



DECISION

Fair Work (Registered Organisations) Act 2009
s.189—Arrangement for conduct of an election

CPSU, the Community and Public Sector Union (E2022/25)

MR STEENSON

SYDNEY, 1 JUNE 2022

Arrangement for conduct of election.

[1] On 3 May 2022, the Western Australian Prison Officers' Union Branch of the SPSF Group (the **WAPOU Branch**) of the CPSU, the Community and Public Sector Union (the **CPSU**), lodged with the Registered Organisations Commission (the **Commission**) prescribed information, and on 13 May and 20 May 2022 lodged amended prescribed information, for a scheduled election to fill the following offices for a new term of office:

Branch Executive offices

Branch President	(1)
Branch Vice-President	(1)
Branch Secretary	(1)
Branch Assistant Secretary	(1)
Branch Treasurer	(1)
Branch Executive Member	(3)

Branch Councillor (Delegate to Branch Council) from the following Sub-Bran

Acacia Prison	(2)
Training Academy	(1)
Albany Regional Prison	(2)
Boronia Pre-Release Centre	(1)
Bunbury Regional Prison	(3)
Casuarina Prison	(5)
Drug Detection Unit	(1)
Karnet Prison Farm	(2)
Melaleuca Womens Prison	(2)
Pardelup Prison Farm	(1)
Special Operations Group	(1)
Wando Rehabilitation Prison	(1)
Wooroloo Prison Farm	(2)
Work Camps	(1)

Federal offices

Branch Delegates to Federal Council (in addition to ex officio offices)	(2)
Branch Representative to Federal Executive	(1)

[2] Further to the above offices, the Branch also lodged with the Commission prescribed information to fill the following offices for the remainder of their current term of office due to insufficient nominations received in the most recent scheduled election for these particular offices (**E2020/39**):¹

Branch Councillor (Delegate to Branch Council) from the following Sub-Branches:

Bandyup Womens' Prison	(2)
Broome Regional Prison	(1)
Greenough Regional Prison	(1)
Hakea Prison	(2)

[3] There are a number of issues that arise in this matter, including in relation to the timing of the lodgement of prescribed information (including an apparent previous non-lodgement) and the Branch's understanding of when particular offices are due for election under the rules.

Election for Federal offices

[4] As will be evident from the list of offices above, the offices to be elected in this election (**E2022/25**) include Federal Council Delegates and a Branch Representative to the Federal Executive.

[5] The number of Federal Council Delegates representing the Branch is determined based on the Branch's financial membership as at 31 December in the year immediately preceding the election.² According to the Branch's membership at 31 December 2021, the Branch is entitled to four Federal Council Delegates. Of these, one Federal Council Delegate position is reserved for the Branch Secretary (ex-officio), and one Federal Council Delegate position is the Branch Representative to the Federal Executive elected by and from the Branch Council.³

Expectation of compliance with rules as they apply to election timetables

[6] In accordance with the Commission's usual practice, the prescribed information for this election has been assessed with reference to the CPSU Chapter C - SPSF Group Rules (**Chapter C rules**) and Schedule B to those rules (**the WAPOU Branch rules**), as well as considering previous elections for the relevant offices. In that assessment, Commission staff have identified that the most recent scheduled election for Federal offices – i.e. Federal Council Delegates, Federal Vice-President and Branch Representative to the Federal Executive, (all of which had a four year term under the rules)⁴ – was election E2016/196,⁵ declared by the Australian Electoral Commission (the **AEC**) in October 2016.

[7] Since that election, alterations to the Chapter C rules were certified by the Fair Work Commission in March 2019.⁶ Among other things, the amended rules introduced a provision whereby the elected Branch Secretary also held the office of Federal Vice-President and was a Federal Council Delegate ex-officio (i.e. by virtue of being Branch Secretary).

