



DECISION

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

Independent Education Union of Australia (R2024/166)

CHRIS ENRIGHT

MELBOURNE, 8 JANUARY 2025

Alteration of other rules of organisation.

[1] On 31 October 2024 the New South Wales/Australian Capital Territory Branch (the Branch) of the Independent Education Union of Australia lodged with the Fair Work Commission (the Commission) a notice and declaration setting out particulars of alterations to its rules.

[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 Branch Rules 5–15, 18 and 20.

[5] The effects of the alterations are varied. The alterations:

- remove commas, insert commas, correct typographical errors, add apostrophes, remove gender specific language, clarify syntax, correct references to legislation (proposed rules 5, 6, 7, 9, 10, 11, 12 and 13);
- provide that financial members have the right to speak at Branch Council meetings with the permission of the meeting (proposed subrule 6.3);
- change references of ‘finances’ to ‘financial matters’ (proposed subrule 6.9(e));
- clarify the titles of Vice Presidents (proposed subrule 7.3);
- include the Secretary as a person who can determine the times and places of Executive meetings (proposed subrule 7.4);
- clarify when teleconferences and videoconferences may be used in Executive meetings (proposed subrule 7.6);
- remove references to the ‘Associated Body’ (proposed rules 7 and 10);
- remove powers from the Branch Executive to define duties, terms and conditions of employees appointed as officers, and provide that the power to appoint and dismiss is on the advice of the President and Secretary (proposed subrule 7.11(e));
- instead of pointing to the Federal rules the alterations particularise the roles of the office holders in the Branch rules (proposed rule 8);
- modify the role of the Secretary, such that appointing and dismissing employees appointed as officers must be done in conjunction with the President. The alterations

- also remove the ability of the Secretary to be sued on behalf of the Branch, as such liability accrues personally or to the organisation as a Federal entity (proposed rule 8.1);
- enable Vice Presidents to speak publicly on behalf of members in their sector, but only at the request of the Secretary or President, and require Vice Presidents to represent the view of members at Branch meetings (proposed subrule 8.8);
 - specify the quorum for sub-branch general meetings and who is eligible to vote (proposed subrule 9(g));
 - correct notice requirements regarding sub-branch general meetings (proposed subrule 9(h));
 - simplify eligibility requirements for members to stand for election as a sub-branch committee member (proposed subrule 9(k));
 - shorten membership length requirement to seek election as a member of the Executive, from twenty-four months to twelve months (proposed subrule 10.5(b));
 - state that the Secretary, instead of the Branch Executive, will be responsible for fixing times for elections (proposed subrule 10.8(a));
 - permit nominations for positions on the Branch Executive to be called for by electronic means (proposed subrule 10.8(b));
 - enable the Australian Electoral Commission to conduct a second-round election if there are insufficient nominations for Council delegates, but limit the number of recall elections to just one for each unfilled office (proposed subrule 10.15(k));
 - provide that vacancies occurring after the first quarter of the term of office must be filled as soon as possible, rather than within 3 months (proposed subrule 11.1);
 - specify that a casual vacancy in the case of a Vice President will be filled by a member of the Council within the relevant sector, and in the case of a Deputy President will be filled by a member of the Executive (proposed subrules 11.1(a)(ii) and (iii));
 - provide for the consistent referencing of ‘Early Childhood Education and Care’ (proposed subrule 12.3);
 - remove the reference that conferences for Early Childhood Education and Care State Council members will normally be held on an annual basis (proposed subrule 12.3);
 - simplify the arrangements for the election of Union Representatives by Chapters and enable the appointment of Union Representatives by the Branch (proposed subrules 13.3, 13.5 and 13.7(d));
 - state that the Branch Secretary may request and convene Chapter meetings (proposed subrule 13.7(a));
 - provide that Chapter meetings may be conducted in person or by proxy, for which a quorum of 25% is no longer required,¹ and enable decisions of Chapters to be conducted by means other than at a meeting (proposed subrule 13.7(b));
 - enable Union Representatives to decide whether to request another member to attend sub-branch meetings if they are unable to attend, instead of appointing an alternate delegate (proposed subrules 9(g) and 13.8(g));
 - specify that Union Representatives can assist the union in visits to workplaces, whereas the current rules just specify school visits (proposed subrule 13.8(i)); and
 - remove subrule numbering (proposed rule 20).

