



DECISION

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

Mining and Energy Union (R2024/13)

CHRIS ENRIGHT

MELBOURNE, 22 MARCH 2024

Alteration of other rules of organisation.

[1] On 25 January 2023 the Mining and Energy Union (the Union) lodged with the Fair Work Commission notices and declarations setting out particulars of alterations to:

- the Union Rules;¹
- the District Branch Rules of the Union’s Northern Mining and NSW Energy District Branch; and
- the District Branch Rules of the Queensland District Branch.

The Association seeks certification of the alterations under s.159 of the *Fair Work (Registered Organisations) Act 2009* (the Act).

[2] On the information contained in the notices, I am satisfied the alterations have been made under the rules of the organisation.²

[3] The particulars set out alterations to:
Union Rules 9 and 22;

- Northern Mining and NSW Energy District Branch Rules 8; and
- Queensland District Branch Rule 8.

[4] The alterations do a number of things.

[5] First, they change the composition of the Union’s Central Council. The Central Council is the Union’s committee of management³ and supreme governing body.⁴

[6] One office on the Central Council is currently reserved for a female member of the Union. It is called the Affirmative Action Councillor.⁵

[7] Under the proposed alterations the number of Central Council offices reserved for females will increase to two.

[8] Secondly, the proposed alterations change the name of the office from Affirmative Action Councillor to Female Central Councillor.

[9] Third, qualifications for the office of Female Central Councillor will change. Under the current Union Rules the office of Affirmative Action Councillor can be held by a female member of the Union—irrespective of the District Branch they are attached to⁶—so long as they have been a financial member, for at least 12 continuous months, when nominations open.⁷

[10] Under the proposed rules, one Female Central Councillor will be elected from the female members of the Union who are attached to the Northern Mining and NSW Energy District Branch. The other will be elected from the members attached to Queensland District Branch.⁸ If a ballot is required, the electorate will comprise the financial members of the relevant District Branch.⁹ The minimum period of financial membership is unchanged.

[11] Fourth, the size of the District Boards of Management of the Northern Mining and NSW Energy District Branch and Queensland District Branch will increase by one. The additional member of the District Board of Management will be the relevant Female Central Councillor, who will hold the office *ex officio*. The District Boards of the Northern Mining and NSW Energy District Branch and Queensland District Branch are the committee of management of the respective Branch.¹⁰

[12] Fifth, the existing office of Affirmative Action Representative in the Northern Mining and NSW Energy District Branch and Queensland District Branch will be renamed District Branch Female Representative. The office is otherwise unchanged. The Affirmative Action Representative is a member of the Districts' Boards of Management.

[13] Finally, a number of sub-rules have been consequentially renumbered, an otiose reference to the Affirmative Action Councillor has been removed from the Union Rules' disciplinary provisions and errant syntax has been corrected.

[14] The Union's wants the proposed alterations to apply in the next scheduled elections. Nominations in those elections open shortly.¹¹

[15] Rule alterations that restrict the right to nominate for office based on sex were considered in by the Commission's General Manager in *Re: The Maritime Union of Australia Division of the Construction, Forestry, Maritime, Mining and Energy Union (Re: MUA)*¹² and *Re: The Association of Professional Engineers, Scientists and Managers, Australia*.¹³ I adopt and rely on the discussion and conclusions reached by the General Manager in those decisions.

[16] Alterations to the rules¹⁴ of organisations registered under the Act do not take effect¹⁵ unless the Fair Work Commission's General Manager, or their Delegate certifies that the alterations, in their opinion:

- 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.¹⁶

[17] In matters where the alterations limit a member's eligibility to nominate for office based on their sex three questions arise.

[18] First, do the alterations impose on members of the organisation conditions, obligations or restrictions that are oppressive, unreasonable or unjust when regard is had to Parliament's intention in enacting the Act and the *Fair Work Act 2009*? If the alterations do, they are contrary to s142(1)(c) of the Act. They cannot be certified.