¹ [2020] ROCD 88

² SPSF Group Rules - Chapter C and Schedule B rules –certified 27/3/2019 [R2018/316] (Chapter C rules) - rule 3.2(a)

³ Chapter C rules – rule 15.1(f)

⁴ Chapter C rules certified 23/12/2015 (2015/253)

⁵ Which was the subject of the decision in [2016] FWCD 5616

⁶ Chapter C rules

[8] Section 145 of the *Fair Work (Registered Organisations) Act 2009 (RO Act)* requires the rules of an organisation to provide for terms of office of no longer than 4 years without re-election.⁷ The Chapter C election rules provide that the Federal Offices referred to have a four-year term.⁸

[9] In response to the queries from Commission staff, the Branch has confirmed that no further scheduled election for Federal Offices has been conducted since election **E2016/196** was declared. That is, some offices have not been the subject of election for six years. The Branch also stated that its understanding was that the officers declared elected under **E2016/196** continued to hold office. The Branch's view in that regard is reflected in the CPSU's most recent Annual Return (AR2022/23) lodged on 18 March 2022, which lists persons elected to Federal offices in 2016 as current officers. If that approach (to have persons remain in office without further election) was accepted, it would be contrary to the provisions in the RO Act about the length of a single term.

[10] The exception to this relates to one office of Federal Council Delegate and the office of Federal Vice-President (which are now held ex-officio by the Branch Secretary under the rules), both offices which were previously held by the former Branch Secretary, John Welch (elected under E2016/196), who resigned from those offices in February 2018.

[11] A casual vacancy election to fill the vacancies for the offices of Federal Council Delegate and Federal Vice-President arising from the resignation of Mr Welch, was conducted at the same time as the scheduled election for Branch offices held under **E2018/38**.⁹ Notifications of change to offices lodged by the WAPOU Branch¹⁰ confirm that the dates of change of the office holder for both these offices, occurred in 2018.

[12] The Branch has advised that it incorrectly assumed that "as the casual vacancies arising from the resignation of John Welch resulted in an election for some of the Federal Officer roles in 2018, that the next scheduled election for these roles would be 2022 and not 2020" and that, as a result, WAPOU did not include these in the prescribed information lodged in 2020. This assumption appears to have been held despite the fact that the election decision issued for E2018/38 expressly stated that the election was to fill casual vacancies for the remainder of term, and that the applicable casual vacancy provision under the Chapter C rules specified that:

'Any person so elected or appointed shall hold office *for the unexpired portion* of the term of the person he or she is elected or appointed to replace.'¹¹

[13] If the Branch had complied with the prescribed election cycle for Federal offices under the Chapter C rules, a scheduled election for Federal offices - Federal Council Delegates and the Branch Representative to Federal Executive - (noting that the office of Federal Vice-President is now held ex-officio by the Branch Secretary), should have occurred in 2020.

The failure to hold the election for Federal Offices within the required period, indicates an apparent lack of understanding of relevant election related rules and of the obligation to lodge prescribed information in accordance with the RO Act, and the Chapter C and WAPOU Branch

⁷ Or five years for the purpose of synchronising terms of office only

⁸ Chapter C rules – rule 13 Part 3

⁹ [2018] ROCD 64

¹⁰ AR2018/2

¹¹ Chapter C – SPSF Group Rules and Schedule B – SPSF Group Rules for the WAPOU Branch - certified 23/12/2015 (R2015/253) – rule 44.3 (emphasis added).

rules. The failure to lodge prescribed information in 2020 for these offices before the prescribed day exposes the CPSU to liability under section 189(2) of the RO Act.

[14] I also note that this Commission has issued a range of guidance material for registered organisations in relation to elections, reminding them of the need to lodge prescribed information if their rules state that an election is due.

Request for extension of time

[15] Section 189(2) of the RO Act requires that prescribed information be lodged before the 'prescribed day'. The *Fair Work (Registered Organisations) Regulations 2009 (Regulations)*, in particular regulation 138(3) of the Regulations defines the 'prescribed day' as the day occurring '2 months before the first day when a person may, under the rules of the organisation or branch, become a candidate in an election'. In other words, it must be lodged at least two months before the date on which nominations open. Section 189(2) of the RO Act is a civil penalty provision and late lodgement can therefore leave an organisation open to litigation and potentially liable to a penalty.

