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Official Committee Hansard

JOINT COMMITTEE ON REPUBLIC REFERENDUM

Reference: Proposed laws, Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999

TUESDAY, 6 JULY 1999

MELBOURNE

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JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

Tuesday, 6 July 1999

Members: Mr Charles *(Chairman)*, Senators Abetz, Bolkus, Boswell, Payne, Schacht and Stott Despoja and Mr Adams, Mr Baird, Ms Julie Bishop, Mr Causley, Mr Danby, Ms Hall, Mr Hawker, Mr McClelland, Mr Price, Mr Pyne and Ms Roxon

Senators and members in attendance: Senators Abetz and Payne and Ms Julie Bishop, Mr Causley, Mr Charles, Mr Danby, Ms Hall, Mr McClelland, Mr Price and Ms Roxon

Terms of reference for the inquiry:

To inquire into and report on the provisions of bills introduced by the Government to give effect to a referendum on a republic.

WITNESSES

Committee met at 9.41 a.m.

CHAIRMAN—I now open this public hearing of the Joint Select Committee on the Republic Referendum. The committee is examining the provisions of the draft legislation introduced by the government to provide for the Constitution to be altered to lead the way for Australia becoming a republic. Last week the committee held its first public hearing in Canberra and took evidence from the Referendum Task Force and from the Attorney-General's Department. The committee also heard arguments from other witnesses, both last week and yesterday in Sydney, regarding some perceived weaknesses in the bills.

The committee sees its task as being to, firstly, determine that the bills themselves do replicate the will of the Constitutional Convention; secondly, that, if passed by the public in November, the bills will operate as intended; and thirdly, to make sure that we give the public an opportunity to comment on the content of the bills themselves. Over the next three weeks the committee will be conducting public hearings around Australia to listen to the arguments about the proposed laws.

[9.42 a.m.]

FRANCE, Mr Glyn Henry, Member, Seniors for a Republic, Australian Republican Movement

McDONALD, Mr Colin Campbell, Member, Australian Republican Movement

MACDONALD, Ms Terry Christina, Convenor, Young Australians for a Republic; Member, State Council, Australian Republican Movement

McGUIRE, Mr Francis John, Victorian Convenor, Australian Republican Movement

CHAIRMAN—Welcome. We have received your submission. Would you like to make a brief opening statement before we ask you questions about it?

Mr France—I am not proposing to speak to the ARM submission that you are referring to, but I would like to speak on my own behalf, with my own suggestions drawn on my own experience.

CHAIRMAN—Fine. If you could be brief, please.

Mr France—My concerns really focus on the wording of what I am calling the question that I have seen published through the media. I would like to refer to three concerns that I have. As I said, I would like to draw on my own experience as an explanation of how I have come to that particular view.

I was born in the United Kingdom in 1927. I served in the British Army from late 1944 to mid-1948, then went to university and studied history. After that I migrated to Australia. I think perhaps more relevant is the fact that I have been back to the UK several times. In fact, altogether I would have lived there some 11 months since I migrated to Australia. Therefore, I think that I do have a pretty good understanding both of its society and its attitudes there, as far as one can, and here.

I want to emphasise that in taking the view that I am regarding the republic I am not in any sense antagonistic in any way whatsoever to the place where I was born and grew up, and certainly not to the British monarchy. To me, having been here for 47 years now, it is simply quite illogical for us to be sharing a head of state with the UK at this point in time. I think to share a head of state is no more logical than, for example, to share a cricket captain with the UK at this point in time. In other words, I see the monarchy as being quite irrelevant to us in Australia, I see it as an anachronism, and whilst having it we deny ourselves our own head of state. That is perhaps my greatest concern, ultimately.

We must have a head of state who represents us in the sense that they have achieved what they have achieved here, that they have won respect here, and that they are held in high regard here as Australians. The symbolism is important. Therefore, I would hope that the question that is put in the referendum can address that central issue, that we are proposing to replace the Queen with an Australian citizen as our head of state. I do not believe that has been brought out properly in the question that I have seen so far. We need

to capture the attention of the public which is difficult to capture, and we have to do that by putting forward a simple, clear and challenging view.

I do recommend to the committee that something should be done to change the question so that it more clearly identifies the move from the Queen to an Australian as our head of state. In other words, the question should contain something along the lines of an Australian citizen to replace the Queen as Australia's head of state, or as Australia's President. I deviate from the submission that I think you may have in front of you by saying that I would be quite happy to see the term 'President' used.

Secondly, I want to move on and say something about my experience in Australia since I came in 1952. Very briefly, I have been very fortunate. I have had a very satisfying career. I have been principal or head of three independent schools, been in Rotary, president of two Rotary clubs, et cetera. But my main activity in retirement is working with the University of the Third Age. For some years now I have been conducting—it is entirely voluntary, the whole thing—courses in history and on the Australian Constitution. Just some of that I will mention: a 10-week course at Frankston on the Australian Constitution, a 10-week course at Mornington, a 10-week course at Dromana, plus a number of workshops otherwise.

One of the things that has come to my mind very clearly is that the older generation—and here I am talking in U3A terms, people in their late 50s, in their 60s, 70s, even in their early 80s—are all coming because they want to continue learning. Some did not go beyond primary school. Some are tertiary educated and have had very important positions in businesses or organisations of one sort or another. They are all coming because they want to go on learning. I have between 20 and 30 in most of the classes.

What I would like to say very strongly is that in my view the term 'head of' is well understood. The term 'head of' is a common expression which we are all familiar with, and the term 'President' is also is generally understood in the community, although probably not with all its ramifications. I am quite sure, from the experience that I have had and from talking to Rotary clubs and Probus clubs and the like, that the term 'republic' is not generally understood. Indeed, the image associated with the word 'republic' for many people would be the sort of news item, the sort of evidence, that we have coming from Ireland. The constant repetition of the word 'republic' that we hear and see in the media today is associated with that kind of background.