[6] The above alterations are uncontroversial. They do not require comment beyond expressing my opinion about the matters set out in subsection 159(1) of the Act.² However, some of the proposed alterations to Branch rules 6, 9 and 13 require further discussion.

‘Employees appointed as officers’ – not officers for the purpose of the Act

[7] The proposed alterations make amendments to rules 6, 9 and 13 which change the reference of ‘professional industrial staff’ to ‘employees appointed as officers’. I note that these positions are not officers within the meaning of section 9(1)(b) of the Act. Rather, the term ‘officers’ in reference to these positions is used in the common sense of the word. Therefore, the appointment of these employees to their positions is not contrary to the Act.

The removal of proxies from Branch Council meetings

[8] The proposed alterations to subrules 6.6, 6.8 and 6.9(c)(ii) remove the ability for Branch Councillors to attend meetings by proxy and provide that voting must occur in person.

[9] Section 142 of the Act provides for the general requirements for the rules of an organisation. Subsection 142(1)(c) provides that rules must not impose on members, conditions, obligations or restrictions that, having regard to Parliament’s intention in enacting the Act (see section 5) and the objects of the Act and the *Fair Work Act 2009* (the FW Act), are oppressive, unreasonable or unjust. The standards set out in subsection 5(3) of the Act include, among other things:

- the participation of members in the affairs of organisations to which they belong;
- the efficient management of organisations; and
- the democratic functioning and control of organisations.

[10] Although the Act does not provide for a right of the use of proxies, the current Branch rules do provide for the use of proxies in Branch Council meetings. The use of proxies facilitates the participation of Council members in meetings when they are unable to attend. This raises the question as to whether the proposed removal of proxies from Branch Council meetings imposes restrictions on members that are oppressive, unreasonable or unjust as they appear to reduce the ability of Council members from participating in meetings.

[11] The Branch lodged submissions regarding the proposed alterations to rule 6,³ explaining that the proposed alterations have been made with the purpose of advancing the objects of the Act and the FW Act.

[12] The Branch noted that:

“...the Council is a large body with over 100 representatives located throughout NSW and the ACT.

The practice of the Branch has always been, and will continue to be, to pay for accommodation and transportation of all Councillors attending meetings where they are required to travel more than two hours to attend the meeting. Where Councillors have not been able to attend, funding is provided for an alternative representative of the same sub branch to participate in discussion and debate (although these representatives do not have the right to vote). Attendance at Council meetings is, as a result, usually entirely representative of the membership and various sub branches across NSW and the ACT.

The purpose of this practice is to encourage all Councillors to attend personally, so as to interact with other members and fully engage in the meeting and any debate. The

experience of the Branch over the pandemic has been that such interaction is difficult to encourage on electronic or online forums for large groups such as Council meetings. The Branch's experience has also been that the use of proxies stifles the ability of that representative's opinions to be part of any debate or discussion regarding issues before Council."⁴

[13] The Branch further submitted that:

"...the proposed changes to r 6 are entirely congruent with the objectives in the FW Act [sic].

The proposed changes encourage members to participate in the affairs of the organisation, encourage the efficient management of the organisation, and provide for the democratic functioning and control of the organisation.

This is achieved by maximising attendance at Council meetings and providing for the highest levels of discussion and debate possible. Where proxy voting is used, it is not possible for the absent voter to be fully accountable for decisions made, particularly after lengthy discussion or debate to which the absent voter was not a participant.

The proposal therefore strengthens the democratic process within the organisation and provides for the effective control of the functioning and control of the organisation, which is fully representative of its membership.

The result of the above is that the proposed changes are not 'oppressive, unreasonable or unjust' and satisfy the requirement in s 142 of the FWRO Act."⁵

[14] I accept these submissions. It is evident that the Branch has made these alterations with the aim of maximising participation of Council members by requiring attendance at meetings and providing the means for their attendance. On the basis of the material before me, I am satisfied that the proposed alterations do not impose oppressive, unreasonable or unjust conditions, obligations or restrictions, having regard to the objects of the Act

Workplace delegates

[15] Several alterations have been made to Branch rule 13 which appear to have been made in connection with the newly introduced legislative provisions regarding workplace delegates, in sections 350A, 350B and 350C of the *Fair Work Act 2009 (Cth)* (FW Act). The FW Act defines the term "workplace delegate" and sets out the rights and protections for these delegates. Among other things, I am required to consider whether the alterations comply with and are not contrary to the FW Act.⁶

