past matters or events, including matters commenced before but not completed at the time of the amendment, the amendments do not apply to the past or uncompleted matters.”<sup>9</sup>

[17] However, that presumption can be rebutted where:

- there is an express or implied intention to apply the alteration to current terms of office;<sup>10</sup> and
- the rule does not have harsh effects or interfere with vested interests or accrued rights.<sup>11</sup>

[18] The proposed alteration reduces the annual fee payable by Saturday School teachers and Music Examiners from 1 January 2024. No member would become unfinancial because of this retrospective decrease of the fees. As such, the insertion of subrule 4(3)(g) does not have harsh effects or interfere with vested interests or accrued rights. Nor does it impose oppressive, unreasonable or unjust conditions upon members within the meaning of s.142(1)(c) of the Act.

[19] On the basis of material before me, I am satisfied that the presumption against retrospective operation is rebutted and therefore the new subrule 4(3)(g) can apply retrospectively.

[20] The rest of alterations to rules 3 and 4 are technical changes. They,

- provide clarification in relation to how members are allocated to regional associations when they work across multiple workplaces and/or reside outside of NSW;
- change the publication destination of the annual expenditure report from the Branch's journal "Education" to its website; and
- make minor numbering changes.

[21] These changes are uncontroversial. They relate to the regular management of the Branch. They do not require comment beyond expressing my opinion about the matters set out in s.159(1) of the Act.

[22] In my opinion, the alterations comply with and are not contrary to the Act, the *Fair Work Act 2009* (Cth), modern awards and enterprise agreements, are not otherwise contrary to law and were made under the rules of the organisation. I certify accordingly under subsection 159(1) of the Act.



DELEGATE OF THE GENERAL MANAGER

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<sup>1</sup> *Imlach v Daley* (1985) 7 FCR 457 at 462

<sup>2</sup> Paragraph 142(1)(c) of the Act provides that rules:

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

<sup>3</sup> Subsection 5(3) of the Act sets out the following standards for registered organisations:

- (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

<sup>4</sup> Subrules 7(2) and 11(2) of the Branch rules.

<sup>5</sup> The Annual Returns of AEU can be viewed on the Commission's website at [Australian Education Union \(AEU\) - Find a registered organisation - Fair Work Commission \(fwc.gov.au\)](https://www.fwc.gov.au/australian-education-union-aeu-find-a-registered-organisation-fair-work-commission).

<sup>6</sup> [2018] FWCFB 16 at [24].

<sup>7</sup> *Ibid.*

<sup>8</sup> *Beeson v Blayney and Others* (1966) 8 FLR 292.

<sup>9</sup> *Ibid* per Joske J at 294. Spicer CJ and Eggleston J concurred.

<sup>10</sup> *Re Mellor; Re Federated Liquor and Allied Industries Employees Union of Australia* (1987) 17 FLR 120; 18 IR 350 per Gray J at 353.

<sup>11</sup> *Ibid.*