[16] The Branch did not lodge the prescribed information before the prescribed day as required by the Regulations. While the Chapter C rules do not specify a prescribed day, rule 19.1 of the Chapter C rules provides that the first stage of the election (i.e. the election for Branch offices and Sub-Branch Council Delegates) are to be conducted so that a result is declared not earlier than 1 May and not later than 30 June in the election year. Using the latest possible date specified in the rules for declaring the result of the election (i.e. 30 June) and working back from that, i.e. allowing a period for the opening and closing of nominations and for a ballot to be conducted if required, it is clear that the prescribed information should have been lodged considerably earlier than it was. The lengthy delay in lodging prescribed information for this election was such that even if 30 June had been the specified date on which nominations were to open (as distinct from the last day that the result could be declared), the lodgement would still be late.

[17] By letter dated 13 May 2022, the Branch Secretary, Mr Smith, advised that the delay in lodgement of prescribed information in the current matter was due to:

- the Branch Secretary being the only full-time paid Branch official who in carrying out his duties is assisted by the Branch President, a prison officer who works on a shift basis;
- the Branch President having been absent due to illness and as a consequence, the Branch Secretary's own administrative and industrial workload having increased;
- an apparently increasing level of industrial disputation and consequent demands on the Branch Secretary's time to attend to industrial issues;
- reasons including the impact of the Covid-19 pandemic and staff leave arrangements, meaning that the Branch's administrative staff members, who are normally responsible for the preparation and lodgement of documents with the Commission, not being available to undertake these duties, and that consequently the Branch Secretary has had to personally prepare and lodge the prescribed information for this election;

[18] The Branch Secretary submitted that these are exceptional circumstances which have resulted in the Branch's failure to lodge the prescribed information within a timeframe to enable

the election process to be completed within the period referred to in rules 19.1 and 32.2 of the Chapter C rules.

[19] The Branch has requested that the Commissioner (or his Delegate) exercise his power under section 189(2) of the RO Act to allow a later date for lodgement of the prescribed information.

[20] In reviewing the Branch's history of lodgements of prescribed information, I note that there has already been a pattern of late lodgements (such as in elections **E2016/196**,¹² **E2017/210**¹³ and **E2020/39**¹⁴), apparently due to administrative oversight, and in the case of the prescribed information required to be lodged in the 2020 scheduled election, the Branch's belief that the AEC's restrictions in holding elections during the Covid-19 pandemic provided the Branch with more time to lodge its prescribed information.¹⁵ I also note that in these previous elections in which the Branch has failed to lodge prescribed time within the prescribed time, the Commission has refused to grant an extension of time to lodge the prescribed information in two of those three instances.¹⁶

[21] This is therefore the fourth time in recent history that the Branch has failed to lodge prescribed information on time. This is in addition to there being no lodgement of prescribed information for Federal offices in 2020.

[22] In those previous election decisions in respect of this Branch, Delegates of the Commissioner have emphasised that the normal and reasonable expectation is that registered organisations and their branches take steps to ensure that they comply with the timeframe requirements set out not only in the RO Act but also in the rules of the organisation, (which the organisation itself has formulated.) In the 2020 election decision (**E2020/39**), it was noted that "the lodgement of the prescribed information with the Registered Organisations Commission on 18 May 2020 would not allow for the results to be declared in the timeframe contemplated by the rules".¹⁷

[23] It could reasonably be expected that, following these three decisions in which the issue of late lodgement was highlighted and in which, in two of those matters, a later date for lodgement was not allowed, that the Branch would take steps to remedy any of the apparent 'administrative' deficiencies that resulted in the late lodgement. Unfortunately, this does not appear to have been the case and, as indicated above, the current late lodgement was accompanied by details of further reasons for delay.

[24] While I do not doubt the veracity of the reasons for delay set out by the Branch Secretary in his 13 May 2022 letter, I am not satisfied that these reasons are sufficient ground to justify the failure to comply with a statutory obligation. I decline on this occasion to allow, under section 189(2) of the Act, a later day for lodgement. I draw attention to the fact that the failure to lodge before the prescribed day exposes the organisation to liability under a civil penalty provision, pursuant to section 189(2) of the RO Act.

