The Parliament of the Commonwealth of Australia

JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

Industrial Elections

Report of the inquiry into the role of the Australian Electoral Commission (AEC) in conducting industrial elections

October 1997

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FOREWORD

This report responds to a reference from the Minister for Administrative Services to inquire into and report on 'the role of the Australian Electoral Commission (AEC) in conducting industrial elections'. The elections in question are conducted for trade union and employer organisations registered under the *Workplace Relations Act 1996* (formerly the Industrial Relations Act). The AEC conducts some 700 industrial elections each year, with the total cost of approximately $5 million being borne by the Commonwealth.

While this inquiry was in many ways prompted by a court case which saw the ordering of a new election of office bearers in the former Communications Workers' Union of Australia, the Committee has not focused on the dramatic allegations often made in connection with union elections. We have instead deliberated on the more substantial matters set out in the terms of reference for the inquiry.

The inquiry revealed strong support for the integrity and professionalism of the AEC's industrial elections staff, and also for the principle underlying the current system - namely, that the public interest is best served by funding industrial elections from the public purse and providing for such elections to be conducted by the AEC. The Committee endorses that principle. As such, we do not propose any change to the AEC's statutory monopoly in the conduct of industrial elections. Nor do we recommend that registered organisations meet the costs of conducting their elections although, on a related issue, we do recommend that the AEC be allowed to market its expertise on a fee-for-service basis.

Also, given that election rules vary widely from organisation to organisation, we recommend that a menu of 'model rules' be developed. Every registered organisation would then be strongly encouraged (but not compelled) to select from that menu a set of rules which suits its needs. In relation to the proper conduct of elections, we recommend amongst other things that returning officers lodge detailed post-election reports and that the penalties for offences be substantially increased.

As Chairman I thank Deputy Chair Senator Stephen Conroy and our fellow members for working through these sensitive issues in a bipartisan manner. I also thank the secretariat staff and the Committee's adviser from the Department of Industrial Relations, Mr David Dick. Mr Dick's expertise and hard work were invaluable to the proper conduct of the inquiry and preparation of this report, which investigates matters outside the Committee's usual focus on parliamentary elections under the *Commonwealth Electoral Act 1918.*

Also, the Committee is indebted to those individuals and organisations who made submissions to the inquiry and appeared as witnesses at public hearings. We particularly thank the AEC for its assistance, and look forward to our productive relationship being continued at future inquiries.

Gary Nairn MP
CHAIRMAN

October 1997

TERMS OF REFERENCE

The role of the Australian Electoral Commission (AEC) in conducting industrial elections under Part IX of the *Industrial Relations Act 1988*, including but not limited to:

- whether there should be some standardisation of the rules governing the conduct of industrial elections;
- mechanisms for the review of the conduct and integrity of industrial elections;
- the cost of conducting industrial elections, including the impact on the resourcing of the AEC; and
- the capacity of the AEC to provide assistance to organisations on a fee-for-service basis.

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4 Chairman to 9 April 1997.
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ABBREVIATIONS

ACCI	Australian Chamber of Commerce and Industry
ACM	Australian Chamber of Manufactures
ACTU	Australian Council of Trade Unions
AEC	Australian Electoral Commission
AFP	Australian Federal Police
AIR	Australian Industrial Registry
AP	Australia Post
APESMA	Association of Professional Engineers, Scientists and Managers, Australia
APSIS	Australia Post Security and Investigation Service
ATSIC	Aboriginal and Torres Strait Islander Commission
AWU	Australian Workers Union
CA	Conciliation and Arbitration (Act 1904)
CE	Commonwealth Electoral (Act)
CEPU	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
DIR	Department of Industrial Relations
ILO	International Labour Organisation
IR	Industrial Relations (Act)
J	Justice
MBA	Master Builders Australia
NSW	New South Wales
NTEU	National Tertiary Education Industry Union
QCCI	Queensland Chamber of Commerce and Industry
QEC	Queensland Electoral Commission
Qld	Queensland
RO	Returning Officer

SDA	Shop, Distributive & Allied Employees' Association
WR	Workplace Relations (Act or Regulations)

CHAPTER SUMMARY AND LIST OF RECOMMENDATIONS

Chapter One - Introduction

This Chapter outlines the current provisions of the *Workplace Relations Act 1996* (WR Act) governing industrial elections and inquiries into disputed elections, traces the development of those provisions and provides information on the conduct of the inquiry.

Chapter Two - Standardisation of Rules

An industrial election is required to be conducted in accordance with the rules of the organisation concerned. Although the rules of different organisations provide for different electoral systems and procedures, there was only limited support for the introduction of a single set of rules to govern all industrial elections. There is scope, however, for some standardisation to improve the efficiency and integrity of industrial elections without infringing on the autonomy of organisations.

The Committee therefore recommends that all postal ballots employ a standard form of declaration envelope to be developed by consultation between interested parties; that the voters' rolls for industrial elections be 'cut-off' rolls, closing 30 to 60 days before the opening of nominations; that where the AEC considers that the membership records of an organisation contain an unduly large proportion of members for whom only a workplace address is recorded, it include that fact in a post-election report and request the organisation to ensure that it has current residential and workplace addresses for as many members as possible; that there be consultations between interested parties to develop a menu of model rules which organisations would be encouraged, but not compelled, to adopt; and that organisations be encouraged to amend election rules that are difficult to interpret or apply.

The Committee does not consider that there should be a move away from postal ballots in favour of attendance or presentation ballots.

Recommendation 1:

> **That section 215 of the WR Act be amended to provide that when a secret postal ballot is conducted by the AEC it shall be by a standard form of declaration envelope. The form of the envelope should be developed in consultation between the AEC and peak employer and trade union bodies and be prescribed in the WR Regulations.** (p20)

Recommendation 2:

> **That the WR Act be amended to require that voters' rolls in all industrial elections should be cut-off rolls. The cut-off date should be 30 to 60 days before the opening of nominations. Organisations should be given a reasonable period within which to bring their**

rules into compliance with this requirement, which should also be contained in the model rules recommended elsewhere in this report. (p22)

Recommendation 3:

That when, having regard to the nature of the organisation concerned, the AEC considers that the membership records of an organisation contain an unduly large proportion of members for whom only a workplace address is recorded, or whose workplace and/or residential addresses are out of date, the AEC should include that fact in the post-election report to be prepared by returning officers (see Recommendation 15).

In addition, the AEC should inform the organisation concerned and request that it take action to ensure that it has current residential and workplace addresses for as many members as possible. Model rules developed in accordance with Recommendation 4 should provide that, as far as practicable, the membership records of an organisation shall contain residential rather than workplace addresses. (p25)

Recommendation 4:

There should be consultations between the AEC, the AIR, DIR and peak employer and union bodies with a view to developing a 'menu' of model rules for the conduct of industrial elections. Any model rules should deal only with the conduct of industrial elections and not with matters such as management structures, terms of office and eligibility to vote and to be a candidate. Organisations should be strongly encouraged but not required to adopt model rules, and should have the further option of adopting such rules in whole or in part. (p32)

Recommendation 5:

That the WR Act be amended to provide that:

(a) where a post-election report identifies any rule (or rules) of the organisation or branch concerned that was difficult to interpret or apply, the report shall be accompanied by a letter inviting the organisation or branch concerned to hold discussions with a view to amending the rule;

(b) the accompanying letter shall be published in the next journal or newsletter of the organisation or branch concerned, together with the post-election report;

(c) within 30 days of receiving such an invitation the organisation or branch concerned shall respond in writing and a copy of the response shall be published in its next journal or newsletter;

(d) in considering an amendment of the rule (or rules) in question, regard shall be had to any model rules contained in the WR Regulations; and

(e) failure to comply with paragraphs (b) and (c) above is an offence under Part XI of the Act. (p34)

Chapter Three - Mechanisms for Review

There was limited support for any changes to the institutional arrangements for reviewing disputed elections.

At present an application to the Federal Court for an inquiry into an industrial election can be made only by a member of the organisation concerned or a person who was a member within the preceding 12 months. It is not acceptable that where a returning officer conducting an election becomes aware of a possible irregularity the AEC has no standing to apply to the Court for an inquiry. The Committee recommends that the AEC be given standing to make such an application.

Under the current provisions, a prosecution for an offence in relation to an industrial election must be commenced within 12 months of the commission of the offence. This is because of a combination of factors, including the time within which an application for an inquiry may be made (currently within six months from the declaration of the ballot), the time that an inquiry may take, the level of penalties prescribed by the WR Act, and the interaction between the WR Act and the relevant provisions of the *Crimes Act 1918.* As a result, the statutory time limit for commencing a prosecution may have expired before sufficient evidence of an offence emerges. The penalties for electoral offences are in any case inadequate, having remained the same since 1972.

The Committee therefore recommends an increase in the level of penalties and a reduction in the time within which an application for an inquiry into an election must be made.

The Committee also recommends an amendment to clarify the power of the Court to make an interim order for the filling of an office to which an election inquiry relates, pending the outcome of a fresh election to fill that office.

Recommendation 6:

That:

(a) section 218 of the WR Act be amended to include the Electoral Commissioner as a person who may make an application for an inquiry by the Court into an alleged irregularity; and

(b) the WR Act should be further amended to provide that, where the Electoral Commissioner is satisfied that it is more likely than not that an irregularity has occurred, the Electoral Commissioner must make an application for an inquiry. (p44)

Recommendation 7:

That:

(a) the penalties prescribed by sections 310, 313, 314, 315, 316, and 317 of the WR Act be increased to $5,000 or imprisonment for 12 months, or both, for an individual; and to $10,000 for a body corporate; and

(b) regulation 62 of the WR Regulations be amended to provide that an application for an inquiry into an election must be made not later than three months after the day on which the result of the election is declared, or such longer period as the Court allows. (p51)

Recommendation 8:

That section 221 of the WR Act be amended to make clear that the Court may make an order that a person may occupy an office to which an inquiry under the Act relates pending the outcome of a fresh election to fill that office. (p52)

Chapter Four - Cost and Capacity

The cost of all industrial elections conducted by the AEC is borne by the Commonwealth. There was no evidence to suggest that the AEC does not provide a cost effective service.

There was limited support for the introduction of any charges for industrial elections. The Committee recommends, however, that the AEC be given authority to conduct elections for non-industrial organisations on a fee-for-service basis, provided that this does not detract from the ability of the AEC to conduct industrial and other elections in a timely and efficient manner.

Recommendation 9:

That the *Commonwealth Electoral Act 1918* (CE Act) be amended to give the AEC authority to conduct elections for non-industrial organisations on a fee-for-service basis, subject to the proviso that the conduct of such elections is not permitted to detract from the AEC's capacity to fulfil its statutory obligations under the WR Act, the CE Act, the *Referendum (Machinery Provisions) Act 1984* and the *Aboriginal and Torres Strait Islander Commission Act 1989* (ATSIC Regional Council elections). (p67)

Chapter Five - Other Matters

The Committee believes that a returning officer should be required to carry out such checks of the voters' roll for an industrial election as are necessary to confirm that the roll is accurate. Furthermore, the returning officer should have access to all the information contained in the Commonwealth Electoral Roll.

The Committee recommends that the WR Act expressly provide that candidates in an industrial election may inspect and obtain copies of the voters' roll, and that members of an organisation who are not candidates may only inspect the roll and may not obtain copies. It should be an offence to use the information thus obtained for a purpose other than in relation to that election.

The Committee also recommends:

- that returning officers be given the power to direct employers as to the handling of ballot material sent to workplaces;
- that organisations be required to notify the Australian Industrial Registry each year of all elections required to be held during the following 12 months;
- that after each industrial election the returning officer be required to prepare a post-election report containing prescribed information;
- consultations between interested parties and the Government to develop legislation to prohibit the use of union resources for electioneering;
- a prohibition on the publication of 'misleading statements of fact' during an industrial election; and
- measures to ensure that the Commonwealth is required to bear only a reasonable amount of the cost of advertising for an industrial election.

Recommendation 10:

That the WR Act be amended to provide that:

(a) in each industrial election where the rules of the organisation do not require the returning officer to verify the voters' roll, the returning officer shall nevertheless carry out such checks of the roll against the records of the organisation as are necessary to satisfy the returning officer that the roll is accurate;

(b) where, following such checks, the returning officer is not satisfied that the roll is accurate, the returning officer may postpone the election until such defects as have been identified in the roll are corrected; and

(c) no application for an inquiry into an election may be made on the ground that any check of the voters' roll by the returning officer was inadequate or that, following such a check, the returning officer did not postpone the election. (pp72-73)

Recommendation 11:

That:

(a) section 91A(3) of the CE Act be amended to include elections and ballots conducted under the WR Act; and

(b) the WR Act be amended to provide that no application for an inquiry into an election shall lie on the ground that, in carrying out a check of the accuracy of the voters' roll for an industrial election, the returning officer did not check the voters' roll against the Electoral Roll. (p75)

Recommendation 12:

That the WR Regulations be amended to:

(a) include a regulation similar to existing regulations 81 and 98O in relation to the voters' roll for an industrial election, but which provides that while candidates in an election may inspect and obtain copies of the voters' roll, members who are not candidates may only inspect the roll and may not obtain copies;

(b) provide that where the AEC is required to provide copies of the voters' roll for an industrial election or for a ballot for an amalgamation or withdrawal from an amalgamation it may do so in electronic form on disk; and

(c) make it an offence to use information obtained from the voters' roll for an industrial election or for a ballot for an amalgamation or a withdrawal from an amalgamation for a purpose other than in relation to the election or ballot in respect of which access to the roll was sought. (p78)

Recommendation 13:

That:

(a) the WR Act be amended to provide that where ballot material is to be sent to a workplace the returning officer may direct the employer at the workplace as to disposition of that material; and

(b) section 215(1)(b) be amended to provide that, where a returning officer considers that adherence to the rules of an organisation or branch may give rise to an irregularity or produce a procedural defect, the returning officer shall take such actions and give such directions as the returning officer considers necessary to avoid the irregularity or procedural defect. (p80)

Recommendation 14:

That regulation 102 of the WR Regulations be amended to include a list of all elections required by the rules of an organisation to be held for offices in the organisation, and each branch of the organisation, during the calendar year commencing on 1 April. (p82)

Recommendation 15:

That the WR Act be amended to require that, not later than 14 days after the declaration of the ballot for an industrial election, the returning officer who conducted the election shall provide to the Industrial Registrar and the organisation (or branch) concerned, a report on the conduct of the election containing prescribed information. It should also be a requirement that such reports are to be published in the next journal or newsletter of that organisation (or branch). The prescribed information should be the same as is prescribed by regulations 96 and 98Z in respect of ballots for amalgamations and withdrawals from amalgamations, with any necessary changes and with the following additions:

- **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;**
- **results of checks of the voters' roll;**
- **results of checks (if any) of signatures on the declaration envelopes;**
- **any rules of the organisation or branch which, because of ambiguity or other reason, were difficult to interpret or apply; and**
- **any other matter the returning officer thinks fit.** (pp84-85)

Recommendation 16:

That the Government consult with the AEC and with peak union and employer organisations with a view to developing legislation prohibiting the use of union resources for electioneering purposes, except as permitted by the WR Act and Regulations or by model rules developed in accordance with Recommendation 4. (p88)

Recommendation 17:

That the WR Act be amended to prohibit the publication by any means of 'misleading statements of fact' during an industrial election. (p89)

Recommendation 18:

That the WR Act be amended to provide that, in respect of each industrial election, the cost of advertising shall be borne by the Commonwealth only up to an amount determined by the AEC, with the AEC having the statutory power to recoup any excess. The AEC should be required to determine in advance of each election what would be a 'reasonable' amount to be spent on advertising for the election. In determining the amount to be borne by the Commonwealth the AEC should be required to take account of the following factors:

- **the amount spent on advertising in the previous corresponding election for the organisation concerned;**
- **any significant changes in the type or nature of election advertising by that organisation since the last corresponding election and the reasons for such changes;**
- **any changes in the size, structure or nature of the organisation;**
- **the amount spent on advertising in similar elections by other organisations of a similar size and structure; and**
- **any increases in the cost of advertisements of the kind to be used in the election in question.**

It should be further provided that where the AEC considers that the Commonwealth should pay less than the full cost of advertising for the election in question, it shall invite the organisation concerned to put its views as to why the Commonwealth should bear the full cost, and shall take those views into account before making a final determination. It should also be provided that, except in exceptional circumstances, the AEC shall not determine an amount that is less than the amount spent on advertising in the previous corresponding election for the organisation concerned. (pp90-91)

CHAPTER ONE

INTRODUCTION

Current legislative framework

Rules of registered organisations to provide for conduct of elections

1.1 The *Workplace Relations Act 1996* ('the WR Act') provides for the registration of associations of employers and employees. One of the criteria for registration is that an applicant association must have rules which comply with the requirements for the rules of registered organisations.[1] The rules of registered organisations are required to provide, amongst other things, for the election of the holder of each office[2] in the organisation by either a direct voting system or a collegiate electoral system.[3]

1.2 Section 197 further requires that the rules of an organisation must provide for: the conduct of each election by a returning officer who is not an officer or employee of the organisation or of a branch, section or division of the organisation;[4] procedures for dealing with defective nominations;[5] the manner in which persons may become candidates;[6] the duties of returning officers;[7] and the declaration of the result of an election.[8]

1.3 The rules of an organisation must further provide that where a ballot is required it shall be a secret ballot and shall make provision for absent voting, the conduct of the ballot and the appointment, conduct and duties of scrutineers to represent the candidates at the ballot.[9] In addition, the rules are required to be such as to ensure, as far as practicable, that no irregularities can occur in relation to an election.[10]

1.4 The rules of an organisation must also specify the terms of office for its officers. A term of office may not be longer than four years, although this may be extended in limited circumstances.[11] Provision may also be made for the filling of casual vacancies.[12]

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1 Section 189(1)(e). Upon registration an association becomes an organisation: section 191(3). 'Organisation' is defined in section 4(1) as an organisation registered under the Act.
2 'office' is defined in section 4(1).
3 Section 197(1)(a), which also requires that, in the case of an election for a full-time office by a collegiate electoral system, it must be a one-tier collegiate electoral system. The terms 'direct voting system' and 'collegiate electoral system' are defined in section 4(1).
4 Section 197(1)(b).
5 Section 197(1)(c).
6 Section 197(1)(d)(i).
7 Section 197(1)(d)(ii).
8 Section 197(1)(d)(iii).
9 Section 197(1)(e).
10 Section 197(1)(f).
11 Section 199.
12 Section 200.

Voting to be by secret postal ballot unless an exemption has been granted

1.5 Where the rules of an organisation provide for elections to be by a direct voting system they must also provide that the elections be by secret postal ballot[13] unless the organisation has obtained from the Industrial Registrar an exemption from this requirement.[14] The Industrial Registrar may grant such an exemption where satisfied as to a number of matters, of which the most important are that:

- the proposed conduct of the ballot is likely to lead to fuller participation by members than would result from a postal ballot; and
- the proposed voting system, which must still be a secret ballot, will allow members to vote without intimidation.[15]

Elections to be conducted by Australian Electoral Commission (AEC) unless an exemption has been granted

1.6 Each election for an office in a registered organisation must be conducted by the AEC unless an exemption has been granted in respect of elections in the organisation or branch generally or an election for a particular office.[16]

1.7 An application for an exemption may be lodged by the committee of management of an organisation or branch in relation to elections for offices, or an election for a particular office, in the organisation or branch.[17] An objection to such an application may be made by a member of the organisation or branch concerned and must be heard by the Industrial Registrar or another Registrar.[18] An exemption may be granted if the Registrar is satisfied that the rules of the organisation or branch comply with the requirements of the WR Act concerning elections and that, if the exemption is granted, the elections or election will be conducted:

- under the rules of the organisation or branch and the Act; and
- in a manner that will afford members entitled to vote an adequate opportunity to do so without intimidation.[19]

1.8 An exemption may be revoked on the application of the committee of management of the organisation or branch concerned, or if the Registrar is no longer satisfied as to the matters referred to above and has given the organisation or branch an opportunity to show cause why the exemption should not be revoked.[20]

13 Section 198(1).
14 Section 198(2).
15 Section 198(3)(b).
16 Section 210.
17 Section 211.
18 Section 212.
19 Section 213(1).
20 Section 213(2).

Initial steps in the election process

1.9 Unless an organisation or branch has been granted an exemption from having an election conducted by the AEC, it must lodge certain information with the Industrial Registry two months before the day on which a person may, under the rules of the organisation or branch, become a candidate in the election.[21] The information to be lodged includes:

- the name of each office in respect of which an election is required;
- the reason for the election (eg that the term of the office has expired) and the number of offices for which an election is required;
- the name of the section, branch or division of the organisation in respect of which the election or elections are required;
- the period allowed for nominations; and
- the voting system to be used (ie. whether direct or collegiate).[22]

1.10 If a Registrar is satisfied that an election is required by the rules of the organisation or branch, he or she must arrange for the election to be conducted by the AEC.[23] The AEC then appoints one of its officers as returning officer for the purpose of conducting the election.[24]

Powers of returning officer

1.11 The returning officer is required to conduct the election in accordance with the rules of the organisation or branch concerned, but may, in spite of anything in the rules, take such action and give such directions as he or she considers necessary to:

- ensure that no irregularities occur in or in relation to the election; or
- to remedy any procedural defects that appear to the returning officer to exist in the rules.[25]

Inquiries into elections

1.12 The WR Act provides for the Federal Court of Australia to inquire into an election where it is alleged that there has been an irregularity in relation to the election.

1.13 An application for an inquiry may be made by a person who is a member of the organisation concerned or who has been a member within the preceding 12 months.[26] An application must be made within six months of the day on which the result of the election was

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21 Section 214(1) of the WR Act; subregulation 61(3) of the Workplace Relations Regulations.
22 Subregulation 61(1).
23 Section 214(2).
24 Submissions p. S390 (AEC).
25 Section 215(1).
26 Section 218.

declared.[27] Where the Court is satisfied that there are reasonable grounds for instituting an inquiry it must do so.[28] The Court has power to make a wide range of interim orders pending the outcome of the inquiry[29] and may grant such injunctions as it considers necessary for the effective performance of its functions and the enforcement of its orders.[30]

1.14 If, after conducting a hearing in accordance with section 222, the Court finds that an irregularity has occurred the Court may:

- declare the election, or a step taken in relation to the election, void;[31]
- make an order declaring a person purporting to have been elected not to have been elected, and declaring another person to have been elected;[32]
- in the case of an uncompleted election, make an order directing the Industrial Registrar to arrange for a step in relation to the election to be taken again and for uncompleted steps in the election to be taken;[33]
- in the case of a completed election, make an order directing the Industrial Registrar to arrange for a step in relation to the election to be taken again or a new election to be held; and[34]
- make incidental, supplementary or consequential orders.[35]

1.15 The Court may not, however, declare an election, or any step taken in relation to an election, to be void, or declare that a person was not elected, unless it is of the opinion that the result of the election may have been affected, or may be affected, by irregularities.[36]

Election provisions are of general application

1.16 The election provisions of the WR Act apply equally to organisations of employers and employees. It should be noted that, although the Act requires the rules of applicant associations and registered organisations to make provision for specified matters in relation to elections, it does not prescribe the manner in which those matters are to be provided for. As a result there is considerable variation between the election rules of different organisations.

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27 Subregulation 62(1).
28 Section 219.
29 Section 221.
30 Section 225.
31 Section 223(3)(a).
32 Section 223(3)(b).
33 Section 223(3)(c)(i).
34 Section 223(3)(c)(ii).
35 Section 223(3)(d).
36 Section 223(3),(4).

Objects of the WR Act

1.17 The provisions outlined above assist in giving effect to the relevant objects of the WR Act. Section 3 of the WR Act states that the principal object of the Act is to:

> *... provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*
>
> *...*
>
> *(g) ensuring that employer and employee organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively;*
>
> *...*
>
> *(k) assisting in giving effect to Australia's international obligations in relation to labour standards.*

In addition, the objects of Part IX of the WR Act - Registered Organisations, are:

> *(a) to encourage the democratic control of organisations; and*
>
> *(b) to encourage members of organisations to participate in the organisations' affairs; and*
>
> *(c) to encourage the efficient management of organisations.*[37]

An historical perspective

1.18 Commonwealth industrial relations legislation has not always contained provisions expressly dealing with elections in registered organisations. In that regard the *Commonwealth Conciliation and Arbitration Act 1904* (the CA Act) initially required only that the rules of a registered organisation provide for, amongst other things,

> *The appointment and continuance of a Committee of Management, a Chairman or President, and a Secretary.*[38]

1.19 In 1928 the *Commonwealth Conciliation and Arbitration Act 1928*[39] amended the CA Act to, amongst other things, require the rules of applicant associations and registered organisations to provide for the election of a committee of management and of the officers of the organisation under a system of voting that made adequate provision for absent voting.[40] In addition, the amendments provided that any 10 members of a registered organisation could demand, either verbally or in writing, that any election for an office within the organisation, or any vote on any resolution proposed to be adopted by the organisation, be by secret

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37 Section 187A.
38 Section 55(2); Schedule B.
39 Act No 18 of 1928.
40 Section 58.

ballot.[41] If the organisation then failed to hold a secret ballot, provision was made for a secret ballot to be conducted under the auspices of the then Commonwealth Court of Conciliation and Arbitration.[42] It was further provided that if, upon a complaint made to the Court, the Court was of the opinion that any secret ballot in an organisation or branch had not been fairly and properly held, the Court could declare the ballot void and give directions for the conduct of a secret ballot under the control of an officer of the Court.[43] In the Second Reading Speech to the amending bill the then Attorney-General, Mr Latham, made it clear that the purpose of the amendments was to give the members of registered organisations:

> *... real and effective control, and not merely nominal control, over the election of officers and the policy of the association*.[44]

1.20 The 1928 Act also inserted into the CA Act a provision enabling a member of an organisation to enforce the rules of the organisation by obtaining from the Court an order directing the performance or observance of the rules of the organisation by any person under an obligation to perform or observe those rules.[45]

1.21 The 1928 amendments concerning secret ballots were repealed by the *Commonwealth Conciliation and Arbitration Act 1930*.[46] In the view of the Scullin Government, those provisions:

> *... have been entirely ineffective in the direction of serving any useful purpose. On the other hand, they have been the subject of much controversy and bad-feeling, and are rightly regarded as an inexcusable interference with the self-government of organisations*.[47]

The requirement that the rules of organisations provide for the election of committees of management and officers and the provision enabling members to enforce the rules of an organisation were, however, retained.

1.22 Thereafter, the CA Act contained no provisions governing the conduct of industrial elections until the passage of the *Commonwealth Conciliation and Arbitration Act 1949*.[48] Election rules were enforceable by members only in the same way as other rules of organisations, that is, by an application to the Court for an order giving directions for the performance or observation of any of the rules of an organisation by any person under an obligation to perform or observe those rules, or under the general law.

