COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON

ELECTORAL MATTERS

Reference: Role of the Australian Electoral Commission in conducting industrial elections

SYDNEY

Thursday, 7 August 1997

OFFICIAL HANSARD REPORT

CANBERRA

WITNESSES

JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

Role of the Australian Electoral Commission in conducting industrial elections

SYDNEY

Thursday, 7 August 1997

Present

Mr Nairn (Chair)

Senator Conroy

Mr McClelland

The committee met at 1.23 p.m.

Mr Nairn took the chair.

KERSLAKE, Mr David, Australian Electoral Commission, Assistant Commissioner, Industrial Elections, Funding and Disclosure, Australian Electoral Commission, West Block, Queen Victoria Terrace, Parkes, ACT 2600

LEWIS, Mr Stephen Geoffrey, Director, Industrial Elections, Australian Electoral Commission, West Block, Queen Victoria Terrace, Parkes, ACT 2600

CHAIR—I declare open this sixth and final public hearing of the inquiry into the role of the Australian Electoral Commission in conducting industrial elections. I welcome the witnesses and others in attendance. We will be taking evidence today from the Australian Electoral Commission.

I remind witnesses that the proceedings here today are legal proceedings of the parliament and warrant the same respect as proceedings in the Senate and the House. The deliberate misleading of the committee may be regarded as a contempt of the parliament. The committee prefers that all evidence be given in public but should you at any stage wish to give evidence in private, you may ask to do so and the committee will give consideration to your request.

We have now received a number of supplementary submissions from the AEC, which are publicly available. Are there any matters that you want to change in those submissions? Also, would you like to make any opening statements before we move to questions?

Mr Kerslake—No, there is nothing we would like to alter in the submissions we have already presented, and I do not have anything additional to add by way of an opening statement. I would be happy to address the particular questions the committee wishes to raise.

CHAIR—To make this hearing today a bit easier, we sent through a number of additional questions which, if the other members of the committee are happy to do this, we might just work through firstly. If there are any additional things that we require, I guess they will come up as we go through.

Let us start with question one. To make it easier for Hansard, I might go through them and then we do not have to worry later about following things up. The first one was whether you could give a response to the possible recommendations. These are areas of potential recommendations that we might look at as part of the report. There are something like 20 of those. Some will possibly be easily answered, and you can just say, `We have no problem with that,' `Yes' or `No'. If you think there is some extra information that would help us with any of them, we would appreciate that.

The first one is that the current provision for postal ballots should be retained except that the definition of postal ballot in section 4 of the Workplace Relations Act should be amended to provide that completed ballot papers are to be returned in a standard declaration envelope.

Mr Kerslake—Mr Chair, I am at a slight difficulty here. It appears that the order of questions you have does not correspond to the order of the ones I have. If you will excuse me, there may be some shuffling around here as I retrieve the notes on a particular point.

CHAIR—That is fine. You have prepared some information based on what we sent through, have you?

Mr Kerslake—That is correct, and in that order.

CHAIR—The secretary has told me that the questions I have here are substantially the same, but it might be easier if we work on what we had given you before and I will double-check a couple of things to make sure we have not missed anything. In that case, let us start with the first one, which is:

Whether the WR Act should be amended to provide that a returning officer must check the accuracy of 10 per cent of the names on the voters' roll and may, at his/her discretion, check a greater percentage (with no challenge to the outcome of an election to be made on the ground that the returning officer did not check more than 10 per cent of names on the roll).

Mr Kerslake—This is one area where the Electoral Commission does have some strong reservations about the recommendation put forward. It has reservations from two main points of view. The first is the time and cost resources that would be required to conduct such checks, and the second is, having conducted those checks, we do not believe that the checks would necessarily result in a more accurate roll and the exercise could have been for nothing.

In making those two points, I should add a rider: that is, they depend on what you mean by checks for accuracy as well—whether you are talking about checks for membership, checks for financiality or checks for whether the addresses are accurate. To conduct any of those checks on a 10 per cent basis would require a significant input of resources and time.

For example, in the recent AWU national election that was conducted, our New South Wales staff who were responsible for conducting the election nationally conducted checks for financiality. They conducted checks on 5 per cent of the total number of members for financiality and it took two casual staff a total of 140 hours between them to conduct those checks just for financiality. They conducted other checks on membership and so on as well, so when you add on the time to conduct the other checks, it is a significant amount of resources.

Senator CONROY—Can I ask what the form of that check was? Presumably you went down to the union offices, sat there and scrolled through the computer?

Mr Kerslake—No. You have to check back. If you want to check financiality for example, you have to check back against source documents. One of the problems with this in terms of making it work is that if you are really just checking to computer records for a start—and that may be all they have done in this particular case—that in itself takes a lot of time and does not give you a terribly accurate result.

Senator CONROY—If the information has come from the computer, then presumably you are going to have almost a 100 per cent match with what the union has supplied you.

Mr Kerslake—Exactly. That means that, if you want to make them accurate, you have to go back to your original source documents which might be receipts, deduction authorities and in some cases records of life membership, if a person is financial for that reason or can be under the rules. If you are checking membership, you can go and check membership

against a membership card or a computerised record. But to be certain you need to go back and look again at source documents, such as application forms for membership, and apply the organisation's rules in each case to those source documents.

When you look at that you end up with a mammoth task to conduct these sorts of membership checks. Often these documents are not available. I went myself only a few weeks ago with some of my staff to check the membership records in a union office. I actually went through the records and the old cards to do the signature checks. Those cards were all over the place and so on. When you go back to beyond the computer records for the source documents, it is very difficult and very time consuming. If all you are doing is checking a roll against the computerised record from which it came, you are not really ending up with a more accurate roll anyway.

Senator CONROY—There were state elections taking place for the state branches at the same time as the federal election. Many federal union offices actually do not have any source documents. They get given some labels by their state branches.

Mr Lewis—That is correct, which means that you are then looking at each state having to run a check in each state branch. That particular one did use the computer for the New South Wales part, which meant that you are looking at less than a third of that entire organisation. But the answer is yes, a union may have a list in each state. Some of course, as you would know, go beyond that. They may then be broken up for example into a northern New South Wales region, an Illawarra region or whatever, so it could be even more diverse than that in theory.

Senator CONROY—You have to check 10 per cent of each of those subdivisional areas in the AWU case?

Mr Lewis—I think in the AWU case we were able to do it by states. So you are looking at the state and territory capitals.

Senator CONROY—But in New South Wales they have three branches for the federal ballot.

Mr Lewis—Yes. My understanding was that it was still done through the Sydney office in New South Wales.

CHAIR—What have you been normally checking? What sort of level?

Mr Lewis—It depends on the rules for one thing and I suppose the size of the organisation. Some would require a two per cent and some a five per cent. I cannot recall any at 10 per cent. That is not to say that there is not any. Often it would depend on the rules. We aim to comply with the rules of the organisation. There is no one set amount.

CHAIR—This could be the area that we could have in the rules.

Mr Lewis—We would also have to say that there is a real question about picking a flat 10 per cent. We took this up with the Bureau of Statistics. They are of the view that taking any one figure is not statistically valid because it depends on a range of factors, not

least the size you are checking on. In industrial organisations you can vary from 20 or 30 people to 150,000. Picking a flat amount statistically does not necessarily work. ABS data is an example. The unemployment survey samples less than one per cent.

CHAIR—It is more the way in which that random sample is taken than the actual percentage, I guess.

Mr Kerslake—It is the manner in which it is taken. If it were compulsory to conduct checks to a certain level, it can be very time consuming and that might be taking place in organisations, for example, where, historically, the roll has been pretty good or in other examples where, historically, the roll has been dreadful but to conduct these checks is not really going to make the situation any better.

The only thing that we could consider is writing to, say, 10 per cent of members, if you are checking addresses, for example, and asking them, `Is this your current address?' But even that is not terribly helpful; what do you do with those who do not reply? Typically, a lot of people get a piece of correspondence like that and say, `It's meaningless; I don't need to bother about that' and they don't send it back, so you cannot assume anything from your nil returns. So, again, it does not give you a figure that enables you to conclude, say, that we can be 99 per cent confident that the roll is 95 per cent accurate. You just do not get to that.

Senator CONROY—Short of doing the census a la ABS, it is almost impossible to check an address?

Mr Kerslake—It is impossible to achieve. The final point I would raise is that, if you conduct these checks and they are compulsory, what is the cut-off point at which you say a roll is reliable or not? Is it 90 per cent accuracy, 95 per cent or whatever? What is an acceptable figure? Secondly, if the roll falls below that figure, what do you do? At what point do you abort the election? What are the ramifications of that—for example, the incumbents being entrenched in power for a longer period because you cannot get an accurate roll and then the next time around you cannot get an accurate roll either? Are you going to abort the election? What do you do when you have this information?

