



DECISION

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

Australian Education Union
(R2024/118)

CHRIS ENRIGHT

MELBOURNE, 2 SEPTEMBER 2024

Alteration of other rules of organisation.

[1] On 13 August 2024 the New South Wales Teachers Federation Branch of the Australian Education Union (the Branch) lodged with the Fair Work Commission (the Commission) a notice and declaration setting out particulars of alterations to its rules. Further information in support of the alterations was lodged on 19 August 2024.

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

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

[4] The particulars set out alterations to the following New South Wales Teachers Federation Branch rules:

- Rule 12 – Branch Council Powers;
- Rule 15 – Branch Executive Powers;
- Rule 25 – Branch Professional Officers;
- Rule 26 – Employment of Branch Professional Officers;
- Rule 28 – Filling Casual Vacancies for Branch Professional Officers;
- Rule 29 – Relief Branch Professional Officers;
- Rule 34 – System for Voting; and
- Rule 38 – Election of Branch Executive.

[5] When considering whether to certify alterations to rules, I am required to consider, among other things, whether the proposed alterations are contrary to the Act and the *Fair Work Act 2009* (Cth) (FW Act).¹

Branch Council and Branch Executive powers

[6] The alterations to rules 12 and 15 redistribute certain management powers between Branch Council and Branch Executive. The alterations:

- enable Branch Council to delegate its powers to terminate the employment of Branch Professional Officers and dismiss elected officers to Branch Executive;
- shift the powers to investigate and act on members' complaints from Branch Council to Branch Executive; and
- shift the powers to employ and dismiss Branch employees and partial powers to terminate Branch Professional Officers from Branch Council to Branch Executive.

[7] The alterations to rule 15 also enable the Branch Executive to delegate these new powers to Branch officers.

[8] There is nothing to prohibit an organisation from reviewing and changing the powers and duties of its collective bodies of office holders. A question arises, however, as to whether the changes to their powers and duties are so substantial that they are no longer the same body. In other words, the persons elected to these offices were not elected to undertake the new powers and duties. If they are new bodies of office holders, then the rules must provide for an election to fill these new positions.²

[9] In my opinion, these alterations do not change the substantive powers and duties of Branch Council or Branch Executive to such an extent that they could be considered different bodies. The Branch Council retains its power to control and manage the business and affairs of the Branch, and the Branch Executive remains the committee of management of the Branch.

Branch Professional Officers

[10] The Branch employs Branch Professional Officers for the efficient operation of the Branch.³ They carry out their duties following the determination and direction of Branch Executive.⁴ I note the Branch Professional Officers are not officers as defined in section 9 of the Act. They are responsible for implementing, not determining, policy, they perform other duties as determined by Branch Council and are under the direction of the Branch Secretary (subrule 27(5)).

[11] Currently, a new position of Branch Professional Officer can be created by either Branch Conference or Branch Council. The alterations to subrule 25(3) reserves such power exclusively to Branch Conference.

[12] The alterations to rules 26 and 28 remove the provisions in relation to the employment of Branch Professional Officers, such as the process for engaging and terminating such appointments and the filling of casual vacancies.

[13] The alterations to rule 29 modernise language and clarify the purposes for which relief Branch Professional Officers can be appointed.

[14] An organisation has the liberty to decide how they wish to employ and terminate their employees. There is nothing in the Act that requires or precludes an organisation from including in its rules these types of processes. The alterations which go to these matters are not controversial; they relate to the regular management of the Branch.

[15] Section 333E of the FW Act provides that employers cannot employ a person on a fixed-term contract that is longer than two years, that have more than one extension option or where the employee will be employed under consecutive contracts.⁵ Current subrule 26(9) suggests that Branch Professional Officers may be engaged on fixed-term contracts as they are “deemed to be an employee until the expiration of their of employment”. This subrule is deleted. Other subrules also suggest that Branch Professional Officers are fixed-term appointments. For example, current subrule 26(6) provides that a Branch Professional Officer who is a Branch Council member is deemed to be on leave from their position on Branch Council. This, and other similar subrules, are not altered, except for renumbering. In summary the alterations do not change the Branch’s ability to engage Branch Professional Officers on fixed-term contracts.