¹² [2016] FWCD 5616

¹³ [2017] ROCD 30

¹⁴ [2020] ROCD 88

¹⁵ Despite the Commission having issued guidance to registered organisations on this issue, including clear advice to continue to lodge prescribed information when their rules required it (see, for example, *Guidance Note on the conduct of elections in organisations and their branches during coronavirus (COVID-19) restrictions*, 9 April 2020).

¹⁶ See Delegate comments in E2016/196

¹⁷ [2020] ROCD 88 at paragraph 2

[25] I also draw attention to the matter of *Registered Organisations Commission v Australian Hotels Association*,¹⁸ in which the Federal Court imposed substantial penalties on a registered organisation which had contravened section 189(2) of the RO Act on multiple occasions. The Commission will engage further with the WAPOU Branch and the CPSU in relation to the recurrent late lodgement of prescribed information that in relation to the Branch, which leaves the organisation open to civil penalties.

[26] The refusal of an extension of time under section 189(2) of the RO Act does not however affect the requirement to conduct an election under section 189(3) of the RO Act.

[27] I am satisfied that an election for the abovenamed offices is required to be held under the rules of the organisation and, under subsection 189(3) of the *Fair Work (Registered Organisations) Act 2009*, I am making arrangements for the conduct of the election by the AEC.



DELEGATE OF THE COMMISSIONER

Printed by authority of the Commonwealth Government Printer

PR352244

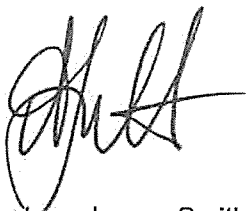
¹⁸ [2019] FCA 1516

PRESCRIBED INFORMATION FOR ELECTIONS in accordance with Section 189 of the Fair Work (Registered Organisations) Act 2009 and Regulation 138 of the Fair Work (Registered Organisations) Regulations 2009.

I, Andrew James SMITH, being the Elected Secretary of the CPSU SPSF WAPOU Branch make the following statement:

1. I am authorised to sign this statement containing prescribed information for the CPSU SPSF WAPOU Branch.
2. The following information is lodged under subsection 189(1) of the Fair Work (Registered Organisations) Act 2009 (the RO Act).
3. The elections that are required are set out in the table in Annexure A.
4. No rule alterations are pending that will impact the election.
5. This Notice is **NOT** lodged at least two months before nominations open for the elections in Annexure A. The Union has sought an extension of time under s189(2) for reasons expressed in a letter and Statement sent to the ROC on Friday 13 May 2022.

Signed:



Andrew James Smith

Branch State Secretary

Dated: 20th May 2022

◆ Elections that are required

Annexure A

Electorate	Branch	Name of Office	Number Required	Voting System	Reason for Election
A	WAPOU Branch	Branch President	1	Direct Voting System - by all members of the Branch	Scheduled
	WAPOU Branch	Branch Vice-President	1	Direct Voting System - by all members of the Branch	Scheduled
	WAPOU Branch	Branch Secretary	1	Direct Voting System - by all members of the Branch	Scheduled
	WAPOU Branch	Branch Assistant Secretary	1	Direct Voting System - by all members of the Branch	Scheduled
	WAPOU Branch	Branch Treasurer	1	Direct Voting System - by all members of the Branch	Scheduled
	WAPOU Branch	Branch Executive Member	3	Direct Voting System - by all members of the Branch	Scheduled

Delegates to Branch Council (Other than Northern Region Sub-Branches Rule 8.4 Schedule B WAPOU Branch))					
Number of Delegates in accordance with Rule 6 (b)					
B	Acacia Prison Sub-Branch	Branch Councillor	2	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Training Academy Sub-Branch	Branch Councillor	1	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Albany Regional Prison Sub-Branch	Branch Councillor	2	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Boronia Pre-Release Centre For Women Sub-Branch	Branch Councillor	1	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Bunbury Regional Prison Sub-Branch	Branch Councillor	3	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Casuarina Prison Sub-Branch	Branch Councillor	5	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Drug-Detection Unit Sub-Branch	Branch Councillor	1	Direct Voting System - by all members of the Sub-Branch	Scheduled