When all those things are added up, the AEC's view is that it would be a tremendous input of resources. It does not really produce a more accurate roll or solve any particular problems. We don't mind going down that path on the basis of the AEC having a discretion to do a greater level of checks than, for example, the rules provide or whatever, if it feels that they are warranted, but we do not consider there is a necessity to do it in every case.

CHAIR—Let us put the 10 per cent aside for one moment. We may be able to get to a figure depending on the way in which that random checking is done. One of the points that we are trying to make out of this is that, within the random checking of the roll, if there is a certain level of error found, we are saying that you should go on doing a bit more checking. For instance, let us say you check 100, if we go back to the 10 per cent. If there are 1,000 people, you are checking 100 randomly on that roll. If you find 100 quite drastic errors with, say, 20 of that 100, you would say, `We have to question the reliability. Maybe we have to go beyond this 100.'

Forget the figures that I am using. I guess that is the sort of thing I was trying to get at—to put in place some recommendation that makes sure that the returning officer does have

some scope to do some additional checking if he felt it was necessary.

Mr Kerslake—I understand what you are saying. It still raises questions in our minds about, firstly, what the purpose of the checks is, whether you are checking for financiality or membership.

CHAIR—I would think all of those things.

Mr Kerslake—If you are checking for all of those, it still comes back to the point that, even at a low percentage being conducted initially, that is a significant input of resources. There is also the question of what you do with the information. You delve deeper and deeper. One of the things the committee would need to consider is what you do with the information once you have it. Are you going to abort the election? If you are, are you going to end up—if you run the election again—with a roll that is any better, and are you going to end up in a situation that is any different?

Mr McCLELLAND—Would you automatically do some sort of a check of the roll?

Mr Kerslake—It depends upon the rules, which vary from—

Mr McCLELLAND—What if there was a recommendation that it was at a minimalist point—that the Australian Electoral Commission conduct a survey of the rolls to ascertain their accuracy in terms of financiality, eligibility and so forth, as determined by the AEC, but that the survey should include not less than one per cent of membership?

Mr Kerslake—If you go down that path, and it is open to the committee to recommend that, our advice would be that a percentage figure—and we maintain the points we have already raised—is perhaps not as useful as, for example, a minimum number in some cases—or it may be X per cent or a certain number, whichever is the lesser or greater, depending how you look at it.

Mr McCLELLAND—Sure.

Mr Kerslake—Because in some cases 10 per cent is 120,000 to 150,000 members. One per cent is a significant number in some cases. So you might put an actual figure, if you choose to go down that path.

Mr Lewis—It still gets back to the purpose. There are two things. You can check and check again. Apart from the question of when you stop, there is still a question you get back to which is: what is accurate? If you define what is accurate, what do you do if it does not meet the definition?

Mr McCLELLAND—If it does not meet the definition, what the Australian Electoral Commission would do, assuming there was another recommendation that the Australian Electoral Commission had standing to apply for an inquiry, would be to go to a court and say, `This is what we found. These are the orders we would seek from you under section 258'—or whatever it is—`to rectify those irregularities so that we can proceed as we think commonsense dictates. Your order will protect the ballot from subsequently being challenged.'

Mr Kerslake—That may link in with other matters that the AEC has put forward about having the ability to go to a court in the first place rather than having to wait for a complaint to be lodged by somebody else in the court proceedings to begin with.

Our problem is twofold. It may be difficult in the legislation to specify a realistic cut-off point where you say you go ahead or you do not. If it was not in the legislation, it would be very difficult for the AEC to exercise a judgment without leaving itself open to criticism as to why it proceeded with this one, which appeared to be 95 per cent accurate, and why it did not go with that one, which was 94 per cent accurate. Where do you draw the line? If a court drew that line, and there was sufficient guidance in the legislation, that would make it more workable. I still question whether it would be workable, but it would make it more workable.

Senator CONROY—Where would the 10 per cent be taken from? My worry would be that, in the AWU, if you were to look at the country area, say, you would be more likely to find with that industry that the country area has a floating population of more than 10 per cent, whereas, if you say, `Let us just do the CBD or the Brisbane city area,' you may easily find a lot more people at their existing addresses than you would in, say, a union that has a large country membership. So, even on a geographic basis, you have to be careful in arbitrarily picking a figure.

CHAIR—Yes. But any checking procedure, if you are talking about random checking, has to be random, so that you do not start to identify areas.

Senator CONROY—What I am saying, though, is that, if you discover that five per cent of your 10 per cent check is out of whack and, therefore, you proceed further to do other things—and the membership of the AWU would be half-half—you are likely to find a much greater proportion of the half in the country is more mobile. Therefore, if you have an arbitrary figure, you will get yourself into a situation where you can say, `Something is going on here,' when it is just that you happen to have been covering a lot of shearers and people who are working casually up the coast of Queensland, at the resorts and things like that.

Mr Kerslake—I also would not want any comments made on the AEC's behalf to suggest that it does not take the issue of roll accuracy seriously. Obviously it is a very important issue. It is just that there are lots of practical problems that we have encountered in the past that—

Mr McCLELLAND—It is not in your interests to have an election challenged afterwards. It is just a waste of resources and so forth.

Mr Kerslake—Anything we could do that would help to protect the election from challenge and ensure that everything is just so is obviously in our and the Commonwealth's interests to avoid waste of money in unnecessarily doing it all again. My point is that it is very difficult to find practical solutions that are really going to avoid you ending up in that dilemma anyway. That is the difficulty.

Senator CONROY—Can I just follow up on a comment you made earlier. You said that a few weeks ago you were down at a union office. Are you doing this now as a regular practice—this checking of the roll—or were you invited under the rules or was there an informal request to go and have a look?

Mr Kerslake—No; it was taking place under the rules anyway. Staff were required to do that. I just happened to be in the area at the time and availed myself of the opportunity to go down and—

Senator CONROY—As you make the point in your submission, the AWU went above and beyond the call of legislation, duty and everything else.

Mr Kerslake—That is right.

Senator CONROY—You are not having to do that regularly in other cases?

Mr Kerslake—Not in the vast majority of cases, no.

Mr Lewis—That is also an assessment of the organisation, the history and a whole range of other things.

Senator CONROY—You would have to do every liquor trades ballot like that.

Mr Kerslake—It is a fair thing for the AEC to look at obviously where things have happened in the past and where we have encountered problems and try to do more where we can.

Mr McCLELLAND—Just in relation to that ability to apply for an order at any stage, including prior to when the voting actually commences, in another AWU case in South Australia—I think it was Birch's case—brick-workers were knocked out. Justice Keely found that they were not engaged in terms of the AWU eligibility rule. What would you currently do if they are on the membership roll, they have been paying their dues for a number of years but there was this ambiguity as to whether or not they were eligible?

Mr Kerslake—We would look at the rules and interpret the rules as best we could. In a lot of cases we seek legal advice on the ambiguities in those rules.

Mr McCLELLAND—That may be an appropriate situation where you could apply to the court for a preliminary determination of that.

Mr Kerslake—Certainly. That is an issue, I think, that arises elsewhere in the recommendations and something that we strongly support. There are situations where we look at rules. If they are ambiguous, we get the best advice we can. We make the best decisions we can and we go into an election hoping, with our fingers crossed, that we are right. We have attempted to cover all of the bases, but you just cannot cover them because you do not know what the rule means precisely, there may be no case law in the area and so on.

That is certainly an area where we would like to have the opportunity, either through a court or through some other body, to seek a ruling. I note that does happen in some other areas that I am aware of—for example, with anti-discrimination commissions and tribunals, where at one level the commissioner investigates and at another level a tribunal hears the case if the investigation does not succeed. The commissioner can go to the tribunal and seek a ruling on an area of law or an interpretation. It is open to that tribunal in some jurisdictions to

decline for whatever reason to give the ruling, but that is something that we would like the opportunity to do. There are parallels elsewhere. That would make our life a lot easier.

We get legal advice. We are happy to pay for the legal advice—all of those points—but legal advice is never definitive. A ruling by a court or something like that is obviously much more helpful.