My experience from these courses has been that it is not until you really work on this business of what a republic is—I do not want to go through all that—and that you refer to the evolution of the idea and the theory and practice of it before the average citizen really has some understanding of the nature of that term. So it would be wrong, in my view, to include the word 'republic' in the question because the term is not understood. It is an abstract term. The others, such as 'head of state', 'President' or whatever, are not abstractions; they are readily understood. The term 'republic' is not readily understood and, to my mind, should not appear in the question that is being put at the referendum.

CHAIRMAN—Mr France, we only have limited time. If you would like us to ask you questions, you had better state the points that you wish to make and let us get on with questions.

Mr France—Certainly. The second point I want to make strongly is that the nomination process is something that we should be proud of in this country. It is not referred to in the question, and it should be. The third point is that the word 'chosen' is a mistaken use of the word. It is not consistent with the legislation and is misleading. If I am right, all this would mean is that the whole process of the referendum would seriously distort the process of decision making by referendum.

CHAIRMAN—Have you read in detail the republic bill and the nomination bill?

Mr France—I have.

CHAIRMAN—You are completely happy with the way that the bills are written?

Mr France—I have two reservations. Firstly, I do not think the diversity of people appearing on the Nominations Committee is adequately addressed. I am not putting that forward as a major priority. Secondly, I do not believe that the sanction on a Prime Minister who, for whatever reason, dismisses a President is strong enough as it now stands. Again, I do not know enough about that and I do not want to press it. I am much more concerned with the question.

Ms JULIE BISHOP—The model has been called a parliamentary bipartisan model, and it has had various names. The reality is that the one step in the chain of events leading to the appointment of a President will be the affirmation or approval by two-thirds of a joint sitting. Other steps in the chain may or may not be taken. For example, the Prime Minister can ignore the nomination of the Nominations Committee. It seems that the one act that must be referred to in the title is the approval, choosing or affirmation by the two-thirds majority of the joint sitting. Why would that not be the focal point of the long title?

Mr France—I am aware of that. I think the wording is that the Prime Minister may accept the name put forward from the Nominations Committee. Given that this is an attempt to implement the model and the resolutions from the Constitutional Convention, it would be very difficult for a Prime Minister to justify not following that.

Ms JULIE BISHOP—I understand all that.

Mr France—The nomination stage is referred to. Do you feel that that is not necessary?

Ms JULIE BISHOP—I understand all that. But the appointment of the President comes about by the placing of a nomination, however it occurred. We can talk about what is political reality and what is not. However, it is the two-thirds majority of a joint sitting that actually appoints the President in the chain of events. So why would that not be the focus of the long title?

Mr France—It is very important to indicate the total process involved in a nomination et cetera.

Ms JULIE BISHOP—That would include the step in the chain of the Prime Minister putting the nomination before the Leader of the Opposition as well.

Mr France—Indeed.

Ms JULIE BISHOP—So you would have the entire nomination procedure set out in the long title?

Mr France—No. The nomination stage is a key stage that should be expressed. That is part of the characteristic way we do things in this country.

Senator PAYNE—Mr France, do you think that will enable the voters at the referendum to more clearly understand the proposition being put?

Mr France—Yes, I do.

Senator ABETZ—Why is that when it is the only stage of the process that can in fact be ignored? The Prime Minister and the Leader of the Opposition have to move and second the nomination if it is to get up, and the parliament has to agree by a two-thirds majority. They are the three steps that have to occur. The nomination bit is a good process that can be completely and utterly ignored. Shouldn't the people be told in the long title that there is a nomination system which can be completely overridden at the will of the Prime Minister?

Mr France—I am really being guided by the legislation and the Attorney-General's speech at the second reading, which seem to indicate that the nomination process is part of the whole thing.

Mr CAUSLEY—I am rather fascinated because you introduced yourselves as young Australians for a republic, older Australians for a republic and seniors for a republic. If we change our Constitution and remove the Queen as our head of state, we are no longer a constitutional monarchy. You have an aversion to the word 'republic'. What are we, then?

Mr France—I do not have an aversion. However, I believe it would be misleading to use it in the question since it is an abstract term which the great majority of people really have not come to grips with. I would be perfectly happy and quite proud to see us become a republic.

CHAIRMAN—You call the term abstract, yet the majority of operating democratic parliamentary systems are called republics. That is why I thought the Constitutional Convention adopted that term. It rejected 'Governor-General' as a title for the head of state and instead chose 'President'.

Mr France—My concern is really about the matter of communication. While everybody in this room would perfectly well understand the term, I very much question whether people in U3A and the older generation I mix with would necessarily appreciate the full meaning of the term 'republic'. It would be misleading to them.

CHAIRMAN—If we accept your argument, the next stage of this process is our report. Both houses of parliament will either pass or reject the two bills. If they are passed as amended, the Commonwealth will fund a 'yes' case and a 'no' case. Following those public presentations, it will argue the issue in front of the public. The Australian Electoral

Commission will then produce documents that will explain the 'yes' case and the 'no' case and we will vote. Is it not your job to convince the public what the word 'republic' means? I understand that you support the model. Is it not your job to convince the public that they should buy it and that they should vote 'yes' at the referendum? Surely it is not our job to change the nature of the wording of the title of the bill.

Mr France—You are quite right in saying that this is our job. It is my job personally to try to educate those people I am dealing with in U3A, and that is what I have been doing. However, I believe that to use the terminology 'head of state' or 'President' would convey clearly and simply what the object of this exercise is. That is what I would like to see.