[19] In *Re: APESMA*, the proposed alterations created a new office styled “Diversity National Assembly Member”. The office was reserved for a female financial member. In relation to s.142(1)(c) of the Act the General Manager concluded that by reserving an office for a female financial member, the alterations imposed conditions, obligations or restrictions on members of the organisation. Those conditions or restrictions were imposed to encourage women to nominate for office, thereby increasing the level of member participation—particularly female member participation—in the organisation’s affairs. The alteration was also intended to ensure that the organisation was representative of its female members. Finally, the alteration was intended to increase the diversity of persons on bodies which have policy determination and/or management functions. In each instance the alteration was consistent with and not contrary to Parliament’s intentions in enacting the Act. Consequently, the conditions, obligations or restrictions were not oppressive, unreasonable or unjust contrary to s.142(1)(c).

[20] I also note Justice Ryan’s comments in *Pillar v Building Workers Industrial Union of Australia*:¹⁷

“In my view, the reservation of places on a committee of management for particular categories of members does not, of itself, infringe, or discourage the democratic control of a committee of management... Of course, there may be extreme cases where the number of offices for which candidature is restricted is out of all proportion to the numbers of persons entitled to the benefit of the restriction, or where a significant section of the membership is precluded from candidature altogether...”

Secondly, are the alterations contrary to s.142(1)(d) of the Act? Section 142(1)(d) provides that the rules of an organisation:

“must not discriminate between... members of the organisation on the basis of... sex”.¹⁸

[21] If they are contrary to s.142(1)(d), they cannot be certified.

[22] In *Re: APESMA* the General Manager noted the Act provides little guidance as to what constitutes “discrimination” contrary to s.142(1)(d). Adopting the approach taken by Gaudron J in *Street v Queensland Bar Association*,¹⁹ the General Manger concluded that the different treatment at issue was not sufficient to render the rule discriminatory. The differential treatment envisioned by the alterations was relevant and appropriate to the object to be attained.

[23] Finally, do the alterations contravene Commonwealth anti-discrimination legislation? If the alterations do, they are contrary to law within the meaning of section 159(1)(c) of the Act. They could not be certified.

[24] In *Re: APESMA* the General Manager concluded the alteration was not contrary to law. In particular, it did not contravene the *Sex Discrimination Act 1984* (Cth) (SDA), because it constituted a special measure taken “for the purpose of achieving substantive equality” in accordance with that Act.

[25] While I agree with the General Manager’s conclusions, that is not the end of the matter.

[26] It should not be presumed that rule alterations which introduce an affirmative action provision will be certified as a matter of course. Nor, in seeking certification of an alteration, is

it enough to point to the inclusion of similar provisions in the rules of another organisation, or another of the applicant organisation's branches/divisions. Regard must be had to the contemporary circumstances of the organisation, branch or division whose rule alterations fall for consideration. As the Full Court of the Federal Court pointed out in *McLeish v Faure and Ors*:²⁰

“What may be a valid rule in one organization does not of necessity mean that such rule would be valid for another. Such validity may depend on different circumstances and conditions which may vary not only from organization to organization but within the same organization at different times.”²¹

[27] At staff of the Commission's suggestion, the notices and declarations in the present matter were accompanied by submissions made by the Union and a statement made by its General Secretary, Mr Grahame Kelly.

[28] In reaching my conclusion in this matter I have had regard to all of the material provided by the Union. It is not necessary to set out Union's submissions in full. Nonetheless, I consider the following background information particularly relevant:

“5. There are currently 18 members of the Central Council. All of the members of the Central Council are male except for one position of Affirmative Action Councillor.

6. On 7 December 2017, the General Manager of the Fair Work Commission certified a Rules alteration... [which] resulted in the creation of an additional position – the Affirmative Action Councillor...

7. Prior to the change to the Union Rules in 2017... the Central Council was always exclusively male. That is, except for the Affirmative Action Councillor role, no females have ever been elected to the Central Council.

8 Despite the addition of the Affirmative Action Councillor position to the Central Council the lack of female representation on the Central Council is at odds with:

a) the female participation rate in the industries in which the Union exercises coverage; and

b) the membership of the Union.