1.23 The preamble to the 1949 Act stated that it was:

> *An Act to make provision for the prevention of irregularities in connexion with elections for offices in organisations registered under the Conciliation and Arbitration Act 1904-1948 and to vest in the Commonwealth Court of*

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41 Section 45.
42 Section 45.
43 Section 45.
44 Australia, House of Representatives, 1928, *Debates*, vol. 117, p. 3290
45 New section 58E, inserted by section 48 of Act No. 18 of 1928.
46 Act No. 43 of 1930.
47 Australia, House of Representatives, 1930, *Debates*, vol. 124 , p. 2366.
48 Act No. 28 of 1949.

> *Conciliation and Arbitration additional powers for the prevention of such irregularities, and for these purposes to amend that Act.*

1.24 In the Second Reading Speech to the 1949 bill, Senator McKenna said:

> *For some considerable time the Government has been investigating the need for statutory provision of this kind. Evidence of malpractices and irregularities in the elections of officials of some registered organisations has accumulated and has been confirmed by responsible industrial bodies and other bodies closely associated with industrial activities.*[49]

1.25 Section 6 of the 1949 Act introduced a number of sections dealing with the conduct of elections and inquiries into disputed elections.

1.26 In respect of inquiries into disputed elections, the amendments provided that:

- a member of an organisation, or a person who was, within the preceding 12 months, a member of an organisation, could lodge with the Industrial Registrar an application for an inquiry into an election;[50]
- if the Industrial Registrar was satisfied that there were reasonable grounds for the application he was to grant the application and refer it to the Commonwealth Court of Conciliation;[51]
- upon referral to the Court an inquiry was deemed to be instituted;[52]
- the Court was empowered to make interim orders;[53]
- if the Court found that an irregularity had occurred it was empowered to order that an election, or a step taken in an election, was void and that a new election must be held or the step taken again, but such an order could be made only if the Court was satisfied that the result of the election may have been, or may be, affected by the irregularity; and[54]
- where the Court found that an irregularity had occurred the Attorney-General could re-imburse the costs of the applicant.[55]

1.27 In respect of elections in the first instance, the amendments provided that the Industrial Registrar was to conduct elections at the request of an organisation, or a branch of an organisation, if he considered it practical to do so.[56] The provisions concerning inquiries into elections, however, did not apply to elections conducted by the Industrial Registrar.[57]

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49 Australia, Senate, 1949, *Debates*, vol. 203, p. 1399.
50 New section 96A.
51 New section 96B.
52 New section 96C.
53 New section 96D.
54 New section 96G.
55 New section 96K.
56 New section 96M.
57 New section 96M(4).

1.28 An illustration of the mischief which the 1949 Act was intended to remedy is to be found in the judgement of Dunphy J in *Re FIA*,[58] which was an inquiry into elections held in 1949 for offices in the Federated Ironworkers' Association of Australia and in the Sydney Metropolitan Branch of that organisation. Dunphy J found that there had been 'forgery, fraud and irregularity on a grand scale'.[59]

1.29 The election provisions introduced by the 1949 Act form the basis of the election provisions in the WR Act, but have been amended many times to arrive at the current position. The most significant amendments are outlined in the following paragraphs.

1.30 The *Conciliation and Arbitration Act (No. 2) 1951*[60] introduced a requirement that the rules of organisations must provide for secret ballots and were to be such as to ensure, as far as practicable, that no irregularities occurred in relation to an election. The committee of management or a prescribed number of members of an organisation (or branch) could request the Industrial Registrar to conduct an election. The Industrial Registrar could conduct the election himself or arrange for it to be conducted by a Deputy Industrial Registrar or by the Commonwealth Electoral Office. The cost of officially conducted elections (except for the salary of any Commonwealth officer performing duties in relation to the election) were to be borne by the organisation. Officially conducted elections remained outside the provisions for the review of disputed elections.

1.31 In 1956, as part of the changes necessitated by the decision of the High Court in the *Boilermakers' Case*[61] the *Conciliation and Arbitration Act 1956*[62] abolished the Commonwealth Court of Conciliation and Arbitration and established the Commonwealth Conciliation and Arbitration Commission and the Commonwealth Industrial Court. The judicial functions of the former Court, including the review of disputed elections, were vested in the Commonwealth Industrial Court (renamed the Australian Industrial Court in 1973[63]). In addition, the 1956 Act amended the provisions concerning costs to provide that the cost of an election conducted at the request of an organisation was to be met by the organisation, except for the salary of Commonwealth officers and the cost of premises provided or used by the Commonwealth for the purpose of the election.

1.32 The *Conciliation and Arbitration Act 1958* inserted a new section 165A which provided that where the Court ordered a new election the Industrial Registrar was to make arrangements with the Chief Electoral Officer for the conduct of the election by a Commonwealth Electoral officer or a returning officer appointed under the *Commonwealth Electoral Act 1918*.[64]

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58 (1951) 73 CAR 27.
59 At p. 29.
60 Act No. 18 of 1951.
61 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254.
62 Act No. 44 of 1956.
63 Act No. 138 of 1973, sec. 41.
64 Act No. 30 of 1958, sec. 33.

1.33 The *Conciliation and Arbitration Act 1959* introduced a provision to the effect that, where an officially conducted election cost an organisation more than it would have cost had the organisation conducted the election itself, the Minister could authorise payment of the excess.[65]

1.34 The *Conciliation and Arbitration Act 1972* amended the provision inserted in 1928 concerning a member's right to obtain a Court order directing the performance or observance of the rules of the organisation.[66] The Court was prohibited from making such an order if it would have the effect of treating as invalid an election, including an officially conducted election, to an office in an organisation or branch, or a step in such an election. The prohibition extended to elections which had been the subject of an inquiry by the Court if the Court had found that no irregularity had occurred in or in connection with the election, or if the Court had found that an irregularity had occurred but had not made an order declaring the election, or a step taken in the election, to be void, or declaring a person not to have been elected.

1.35 The *Conciliation and Arbitration Act 1973* amended the CA Act to provide that the expenses of officially conducted elections were to be borne by the Commonwealth.[67] That Act also inserted a requirement to the effect that the rules of an organisation must provide for the election of officers directly by the financial members of the organisation, subject only to reasonable provisions with respect to enrolment and eligibility to vote.[68] Organisations were allowed three years to bring their rules into compliance with this requirement. An exemption was made for existing rules which provided for an election by a collegiate electoral system for a part-time office the holder of which was a member of the committee of management of the organisation.

1.36 The *Conciliation and Arbitration Amendment Act 1976*[69] introduced amendments requiring the rules of associations to provide for elections for certain offices to be by secret postal ballot.[70] This Act also provided that all elections by a direct voting system were to be by secret postal ballot unless an exemption was granted by the Industrial Registrar; if the rules of an organisation did not provide for a 'secret postal ballot' as defined, elections were required to be conducted in accordance with the regulations unless an exemption had been granted.[71] The *Conciliation and Arbitration Amendment Act (No. 3) 1977* extended those provisions to apply to all elections required to be by secret postal ballot: the detailed election regulations were deemed to form part of the rules of each organisation and any inconsistent rules ceased to have effect.[72]

1.37 The *Conciliation and Arbitration Act (No. 2) 1976*[73] amended the changes made in 1973 by permitting elections for offices by a direct voting system or a collegiate electoral

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65 Act No. 40 of 1959, sec. 9.
66 Act No. 37 of 1972, sec. 47.
67 Act No. 138 of 1973, sec. 62.
68 ibid. Section 52.
69 Act No. 64 of 1976.
70 ibid. Section 12.
71 ibid. Section 13. Statutory Rules 1976, No. 187 contained detailed provisions for the conduct of secret postal ballots.
72 Act No. 108 of 1977, sec. 15.
73 Act No. 117 of 1976.

system. The use of a collegiate electoral system was not restricted to part-time offices, but in respect of full-time offices, only a one-tier collegiate electoral system was permitted.[74]

1.38 The *Conciliation and Arbitration Amendment Act (No. 3) 1976* abolished the Australian Industrial Court and transferred its jurisdiction to the Federal Court of Australia.[75]

1.39 In 1985 the Hancock Report noted the increasing use made of the facility for officially conducted elections between 1949 and 1983.[76] In 1956, 16 requests were made to the Registrar. In 1970 the number was 76. After 1973, when the Commonwealth began to bear the entire cost of officially conducted elections, the number of requests increased rapidly: by 1975 it had risen to 142 and in 1983 there were 376 requests. The authors of the Hancock Report considered that:

> *The conduct of elections by Commonwealth officials facilitates a consistency of approach, leading to fewer invalidities and disputed elections. It should enhance the confidence of the community and the members of organisations in the conduct of ballots*.[77]

1.40 The Hancock Report recommended that the CA Act be amended to, amongst other things, require that all elections for office holders within registered organisations be officially conducted unless an exemption had been granted.[78] This recommendation was adopted in the *Industrial Relations Act 1988*[79] ('the IR Act') which replaced the CA Act and which commenced operation on 1 March 1989.

1.41 As to costs, the authors of the Hancock Report considered that:

> *Present provisions as to the cost of elections should not be changed. That is, the cost of an officially conducted election should be borne by the Commonwealth; but if an organisation conducts its own election, it should bear the costs*.[80]

That view was also given effect to by the IR Act.[81]

1.42 The Hancock Report, after discussing amendments made to the election provisions of the CA Act during the 1970's, commented that the authors:

> *... can appreciate the frequency of amendments has caused frustration and costs to organisations required repeatedly to alter their rules*.[82]

1.43 As noted above, the IR Act made it compulsory for all industrial elections to be conducted by the AEC unless an exemption had been granted, and provided that the cost of all AEC-conducted elections was to be borne by the Commonwealth. In addition, the Industrial Relations Regulations made under the IR Act provided that an application for an

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74 ibid. Section 4.
75 Act No. 160 of 1976, ss. 4 and 5.
76 *Report of the Committee of Review into Australian Industrial Relations Law and Systems*, April 1985, Vol. 2, para. 9.144.
77 ibid. para. 9.146.
78 ibid, para 9.145 and Vol. 1, *Recommendations for Change*, p.28 (Recommendation 80).
79 Act No. 86 of 1988, section 210.
80 op. cit. para. 9.147.
81 Section 215(4).
82 op. cit. para. 9.127.

inquiry into an election must be made no later than six months after the day on which the result of the election is declared.[83] The IR Act also established the Industrial Relations Court of Australia[84] and vested it with jurisdiction with respect to matters arising under the Act.[85] Otherwise, the IR Act and Regulations adopted the election provisions contained in the former CA Act without significant change. The election provisions of the former IR Act are now contained, without amendment, in the WR Act, except that the Industrial Relations Court of Australia has been abolished and its jurisdiction vested in the Federal Court of Australia.[86]

1.44 Despite the measures discussed above, the mischief which the 1949 amendments were intended to remedy has not been eliminated, as is illustrated by the recent inquiry into the 1994 elections for the NSW Postal and Telecommunications Branch of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU).[87] Moore J of the former Industrial Relations Court of Australia found that irregularities in the elections had occurred in a number of areas, including the fraudulent completion of ballot papers. In a sentence which is reminiscent of the words of Dunphy J some 45 years earlier, his Honour said:

> *While there can be no certainty about the total number of fraudulently completed ballot papers, the fraud was on a large scale*.[88]

1.45 It would be naive to think that malpractices can be eliminated from industrial elections, or any other field of activity, by legislation. In answer to the criticism that the 1949 bill contained no measures to prevent the occurrence of irregularities in industrial elections, Senator Cooke said:

> *One cannot prevent a man from doing wrong. That is a matter of common sense. However, one can provide penalties for wrong-doers, and this bill will establish legal penalties for certain acts that are not punishable now. It will enable an individual or group of individuals to correct a wrong that might be done by another group of individuals*.[89]

1.46 The Senator might have added that legislation can, perhaps, deter persons from wrong-doing.

The inquiry

1.47 In August 1996 the Committee received the transcript of Moore J's judgement which overturned, on the basis of certain irregularities, the results of the 1994 CEPU election referred to at paragraph 1.44. A fresh election was held between July and October 1996.

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83 Regulation 62. The Hancock Report recommended a period of 12 months: op. cit. Vol. 1, p.28 (Recommendation 83).
84 Section 361.
85 Section 412.
86 See section 412 of the WR Act.
87 (1996) 40 AILR 3-319.
88 ibid, pp.2,537-2,538.
89 Australia, Senate, 1949, *Debates*, vol. 203, p. 1546.

1.48 Rather than investigating specific elections, the Committee determined that it should undertake an inquiry into the role of the AEC in conducting industrial elections generally. On 3 October 1996 the Minister for Administrative Services asked the Committee to inquire into and report on:

> *the role of the Australian Electoral Commission (AEC) in conducting industrial elections under Part IX of the Industrial Relations Act 1988, including but not limited to:*
>
> - *whether there should be some standardisation of the rules governing the conduct of industrial elections;*
> - *mechanisms for the review of the conduct and integrity of industrial elections;*
> - *the cost of conducting industrial elections, including the impact on the resourcing of the AEC; and*
> - *the capacity of the AEC to provide assistance to organisations on a fee-for-service basis.*

1.49 Members of the public were invited to make submissions in an advertisement placed in the *Financial Review* of 1 November 1996 and *The Weekend Australian* of 2 November. Letters were sent to individuals and organisations with a particular interest in the process.

1.50 The inquiry received 39 submissions from various registered organisations, peak bodies such as the Australian Council of Trade Unions (ACTU) and the Australian Chamber of Commerce and Industry (ACCI), the AEC, other Commonwealth agencies, State governments, practising electoral officials and others. The submissions are listed at Appendix 2. The 10 sets of documents listed at Appendix 3 were accepted as exhibits. The Committee also held six public hearings through April to August 1997. A list of the hearings and the witnesses heard is at Appendix 4.

1.51 The submissions and transcripts of evidence from the public hearings have been incorporated into separate volumes. Copies of these documents are available for inspection at the Committee secretariat, the Commonwealth Parliamentary Library, the National Library of Australia and the State libraries.

1.52 While the inquiry revealed some areas where the WR Act could usefully be amended, the Committee concurs with the view put by most submission writers that the current election provisions work well and that the AEC provides a professional service which does much to ensure the integrity of industrial elections.

1.53 The inquiry's terms of reference are examined in detail in the following chapters.

CHAPTER TWO

STANDARDISATION OF RULES

A single set of standard rules for all industrial elections?

2.1 The terms of reference for the inquiry required the Committee to consider whether there should be some standardisation of the rules governing the conduct of industrial elections. This refers to the fact that each industrial election is required to be conducted in accordance with the rules of the organisation concerned.[90] It can be seen from the summary of the relevant provisions in Chapter One that the WR Act already contains some standard requirements for the conduct of industrial elections.[91] So long as the rules of an organisation provide for the matters specified in the Act, they may deal with those matters in a way that meets the specific needs and requirements of the organisation concerned.[92] As was noted in Chapter One[93], and as evidence before the Committee showed, the rules of different organisations provide for different electoral systems and procedures.

2.2 There was limited support for the introduction of a single set of standard election rules to govern all elections in all organisations. The Western Australian Government recommended that:

> *the major elements relating to the conduct of elections be removed from organisation rules and placed in regulations under the Workplace Relations Act*

with organisations free to determine matters such as terms of office, management structures and eligibility to vote or be a candidate.[94] Mr Michael Preston, an ex-AEC returning officer, considered that all union elections should be run under the same rules.[95] The Australian Federation of Air Pilots would support standardisation only if necessary to preserve the role of the AEC in conducting industrial elections.[96]

2.3 The main concerns expressed about further standardisation of election rules related to the autonomy of organisations and the right of each organisation to determine the rules and structure which best suited it. These concerns were expressed by both employer and employee organisations. The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) considered that:

> *while it may be appropriate to prescribe some minimum level of standardisation of the rules governing the conduct of industrial elections, capacity should exist*

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90 WR Act, sec. 215(1).
91 paras. 1.1 - 1.5.
92 Subject to the rules also meeting the general requirement that they do not impose on members or applicants for membership conditions, obligations or restrictions that are oppressive, unreasonable or unjust: sec. 196(c).
93 Para. 1.16.
94 Submissions p. S480.
95 Submissions p. S503.
96 Submissions pp. S75-76.

> *for individual organisations to extend those requirements to meet the particular needs of individual organisations.*[97]

2.4 As an example, APESMA noted that its rules require candidates for certain elections to submit a 250 word statement in support of their nominations; failure to do so renders the nomination ineligible.[98] The ACCI would support the development of standardised rules provided certain conditions were met. The ACCI stressed that any standardised process should not prevent each organisation from determining the structure, representative functions and conditions of eligibility appropriate to that organisation, and should address only the conduct of elections and investigations into elections.[99] They argued that attempts to achieve standardisation could result in over-regulation and over-intrusion into the affairs of organisations, and that although standardisation may have some superficial attraction it is important to maintain accountability and the democratic right of organisations to set their own rules, provided the public interest considerations are satisfied.[100]

2.5 The Australian Chamber of Manufactures (ACM) noted that the Act and Regulations already impose a heavy normative structure on organisations and that:

> *... such diversity as remains is the very minimum which is necessary for organisations to have in place rules and procedures regarding elections which reflect the needs and character and culture of the organisation concerned.*

They therefore did not believe there is any scope or need for further standardisation.[101] The ACM did, however, indicate that they would accept a measure of standardisation which 'did not interfere with the fundamentals of an organisation's structure and character'.[102]

2.6 The Queensland Chamber of Commerce and Industry (QCCI) also opposed standardisation, noting that it suggests greater prescription.[103] They expressed the belief that:

> *it is a matter for the members to decide the running of their organisation and ipso facto the manner of conducting their elections within the law.*[104]

The QCCI did not accept that greater convenience for the AEC in the conduct of ballots should outweigh the rights of members of organisations. The QCCI further rejected the argument that industrial organisations should be subject to the same law and regulations as companies registered under the Corporations Law, noting that the Corporations Law does not require Company Articles to be standardised, nor does it contain prescriptive provisions governing company elections.[105] The QCCI argued that there is 'no mischief of any consequence' calling for prescriptive legislation, and noted that neither the Cooke Inquiry[106]

97 Submissions p. S467.
98 ibid.
99 Submissions pp. S109-110.
100 Transcript p. EM 73.
101 Submissions pp. S3-4.
102 Transcript p. EM 87.
103 Submissions p. S48.
104 Submissions p. S50.
105 Submissions pp S50-51.
106 *The Commissioner Appointed to Inquire into the Activities of Particular Queensland Unions* (Marshall Cooke QC).

nor the Queensland Parliament 'has gone so far as to propose that prescriptive union rules relating to elections be introduced'.[107]

2.7 The Shop, Distributive & Allied Employees' Association (SDA) opposed the standardisation of rules, also on the grounds of the democratic rights of organisations and their members to determine their own rules.[108] They pointed out the adverse consequences that might result for the SDA if it was forced to adopt a different voting system. The SDA explained that, with the exception of four key national officers, its elections for national officers are collegiate elections: members vote on a State branch basis for candidates they know and the elected candidates then elect honorary officers by and from their own number. The SDA argued that:

> *It would be a pity if that was eliminated and you had to elect all of your national officers by a postal ballot of 230,000 ... members, many of whom would not know those officers if they came from a different State.*[109]

2.8 The SDA emphasised that the courts have been:

> *... quite firm in the importance of retaining the right of the organisation itself to tailor its elections to the industry ... the expectation of the members and the like. There are different traditions and different expectations and, provided that they conform - as they must - with the requirements of the Act, ... it is important for the credibility of the industrial process that they be left with that freedom.*[110]

2.9 The ACTU opposed any standardisation, arguing that it would 'undermine the autonomy and democratic control of union rules invested in its members'.[111] The ACTU stressed the need to retain that autonomy and democratic control, including the right of organisations to determine the contents of their own rules.[112] After referring to some cases in which the courts have accepted the principle that, subject to the requirements of the Act, the contents of the rules of an organisation is primarily a matter for its members, the ACTU submitted that:

> *Standardisation denies membership control of their own organisations and will be unlikely to provide any greater certainty or fairness in the electoral process.*[113]
>
> *The AEC and its staff have a well regarded knowledge of organisations' election rules. This knowledge and skill is put to good use informing unions' members and adding certainty to an electoral process which has been chosen by the union and its members in accordance with their rules and the Act as being most appropriate to their needs*.[114]

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107 ibid.
108 Submissions pp. S23-25.
109 Transcript p. EM 59.
110 Transcript p. EM 58.
111 Submissions p. S320.
112 Submissions pp. S320-326.
113 Submissions p. S322.
114 Submissions p. S324.

2.10 The ACTU noted that in 1995 the AEC commissioned ACIL consultants to conduct an evaluation of its Industrial Elections Program. On the issue of rule standardisation the consultants commented that the requirement to conduct elections in accordance with an organisation's rules:

> *... constrains the performance of the Program, precluding the use of common regulation to provide a more flexible mechanism for all parties. Consideration should be given to the option of using regulation to deliver industrial election services.*[115]

2.11 In response to that comment the ACTU said:

> *Elections are not exercises motivated by a need for administrative ease. They are motivated by the need for the democratic involvement and control of organisations registered pursuant to the Act by their members .... Cost minimisation at the expense of membership control of an organisation's rules is in the ACTU's opinion too high a price to pay.*[116]

2.12 The ACTU also noted that organisations have been prepared, in consultation with the AEC, to make changes to their election procedures when there is 'some wider benefit rather than standardisation for the sake of administrative ease'[117] but that the imposition of standard rules would have a negative effect upon the high regard in which the AEC is held.[118]

2.13 The ACTU was not, however, opposed to the development of model rules which unions could be encouraged, but not compelled, to adopt,[119] nor was it opposed to the introduction of standard security envelopes.[120] These matters are discussed below.

2.14 The ACTU noted that it has:

> *long held the view that the current electoral requirements are too complex and intrusive*[121]

and in that regard referred to the ACTU's submission to the Hancock Inquiry about the electoral framework contained in the former *Conciliation and Arbitration Act 1904*.

2.15 The AEC noted legal advice it has received to the effect that the imposition of standard election rules would be inconsistent with Australia's obligations under the International Labour Organisation concerning *Freedom of Association and Protection of the Right to Organise, 1948* (ILO Convention No. 87) and quoted the following comments from the ILO's Committee on Freedom of Association:

> *The right of workers' representatives to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any*

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115 Submissions p. S325.
116 ibid.
117 Submissions p. S327.
118 ibid.
119 Submissions p. S328.
120 Transcript p. EM 275.
121 Submissions p. S328.

> *intervention which might impair the exercise of this right, whether it be in determining conditions of eligibility of leaders or in the conduct of the elections themselves.* (Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (4th. ed, para 353)

and

> *An excessively meticulous and detailed regulation of the trade union electoral process is an infringement of the right of such organisations to elect their representatives in full freedom, as established in Article 3 of the Convention No. 87* (ibid para 355)*.*[122]

2.16 The Committee notes that Australia ratified ILO Convention No. 87 in 1973. Article 3 of the Convention is in the following terms:

> *1. Workers' and employers' organisations shall have the right to draw up constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and formulate their programs.*
>
> *2. The public authority shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

2.17 Article 8 of the Convention requires that, in exercising these rights, organisations of workers and employers shall respect relevant national laws. Article 8 also requires, however, that the law of the land not be formulated or applied in such a way as to impair the guarantees provided for by the Convention.

2.18 The Department of Industrial Relations (DIR)[123] noted that standardisation could be achieved by the 'compulsory adoption of detailed model rules'.[124] DIR did not support this approach, which it considered would be inconsistent with:

> *ensuring democratic and representative organisations, as it would not allow an organisation to develop systems which are appropriate to its structure and aims.*[125]

In DIR's view, such a measure would also be inconsistent with sections 3(g) and (k) and section 187A of the WR Act and with ILO Convention No. 87. In that regard DIR noted that the imposition of standard election rules could be expected to result in a complaint to the ILO's Freedom of Association Committee or an expression of concern by the ILO's Committee of Experts on the Application of Conventions and Recommendations. DIR considered it likely that those supervisory bodies:

> *... would find such a provision to be inconsistent with the principles of freedom of association.*[126]

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122 Submissions p. S371.
123 Since the evidence to this inquiry was received the Department of Industrial Relations (DIR) has been renamed the Department of Workplace Relations and Small Business.
124 Submissions p. S544.
125 Submissions p. S548.
126 ibid.

2.19 DIR noted that those State jurisdictions (South Australia and Queensland) which provide for the adoption of model rules do so on a voluntary, not a compulsory, basis.[127] DIR also argued that if organisations were unable to provide in their own rules for election processes appropriate to their own needs it:

> *... could reduce member confidence and involvement in the electoral process, with a resultant lessening of democracy within the organisations.*[128]

2.20 The Australian Industrial Registry (AIR) referred to the complexities associated with standardising rules, noting that:

> *Rules of existing organisations (including rules relating to elections for office) have evolved over many years in response to the specific nature of the membership, the structural characteristics of organisations, the number and dispersal of their members and the needs and aspirations of those members. The terms of rules of one organisation meeting the standards required in relation to democratic control, participation of members and efficient management would not necessarily meet those standards if imported into the rules of another organisation. There are often complex relationships between rules relating to the conduct of elections and other rules which are unique to each organisation and not immediately apparent. For example, rules concerning the financiality of members and those setting financiality criteria in relation to becoming a candidate in an election or participating in a ballot may be difficult to separate.*[129]

2.21 The AIR considered, however, that the standardisation of the rules of new organisations, particularly enterprise unions, seeking registration under the WR Act 'appears to be less problematic'.[130]

2.22 In light of all the evidence outlined above, the Committee concludes that it should not recommend the introduction of a set of standard election rules to govern all industrial elections under the WR Act. In particular, the Committee accepts the argument put by employer and employee bodies alike, that the imposition of a standard set of election rules would be an unwarranted interference in the right of organisations and their members to determine their own rules, structures and voting procedures. However, there is scope for the standardisation of some aspects of election procedures and therefore of rules dealing with those procedures. Recommendations on those matters are made below, including a recommendation for the development of a menu of model rules which organisations should be encouraged to adopt. The adoption of such rules should result in a greater standardisation of election procedures.

