From:

Andrew Farran

To:

Committee Secretary
Joint Standing Committee on Electoral Matters
PO Box 6021
Parliament House
Canberra ACT 2600

Phone: +61 2 6277 2374
Fax: +61 2 6277 4773
section44@aph.gov.au

**Submission to the Inquiry into matters relating to Section 44 of the Constitution**

I am making a submission - see below - on several aspects of the Committee's current inquiries in relation to Section 44 of the Constitution arising from recent High Court (Court of Disputed Returns) decisions in that regard.

I am a former Australian diplomat, trade adviser, and academic in public and international law. Now in semi-retirement, I mix woolgrowing with published

commentary on public affairs, particularly international relations, defence policy, and constitutional reform - and have done so in various capacities over many years (organisationally and otherwise).

My submission appears below. I commend it to the Committee.

Thanking you.

**Andrew Farran**

**Submission to the Inquiry into matters relating to Section 44 of the Constitution**

This submission embraces several aspects of the Committee's inquiries arising from Section 44 of the Constitution, the recent misconceived decisions of the High Court acting as the Court of Disputed Returns, and their inconceivable repercussions.

As far as Section 44(i) is concerned the issues revolved around the words "foreign power". Rightly or wrongly the Court has made the decision it has from which there is no appeal unless the Court were to change its mind and accept a reference to it in its capacity as the High Court. Given the absurd things that some court's do from time to time that need not altogether to be out of the question.

It is not inappropriate to review the decisions and to ask whether the Court got it wrong at the outset. No issue can be closed for all time and posterity might benefit from such a review. The central question was the meaning of "foreign power" in relation to Parliamentary eligibility. When considering the meaning of words in a constituent document which in this case has served well and been accepted for the most part as it stood for over a century, if a literal interpretation would have nonsensical or disruptive consequences it is usual to look at the drafting in its historical context. What was the drafters' intent? What would they consider to be a "foreign power'? Obviously, from both original intent and subsequent practice for decade after decade, they would not have conceived that the words would or should preclude them personally from Parliamentary service.

In the historical context an understanding of their meaning is aided by recalling the nature of foreign relations as seen at the time by the British Foreign Office where they had not ceased to be preoccupied with the policies of such powers as France, Germany and Russia, and where the 'Great Game' elsewhere was in evidence. And closer to home the objective was to entrench and deepen the White Australia policy against any dilution on the part of Japan and China as powers (potentially).

It may be recalled that the Constitution was reviewed in 1929 by a Royal Commission. Section 44 was discussed but no specific comment was made on Section 44 (i) which would confirm that the general understanding of "foreign power", and practice in relation thereto, remained as it was in 1901. No

licence, implicit or otherwise, was given to change it.

Having regard to this it was truly daring to give the words a literal construction because on balance the disruption caused would be damaging to good and stable governance as we have seen lately in abundance. The guiding principle in decision making should be to do least harm.

Obviously the present Court took the view that the words should be read in their contemporary context. But this wasn't being helpful unless they were anticipating Australia becoming a Republic. But that would not be a matter for the Court. Bearing in mind the loyal oath, to do so could amount to legislating or worse.

The damage has been done. How then to overcome it?

If Australian citizenship is good enough for appointment to the High Court it should be good enough for election to Parliament. If there is concern about Australian citizenship in the light of changing circumstances it it up to Parliament to address that in its context and do the best thing in the national interest.

Some have argued that such a legislative move might breach some notion of the Constitution. If so, in order to overcome the present absurdity and its negative consequences, there would need to be a Referendum with an unambiguously clear provision for Parliamentary eligibility. This would have to be effectively explained to the electorate so that the issue was not misunderstood and clear as to its implications for future generations.

**I have discussed the above in more detail in the *attached articles* which I wish to incorporate in this submission. The articles first appeared in *Pearls & Irritations*, a respected internet blog published by John Menadue, AO - and are not subject to copyright.**

Two further points:

(i) With regard to the "foreign power" issue, in that as interpreted by the Court it precludes 'dual citizenship' in the Parliament: dual citizenship *per se*, where allowed, has served Australia well and should continue to do so, given that we are a country of immigration with a diverse demographic. The advantages are largely economic and social - not insignificant considerations.