[16] I have considered rules regarding workplace delegates and the relevant provisions in the FW Act recently.⁷ In these decisions, I determined that:

- a workplace delegate must be interpreted as a person who works in the enterprise or regulated business;⁸
- rules regarding workplace delegates must not undermine the statutory scheme regarding workplace delegates set out in the FW Act;⁹
- rules must not purport to extend workplace delegate rights or obligations to persons who would not be so entitled under the FW Act;¹⁰

- rules must not purport to extend workplace delegate rights or obligations to persons who would not be so entitled under the FW Act;¹¹ and
- rights endowed by a union on workplace delegates can only be rights regulating their relationship with the union and cannot extend to parties external to the union.¹²

Proposed alterations to Branch Rule 13 – Chapter and Union Representatives

[17] Proposed subrule 13.3 provides that:

Every Chapter shall have at least one Union Representative. The Union Representative may be elected by members in the Chapter or appointed by the Branch, following consultation with the Chapter or after a communication of the intention to elect or appoint has been sent to all Chapter members. The fact of the election or appointment must be recorded by the Branch, and such record shall serve as evidence of the appointment or election. The Union Representative must be elected from the group of members who are employed by the employer in the enterprise. Where there are only one or two union members in a Chapter, one such member shall become the Union Representative by election of the members or appointment by the Branch.

Where a Union Representative has been elected, they shall ensure the Branch office is notified of their election as soon as possible. The Union Representative or Branch shall send the full name and contact details of the new Union Representative to all members of the Chapter. In all cases, the Union Representative shall also advise the school principal or other appropriate representative of the employer.

[18] Proposed subrule 13.4 states that:

Each Chapter with three or more members shall elect one or more Union Representatives from among the financial members of the Chapter. In addition, each Chapter with six or more members may also elect a Chapter Chairperson and Chapter Secretary, who may or may not be a Union Representative.

[19] In addition, proposed subrule 13.8(j) specifies that a Union Representative shall exercise any other powers or rights they may have under relevant industrial instruments, agreements and legislation. This proposed subrule does not extend rights to persons who are not so entitled, therefore the subrule fits within the scheme of the FW Act.

[20] Furthermore, proposed subrule 13.8 sets out other powers and rights which are not contained within the FW Act. However, these powers and rights go to regulating the relationship between the Union Representative and the Branch, and not to external parties. Therefore, the proposed alterations are not contrary to legislation.

[21] In the explanatory notes lodged with the proposed alterations, with reference to proposed rule 13, the Branch stated that:

“These amendments are intended to strengthen rights of delegates under s 350C of the Fair Work Act 2009 (Cth) by removing unnecessary hurdles to becoming a delegate/union representative, while ensuring that the workplace delegates’ rights are only extended to representatives who are entitled to them under legislation.”¹³

[22] It is clear from the proposed alterations that a person appointed as a Union representative would be a person who works in the enterprise or regulated business; the proposed rules are in alignment with the statutory scheme regarding workplace delegates as set out in the FW Act; the proposed rules do not purport to extend workplace delegate rights or obligations to persons who would not be so entitled under the FW Act; and the additional rights endowed to Union Representatives are limited to regulating their relationship with the Branch. I conclude that these alterations are not contrary to the workplace delegates provisions in the FW Act.

Conclusion

[23] 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 National subrule 12(g) states that:

Unless specified to the contrary elsewhere in these rules or the Branch Rules the quorum for any meeting of a body described in these rules or the Branch Rules, is one half of those at that time holding membership of the body or, in respect of general meetings of members, 20% of the relevant body of members.

² 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.

³ Submissions of Carol Matthews, NSW/ACT Branch Secretary, 5 December 2024.

⁴ Ibid, paragraphs 4 – 6.

⁵ Ibid, paragraphs 10 – 14.

⁶ See endnote 2 above.

⁷ *Re Independent Education Union of Australia* [2024] FWCD 1019, *Re Australian Municipal, Administrative, Clerical and Services Union* [2024] FWCD 1042 and *Re National Tertiary Education Union* [2024] FWCD 1051.

⁸ *Re Independent Education Union of Australia* [2024] FWCD 1019 at [37].

⁹ *Ibid* at [18].

¹⁰ *Ibid*.

¹¹ *Ibid*.

¹² *Re Australian Municipal, Administrative, Clerical and Services Union* [2024] FWCD 1042 at [22].

¹³ Schedule E, Proposed Changes to IEU NSW/ACT Branch rules, 15 October 2024.