9. The industries in which the Union exercises coverage were numerically heavily male dominated. That is no longer the case. There is now a significant number of females working in the coal mining industry, power industry, coal ports and mining industry more generally in the Union

10. The Female component of the membership of the Union is not numerically insignificant. The Union currently has 22,766 members. About 89.53% of the Union's members are male. The remaining 10.47% are female.

11. A percentage of 10.47% (or 2,385 female members) of the total membership of the Union is not a trivial or an insignificant number.

12. It is evident that females are, and have been, underrepresented on the Central Council.

13. The proposed rule alteration seeks to address that underrepresentation. This is proposed to be achieved by establishing an additional position on the Central Council. That being, increasing the number of Affirmative Action Councillors on the Central Council. That position is to be, as the current position is, exclusively reserved for female members.”²²

[29] The same issues exist in connection with the management of the Union’s Northern Mining and NSW Energy District Branch²³ and Queensland District Branch.²⁴

[30] Similarly important are the stated intentions that underpin those proposed alterations:

“ 42. The material filed by the ME Division in support of the proposed rule alteration clearly demonstrates that females are – and have been – underrepresented on the [District Branches’ Boards of Management] and the Central Council...

...

44. The introduction of the Female Central Councillor representative would ensure that females are appropriately and proportionally represented within the leadership structure of the MEU...

45. The introduction of the positions seeks to encourage females to nominate for office and to achieve increased representation of women in elected positions. That otherwise seems unlikely in the absence of the proposed rule alteration...

...

49. The establishment of the Female Central Councillor aims to advance the affirmative action of females and create substantive equality between members of the MEU.

50. It aims to ensure that there is increased awareness and understanding amongst the Central Council of the issues facing females in the industries where the MEU exercises coverage. That will be best achieved through the elevation of the female perspective during the deliberations of the Central Council.

51. The proposed rule alteration further seeks to increase the diversity of the Central Council. This will ensure that the Central Council is as properly reflective of the membership as it should be.

52. Finally, the proposed rule alteration will encourage female participation in the affairs of the Central Council. As an important and influential stakeholder in the industries where the MEU exercises coverage, the MEU seeks to positively influence opportunities for females in those industries.

53. The establishment of the Female Central Councillor is in addition to the existing members of the Central Council. This does not create any disadvantage or unfairness to

members of the MEU. That is because it is reflective of the proportion of female members to the number of members of the Central Council.

54. The additional Central Council roles reserved for females simply ensures that the unique experience and perspective of females will be at the decision making table. This will improve the effectiveness of the MEU to advocate on behalf of all of its members.

55. There will be no detriment or unfairness caused to the membership of the MEU by creating these additional positions, as all current elected positions of the MEU remain and would be open to all eligible members of the union.”²⁵

[31] It is similarly unnecessary to set out Mr. Kelly’s statement in full. However, the following information about the distribution or the Unions’ membership should be noted:

“8. In preparing this statement I had cause to review the MEU Roll, the Northern District Roll and the QLD District Roll.

...

10. In respect of the Northern District, the Roll recorded that the total membership of the District was 8,726. There were 7,765 male members, and 961 female members. That equates to 11% of the Northern District membership being female.

11. The QLD District Roll recorded that the total membership of the MEU was 7,952. There were 6,905 male members, and 1,047 female members. That equates to 13.16% of the QLD District membership being female.

12. Combined, the membership of the Northern District and QLD District comprises 73.3% of MEU membership. The combined female membership of the Northern and Queensland Districts is 84.2% of the female MEU membership.”²⁶

[32] Mr Kelly’s opinion about the rationale for the proposed alterations is also worth noting:

“14. In about the past decade, there has been a significant increase in female participation in industries covered by the MEU, and amongst the ranks of the MEU membership. The increase has not translated into the number of females being elected to the leadership positions on the Central Council. Except for the Affirmative Action Councillor role, no females have ever been elected to the Central Council. That is concerning because it means that the Central Council is not as diverse and reflective of the membership as it should be. The female participation in industries covered by the MEU is not translated into females being elected to leadership positions.