Standardised declaration envelopes

2.23 Although the AEC did not support the imposition of a set of standardised election rules, it did consider that there is scope for standardising some minor procedural aspects of

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127 Submissions pp. S547-548.
128 Submissions p. S548.
129 Submissions p. S532A.
130 ibid.

the electoral process without infringing ILO Convention No. 87.[131] In that regard, the AEC recommended that the definition of the term 'postal ballot' in section 4 of the WR Act be amended to provide that all postal ballots be by a standard form of declaration envelope determined by the AEC.[132] At present 'postal ballot' is defined as meaning:

> *... a ballot for the purposes of which:*
>
> *(a) a ballot paper is sent by pre-paid post to each person entitled to vote; and*
>
> *(b) facilities are provided for the return of the completed ballot paper by post by the voter without expense to the voter.*

2.24 The AEC explained that, under this definition, a secret postal ballot can be accomplished in two ways: by the use of unmarked envelopes for the return of ballot papers, in which case the returning officer has no way of knowing from whom the returned ballot paper came; and by the use of declaration envelopes on which the voter is required to make a declaration as to their identity and/or eligibility to vote. Voters are at least required to sign declaration envelopes and sometimes to also fill in their name and address or other details.[133]

2.25 The AEC advanced a number of arguments in favour of the use of a standard declaration envelope. Declaration envelopes enhance the security of the ballot by enabling the returning officer to compare the signature and other information on the envelope with other records to confirm the voter's identity and eligibility to vote; they provide a record of those who have apparently voted, thereby assisting in the detection of possible multiple voting; and the use of a standard declaration envelope would reduce costs.[134]

2.26 As to costs, the AEC noted that there is a variety of different declaration voting requirements in the rules of registered organisations.[135] Some are common to a number of organisations, but many organisations have developed their own provisions which require small, one-off print and/or manufacturing runs. As a result, the AEC employs a range of enveloping systems to meet these differing requirements. Returning officers must interpret rules to determine the most appropriate form of declaration voting, if any, to be used and develop appropriate procedures for counting votes. Scrutiny procedures need to be regularly revised and adapted. The AEC explained that it is common practice for returning officers to number declaration envelopes with the voters' roll number to assist in sorting returned ballots. This usually precludes the use of machines to insert the security envelope in the outer envelope. The AEC submitted that the use of a standard declaration envelope would reduce costs by simplifying the production and storage of envelopes, reducing the need for the manual insertion of declaration envelopes and streamlining scrutiny procedures.[136]

2.27 The introduction of a standard security envelope was not opposed by any witness who addressed the matter. DIR supported the AEC's proposal but considered that the standard form should be developed in consultation between the AEC and other interested parties and should be prescribed by regulation rather than determined by the AEC. DIR doubted,

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131 Submissions p. S371.
132 Submissions p. S369.
133 Submissions p. S367.
134 Submissions p. S368.
135 Examples of these are given at Submissions p. S451.
136 Submissions p. S368.

however, that this measure would result in significant cost savings as different ballot papers would still need to be printed for each election.[137] The AEC subsequently advised that it had 'no difficulty' with DIR's suggestion.[138]

2.28 The ACTU indicated that it would have 'no difficulty' with the introduction of standard declaration envelopes.[139]

2.29 Mr Gordon Hodge, an AEC returning officer submitting in a private capacity, considered that every election should include the use of security envelopes.[140]

2.30 For the reasons given by the AEC, a standard declaration envelope should be introduced for all industrial elections conducted by the AEC. It does not seem necessary to impose such a requirement for industrial elections not conducted by the AEC. The Committee agrees with DIR's proposal that the development of a standard security envelope should be the subject of consultations between the AEC and other interested parties, and that the form of the envelope should be prescribed in the WR Regulations. In that regard, for the convenience of registered organisations and industrial relations practitioners all requirements concerning industrial elections should, as far as possible, be contained in the WR Act and the regulations made under that Act.

2.31 The Committee refers to the recommendation contained in its report on the 1996 Federal election that the postal provisions of the Commonwealth Electoral Act and Referendum Act be amended to permit double enveloping.[141] The Committee considers that, in developing a standard declaration envelope for use in industrial elections, regard should be had to that recommendation.

2.32 ***Recommendation 1:***

> **That section 215 of the WR Act be amended to provide that when a secret postal ballot is conducted by the AEC it shall be by a standard form of declaration envelope. The form of the envelope should be developed in consultation between the AEC and peak employer and trade union bodies and be prescribed in the WR Regulations.**

Voters' rolls

'Continuous' versus 'cut-off' voters' rolls

2.33 The voters' roll for an industrial election is prepared by the returning officer from a list of members eligible to vote provided by the organisation concerned. A voters' roll may be either a 'continuous' roll or a 'cut-off' roll. A continuous roll is one which may be

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137 Submissions pp. S549-550.
138 Submissions p. S605.
139 Transcript p. EM 275.
140 Submissions p. S299.
141 *The 1996 Federal Election* (June 1997), pp. 56-57 (Recommendation 31).

amended up until the ballot is held, as existing or new members become eligible to vote or persons on the roll are found to be ineligible to vote. A cut-off roll is one which is closed at some pre-determined time before the ballot and to which no new names can be added.

2.34 Mr John Curtis, an AEC industrial elections returning officer, made a submission in a private capacity. Mr Curtis proposed, amongst other things, that a cut-off date should be set for the voters' roll in all elections. He explained that, at present, when an organisation provides a list of members for the purpose of enabling a returning officer to prepare the roll of voters, the list is of members who were financial at a certain date in accordance with the rules of the organisation. This often means substantial additions and deletions are subsequently given to the returning officer. Mr Curtis submitted that a cut-off date of at least three months before the opening of nominations would have the benefit that the organisation would be able to ensure that its records are up to date when they are given to the returning officer and would reduce the large number of changes, additions and deletions to the roll of voters which presently occur. He proposed that alterations such as deaths, resignations and changes of address should continue to be made after the cut-off date.[142]

2.35 Mr Gordon Hodge, another AEC industrial returning officer who made a submission in a private capacity, also supported the introduction of cut-off rolls unless a suitable alternative system is in place.[143] By a suitable alternative system Mr Hodge meant procedures to ensure that all subscription payments are accounted for and advised to the returning officer before the scrutiny of the ballot. Mr Hodge noted that some organisations have a cut-off date which is months prior to the poll dates, while at least one organisation allows a member to pay outstanding subscriptions 'just minutes before the scheduled closing time of the ballot and still record a valid vote'.[144]

2.36 Mr Hodge stated that:

> *... there are all sorts of dangers when there is a continuous roll, because it just adds to the confusion. We do not know whether we have the whole list of financial members.*[145]

He also raised a number of issues concerning the payment of subscriptions and the processing of resignations which give rise to uncertainty about a person's entitlement to vote, including the processing of payments made to shop stewards at work places or to collectors in the country, the processing of union dues by payroll deductions and the processing and date of effect of resignations. Mr Hodge believes:

> *that unless an organisation can be precise about the composition of an 'on-going' or 'continuous' voters roll and it also has a system in place to accommodate all of the members (relevant) payments, then they should have a 'cut-off' roll as at (say) the end of the previous quarter or as at the opening of nominations or the close of nominations (for example).*[146]

142 Submissions p. S131.
143 Submissions p. S304.
144 ibid.
145 Transcript pp. EM 120-121.
146 Submissions p. S305.

2.37 The ACTU supported the concept of a cut-off roll. Mr Pallas for the ACTU said:

> *I believe that there should be some reasonable period in advance of the poll when the ballot should close. I think it is unnecessarily onerous on the returning officer of the AEC and, indeed, the office holders of the organisation, to be required to continually add names.*[147]

2.38 The ACTU considered that a cut-off roll could be implemented in one of two ways: by closing the roll at some time before the ballot; or by putting a pre-condition on the period of membership necessary to be eligible to vote. The ACTU further considered that a cut-off period of between one and three months would be reasonable.[148]

2.39 The Committee notes that the model rules drafted by the Cooke Inquiry provide for a cut-off date of 60 days before the date of the election or the opening day of a postal ballot.[149] The draft *Industrial Organisations (Model Election) Rules 1997* circulated for comment by the Queensland Government require only that the roll be completed 'no more than 14 days before the election starts'.

2.40 One consequence of having a cut-off roll for an industrial election is that some members of the organisation concerned will be precluded from voting in the election, namely those members who were not eligible for inclusion on the roll at the cut-off date, but who would have become eligible for inclusion if there been no cut-off date for the roll, or if the cut-off date had been closer to the election. Provided that the cut-off date for a voters' roll is not excessively early, however, relatively few members will be precluded from voting in the election for which the roll is prepared. Nevertheless, it might be objected that the imposition of cut-off rolls would be inconsistent with the objects of Part IX of the Act referring to the democratic control of organisations and the participation of members in the affairs of their organisations. In the Committee's view, that objection is outweighed by the importance of accurate voters' rolls to the integrity of industrial elections.

2.41 ***Recommendation 2:***

> **That the WR Act be amended to require that voters' rolls in all industrial elections should be cut-off rolls. The cut-off date should be 30 to 60 days before the opening of nominations. Organisations should be given a reasonable period within which to bring their rules into compliance with this requirement, which should also be contained in the model rules recommended elsewhere in this report.**

Voters' rolls - residential or postal addresses

2.42 Section 268 of the WR Act requires each organisation to maintain a list of its members, showing the name and postal address of each member. During the course of the inquiry it was noted that the lists of members maintained by organisations may contain a greater or lesser proportion of workplace addresses as distinct from residential addresses.

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147 Transcript p. EM 289.
148 ibid.
149 op. cit. See Submissions p. S430.

That is then reflected in the voters' rolls prepared from the membership lists. Some witnesses considered that sending ballot papers to workplace addresses facilitated electoral fraud.

2.43 Mr Hodge noted that the rules of some organisations stipulate that ballot papers are to be sent to workplace addresses while others require them to be sent to residential addresses. He argued that there is less likelihood of fraud if ballot material is sent to residential addresses, but noted that many residential addresses may be out of date because members have not advised their union of a change of address.[150]

2.44 The AEC noted that the responsibility of maintaining an accurate record of members rests with the organisation concerned, not with the AEC, but the responsibility for ensuring that an organisation has a current address lies with the member concerned.[151] It noted that the sending of ballot material to workplaces raises concerns in some quarters about the security of the material, and referred to allegations made during the inquiry into the 1994 CEPU election that ballot material forwarded to members at the workplace was interfered with (mechanisms for reviewing the conduct and integrity of industrial elections are examined in the next Chapter). The AEC believes, however, that to make it compulsory for members to supply a residential address would be an invasion of personal privacy.[152]

2.45 The AEC noted that in the most recent election for the Australian Liquor, Hospitality and Miscellaneous Workers Union, 21,401 ballot papers (86.22%) were sent to home addresses, while 13.78% were sent to workplace addresses.[153]

2.46 The AEC referred to a newspaper article concerning an election then being conducted in the Australian Workers Union (AWU) which suggested that there was no known address for up to 30% of AWU members. The evidence indicates that the article greatly exaggerated the percentage of members for whom there was no known address. The AEC set out the steps which it took to contact those members for whom there was no known address, noting that this added to the cost of the elections and involved considerable resources and added pressure on the AEC's industrial elections staff. The result was that no address could be found for only 8.02% of members listed on the AWU national roll for the election. Ballot papers were not sent to those members whose address could not be established and who did not subsequently contact the AEC to say they had not received ballot papers.[154]

2.47 The QCCI acknowledged that insisting on home addresses may assist in minimising electoral fraud but noted that it would be very difficult for the AWU, for instance, to have the home addresses of many of their members because the very nature of the union is that it represents workers who are fairly itinerant.[155]

2.48 The SDA considered it axiomatic that electoral rolls should be compiled on the basis of home addresses. It explained that in the SDA:

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150 Submissions p. S301.
151 Submissions p. S369.
152 ibid.
153 Submissions p. S595.
154 Submissions pp. S602-603.
155 Transcript p. EM 103.

> *... in almost every case the member gives a home address. It would be regarded as a matter for inquiry and correction if a member omitted a home address ... that is an almost essential protection against fraud.*[156]

The SDA could see no good reason for large numbers of members to be registered under their work address for electoral purposes:

> *The propensity that might give rise to for interference with the ballot is manifest ... particularly with any organisation which has a fairly large number of part-time workers with a high rate of turnover.*[157]

2.49 The ACTU supported the right of members to give a workplace address for the voters' roll if they choose to do so. However, it noted that most unions have a strong preference for residential addresses.[158]

2.50 The ACCI did not seem to regard this issue as important, and seemed to consider that a requirement that members of organisations must give a residential address would be an undue regulation of the internal affairs of organisations. The ACCI noted that there is a clear workplace connection in industrial elections, since the members of a trade union must be employees to be eligible to join the union.[159]

2.51 Australia Post stated that in the 1994 CEPU election less than 5% of members gave a workplace address.[160]

2.52 The Committee notes that the model rules drafted by the Cooke Inquiry require the roll of voters to be in two parts. Part A is to be an alphabetical listing of the names and addresses of all the voters. Part B is to be a listing of the names of all voters under their respective workplace addresses.[161] The draft model election rules circulated for comment by the Queensland Government require only that the roll contain each member's name and address. They do not specify a residential or workplace address.[162]

2.53 The evidence on this matter does not justify a recommendation that members of registered organisations be required to provide their residential address to their organisations. The evidence of the AEC and Australia Post indicates that the proportion of workplace addresses is not unduly high. In any case, such a requirement would seem to be unenforceable: even if members were required to provide their organisations with a residential address at the time of joining, it is not clear how they could be compelled to notify the organisation each time they changed address. A requirement that organisations have a current residential address for each member would be unduly onerous and unreasonable.

2.54 However, organisations should be encouraged to keep their membership records up to date and to minimise the proportion of members for whom only a workplace address is recorded.

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156 Transcript p. EM 64.
157 Transcript p. EM 64.
158 Transcript p. EM 289.
159 Transcript pp. EM 77-78.
160 Transcript p. EM 243.
161 op cit. See Submissions p. S430.
162 Exhibit No. 4, p.8, rule 11(2).

2.55 In addition, the Committee acknowledges the risk that a ballot paper sent to a workplace address may fall into the hands of persons other than the intended recipient, particularly if the intended recipient is no longer employed at that workplace. For that reason the Committee recommends elsewhere in this report that returning officers be given the express power to direct employers as to the handling of ballot material sent to the workplace.

2.56 ***Recommendation 3:***

> **That when, having regard to the nature of the organisation concerned, the AEC considers that the membership records of an organisation contain an unduly large proportion of members for whom only a workplace address is recorded, or whose workplace and/or residential addresses are out of date, the AEC should include that fact in the post-election report to be prepared by returning officers (see Recommendation 15).**
>
> **In addition, the AEC should inform the organisation concerned and request that it take action to ensure that it has current residential and workplace addresses for as many members as possible. Model rules developed in accordance with Recommendation 4 should provide that, as far as practicable, the membership records of an organisation shall contain residential rather than workplace addresses.**

Attendance/presentation ballots versus postal ballots

2.57 The WR Act requires the rules of organisations to provide that all elections by a direct voting system are to be by secret postal ballot unless an exemption has been granted.[163] An exemption may be granted only where the Industrial Registrar is satisfied as to a number of prescribed matters, including that the rules of the organisation concerned, as proposed to be altered in the application for an exemption, comply with the WR Act and that a ballot under those rules is likely to result in greater voter participation and will afford members an adequate opportunity to vote without intimidation.[164]

2.58 Mr Quentin Cook strongly recommended that all union ballots be conducted on a presentation basis. He considered that presentation ballots have the following advantages: they circumvent the postal system, which is vulnerable to breaches of security; they increase voter turnout, particularly if members are given leave from work to vote; they reduce costs because there is no postage and they utilise existing AEC resources; they are similar to parliamentary elections and give some uniformity to the voting process; they eliminate voter intimidation and soliciting of ballot papers; and, by presentation of an acceptable form of ID, they provide greater security from multiple voting and voting by ineligible persons. He noted that where there is no convenient AEC office in which to hold a presentation ballot, voters could attend a police station. This would be preferable to attending a bank or post office

163 Section 198.
164 Section 198(2) and (3).

because people are less likely to commit a crime in a police station.[165] He explained that he was recommending presentation ballots rather than attendance ballots because intimidation and coercion can still occur at attendance ballots (where voting takes place at the workplace rather than at some other place such as an AEC office).[166]

2.59 Dr Amy McGrath OAM referred favourably to attendance ballots but did not actually recommend that they be universally adopted. She seemed to accept that they would be difficult to implement with a widely dispersed workforce, eg transport workers.[167]

2.60 Mr Michael Preston, an ex-AEC returning officer making a submission in a private capacity, stated that:

> *The use of a system which relies on the Post Office is both outdated and can be open to 'outsiders' to abuse the election [by the interception of ballot material].*[168]

He did not use the term 'presentation ballot', but recommended that all election material be delivered or completed personally by the voter.

2.61 Mr Michael Warren provided a copy of a submission he made to Moore J on behalf of the Country Metro Alliance in the course of the inquiry into the 1994 CEPU election. The submission refers to the insecure nature and vulnerability of postal ballots and states that the Country Metro Alliance:

> *cannot support a full postal ballot, only a centralised ballot in major country centres and city areas and a partial postal vote*.[169]

2.62 The AEC opposed the general adoption of attendance ballots, arguing that they are most suitable for elections where the voters are employed in defined geographical areas and in a limited number of workplaces, but are unsuitable where the voters are widely dispersed and employed in a large number of workplaces.[170] The AEC did not support the view that attendance ballots are more effective than postal ballots in ensuring the security and integrity of industrial elections, noting that in the recent inquiry into the 1994 CEPU elections the Court, having found evidence of fraud, nevertheless rejected proposals that the fresh election be by attendance ballot. The fresh election conducted in 1996 was by postal ballot incorporating a number of additional security measures.[171]

2.63 The AEC acknowledged that in those elections which it has been required to conduct by attendance ballot there has been a higher participation vote than is typically achieved by postal ballots for the same organisation (approximately 70% compared with around 35%). It noted, however, that this result was achieved by on-site voting at the workplace.[172] The AEC argued that a similar result would not be achieved in most attendance ballots were they to

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165 Submissions pp. S67-70.
166 Transcript p. EM 232.
167 Transcript pp. EM 172-173.
168 Submissions p. S503.
169 Submissions p. S8.
170 Submissions p. S384.
171 Submissions p. S384.
172 ibid.

become the norm. It referred to the 1996 CEPU ballot where about 3,600 members were given the option of attending selected AEC offices to vote: only 208 indicated that they would vote in that manner and only 60 actually did so.[173]

2.64 During public hearings the AEC advised[174] that in recent council elections in Victoria the introduction of postal ballots had, in some cases, resulted in lower participation rates than attendance ballots. The AEC stated, however, that:

> *predominantly the switch from attendance to postal ballots resulted in an increased voter participation*[175]

and that increased participation was evident in all regions, ranging from 0.2% in metropolitan areas to an average of 10.55% in non-metropolitan areas.[176]

2.65 The AEC also submitted that, for most elections, attendance ballots would be significantly more expensive that postal ballots. Again, it gave the example of the 1996 election for the NSW Postal and Telecommunications Branch of the CEPU. The Branch comprised some 18,000 members spread across NSW at around 1,500 workplaces. Some workplaces were large and some very small, eg one-person country post offices. The AEC estimated that to conduct a full attendance ballot using visiting mobile polling teams would have cost $250,000, whereas the cost of a postal ballot with the additional security measures required by the Court was estimated at $70,000. In the event, the mixed postal/attendance ballot ordered by the Court cost $92,000. The AEC noted that the estimated cost of a full attendance ballot was 3.5 times higher than the full postal ballot which included some additional security measures.[177]

2.66 The ACTU supported the retention of the ability to conduct workplace ballots[178] where unions have a high membership concentration in a few workplaces, since that can maximise voter turnout. During public hearings the ACTU distinguished between postal ballots for ordinary elections and for industrial elections, noting that unions are voluntary associations and arguing that they should not be subject to the same compulsion that, in their view, properly attaches to ordinary elections.[179] Membership of unions being voluntary, the ACTU would not wish to see:

> *levels of obligation attaching to what is essentially a voluntary function become too onerous*.[180]

2.67 In response to adverse comments by a number of witnesses about the security of postal ballots, Australia Post (AP) provided a submission on the security of mail generally and postal ballots in particular.[181] The submission emphasises the importance which AP

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173 Submissions p. S386.
174 Transcript p. EM 48.
175 Submissions p. S601.
176 Submissions p. S602
177 Submissions p. S385.
178 If an organisation obtains an exemption from the requirement that an election be conducted by postal ballot, an attendance or presentation ballot may be conducted instead, provided that the rules of the organisation make provision for such a ballot: see section 198(3) of the WR Act.
179 Transcript p. EM 290.
180 Transcript pp. EM 290-291.
181 Submissions p. S613.

attaches to security of the mail and explains the relevant policies and practices it has adopted.[182] It explains the role of the Australia Post Security and Investigation Service (APSIS)[183] and discusses the handling of postal ballots for the 1996 CEPU election, emphasising the co-operation between AP and the AEC.[184] The submission also discusses the increasing use of postal ballots in local council elections, noting that postal voting has been adopted successfully in Tasmania, Victoria and South Australia, and is the Federal Government's preferred method of conducting elections for the Constitutional Convention. The submission argues that these developments demonstrate confidence in AP's commitment to handling postal ballots in a secure, timely and cost effective manner.[185]

2.68 AP noted that the level of security provided for the 1996 CEPU election was higher than normal and provides a 'template' for handling future postal ballots in consultation with the AEC. The level of security to be deployed for future industrial elections will involve a judgement of the potential risk in each case.[186] If the AEC required a certain level of security, AP could and would provide it.[187] However, if a higher than normal level of security was required for all industrial elections (for example by model rules), AP would have to review the charge it makes to the AEC. The security of the ballot would be paramount, but AP would negotiate with the AEC to set a commercial rate for providing the higher level of security.[188]

2.69 AP also rejected certain allegations made against it in relation to the conduct of the 1994 CEPU election.[189] In summary, those allegations were that: AP management at various levels were involved in the obtaining of nearly 1,000 ballot papers which had later been fraudulently completed; there was political coercion within AP which bore on the dismissal of an AP employee who was involved in the inquiry into the election; and the employee concerned had been singled out for 'special' or 'singular' treatment in that he was dismissed for 'discourtesy'. These allegations were referred to by Dr McGrath and Mr Sheehan but not by any other witness. They were considered during the inquiry into the 1994 CEPU branch election conducted by Moore J of the former Industrial Relations Court of Australia[190] and in the decision of Judicial Registrar Locke concerning the dismissal of the employee in question.[191] The Court found that some 1,000 ballot papers had been fraudulently completed and the Judicial Registrar found that the AP employee in question had been wrongfully dismissed, but in neither proceeding were the above allegations upheld. The Committee makes no finding in respect of those allegations.

2.70 The Committee does not consider that the evidence it has received on this matter demonstrates a need to move away from postal ballots in favour of attendance or presentation ballots. It notes that in the inquiry into the 1994 CEPU elections the Court did not find that ballot material had been improperly tampered with in the course of post, although it does not

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182 Submissions pp. S614-617.
183 Submissions pp. S617-619.
184 Submissions pp. S620-625.
185 Submissions pp. S625-627.
186 Transcript p. EM 244.
187 Transcript p. EM 245.
188 Transcript pp. EM 249-250.
189 Submissions pp. S628-629.
190 op cit.
191 *Cook v Australia Post*, NI 4428 of 1995, 17 March 1997.

seem to have completely ruled out that possibility.[192] During a Committee inspection of the Southern Suburbs Mail Centre in Sydney, it was apparent that, despite a high degree of automation in the processing of mail, there is still a considerable amount of manual handling. The amount of manual handling helps to explain the suspicions entertained by some of interference with ballot material in the course of the post. On balance, however, the handling of postal ballots by AP (as distinct from what happens to those papers after they have been delivered) appears to be at least as secure as can reasonably be expected. A new generation of automated mail handling equipment which should further reduce the need for manual handling will be acquired by AP in the near future. Even if the security of postal ballots in the mail can never be absolutely guaranteed, however, a general requirement that industrial elections be by presentation ballot or attendance ballot would, in many cases, be impractical and unduly expensive.

2.71 The Committee is not satisfied, on the evidence before it, that attendance or presentation ballots necessarily result in higher voter participation than do postal ballots. The Committee notes that an exemption from the requirement to hold a postal ballot may be obtained only if the Industrial Registrar is satisfied that, amongst other things, the conduct of the ballot is likely to result in a fuller participation rate than would result from a postal ballot and will afford an adequate opportunity of voting without intimidation.[193] The Act, therefore, requires exemptions from the postal ballot requirement to be decided on a case by case basis and the Committee considers that situation should be retained.

2.72 However, the AEC and AP should continue to consult on individual industrial elections, with a view to ensuring an appropriate level of security having regard to the likelihood of attempts to improperly tamper with ballot material in the course of the post.

Model rules

2.73 The AEC submitted that it could develop a 'menu' of model rules which would allow organisations considerable flexibility in selecting an electoral system appropriate to their individual circumstances. The 'menu' could, for example, contain a standard first-past-the-post model, a standard optional preferential model and one or two proportional representation models. The benefits of using model rules might include: improved integrity through the use of uniform measures; and savings arising from the use of rules that might be expected to be more cost effective for the AEC to apply. Savings might also arise from a reduction in litigation, since many inquiries before the courts result from differing interpretations of the rules in question.[194]

2.74 The AEC considered that, while the savings might not be significant, the use of model rules would serve the public interest by enhancing the actual and perceived integrity of industrial elections.[195]

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192 op. cit. at p. 2,534.
193 Section 198(3)(b) of the WR Act.
194 Submissions pp. S371-372.
195 Submissions p. S372.

2.75 Although the majority of witnesses were opposed to the imposition of a standard set of election rules, there was greater acceptance of the concept of model rules, provided that organisations would not be compelled to adopt them. The ACTU indicated that it would support the development of a:

> *set of rules or a series of rule options that organisations pick up which would minimise the exposure to litigation of those organisations*.[196]

It considered that having standard rules put out by the AEC as a guide that unions could modify or incorporate as they saw fit would be a 'particularly desirable process'. The ACTU noted the assistance which unions have received from the AIR in relation to rules matters and expressed the view that in the development of model rules the AIR Organisations Branch would have to work closely in co-operation with the AEC.[197] The ACTU agreed that the desire to have rules which are in accordance with the Act and relevant case law would be sufficient incentive to adopt rules which were at least consistent with any model rules prepared as guidelines.[198]

2.76 As noted above, the ACM indicated that it would accept a greater degree of standardisation of the election process provided that it did not interfere with the fundamentals of an organisation's structure and character.[199]

2.77 Dr McGrath referred to the model rules drafted by the Cooke Inquiry[200] and argued that the adoption of such rules is 'imperative'.[201]

2.78 DIR also referred to the recommendation of the Cooke Inquiry concerning model rules.[202] DIR noted that there are, broadly, three possible approaches to introducing some standardisation of election rules: the compulsory adoption of detailed model rules (which was discussed above and which DIR opposed); detailed model rules provided as guidelines which organisations could chose to adopt in whole or in part; and further standardisation of particular election requirements.[203]

2.79 DIR saw:

> *some value in the concept of model rules which would act as guidelines for organisations, with organisations able to adopt such rules in whole or in part, as they consider appropriate*.[204]

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196 Transcript p. EM 270.
197 Transcript p. EM 271.
198 Transcript p. EM 272.
199 Transcript p. EM 87.
200 op cit. A copy of the Cooke Inquiry's *Sixth and Final Report* containing a copy of the model rules is attached to the AEC's submission - see Submissions p. S429.
201 Submissions p. S91 & p. S104.
202 Submissions p. S547.
203 Submissions p. S544.
204 Submissions p. S548.