Mr DANBY—I think a lot of us are considering the wording of the long title. I am sure that we have not formed any views about it. It is possibly one of the rights of the committee. However, I am interested in the views of the other two people in the group, and particularly the views of Ms Macdonald. Concerning the views of younger people on the republic in particular, the Prime Minister has argued that people are very passionless about this. A lot of people yesterday argued the issues in a very arcane way. I wonder whether younger people in particular are confused by the debate as it is taking place at the moment and whether the wording of the title is as important as people say it is. I would be interested in your views.

Ms Macdonald—There are a couple of key differences between young people and the broader community in terms of the way they are responding to and engaging in this debate. I will speak to the ARM's submission from the point of view of young people. The first key thing is that young people tend to be a lot more apathetic about this debate and a lot less well informed than the rest of the community about what is actually being proposed, what is actually going to referendum.

In order to facilitate young people's engagement in this debate it is essential to spell out as explicitly as possible exactly what the republic entails. The reality is that the overwhelming majority of young people did not listen to the broadcast of the ConCon debate. The majority of young people have not read the draft legislation. The majority of young people did not read the communique from the convention. Most young people are quite confused about exactly what is being proposed.

All of us here in this room are quite clear on what the term 'republic' means and exactly what changes are being proposed to the Constitution. We have heard debate about so many different models, and so many different arguments about the extent of the constitutional changes, what they should be, whether we should have an elected president, and whether the powers should change. Young people have heard these debates. I think very few people are up to scratch on exactly what is going to referendum. It is important to highlight that point.

At the ConCon election only about 33 per cent of young people voted. That was the level of confusion and apathy that young people have experienced in relation to this debate. That is half as many as people over 65. There is a big discrepancy there in the way that young people are engaging in this debate, and confusion about exactly what is being proposed is one of the key reasons for that.

It is especially important for young people, if they are to participate in this debate, that they can make a choice on the basis of a clear understanding of what changes are actually being proposed. It is not enough to bandy around this ambiguous term 'republic' that is being used to mean so many different things over the course of the debate. It is important to spell explicitly that a move to a republic means replacing the Queen with an Australian citizen as our head of state. That is essentially what is being proposed.

Having gone out and spoken to a lot of young people at schools and universities and in workplaces and so on throughout the community, I believe a lot of people do not understand that the issue is that simple. There is a lot of confusion about whether the powers will change. There is confusion about some of those broader issues. I think spelling it out will help young people to make an informed choice. That is important. It is important to spell out that this referendum is about who our head of state is going to be, whether it is going to be the Queen or whether it is going to be an Australian citizen. That is important.

The second point that is important to recognise when we are talking about young voters is that young people tend to be especially cynical about politicians and about the political process in general. Young people tend to feel alienated from the process and tend to be distrustful of decisions that are made by politicians and by the process.

Another concern that I would have is that the wording of the question, in leaving out the nomination process, perhaps overemphasises the role of politicians and perhaps underemphasises the symbolic significance of that consultation process. And especially if you look back to the Constitutional Convention, the youth delegates there, the republican youth ticket from Victoria, were actually in favour of popular election. In fact, it was one of the groups that the nomination process concession was made to accommodate. Having spoken to a lot of young people, I know that young people are particularly keen to ensure that this process is not completely controlled by politicians, that there is some kind of consultation process, at least in the nomination stage, and that the symbolic significance of that consultation is one that has particular appeal to young people.

I acknowledge the point a couple of people have raised that the nominations stage is the stage that can be left out, that it does not have to be followed and so on, but it was included for a reason. The reason is that the symbolism of that consultation is very important to a lot of people, and especially to young Australians who tend to be quite sceptical about politicians and the political process. Acknowledging that stage in the process is going to be an important one to make young people feel a bit more involved in the debate and a bit more receptive to the model.

Again, going from that point of young people's scepticism about the political process and so on, the same point applies to the second point in the ARM submission which was in regard to making an explicit reference to the vote of no confidence when the President is dismissed. That is another point, that young people are going to be particularly susceptible to arguments based on this idea that the President will just be a stooge of the Prime Minister and can be dismissed at any time if they start to disrupt what the Prime Minister is doing. Given that young people tend to be distrustful of politicians and tend to be much more responsive to republican arguments which are based on this idea of representativeness and this idea of having a person who is above the political process, I think the way that the

question is presented perhaps misrepresents the extent of community participation and misrepresents perhaps the role of politicians in that process.

They are the two key points that are of particular significance to young people: firstly, the need to highlight the consultation process and the significance of public involvement and, secondly, the need to make the question and the issue as explicit as possible to accommodate the fact that a lot of young people have not followed the debate and do not understand exactly what it is about. I think they are the two key points.

Ms ROXON—I was going to put a similar question to Terry and Colin. Perhaps I could invite Colin McDonald to give us a brief statement about the position that he is representing as well. But before that, Terry, my experience as a youngish politician—not that young but youngish—has been slightly different to yours in that I have found young people much more engaged in this debate about the republic and what Australia should look like in the future than perhaps you have been saying.

Do you have a view that you might be able to expand on a bit about whether younger people do identify with this change of our system in severing our ties with England and the symbolism of that more than with the rest of the sort of technical argument that goes with it? I am really only asking for a brief answer because my concern was to make sure that both you and Colin had an opportunity to be able to address your views to the committee.

Ms Macdonald—I will be brief. If your question is whether you think the symbolism of the changes are of particular importance to young Australians, yes, I would agree that is true. Young people are not really engaged in the constitutional detail of debate. I have spoken to very few people, even republicans, who really care about the details. The reason that most young people are republican is because we have grown up in this country. It is not even a question of feeling the need to sever the ties because as far as we are concerned they have already been severed, it is just a matter of that symbolic shift to reflect the reality of contemporary Australian society.