CHAIR—We will have to give that some further thought as to what might be the best result there. We will move on to the next point, which states:

.Whether the WR Act should be amended to require that, not more than 14 days after the declaration of the ballot, the returning officer who conducted the election shall provide to the Industrial Registrar and the organisation or branch concerned a "post-election" report containing prescribed information—namely, the same as is prescribed by regulation 96 in respect of amalgamation ballots but with any necessary changes and with the following additions:

.if the ballot was a postal ballot, any special security measures adopted by Australia Post at the request of the AEC and the reasons for such measures;

.the percentage of workplace addresses to which ballot papers were transmitted;

.the number of complaints (if any) of irregularities made to the returning officer during the election;

.action taken by the returning officer in respect of those complaints;

.the result of random checks of the voters' roll;

.the result of random checks of signatures on declaration envelopes;

.any rules of the organisation which, because of ambiguity or any other reason, were difficult to interpret or apply; and

.any other matter which the returning officer sees fit.

Mr Kerslake—In general we support the thrust of the recommendation to provide reports. That is part of our recommendation 9 that we put to the committee. But we do have some concerns with some of the particular points that have been raised here. If I could run through them very quickly. In relation to including in that report special security measures adopted by Australia Post at the request of the AEC, we have some concerns about that from two angles. One is that we would not want to be disclosing any particular security arrangements that we had put in place because that would negate their effectiveness in future, obviously. Secondly, we have some concern about, as it were, tarring all organisations with the same brush. In some cases you would be adopting special security arrangements for only particular organisations—not all of them generally.

I will press on and, if people have any questions as I comment on these, please ask them. In relation to the percentage of workplace addresses to which the ballot paper is sent, yes, we would be happy to support that being in the report but we would suggest that it may be more meaningful to record the number rather than the percentage, or even both.

In relation to the number of complaints of irregularity, we have no problem with incorporating in a report basic details of complaints received. We think it is very important to keep the whole process open and accountable. So that people do not see this as being a universal panacea, if you like, we make the point that the number of complaints that are

received does not always tell you that much because often the complaints are inaccurate and many complaints received are anonymous and so on. But we have no problem with—

CHAIR—Just on that: because they could be without foundation and anonymous, do you think they should be in writing or the number of written complaints—

Mr Kerslake—One of the concerns I suppose that we have—and it is fair to say that some staff express concerns about this—is either reports are anonymous and nobody is really prepared to put up their hand and follow them through or they do not produce anything of substance. When you are reporting that we received 93 anonymous complaints, if there were that many, it may create a perception that there are a lot of things going wrong with an election, whereas in fact there may have been no substance to the allegations that were made. But maybe that is something to be covered—

CHAIR—Maybe that could be handled by the next part—action taken by the returning officer. I take your point that, if you get 50 anonymous phone calls saying a certain practice is taking place but you are not given any detail to follow them up, you can simply report that and report that no action was taken on these because of reason X, Y, Z. So I guess it is put into context. If it is frivolous complaints—

Senator CONROY—Someone could say they have checked the computer database and report there are 1,500 mentions of union ballots having allegedly done something. People can use figures any way they want if a record is being kept, however inaccurately or deliberately misleading.

Mr Kerslake—I think there are concerns there, but on balance we came down on the side of being happy to include those in the report and obviously being careful and meticulous about how you presented that information to try to avoid any wrong perception. But we thought that, in terms of our operations being open and accountable, that was the preferred way to go.

With regard to incorporating results of signature checks, we make the point there that signature checks are a very difficult area. To include this in your report assumes that signature cards are available and are up to date and, therefore, are of some value. I mentioned that I noticed, when I went down to check the cards in an organisation recently, that you often find somebody who has married and changed their name or who signed the form 25 years ago or whatever. You are comparing that signature with a signature on the ballot paper envelope now, and you have no way of knowing whether it is accurate or not. Even the AFP acknowledge that they have extreme difficulty in comparing signature checks, when the signature they are comparing with is so old. I note that as a word of caution. Incorporating the results of signature checks may create an expectation of an outcome that is not achievable in terms of verifying all the signatures.

Senator CONROY—To balance that, would you concede that having signature declaration envelopes is a significant deterrent?

Mr Kerslake—Yes, having those declaration envelopes is one of the strongest things that we support. They are a very useful deterrent but, again, there are always difficulties in comparing signatures. With regard to ambiguous rules, we strongly support and welcome the opportunity to meet with organisations to try to clarify or amend ambiguous rules. That has

pretty well covered it.

CHAIR—The next question we had related to whether a post-election report which identifies any problem rules should, when sent to the organisation or branch concerned, be accompanied by an invitation to hold discussions. You just mentioned that invitation to hold discussions—including with the AIR—with a view to amending the rules to eliminate the problem.

Mr Kerslake—Yes. I make the point that, while welcoming the opportunity to discuss things with organisations, it would be helpful to have some sort of legislative backup there. We have often raised problems with their rules with organisations, sought opportunities to meet with them and found ourselves in exactly the same position whenever the next election comes around. So it has not worked well in the past, but it might work better if there were some sort of legislative requirement on the part of the AEC and the organisations to go through a formal consultative process somehow.

Mr McCLELLAND—Do you think you should be given standing under section 208 to seek a declaration that a rule is harsh or oppressive?

Mr Kerslake—I would have some concerns in terms of the ILO convention and interfering with the rights of organisations to formulate their own rules. I would have to take legal advice on that point to ensure that it was not in contravention of the convention.

Mr McCLELLAND—If you gave a written report, the reality of unions is that there is different factional representation in the executive. If your report as to ambiguities or difficulties with rules was put before an executive, there would be someone from a differing faction to the majority who could themselves determine whether they wanted to pursue the matter through—

Mr Kerslake—Yes. There is also a problem in that the AEC could sometimes end up in the invidious position of exercising their judgment in an area that is partly political—an area where we do not want to go. For example, you might have a rule that, by virtue of the financiality rule, excluded people who have their dues paid by payroll deduction, effectively disenfranchising them. That might be considered to be unfair and harsh and something on which we could readily comment. But there might be other areas where we would find that we started to get into organisations' internal politics on those rules, and we would not necessarily want to be the ones to exercise that judgment. I raise that word of caution.

CHAIR—The next one is whether there should be consultations between the AEC, the AIR and peak employer and trade union bodies with a view to developing one or more sets of model election rules on the following terms: model rules deal with procedural matters only and do not touch upon matters which go to the autonomy and democratic control of organisations, such as management structures, terms of office and eligibility to vote and to be a candidate; the legislation permits the adoption of model rules in whole or in part and with or without modification; the adoption of model rules, particularly where they are adopted in part or with modification, is subject to the same process of certification as currently applies to rule changes under section 205 of the Workplace Relations Act; and, the adoption of model rules is discretionary and no disadvantage is incurred by any organisation which does not adopt any model rules.

Mr Kerslake—Overall, the AEC agrees with the proposal put forward. It agrees that, if model rules are adopted, they should be certified. It makes the point that eligibility to vote could also in fact be covered by those rules. In other words, the organisation determines its own eligibility criteria but, having determined what those criteria are, we can always help them with a form of words which may in fact be commonly used by other organisations, or whatever, which have the same rules.

Mr McCLELLAND—To vote and/or nominate?

Mr Kerslake—Yes, it is not contravening the convention. It is still giving them entirely free choice. What it really boils down to is they determine what they want. We may be able to assist and to ensure that they get what they want and that their rule is not ambiguous or that it does not actually end up meaning something other than what they want.

Mr Lewis—They determine them and we give them a set of words that we understand and have tested. Therefore, they have got exactly what they want at the end of the day, but it still fits in with that model.

CHAIR—Assuming the Workplace Relations Act continues to require that all elections for registered organisations be conducted by the AEC, unless an exemption has been granted, should the current provisions concerning exemptions from both postal ballots and AEC conducted elections be retained?

Mr Kerslake—The AEC's view is that the current provisions seem to be working well. Yes, we believe that they should be retained. In some cases, the current organisations that get exemptions have good reasons for the exemptions that have been obtained. They might relate to the particular structure of the organisation or, indeed, there may be a huge cost to the AEC to run their elections under their particular structure. So, yes, at the moment we believe that things are working well.

We believe that the AEC should have the opportunity to comment to the Industrial Registry on proposed exemptions before it actually makes a decision. For that matter, while I am on that point, if the proposal were, for example, to run an attendance ballot as opposed to a postal ballot, we would like the opportunity to be able to comment on that as well. The proposal might end up costing the Commonwealth millions of dollars to run it as an attendance ballot and we would at least like to have the opportunity to point that fact out before the registry made a decision. But, yes, we believe the current provisions are working.