However, DIR noted that the development of such rules would be complex and argued that it should occur only after:

> *... significant consultations with organisations, their members and others with experience in the conduct of industrial elections and knowledge of the rules of organisations, including the AEC and the Australian Industrial Registry...*[205]

2.80 DIR also considered that:

> *the adoption of such an approach should only occur following careful consideration by the Committee on Industrial Legislation of the National Labour Consultative Committee (a consultative statutory body, chaired by the Minister for Industrial Relations which contains representatives of peak trade union and employer bodies).*[206]

2.81 The Committee agrees with DIR that the development of a menu of model rules would be a complex task, but considers it is a task which should be undertaken. If organisations were provided with a menu of model rules which they could adopt in whole or in part, or not at all if they chose, it would over time have a number of benefits. These would include a greater standardisation of election rules and a reduction in the number of existing rules which are difficult or complex to interpret and apply.

2.82 If model rules are to be developed but organisations are not to be required to adopt them, the question arises as to how they might be encouraged to do so. One possibility is that where an organisation declines to adopt model rules it should be required to pay the difference between the cost of conducting an election under the organisation's rules and under the model rules (assuming an election under the model rules would be cheaper to conduct). The AEC raised this possibility[207] but seemed to reject it on the ground that under such a system organisations would seek exemptions to conduct their own elections, which could lead to a mass exodus from officially conducted elections. In the AEC's view that would not be in the public interest.[208] In addition, legal advice obtained by the AEC indicates that a system under which organisations were required to have their elections conducted by the AEC but were charged a fee only where they declined to adopt model rules would contravene ILO Convention No. 87 unless such fees could be regarded as merely nominal.[209]

2.83 The AEC also stated that, because they are happy with the current arrangements, very few organisations have applied for exemptions from AEC-conducted elections. They noted that a number of submissions to the inquiry indicated that if a charge or fee was introduced the organisations concerned would consider opting out of the system and running their own elections.[210]

2.84 The question of whether the AEC should be able to charge fees for the conduct of industrial elections is discussed in detail in Chapter Four of this report. For present purposes

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205 Submissions p. S549.
206 ibid.
207 Submissions p. S371.
208 Submissions pp. S372-373.
209 Submissions p. S464.
210 Transcript p. EM 19.

it is sufficient to say that the Committee does not consider the introduction of fees would be an appropriate method of encouraging organisations to adopt model rules.

2.85 In this regard, the ACTU commented that:

> *Unions do not wish effectively to subject their organisations to protracted processes of litigation which are time consuming and, in many cases, distractive of the organisation's principal objective. So we do see it as particularly important that, to the extent that advice can be offered, the ACTU would encourage it being taken up*.[211]

The ACTU was there responding to a question from the Committee as to whether:

> *... the desire to have union rules in accordance with the Act and in accordance with relevant principles in case law would, in itself, be probably sufficient incentive for unions to adopt rules which are at least consistent with those guidelines?*

2.86 The availability of model rules as guidelines which, if followed, would ensure compliance with the Act, avoid anomalies and ambiguities that exist in some current rules, and enhance the efficiency and integrity of elections, should be sufficient incentive for organisations to adopt or at least ensure consistency with those model rules. Where the AEC encounters difficulties with the existing election rules of an organisation, the AEC and, where appropriate, the AIR, should encourage the organisation to adopt appropriate model rules.

2.87 ***Recommendation 4:***

> **There should be consultations between the AEC, the AIR, DIR and peak employer and union bodies with a view to developing a 'menu' of model rules for the conduct of industrial elections. Any model rules should deal only with the conduct of industrial elections and not with matters such as management structures, terms of office and eligibility to vote and to be a candidate. Organisations should be strongly encouraged but not required to adopt model rules, and should have the further option of adopting such rules in whole or in part.**

Problem rules

2.88 The AEC noted that:

> *When appropriate, the AEC alerts organisations to any ambiguous or difficult rules so that these may be reviewed by the organisations concerned*.[212]

This was in the context of references to the difficulties posed by the diversity of electoral systems and procedures encompassed by the rules of organisations. The AEC advised that some organisations are co-operative and will address any problems identified by the AEC

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211 Transcript p. EM 272.
212 Submissions p. S370.

while others will not. The AEC has no power to require an organisation to change its rules and noted that if such a power was to be given to the AEC it would have to be given in a way that did not infringe ILO Convention No. 87.[213]

2.89 The AEC advised that it would welcome legislative support for a process of consultation with organisations on difficult and ambiguous rules:

> *... 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 organisations to go through a formal consultative process somehow.*[214]

2.90 The AEC had reservations, however, about whether it should be given standing under section 208 of the WR Act to seek a declaration that a rule of an organisation was harsh, oppressive or unjust and therefore contrary to the Act and invalid, noting that such a process might result in the AEC becoming involved in the internal politics of an organisation, something it would not want to do.[215]

2.91 In the context of discussing model rules, the ACTU noted that organisations may seek advice from the Industrial Organisations Branch of the AIR about whether proposed rules comply with the requirements of the Act. They said:

> *It would be ... only a minor administrative addition to require the Industrial Organisations Branch to also take into account an encouragement of standardisation in any advice they give*.[216]

2.92 The ACTU noted that unions do not wish to subject their organisations to protracted processes of litigation and therefore it is important to ensure rules comply with the requirements of the Act and relevant case law. They saw a need for:

> *administrative procedures and dialogue between the AEC and the Industrial Registry to ensure that the utility of that advice is maximised*.[217]

2.93 The SDA noted that the service of the AEC and the AIR is very valuable when differences of opinion arise as to the interpretation of a rule.[218]

2.94 For reasons concerning the autonomy and democratic control of organisations, the AEC should not be given power to compel an organisation to amend a difficult or ambiguous rule. However, organisations should be encouraged to amend such rules when they are identified by the AEC. It is for that reason that Recommendation 15 provides that post-election reports prepared by returning officers should identify any rules that were

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213 Transcript pp. EM 13-14.
214 Transcript p. EM 308.
215 Transcript pp. EM 308-309.
216 Transcript p. EM 271.
217 Transcript p. EM 272.
218 Transcript p. EM 62-63.

difficult to interpret or apply. Some additional encouragement to amend problem rules also seems desirable.

2.95 ***Recommendation 5:***

That the WR Act be amended to provide that:

(a) where a post-election report identifies any rule (or rules) of the organisation or branch concerned that was difficult to interpret or apply, the report shall be accompanied by a letter inviting the organisation or branch concerned to hold discussions with a view to amending the rule;

(b) the accompanying letter shall be published in the next journal or newsletter of the organisation or branch concerned, together with the post-election report;

(c) within 30 days of receiving such an invitation the organisation or branch concerned shall respond in writing and a copy of the response shall be published in its next journal or newsletter;

(d) in considering an amendment of the rule (or rules) in question, regard shall be had to any model rules contained in the WR Regulations; and

(e) failure to comply with paragraphs (b) and (c) above is an offence under Part XI of the Act.

CHAPTER THREE

MECHANISMS FOR REVIEW

3.1 The terms of reference for the inquiry required the Committee to consider the mechanisms for the review of the conduct and integrity of industrial elections. The existing mechanisms are outlined in Chapter One. In summary, the Federal Court of Australia may inquire into an alleged irregularity in relation to an election in an organisation or a branch of an organisation.[219] If the Court finds that an irregularity did occur it may make a number of interim and final orders, including an order declaring an election to be void and directing that a fresh election be held.[220] The Court may, however, make such an order only if it is of the opinion that, having regard to its findings in the matter, the result of the election may have been affected, or may be affected, by irregularities.[221] An application for an inquiry may be made by a person who is, or who was, within the preceding 12 months, a member of the organisation concerned.[222]

3.2 The AEC advised that during the period 1991-96 it conducted over 3,500 industrial elections. Only about 1.5% of those elections resulted in an inquiry and the Court ordered only eight fresh elections to be held.[223]

3.3 Those figures were not disputed by any other submission or witness. Some witnesses did, however, either expressly or by necessary implication, argue that many instances of fraud in industrial elections go undetected and, consequently, that the figures produced by the AEC do not represent the real extent of malpractice. Dr McGrath argued that the adoption of model rules as recommended by the Cooke Inquiry:

> *... is imperative to judge by Marshall Cooke QC's declaration to the Forum on Electoral Fraud, held by the HS Chapman Society on November 9, 1996 that 'almost every union election in Australia is corrupt'.*[224]

3.4 The Committee notes that the general conclusions of the Cooke Inquiry stated that:

> *Ballot rigging in union elections in Queensland and indeed throughout Australia is much more wide-spread than is generally supposed and has gone undetected for years.*[225]

3.5 Dr McGrath referred also to the 1994 CEPU elections and to other industrial elections where allegations of fraud and ballot rigging were made.[226]

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219 WR Act, Part IX, Division 5.
220 WR Act, ss. 221, 223.
221 WR Act, s. 223(4).
222 WR Act, s. 218.
223 Submissions p. S359. A list of the eight elections in question is at Transcript p. EM 25.
224 Submissions p. S91.
225 *Sixth and Final Report of the Commissioner Appointed to inquire into the activities of particular Queensland Unions,* July 1991, p.6 (see Submissions, p. S405).
226 Submissions pp. S94-95.

3.6 Mr Paul Sheehan, a journalist with the *Sydney Morning Herald*, was also clearly of the view that a considerable amount of malpractice in industrial elections goes undetected or is not acted upon. He stated that:

> *As far as I am aware, the combined forces of the Australian Electoral Commission, the office of the Commonwealth Director of Public Prosecutions, and the office of the Australian Government Solicitor, did not manage to successfully prosecute a single union fixer during the entire 13 years of the Hawke-Keating government. It was not as if they had a shortage of issues. A check of the Herald's online data-base found 1,529 stories or letters about various rorts in the union movement during the past decade.*
>
> *Several thousand union elections were conducted during the 13 years of Labor government, a period during which the Cooke Inquiry into election fraud in Queensland commented in 1990 ... that rorting was commonplace in union elections. Yet the Herald is unaware of a single successful prosecution stemming from union election irregularities during the Labor years.*[227]

3.7 The AEC's position regarding the allegation that fraud and ballot-rigging in industrial elections is widespread and largely undetected was that most of the allegations are no more than assertions and that the AEC can act only on substantive evidence. In the public hearings the Electoral Commissioner, Mr Bill Gray AM, said:

> *We have no evidence, apart from assertions made by various people, that fraudulent activity is endemic ... We have brought before you the evidence that we have. I think it takes more than assertion .... I appreciate that there are those who will publicly assert otherwise; that they believe that something is not being detected. The opportunity has been there for people to come before this inquiry. One assumes that, if people have evidence which substantiates the claim that fraudulent activity is endemic, it will be laid before you. I have not seen that evidence yet.*[228]
>
> *... the AEC certainly does not seek to be dismissive of what people within the community have expressed as suspicions or concerns about the way in which they believe elections are conducted. We can only draw upon what we have had placed in front of us. We can only draw upon what has been put before the courts and the findings of those courts ...*[229]
>
> *I appreciate that there are those who believe, as they do with Federal elections, that there is rorting on a wide scale and that there are various fraudulent activities undertaken by parties, et cetera. But they are assertions; they are not proven and they are not the subject of evidence that is placed before you and others or the courts. I do not think that the assertion alone is sufficient to determine the issue. I think the assertions have to be followed by the presentation of substantive evidence.*[230]

3.8 Mr Curtis noted that:

> *With every election you conduct, you hear people making allegations ... When you conduct an election, people will ring up and make allegations that the other side is going to rort the election. I cannot sit here and tell you that I have no evidence. I am saying that people tell me that these things occur from time to time. When you ask them to give more details or when you ask them whether*

227 Submissions p. S516.
228 Transcript p. EM 33.
229 Transcript p. EM 34.
230 Transcript p. EM 36.

> *they have reported it to the police, they will say, 'You know, it's hypothetical and it could happen', and they backtrack. This is the area in which we work.*[231]

> *... anybody who conducts elections will tell you that they get a lot of allegations about malpractice.*[232]

3.9 Mr Pallas of the ACTU, referring to the conclusion of the Cooke Inquiry quoted above, stated that:

> *It is disturbing. What I found most disturbing about those comments was the use of a generalist statement rather than specific reference to a factual situation. Certainly there were a number of ballots which were the subject of inquiry where problems had been identified, but I put in mitigation of the integrity of the balloting process the views of [Don Rawson], who is perhaps the most pre-eminent academic on union elections when he said, 'After nearly 30 years of conducting union elections, while being observed by people who would have [been] delighted to establish bias or improper conduct, the reputation of the electoral office in this area is as good as any reputation is likely to be'.*

> *It is important, therefore, to separate criticisms of the balloting process which may or may not be true. In many cases, they are the subject of political hyperbole for what are essentially sectional interests. Putting those to one side, the electoral office and the conduct of its function has been beyond repute in our estimation. Suggestions of impropriety in balloting by candidates or participants in the election is something that needs to be dealt with on a case by case basis. Generalist statements about improper conduct can quite simply and appropriately be dismissed, unless it is backed up by hard and substantiated evidence.*[233]

3.10 As to why persons making allegations of electoral malpractice are reluctant to come forward with hard evidence, Dr McGrath quoted the Cooke Inquiry conclusion that:

> *Witnesses to ballot rigging rarely come forward, either through apathy or fear of intimidation and/or victimisation. In most cases, then, although there may be strong rumours about what happened, no direct evidence of it can be produced before the Federal Court.*[234]

3.11 Dr McGrath referred also to the observation of the Cooke Inquiry that:

> *... cost was another inhibiting factor deterring anyone who felt they had a good reason to succeed in an application for an inquiry from proceeding, because he 'may, at the end of the case, be allowed a payment in the nature of legal aid, but he must fund the proceeding out of his own pocket in the hope of ultimate reimbursement'.*[235]

3.12 In addition, Dr McGrath referred to the remarks of Sir Percy Spender during the debate on the 1949 bill which introduced the forerunner to the present legislation:

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231 Transcript p. EM 138.
232 ibid.
233 Transcript pp. EM 294-295.
234 Submissions p. S97.
235 ibid. Sections 342(2)(d) and (e) of the WR Act authorise financial assistance for, respectively, a person who applied for an inquiry into an election, where the Court found that an irregularity happened; and a person who applied for an inquiry into an election, where the Court certified that the person acted reasonably in applying.

> *Another reason why it is unlikely that an individual unionist will challenge the result of a ballot is the absence of any certainty that, even if his challenge is successful, he will recover his costs. He runs the risk of engaging in litigation that may ultimately impoverish him ... except in the rare case in which a man is prepared to put his future, and his small fortune, to the touch, no irregularity, however serious, will be challenged in court.*[236]

3.13 The Cooke Inquiry concluded, amongst other things, that:

> *Investigations into allegations of ballot rigging are given a very low administrative priority with the result that few allegations are determined conclusively*.[237]

3.14 The AEC, however, advised that:

> *Occasionally the AEC receives information and allegations concerning possible breaches of these provisions. Such allegations are always taken seriously. The precise nature of the AEC's response may depend upon the kind of offence alleged, the degree of initial evidence, and legal advice from the Australian Government Solicitor. All allegations are investigated by the AEC to the extent that they can be or, more usually, are referred to the Australian Federal Police for action.*[238]

3.15 The Committee is unable to come to a conclusion about the extent of malpractice in industrial elections. It may be that more instances of fraud and ballot-rigging occur than are detected or than result in an application to the Court for an inquiry. It is also reasonable to suppose that some false allegations are made, either deliberately to cause mischief or in the belief that they are true. If, for whatever reason, persons making allegations of electoral misconduct will not come forward to substantiate their assertions the AEC and the Federal Police are in a difficult position. In appropriate cases a decision has to be made as to whether there is sufficient evidence for a successful prosecution. Such a decision can be made only by those in possession of all the facts and who know what is necessary to mount a prosecution that has some chance of success.

3.16 Given the number of allegations of electoral fraud made over the years and the conclusion of the Cooke Inquiry that ballot rigging is widespread, it may seem surprising that there have been so few prosecutions. As noted above, many allegations are not supported by evidence. In some cases this may be because they are made by disgruntled candidates who then find there is no evidence, or insufficient evidence, to support their suspicions, or because of difficulties in accessing the legal processes necessary to challenge an election result. Later in this Chapter the Committee recommends that the AEC be given standing to initiate inquiries into elections. Such a measure should go at least some way towards encouraging persons who believe that fraud or ballot-rigging is occurring to come forward without fear of intimidation, reprisal, or financial ruin. The Committee also recommends increases in the

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236 Australia, House of Representatives, 1949, *Debates*, vol. 203, p. 2073; quoted at Submissions, pp. S97-98.

237 Sixth and Final Report, p.6 (reproduced at Submissions, p. S405).

238 Submissions p. S365.

penalties prescribed for electoral offences. Apart from their deterrent effect, the increases would have the effect of removing the current limitation of 12 months for the commencement of prosecutions for electoral offences. It is to be hoped that these measures will both deter ballot fraud and facilitate prosecutions where such fraud is established.

Institutional arrangements

3.17 As discussed in the following paragraphs, the AEC and Dr McGrath suggested institutional changes to the review mechanism, but there was only limited support for such changes.

3.18 The AEC noted that the vast majority of inquiries have centred on technical issues such as the interpretation of rules and disputes about eligibility. It questioned whether the resources of a court of law are best utilised on such matters and recommended that consideration be given to introducing a two-tiered system of review. Under that system jurisdiction for inquiries involving purely technical issues not involving allegations of misconduct would be vested in judicial registrars of the Federal Court or, alternatively, the Australian Industrial Relations Commission (which is a non-judicial body). Proceedings involving electoral fraud constituting criminal activity would remain with the Court. In addition, there would be a right of appeal to the Court, but only in cases involving complex issues of law or fact or important principles of general significance.[239]

3.19 DIR 'on balance', did not support the AEC's proposal. It agreed that such a system would have advantages of speeding up the processing of complaints, reducing the strain on the Court system and reducing costs and legal formalities, but noted the potential disadvantages associated with the establishment of non-judicial bodies, namely the cost of setting up and maintaining such a body and the possibility that such a body would develop its own rules and procedures which could result in greater legalism and complexity for prospective applicants. DIR referred also to the difficulties in precisely defining what matters would properly be within the jurisdiction of a non-judicial body, and to the fact that referring a matter to such a body would not prevent the matter going to the Court on appeal (if provided for) or by way of judicial review or prerogative writ. DIR referred also to the comments of the ILO's Committee on Freedom of Association that, if official supervision of industrial elections is deemed necessary, it should be carried out by a judicial authority.[240]

3.20 The ACCI acknowledged that, if the net result was that election inquiries concerning technical irregularities were dealt with more quickly and at less cost, there may be some benefit in having them dealt with by a judicial registrar or industrial registrar.[241]

3.21 The ACTU opposed the AEC proposal. They considered that:

> *one of the greatest safeguards against abuse of an electoral process is that people can be brought before a court and held to account for their conduct*.[242]

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239 Submissions pp. S376-377.
240 Submissions pp. S558-559.
241 Transcript pp. EM 80-81.
242 Transcript p. EM 281.

The ACTU would have grave concerns even if the non-judicial body concerned was a quasi-judicial body such as the Australian Industrial Relations Commission.[243] The ACTU noted that industrial elections is a specialised area and that the capacity of people to stand for and hold office and to work in their chosen industries can depend on the outcome of elections and inquiries into elections.[244] The ACTU emphasised that, if a two-tiered system was introduced then any decision by the lower tier would inevitably be appealed. Mr Pallas, for the ACTU, said:

> *... under that scenario if you go to the commission or to a judicial registrar on what is described as a technical matter, whether you could constitute a candidate for office, these matters would inevitably be appealed. Without question, they would be appealed*.[245]

3.22 In response to questions from the Committee, Mr Pallas stated his view that, because of the inevitability of appeals, such a system would be a waste of both time and money and that issues as to the eligibility and the construction of rules are 'the most highly litigated area of industrial relations, I would hazard a guess, bar none'. In this context, the ACTU reiterated its support for a process by which questions of law could be referred to the Court during the election process.[246]

3.23 Dr McGrath considered the proposal to use judicial registrars to be 'ridiculous' because:

> *Electoral law is very complex and those people are not trained or equipped for the complexities*.[247]

For her part, Dr McGrath recommended that:

> *A specialist tribunal sit on challenges after elections, and train counsel in the complexities of electoral law, and maintain a data base of relevant judgements*.

3.24 This follows from Dr McGrath's comments that:

> *A case could fairly be made out for disassociating hearings altogether from Industrial Courts on the grounds that the electoral process is such a specialised subject, any arbitrator in disputed returns needs to be as expert in the field as those who represent the law (the returning officers) and those who are said to be seeking to subvert it. This can be a chancy matter both with judges and legal counsel.*[248]

3.25 Essentially, Dr McGrath favoured a less adversarial and more inquisitorial process for the review of industrial elections, in which the tribunal would have powers akin to the powers of a royal commission. Her evidence, however, disclosed some confusion about the powers of the Court in conducting inquires under the WR Act. She stated, for example, that in

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243 ibid.
244 ibid.
245 Transcript p. EM 282.
246 ibid.
247 Transcript p. EM 166.
248 Submissions p. S104.

conducting an inquiry the Court is bound by the rules of evidence[249] whereas section 222(3)(b) of the WR Act expressly states that in conducting an inquiry into an election:

> *... the Court is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it considers just.*

3.26 Dr McGrath also referred to the tendencies of courts to become too familiar with the adversaries and to tend towards narrow legalism.[250] She did not seek to explain how a specialist tribunal would avoid those tendencies.

3.27 With the exceptions of the AEC and Dr McGrath no witnesses proposed any such changes or expressed dissatisfaction with the existing institutional arrangements, which the Civil Contractors Federation described as 'simple and very effective'.[251] The SDA noted that the existing provisions correspond in general to the recommendations of the Hancock Committee and supported their continuation.[252] The ACTU also referred to the relevant recommendations of the Hancock Committee and stated that the ACTU:

> *... considers the review mechanisms both effective and broad ranging in their capacity to maintain the integrity of the electoral process and to remedy any perceived difficulties. The fact that the function is performed in the context of judicial review is of particular significance*.[253]

3.28 In conclusion, there do not appear to be sufficient grounds for recommending a change to the existing institutional arrangements for the review of industrial elections. The Committee agrees with the comments made by DIR about the hazards of establishing specialist tribunals and believes that such tribunals should be established only for the most compelling reasons. The Committee is also mindful of the comments by DIR about the difficulty of precisely defining the jurisdiction of a specialist tribunal and of the comments by the ACTU about the inevitability of appeals from decisions of a specialist tribunal. The creation of a specialist tribunal or the involvement of an ombudsman or other agent of review would unnecessarily disrupt what the major players seem to regard as a satisfactory institutional arrangement and would be likely to create problems and uncertainty where few seem to exist at present.

Should the AEC have standing to initiate an inquiry?

3.29 At present section 218 of the WR Act provides that an application to the Court for an inquiry into an election can be made only by a member of the organisation concerned or a person who was a member within the preceding 12 months. The AEC recommended that section 218 be amended to also allow the AEC to apply for an inquiry. In making that recommendation the AEC noted that, although the AEC may become aware of an irregularity

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249 Transcript p. EM 167.
250 Submissions p. S104; transcript pp. EM 167-171.
251 Submissions p. S83.
252 Submissions pp. S25-26.
253 Submissions pp. S339-340.

once an election has been completed, an inquiry cannot be initiated unless and until a member of the organisation challenges the result.[254]

3.30 The ACCI had no objection to the proposal.[255]

3.31 The SDA stated that it had no policy on the matter but could see no good policy reason why the AEC should not have the right, and perhaps the duty, to bring an apparent irregularity to the notice of the Court for an inquiry.[256]

3.32 The QCCI expressed reservations about the proposal, stemming from their view that the AEC should not be an investigator or a regulator.[257] The QCCI suggested that section 218 be amended to make it easier for individual members of organisations to apply for an inquiry, while discouraging frivolous and vexatious applications. The QCCI noted that the AEC has extensive powers to ensure a 'clean' election and can make checks on the voters' roll but is limited in what it can do to achieve a 'correct' roll or to totally eliminate ballot rigging. They opposed the AEC being given investigative powers but proposed that, when the AEC has concerns that serious irregularities may exist in relation to an election, it should have the capacity and responsibility to refer the matter to the Attorney-General. Consequently, the QCCI proposed that section 218 be amended to include the Attorney-General as a person who may apply to the Court for an inquiry.[258]

3.33 The ACTU stated that, having regard to the integrity with which the AEC conducts industrial elections, the ACTU would probably support the proposal. The ACTU would support measures enabling the AEC to obtain court orders or directions during an election concerning the roll of voters and eligibility to participate in the ballot. This would have the advantage of avoiding a situation where the AEC forms a view about who is eligible to stand for office but an application for injunctive relief is immediately made to the Court.[259]

3.34 Dr McGrath considered that there was no inconsistency between the AEC conducting elections impartially and having a policing role. She considered that to be the role of a returning officer. She illustrated her point by referring to the action of the returning officer in a Liquor Trades Union election who exposed electoral fraud by going out to the worksites.[260] Dr McGrath subsequently recommended that:

> *The Registrar and his officers, or an independent ombudsman, be a means of appeal on irregularities and intimidation etc during an election; and have the same right to initiate proceedings as the Act gives individual unionists.*

3.35 Mr Sheehan also considered that the AEC should play a more pro-active role in detecting offences. He stated that, amongst other things, the AEC should have power 'to go out and troll the workplaces for illegality'.[261]

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254 Submissions p. S376.
255 Transcript p. EM 74.
256 Transcript p. EM 65.
257 Transcript p. EM 107.
258 Submissions p. S586.
259 Transcript p. EM 277.
260 Transcript p. EM 184.
261 Transcript p. EM 192.