B	Karnet Prison Farm Sub-Branch	Branch Councillor	2	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Mieleuca Women's Prison Sub-Branch	Branch Councillor	2	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Pardelup Prison Farm Sub-Branch	Branch Councillor	1	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Special Operations Group	Branch Councillor	1	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Wando Rehabilitation Prison Sub-Branch	Branch Councillor	1	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Wooroloo Prison Farm Sub-Branch	Branch Councillor	2	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Work Camps Sub-Branch	Branch Councillor	1	Direct Voting System - by all members of the Sub-Branch	Scheduled
	Bandyup Women's Prison Sub-Branch	Branch Councillor	2	Direct Voting System - by all members of the Sub-Branch	Insufficient Noninations
	Broome Regional Prison Sub-Branch	Branch Councillor	1	Direct Voting System - by all members of the Sub-Branch	Insufficient Noninations
	Greenough Regional Prison Sub-Branch	Branch Councillor	1	Direct Voting System - by all members of the Sub-Branch	Insufficient Noninations
C	Hakea Prison Sub-Branch	Branch Councillor	2	Direct Voting System - by all members of the Sub-Branch	Insufficient Noninations
	Federal Council	Branch Delegate to Federal Council *	2	Collegiate Electoral System - by all members of the Branch Council	Scheduled
	Federal Council	Federal Executive Member *	1	Collegiate Electoral System - by all members of the Branch Council	Scheduled
D					

* Under Rule 32.2 of Chapter C WAPOU is entitled to four Federal Council Delegates

☞ The Branch Secretary (ex officio) (see Rule 32.2 (b) (i))

☞ The Branch Representative on Federal Executive (ex officio) (see Rule 32.2 (b) (ii))

☞ Two elected Delegates to Federal Council (see Rule 32.2 (b) (iii))

◆ **Reasons for election:**

☞ Election for Branch Offices and positions marked A, B and D are held every four years in accordance with Rule 7.5 and 23 Schedule B of the CPSU - SPSF Group - Western Australian Prison Officers' Union (WAPOU) Branch

☞ Elections for positions marked C are for vacant positions needing a by-election for the remainder of term created by insufficient nominations in prior election E2020/39, or positions vacant due to the resignation of Branch Councillors elected in prior election E2020/39.

Sub-Branch	Number Required	Reason for By-Election
Bandyup Womens' Prison	2	Insufficient Nominations E2020/39
Broome Regional Prison	1	Insufficient Nominations E2020/39
Greenough Regional Prison	1	Insufficient Nominations E2020/39
Hakea Prison	2	Insufficient Nominations E2020/39

◆ **Elected by:**

☞ For positions under A the electorate is all financial members of WAPOU Branch

☞ For positions under B the electorate is all financial members of each Sub-Branch (rules 6.2(b) and 8.1). Below is a list of the Sub-Branches identifying the total number of financial members as at the end of the quarter of the year preceding the calling of elections and therefore the number of delegates for each Sub-Branch.

Acacia (2)	155	Casuarina (5)	474	Special Operations Group (1)	51
Academy (1)	10	Drug Detection Unit (1)	14	Wandoo (1)	52
Albany (2)	185	Karnet (2)	119	Wooroloo (2)	115
Boronia (1)	29	Melaleuca (2)	112	Work Camps (1)	19
Bunbury (3)	207	Pardelup (1)	29		

For positions under C the electorate is all financial members of each Sub-Branch (rules 6.2(b) and 8.1). Below is a list of the Sub-Branches identifying the total number of financial members as at the end of the quarter of the year preceding the calling of elections and therefore the number of delegates for each Sub-Branch. Elections are called for only those positions not filled in the election process E2022/39 and those positions filled in the election process E2022/39 and vacated by the resignation of those elected.

Bandyup (2)	133	Greenough (1)	147
Broome (1)	52	Hakea (1)	465

Nominations open:

To be determined by the Returning Officer. (At the earliest permissible date (Rule 17.2, CPSU - SPSF Group Rules).

Nominations close:

To be determined by the Returning Officer. (At 12 Noon on the earliest permissible date (Rule 17.2, CPSU - SPSF Group Rules).

Cut-off date for roll:

As directed by the Returning Officer under Rule 7.2, CPSU - SPSF Group Rules.