CHAIR—If the committee adopt's the AEC's recommendation that a limit be placed on the amount which the Commonwealth will contribute to advertising costs for an election, what a reasonable limit might be and whether there should be consultations between the government and peak employer and trade union bodies with a view to determining said limit—and this is probably a difficult area—have you put together any sorts of costings that have occurred over a period of time to help structure a recommendation in that regard?

Mr Kerslake—We have not dug out the costings, although we would be happy to do that or to provide whatever information we can. I am not sure how readily available it is, but we have in our recommendation already pointed to the need for a limit on advertising costs.

We have given some thought to the different ways you might go about establishing a

reasonable limit. You could, for example, just go with a dollar maximum, obviously, but that might be a straight dollar maximum or it might be a varying maximum on a sort of sliding scale, depending upon the number of members in an organisation, for example.

We also believe that there should be discretion in advertising for the AEC not necessarily to follow an organisation's rules on advertising. For example, the organisation's rules might have a provision that we advertise in every newspaper—I am not sure whether the act currently provides that or just the rules—but rather than advertise in every capital city newspaper, or even a local one, it might be much cheaper for us to do a mail out. There might only be 300 members in the organisation and you send them all a letter.

Admittedly, as we have already acknowledged, the addresses may not be entirely accurate and not everybody may get the notice, but not everybody is going to read the newspaper on the Saturday morning or turn to that particular page of the newspaper either. They are more likely to find out that the election is coming up through their discussions in the workplace, through the organisation or whatever, rather than through the advertising. In some cases, if we take an election where the organisation was based in Newcastle or there were a lot of members there, we might prefer to advertise in the Newcastle newspaper rather than in the *Sydney Morning Herald*, for example.

Mr McCLELLAND—What about something along the lines of that section of the act which talks about orders and directions the returning officer can give, including some subsection providing that the returning officer shall be entitled to ignore or override the rules if compliance with the rules would cause unjustifiable expense to the conduct of the ballot?

Mr Kerslake—I think something along those lines would be desirable. It needs to be done in a way, obviously, that does not leave the AEC open. I am not suggesting we do not want to be held accountable, but you do not want to create a whole new avenue of appeals in the court system because somebody does not agree with the way we went about advertising it. So you would need to cover that angle.

I think you also need to cover the angle, say, if you went with a dollar maximum or a sliding scale, and if an organisation's rules currently only provide for a low level of advertising, I do not think you should open up a thing where they can raise that to whatever the maximum level is. In other words, we are talking here about bringing costs down, not bringing costs up for some organisations where it is currently cheap. Again, the AEC's having some discretion might be able to say, `You've been happy with that for the last 30 years, why do you want to change now?'

Mr Lewis—One other point you just need to consider if you look to the sliding scale is that, if you looked at something like a newspaper ad, you could say a cost per member, but to some extent you would need to bear in mind that to put an ad in of a certain size is going to cost the same. So it would not be as simple as saying, `We will have this amount per person.'

CHAIR—Could I ask you then, if it is available, to provide to the committee some examples in recent years of the money spent on advertising for a variety of organisations of varying sizes? It does not have to be too comprehensive.

Mr Lewis—I can tell you three just at the moment, if that would help. We could get more, or would you rather I came back with a more detailed list?

CHAIR—If you have three handy, I would be interested to know just now, but a more detailed list would be useful.

Mr Lewis—Do you want the organisation and the size?

CHAIR—Yes.

Mr Lewis—The National Tertiary Education Industry Union for 2,092 ballots was $4,200 in advertising. The Rail, Tram, Bus Industry Union of 31,000 members is about $10,000 in advertising. This is not an exact figure but, of about 150,000 people in the AWU national election, the estimated advertising costs were around $105,000.

Mr Kerslake—I might add that we currently have a small group of people looking at advertising from our viewpoint and seeing if there are ways that we can reduce our own costs in terms of the notices that are set out. So we have not been sitting on our thumbs. We are trying to keep these costs down, but there obviously is a limit to how far you can do that.

Mr McCLELLAND—What about asking the chairman to request the AEC to perhaps provide us with a draft section, if we decided to go along the lines of recommending that the Australian Electoral Commission could override the rules in so far as the rules might cause excessive expense to the AEC in conducting the ballot?

Mr Kerslake—We would be happy to have a look at that on the proviso that you noted earlier, Mr Chairman, that at some stage there would obviously need to be consultation with organisations on that process. We have no problem with putting something up front.

CHAIR—We appreciate that. The next matter is whether the Workplace Relations Act should be amended to require that all voters' rolls be cut-off rolls and, if so, whether the cut-off date should be 60 days before the opening of nominations.

Mr Kerslake—That is an area where the AEC has some reservations. One of our concerns is that, in terms of the way different organisations' elections run, if you bring in a cut-off point based on a certain event, you might be talking about two or three months after that before people actually vote. In other words, you might have people who have become members or become financial over a two or three-month period who, because you choose a particular cut-off point, are going to be disenfranchised.

That is perhaps our major concern about the potential to disenfranchise people who may have been fully paid up members for some time, but after the cut-off point. We also make the point that even for federal elections the cut-off period can be as low as 26 days, whereas—depending upon what event you choose in an organisation's election—that might be 60 or 90 days.

Mr McCLELLAND—Does 26 days give you room to get your act in order, do you think?

Mr Kerslake—In an ideal world we would like all of these things. From a practical viewpoint, having a cut-off point and so on serves numerous purposes that would assist the

AEC. But we take the view that it may be more difficult for us, but if that means that more people can vote, then we should be able to do that. As long as our job is not impossible—it may be more difficult, but as long as it is not impossible—we will go ahead and run these elections and we often do.

The other point that I would make is that having the cut-off point may run contrary to a principle that was enunciated in another recommendation of the committee, and that is in relation to model rules. The point was made that you might have model rules that people could adopt, but they are not going to be compulsory for organisations. This could constitute an interference in the organisation's conduct of its own affairs, which may not be warranted. Again it may be that we can point out to organisations certain difficulties and have model rules there that they could adopt in this respect, but to make it compulsory may be difficult.

Mr Lewis—Could I also just add that most organisations do not have a cut off. I say `most', but it is probably just more than half. Of those that did, it would certainly be a heck of a lot less than this. You would be creating a cut-off date that is way in excess of whatever currently binds us.

Senator CONROY—You are trying to balance between fairness of maximum participation and fairness for a candidate, particularly a challenger to an incumbent. Incumbency is a powerful position to be in and, unless there is a clearly identified role that you can campaign on, it becomes very difficult for a challenger to gain access if you have not got some sort of cut off. It is a little different in the federal area because all you have to do is walk down the road and put something in everybody's letterbox, whereas you cannot do that. You can stand outside a workplace, but many unions have cases of a very diverse membership across either a geographically large area or a very diverse work force across a city.

You need to have some balance in the capacity of particularly a challenger to campaign. Normally, the Electoral Commission will hand the roll over as soon as is humanly possible after nominations close. Different unions have different rules on that. My own organisation's nominations close in December, but the ballot does not take place until mid to late January, whereas others can close and the ballots can be posted within a week or two.

That can be used by an incumbent to disadvantage a challenger. So you have to have somewhere in there a balance. I am not sure you can quite use a federal election, although it seems fair and reasonable because that is what you do in a federal election. They are two very different types of ballots.

Mr Kerslake—I take your point. It is really a question of arriving at a balance. It is a balance between not disenfranchising people, which is a detriment to the democratic process obviously, and not disadvantaging particular candidates or factions, which also is undemocratic. Somewhere you have to arrive at a balance. I think the balance, if you do arrive at a cut-off point, is later in the process rather than earlier to allow at least the maximum amount of people the opportunity to vote, but still enabling people to get the roll—

Senator CONROY—As an example—this is something that has come to light more because of your actions in chasing them up—the Electoral Commission has identified large numbers of nonaddresses, blank work addresses. The supplying of those new addresses after the union has chased them up has become a bit of a game, where something like a thousand names and addresses can suddenly be supplied to you a week before the ballot papers go out.

There is a question of fairness again. The union could decide to play fast and loose and say, 'We could not find those addresses when we gave you the first roll,' but three weeks later, with one week to go before the ballot, a thousand new addresses turn up. You have a capacity to play fast and loose there. Again, that is a balance between not wanting those thousand people to be disenfranchised and ensuring that the union has not been using its position of incumbency to disadvantage a challenger.

Mr Kerslake—I think your points are well taken. It is an area on which, in consulting our staff around the country, there were different views and different views on what a desirable date was. I suppose all that the AEC is pointing to is the possibility of people being disenfranchised if your cut-off point is too early in the process. The other thing that we are also trying to point out is that, although there may be advantages for the AEC, the primary thing is to weigh up those competing democratic principles, if you like, rather than the convenience of the AEC in arriving at that determination.