3.36 Mr Cook considered that the AEC returning officer should be both a 'ballot facilitator' and a 'ballot enforcer'. He acknowledged that the ability of the AEC to play a policing role depended on how much money and other resources they had; however, he considered that where the AEC knew that elections in a particular organisation had a history of malpractice they should take complaints seriously.[262]

3.37 DIR gave qualified support to the proposal that the AEC be given power to make an application for an inquiry, noting that:

> *In many respects, it is a logical extension of its current role, and similar to the role it performs in relation to federal elections.*

However, DIR also noted:

> *... possible corollaries to the AEC having such a role. Extending standing to the AEC may encourage potential applicants to approach [the] AEC, rather than pursuing claims at their own expense:*
>
> . *this may result in greater scrutiny of industrial elections;*
>
> . *on the other hand, such a move may encourage vexatious complaints to the AEC (particularly if there is no cost in seeking to have the AEC investigate and bring applications), and delay elections.*[263]

3.38 The AEC advised the Committee that it neither disagreed with, nor dismissed, DIR's view on this matter, but submitted that:

> *... the ability to take direct action where we become aware of an irregularity, outweighs any disadvantage. Not least, this would enable the AEC to take direct action upon the discovery of an error of our own making*.[264]

3.39 In its report on the five Queensland unions it was required to investigate, the Cooke Inquiry observed that in an election inquiry the Court relies on normal adversarial processes, and that, for a variety of reasons including cost, witnesses to ballot rigging rarely come forward.[265] The Cooke Inquiry referred to the comments of Sir Percy Spender during the debate on the 1949 Chifley amendments, that the way to deal with the deterrent effect of costs was to give the Registrar and his officers the same right to initiate proceedings as was given to individual unionists (at that time the Registrar conducted elections).[266] The Cooke Inquiry saw:

> *merit in the suggestion that the Industrial Registrar or some other official should be given the power to initiate an election inquiry on his own motion*.[267]

3.40 The Committee is mindful of the reservations expressed by DIR about this matter, but considers that the AEC should be given the right to initiate an inquiry and, in some circumstances, an obligation to do so. It is quite unsatisfactory that if the AEC becomes

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262 Transcript p. EM 227.
263 Submissions p. S557.
264 Submissions p. S604.
265 op cit. Second Report, paras 10.8.7 - 10.8.8
266 ibid. para 10.8.9
267 ibid. para. 10.8.10.

aware, by whatever means, of a possible irregularity in relation to an industrial election, it cannot refer the matter to the Court for an inquiry but must depend upon some other person to do so. Because of the importance for an organisation and its members, including candidates in an election, the Committee considers that the decision on whether to refer a possible irregularity to the Court should be made by the Electoral Commissioner, or an officer of the AEC to whom the Electoral Commissioner has delegated that power, rather than by the returning officer conducting the election. This would have the additional advantage of deflecting pressure to initiate an inquiry, exerted by a disgruntled candidate or group, from the returning officer onto a person who is not directly involved in the conduct of the election but who is ultimately responsible for the proper conduct of the election.

3.41 No witness who addressed this issue suggested that it would be inappropriate to give the AEC standing to initiate an inquiry, although Dr McGrath recommended that it be given to the Industrial Registrar or an independent ombudsman. The Committee does not consider that standing to initiate an inquiry should be given to the Attorney-General, the Industrial Registrar or some other person or authority instead of to the AEC. That would introduce an unnecessary step in what should be an expeditious process. The Industrial Registrar has no role in the conduct of elections and it would be necessary to provide a mechanism whereby the Industrial Registrar was informed of an alleged irregularity and had to decide whether the information justified an application to the Court. A similar mechanism would have to be provided in respect of the Attorney-General. In addition, the exercise by the Attorney-General of the right to initiate an inquiry might invite allegations and perceptions of political interference in a union election.

3.42 ***Recommendation 6:***

That:

(a) section 218 of the WR Act be amended to include the Electoral Commissioner as a person who may make an application for an inquiry by the Court into an alleged irregularity; and

(b) the WR Act should be further amended to provide that, where the Electoral Commissioner is satisfied that it is more likely than not that an irregularity has occurred, the Electoral Commissioner must make an application for an inquiry.

Whether the right to apply for an inquiry should be restricted in the public interest

3.43 The ACCI raised the cost of challenged and disputed elections, stating that it 'suspects' that industrial elections, especially those for trade unions, are amongst the most disputed of all Australian polls. It suggested that the Committee consider:

> *... further restricting the access of disgruntled candidates and their supporters to (a) the investigation of any election, and (b) any new elections*.[268]

3.44 During the public hearings the ACCI explained that this proposal related only to AEC-conducted elections. In the ACCI's view, there should be a strong presumption that an AEC-conducted election has been properly conducted and therefore there should be limits to the extent to which it can be challenged. In their view, an individual should not be able to challenge an AEC-conducted election.[269] The ACCI appear to have in mind that the right to challenge an election should be restricted to a minimum number or percentage of the members of the organisation concerned. They stated that an aggrieved candidate who wished to challenge an election should not have any difficulty in securing 100 persons to support the challenge. The ACCI acknowledged, however, that:

> *It seems to be problematic to try to say that the rights of a member or a group of members to challenge at law the results of an election should be circumscribed.*[270]

3.45 The Committee is not attracted to this proposal. The WR Act does require that certain applications must be made by a minimum number or percentage of the members of an organisation[271] or approved by a majority of members at a general meeting.[272] However, to impose a similar requirement where a person believes there has been an electoral irregularity (which may constitute a criminal offence) appears to stand in a different category. In addition, the restriction proposed by the ACCI is inconsistent with maintaining the integrity of industrial elections.

The time limit for commencing prosecutions for electoral offences

3.46 Section 315 of the WR Act prescribes a number of offences in relation to elections. Offences in relation to ballots are set out in section 317. Section 316 deals with conduct obstructing the Industrial Registrar in relation to an election inquiry. Sections 310, 313 and 314 also create offences relevant to the conduct of elections.

3.47 Prohibited conduct includes:

- impersonating another voter;
- destroying or defacing ballot papers;
- multiple voting;
- forging nomination or ballot papers;

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268 Submissions p. S112.
269 Transcript p. EM 76.
270 Transcript p. EM 73.
271 See section 136(10) concerning applications for the Australian Industrial Relations Commission to order secret ballots.
272 See section 189(1)(g) concerning applications for registration.

- destruction or other interference with a ballot box;
- failing to provide a list of members to an electoral officer; and
- offering threats or inducements to compel another person to withdraw their nomination, or to vote, or not vote, for a particular candidate.

3.48 The penalty for an offence under sections 315 and 317, which apply only to individuals, is $500 or imprisonment for six months, or both. Sections 310, 313, 314 and 316 apply only to bodies corporate or to bodies corporate and natural persons. In the case of a body corporate the penalty is, in each case, $1,000.

3.49 A consequence of the level of penalties prescribed by those provisions is that the prosecution of a natural person for an offence in relation to an industrial election must be commenced within 12 months of the commission of the offence. That is because of section 15B(1) of the *Crimes Act 1918*, the effect of which is that the prosecution of an individual for an offence under any law of the Commonwealth for which the maximum penalty is imprisonment for six months or less must be commenced within one year of the commission of the offence. If the maximum penalty is, or includes, imprisonment for more than six months for a first offence, a prosecution may be commenced at any time.

3.50 Section 15B(3) of the Crimes Act does, however, permit any law of the Commonwealth to provide that a prosecution for an offence against that law may be commenced within a longer period than would otherwise apply under section 15B(1).

3.51 As noted at paragraph 3.14, the AEC advised that allegations concerning possible breaches of the WR Act are always taken seriously. All allegations are investigated by the AEC to the extent that they can be or, more usually, are referred to the Australian Federal Police (AFP) for action.[273]

3.52 The AEC submitted that, because of the time taken for election inquiries to be initiated and finalised, where there are allegations of electoral fraud there is not sufficient time for all allegations to be fully investigated and prosecutions commenced before the statutory time limit imposed by the Crimes Act expires.[274] As the AEC expressed it:

> *Having a six month period to lodge an application for an inquiry means that the inquiry can be completed some 12-18 months or more after an election*.[275]
>
> *An election inquiry can take many months to complete. Sometimes allegations or evidence of fraudulent activity only emerge in the course of an inquiry. Accordingly, the current limitation period may have expired before sufficient evidence for a prosecution is available*.[276]

3.53 Accordingly, the AEC made two recommendations designed to overcome the 12-month limitation on the commencement of prosecutions.

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273 Submissions p. S365.
274 Submissions pp. S365-366.
275 Submissions p. S375.
276 Submissions p. S366.

3.54 First, the AEC recommended that the relevant provisions of the WR Act be reviewed with a view to increasing the penalties in relation to election and ballot offences.[277] If the term of imprisonment was increased from six months to any term greater than six months a prosecution could be commenced at any time after the commission of an offence. (The AEC considered that the penalties are, in any case, too low and should be increased to act as a greater deterrent to electoral malpractice).

3.55 Second, the AEC recommended that the time for making an application for an inquiry into an election be reduced from six months to 30 days after the day on which the election is declared.[278] This would more closely approximate the time limit on appeals in other AEC conducted elections:[279]

- 30 days after the declaration of the result of a ballot for an amalgamation;[280]
- 40 days after the return of the writ for Federal elections;[281] and
- 40 days after the end of the election period for ATSIC elections.[282]

3.56 During the public hearings the AEC conceded that if penalties were increased, thus removing the time limit on commencing prosecutions, the imperative to reduce the time limit for making applications would not be as great.[283] In a supplementary submission the AEC explained that, while both an increase in penalties and a reduction in the time limit for lodging applications for an inquiry remain the AEC's preferred approach, its overriding concern is to overcome the current time limit on commencing prosecutions, and stated that 'As a minimum, this could be addressed simply by an increase in penalties'.[284]

3.57 The ACTU opposed any increase in penalties on two grounds. Firstly, the effect of an increase in penalties would be to increase indefinitely the time within which a prosecution could be commenced.[285] Noting that there have been few, if any, examples of persons being imprisoned under the current provisions, the ACTU concluded that this would be the only reasons for increasing existing penalties.[286] They submitted that extending indefinitely the period within which a prosecution could be commenced would have an adverse effect on the stability and coherence of leadership within organisations; any suggestion of impropriety in an election should be dealt with immediately, and in a time frame that is contemporaneous with the electoral process itself.[287] Organisations and persons holding office in organisations

277 ibid.
278 Regulation 62 of the WR Regulations requires an application for an inquiry into an election to be lodged no later than six months after the day on which the election is declared.
279 Submissions pp. S375-376.
280 WR Act, sec. 253M(1).
281 *Commonwealth Electoral Act 1918*, sec. 355(e).
282 *Aboriginal and Torres Strait Islander Commission Act 1989*, sec. 140.
283 Transcript pp. EM 22-24.
284 Submissions p. S605.
285 Transcript p. EM 272.
286 Transcript p. EM 273.
287 ibid.

'should not be subjected to a prolonged period of answerability' under the WR Act.[288] Mr Pallas for the ACTU stated:

> *I can say that, from experience, there would be considerable difficulties if inquiries were to extend for some inordinate period whilst at the same time requiring particular officers, by virtue of the office that they hold, who are under scrutiny to continue to perform a function*.[289]

3.58 The second reason for the ACTU's opposition to an increase in penalties was

> *... simply because we think electoral matters are matters that should be dealt with quickly and effectively*.[290]

3.59 The ACTU agreed that where there are competing civil and criminal proceedings on foot, there is a risk that if the criminal proceedings are not determined expeditiously, an election inquiry under the WR Act could be deferred indefinitely and therefore affect the stability of the organisation, or result in someone who had a legitimate grievance about electoral processes not having their case heard.[291]

3.60 The ACTU did not want to be seen to be arguing that the statutory time limit should be an effective defence to identified malpractice in industrial elections, but stated that:

> *Certainly our view would be that the current statute of limitations requires some pretty firm decisions to be made. If those decisions cannot be made within a 12-month period after an election, the question we would have to ask is how much taxpayers' money is going to be spent in pursuing these issues in being able to identify whether or not a charge should ultimately ever be laid. [The ACTU] would be greatly concerned about the impact that would have upon the stability and coherence of leadership within the organisations subjected to that sort of elongated process of dispute as to legitimacy of the office bearers.*[292]

3.61 Dr McGrath considered that the penalty should be increased to 12 months to remove the statutory time limit on bringing prosecutions.[293]

3.62 DIR agreed that the current penalties are too low but noted that they are consistent with the penalties for comparable offences under the *Commonwealth Electoral Act 1918* and other offences under Part XI of the WR Act. DIR submitted that it is open to the Committee to also consider whether any review of penalties should include consideration of offences other than those enumerated in sections 315 and 317 of the WR Act (eg section 314, which relates to failure to preserve ballot paper) and whether all offences should carry the same penalty or whether a scale of offences is appropriate.[294]

3.63 DIR noted that the statutory time-limit problem could also be overcome by prescribing a longer period for the commencement of prosecutions, as permitted by section

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288 ibid.
289 ibid.
290 ibid.
291 Transcript p. EM 274.
292 Transcript pp. EM 274-275.
293 Transcript p. EM 171.
294 Submissions p. S554.

158(3) of the Crimes Act.[295] They pointed out, however, the disadvantages associated with that course, namely the difficulty of aligning the prosecution process to the court proceedings, which may be left open for an indefinite period. They noted that increasing the penalty to 12 months or some equivalent monetary penalty would automatically overcome the problems with the time limit.[296]

3.64 DIR also agreed with the AEC proposal that the time for making an application for an inquiry into an election be reduced. DIR noted that a major advantage of the proposed reduction would be to:

> *enable inquiries to take place more speedily and allow more opportunity for charges to be laid within the statutory time limit*.[297]

In addition, it would have the possible advantage of ensuring 'that those with genuine concerns acted with appropriate speed in identifying their concerns'.[298] However, DIR submitted that:

> *If the application period were to be reduced, care would need to be taken to ensure that any reduction in the time to apply did not have the effect of denying eligible people the opportunity to seek an inquiry. Such a denial would have the consequential effect of reducing scrutiny of elections and reducing detection of fraud/irregularity.*[299]

3.65 DIR proposed, therefore, that the Court should have power to extend the period in appropriate cases.[300]

3.66 The ACCI considered that a time limit of 30 days would be acceptable.[301]

3.67 The ACTU supported a time limit of 30 to 40 days. They considered the present period of six months to be inordinately long. They considered it would be sensible for the application period to commence when the returning officer lodged his/her post-election report, which they thought would take over a week to prepare.[302]

3.68 The Committee believes that the penalties for electoral offences should be increased, and that the time for making an application for an inquiry into an election should be reduced.

3.69 In recommending an increase in penalties the Committee is mindful of the concerns expressed by the ACTU. However, those concerns, while valid, are outweighed by the need to ensure that persons who commit electoral offences cannot escape prosecution merely by the elapse of time.

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295 Submissions p. S555.
296 Transcript p. EM 144.
297 Submissions pp. S557-558.
298 Submissions p. S558.
299 ibid.
300 ibid.
301 Transcript p. EM 74.
302 Transcript p. EM 276. And see recommendation 15 concerning post-election reports.

3.70 An additional consideration is that the penalties for electoral misconduct have not been increased since 1972.[303] Penalties which reflect the change in the value of money since then may act as a greater deterrent to electoral misconduct.

3.71 The Committee notes the comments of Moore J during the CEPU election inquiry which are reproduced in the AEC submissions[304] that:

> *... it would be a rather unusual, if not unsatisfactory, result if the inquiry was proceeding to investigate matters and to a point at least the proceedings might be seen as inquisitorial and on the other hand the AFP is investigating the same or similar issues.*

3.72 As noted in paragraph 3.59 a similar issue was raised with the ACTU. The Committee does not see an easy solution to the issue which can, in any case, arise under the present provisions. Election inquiries under the WR Act, which may result in an election being declared void and a new election being held, should be completed as expeditiously as possible, but so too should the prosecution of persons who have committed electoral offences. It is to be hoped that where an election inquiry and an AFP investigation into the same election are proceeding simultaneously the AFP will conduct its investigations in a manner that does not impinge upon the election inquiry.

3.73 The Committee's recommendation for an increase in penalties applies to all the provisions which create offences in respect of industrial elections. The Government may wish to consider whether there should be a separate review of the penalties for electoral offences under other Commonwealth Acts.

3.74 The time for making an application for an inquiry should be reduced from six months to three months or such longer period as the Court allows. That period will ensure that election inquiries are initiated more quickly than is presently the case, but it should also give persons contemplating an application adequate time to decide whether they do have sufficient grounds to apply for an inquiry. Giving the Court discretion to allow a longer period will meet the concern expressed by DIR that the shorter period should not have the effect of denying people the opportunity to seek an inquiry. The Committee expects that the Court would exercise its discretion only in cases where an applicant could not, with reasonable diligence, have become aware of an alleged irregularity in time to lodge an application within the prescribed period.

3.75 The ACTU argued that it was inconsistent for the AEC to be seeking a reduced period for applications for an inquiry while at the same time it is seeking an extension of the statute of limitations for prosecutions.[305] The Committee does not agree that there is a contradiction. An application for an election inquiry is quite separate from a prosecution for an electoral offence and, while it may deal with the same fact situation, is of a quite different nature. In any case, the majority of election inquiries are not concerned with allegations of fraud, but with more mundane matters such as eligibility and the interpretation of rules. The Committee's recommendation of a shorter period for applications for inquiries is not made because of its implications for the limitation period on commencing prosecutions, which will

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303 The current penalties were inserted by Act No. 37 of 1972, sec. 5.
304 Submissions p. S366.
305 Transcript p. EM 272.

be adequately dealt with by the recommended increase in penalties, but because it considers that, as the ACTU acknowledged, the current application period of six months is inordinately long.

3.76 ***Recommendation 7:***

That:

(a) the penalties prescribed by sections 310, 313, 314, 315, 316, and 317 of the WR Act be increased to $5,000 or imprisonment for 12 months, or both, for an individual; and to $10,000 for a body corporate; and

(b) regulation 62 of the WR Regulations be amended to provide that an application for an inquiry into an election must be made not later than three months after the day on which the result of the election is declared, or such longer period as the Court allows.

Interim officers pending the outcome of fresh elections

3.77 DIR noted that in the 1994 CEPU election inquiry[306] Moore J:

> *... identified uncertainty in the breadth of the power conferred on the Court by section 221 of the WR Act (that section confers a power to make various types of interim orders when an inquiry into an election has been instituted). The issue in question was the Court's power to fill an office on a temporary basis pending the outcome of a fresh election ordered by the Court. His Honour noted that this is potentially an important issue in an election inquiry. In his decision of 3 June 1996, Moore J analysed the competing possible interpretations of section 221 and found [that] a broad interpretation (which allowed the Court to fill the offices on an interim basis) was the correct one.*[307]

3.78 DIR submitted that, to avoid uncertainty about whether the ambiguity will be resolved the same way in future cases, it would be appropriate to amend the WR Act to make clear that the Court does have power to decide who should occupy offices in an organisation pending the outcome of a fresh election to those offices.[308]

3.79 This matter was not raised by any other witness. The Committee, however, accepts DIR's proposal and the reasoning behind it.

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306 op. cit.
307 Submissions p. S559.
308 Submissions p. S560.

3.80 ***Recommendation 8:***

That section 221 of the WR Act be amended to make clear that the Court may make an order that a person may occupy an office to which an inquiry under the Act relates pending the outcome of a fresh election to fill that office.

CHAPTER FOUR

COST AND CAPACITY

4.1 The terms of reference for the inquiry required the Committee to consider:

- the cost of conducting industrial elections, including the impact on the resourcing of the AEC; and
- the capacity of the AEC to provide assistance to organisations on a fee-for-service basis.

4.2 These elements of the terms of reference received considerable attention in the submissions received by the Committee. Many submissions, however, did not clearly distinguish between the two but approached them on the basis that they raised a single issue, namely whether a charge should be introduced for the conduct of industrial elections by the AEC. This was no doubt because of the use of the word 'organisations' in the second of the terms of reference set out above, which was interpreted as having the same meaning as it has in the WR Act, that is, an association of employers or employees registered under that Act. The term of reference was, in fact, intended to refer to non-industrial bodies such as the NRMA, which are required to elect members of their boards of directors. The question of charges for the conduct of industrial elections having been raised, however, the Committee has given it consideration and it is discussed later in this Chapter.

The cost of conducting industrial elections, including the impact on the resourcing of the AEC

Whether the AEC provides a cost-effective service

4.3 Industrial elections are conducted under the AEC's Industrial Elections Program, which is administered by the Assistant Commissioner Industrial Elections, Funding and Disclosure. The program has staff located in the AEC's Central Office in Canberra and in each State and Territory capital.[309] As at 14 May 1997 there was a total of 41 staff located as follows: four in Central Office; nine in New South Wales and Victoria respectively; seven in Queensland; three in South Australia, Western Australia and Tasmania respectively; one in the Northern Territory; and two in the Australian Capital Territory.[310] Total program staffing costs in 1995-96 were approximately $2 million in direct salary costs, or $3.6 million if administrative overheads, on an accrual accounting basis, are added.[311]

309 Submissions p. S363.
310 Submissions p. S598.
311 Submissions p. S363.

4.4 On an accrual accounting basis, the break up of costs for industrial elections is approximately one-third direct costs (eg printing and postage) and two-thirds salary and administrative overheads.[312]

4.5 The AEC provided figures for the number of industrial elections conducted during the period 1987-88 to 1995-96, noting that:

> *It is evident that there was a marked increase in election activity in the early 1990s, mainly associated with a surge of amalgamation ballots among trade unions. The level of activity has since stabilised and reduced, but remains at around 700 per year, considerably higher than in the early 1980s*.[313]

4.6 Total annual costs in 1991-92 were $4,879,000. This rose to $5,153,000 in 1992-93 but has progressively decreased to $4,124,000 in 1995-96. The AEC sounded a note of caution about comparing total costs between different years, noting that the cost of individual elections can vary to a significant degree depending on factors such as size, demographics, the type of voting system or advertising required by an organisation's rules, the complexity of those rules, whether the election is contested[314] and changes in public service accounting methods and procedures.[315]

4.7 The average costs per election fluctuated from a low of around $5,500 in 1990-91 to a high of $8,000 in 1993-94. The average for the 1995-96 financial year was around $6,000. The AEC noted that these figures illustrate:

> *the variability of program costs associated with the number of contested elections and the nature of each election in terms of number of members and voting system*.[316]

4.8 In 1990-91 the cost per ballot paper was $3, whereas in 1995-96 it was about $4.20. In 1991-92 1.6 million ballot papers were issued, compared with only 0.95 million ballot papers in 1995-96. The AEC notes that these figures too illustrate the variability in program costing; in this case the variation in cost per ballot paper results from amortising fixed costs over a larger number of ballot papers.[317]

4.9 The AEC was unable to say what the percentage factor of increase in costs to the AEC was after 1973, when the AEC began to bear the full cost of conducting industrial elections. It noted, however, that from 1959 to 1973 the Act required the Commonwealth to bear only those election costs that were over and above what might normally be incurred by an organisation in conducting the election itself, eg printing and postage.[318]

4.10 The AEC expressed the belief that, even allowing for the difficulties in making accurate comparisons as to costs, it offers the public good value for money. It supported this by reference to the 1996 external evaluation of the AEC's Industrial Elections Program, which found that:

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312 Submissions p. S597.
313 Submissions p. S379.
314 ibid.
315 Submissions p. S380.
316 Submissions p. S379.
317 Submissions p. S380.
318 Submissions p. S597.

> *Budget management has been efficient, given that the IE environment is inherently unpredictable...*

and concluded that there is no workload basis for changing the overall resourcing of the program.[319] The AEC noted that the consultants found that the Industrial Elections Program was efficiently run and that client satisfaction was high.[320]

4.11 The AEC is in the process of developing a cost model to gauge the efficiency of one election against any other election. This is expected to allow a greater degree of forward planning and more efficient resource utilisation.[321] (The Committee is recommending that organisations be required to provide annual statements of elections due during the following year - see recommendation 14. That should also assist the AEC in forward planning).

4.12 The ACTU also provided an analysis of the cost of industrial elections. It noted that:

> *... the annual costs per ballot fluctuate depending on the measurement used. Clearly not all ballots conducted by the AEC are contested. A contested ballot carries with it a much greater cost, specifically in the issuing of ballot papers and the scrutiny of the ballot.*[322]

4.13 The ACTU concluded that from 1991-92 to 1994-95 the cost of industrial elections remained relatively constant in absolute terms while the cost of parliamentary elections and referendums increased by 38.3%. The ACTU also referred to the report of the external consultants, noting the statement that 'Scope for meaningful reductions in expenditure is slight'. The ACTU noted that the goal of the AEC's Industrial Elections Program is 'To achieve a high quality electoral service for industrial organisations and their members' and submitted that the AEC provides an important, quality service which should not be compromised by an obsession with budgetary restrictions.[323]

4.14 The ACCI did not attempt an analysis of the cost of industrial elections, but supported:

> *the injection of efficiencies and economies into the process of conducting industrial elections to minimise the cost burden upon government and the general public.*[324]

In that regard it referred to the efficiencies which may be achieved through standardised practices. It is in this context that the ACCI also invited the Committee to consider the cost of disputed elections and suggested restricting the right of disgruntled candidates and their supporters to initiate inquiries (as discussed in Chapter Three).

4.15 No other submissions or witnesses addressed directly the cost of industrial elections and no submission sought to argue that the AEC does not provide a cost-effective service under the current system.

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319 Submissions p. S381.
320 Transcript p. EM 31.
321 Submissions p. S381.
322 Submissions p. S345.
323 Submissions pp. S345-346.
324 Submissions p. S111.

4.16 The evidence on this point indicates that the AEC is providing a cost effective service under the current system for the conduct of industrial elections. It appears that any significant cost reductions would have to be achieved by changes to the system.

Whether the Commonwealth should continue to bear the full cost of industrial elections

4.17 As mentioned in paragraph 4.2, many submissions raised the question of whether the Commonwealth should continue to bear the full cost of industrial elections conducted by the AEC or whether industrial organisations should be required to bear some or all of the cost.