Therefore, I think that highlighting the symbolism of that change in the wording, making it explicit that this is about replacing the Queen with an Australian citizen, will capture or focus on the issue which young people most engage in in the republican debate, which is an issue about symbolism and about reflecting the unique character of Australian society rather than an issue about technical constitutional discussion and debate and so on. I think that is certainly true. That was the main point.

Mr McDonald—I am a very proud Australian. I have represented Australia in test cricket for many years—

Mr CAUSLEY—I remember watching you.

Mr McDonald—from the years 1951 to 1961. I have also met the Queen on three occasions and spoken with her. I will not bore you with this at any length, but I think it is pertinent to where I stand and why I am a member of the ARM and why I am a republican.

We were presented to the Queen. I always found that a little difficult. I think that we are all people. I am very happy to have met the Queen and found her to be a lovely person. In fact, I had quite a long time with her—probably 20 minutes on my own—and we discussed the most diverse subjects, such as Yuri Gagarin, Lady Baden-Powell and others, and I found her lovely. However, I am an Australian, and I do not wish to do anything else but respect the position of the Queen in England and I wish to keep the friendship with the British people, whom I admire.

More recently I have been employed as the Executive Director of Tennis Australia and I have been involved in the planning of the National Tennis Centre. I do not think I am getting away from the point here either, in that Australia has always had a bit of an inferiority complex when it deals with England in particular and other nations perhaps not so much so. As it happens, there has just been Wimbledon, and everyone has been saying that that is the greatest tournament in the world. Perhaps it is. But our tournament is just about as good, and as Australians we ought to tell the world that and be proud Australians. That is why I want an Australian head of state.

This whole debate has been going on for years now, but it is coming to a climax—a successful one, I hope, from the ARM's point of view and from the Australian people's point of view. But the whole debate has been about the Queen, a foreign person—and I use the word 'foreign' carefully. Australia has a British heritage; I know that. But she is foreign, and the High Court determined the other day that she is foreign, and she is the head of state of this nation. She resides in England and she has mixed allegiances which do not really always identify with ours.

Because I am 70 years old—and I will not bore you with this—I have been able to see Australia emerge from a colonial status when we were dependent and needed to be dependent upon England and then through the Second World War to become a confident, vibrant, multicultural nation, mainly because of our immigration of non-English people, non-British people, non-Celtic or non-Irish people. Now, of course, we have got to the stage where we have complete independence—but we have got to be seen to have complete independence.

This debate, as far as I am concerned—and I believe that the convention indicated this—is about putting into action what was agreed at the convention. I think that, generally, the two bills in question today have been very well drafted. I am not at all happy, however, about the long title of the Constitution amendment bill. I do not think that it reflects the will of the convention. It is strictly an accurate account of what would go on the ballot paper. It is quite accurate, but it does not tell the whole story. Terry is quite right in saying that younger people, who do not have the experience that Glyn and I have, though they might have more intelligence, need to be told just exactly what they are voting for. The proposed ballot paper will not do that. In my view, the Queen has to be mentioned. That is what we have been talking about—the head of state.

I do not have the difficulties that apparently Malcolm Turnbull and Glyn have about the word 'republic'. I know it has been all over the newspapers today about how the republicans do not want the republic mentioned. That is a load of crap, if you will excuse my expression. There is nothing wrong with the word 'republic'. If this is passed of course we become a

republic, but we have an Australian head of state—that is what is going to make us feel a lot better. More than that, I think we can look the rest of the world in the eye when we do that.

I do not wish to get onto the other matters that the ARM have proposed today and that Glyn and Terry have mentioned. I do not wish to get into that to any extent. I do wish to say, however, that I think it is very clear that the submission by the people has not been given the headings that it deserved or the importance that it deserved. I think that the Constitution alteration bill does not deal adequately with the procedure for the dismissal of the President. However, those two items are fairly minor in comparison with the desire that the Queen be seen to be replaced by an Australian. I will leave it at that, unless you have any questions.

CHAIRMAN—Can we try and make this fairly quick.

Ms HALL—Mine will be very brief. It is in a way a summing up of your overall position. Would it be fair to say that you would like the referendum question to be put in such a way that it creates the least confusion and gets the most honest and appropriate response from the Australian people and, to do that, you feel that you need in that question (a) the fact of the Australian head of state and (b) the fact of the way the committee is appointed? Is that the reason you are coming from this position—because you want an honest answer from the Australian people and one that really reflects where they are coming from?

Mr McDonald—I think we all said that in different ways—

Mr France—Yes.

Mr McDonald—in that the long title which is in the ballot paper does not give enough information on what they are voting about, to the people who are voting. I am not going to make another speech. It is quite true that a great number of people—probably a majority of the people, unfortunately—are not aware of the legalese and the terminologies that are used. We know that the terminology is accurate, but it is not giving a picture to the people who have to vote.

Ms JULIE BISHOP—In relation to the question, I am a little confused by the ARM's position because, taking into account what Mr Turnbull said yesterday and taking into account what Terry and Glyn have said today, I understood that the ARM thought it would be less ambiguous if the word 'republic' were not contained in the question, therefore not be in the long title. Yet we are to be true to the Constitution Convention in this legislation and the question we were asked at ConCon was: 'Should Australia become a republic?' That was the question. There is nothing ambiguous about it: should Australia become a republic? The answer to that from ConCon was sufficiently yes, and then the question is: what sort of republic? So I do not understand why the ARM, apart from Mr McDonald, would not have 'republic' in the question. It is the essence of it.

Ms ROXON—Before you answer that question I should just say, for the benefit of the witnesses, that that is not really what Mr Turnbull said when he presented the evidence to us yesterday. He had said—

Ms JULIE BISHOP—I just meant the alternative long title. It does not have the word 'republic' in it.