Mr Lewis—Senator, you made the point about the period between nominations and the ballots. This proposal actually talked about the cut-off date being prior to the opening nominations. Of course, the other effect of that would be that you could be looking at, say, 90 days prior to the actual ballot. It has that problem; it stretches out even further than prior to the ballot. So, when you weigh that up, you probably want to consider whether you should word it in terms of the opening of nominations or in terms of the opening of the ballot.

Senator CONROY—It is hard to supply a roll, though, to someone who says that they are a candidate before nominations have closed. If they put their nomination in on the first day and they walk up to you and say, `Here's my nomination. Give me a copy of the roll,' I guess they can claim that. But, if your application to get a roll is prior to the actual nominations either opening or closing, you guys are going to be in a difficult position trying to determine whether someone is a genuine candidate.

Mr Kerslake—Generally I think more of our staff favour the cut-off point as the opening date of the ballot or seven days before the—

Senator CONROY—Opening date of the ballot or the nominations?

Mr Lewis—Ballot.

Senator CONROY—How could you even organise a how-to-vote card to be sent to a member if names are still being added up to the day of the posting?

Mr Kerslake—Some suggested that seven days, something like that, or 14 days prior to the opening of the ballot might be an appropriate time, which again takes into account your considerations.

Mr Lewis—And it means that people do not go through an exercise when they may be elected unopposed anyway, for example.

CHAIR—Are there many unions that have rules where you have to have been a member of the union for a period before you are eligible to vote?

Mr Kerslake—It varies, but there are some.

CHAIR—Those that do have such a rule, what sort of period do they provide?

Mr Kerslake—It varies. I would need to take that on notice. I am not sure how easy a task that would be for us to do. I can give you some anecdotal—

CHAIR—Stephen might have been the better person to answer that.

Mr McCLELLAND—I think Justice Wilcox in Rule's case looked at these and said, `A union would be hard-pressed to convince me as a judge why they needed more than 12 months eligibility to nominate.' But I cannot recall his comments on voting. I think his indications were that considerably less than that was appropriate for voting.

Mr Lewis—That is well known, because of the `in excess of 12 months'. In relation to nominating, obviously the CEPU is an example where you have to be 12 months continuously financial to nominate. I cannot, off the top of my head, remember with regard to voting.

CHAIR—I would be surprised if you could join a union today and vote tomorrow.

Mr McCLELLAND—To avoid stacking.

CHAIR—To avoid stacking, exactly—particularly where you have situations where you may not necessarily have to be employed to be a member of that union. All of a sudden everybody could rush out and become a member of the AWU this week to vote in next week's election. This is probably where we sort of come up with this 60-day cut-off. Basically, if you did have a three-month period—and personally I would have thought a three-month or six-month period was probably reasonable—anybody joining after that 60-day cut-off in a lot of senses would not be eligible to vote anyway. It does give the AEC a reasonable amount of time to really put together a decent roll prior to the nominations closing and the ballot taking place and, as Senator Conroy said, give candidates the opportunity to know who they are appealing to in advance.

Mr Kerslake—Yes, Mr Chairman. The AEC does not have a firm view. We have really, only on this particular point, sought to raise some issues that ought to be considered. There are questions there that have to be weighed up.

Mr McCLELLAND—I take your point earlier about not wishing to interfere in the autonomy of union affairs in terms of what they think is the appropriate cut-off or the appropriate qualifying period to vote. If you look at it from that point of view, would it be more useful in that section where the returning officer can give such directions as are necessary? I think the words are, `To avoid a regularity occurring to overrule the rules'—I cannot remember the precise wording—`in so far as it is necessary to avoid an irregularity occurring.'

I think in Carter's case Justice Grey said, `The direction given was not in accordance with that section because there was not going to be an irregularity occurring.' The Commonwealth electoral officer, as a returning officer, acted on a false premise and therefore was not entitled to give a direction. Would it be appropriate to amend that section so that it

read something like ‘in order to avoid an irregularity occurring or to ensure the orderly conduct of the ballot’—in other words, to give you a broader discretion if a union said, `Our rolls close within 24 hours of the voting occurring,' you would not have time to prepare your rolls?

Mr Kerslake—Can I answer that with two points. Firstly, if I speak for officers around the country, I am sure if they were sitting here they would all be cheering to hear you say that. They often do get thrown into very difficult positions with a very short time frame to try to put things together. They do it very well but wish they had more time.

The second point relates to the ILO convention. It is certainly a matter that we would be happy to get specific advice on, if you wish. The advice we received, which we provided to the committee, gave the general, `You can't do these things, because they would be in breach of the convention, but here are some examples of things that you could do.' I am not sure whether this would fit one or the other category. It may be helpful to the committee to get advice on that point so that, if you go down that path, you will know what the legal situation is.

CHAIR—We would appreciate that. Can you comment on whether the current provision requiring an organisation to maintain a list of its members showing the name and postal address of each member should be retained with no requirement that the postal address be a residential address?

Mr Kerslake—Our concern with this particular recommendation relates to the issue of privacy. If I understand the recommendation correctly, reference is given to an issue relating to private addresses—post box and residential. That is where I think the issue of privacy comes in. There are good reasons why a member of an organisation may not want their residential address to be known and made publicly available on the organisation's roll, just as in federal elections, which is why there is a provision in the Commonwealth Electoral Act enabling people to have a silent enrolment. There is a concern about making it compulsory for people to give a residential address.

If the issue becomes one of whether you have a private address—a post office box or residential—against a workplace address, then the AEC's preference would be to have the private address because of the additional security provisions that that provides. I simply make the point that, if you are talking about a residential address, it does not mean a post office box. If you are forcing people to give their residential addresses, there could well be a problem in that regard.

CHAIR—Should there be a provision, similar to regulation 81, to the effect that members of an organisation may inspect the roll of voters for an industrial election and may make copies of all or part of the roll?

Mr Kerslake—The AEC agrees with that. It was incorporated in recommendation 8 of our submission.

Mr McCLELLAND—I personally have not spoken with any other member of the committee on that. I have some difficulty in understanding why a general member of the organisation would need it as opposed to a candidate. Can you express your point of view, for my benefit, as to why you think it should be broader than a candidate?

Mr Kerslake—From our viewpoint, it is a matter of keeping the processes as open as possible in enabling anybody participating in organisations to get a copy of the roll. Obviously candidates are the primary people who would want to get the roll in order to campaign. But others may well want to get a copy of the roll to satisfy themselves that the election being run for the organisation they belong to is being run properly, if you like. The AEC supports the idea of keeping an open process and trying to strengthen perceptions that the roll is accurate and accountable.

Mr McCLELLAND—I see that argument, and I appreciate its strength. However, a person who has a chronic interest in ensuring that it is accurate is a candidate. That is against the risk to individuals who, for instance, may not want their employer to find out that they are a member of a union. There are a lot of people who join unions without advising their employer, and perhaps they would be dissuaded from joining unions if they thought their membership of the union was going to be more widely accessible.

Mr Lewis—It would be accessible only to a member, so why would an employer—

Mr McCLELLAND—Yes, but, for instance, the AWU has 150,000 members. One hundred and fifty thousand people could come in—that is an exaggeration, obviously, but a number of people could come in—and request copies of the rolls.

CHAIR—By the same token, that same 150,000 could nominate for election and request it and get on the roll.

Mr McCLELLAND—That is true, but there is justification rather than simply being a busybody, for instance.

Mr Kerslake—We tried to cover that through our current policy by requiring people who do get access to the roll to sign an undertaking that they will only use it for the purpose for which they have obtained it in relation to the election, not for any other purpose. Our advice is that that does dovetail with the Privacy Act in that if somebody were to use it for a different purpose, any other member of the organisation in the circumstances you are talking about would have a right to complain to the Privacy Commissioner about the fact it had not been used for that purpose - in other words, that this undertaking has been breached.

Mr McCLELLAND—I am still a bit unhappy with that. The Privacy Commission is more persuasive in its condemnation rather than penal. When we, as federal members, get the electoral roll updates, we get these warnings that say, `If you misuse this information, you are liable for this, that and the other offence.' If the committee recommended moving down that line, is it appropriate that there was also a recommendation that it is an actual offence to misuse the information?

Mr Kerslake—We have noted that and wanted to draw that point to the committee's attention—that you could put penalties in the act for the misuse of that, which strengthens the position from your point of view.