(ii) With regard to Section 44(iv) it is clearly undemocratic that a mere appointment to a government school, to the bureaucracy, the armed forces and the like should in itself require resignation prior to nomination or prior to election given the risks that entails to position and personal livelihood. Resignation after election is another matter. As a former legal colleague put it to me recently: “What we need to avoid is the kind of corruption that led to rotten boroughs [in 19th century England], and simony. But having a post office franchise as a tenant of a company in which one holds shares is really stretching it. This is one of those matters which would be funny if it were not so serious!"

I commend this submission to the Committee.

**Andrew Farran**
Melbourne and Edenhope, Victoria
Former diplomat, trade adviser, and academic in public and international law.

Attachments to Submission by Andrew Farran (see below):

## 1. Parliamentary eligibility - did the High Court get it wrong? (Part 1)

*The response to the High Court’s decision in the Parliamentarians eligibility case has been largely uncritical and disappointing. While Section 44 (i) of the Constitution allows for a simplistic literal interpretation the Court’s failure to transpose that provision into the social and political context of the present day, and have better regard for its historical antecedents, will create more problems than it has solved and does not sit well with our multicultural and regional realities.*

The High Court’s decision in the Federal Parliamentary eligibility case is another blow to the equanimity of our pluralistic system of government. While the relevant section of the Constitution allows for a simplistic literal interpretation the Court’s failure to transpose that provision into the social and political context of the present day, and have better regard for its historical antecedents, will create more problems than it has solved and does not sit well with our multicultural and regional realities.

The media response has shown more glee over the embarrassment caused to Prime Minister Turnbull and the discomfiture caused to Deputy Prime Minister

Barnaby Joyce, than the consequences for our demographic wellbeing - quite apart from its political repercussions. Understandably many ordinary people in electorate cannot understand why a person born in this country, with a wife and grandparent born in this country, lived all his life in this country, and simply because one parent had been born in New Zealand (a country that participated in the drafting of this very Constitution), and migrated to this country many decades ago, could be rendered ineligible for election to Parliament. Can one conceive of the likelihood that the drafters of the Constitution would have thought such a thing, for if they had they would have excluded many of their number from subsequent Parliamentary office?

The bugbear in the situation is Section 44 (i) which uses the term ‘foreign power’. If the Court had an informed notion of history it would have understood what that meant at that time - certainly not New Zealand nor any other polity of British origin or descent.

The word power itself is significant and should not be divorced from the entity to which it is attached. Can it be attached to any state regardless of its overall attributes? Are all members of the UN ‘powers’? To accept that view diminishes the notion of power. Surely the term power should mean just that, real power, and qualify the term in relation to the entity to which an attachment is alleged.

In 1901 at a time of Empire and imperialism the term British was embracive within the Dominions and excluded foreign powers. Many a subject derived his or her British character regardless of where they travelled or settled. This distinguished them from matters foreign. Indeed, the distinction followed by the Court between a natural born citizen and naturalised citizen required a further distinction within the latter as in the late 1990s subjects born in the other Dominions or in Britain did not need to be ‘naturalised’. This might have been clear from the Colonial Office letters to the Constitutional Convention but the Court did not wish to look into that. Moreover the Colonial Office would have had a clear notion of what constituted a ‘foreign power’.

Thus, when the first Australian Parliament sat in Melbourne it was constituted by members whose connection with their birth or origins had a strong immigration background and the notion of Australian citizenship was as oblique as the notion of foreign powers - the latter being the likes of France, Germany, Russian, not British nationals who by definition would not have been precluded.

Of the 111 members of the First Commonwealth Parliament their countries of birth were: Australia 59, England 25, Scotland 16, Ireland 8, Wales 1, USA 1, and Chile 1. That is itself raises the question of what the drafters of the Constitution meant by the phrase 'foreign powers'.

Statutory construction does allow for regard to be had to the origins of a provision to garner its meaning in its original context. If a literal interpretation would be disruptive or even absurd in the present context, and harmful for stable government, then to proceed on that basis would not serve the common interest.. This is what the Court did. The Court may have been minded that the common interest would be better served in future by putting a broad rule across the issue by removing all ambiguity. However it did not explore the statutory records on the drafting as there were little of these of consequence in relation to this section and questions raised were not pursued as the drafters knew what the words 'foreign power' were intended to mean. It has long been the belief that being born in Australia or by taking the oath of Australian citizenship one's first and foremost allegiance is to the Commonwealth of Australia, unless overtly disclosed to be otherwise.