Ms ROXON—No, the alternative long title does not. But in answer to the question, so the witnesses at least are aware of what was said, he said he did not have a problem with the republic being in there but he thought it was clearer to explain that an Australian head of state may actually understood by more people. I am paraphrasing because we do not have the transcript.

Ms JULIE BISHOP—Well I am looking at the alternative long title that was produced. It does not—

Ms ROXON—Julie, I am not trying to have a fight with you about it. I just think it is unfair to the witnesses to have that presented as what Mr Turnbull said.

Mr CAUSLEY—Just changing positions—

Ms ROXON—No, I am wanting the witnesses to be able to answer it without being misled.

Ms JULIE BISHOP—Okay. Forget Mr Turnbull. Mr France said he would not have the word 'republic'. So perhaps you could give your comment on that?

Mr France—Yes, I will forget Mr Turnbull also. I would believe that if it says an Australian citizen as our head of state, or in my case I would accept as President, that implies the republic without introducing an abstract term which confuses people. I would not want the word 'republic' in because I believe that an Australian head of state is the essential point and can be understood by people.

Ms JULIE BISHOP—Thank you.

Ms Macdonald—As I see it, the important point is not that the word 'republic' be left out but that an explanation of what that entails be put in. I think that is the point. So whether or not the word 'republic' is there I do not think really matters, but the point is that the republican debate is so wide and has spanned so many different issues. There have been debates about preambles, there have been debates about powers and there have been debates about broader constitutional reform, and people are confused about what is exactly going to referendum here. So what is important is not that the word 'republic' be left out but that there be a reiteration of the key issue, and that is about who our head of state is to be: is it to be the Queen or is it to be an Australian citizen? That explanation should be put in.

Ms JULIE BISHOP—Would you include an explanation as to how the Nominations Committee is put together, that is, nominated by the Prime Minister, 16 politicians and 16 community people? Is any aspect of the Nominations Committee important for the question?

Ms Macdonald—I do not know how much detail is necessary, but I think there should be a reference to the fact that there will be some kind of community consultation. I think that is the key point. The title as it stands now does not make any reference to the fact that

there will be community consultation in the nomination process. Obviously everyone here is aware that a lot of republicans support the republic because they want to have more public input and they want to have more democratisation of that role of head of state, and obviously the public input into the nomination procedure was the concession to those sentiments and to those republican ideas and values. That is why the ConCon decided to include that stage in the process. Not to mention that is going to alienate a lot of republicans who have come to support this model because of the compromise that was made at the ConCon. So I think it is misleading to a lot of those republicans, including a lot of young people who would like to see perhaps a democratically elected head of state or would like to see more public input, who are perhaps prepared to accept that concession of that public nomination process. The level of detail probably is not so important, but a reference to that stage in the process is important.

Mr France—I would like to see nominations submitted by the people in the question, with whatever amplification is necessary elsewhere.

CHAIRMAN—On behalf of the committee, may I thank all three of you for coming to talk to us today. We appreciate your comments. We will table our report on 9 August in the House of Representatives and will make sure that we send you a copy of a report. Thank you once again.

Mr DANBY—Mr Chairman, is Mr McGuire, the Victorian Convenor of the Australian Republican Movement, being invited to make a presentation as well?

CHAIRMAN—It will have to be brief.

Mr McGuire—I just want to make a couple of clear points on this. The republican referendum is a defining moment for our national identity. On behalf of republicans, all I ask for is that the quintessential Australian characteristic is put in place, and that is a fair go. By a fair go I mean that it will be crucial to have the wording of the referendum question so that people understand that, if they vote yes, for the first time in our history we will have an Australian as our head of state instead of the British monarch; that at the beginning of the 21st century and at the centenary of our nationhood we will reaffirm our egalitarian heritage and have an Australian head of state based on merit and performance, not birthright.

Voters need to know that Australia's first President will be nominated by fellow citizens, approved by the bipartisan support of parliament, and stand above party politics. These are the key essentials that have to be in the question. To go to one of the issues that Julie Bishop was talking about earlier, the question has to define the process and the outcomes fairly, accurately and thoroughly. That is the duty of what we really want to get here today. What it really comes down to is that people have to understand that the outcome of this is that we could have Sir William Deane go to bed as our last Governor-General and wake up as our first President and have the same powers and duties, so that people understand really what this change is. It is historically significant but it is simple.

To go to the three key issues that I think this turns on, they are the long title of the bill, the dismissal procedure and the criteria for membership of the Nominations Committee. Malcolm Turnbull took you through a number of these points yesterday, so I will be brief.

CHAIRMAN—You are going to have to be extremely brief or I am going to have to stop you, I am sorry. You have about a minute.

Mr McGuire—Okay. Just to go to Julie's point, I do think it is important to thoroughly and accurately explain that the nomination process is part of the question. That definitely must be there. On the use of the words 'chosen by parliament': that is a crucial point that we need to have changed in that it is parliament that has to approve the appointment by a two-thirds majority. It was the former Victorian Liberal Premier, Sir Rupert Hamer, a patron of the ARM of Victoria, who first raised this publicly and, given his background, that should really be taken into account. I think we should not remain silent over the question of the no confidence motion against the Prime Minister on dismissal.

Thank you for your time; I just wanted to make sure that people understood these points, because what we are coming down to here already in the debate is that monarchists—and I have debated Kerry Jones on this—have already surrendered the Queen. Kerry Jones says that she is no longer a monarchist and Australians for a Constitutional Monarchy are not monarchists either. So the point really is that Australians have the predisposition to become a republic. They want that to happen, and only fear or misapprehension can really defeat this happening.