Mr Lewis—I have just one other point about that. Another thing was the consistency between elections, amalgamations and withdrawal from amalgamations. Both amalgamations

and withdrawal from amalgamations, which is where regulation 81 and 98 0 come from, allow members that access. They have got that wording there. The only thing we would probably suggest is that, since part of the basis for what we are saying is the consistency, if you put that sort of warning in, you should make it consistent for all of

them rather than doing it for one and not the other, or else we are back with the same sort of problem.

Mr Kerslake—Finally, on that point, if you do make copies of the roll available to whatever groups you make it available, we think the act should specify that a copy of the roll can include an electronic copy on disk, not just a hard copy. We do have some circumstances now where organisations will provide us with copies of their roll on disk, for example, on the proviso that we do not provide that disk copy to any other candidates and so on, that they can only get a hard copy. Our response to that is to say, `No, thank you, but we won't accept a disk copy on that basis. We will go and make our own so that it is generally available and nobody is disadvantaged.' I think that could be covered in the legislation if that goes ahead.

CHAIR—The next question is related to whether regulation 61 of the workplace relations regulations should be amended to require organisations to advise the Industrial Registry of all elections required by the rules of the organisations' branches to be held during the following 12 months.

Mr Kerslake—We strongly support the recommendation. We think it would have great benefits, certainly to the AEC, in forward planning for elections and knowing where your peaks of activity are going to be. It also facilitates, knowing that an election is coming up, getting in there and having a meeting with an organisation to discuss ambiguous rules or what have you.

We do not have an answer and we simply raise the question: what about failure to comply? What action then follows? If failure to comply means that the election does not go ahead, for example, again the incumbents are at an advantage. We have tossed that around. We are not quite sure what the answer to our question is but there is a question there to be considered.

Mr McCLELLAND—It may need to be provided in the relevant section or regulation providing that non-compliance shall not amount to an irregularity for the purposes of the act or something like that.

Mr Kerslake—It may be. I hesitate to raise this because we do not want to appear to be ogres or the tough guys. There might be penalties or whatever that applied to individuals in an organisation for failure to comply. Let me quickly add that I would not see the AEC rushing out to enforce those provisions. It is more a negotiating tool that you would use with an organisation to point out to them that, in fact, `You are in breach, so please get this in very quickly because we do not want to have you prosecuted.' That might just simply have the desired result.

CHAIR—Can you comment whether the industrial elections branch, as it is presently configured, has the capacity to conduct elections for non-industrial bodies on a fee-for-service basis should the parliament so decide? What demand is there likely to be for such a service?

Mr Kerslake—We strongly support the AEC having the ability to conduct elections on a fee-for-service basis. We make a couple of points there. We would not necessarily see these elections as being run by just an industrial elections branch. In fact, it might be flat out at some stage and unable to run them. The expertise exists across the whole organisation to be able to run them. We would welcome that.

We point out the fact that there is some uncertainty at the moment, under current legislation, section 7, 7A and 7B of the Commonwealth Electoral Act, as to how far the AEC's powers extend to run other elections. For example, we have certainly conducted a number—enterprise ballots and so on. Whether they would extend to running elections for the NRMA, some other organisation or a footy club is a little bit uncertain.

There is currently legislation with an amendment that would clarify that. It is yet to be dealt with by the parliament. From the AEC's perspective, the sooner that is clarified the better. As I have just indicated, the demand is likely to be high. As to the other part of your question, we have already run a number of ballots and that area seems to be expanding all the time.

CHAIR—If we made such a recommendation—I speak for myself—I would want to see any such ballots be able to be done within the current resources of the AEC, to fill in some of the troughs that might occur, and not to be a new organisation within an organisation. Do you see that it is quite likely that there would be capacity within the AEC for those sorts of things, particularly given that we are talking about you knowing what industrial elections might take place in a 12-month period so you would have a far better opportunity to plan it?

Mr Kerslake—Let me state initially that the AEC, in supporting this, is not arguing for a great expansion of resources to be able to do it. On the other hand, the AEC would obviously protect its core business first. If the resources were not available to conduct a particular election on a fee-for-service basis, it cannot be done. Obviously we would try to use our resources and plan our resources to be able to run as many as we could within the resources that we have, as long as there is that understanding that if a private organisation came to us when we were heading right into a federal election, it is not on.

CHAIR—Can you comment whether the high level of security adopted for the 1996 CEPU election should be required for all industrial elections?

Mr Kerslake—We do not support that proposal for a number of reasons. Firstly, perhaps inherent in the proposal is that electoral fraud is widespread. We do not believe the available evidence points to that fact. In fact, less than two per cent of industrial elections result in court challenges. For the most part, they relate to technical matters. Often, people have suspicions—it is easy to talk about suspicions—but the actual concrete evidence of widespread fraud does not appear to exist. Other reasons are that we believe it may be unfair, as it were, to punish some organisations which historically have always had a very clean record because some other organisation's record has not been up to that same standard in the past.

Another factor, and a very pertinent factor, is the cost. By way of example, when we re-ran the CEPU election in 1996 with additional security measures that were ordered by the court, it cost us in total over $90,000 to do the re-run, whereas it cost us about $42,000 to do the first one. So you get a picture of the cost of those additional security measures—in that case it basically doubled the cost of the election. If you multiply that by the number of

contested elections that we run in a year and you apply these additional security measures across-the-board, the cost suddenly becomes astronomical.

We have though raised other points in our submission. For example, we certainly favour the use of uniform declaration envelopes across-the-board. That is a security measure that we would like to see universally applied.

We certainly support a returning officer having the discretion to impose additional security measures where it is thought to be warranted. It might be justified by the history of previous elections or whatever. We certainly support having that discretion but we do not favour a compulsory, across-the-board approach under the legislation.

Mr Lewis—The costs Mr Kerslake talked about were our costs. You would also be adding obviously to Australia Post's costs as well, as we saw today.

CHAIR—I think we asked Australia Post about that aspect. If, for instance, you had the suspicion that there may be some problems in a particular election, intelligence or who knows what would be provided. You would make the decision that there should be some additional security measures. I think Australia Post have commented on whether they would then want to negotiate additional fees to participate in those extra security measures.

Mr Kerslake—I cannot speak for Australia Post. I do not know what their profit margin is in this area, so I am really not well qualified to comment. Just speculating, it occurs to me that Australia Post may have been happy to wear their additional costs in the CEPU elections.

CHAIR—For obvious reasons.

Mr Kerslake—For obvious reasons, but they may be less prepared to wear those additional costs in other elections. That means those costs are going to come back to the AEC and therefore to the Commonwealth, so Mr Lewis is right. It is not just our cost. You might be adding to that significantly increased postage costs, paying Australia Post for those security measures that it puts in place or whatever.

Mr McCLELLAND—Aside from the CEPU election, which was the subject of the decision by Justice Moore, Australia Post were not aware of any other election where an irregularity as a result of postal tampering had been alleged. Is that consistent with your knowledge?

Mr Kerslake—Yes. Certainly it has been our view that there were particular circumstances in the CEPU election. Concerns have been expressed about postal ballots for a postal organisation. Some concerns have been expressed about postal ballots generally for all organisations, but the AEC does not share those concerns. I do not want to suggest that we do not take these issues seriously, but I do not think there is any evidence of widespread postal fraud or postal interference in industrial elections generally.

CHAIR—The secretary has found the transcript and basically Australia Post said that, if they were requested by the AEC to do those things, they would do it but they would negotiate the cost of carrying that out.

Mr Kerslake—Can I emphasise that there simply is no way that we could carry the costs of those security measures across all organisations on our current budget. The postal costs are obviously a very significant part of our total costs.

CHAIR—Our next question is about whether there should be a requirement that ballot papers should contain security measures—for example, a unique watermark. Apparently that is one of the requirements in the draft Queensland industrial organisations regulations.

Mr Kerslake—Firstly, the AEC strongly supports the use of such security measures, but we feel we already use best practice in this area. For example, if someone shoves any ballot paper on the photocopier, it comes up with the word `copy' on it. We have other aspects in relation to our ballot papers as well and, as a matter of policy, we use those for all industrial elections.

We appreciate that that could be written into the legislation. The only danger we point to there is that the legislation could both help and hinder. The legislation could hinder by saying, `You shall do this, this and this', and then, when you suddenly had more advanced technology coming on the market and you wanted to move to it quickly, you would not want to be waiting for legislation to be amended to allow you to do that. So our preferred position is that we have the discretion to apply these things. Our policy is to do that, and we feel that we are using best practice in that area at the present. And we will always be on the lookout for improved security measures that we can use in relation to ballot papers.