4.18 There was little support for the introduction of full or partial cost recovery for industrial elections. The Timber Trade Industrial Association submitted that organisations should bear the cost of industrial elections as this would be a useful deterrent against impropriety. That organisation also submitted that the AEC should be able to provide assistance on a fee-for-service basis, but was clearly referring only to industrial organisations.[325] The Government of Western Australia recommended that organisations be required to pay the cost of industrial elections.[326] That recommendation appears to have been made with the idea that if organisations are required to bear the cost of industrial elections it will encourage them to adopt clear, unambiguous and more standardised election rules which would, in turn, reduce the cost of conducting elections. The Government of Queensland advised that the new *Industrial Organisations Act 1997* (Qld) introduces full cost recovery for elections conducted by the Queensland Electoral Commission (QEC), except where a new election (or a step in an election) is ordered because of an irregularity which was the fault of the QEC.[327]

4.19 Other submissions were either silent on the question of cost-recovery or supported the status quo. The argument in support of the status quo may be summarised as: the democratic control of organisations is important to members of organisations and to the community generally. It is therefore in the public interest that there be confidence in the integrity of industrial elections, and for that reason industrial elections should be conducted by an impartial and experienced body, namely the AEC. If, however, organisations are to be compelled to have their elections conducted by the AEC in the public interest, the cost should be borne by the State. A corollary of that argument is that if organisations are to be required to pay the cost of AEC-conducted elections, then they should be free to conduct their own elections or have them conducted by another body of their choice.

4.20 The AEC referred to the public interest considerations attaching to the conduct of industrial elections by the AEC, noting that:

> *The contribution of the independent conduct of industrial elections to the public interest has long been recognised in Australia. For example, in 1976, when amendments were proposed to the Conciliation and Arbitration Act, the then Minister for Employment and Industrial Relations, Mr Street, indicated his Government's intention:*

325 Submissions pp. S119-120.
326 Submissions p. S1 & p. S5.
327 Submissions p. S506.

> *... that all elections for officers should be conducted by the Australian Electoral Office, with the cost of the election being paid by the Government.*[328]

4.21 The AEC did not make any recommendation concerning cost recovery for industrial elections but stated that:

> *... irrespective of whether charges are levied, elections for industrial organisations should continue to be conducted by an independent electoral authority such as the AEC. This will help to ensure that members of organisations enjoy, and are seen to enjoy, free and fair elections.*[329]

4.22 The AEC referred to legal advice to the effect that the charging of fees for industrial elections would not be inconsistent with ILO Convention No. 87 provided that the level of fees was not so onerous as to prevent or hinder an organisation in the conduct of elections. The AEC also referred to the possibility of a sliding fee structure which might encourage the adoption of model rules or the standardisation of certain aspects of industrial elections.[330] The AEC argued, however, that the introduction of cost recovery conditional on the adoption of model rules might lead to organisations seeking exemptions to conduct their own elections. The AEC further stated that it:

> *... considers that the conduct of elections for industrial organisations by an independent agency is the cornerstone by which the public, and the members of organisations, maintain faith in the industrial elections process. A mass exodus of organisations from the current system would not be in the public interest*.[331]

4.23 As will be seen, the argument that the imposition of a system of cost recovery might lead to organisations seeking to conduct their own elections found support in the submissions of several organisations.

4.24 In response to a question from the Committee as to whether the AEC could provide a fee-for-service structure for industrial elections, the AEC stated that no firm structure has been developed and that the final structure would be developed in the light of any recommendations by this Committee. It noted that a range of matters would have to be considered, including: whether there was to be full or partial cost recovery; whether staff time and overheads were to be included or excluded; and whether it should price on a limited range of standard service elements or provide detailed estimates. It stated that, whatever approach is adopted, it will not be possible to provide organisations with a fixed price because of the uncertainty of nominations, what positions will go to ballot, or whether a ballot will be required. The AEC then listed the various phases in an election that will have to be taken into account in arriving at an estimate of costs.[332]

4.25 The Tasmanian Chamber of Commerce and Industry was clearly unhappy that provisions which it accepted as necessary to govern elections in large trade unions applied

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328 Submissions p. S378.
329 Submissions p. S382.
330 Submissions p. S371. A copy of the legal advice referred to is at p. S458.
331 Submissions p. S373.
332 Submissions p. S599.

also to small employer organisations, and stated that it '... wouldn't pay the AEC to conduct elections but we would do them ourselves at no cost ...'.[333]

4.26 The Screen Producers Association of Australia expressed the hope that 'the introduction of a fee-for-service structure would not be necessary'.[334]

4.27 The Australian Federation of Air Pilots explained that it had turned to the AEC to conduct its elections for financial reasons. The AEC provided a professional and impartial service. If the Federation had been required to fund its own elections it may have been forced to alter its constitution to lengthen the tenure of office bearers. On the possibility of a fee-for-service system, the Federation stated:

> *Where an employee organisation is unable to pay the AEC's "fee for service", the union body will be left largely to its own devices. Self-conducted and administered elections are obviously problematic. Whereas the AEC's role as a legitimate "third party" is thoroughly established, an election process without such impartiality is open to abuse and perhaps more damaging, the allegation of abuse. However, if the AEC service is withdrawn for organisations that are unable to pay, the potential for accusations of impropriety will increase. A mistake in the electoral process, with a potential journey through the judicial system, may lead to greater costs for the system overall than the AEC election process itself. It is relevant to consider whether the workers who belong to these bodies deserve a workplace industrial election process that is as free from doubt as their federal and state elections.*[335]

4.28 The National Tertiary Education Industry Union stated that:

> *Given the high level of regulation of Union rules in Australia, it would be completely inappropriate for unions to have to pay for what is essentially a 'compulsory' service.*
>
> *Moreover, the NTEU believes that the cost of $5 million per annum for industrial elections is a small price to pay to ensure that the results of union elections are above question.*[336]

4.29 The Victorian Farmers Federation Industrial Association saw no need for any changes to the electoral provisions of the WR Act: 'The status quo operates very well'.[337]

4.30 The Entertainment Industry Employers Association urged the Committee:

> *...not to apply any form of fees or charges on industrial organisations with a membership base of less than 500 Members*.[338]

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333 Submissions p. S72.
334 Submissions p. S73.
335 Submissions p. S76.
336 Submissions p. S79.
337 Submissions p. S85.
338 Submissions p. S87.

4.31 The Civil Air Operations Officers' Association of Australia submitted that, with its comparatively small membership base, the cost of conducting its elections:

> *... are far outweighed by the benefit obtained in providing an impartial election procedure. In turn, the need to utilise appeal provisions is virtually non-existent.*[339]

4.32 The QCCI noted that, 'regrettably', the Queensland *Industrial Organisations Act 1997* (which had not yet come into effect) provides for full cost recovery for industrial elections conducted by the QEC, and that, as a result, the QCCI will probably seek an exemption from having their elections conducted by the QEC.[340] They argued that the likely effect of the introduction of cost recovery in the Federal system would be a general move away from officially conducted elections and 'back to the old practices'. The QCCI considered that:

> *An important aspect that should be taken into consideration in our opinion is the great importance in which democratically controlled elections are held in Australian society. Unions are an integral part of the fabric that binds Australia together. It is important that union elections are not only free from irregularities, but are seen to be clean and democratic by Australians at large*.[341]

4.33 Consequently, the QCCI opposed the introduction of cost recovery for officially conducted elections and adhered to that position during the public hearings, arguing that cost recovery would be prohibitively expensive for small unions[342] and reiterating the public policy reasons for having union elections conducted at the public expense.[343] In response to a question from the Committee the QCCI also stated that it is the right of members of organisations to run their organisations without undue external interference, and that if the state wishes to impose certain requirements on organisations it should bear the cost of meeting those requirements.[344]

4.34 The ACM submitted that the status quo should be maintained while the use of the AEC is compulsory, and a fee-for-service regime should be introduced only if the AEC does not have 'preferred provider' status.[345] During the public hearings the ACM stated that there is nothing more fundamental to an organisation than the right to choose its leadership from within the organisation, and that where the state imposes constraints on the election process it should bear the cost.[346]

4.35 The SDA referred to the bipartisan support for the introduction of Commonwealth funding for industrial elections in 1973, which was seen as providing an inducement to hold court-controlled ballots.[347] The SDA argued that the current system has proved itself and that:

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339 Submissions p. S298.
340 Submissions pp. S45-46.
341 Submissions p. S47.
342 Transcript p. EM 96.
343 Transcript p. EM 98 & p. EM 105.
344 Transcript p. EM 110.
345 Submissions p. S5.
346 Transcript p. EM 90.
347 Submissions p. S26.

> *There are important public interest considerations attaching to the fair, impartial and cost free conduct of industrial elections and industrial peace can in some cases depend upon a recognition that the organisation representing employees in that industry have officers who have been elected in accordance with fair electoral processes and will have the tenure of its officers reviewed at periodic elections conducted by a body in whom the industrial electorate has confidence and which has no financial or other interest in the result.*[348]

4.36 The SDA argued that the introduction of a user-pays regime for industrial elections could lead to resistance to the service provided by the AEC, increased applications for exemptions, and a reluctance by members to stand for election (to spare the organisation the expense of a ballot). The SDA also argued that if a fee-for-service regime were introduced it would not be appropriate for the AEC to retain its present monopoly on the conduct of elections.[349] On that point the SDA submitted at the public hearings that if cost recovery were introduced the Parliament may be faced with submissions that the AEC should lose its statutory monopoly and that other bodies should have the right to be considered for the remunerative work. The SDA would not consider that to be desirable.[350] The SDA did, however, reluctantly agree that partial cost recovery would be better than full cost recovery and, if that was the alternative, would grudgingly be accepted.[351]

4.37 The Civil Contractors Federation opposed the introduction of fees for AEC-conducted elections and submitted that perhaps the option for an organisation to conduct its own elections should be removed.[352] Mr Hodge opposed the introduction of fees for industrial elections but had an open mind on the introduction of a fee-for-service regime for other organisations.[353] APESMA supported the status quo but suggested that there may be some scope for the AEC to reduce the cost of mailing out nomination forms by taking out advertising in the relevant union journal.[354] Master Builders Australia (MBA) considered that:

> *... it is important in the public interest for the full cost of AEC conducted elections to be met by the Commonwealth. Unless the representative and accountable nature of unions is maintained, serious industrial consequences may result. Already, remoteness of union officials from the rank and file is a noticeable factor in the irresponsible use of union power, and any measures recommended by the Committee should be aimed at increasing rather than reducing the accountability of union officials.*
>
> *If the AEC were to move to a fee for service basis, this would be a significant cost impost and MBAs would undoubtedly seek exemption from the requirement that they conduct our elections.*[355]

4.38 The MBA went on to submit that if a fee-for-service regime were introduced the current provisions for obtaining exemptions would need to be retained and perhaps expanded to allow for smaller organisations.[356]

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348 Submissions p. S27.
349 Submissions p. S28.
350 Transcript p. EM 61 & p. EM 67.
351 Transcript pp. EM 57-58.
352 Submissions p. S84.
353 Submissions p. S299.
354 Submissions p. S467.
355 Submissions p. S471.

4.39 The AIR submitted that costs could be reduced by reducing the frequency of elections; extending maximum terms of office; requiring synchronisation of elections and limiting the circumstances in which elections must be conducted to fill casual vacancies. The AIR noted, however, the need to balance such measures against considerations of accountability, democratic control and the participation of members in the affairs of their organisations. In addition, the AIR submitted that:

> *Should responsibility for the conduct of elections return to the organisations concerned, there may be a greater incident of inquiries into elections under Division 5 of Part IX of the WR Act, thereby reducing any cost benefit to the Commonwealth.*[357]

4.40 The AIR also submitted that efficiency would be improved if organisations were required to notify the AIR of all elections due in the following year.[358] Elsewhere in this report the Committee recommends the introduction of such a requirement.

4.41 The ACCI opposed the introduction of any cost recovery or fee-for-service regime for industrial elections, stating that:

> *It is an important matter of public policy that industrial elections continue to be administered by a fair and impartial body established to oversee elections in this country. The particularly high level of confusing and often emotive litigation which has beset union elections in particular indicates that many organisations are simply incapable of running their own elections in a manner which protects the democratic and financial interests of their members and of the public generally.*
>
> *ACCI submits that it is vitally important that the AEC continues in its present role in relation to union elections. ACCI further submits that as this is a matter very important to the public interest (with the consequences of intra-union battles often serious for employers, individual employees and sometimes entire industries) the costs of electoral services provided by the AEC should continue to be met by the Commonwealth as the existing s.215(4) provides.*[359]

4.42 The ACCI went on to submit that the emergence of so called 'super unions' with very large finances has 'reinforced the public's interest in having free and fair elections conducted in such organisations'[360] and concluded that:

> *... it is important in the public interest that the Commonwealth continues to meet the full costs involved in elections conducted for registered organisations.*[361]

4.43 During the public hearings the ACCI noted that the current degree of acceptance by the trade union movement of the existing system has been built up over a long period of time and that the introduction of cost recovery could jeopardise that acceptance.[362]

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356 ibid.
357 Submissions p. S532B.
358 ibid.
359 Submissions pp. S112-113.
360 Submissions p. S113.
361 Submissions p. S114.
362 Transcript pp. EM 74-75.

4.44 The ACCI did, however, indicate that it would support any efficiencies which may be introduced through standardised practices, provided that the integrity of the system is maintained.[363]

4.45 The ACCI also submitted that consideration should be given to the possibility of the AEC offering a fee-for-service consultancy to prepare organisations to obtain exemptions from the requirement to have their elections conducted by the AEC. This would assist organisations 'to set in place internal electoral processes which allow them to conduct their own elections'. They noted, however that such a process would need to be subject to a range of controls and the public interest would need to be protected into the future.[364]

4.46 In addition, the ACCI raised the question of elections in enterprise unions, which may now be formed under the WR Act.[365] During the public hearings the ACCI explained its concern as being that, potentially, there could be so many enterprise unions that the AEC would not have the resources to conduct elections for all registered organisations.[366] The ACCI suggested three options to meet this problem: a code of practice to 'fast track' exemptions for enterprise unions; AEC-supervised elections for a maximum period, after which such organisations would be expected to gain exemptions; and AEC supervision, rather than conduct, of elections in enterprise unions.[367]

4.47 It was in this context that the ACCI also raised the cost of challenged and disputed elections and submitted that the right to challenge AEC-conducted elections should be restricted in the public interests. That matter is discussed in Chapter Three of this report.

4.48 The ACTU stated that it is:

> *.. strongly opposed to the introduction of a user pays system associated with union elections. Such a process runs the risk of ... undermining over two decades of consensus upon the appropriate handling of union elections and their funding [but] also could compromise an acknowledged quality service.*
>
> *...*
>
> *These arrangements have been applied and remained relatively stable over the last two decades because there is an acceptance within the community that if public policy dictates a certain quality and type of industrial elections then to the extent those ballots impose higher measures than the organisation would or could (within the parameters of fiscal prudence) apply then the community should pay for the premium it attaches to such elections.*[368]

4.49 The ACTU noted that, unlike parliamentary elections, the cost of industrial elections has remained relatively constant in absolute terms.[369] It argued that compulsory AEC-conducted elections are a restriction on an organisation's autonomy, the consideration

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363 Submissions pp. S111-112.
364 Submissions p. S115.
365 Submissions p. S113.
366 Transcript p. EM 72 & p. EM 75.
367 Submissions pp. S115-116.
368 Submissions p. S347.
369 Submissions p. S345.

for which is that the financial burden of elections is borne by the Commonwealth[370] and noted the bipartisan support for Commonwealth funded elections since their introduction in 1973, quoting Mr Fraser, then Leader of the Opposition:

> *We support the Minister's proposals to pay the full costs of all court controlled ballots. We regard that as an inducement to hold such ballots.*[371]

4.50 The ACTU referred to the public funding of industrial elections in the United Kingdom, the underlying theme of which 'was to encourage representative democracy within unions by increasing membership involvement'[372] and to the comments of Fitzgerald J in *Re Penhallurich & Ors (Application for an Inquiry into an Election in the TWU)* that:

> *... the present proceeding cannot be viewed merely as a 'lis inter parties'. The proper conduct of union elections is a matter of public interest and, more particularly the proper conduct of a particular union election is of special interest not only to the rival protagonists but to a class of the public, the particular union members involved.*[373]

4.51 Noting the goal of the Industrial Election Program to provide a high quality service, and the comments of the external review of that program, that the scope for meaningful reductions in expenditure is slight, the ACTU argued that the goals of the AEC should not be 'compromised by an obsession with budgetary restrictions'.[374] It argued that if budgetary restrictions were to result in a reduction in the quality of the service provided, unions could be expected to apply for exemptions. It referred to the comments of the Hancock Inquiry that AEC ballots provide:

> *...a consistency of approach leading to fewer invalidities and disputed elections. It should enhance the confidence of the community and the members of the organisations in the conduct of ballots.*[375]

The ACTU concluded that:

> *it is important that a core of specialised AEC employees continue to have the principal responsibility for union elections.*[376]

4.52 The ACTU also argued that the introduction of user-pays would be inconsistent with a legislative preference for the use of the AEC and that, if such a regime is introduced, organisations should be free to choose other providers.[377] They submitted that:

> *If the Australian community therefore loses the consensus that has developed concerning the handling of union elections then the important role that the AEC performs will be compromised or lost, not as a consequence of a choice made by unions but by economic necessity imposed upon them by government. The likelihood of increased pressure for union run ballots (such as those available under s. 213 exemptions) would increase.*

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370 Submissions pp. S341-342; transcript p. EM 272.
371 Submissions p. S342.
372 Submissions p. S343.
373 (1983) 51 ALR 589, quoted at Submissions pp. S343-344.
374 Submissions p. S345.
375 Submissions p. S346.
376 ibid.
377 Submissions p. S348.

> *The negative consequences of this may be a reduction in voter participation and voter choice at the ballot box.*[378]

4.53 Like the SDA, the ACTU argued that members who would otherwise contest an election may not do so because of the financial implications for the organisation. The ACTU produced figures for the cost of AEC-conducted ballots in organisations of various sizes and concluded that such costs would make it prohibitive for unions to use AEC facilities if they had to pay for them.[379] It argued that new principal object 3(g) of the WR Act (ensuring that registered organisations are representative of and accountable to their members, and are able to operate effectively) seems to imply an intention that the Government wants to instil public confidence in the democratic processes of registered organisations and that user-pays would work against that intention by pricing the AEC out of the market.[380]

4.54 The ACTU argued that the introduction of a fee-for-service regime could prove to be a false economy. Like the AIR, it submitted that a fee-for-service regime will result in fewer AEC-conducted elections and consequently more disputed elections, and that the higher litigation costs would have to be borne by the Commonwealth.[381]

4.55 The ACTU submitted that the only other way to minimise expenses would be for the Commonwealth to abandon the policy of ensuring the integrity of industrial elections and that no public good could come from such a course.[382]

4.56 In conclusion, the ACTU said:

> *The Australian union movement is overwhelmingly confident and satisfied with the function performed by the AEC.*
>
> *In reality the [AEC's] skills and the alleviation of funding elections has led unions to voluntarily support the concept of state controlled ballots.*
>
> *If the principle of user pays were to be introduced it risks the continued consensus that exists with respect to state controlled balloting. User pays negates the broader public policy considerations that attached to the introduction of government funded organisational elections. A movement towards user pays will invariably see a movement away from AEC controlled ballots as unions make choices borne not of desire but rather [of] economic necessity.*[383]

4.57 It is apparent that there was almost unanimous support for the retention of the existing funding arrangements from union and employer organisations alike. It would be superficial to dismiss that support as stemming from a common interest in not wishing to pay for a service which is currently provided free of charge. There is, however, a common concern running through many of those submissions, namely that the introduction of charges for AEC-conducted elections would inevitably lead to a move away from using the AEC and a consequential decline in the integrity of industrial elections, an increase in disputed elections

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378 ibid.
379 Submissions pp. S348-349.
380 Submissions pp. S349-350.
381 Submissions p. S350.
382 Submissions p. S351.
383 ibid.

and a detrimental effect on the confidence of members and the general public in the conduct of industrial elections.

4.58 No submission which addressed this issue, including any which argued for the introduction of a user-pays system for industrial elections, questioned the professionalism of the AEC or suggested that other providers, or organisations themselves, could provide a better service.

4.59 Given the importance to organisations, their members and the general public of ensuring as far as possible the integrity of industrial elections, there would have to be very compelling reasons for recommending any change to the current funding arrangements. The evidence before the Committee does not disclose any such reasons.

4.60 As noted in paragraph 4.46, the ACCI raised the implications for the resources of the AEC of the new provisions in the WR Act allowing for the establishment and registration of enterprise unions. It is apparent that a proliferation of such unions would have implications for the ability of the AEC to continue to conduct all industrial elections with its existing resources. It is, however, likely to be some time before that situation arises, if it arises at all. Consequently, at this stage, it is merely something that the Government and the AEC should monitor with a view to identifying any emerging problems and taking appropriate action before they cause difficulties.

The capacity of the AEC to provide assistance to organisations on a fee-for-service basis

4.61 As explained at the beginning of this chapter, this term of reference is intended to refer to non-industrial organisations. It has its origins in the fact that the AEC has received requests from private organisations such as the NRMA to conduct elections on their behalf.[384] Only a few submissions addressed this issue.

4.62 The AEC explained that it has had to decline requests to conduct elections for private organisations because, under section 7 of the *Commonwealth Electoral Act 1918*, (CE Act) it is not clear that the AEC has authority to conduct such elections. An amendment of the CE Act which would authorise the AEC to conduct elections for private organisations on a commercial basis is pending.[385]

4.63 The AEC explained that it does not know how many requests to conduct such elections are likely to be received and they have not estimated the likely cost of such elections. In respect of the NRMA the AEC said:

> *They have no difficulty in relation to the principle of cost recovery. We have not gone to the figures because we do not have the authority and we have just merely responded in general terms so far.*[386]

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384 Submissions p. S382 (AEC).
385 Submissions p. S382; transcript p. EM 38. See also the *Electoral and Referendum Amendment Bill 1996*.
386 Transcript p. EM 38.

4.64 Presumably, the private organisations that would be most interested in using the AEC to conduct their elections are those with a sizeable number of electors. An idea of the size of elections which the AEC might conduct on behalf of private organisations if they had the authority to do so may be gleaned from correspondence between the AEC and the NRMA. The NRMA advised that:

> *NRMA Ltd is a company limited by guarantee and is governed by the provisions of the Corporations Law. The current membership of NRMA Ltd is approximately 1.85 million members. The Memorandum and Articles of Association of NRMA Limited provide for, amongst other things, the biennial election of Directors to the NRMA Ltd Board.*[387]

4.65 In another letter, the NRMA noted that the size of the company's membership 'means that the election is on a similar scale to a Queensland state election'.[388]

4.66 The Institution of Engineers, Australia advised that it conducts national elections and ballots in which some 55,000 voters are involved. The Institution:

> *... would be interested in using the services of the AEC to conduct its elections or ballots so long as the fees involved are less than the cost of conducting them ourselves.*[389]

4.67 The AEC made no recommendation on this matter but stated that is open to the Committee to consider.

4.68 The SDA submitted that:

> *There is no reason in principle ... why the services of the AEC could not be made available on a fee for service basis to other entities such as professional associations. Some associations could be expected to welcome the opportunity to have elections conducted by an independent body of the acknowledged experience of the AEC as a paid service.*[390]

4.69 Mr Hodge had an open mind on the capacity of the AEC to conduct non-industrial elections on a fee-for-service basis, but raised a number of issues: the rules and constitutions of such organisations could be 'really deficient' in describing elections; what legal protection would a returning officer have if he/she made an error; and could a returning officer impose extra conditions on a non-industrial organisation to avoid irregularities (ie, would a returning officer have similar powers to those in section 215(1) of the WR Act)?[391]

4.70 The Committee is somewhat concerned at the lack of any firm assessment of the likely demand for the services of the AEC from non-industrial organisations (as to both number and size) and therefore the capacity of the AEC to meet that demand without derogating from its capacity to carry out its existing responsibilities, although it acknowledges the difficulty of making such an assessment. In this regard the Committee notes that in a reply to the NRMA the Minister for Administrative Services, after referring to

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387 NRMA letter dated 12 March 1997.
388 NRMA letter dated 2 August 1992.
389 Letter dated 21 July 1997 to the Inquiry Secretary, Joint Standing Committee on Electoral Matters.
390 Submissions p. S28.
391 Submissions p. S299 & p. S307.

the proposed amendments which would enable the AEC to conduct elections for non-industrial organisations, said:

> *However, I must point out that the primary functions of the Commission relate to the conduct of federal parliamentary elections and other elections required under Commonwealth laws. Therefore, it will be a matter for the Commission to decide whether at any particular time it has the resources to conduct other elections without compromising its statutory responsibilities.*[392]

4.71 Notwithstanding the absence of any hard facts about the likely demand which conducting elections for non-industrial organisations may place upon the resources of the AEC, there does not appear to be any reason in principle why the AEC should not be given the statutory authority to conduct such elections. The provision of services to private organisations should, however, be provided on a proper commercial basis and in accordance with the principle of competitive neutrality. It should also be provided within the structure and resources need to fulfil the AEC's existing statutory obligations.

4.72 An authority to conduct elections for private organisations should, of course, be subject to a proviso of the kind referred to in the Minister's letter quoted above.

4.73 However, before such a measure is put into effect, consideration should be given to the issues raised by Mr Hodge, and any other issues of a similar nature, with a view to determining whether it is necessary or desirable to include provisions to ensure that, as far as practical, AEC returning officers conducting elections for non-industrial organisations have the same authority and protection as they have in conducting industrial elections.

4.74 ***Recommendation 9:***

> **That the *Commonwealth Electoral Act 1918* (CE Act) be amended to give the AEC authority to conduct elections for non-industrial organisations on a fee-for-service basis, subject to the proviso that the conduct of such elections is not permitted to detract from the AEC's capacity to fulfil its statutory obligations under the WR Act, the CE Act, the *Referendum (Machinery Provisions) Act 1984* and the *Aboriginal and Torres Strait Islander Commission Act 1989* (ATSIC Regional Council elections).**

392 Letter dated 18 October 1996 from the Minister for Administrative Services, the Hon. David Jull MP to the NRMA.

CHAPTER FIVE

OTHER MATTERS

Verifying the voters' roll

Should returning officers be under a statutory obligation to verify rolls?

5.1 Section 268(1)(c) of the WR Act requires each registered organisation to keep a register of its members showing the name and address of each member. Under section 317(1), when an industrial election is required an organisation must provide the AEC with a copy of the register or with a list of members. The AEC then uses the register or list to compile the voters' roll. The AEC has a purpose-developed software system called *Rollmaker* that assists with the preparation of the roll. Organisations may provide electronic copies of their membership list and *Rollmaker* is able to check for inconsistencies in membership and addresses.[393]

5.2 During the inquiry some concern was expressed about the accuracy of membership lists provided to the AEC and, therefore, the accuracy of the voters' rolls prepared from those lists. Mr Hodge described circumstances in which significant errors could inadvertently occur in the compilation of membership lists and voters' rolls.[394] The AEC noted that the integrity of an election depends in part on the accuracy of the roll of voters but did not consider inaccurate rolls to be a significant problem, noting that the quantity of unclaimed mail in industrial elections averages only around 2.5%. In the AEC's view this 'indicates that membership rolls are as accurate as might reasonably be expected'.[395] The ACTU considered that membership lists have improved in accuracy, in many cases as a consequence of computerisation, but that:

> *membership lists do tend to be inaccurate ... simply because the people data inputting on membership are largely restricted to what people have chosen to put on the membership application forms*.[396]

5.3 At present there is no statutory requirement that a returning officer must verify the voters' roll for an industrial election by checking its accuracy. The rules of some organisations do, however, contain such a requirement although the level of checking required varies.[397]

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393 Submissions p. S363 (AEC).
394 Submissions pp. S302-304.
395 Submissions p. S369.
396 Transcript p. EM 288.
397 Transcript p. EM 301 (AEC).