[16] Notwithstanding that the rules continue to allow for fixed-term contracts, in my view neither the current nor the altered rules contravene section 333E of the FW Act. Though the rules permit fixed -term contracts, they do not provide for fixed-term contracts outside the limits imposed by section 333E. Current and altered rule 26 must be read in the context of section 333E, that is the fixed-term contracts of Branch Professional Officers cannot be for a period longer than two years, cannot have more than one extension option and cannot be employed under consecutive contracts.

Voting procedures for the election of office holders

[17] The alterations to rule 34 clarify voting procedures. They are made to:

- clarify that the voting system is an exhaustive preferential system when more than one candidate is to be elected;
- set out provisions in relation to ballot paper formalities; and
- provide for the order of ballot.

[18] The alterations to rule 38 update rule references following the alterations to rule 26.

[19] These alterations are not controversial. They do not require comment beyond expressing my opinion about the matters set out in subsection 159(1) of the Act.

Typographical errors

[20] On 19 August 2024, Maxine Sharkey, Branch Secretary, gave consent under subsection 159(2) of the Act for me to make various amendments to the alterations for the purpose of correcting typographical, clerical or formal errors. Accordingly, the following corrections have been made:

- In proposed subrule 15(4)(c), changed the rule reference “12(1)d” to “12(1)(d);”
- In proposed subrule 34(2)(c), changed the word “bare” to “bear”.

[21] In my opinion, the alterations comply with and are not contrary to the Act, the FW Act, 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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¹ Subsection 159(1) of the Act provides that:

(1) An alteration of the rules (other than the eligibility rules) of an organisation does not take effect unless particulars of the alteration have been lodged with the FWC and the General Manager has certified that, in his or her opinion, the alteration:

- (a) complies with, and is not contrary to, this Act, the Fair Work Act, modern awards and enterprise agreements; and
- (b) is not otherwise contrary to law; and
- (c) has been made under the rules of the organisation.

² Subsection 143(1)(a) provides that the rules of an organisation:

- (a) must provide for the election of the holder of each office in the organisation...

³ Branch rule 25.

⁴ Ibid.

⁵ Section 333E of the FW Act provides:

(1) A person contravenes this subsection if:

- (a) the person enters into a contract of employment with an employee; and
- (b) the contract includes a term that provides the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and
- (c) the employee is not a casual employee of the employer; and
- (d) subsection (2), (3) or (4) applies.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: A contract referred to in this subsection includes (and is not limited to) a contract of employment for a specified period of time, for a specified task or for the duration of a specified season.

Employment for more than 2 years

(2) This subsection applies if the identifiable period is greater than 2 years.

Renewable contracts

(3) This subsection applies if:

- (a) the sum of the identifiable period and any other period for which the contract may be extended or renewed is greater than 2 years; or
- (b) the contract provides for an option or right to extend or renew the contract more than once.

Consecutive contracts

- (4) This subsection applies if the contract comes into effect after another contract (the previous contract) of employment between the person and the employee in circumstances referred to in subsection (5).
- (5) The circumstances for the purposes of subsection (4) are:
 - (a) the previous contract included a term that provided that the contract would terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and
 - (b) the previous contract was for the employee to perform the same, or substantially similar, work for the person as the employee is required to perform under the contract referred to in paragraph (1)(a) (the current contract); and
 - (c) there is substantial continuity of the employment relationship between the person and employee during the period between the previous contract terminating and the current contract coming into effect; and
 - (d) any of the following apply:
 - (i) the sum of the period for which the previous contract was in effect and the identifiable period referred to in paragraph (1)(b) for the current contract is greater than 2 years;
 - (ii) the current contract contains an option for renewal or extension;
 - (iia) the previous contract contained an option for extension that has been exercised;
 - (iib) the previous contract came into effect after another contract (the *initial contract*) that satisfies the requirements of paragraphs (a) and (b) of this subsection and there was substantial continuity of the employment relationship between the person and the employee during the period between the initial contract terminating and the previous contract coming into effect.