CHAIR—Do you see that specifying things also tends to highlight the security measures you are taking, whereas currently you can determine certain security aspects about ballot papers which people do not know about?

Mr Kerslake—In some cases that can happen, which is why I did not refer to some other examples. You do not want to make those public knowledge.

CHAIR—Fair enough. There are a couple of other things on the list.

Recommendation 10, put forward by the AEC in a supplementary submission, is that there should be new regulations which would provide for the formal scrutiny of ballots and for the rights and obligations of scrutineers. The submission gives the impression that there are no provisions dealing with the scrutiny of the ballot in industrial elections—as distinct from amalgamation and disamalgamation ballots—in the act or in the regulations. However, the Workplace Relations Act already requires the rules of organisations to provide for the appointment, conduct and duties of scrutineers to represent the candidates at that ballot. This is at paragraph 197(e) of the act.

Has the AEC found that provision—or the rules of organisations giving effect to that provision—to be inadequate? Have there been any cases where the rules of an organisation have not made provision for scrutineers, as required by the act?

Mr Kerslake—We have found in some cases that rules in this area are vague or difficult to interpret. We do not want to overstate that position; we do not see this as a major problem area. Our aim was simply to achieve a level of consistency between amalgamation ballots and disamalgamation ballots. We are not suggesting that there are massive problems out there with organisations' rules in relation to scrutineers. That recommendation relates

more to the issue of consistency.

CHAIR—On the question of penalties and the time limit on commencing prosecutions, the AEC recommended both an increase in penalties and a reduction in the time limit for lodging an application for an inquiry. In a supplementary submission—No. 37—the AEC noted that the present time limit on commencing prosecutions could be extended simply by an increase in penalties. That was on page 16, at paragraph 6.3.5. The effect would be to extend the time limit indefinitely for commencing prosecutions.

Does the AEC have any comments on the concerns expressed by the ACTU that, if allegations of irregularities in elections—including allegations of criminal offences—are not dealt with promptly, it can have a significant adverse effect on the management and stability of the organisation concerned?

Mr Kerslake—Firstly, the AEC acknowledges the concerns raised by the ACTU and certainly acknowledges and supports the need for allegations of fraudulent activity to be dealt with promptly. The AEC's view however is that, for certainty in this area to achieve an effective deterrent and to ensure that elections are free from fraud, if prosecutions should arise they should override any other consideration. It is more important to be able to prosecute individuals who are suspected of having committed fraud than it is to be able to resolve the situation quickly. There might be an opposite argument here that organisations might be equally destabilised by allegations or the belief that somebody out there has acted fraudulently in the election—maybe somebody who has succeeded in the election has acted fraudulently but the time limit has expired and nothing can be done about it. That could be equally destabilising for an organisation as the time factor.

We also point out in relation to any possible destabilisation of organisations that we are talking about cases here that would be very much a rarity. On the figures, less than a quarter of one per cent of industrial elections are actually overturned by the courts. So we are not talking again about a mammoth number of cases. The bottom line is that we do not believe people should be constrained from laying charges against individuals simply by virtue of a time limit in these cases. We accept that time limits do apply in other areas and for other crimes, but we believe that the integrity of industrial elections is of such import that they should not apply here. The deterrent effect, by being able to pursue and prosecute people, from even just one successful prosecution could be of enormous value.

Mr Lewis—Most of that quarter of one per cent are not criminal matters anyway; they are technical matters. So the criminal thing is a fraction of a quarter of one per cent. In relation to an inquiry within 30 days, rather than people not knowing, it is actually the reverse effect. It would make them more stable, because you know within a month that somebody is having an application of inquiry. At the moment you are waiting six months. So to some extent the argument is that, rather than it making it more unstable, it would make it more stable; people know quicker.

Mr McCLELLAND—I think the ACTU supported also shortening the period, as I recall.

Mr Kerslake—They did.

CHAIR—Instead of 30 days, what would you think about 45 or 60 days? I think 30

days is a touch too short.

Mr Kerslake—There were two issues in the AEC's mind. Firstly, six months seemed to be an inordinately long time. Secondly, choosing 30 days made it consistent with—I am not sure whether I have these right—federal elections or ATSIC; one is 30 and one is 40. I suppose you could put a different argument and say that ATSIC and federal elections are different, so why shouldn't industrial elections be different again? We are simply saying shorten the period, but we would have no particular problems with 45 days.

Mr McCLELLAND—Or even 30 days after the 14 days after you give your report, which effectively takes it out to 45.

Mr Kerslake—That is a good point. If you were to require the AEC to produce a report, I do not think anybody would be in any position to be making decisions about what action they would want to take until they had received that report. They need a reasonable time to do that, and 14 or 16 days after that would not be enough. Certainly you would be looking at 30 days after the report, if that were brought in.

CHAIR—Finally, does the AEC have any additional points to make in support of its recommendation of a two-tiered system of review, given that other witnesses who have addressed this issue have argued for the establishment of a specialist tribunal to deal with election inquiries or for the retention of the existing mechanisms?

Mr Kerslake—The AEC is grateful for the opportunity to clarify what it has in mind in relation to a two-tiered system of review. Firstly, it may help if I set out the issues that we were trying to address in coming up with a proposal. One was the expense of the current court system. Any case that goes before the court and all the resources the court requires is obviously a very great expense to the Commonwealth.

The second issue is the delays that relate to court cases, and the third is the fact that many court cases deal with technical issues, such as interpretation of a rule of financiality and whether a particular person was eligible to nominate to be a candidate or not. So it is getting down to quite technical issues.

Fourthly, Marshall Cooke QC in his report in Queensland did make the point that some people find court proceedings to be quite intimidating—the formality of court proceedings and so on—and that that may act as a deterrent to their actually pursuing concerns they may have. Those are the issues we set out to address.

The AEC has noted that some concerns have been expressed to the committee about merely adding an additional level of review to a level that already exists. Certainly, if that were the outcome of any recommendation we had made, then that would be an undesirable outcome. We are not looking at trying to create just an additional layer and then having people go on to the court and appeal in due course. What we had in mind was, for the majority of cases, replacing the existing layer with another layer, which may be a specialist tribunal, may be being heard by a judicial registrar or somebody with appropriate legal qualifications to hear it, but may be dealt with more informally, could be dealt with more quickly and does not require the infrastructure of a court in maintaining that.

We would see that at that level that could deal with a vast majority of cases. I know

people can say, ‘Yes, but the people are going to automatically appeal to the courts, so what would you have achieved?’ But you could write into the legislation—and this was considered by the Administrative Review Council for its administrative review tribunals—that there is a certain threshold or certain points that you have to establish to get to the higher level.

For example, under the legislation it could provide that you can appeal to a court only on a complex issue of law or a very complex issue of fact or in the circumstances where your case had ramifications for a large number of organisations or whatever and required more general consideration. And if you wanted to appeal to that court you would have to establish, before you went on to the second level, that you met those criteria.

In other words, you could not just go to the court, as many people currently do, saying, `I'm not happy I lost. I'm going to court to complain about it.' You go in at this level, which is much cheaper, and if you want to go on to the court you have to satisfy certain criteria, which may be determined by a registrar of the court—for example, that you put in a written submission to the registrar, who will decide whether you are going to get on to that next level or not—in other words, you require some sort of leave to go on.

That may mean that the court system and the court time are not taken up with a lot of cases that, firstly, do not go anywhere, secondly, are very technical cases and, thirdly, you do not necessarily require a judge to resolve.

Mr McCLELLAND—Is it not the case that the eligibility for membership and the eligibility to nominate are the most common legal issues that come up, and are they not intensely complicated? In my experience, in Sydney now there would be three barristers who are red-hot in the area, five who are competent and ten who are barely competent—and certainly they would be earning much more money than the judicial registrars are earning. And there is no contemplation that blokes of that competence would ever become judicial registrars.

So when these fellows, the hired guns, are inevitably drawn into these cases, very big stakes are on the table, both sides of the factions are prepared to throw a lot of money into these big contests—throw it into the initial review proceedings before a judicial registrar and they will also throw it at the appeal proceedings, because the stakes are so high. Are you not compelling these very specialist barristers or combatants to appear before someone who just does not have that level of experience? I can think of half a dozen solicitors who are of fair average quality in the area who may become judicial registrars but, aside from that, at the moment the judges who hear these cases have invariably had the depth of experience and skill in the area but, because of its speciality, is this not one area where to reduce the level of expertise of the tribunal would actually be a waste of time and expense?