This is a rite of passage whose time has come and the only way it can really be brought down is by a scare campaign. This is the issue that we really should go to in this question so that these key points are not left silent, so that people do know and understand what they are voting on and so that they know that if they vote yes we will get an eminent Australian who is above party politics and has put in a lifetime of achievement for this country. If they vote no and the status quo is maintained, we get King Charles III. I believe that would be so inappropriate that it would cause a backlash that not even republicans would want, and it would be terribly unfair to Prince Charles. Thank you.

CHAIRMAN—Once again, thank you all. On behalf of the committee, I will ask you to do something you have not done to date: submit to us an alternative to the long title.

Mr McGuire—I will do that before we go.

CHAIRMAN—Thank you.

[10.31 a.m.]

HIRST, Dr John Bradley (Private capacity)

CHAIRMAN—Welcome. Do you have any comments to make about the capacity in which you appear?

Dr Hirst—I appear in my own capacity. I am an historian who has had a longstanding interest in this matter.

CHAIRMAN—We have received your submission, for which we thank you. Would you like to make a brief opening statement regarding the issues that you have addressed?

Dr Hirst—Yes, I would, thank you. I will be brief, and I will not touch equally on all matters. I think you have probably heard enough on the name of the act. Taking up your challenge, Mr Chairman, my suggestion for a change would be just to add the words 'nominated by the people' before 'chosen by two-thirds of the Parliament'.

Moving on to the covering clauses in the preamble—which is the second matter I raised—I understand that the retention of the covering clauses in the preamble has no legal effect, but it seems to me very odd to leave them there. They are not completely dead letters, because the explanatory memorandum says there may be an occasion later to rescind or repeal the covering clauses and the old preamble. It seems to me that if there is a moment to do so it is now, and I cannot understand why the government has chosen not to repeal them.

The Constitutional Convention said it wanted to keep the old preamble, and that is a very good reason for not repealing it, but in its recommendation it was assuming there was going to be a new preamble. Now it seems that we may not have a new preamble. If that were to happen, we would have the old preamble, which still talks of a union 'under the Crown', preceding a republican constitution, and that does seem to me totally inappropriate.

I am also a member of the Australian Republican Movement. We are into minimalism, as you know, and I think that perhaps, if we are not to have a full new preamble, we do at least need to do what George Winterton has suggested—and perhaps he spoke about this to you yesterday. That is, you add a minimalist preamble which says something like:

And whereas that Federal Commonwealth, the Commonwealth of Australia, evolved into an independent nation under the Crown of Australia:

We, the people of Australia, have decided to constitute the Commonwealth of Australia as an independent democratic republic.

I think that would be an uncontroversial addition, but at least it would signify that union 'under the Crown' had been superseded.

On nomination I make some points, which you may think small, about the quality of the drafting. There is this odd term 'a named citizen'. If we are into plain English, why don't we just say 'nominate'? Perhaps I should take this opportunity to say I am very interested in the

Constitution being a readily understood document, and that is why I would like to see also the spent provisions withdrawn, which I understand the Constitutional Convention did recommend.

Wearing another hat, I am chair of the Commonwealth government's civics education group. We are responsible for the new push to educate our students in the rights and responsibilities of citizenship. As part of that, I would very much like to see senior students start to read the Constitution in school. It is a much better document to give them now, because at least the executive power of the head of state is defined more exactly as being exercised on the advice on ministers, which was not there before. I think that is a great plus. But if we give them a document which still has all of these spent provisions, it makes it that much more difficult to understand. So I would be in favour of removing them.

More substantially, on the issue of the Leader of the Opposition—which I think is a really important point—I think the drafting has unnecessarily linked the whole process of nomination to the existence of a Leader of the Opposition. It is very easy to imagine circumstances in which there would be dispute over who that person is. It is easy, too, to imagine circumstances in which the Leader of the Opposition might be leader of a very small rump—you could have a grand coalition of parties in some circumstances. So I think the convention was reaching for the correct symbolism here. It would be good if the Leader of the Opposition were to second the motion, but I do not think the black letter of the Constitution should depend on the existence of such a person. The explanatory memorandum says that it is not intended that this create any impediment but, on my reading, the seconding by the Leader of the Opposition is as much a requirement as the two-thirds majority. That just seems to me an imbalance and something that does not have to be there. I have suggested a different form of words—'if there is a Leader of the Opposition that person should second'—which I think would be a safer procedure.

On term of office I think there is a lot of fussiness that starts with the dating of the term of office. It does not start with, 'The term of office shall be five years.' Again, this is a point of ease of understanding of the document. Interestingly enough, the explanatory memorandum starts with the five-year provision. I think also there is no need for this fussiness about the definition of the term of office. It could simply say, 'The term of office begins when the President takes the oath.' Why do we have to link a new term of office to the last term of office and create six rather gobbledegook lines?

Again though, on a more substantial point—and I really feel this quite strongly—I think there is a danger in that the President can remain in office until a successor is chosen. It only takes one-third of the members of both houses of parliament to frustrate the election of a President. So conceivably, either a government or an opposition who wanted to keep a President in power would only have to vote against all new nominations to have that effect. Since there is a clear provision for an acting President, I think we should not allow the President's term to be extended. I understand George Winterton's point is that perhaps you would allow it for 30 days, and I would certainly be happy with that.

Just to backtrack a bit—this is not a point that I have made; this is a point that Professor Brian Costar, who is in the room, has made—and I think this is an important point about nomination: if the Prime Minister's nomination fails, what happens then? There is no

provision in the document to say what will happen. That is, does the Prime Minister just go on producing names until he or she has a success—that is, gets the two-thirds—or is the nominating process brought into operation again? This may be something that your committee would like to consider.