15. Considering the level of female membership covered by the MEU, we, the MEU strongly believe increasing the number of female representative positions on Central Council will greatly benefit the MEU. The increase will ensure that the female perspective of the membership is elevated during the deliberations of the Central Council, and decisions of the MEU.”²⁷

[33] I accept the Union's submissions and the content of Mr Kelly's statement. I find this material persuasive.

[34] As a consequence, I find that the alterations do not in the circumstances: impose on members of the organisation conditions, obligations or restrictions that are oppressive, unreasonable or unjust when regard is had to Parliament's intention in enacting the Act and the *Fair Work Act* 2009, contrary to s142(1)(c) of the Act;

- discriminate against members of the organisation on the basis of sex, contrary to s.142(1)(d) of the Act;
- contravene Commonwealth anti-discrimination legislation, contrary to law within the meaning of section 159(1)(c) of the Act.

[35] My conclusion about s.142(1)(c) of the Act has two limbs.

[36] First, allowing only female members to nominate for the two Female Central Councillor offices is not contrary to s.142(1)(c) There is nothing about the circumstances of the current matter which makes it distinguishable from *Re: APESMA* or otherwise warrants a departure from the conclusions reached in that case.

Secondly, limiting the election of those two offices to members of the Union attached to the Northern Mining and NSW Energy District Branch and Queensland District Branch imposes on members attached to the other District Branches of the Union of the organisation conditions, obligations or restrictions. However, those conditions, obligations or restrictions are not oppressive, unreasonable or unjust when regard is had to Parliament's intention in enacting the Act and the *Fair Work Act* 2009. Given the dispersal of members across the Union's District Branches, it is not unreasonable for the two Female Central Councillor to be drawn from—and elected by—the members allocated to the two numerically dominant branches.

[37] In my opinion, the alterations comply with and are not contrary to the Act, the *Fair Work Act* 2009, modern awards and enterprise agreements, are not otherwise contrary to law and have been 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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<PR772482>

¹ According to Union Rule 5 – Definitions of the rules of the Union, the expression “Union Rules” refers to the rules other than the District Branch Rules.

² Including, as applicable the rules of the respective District Branches.

³ See Union Rule 9(i)(a).

⁴ Ibid.

⁵ See Union Rule 9(b)(2)

⁶ Ibid.

⁷ See Union Rule 18.

⁸ See proposed Union Rule 9(i)(2).

⁹ See proposed Union Rules 9(i)(2), 7(ii)(e) & 8.

¹⁰ See District Branch Rules 8(i)(b).

¹¹ I note Reg. 132 of the *Fair Work (Registered Organisations) Regulations 2009* in this regard.

¹² *Construction, Forestry, Maritime, Mining and Energy Union; R2022/2*; 6 September 2022; [2022] FWCG 54.

¹³ [2017] FWCD 4034; 10 November 2017 at paragraphs [20] – [44].

¹⁴ Other than an alteration to a registered organisation’s name or eligibility rules – see s.158 of the Act.

¹⁵ See section 159(3) of the Act.

¹⁶ See s159(1)(a) and (b) of the Act. The decision maker must also be of the opinion that the alterations were made under the rules of the organisation: s.159(1)(c). I dealt with s159(1)(c) of the Act in paragraph [2]

¹⁷ [1994] AILR 249.

¹⁸ Section 142(1)(d) of the Act protects members of the organisation (and applicants for membership) from discrimination a number of other grounds. However, none of those grounds are presently relevant.

¹⁹ (1989) 168 CLR 461.

²⁰ (1979) 40 FLR 462.

²¹ Ibid at 469.

²² Mining and Energy Union’s 30 January 2024 submissions at paragraphs 5 – 13.

²³ Op Cit at paragraphs 17 – 19.

²⁴ Op Cit at paragraphs 28 – 30.

²⁵ Op Cit at paragraphs 42, 44 – 45 & 49 – 55.

²⁶ 1 December statement of Mining and Energy Union General Secretary Grahame Kelly at paragraphs 8 & 10 – 12.

²⁷ Ibid at paragraphs 14 – 15.