Mr Kerslake—If all cases were of that level of complexity, I would agree. I would also add that the system could provide—and this is what was contemplated by the model put forward for an Administrative Review Tribunal—that, if an issue on the face of it was sufficiently complex, you would not go through a two-stage process; you would simply direct it to the court on day one.

So the system proposed by the Administrative Review Council, for example, was that you would have a body of tribunals—such as the Veterans' Review Board or the Social Security Appeals Tribunal—and above that you would have the AAT. The AAT has a

registrar. All cases going to these various tribunals go into the registrar. The registrar determines, ‘This one is a very complex case. It goes to the higher level’—in our case, to the court. Other issues that are technical and not as complex can be dealt with at a different level.

Mr McCLELLAND—I could see the argument in favour of perhaps a registrar or judicial registrar determining whether the result of the ballot may have been affected. If he decides, `The result of the ballot wouldn't have been affected anyway,' you do not take up the court's time. Aside from that issue, I think you are then getting into complex areas of these legal constructions that inevitably have significant precedent attached to them.

Mr Kerslake—Let me reiterate, I would not see the majority of those cases being dealt with at one level. If they have that inherent complexity, they would go on to the court in the first place. It would simply be a matter of a registrar or somebody with appropriate qualifications reviewing and making an initial decision on that point. But there will be other cases which are of much less complexity and which could be dealt with at a different level. Currently, you take up a significant amount of the court's time and expertise that is unwarranted.

So, yes, if the system means that you have complex cases ending up in court anyway and you are simply doing it twice, what is the point of that? I agree that there is no point. But people can make those decisions. Somebody can make that decision up-front. Then if you have criteria that, if you go to a lower level and it appears very quickly to a registrar that it is very complicated, it can be referred on.

If the outcome of that is that the vast majority of cases end up being referred on after an initial consideration by a judicial registrar, there would be no point in having that system. I would accept that. But if a significant number of cases can be dealt with at that level, you do not have the duplication and you can immediately refer them on if they are the types of cases that you were mentioning. I am certainly not advocating a doubling up, as some people interpreted may be the case.

There is another thing if the committee is not wedded to that particular idea. The reason this was looked at—if I go back to the initial concerns of the AEC—is that, although we do not have any figures, courts cost the Commonwealth a lot of time. I would hate to guess how much the CEPU case, which really was extraordinary, has cost the Commonwealth.

There may be other avenues that a group of people from the AEC, the Department of Industrial Relations and so on could get together and look at any other options as well. There may be better options. There are matters in relation to legal aid and various other things. All we are suggesting is that these issues ought to be canvassed in some way and looked at. If the existing system still remains the best system, then fine. But we feel there are a lot of costs in court cases that at least ought to be looked at.

Mr McCLELLAND—The judges in this area seem to have been very cooperative with unions. They tend to give them a degree of priority in my experience. The judges of previously the industrial court and now I suppose the industrial division of the Federal Court have tended to bend over backwards to get the union hierarchy in place quickly. Is that your experience?

Mr Kerslake—I do not have experience on that particular point to be able to

comment. I reiterate the point that I made earlier: the AEC at least have the ability to be able to go and seek a ruling on an area of law that we referred to earlier. Again, if you brought in this type of system, that could be going to a court and seeking a ruling or it might be going to the registrar or whomever to seek a ruling on a particular issue as well. I simply raise that for consideration as well.

There are times when the election has been run—even though you know that you are on difficult ground at the beginning in interpreting the rule—and you have to wait for the court case to decide whether you were right or wrong. It would be preferable to settle that issue, if you can, up front.

Mr McCLELLAND—At the moment, there is a degree of finality, isn't there, in the sense that there is no right of appeal from a judge exercising his jurisdiction in election inquiries? There has been some judicial review where it has been argued that a judge has exceeded his jurisdiction. But, aside from that, there is no appeal against findings of fact. Once you go to the judge, he is literally your judge and that is the end of the day.

In that sense, the potential for a cost blow-out in appeals has been removed. That is only if the judge exceeds his jurisdiction. He can only go on challenging that he has misconstrued the—

CHAIR—To the Federal Court or Supreme Court?

Mr McCLELLAND—No. You have to go to the High Court. For instance, there has been some judges who have said, in Marsh's case, `This doesn't amount to an irregularity.' The judge was taken to the High Court, where the High Court said, `There was an irregularity. I direct you: perform your obligations at law and hear the case.' That is the sort of thing that has happened.

Mr Kerslake—That is correct. The last point I raise is that there is difficulty in going to a court, as things currently stand, and seeking our ruling in advance on a particular issue. We pursued that line in the CEPU case in looking at an issue as to whether certain people were eligible for the re-run election. The judge indicated that that was really a question for the AEC to decide and then people can challenge if the AEC is wrong. That is the sort of issue I am talking about, where it would have been desirable to have got a ruling on that up front. Otherwise, you could have run the election again—the second time at great expense—and still have fallen foul—

Mr McCLELLAND—I have to be honest: my view on this is that the judges hearing these cases are not bound by the rules of evidence. There is no appeal from their deliberations. It is supposed to be an expeditious deliberation and, in the overall context of justice, relatively cheap, given that the avenue for appeal is limited. Whereas if you introduce the same concept at a lower level with that tribunal not being bound by the rules of evidence, not having the legal expertise, and then trying to challenge a decision itself not made by the rules of evidence, it gets very cumbersome and could itself introduce complexities which are more expensive and protracted than the current situation. That, I have to be frank, is my feeling on it.

CHAIR—One other matter that was in some other questions here, but not in the ones that we just went through, relates to the standard declaration envelope which has been talked about. Did you say that you could develop that in consultation with the Australian Industrial

Registry and employer or trade unions and then have them prescribed in regulations?

I also throw in for your comment whether there is a capacity for us here to standardise such an envelope also with a federal election—we made some recommendations in our previous inquiry into last year's election in relation to double enveloping, et cetera—so that we could have standardisation right across the board, whether it be industrial election or federal election, et cetera?

Mr Kerslake—Firstly, in relation to standardising for industrial and consultation and so on, we have actually, at a recent conference, got a group together who have come up with what we believe would be a very suitable declaration envelope to be used uniformly in industrial elections. Obviously, we would favour consultation with organisations and so on. We are not trying to impose this upon everybody. We would want to get other people's views to ensure that it suits their needs. But we have certainly come up with something which took some soul-searching on the part of our staff, who all had different views on this as well, but we came up with a consensus.

In relation to federal elections, in developing our declaration on voting for IE it is not an area where we have consulted. Obviously we would be happy to do so, but I would not like to indicate that it could be done. Even if you come up with uniformity in the design of an envelope, obviously the wording and so on on envelopes may well vary because of your particular circumstances.

CHAIR—I acknowledge that different wording could be quite likely, but the actual design of the item could be standardised.

Mr Lewis—As Mr Kerslake said, we have actually come up with a model we think would fit that, and we would have no problems with consulting. The only thing we would probably say is why not consider not making the wording so specific that it made it very difficult to modify it when technology improves it. That is part of the reason we went down that line: we see the sense in having the best possible form of declaration envelope.

Mr Kerslake—Because there are differences between an organisation's rules, for example, and the Workplace Relations Act and the Electoral Act, there may be different things that people are likely to be required to declare. For example, in industrial elections you are more or less declaring, `I filled out this ballot paper, that is my signature and I so declare.' It is as simple as that. I am not an expert on declarations in the federal area, but it may well be that, in addition to what people are being required to declare there, there are more things required to be declared under the act. Certainly if there were, that would not necessarily meet our needs. Certainly we have an overriding concern in the industrial elections area in terms of simplicity. The simpler you can keep the envelope, the less a person has to declare and the easier it is for them to understand. Bear in mind that you are dealing with a voluntary election and, once you start making it difficult, people say it is too hard and they will not fill it in. So we are aiming for simplicity to encourage people's participation in that process. For federal elections it is a different ball game from a number of viewpoints.

Mr Lewis—The only other thing in terms of consultation is that we also thought that the other people we would consider consulting with would be the Australian Federal Police to establish what layout would assist them in checking for forensic evidence and so on. We would not make something that we all say we think is great, the ACTU thinks is great and so

on but the Australian Federal Police says that it would be dreadful. So we would say look at them as well.

Mr Kerslake—We have some further consultation to go. We welcome the opportunity to consult key players in the industrial elections area. We would be very happy to consult with people in our federal elections area. Personally, from my limited experience, I am doubtful that the needs would coincide. Obviously if they could that would be a desirable thing, but I am doubtful.

CHAIR—Point taken. There being no other questions, thank you for attending today and providing evidence.

Resolved (on motion by Mr McClelland):

That the committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 3.15 p.m.