On dismissals, section 62, this is the one place where the document clearly departs from the Constitutional Convention's recommendation, and I believe in a most unfortunate way. The convention gave large power to the Prime Minister to dismiss a President, but balanced that with a sanction on the Prime Minister, that, if he failed to get the support of the House of Representatives, that would amount to a vote of no confidence. As you know, that sanction has now been removed.

The explanatory memorandum says that since we do not really know what the effect of such a vote of no confidence would be, we will leave it for resolution by parliamentary process. But that envisages that we are going to regularly have Presidents dismissed and Prime Ministers trotting off to the House of Representatives to find out if they have got support and the House of Representatives to vote 'No, you have not got the support.' We hope that this will never happen. So to say we are going to leave it to time to work out what happens if a Prime Minister does not have the support of the House of Representatives seems to me most unsatisfactory. It is far more likely, of course, that a Prime Minister will ponder, since he is given the power so explicitly under this scheme, the removal of a President. And when any Prime Minister ponders the removal of a President I think that in black letter law there should be something very clearly spelt out that there is a sanction if the Prime Minister gets this wrong.

As it exists, I cannot see why a Prime Minister would even have to go to the House of Representatives, since there is no sanction for his failure to get their approval. It does seem to me very odd. It seems to me an elementary rule of drafting that if you provide for something to happen you should say what is going to follow if it does not happen. So for the document to be silent on what happens if the Prime Minister does not get the support of the House of Representatives just seems to me a basic flaw.

I can understand why people are reluctant to put in the no confidence provision. I think, if you do nothing else, you should recommend that it go back in, even though no-one really knows what it might mean. I think better to have something there than nothing. But what occurs to me is that we need to go back to the Constitutional Convention and say to them, 'Listen, your scheme really cannot be put into law in a satisfactory way, so what do you recommend instead?' This was the procedure in the 1890s; that is, the Constitutional Convention met, drew up a draft and then waited. Submissions were made, reconsideration was given and then the Constitutional Convention met again. Some people will think it is impossible to reconstitute this convention. I do not see that it would be impossible for the difficulties that this provision has created to be put before all those members, for them to gather in the capital cities perhaps and debate the matter, with some video hook-up or something. Something could be done.

If they are the only people who can change it, they should be asked. It is totally unsatisfactory, it seems to me, just to leave out a bit of their scheme and say, 'We are following the Constitutional Convention's provision.' So I think either you recall them or

you have to think up a replacement, and I would think that it is certainly a role of this committee, if the convention is not to be recalled, to make recommendations about what should be there instead. I have suggested that at least the President could be reinstated if there is a failure by the House of Representatives to approve; or, more simply—and something that I think would be, in essence, a much better proposal—that the House of Representatives does the dismissing, on the motion of the Prime Minister.

The other points are fairly brief. The numbering of the sections is not a totally unimportant matter. There seem to have been some rather odd decisions made here. The oddest is that the broad authority that the Constitution claims has now been placed—this is new section 126—under a chapter at the end called 'Miscellaneous', which seems to me a very odd place to put the claim that the Constitution is binding on all citizens and on all state parliaments and on all courts. So I think that placement is rather odd. I would endorse what other people have said about the appointment of deputies to the President. I do not think this is necessary any more and it could well be removed.

CHAIRMAN—Thank you for that. In discussing the issue about the inclusion or otherwise of the Leader of the Opposition in the nomination process before the House of Representatives, I would point out that the original exposure draft of the bill had the words 'seconded by the Leader of the Opposition, if any'. I am advised two things: one, in writing, that 'if any' was removed on the basis of advice that it was unnecessary and the provisions would not be construed so as to frustrate the appointment of a President even if no Leader of the Opposition existed; secondly, there were a number of submissions, evidently substantial, from people who believe that 'if any' associated with the Leader of the Opposition demeaned the office of Leader of the Opposition. If the committee was to propose that the words 'if any' went back into the legislation, would that satisfy your point on that issue?

Dr Hirst—I think my wording might be a bit more respectful. 'If there is a Leader of the Opposition' would perhaps read better than just 'if any', which was added as an afterthought. On your first point, I am not a lawyer, but just reading the section it seems to me that it would be very hard to say a President could be properly elected if the Leader of the Opposition had not seconded the motion. It is given equal status, on my reading, to every other stage of the procedure, including the two-thirds majority.

CHAIRMAN—I am sure colleagues have heaps of questions, but the second point is that you said that if the Prime Minister fails to get a two-thirds vote in the joint sitting, there is no procedure to continue on. But is it not quite normal in approval processes of governments all across the world of all sorts of persuasions and all kinds of constitutional democracies that approval means approval and if you do not get approval you have to put somebody else up?

Dr Hirst—Yes, but what if the Prime Minister were to put up the three names on the short list and they were all rejected? You might then think that the nomination process had to be reactivated. I would have thought, as you do, Mr Chairman, that the implication is that you just go on with the process and the Prime Minister just puts forward another name, but I have raised this with Professor Winterton only this morning. He had not heard this objection before. As I said, it is not my own, it is Professor Costar's, and he, a leading authority, thought that it was a substantial point.

CHAIRMAN—From my memory of the United States constitution, which gives advise and consent powers to the Senate in respect of executive appointment of secretaries, of the executive and all the bureaucracy, it is really an approval process. They cannot themselves put up another name.

Dr Hirst—No.

CHAIRMAN—In other words, the process is never-ending. If the approving body—in this case two-thirds of the House and the Senate sitting in joint session—say no, the procedure replicates. My understanding is that that happens in other constitutions in other situations as well.

Dr Hirst—Yes, and you may well be right. I am suggesting that you might take advice on this. The difference in the situations, though, is that here there is not a sort of single person. In the United States it is the President who can go on nominating Secretaries of State until the Senate approves. Here we have a nomination process which includes a Prime Minister and a committee. It may be a point about when the whole process has to be reactivated if there is a failure at the two-thirds.