As it is, with so many issues of origin being compounded, the determination of a person's eligibility for Parliament will be even more difficult unless legislation is enacted to eliminate the question of a person's citizenship status being determined overseas. The Court's view is that if objectively speaking a person could have a claim of citizenship or citizenship privileges from somewhere else in the world the onus is on them to be aware of it and, if seeking a seat in Parliament, to go out of their way to denounce it. This creates a situation whereby doubt on their eligibility can be raised from exogenous factors about which they may know nothing and should not be required or expected to explore. Otherwise their fate could be determined, and seemingly will be, and unknowingly, overseas.

Yet in one of these cases the Court questioned whether a person was an Italian citizen and concluded, for its part, that it was unlikely because of how citizenship might be assessed in that country. In any case, it is not the business of an Australian court to decide this in a matter of Constitutional interpretation. What is relevant is what is done here unless Australian Courts have moved away from the existing position that international and foreign law are not applied here unless legislated to do so.

In the only relevant previous case of Sykes v. Cleary (1992) - following Prime Minister Hawke's resignation from Parliament and the by-election in Wills to replace him - a case primarily concerned with an issue of 'office of profit under the Crown' and not with the question of attachments, duties, etc. to foreign powers, two dissenting justices, Deane J and Gaudron J addressed this point in some detail even though it was not directly relevant, and adverted to the nonsense that a literal application of clause would cause. The other judges did not follow them in this regard but the dissenting judgments could have opened the way to a fresh approach to this section.

In the present cases the High Court has conflated two separate considerations – the notion of a foreign power per se and the derivative nature of a former British subject by transposing that concept of derivation to ancestry of a non-British subject. The problem then is where to draw the line? The British connection might pass without more ado but the non-British connection would vary according to whether or not that might be with a 'foreign power'. This is a matter that should be covered by the Nationality and Citizen Act, on the basis of which eligibility could be defined. That Act should prescribe the oath to be taken by Australian born or naturalised persons when being seated in the Parliament. It could allow for dual-citizenship in specific cases, such as for persons of British ancestry and for others as befits the policy. It should also include renunciation provisions so that those in any doubt may by way of the oath renounce any external connection they no longer wish to retain.

With regard to the effectiveness of a renunciation of a foreign citizenship, under statutory oath, Dean J in the Sykes v. Cleary case stated that such an oath in citizenship proceedings was not only a declaration by the naturalised person but was also "a clear representation by the Australian Government and people" that, for the purposes of Australian law, there has been a "final severing" of all other ties of nationality and a compliance with all requirements to become "a full and equal member of this nation". It would be inconsistent with that oath, he stated, for the new citizen to then apply to the foreign country to renounce its citizenship, thereby asserting the continuing existence of that citizenship and, as a citizen of that country, submitting to the discretion of its responsible (foreign) minister.

If the Court is determined to maintain its 2017 position on this sub-section rather than that assumed in 1901, and if a statutory change will not suffice, then a referendum to make a Constitutional amendment will be necessary. While

this has had its difficulties in the past it would not seem too much to ask of the major parties that they should jointly submit an agreed proposal to the people to avoid future disruption as experienced as will most certainly occur if these matters are not resolved. This would surely be in the national interest.

The concept of dual-citizenship in itself is not alien to the purity of Australian nationalism. It has positive uses in a globalised world which should not be overlooked or unnecessarily negated. Apart from the thousands attracted to these shores from countries without a British background, there are those Australians whose opportunity to compete on a level playing field, as for example in the European Union, has been facilitated by their dual-citizenship. As a Constitutional issue however its retention for a Parliamentarian should be a matter for a referendum if other alternatives fall short.

Finally, it is difficult to understand how Australia with a British monarch can regard other persons of similar ancestral background as being foreign. For the purposes of eligibility to sit in the Federal Parliament, Australian citizenship should, as argued, be sufficient. A Republican structure would in due course settle that emphatically.

***Andrew Farran***

**2. Parliamentary eligibility – did the High Court get it wrong? (Part 2)**

*Prime Minister Turnbull now asserts that the onus is on individual Parliamentarians to prove their non-dual citizenship status (a status that previously did not disqualify). How can the onus of proof be put on them when that determination may be in the hands of an external authority?*

What can be done when one arm of the ‘division of powers’ under our Constitution gets ahead of the other, particularly when it is a Court from which there can be no appeal (the Privy Council having been shut out)?