5.4 Mr Curtis considered it:

> *essential that the Returning Officer check the roll as it is an accountable document on which the integrity of the election rests.*[398]

He considered that checking the roll should be a documented process covering such matters as financial status, method of paying membership dues, and verifying from 'source documents' that a member is entitled to vote.

5.5 Mr Hodge considered that the returning officer should endeavour to check the accuracy of the voters' roll and, if necessary,

> *stall the conduct of the ballot (or extend the period of the ballot) if he/she is not satisfied that the roll is accurate*.[399]

Mr Hodge explained that, in checking a voters' roll, he first checks that all candidates and nominators are on the roll; he then chooses names from the roll at random and checks their financial status from the organisation's records.[400] He also obtains a list of unfinancial members and checks that they are in fact unfinancial.[401] He noted that, although the standard of the records varies from union to union, 'these days with computer rolls it is not very often that I find discrepancies'.[402]

5.6 Mr Cook believed that there should be a pre-ballot and a post-ballot audit of the voters' roll and that it should be cross-referenced with employee records and records from the Australian Taxation Office.[403]

5.7 Dr McGrath's submission reproduced extracts from the report of the Cooke Inquiry concerning proposed model rules and the preparation of a post-election report by returning officers.[404] In each case references are made to checks to verify the voters' roll. The model rules recommended by the Cooke Inquiry provide that:

> *The returning officer shall make such checks of the records of the organisation or branch as are necessary to verify the voters' roll.*[405]

5.8 That provision does not appear to have been adopted in the draft *Industrial Organisations (Model Election) Rules 1997* prepared by the Queensland Government.[406]

5.9 The AEC had strong reservations about the introduction of a statutory obligation to carry out a check of voters' rolls. It doubted the usefulness of such checks in producing a more accurate roll and raised a number of practical difficulties which a statutory obligation would create. These may be summarised as follows:

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398 Submissions p. S131.
399 Submissions p. S299.
400 Transcript p. EM 114.
401 Transcript p. EM 116.
402 Transcript p. EM 114.
403 Transcript p. EM 221.
404 Submissions pp. S105-106.
405 See submissions p. S430 (proposed rule 2.3).
406 Exhibit No. 4.

- such checks are very resource intensive and time consuming. In the recent AWU national elections it took two casual staff 140 hours to check the financial status of 10% of the total number of members on the voters' roll;[407]

- there is a question of whether checks should be made of some or all of the following: the membership of persons on the roll, their financiality, the accuracy of their addresses and so on. The more matters are required to be checked, the more resource intensive and time consuming such checks are;[408]

- to be effective, checks must be made against the source documents held by organisations, which might include application forms, receipts, deduction authorities and in some cases records of life membership. Often such documents are not available or may not be held in a central place (in a national election, membership records for each State may be held in that State) and, in any case, checking them is a mammoth task;[409]

- a requirement to check a flat percentage of the roll would not produce a statistically valid result;[410]

- a blanket requirement to carry out such checks would include rolls the accuracy of which had historically been 'pretty good';[411]

- how would the cut-off point at which it is decided that a roll is, or is not, accurate be determined: would it be 90% accuracy, or more, or less?[412] It may be difficult for the legislation to specify a realistic cut-off point, but if that were not done the AEC would be vulnerable to criticism as to where it decided the cut-off point should be in a particular case;[413] and

- what happens if it is decided that a roll is below an acceptable level of accuracy? If the election is to be aborted and run again, what happens if the roll for the fresh election is no more accurate than the roll for the original election?[414]

5.10 The AEC stated that:

> *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...*[415]

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407 Transcript p. EM 299.
408 ibid.
409 Transcript p. EM 300.
410 Transcript p. EM 301.
411 ibid.
412 Transcript p. EM 302.
413 Transcript pp. EM 302-303.
414 Transcript p. EM 302.
415 ibid.

5.11 In *Re Pullen*[416] Gray J held that the failure of the returning officer to check the voters' roll against the primary records of the organisation (as distinct from the computerised membership list) was not an irregularity. His Honour commented that, although it may be prudent to carry out spot checks of the voters' roll, the returning officer is not required to do so by the Act. To find that a failure to do so was an irregularity would be to create a positive legal requirement to make such a check. The result would be that argument would then occur as to the adequacy of any check carried out. His Honour noted that if a party to an inquiry wanted to investigate the accuracy of the roll the Court has power to make orders giving the party ample access to the organisation's records. (In that case it was estimated that a complete check would have taken eight people a month).[417]

5.12 *Re Pullen* was followed by Moore J in the recent CEPU election inquiry.[418] In that case one of the parties had submitted that the failure of the returning officer to take steps to authenticate the roll was an irregularity. After referring to *Pullen's case*, his Honour said:

> *For the same reasons no irregularity arose in these elections as a result of the reliance placed on the certificate of the Branch Secretary by the returning officer.*

5.13 Having regard to *Pullen's case* and in light of the strong reservations expressed by the AEC about the usefulness of a requirement that the voters' roll be checked for accuracy in all industrial elections, and the practical problems identified by the AEC that such a requirement would create, it would not be appropriate to impose a requirement that returning officers must check a minimum percentage or number of names on voters' rolls. Nevertheless, because of the importance of accurate voters' rolls to the integrity of industrial elections, returning officers should be required to satisfy themselves that the voters' roll in each election is accurate. That requirement should apply only where the rules of the organisation concerned do not already require the returning officer to verify the voters' roll, and the outcome of an election should not be open to challenge on the ground that the check carried out by the returning officer was inadequate.

5.14 ***Recommendation 10:***

That the WR Act be amended to provide that:

(a) in each industrial election where the rules of the organisation do not require the returning officer to verify the voters' roll, the returning officer shall nevertheless carry out such checks of the roll against the records of the organisation as are necessary to satisfy the returning officer that the roll is accurate;

(b) where, following such checks, the returning officer is not satisfied that the roll is accurate, the returning officer may postpone the election until such defects as have been identified in the roll are corrected; and

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416 (1990) ALR 699.
417 ibid pp. 703-704.
418 (1996) AILR 3-319.

(c) no application for an inquiry into an election may be made on the ground that any check of the voters' roll by the returning officer was inadequate or that, following such a check, the returning officer did not postpone the election.

Cross-checking voters' rolls against the Commonwealth Electoral Roll

5.15 In the course of discussing means of checking the accuracy of voters' rolls for industrial elections the AEC noted that:

> *For privacy and practical reasons, recourse cannot be had to the Commonwealth Electoral Roll to solve this problem.*[419]

5.16 In response to a question from the Committee the AEC subsequently advised that:

> *Full personal details contained in the AEC's electoral roll database are not available for use by industrial returning officers. Section 91A of the Commonwealth Electoral Act sets out the purposes for which the electoral roll can be used. Those purposes include any purpose in connection with a Federal, State, Territory or local government election or a referendum. Industrial elections are not included.*
>
> *It is not uncommon for returning officers to access publicly available electoral roll details (ie name and address) when compiling an industrial membership roll but this is of limited benefit. Such information can only be used to verify an organisation's records where the name and address information is the same. It is not sufficient to identify a person where the name or address on the electoral roll differs from the organisation's records.*[420]

5.17 The AEC believes that access to the full personal details contained in the Electoral Roll would be of assistance to returning officers in identifying members of industrial organisations or confirming the membership information provided by an organisation. However, it is not a complete answer, and the AEC noted that any benefit achieved would depend on information contained in an organisation's own records that could be checked against the Electoral Roll (for example, date of birth). The AEC noted also that many members of organisations will not have updated their Electoral Roll details following a change of address, and some will not be enrolled at all. It concluded that:

> *In short, there is no simple solution to the problem of incorrect address information on organisations' records.*[421]

5.18 Nevertheless, the AEC recommended, 'on balance', that:

> *... Section 91A(3) of the Commonwealth Electoral Act be amended to include 'Elections and ballots conducted under the Workplace Relations Act'.*[422]

5.19 The ACTU saw no problem with returning officers accessing the Electoral Roll to clarify a person's address.[423]

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419 Submissions p. S369.
420 Submissions p. S595.
421 Submissions p. S596.
422 ibid.

5.20 Under section 90(2) of the CE Act, copies of the Electoral Roll are to be available for public inspection. However, section 91(9) provides that:

> *Except as otherwise provided by this Act, the Electoral Commission shall not provide any person with any information which discloses particulars of the occupation, sex or dates of birth of electors.*

5.21 Consequently, the Roll which is available for public inspection contains only names and addresses. Access to other information contained in the Electoral Roll is restricted by the combined operation of sections 91 and 91A of the CE Act.

5.22 Section 91(2) of the CE Act provides that, after each general election, the Electoral Commission shall provide copies of the latest print of the Electoral Roll to each registered political party, Senator and Member of the House of Representatives. Section 91(2)(d) allows a copy to also be provided to:

> *such other persons or organisations (if any) as the Electoral Commission determines are appropriate.*

By section 91(4) the Electoral Commission has a discretion to provide the persons and organisations referred to in section 91(2)(d) with a copy of the Roll on tape or disk instead of in printed form. Section 91A applies where a tape or disk has been provided under section 91 and restricts the use of information from the Electoral Roll to:

> *a purpose which is a permitted purpose in relation to the person or organisation to which the tape or disk was provided*.

A 'permitted purpose' in respect of a person or organisation other than a Senator, Member or political party is any purpose in connection with a Federal, State, Territory or local government election, or a referendum conducted under a law of the Commonwealth or of a State or Territory.[424] Consequently, the AEC cannot, for the purposes of an industrial election, access all the information contained in the Electoral Roll, but only names and addresses.

5.23 The confidentiality of personal details on the Electoral Roll is further protected by section 91B which provides, amongst other things, that a person must not disclose information from the Roll except for a permitted purpose; and must not use such information for a commercial purpose.

5.24 It is desirable that returning officers, but not organisations, should have access to the Electoral Roll for the sole purpose of checking the accuracy of voters' rolls in industrial elections. While allowing returning officers access to personal details from the Electoral Roll for purposes associated with a person's membership of an organisation raises issues of privacy, there is a clear public interest in ensuring, as far as possible, the integrity of industrial elections. Accurate voters' rolls are essential to that integrity. Accordingly, provided proper safeguards are in place, it is desirable that where a returning officer conducting an industrial election is required by the rules of an organisation or by legislation

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423 Transcript p. EM 283.
424 Similar provisions apply to Senators, Members and political parties.

based on the previous recommendation to check the accuracy of the voters' roll, the returning officer should be able to access all the information available on the Electoral Roll for that purpose.

5.25 ***Recommendation 11:***

That:

(a) section 91A(3) of the CE Act be amended to include elections and ballots conducted under the WR Act; and

(b) the WR Act be amended to provide that no application for an inquiry into an election shall lie on the ground that, in carrying out a check of the accuracy of the voters' roll for an industrial election, the returning officer did not check the voters' roll against the Electoral Roll.

Whether the WR Act should expressly allow members of an organisation to inspect or copy the voters' roll for an election

5.26 Regulations 81 and 98O of the WR Regulations provide that, during a ballot for an amalgamation or a withdrawal from an amalgamation, the roll of voters shall be available for inspection and copying by members of the organisations concerned, or any other person authorised by the electoral official conducting the ballot. There is no such provision in respect of elections. The AEC drew attention to this apparent inconsistency and recommended that the WR Regulations be amended to enable members of an organisation to view or copy a roll of voters for an election. Such a regulation would use identical wording to that contained in regulations 81 and 98O.[425]

5.27 In making that recommendation the AEC explained that, although organisations are required to keep membership lists, there is no requirement that the list be made available to the members of the organisation. A number of cases have resulted in a common law assumption that returning officers will make a membership list available to members of an organisation and it is AEC policy to do so.[426]

5.28 The ACTU expressed concern about:

> *the sanctity of membership being accessed if the membership roll is broadly available [because] people may access membership lists for purposes other than the election itself.*[427]

The ACTU questioned whether there is any value in making the membership list broadly available to persons other than candidates in an election,[428] but conceded that there might be some value in making it available during the election period. However, the ACTU would be concerned at the list being available 'post facto' to people who just want to satisfy themselves that there was no fraud in the election. They argued that the AEC and ultimately the Court

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425 Submissions p. S601.
426 ibid.
427 Transcript p. EM 283.
428 Transcript p. EM 284.

have the obligation to satisfy themselves about the processes of an election, when matters of substance are put before them.[429]

5.29 On the question of whether members should be able to obtain a copy of the voters' roll, the ACTU argued that it would be 'preposterous' to require organisations to provide their entire membership to members who 'just wanted a list simply during an election period'. The ACTU pointed out that in some cases a membership list could contain hundreds of thousands of names.[430]

5.30 The Committee notes that the WR Act does envisage that members of an organisation have the right to inspect the organisation's register of members, since it provides for the enforcement of that right where necessary. Section 268(12) provides that where, on the application of a member of an organisation, a Registrar is satisfied that the member has been refused access to the register of members, or part of the register of members of the organisation at the office or premises where the register or part is kept; or there are other grounds for giving a direction under the section; the Registrar may direct the organisation to deliver to the Registrar, before a specified day, a copy of the register of members, certified by the organisation to be correct as at the date specified in the certificate, being not more than 28 days before the day specified by the Registrar. The member may then inspect the register at a specified Industrial Registry.

5.31 There is, however, no requirement that organisations must provide a member with a copy of the membership list. As the ACTU indicated, such a list may contain many thousands of names and it would be unduly onerous to require organisations to provide copies of their membership lists on request.

5.32 Regulations 81 and 98O, on which the AEC recommendation is based, do not require organisations or the AEC to provide members of an organisation with a copy of the voters' roll. Members may inspect the roll and may take copies of the roll or part of the roll. That is, the AEC is not required to provide copies, but it is required to allow members to make copies. The roll is available for inspection only during the period between the day after the roll is completed and 30 days after the declaration of the poll.

5.33 Consequently, members of an organisation at present have an enforceable right of access to the organisation's membership list and a statutory right to inspect and make copies of the voters' roll for a ballot for an amalgamation or a withdrawal from an amalgamation, but not the voters' roll for an election.

5.34 In relation to the concerns about privacy expressed by the ACTU, the AEC advised that they require 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 ... would*

429 Transcript p. EM 286.
430 Transcript pp. EM 286-287.

> *have a right to complain to the Privacy Commissioner about the fact ... that this undertaking has been breached*.[431]

5.35 It was noted, however, that the Privacy Commission 'is more persuasive in its condemnation rather than penal'.[432] The AEC therefore suggested that if the Committee was to recommend that the legislation be amended to expressly provide for access to voters' rolls, there could also be penalties prescribed for misuse of the information thus obtained.

5.36 The Committee notes that the draft *Industrial Organisations (Model Election) Rules* circulated for comment by the Queensland Government expressly provide for a candidate in an election, a member of the organisation, or other persons authorised by the Registrar to be able to inspect the roll of voters free of charge. A candidate or member may also obtain a copy of the roll on payment of a 'reasonable fee'.[433]

5.37 The fact that the WR Regulations provide for members of an organisation to have access to the roll of voters for an amalgamation or withdrawal from an amalgamation but not for elections does not, by itself, demonstrate that any change is necessary. The reason for this apparent inconsistency may be because, under the WR Act, detailed provisions for the conduct of elections are largely left to the rules of organisations whereas ballots for amalgamations and withdrawals from amalgamations are entirely governed by the Act and Regulations. In any case, the evidence does not show that this difference has caused any practical difficulties. On the other hand, if members of organisations have a right to access the voters' roll for an election, then that right should be set out in the legislation. As far as practical, all matters governing the conduct of industrial elections should be contained in the WR Act or the Regulations.

5.38 As to privacy, it was noted above that the AEC requires a person who is given access to the voters' roll to sign an undertaking that the information thus obtained will be used for the purposes of the election and not for any other purpose. The AEC submitted that if the Committee recommends that there be a statutory right of access to the voters' roll for an industrial election then penalties could be included for misuse of that information and, for the sake of consistency, penalties should also be prescribed in respect of access to the voters' roll for ballots for amalgamations and withdrawals from amalgamations.[434] While the evidence did not disclose any concerns about the misuse of information obtained under regulations 81 or 98O, there is merit in the AEC's submission on this point.

5.39 Subject to adequate protection of privacy, candidates in an industrial election should have access to the voters' roll and be able to obtain copies of the roll. Candidates are then able to carry out their own checks of the accuracy of the roll and to effectively organise the distribution of their electioneering material. However, if members as well as candidates were able to obtain copies of the voters' roll it could cause administrative problems for the AEC, since the demand for copies of roll could become onerous. In any case, there does not seem to be any compelling reason for allowing members of an organisation who are not candidates in an election to obtain copies of the voters' roll; it is sufficient for a member to be able to

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431 Transcript p. EM 318.
432 ibid.
433 Exhibit No. 4, rule 12.
434 Transcript pp. EM 318-319.

inspect the roll to, for example, check that he or she is entered on the roll and that the entry is accurate.

5.40 The AEC also submitted that if the legislation is to provide for access to the voters' roll it should specify that a copy of the roll can include an electronic copy on disk, not just a hard copy. The reason was that some organisations offer to provide the AEC with a copy of their roll on disk, subject to the condition that the AEC does not provide a copy of the disk to any other candidate or member but gives them a hard copy only. The AEC declines to accept disk copies on that basis but makes its own disk 'so that it is generally available and nobody is disadvantaged'.[435]

5.41 ***Recommendation 12:***

That the WR Regulations be amended to:

(a) include a regulation similar to existing regulations 81 and 98O in relation to the voters' roll for an industrial election, but which provides that while candidates in an election may inspect and obtain copies of the voters' roll, members who are not candidates may only inspect the roll and may not obtain copies;

(b) provide that where the AEC is required to provide copies of the voters' roll for an industrial election or for a ballot for an amalgamation or withdrawal from an amalgamation it may do so in electronic form on disk; and

(c) make it an offence to use information obtained from the voters' roll for an industrial election or for a ballot for an amalgamation or a withdrawal from an amalgamation for a purpose other than in relation to the election or ballot in respect of which access to the roll was sought.

Power of returning officers under section 215(1)

5.42 Section 215(1)(b) of the WR Act authorises a returning officer to depart from the rules of an organisation to ensure that no irregularities occur in or in relation to an election or to remedy any procedural defect that appears to exist in the rules. The AEC noted that, with those exceptions, returning officers do not have any discretionary power.[436]

5.43 Several witnesses commented on the scope of that power and the extent to which it is used in practice. Mr Curtis stated that:

435 Transcript p. EM 319.
436 Submissions p. S362.

> *There appears to be a clear lack of will from within the AEC to apply this Section of the Act to conduct elections to a required standard*.[437]

5.44 Dr McGrath was firmly of the view that section 215(1)(b) gives returning officers much wider powers than they generally use.[438] She subsequently recommended that:

> *Returning officers be encouraged to use their discretionary powers under Section 215 to intervene where irregularities appear, or to halt an election under section 98.*

5.45 DIR expressed its understanding that the AEC, on legal advice, has taken a cautious view of the powers available to returning officers under section 215(1) and that:

> *The AEC's returning officers would be understandably wary of legal challenges if they imposed safeguards not provided for in each union's own election rules.*[439]

5.46 DIR considered, however, that there is considerable scope for applying a wider interpretation to the provision than is presently the case. In that regard DIR referred to *Re Porter*. In that case Gray J, in considering what decisions would be struck down as not being authorised by section 215, stated:

> *The Court ... accepts [directions given under the predecessor of section 215], unless they are wrong in law, not a bona fide exercise of the power ... for the purpose for which it was given, or so unreasonable that no reasonable returning officer could have formed a view which justified them*.[440]

5.47 DIR considered, therefore:

> *... that the current powers available to returning officers are adequate and represent a reasonable balance between the right of the members to adopt rules suitable for their organisations and the need to ensure that a returning officer has sufficient power to run an election without irregularities.*[441]

5.48 DIR would, however, 'support an amendment that makes the purpose of the provision clearer'.[442]

5.49 The Cooke Inquiry noted that there are doubts about the extent of a returning officer's powers under section 215(1)(b) and recommended that those doubts be resolved.[443] The relevant provision of the *Industrial Relations Act 1990* (Qld) recommended by the Cooke Inquiry is, however, in almost exactly the same form as section 215(1)(b) of the WR Act.[444]

5.50 The Cooke Inquiry also recommended that the equivalent provision in the Queensland legislation contain a provision expressly authorising a returning officer to require an employer to whose establishment ballot papers are sent to account to the returning officer for

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437 Submissions p. S131.
438 Submissions pp. S93-94.
439 Submissions p. S553.
440 (1989) 34 IR 179 at 210-211.
441 Submissions p. S553.
442 ibid.
443 op cit, Second Report, para 10.2.7.
444 ibid, Sixth and Final Report, p. 27 (reproduced at Submissions, p. S426).

the employer's disposition of the papers.[445] However, the new Queensland legislation does not appear to have adopted that recommendation.

5.51 It appears that AEC returning officers regard themselves as already having the power to direct employers on the handling of ballot material sent to workplaces. Mr Curtis stated that, in the AWU election then underway in Queensland, the AEC had written to employers giving them 'directions' advising them that ballot material would be sent to the workplace, that they had a responsibility to pass the material on to their employees and, if the employee had left their employment, to return the material to the AEC.[446]

5.52 Nevertheless, in the light of concerns expressed by a number of witnesses about ballot papers sent to workplace addresses, it is appropriate to put the power of returning officers in this regard beyond doubt by an appropriate amendment of the WR Act.

5.53 In addition, returning officers should be encouraged, indeed, required not to be unduly cautious in deciding whether to exercise the discretion given by section 215(1) of the WR Act to depart from the rules of an organisation in appropriate circumstances. In that regard the Committee is mindful of the comments of Gray J in *Re Porter*[447] which indicate that, provided the discretion is exercised reasonably, the courts will not intervene. The discretion to depart from the rules of an organisation should be exercised in all cases where it appears to the returning officer that adherence to the rules of an organisation may result in an irregularity or produce a procedural defect. An amendment of section 215(1)(b) to achieve that result and to clarify the purpose of the provision is recommended below.

5.54 ***Recommendation 13:***

That:

(a) the WR Act be amended to provide that where ballot material is to be sent to a workplace the returning officer may direct the employer at the workplace as to disposition of that material; and

(b) section 215(1)(b) be amended to provide that, where a returning officer considers that adherence to the rules of an organisation or branch may give rise to an irregularity or produce a procedural defect, the returning officer shall take such actions and give such directions as the returning officer considers necessary to avoid the irregularity or procedural defect.

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445 ibid.
446 Transcript p. EM 134.
447 quoted at paragraph 5.46 above.

Notification of elections due

5.55 Section 214 of the WR Act provides the mechanism whereby the AEC is informed that it is required to conduct an election. Section 214(1) requires organisations to lodge prescribed information in relation to an election in the AIR before the prescribed day or such later day as the Industrial Registrar allows. Where such information has been lodged and a Registrar is satisfied that an election is required to be held the Registrar must arrange for the conduct of the election by the AEC.

5.56 By regulation 61(3) of the WR Regulations, the prescribed day for lodging information under section 214(1) is two months before the day on which a person may become a candidate in an election. However, under section 214(2) a Registrar must make arrangements for the conduct of an election whether or not the prescribed information was lodged before the prescribed day or the later day allowed by the Industrial Registrar.

5.57 The AIR advised that in the majority of cases the prescribed information is not lodged within the prescribed time limit.[448] The AIR submitted that the efficient management of the AEC and the AIR would be enhanced if organisations were required to notify on an annual basis details of elections to be commenced in the following year.

5.58 The AEC strongly supported that proposal, noting that:

> *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 ... having a meeting with an organisation to discuss ambiguous rules or what have you.*[449]

5.59 The AEC did, however, raise the question of what would be the consequences of failure to comply with such a requirement. Would it, for example, mean that an election would not proceed?

5.60 A requirement to notify the AIR each year of elections due during the following 12 months would not impose an unduly onerous burden on organisations, which are already required to lodge certain information with the AIR each year. Section 268(3) of the WR Act requires each organisation to lodge with the AIR each year a statutory declaration that it has maintained its register of members in accordance with the Act; a list of the offices in the organisation; a list of the names and addresses of its office holders; and such other records as are prescribed. Regulation 102 prescribes records of the name of each branch of the organisation and the address of the office of the organisation and of each branch of the organisation.

5.61 For the reasons given by the AIR and the AEC, the AIR's proposal should be adopted. The most convenient method of doing so would appear to be by an amendment of regulation 102 to include a list of elections due during the calender year commencing on 1 April. That date is chosen because the prescribed period for lodging records under section 268(3) is anytime during the period of three months commencing on 1 January.[450] To ensure that the

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448 Submissions p. S532.
449 Transcript p. EM 319.
450 Regulation 103.

maximum amount of notice is received by the AIR it is appropriate to specify a date at the end of that period.

5.62 As to the consequences that should flow from a failure to comply with that requirement, it would clearly be undesirable if an election was to be postponed merely because the organisation had not complied. Incumbent officers of an organisation might then be seen as obtaining a benefit rather than incurring a penalty for non-compliance. In any case, the WR Act already makes it an offence not to comply with section 268(3). The penalty is a fine not exceeding $1,000 plus $250 for each completed week that an organisation fails to comply.[451] No additional penalty appears to be necessary.

5.63 ***Recommendation 14:***

> **That regulation 102 of the WR Regulations be amended to include a list of all elections required by the rules of an organisation to be held for offices in the organisation, and each branch of the organisation, during the calendar year commencing on 1 April.**

Post-election reports

5.64 Regulation 96 of the WR Regulations requires that after each ballot for an amalgamation, the returning officer shall furnish a certificate providing prescribed information in relation to the ballot. A copy of the certificate is to be sent to the Industrial Registrar and each of the organisations concerned in the amalgamation for which the ballot was conducted. Regulation 98Z makes similar provision in respect of ballots for withdrawals from amalgamations.