The High Court’s decision on the eligibility of Federal Parliamentarians is surely one such over reach. We are not yet a Republic. It is remarkable also for being unanimous on such a potentially complex and divisive matter. That must have been decided as a matter of policy, not practice.

No Federal Act has declared the United Kingdom and its British Crown to be a ‘foreign power’. Had that been done we would have known about it as part of

the democratic process. Various pieces of legislation have clarified matters of nationality and citizenship, whether acquired by natural birth or naturalization. All of these exist under the Crown, previously and generally as British subjects, and now for purposes of citizenship as a matter of domestic law.

Nor is there any doubt about Australia's national sovereignty, acknowledged since the Statute of Westminster was adopted in 1941 and further as an exercise of the Prerogative and the Foreign Affairs power through treaties, including membership of the United Nations.

But these did not per se render all our treaty partners or co-members of the United Nations as foreign. A good number were not. Hence we treat members of the Commonwealth, including the UK and former British colonies, differently from 'foreigners' with whom diplomatically we exchange High Commissions and High Commissioners, not Embassies and Ambassadors. An Ambassador represents a Head of State. High Commissioners represent, in our case, the "Governor-General of the Commonwealth of Australia being the representative in Australia of Her Majesty the Queen" – hardly a foreign power.

There is no doubt that those who have been caught up in this fiasco have, as it were, been ambushed, in the sense that the meaning of 'foreign powers' has changed since it was drafted in the Constitution. It has changed because the Constitution Founders clearly did not intend to exclude themselves from the Parliament not only when it convened for the first time but for the decades ahead.

The countries of birth of the 111 members of the First Commonwealth Parliament were: Australia 59, England 25, Scotland 16, Ireland 8, Wales 1, USA 1, and Chile 1. That in itself would raise the question of what the drafters of the Constitution meant by the phrase 'foreign powers'.

Over the next decades Commonwealth practice was to accept the eligibility of all and any who were British subjects or Australian citizens (when that concept was legislated for), natural born or naturalized.

How does it come about that a Court can change the clear intent of the Founders in this regard and subsequent practice, with clear implications in this case for Australia's diplomatic relations? Was this creative legalism?

Perhaps the Court was looking ahead to when Australia might be a Republic. But meanwhile the British origins and continuities in our legal system and past Constitutional practice have been ignored in spite of the fact that High Court judges themselves are required to acknowledge allegiance to the Crown. It shouldn't matter whether it is "the Crown in right of" here or elsewhere. The British heritage is a fact either way and is not foreign.

Rather than making the leap they did the Court might have drawn attention to the ambiguity of the words 'foreign powers' when viewed in context and upheld the status quo at least for those of British origin, and gone on to advise the Parliament to resolve and clarify the matter before the next round of elections by way of revisions to the Nationality and Citizenship Act.

Prime Minister Turnbull has now asserted that the onus is on individual Parliamentarians to prove their non-dual citizenship status. But how can the onus of proof be put on them when it may not be in their hands to determine their status but rather it is in the hands of some external authority? Hardly a domestic procedure.

As noted in my earlier piece on 3rd November, the avenue of renouncing or denouncing a dual- citizenship to settle the question once and for all - for those for whom it is or could be an issue - would be legally effective if done as expressed by Mr Justice Dean in the earlier Cleary case, when he remarked with regard to the effectiveness of a renunciation of a foreign citizenship under statutory oath that such an oath in citizenship proceedings was not only a declaration by the naturalised person but was also "a clear representation by the Australian Government and people" that, for the purposes of Australian law, there has been a "final severing" of all other ties of nationality and a compliance with all requirements to become "a full and equal member of this nation". It would be inconsistent with that oath, he stated, for the new citizen to then apply to the foreign country to renounce its citizenship, thereby asserting the continuing existence of that citizenship and, as a citizen of that country, submitting to the discretion of its responsible (foreign) minister.

What to do? Either the Parliament should amend the Nationality and Citizenship Act to define Australian citizenship as excluding any other, or define and clarify what is meant what by the words "foreign power" and give status to that fact. Or Parliament could put the issue beyond doubt by holding a Referendum to amend and clarify Section 44 (i) or delete it altogether.

Then we might also decide whether “dual citizenship” is a good or bad thing from a national perspective.

***Andrew Farran***