5.65 There is no such legislative requirement in respect of industrial elections, but the AEC advised that after each election the returning officer compiles a brief report on various aspects of the election. The report:

> *... provides a snap-shot of the main steps in the conduct of the election and a guide to future ROs on any unusual matters peculiar to the election.*[452]

5.66 The AEC recommended that the WR Regulations be amended to formalise this practice by requiring that, after each election, the returning officer sign and date a certificate similar to those provided in respect of ballots for amalgamations and withdrawals from amalgamations.[453]

5.67 The ACTU supported the proposal.[454]

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451 Section 321(3).
452 Submissions p. S395.
453 Submissions p. S603.
454 Transcript p. EM 287.

5.68 DIR saw no difficulty with such a requirement, but noted that if the AEC was required to speculate on the cause of any problems with an election 'we might start to move into slightly awkward territory'.[455]

5.69 Dr McGrath submitted that returning officers should be required to furnish a report after each election. The report should contain specified information from which it would be possible to monitor trends and identify irregularities for further investigation.[456] In proposing such post-election reports, Dr McGrath was adopting a recommendation of the Cooke Inquiry.[457] Dr McGrath subsequently recommended:

> *That returning officers be required to keep returns at all stages of the electoral process including lists of "return to sender" mail and members to whom second ballot papers have been sent; and to lodge them within 30 days of the end of polling.*

5.70 The AEC had concerns about some matters which might be required to be included in a post-election report. For obvious reasons the AEC did not support the inclusion of details of any security measures adopted during an election.[458] The AEC also had reservations about including the number of complaints (if any) of irregularities made to the returning officer during an election because:

> *... 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.*[459]

5.71 On balance the AEC considered that, because of the desirability of their operations being open and accountable, such information should be included. It would, however, need to be carefully and meticulously presented to avoid creating any wrong perceptions.[460]

5.72 The AEC also had reservations about including the results of signature checks, that is, the checking of signatures on a declaration envelope against signatures on membership applications or other documents held by the organisation concerned. The AEC submitted that a requirement to include that information would be based on the assumption that signature cards are available and up to date. They noted 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 now, and you have no way of knowing whether it is accurate or not ... Incorporating the results of signature checks may create an expectation of an outcome that is not achievable in terms of verifying all the signatures.*[461]

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455 Transcript p. EM 147.
456 Submissions p. S105.
457 op cit.
458 Transcript p. EM 306.
459 Transcript p. EM 307.
460 ibid.
461 Transcript p. EM 308.

5.73 The Committee notes that the Cooke Inquiry recommended that the *Industrial Relations Act 1990* (Qld) be amended to, amongst other things, require the returning officer conducting an election to prepare a report on the conduct of the election. The report would be filed with the Industrial Registrar within 30 days of an election and would be published in the next journal or newsletter of the organisation concerned.[462] It would include such matters as: complaints (if any) of irregularities made to returning officers during an election; action taken by the returning officer in respect of those complaints; and the result of random checks of signatures. The model rules recommended by the Cooke Inquiry would also require the returning officer to prepare a report containing information about the compilation of the voters' roll, nominations, scrutiny and statistical analysis.[463] That report would be prepared as soon as practicable after the declaration of an election and be provided to the Industrial Registrar and the organisation or branch concerned, and would be published in the organisation's next journal or newsletter.

5.74 Section 52 of the *Industrial Organisations Act 1997* (Qld)[464] requires a returning officer to prepare an 'election result report' in respect of elections, amalgamations and withdrawals from amalgamations. The contents of such reports are prescribed by regulation 36 of the draft *Industrial Organisations Regulations*.[465] The reports are to be more comprehensive than those required by the WR Act for amalgamation and disamalgamation ballots, but not as comprehensive as those recommended by the Cooke Inquiry. They are not required, for example, to address complaints of irregularities, action taken, and the result of random checks of signatures. The report must contain the prescribed particulars and must be given to the Registrar within 14 days of the declaration of the poll[466] and to the organisation, branch or constituent part that the election or ballot was about and, in the case of an election, to each candidate.[467] The draft *Model Election Rules* contained in the Queensland regulations do not require the returning officer to prepare a post-election report (that is, they do not adopt the relevant recommendation of the Cooke Inquiry).

5.75 The Committee recommends that returning officers be required to prepare post-election reports. Those reports should be more comprehensive than the reports currently required to be prepared following ballots for amalgamations and withdrawals from amalgamations. The Government may wish to consider whether some or all of the additional matters recommended to be included in post-election reports should also be prescribed in relation to those ballots.

5.76 ***Recommendation 15:***

> **That the WR Act be amended to require that, not later than 14 days after the declaration of the ballot for an industrial election, the returning officer who conducted the election shall provide to the Industrial Registrar and the organisation (or branch) concerned, a report on the conduct of the election containing prescribed information. It should also be a requirement that such reports are**

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462 op cit, Sixth and Final Report, p. 29 (Reproduced at Submissions, p. S428).
463 ibid p. 37 (Reproduced at Submissions, p. S436).
464 Exhibit No. 2.
465 Exhibit No. 4.
466 *Industrial Organisations Act 1997* (Qld), sec. 52.
467 Draft *Industrial Organisations Regulation 1997* (Qld), reg. 37.

to be published in the next journal or newsletter of that organisation (or branch). The prescribed information should be the same as is prescribed by regulations 96 and 98Z in respect of ballots for amalgamations and withdrawals from amalgamations, with any necessary changes and with the following additions:

- **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;**
- **results of checks of the voters' roll;**
- **results of checks (if any) of signatures on the declaration envelopes;**
- **any rules of the organisation or branch which, because of ambiguity or other reason, were difficult to interpret or apply; and**
- **any other matter the returning officer thinks fit.**

Electioneering material

Use of organisation resources for electioneering

5.77 Dr McGrath drew attention to the decision of the High Court in *Re Collins; Ex parte Hockings*[468] in which it was found that the use of union resources to support one team in an election did not constitute an irregularity within the meaning of the former *Conciliation and Arbitration Act 1904*. The decision is equally applicable to the current definition of 'irregularity' which is in the following terms:

> ***irregularity**, in relation to an election or ballot includes:*
>
> *(a) a breach of the rules of an organisation or branch of an organisation; and*
>
> *(b) an act or omission by means of which:*
>
> *(i) the full and free recording of votes by all persons entitled to record votes and by no other persons; or*
>
> *(ii) a correct ascertainment or declaration of the results of the voting;*

468 (1989) 167 C.L.R. 522.

> *is, or is attempted to be, prevented or hindered.*[469]

5.78 In *Re Collins* it was not disputed that, even in the absence of a specific rule, the use of union resources to support a candidate in an election when the resources or funds are, or would be, denied to an opposing candidate may constitute a breach of a prohibition implicit in the rules. The issue before the Court, therefore, was whether the matters complained of were capable of constituting an irregularity as defined. The Court found that they were not. In so doing the Court held that not every breach of union rules is capable of constituting an 'irregularity in or in connection with an election' because there may be no election in progress or in prospect and some breaches could not in any way bear upon an election.[470] The Court noted that the word 'election' is not defined in the Act but considered that it referred only to 'the machinery processes or formal steps involved in an election' and did not include the activities involved in electioneering.[471] In addition, it was noted that the Court may not declare an election void unless it is satisfied that the result may have been, or may be, affected by irregularities.[472] A majority of the Court also took the view that, even if it were possible to ascertain whether electioneering had affected the result of an election, it would require a very substantial intrusion into the secrecy of the ballot and nothing in the Act would permit or justify such an inquiry.[473]

5.79 Accordingly, Gaudron J, with whom the other members of the Court agreed, concluded that:

> *'irregularity in or in connection with an election' as used in the Act does not encompass those activities by which candidates or persons acting in their interests seek, by their advocacy, or by promoting or publicising such advocacy, to influence voters in their decision for whom to vote. Accordingly, the matters complained of are not capable of constituting an irregularity in or in connection with an election.*[474]

5.80 *Re Collins* was criticised by Wilcox J of the Federal Court in *Application by Davidson for an election inquiry*[475] who nevertheless felt bound to follow it. His Honour felt that the expression 'in relation to an election' should have been given a wider interpretation to encompass electioneering and commented that, following *Re Collins*:

> *... there is now no legal sanction against the use of union funds for electioneering purposes.*

5.81 In *Post v TWU (WA)*[476] the union's mail franking machine had been used to stamp envelopes which contained leaflets promoting the incumbent's candidacy. The Federal Court found that the complaint could not be sustained after the High Court decision in *Re Collins.*

5.82 In light of the decision in *Re Collins*, the Cooke Inquiry recommended that the Queensland legislation be amended to include a provision expressly prohibiting the use of

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469 WR Act, Sec. 4.
470 at pp. 529-530.
471 at pp. 530-531.
472 at p. 531.
473 ibid.
474 at pp. 531-532.
475 (1990) AILR 248.
476 (1992) AILR 117.

union resources for election purposes.[477] In making that recommendation, Marshall Cooke QC noted that:

> *Evidence before the Inquiry and my investigations generally reveal a widespread use of union resources by incumbent officials in their re-election campaigns. Official union journals are used to promote the officials in power, sometimes subtly, sometimes not ... Opponents do not get a mention ... Union vehicles, telephones and office facilities are utilised ... All these factors give incumbent officials a very strong advantage over a rank and file challenge.*[478]

5.83 Marshall Cooke QC noted that prior to the decision in *Re Collins*, the blatant use of union resources for electioneering had:

> *been mildly restrained by the widely held view that the use of union resources constituted 'an irregularity in relation to an election' which could result in the election being declared null and void ...*

The decision in *Re Collins* had lifted any such restraint.[479]

5.84 The Cooke Inquiry did, however, recommend that union resources be permitted to be used to provide certain assistance to all candidates in an election. He noted that:

> *The cost of postage of election material to members is the most significant item in any election budget. It would be fair to allow election material for all candidates or teams to be posted out to members at the union's expense. One mail-out only should be at union expense and election material (of uniform size and format) on behalf of all candidates or teams could be posted in the one envelope. In addition, equal space should be provided in the union journal for candidates at election time free of charge.*[480]

5.85 Accordingly, Marshall Cooke QC recommended an amendment of the Queensland legislation to give effect to that proposal.

5.86 The recent Queensland legislation has adopted those recommendations of the Cooke Inquiry, albeit in modified form. The rules of an organisation are required to provide that the organisation must help a candidate in a way that is stated in the model election rules or prescribed under a regulation[481] and must require the organisation to give candidates an equal opportunity to express their views to members in a statement given to each member with the ballot papers and paid for by the organisation.[482] The statement is to be printed on a single A4 sheet of paper and include the candidate's name and other details decided by the candidate, such as the candidate's credentials, policies, union activity, views and work history.[483] These requirements are reflected in the draft *Industrial Organisations (Model Election) Rules 1997* (Qld).[484]

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477 op cit, Second Report, para. 10.7.3; Sixth and Final Report, p. 29.
478 ibid, Second Report, para 10.7.1.
479 ibid, para 10.7.3.
480 ibid, para. 10.7.5.
481 *Industrial Organisations Act 1997* (Qld), sec. 58.
482 ibid, sec. 25(1)(c); draft *Industrial Organisations Regulation*, reg. 41.
483 Draft *Industrial Organisations Regulation*, reg. 12.
484 Rules 14 and 16.

5.87 The Committee has received insufficient evidence on this matter to make a detailed recommendation. It has no evidence, for example, on the problems that might arise if there were numerous candidates for a national election in an organisation and, following the Queensland provisions discussed above, there was a requirement to distribute candidate's statements with the ballot papers. Nevertheless, the use of union resources for electioneering is a matter which, following the decision in *Re Collins*, should receive consideration. The Queensland provisions discussed above may provide a model for developing appropriate measures at the Federal level.

5.88 ***Recommendation 16:***

> **That the Government consult with the AEC and with peak union and employer organisations with a view to developing legislation prohibiting the use of union resources for electioneering purposes, except as permitted by the WR Act and Regulations or by model rules developed in accordance with Recommendation 4.**

Smear sheets and misleading statements

5.89 Dr McGrath and Mr Sheehan raised the issue of smear sheets, that is, electioneering material containing defamatory material about candidates in an election with a view to discrediting them. Mr Sheehan described the practice as 'time-honoured' but unlawful.[485] Misleading statements published during an election may not be defamatory but may seek to influence voters by, for example, giving a false impression about such matters as an opponent's policies or party affiliations or how to cast a valid vote for a particular candidate.

5.90 Mr Sheehan described the use of smear sheets in the 1996 CEPU branch elections, noting that some such sheets:

> *... had described some of the reform candidates variously as a phone sex addict, an alcoholic, a bankrupt. One of the sheets even carried the photograph of an adversary of the incumbent Right faction, plus this description of his life:*
>
> *'My wife left me. Her and her solicitor squeezed me for every cent I had. I have lost my home and am now living out of the back of my car. They made up stories about my drinking and gambling. They even told lies about me visiting prostitutes in Fyshwick (in Canberra). So then I lost custody of my kids.'*
>
> *I have spoken to the man in question. He is not living in the back of his car. In fact, he recently put an extension onto his house. Everything else in the sheet is also untrue.*[486]

5.91 During the public hearings Mr Sheehan said that the Committee should consider an amendment of the WR Act to make the distribution of anonymous material and defamatory material a statutory offence, and not simply a matter for common law defamation. Mr Sheehan said:

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485 Submissions p. S507.
486 Submissions p. S508.

> *... if somebody is standing for office in a union election that is just as sacred an election as any other. The system basically winks at these sheets.*[487]

5.92 Dr McGrath also referred to the use of misleading circulars in the 1996 CEPU branch elections, and to case law on the subject.[488] However, she made no recommendation on the subject.

5.93 The preparation and dissemination of smear sheets is not an offence under the WR Act and does not appear to be unlawful except under the laws of defamation. Similarly, misleading statements are not prohibited by the Act.

5.94 Misleading statements made during an election campaign will constitute an irregularity in relation to the election if they 'hinder the full and free recording of votes' and thus come within the extended definition of 'irregularity' in section 4 of the WR Act.[489] The words 'recording of votes' refer to the acts of obtaining, marking and returning a ballot paper, not to the process of deciding for whom to vote. Consequently, a misleading statement which may influence a person in deciding for whom to vote will not constitute an irregularity, whereas a misleading statement which is intended to affect a person when he or she seeks to give effect to that choice by casting a vote may constitute an irregularity. Examples of misleading statements which may constitute an irregularity are a statement that a ballot paper should be marked in a way that would not conform to the requirements of the Act and so render it invalid, or a statement that a person who wished to support a particular party should vote for a particular candidate who in fact belonged to a rival party.[490] The use of deliberately misleading statements in industrial elections should be prohibited by the WR Act.

5.95 Smear sheets are generally published and disseminated anonymously. Where the author cannot be identified it is difficult to take any action, whether under the law of defamation or otherwise. Nevertheless, it is appropriate that the legislation reflect abhorrence for the practice and enable a penalty to be imposed where the author can be identified.

5.96 In this regard the Committee refers to the recommendation contained in its report on the 1996 Federal election that the Commonwealth Electoral Act and the Broadcasting Act be amended to prohibit the publication, during election periods, of 'misleading statements of fact'.[491] There does not appear to be any reason why a similar prohibition should not apply to industrial elections.

5.97 ***Recommendation 17:***

> **That the WR Act be amended to prohibit the publication by any means of 'misleading statements of fact' during an industrial election.**

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487 Transcript p. EM 199.
488 Submissions pp. S101-102.
489 *Re Gray; Ex parte Marsh* (1985) 157 C.L.R. 351.
490 per Gibbs CJ at pp. 366-367.
491 op cit pp. 84-85 (Recommendation 47).

Advertising costs

5.98 The AEC raised the question of advertising costs, noting that at present there is nothing in the legislation to prevent an organisation from providing in its rules for quite expensive advertising procedures such as national prime-time television advertising. The AEC recommended that section 215(4) of the Act be amended to limit the extent to which an organisation may advertise at the public expense.[492] The AEC acknowledged that there has not been a problem with advertising costs so far, and that they were simply pointing to a potential problem. They noted, however, that they have legal advice to the effect that an attempt to regulate advertising might be in breach of ILO Convention No. 187.[493]

5.99 DIR supported in principle that the cost of public funded elections should be subject to reasonable limits, but noted that the AEC did not identify advertising costs as being of immediate concern.[494]

5.100 The ACTU indicated that it would support a limitation on the extent to which organisations may advertise at public expense. They considered that some degree of reasonableness should attach to advertising costs but asked 'what is a reasonable level?'. The ACTU would be happy to make a substantive submission on the issue if the Committee was to make such a recommendation.[495]

5.101 It would not be appropriate to restrict the type or quantity of advertising that an organisation may engage in during an election and no witness suggested such a restriction. However, it would be appropriate to limit the amount which the Commonwealth could be required to pay for such advertising. Having regard to the diversity amongst registered organisations in size, structure and the dispersion of members, it would not be appropriate or practicable to impose a fixed limit on advertising expenses. Instead, for each election the AEC should have the ability to determine a reasonable level of expenditure, based on a number of factors.

5.102 ***Recommendation 18:***

> **That the WR Act be amended to provide that, in respect of each industrial election, the cost of advertising shall be borne by the Commonwealth only up to an amount determined by the AEC, with the AEC having the statutory power to recoup any excess. The AEC should be required to determine in advance of each election what would be a 'reasonable' amount to be spent on advertising for the election. In determining the amount to be borne by the Commonwealth the AEC should be required to take account of the following factors:**

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492 Submissions p. S373.
493 Transcript p. EM 27.
494 Submissions p. S550.
495 Transcript pp. EM 275-276.

- **the amount spent on advertising in the previous corresponding election for the organisation concerned;**
- **any significant changes in the type or nature of election advertising by that organisation since the last corresponding election and the reasons for such changes;**
- **any changes in the size, structure or nature of the organisation;**
- **the amount spent on advertising in similar elections by other organisations of a similar size and structure; and**
- **any increases in the cost of advertisements of the kind to be used in the election in question.**

It should be further provided that where the AEC considers that the Commonwealth should pay less than the full cost of advertising for the election in question, it shall invite the organisation concerned to put its views as to why the Commonwealth should bear the full cost, and shall take those views into account before making a final determination. It should also be provided that, except in exceptional circumstances, the AEC shall not determine an amount that is less than the amount spent on advertising in the previous corresponding election for the organisation concerned.

Gary Nairn MP
CHAIRMAN

October 1997

APPENDIX 1

RESOLUTION OF APPOINTMENT

(1) That a Joint Standing Committee on Electoral Matters be appointed to inquire into and report on such matters relating to electoral laws and practices and their administration as may be referred to it by either House of the Parliament or a Minister.

(2) That the committee consist of 10 members, 3 Members of the House of Representatives to be nominated by the Government Whip or Whips, 2 Members of the House of Representatives to be nominated by the Opposition Whip or Whips or by any independent Member, 2 Senators to be nominated by the Leader of the Government in the Senate, 1 Senator to be nominated by the Leader of the Opposition in the Senate and 2 Senators to be nominated by any minority group or groups or independent Senator or independent Senators.

(3) That every nomination of a member of the committee be forthwith notified in writing to the President of the Senate and the Speaker of the House of Representatives.

(4) That the members of the committee hold office as a joint standing committee until the House of Representatives is dissolved or expires by effluxion of time.

(5) That the committee elect a Government member as its chair.

(6) That the committee elect a deputy chair who shall act as chair of the committee at any time when the chair is not present at a meeting of the committee and at any time when the chair and deputy chair are not present at a meeting of the committee the members present shall elect another member to act as chair at that meeting.

(7) That, in the event of an equality of voting, the chair, or the deputy chair when acting as chair, shall have a casting vote.

(8) That 3 members of the committee constitute a quorum of the committee, provided that in a deliberative meeting the quorum shall include 1 member of either House of the Government parties and 1 member of either House of the non-Government parties.

(9) That the committee have power to appoint subcommittees consisting of 3 or more of its members and to refer to any subcommittee any matter which the committee is empowered to examine.

(10) That the committee appoint the chair of each subcommittee who shall have a casting vote only and at any time when the chair of a subcommittee is not present at a meeting of the subcommittee the members of the subcommittee present shall elect another member of that subcommittee to act as chair at that meeting.

(11) That the quorum of a subcommittee be 2 members of that subcommittee, provided that in a deliberative meeting the quorum shall comprise 1 member of either House of the Government parties and 1 member of either House of the non-Government parties.

(12) That members of the committee who are not members of a subcommittee may participate in the proceedings of that subcommittee but shall not vote, move any motion or be counted for the purpose of a quorum.

(13) That the committee or any subcommittee have power to send for persons, papers and records.

(14) That the committee or any subcommittee have power to move from place to place.

(15) That a subcommittee have power to adjourn from time to time and to sit during any adjournment of the Senate and the House of Representatives.

(16) That the committee have leave to report from time to time.

(17) That the committee or any subcommittee have power to consider and make use of:

(a) submissions lodged with the Clerk of the Senate in response to public advertisements placed in accordance with the resolution of the Senate of 26 November 1981 relating to a proposed Joint Select Committee on the Electoral System, and

(b) the evidence and records of the Joint Committees on Electoral Reform and Electoral Matters appointed during previous Parliaments.

(18) That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

APPENDIX 2

INDEX OF SUBMISSIONS

1	Mr David Combridge JP
2	Tasmanian Sawmillers Industrial Association
3	Australian Chamber of Manufactures
4	Mr Michael Warren
5	Territory Construction Association
6	Shop, Distributive & Allied Employees' Association
7	Queensland Chamber of Commerce and Industry
8	Mr Quentin Cook
9	Tasmanian Chamber of Commerce and Industry Ltd
10	Screen Producers Association of Australia
11	Australian Federation of Air Pilots
12	National Tertiary Education Industry Union
13	Civil Contractors Federation
14	Victorian Farmers Federation Industrial Association
15	Entertainment Industry Employers Association
16	Dr Amy McGrath OAM
17	Australian Chamber of Commerce and Industry
18	Timber Trade Industrial Association
19	Mr John Curtis
20	Civil Air
21	Mr Gordon Hodge
22	Australian Council of Trade Unions
23	Australian Electoral Commission

24	The Association of Professional Engineers, Scientists and Managers, Australia
25	Master Builders Australia Incorporated
26	Western Australian Government
27	Mr Michael Preston
28	Queensland State Government
29	Mr Paul Sheehan
30	Mr Neil Kean
31	Australian Electoral Commission (Supplementary Submission)
32	Australian Industrial Registry
33	Department of Industrial Relations
34	Mr John Curtis (Supplementary Submission)
35	Australian Electoral Commission
36	Queensland Chamber of Commerce and Industry (Supplementary Submission)
37	Australian Electoral Commission (Supplementary Submission)
38	Australia Post
39	Ms Kerry Rehn

APPENDIX 3

LIST OF EXHIBITS

1	Mr Victor Dominello *Affidavit sworn 27 September 1996* Affidavit in relation to the election for an office in the Communication Workers' Union of Australia, Postal and Telecommunications Branch, NSW
2	Queensland State Government *Queensland (State) Industrial Organisations Bill 1996* (Related to Submission No. 28)
3	Australian Industrial Registry *List of Registered Organisations for all States*
4	Department of Industrial Relations *Draft Queensland Industrial Relations Organisations Regulations 1997* Model Rules
5	Australian Industrial Registry *Information on exemptions granted to organisations under sections 198 and 213 of the Workplace Relations Act* Requested by the Committee at the 29 April 1997 public hearing.
6	Australian Industrial Registry *Decision and transcript relating to the application for an exemption under section 213 by The Pastoralist's Association of West Darling.* Requested by the Committee at the 29 April 1997 public hearing.
7	Australian Electoral Commission *Evaluation of the Industrial Elections Program* Evaluation of the Industrial Elections Program, a report to the Australian Electoral Commission by ACIL Economics, Policy and Strategy Consultants, March 1996
8	Australian Electoral Commission *Industrial Elections Advertising Costs* Requested by the Committee on 7 August 1997. Accepted as an exhibit 2 September 1997.
9	Registry of the Industrial Relations Commission of New South Wales *Information on Panel of Independent Returning Officers* Requested by the Committee on 16 July 1997. Accepted as an exhibit 2 September 1997.

10 Australian Electoral Commission
Statutory Declarations
Standard declarations for the purposes of inspecting information in relation to industrial elections.

Requested by the Committee on 7 August 1997. Accepted as an exhibit 2 September 1997.

APPENDIX 4

LIST OF HEARINGS AND WITNESSES

Canberra, Wednesday 9 April 1997

Australian Electoral Commission:

Mr Bill Gray AM, Electoral Commissioner
Mr David Kerslake, Assistant Commissioner, Industrial Elections, Funding and Disclosure
Mr Stephen Lewis, Director, Industrial Elections

Melbourne, Tuesday 29 April 1997

Australian Chamber of Commerce and Industry:

Mr Scott Barklamb, Labour Relations Adviser
Mr Reginald Hamilton, Manager, Labour Relations
Mr Bryan Noakes, Executive Director

Australian Chamber of Manufactures:

Mr Mark Quirk, National Manager, Human Resources
Mr Barry Watchorn, Director

Australian Industrial Registry:

Mr Michael Kelly, Industrial Registrar
Mr Terry Nassios, Manager, Research, Information and Advice Branch
Mr Damien Staunton, Principal Executive Officer, Research, Information and Advice Branch

Shop, Distributive and Allied Employees Association:

Mr Ian Blandthorn, National Assistant Secretary
Mr Anthony Macken, Solicitor

Brisbane, Monday 19 May 1997

Mr Gordon Hodge

Mr John Curtis

Queensland Chamber of Commerce and Industry:

Mr William Love, Senior Industrial Relations Consultant

Sydney, Tuesday 20 May 1997

Mr Paul Sheehan

Mr Quentin Cook

Department of Industrial Relations:

Mr David Bohn, Director, Organisations, Sanctions and Industrial Chemicals Unit, Legal Services Group
Mr Greg Parkin, Assistant Secretary (Projects), Legal Services Group

H S Chapman Society:

Dr Amy McGrath OAM, Convenor

Melbourne, Tuesday 1 July 1997

Australia Post:

Mr Sal Perna, Group Manager, Security and Investigation Services Group
Mr Gerald Ryan, Corporate Secretary
Mr Terry Taylor, General Manager

Australian Council of Trade Unions:

Mr Tim Pallas, Assistant Secretary

Australian Electoral Commission:

Mr David Kerslake, Assistant Commissioner, Industrial Elections, Funding and Disclosure

Sydney, Thursday 7 August 1997

Australian Electoral Commission:

Mr David Kerslake, Assistant Commissioner, Industrial Elections, Funding and Disclosure
Mr Stephen Lewis, Director, Industrial Elections