CHAIRMAN—Okay. We will think on that.

Senator PAYNE—Dr Hirst, thank you very much for your submission, which I found very useful in a number of areas. I want to ask you one question in relation to your thoughts on the nomination and election of the President. On the question of the word 'chosen' in the long title, I do not think you turn to that at any particular length. Do you have a view on the use of the word 'chosen' as opposed to—as it is in the context of the bill—affirm, approve or something else?

Dr Hirst—I do not have strong views on it, except to say that perhaps it would be as well to be consistent. As various other submissions have pointed out, the wording seems to shift from 'chosen' to 'elected' and perhaps back again. I have not turned my mind to it, I must say.

Senator PAYNE—My second question is: you refer very briefly, again under nomination and election of the President, to replacing the word 'may' in the phrase, 'The Prime Minister may in a joint sitting' with 'shall'. What is your reasoning for that?

Dr Hirst—It could well be that a Prime Minister would choose not to put a nomination to the House.

Senator PAYNE—Have you made that point to reflect the results of the Constitutional Convention?

Dr Hirst—I think they and everyone else would assume that there will always be a President. This document does not say 'there shall be a President,' which Winterton in his draft did have. The President sort of sneaks up on you in this draft—you learn that he or she is to be elected; you do not learn that there is definitely to be one, except by inadvertence. I think that is a weakness, and Professor Howell, I think, in his submission has pointed out

that some state governments have saved on the salary of a governor by not appointing governors—you just keep the acting there, perhaps because you like the acting better. So I think it should say, 'There shall be a President,' and I think it should say, 'The Prime Minister, when there isn't a President, shall put forward a nomination for a new one.'

Senator PAYNE—Thank you.

Mr McCLELLAND—Doesn't your replacing 'may' with 'shall' create your first dilemma? That is, if parliament is not happy with any of the community recommendations—in other words, if, for some fanciful reason, all of the recommendations of the community committee were rejected by the two-thirds majority—and it is 'may', the Prime Minister can sit down with the Leader of the Opposition and say, 'We're not happy with any of these. Let's sit down and work out between ourselves—with you consulting with your members and me consulting with my members—who would be acceptable.' Doesn't the continuing use of 'may' enable that to happen and break that possible deadlock which could fancifully occur?

Dr Hirst—No. My point about 'shall' is that the process shall be carried through. On my reading, if the words were to be 'the Prime Minister shall' or 'the Prime Minister must', it could still allow for the situation that you outline—that is, if there is some impasse you can then move to a more informal arrangement, because it is not provided that the Prime Minister must choose from the short list. It does not say that; it says, 'the Prime Minister must consider the short list'. So I think that, whatever we do with 'may' or 'shall', there is complete discretion for the Prime Minister to put forward any name.

Mr CAUSLEY—This bill changes chapter I of our present Constitution. We are talking about this being the minimalist approach. The present Constitution says:

. . . vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives . . .

Dr Hirst—Perhaps my point is not as strong, because the section on the parliament will then say that the President is part of the parliament. But I still think there would be nothing lost and something to be gained if it did say definitely, under the heading 'President', that there shall be a President. Since we have got Acting President provisions, you do not want the situation in which people are going to just leave the 'Acting' in position and not move to the election of a President.

Mr McCLELLAND—The second question I have is: how can you say the President sneaks up on you when, if you look at schedule 2 with the consequential amendments in section 1, the first section of the Constitution—if this bill is approved—will read:

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the—

replace 'Queen' with 'President'—

President, a Senate and a House of Representatives . . .

There is clearly, in the very first section, the reference to the institution of the President. While it is a small amendment in the consequential amendment context, it is obviously at the foundation stone of the Constitution, is it not?

Dr Hirst—Yes, and I have conceded the point that in various places the President is mentioned, but I would have thought the chapter on the executive government might well begin by saying, 'There shall be a President of the Commonwealth,' which it does not quite do at the moment; it begins with the election procedure.

Mr McCLELLAND—The third question I have is: why do you say that the recommendations of the Constitutional Convention are unworkable? Their recommendation in respect of section 62 was that, if the dismissal of the President were objected to by the parliament, it shall constitute a vote of no confidence in the Prime Minister. While the Attorney-General has not included that provision in the draft, it does not mean that the recommendation was unworkable.

Dr Hirst—No. I agree. At various stages the people who have been involved in the preparation of this draft have clearly thought it unworkable. The exposure draft did not include this.

Mr McCLELLAND—Unworkable or unnecessary? We have had evidence from the Department of the Prime Minister and Cabinet that they thought parliament had the power anyway to move a vote of no confidence and it should be left to parliament's discretion as to whether or not they did so. So, not 'unworkable' but 'unnecessary' was more their language.

Dr Hirst—I think they are misguided, because I think if they are confident that something would follow from the mention of the sanction, the sanction should be there.

Mr McCLELLAND—Do you think it should be spelt out?

Dr Hirst—It should be spelt out. They are uncertain of what it would mean, and perhaps we would all be uncertain of what it would mean. I think its uncertainty might be part of its virtue as a restraint on a Prime Minister. But at the moment there is no restraint on a Prime Minister.

Ms JULIE BISHOP—Following on from Robert's point, under the proposed section 62 the Prime Minister who removes a President must seek the approval of the House of Representatives, so he is constitutionally bound to at least put his removal before the House, otherwise he is acting unconstitutionally. Is that correct?

Dr Hirst—Yes, but I wonder how he would be brought to book over it. It would be interesting to know, wouldn't it?

Ms JULIE BISHOP—I think the political processes would kick in if a Prime Minister were acting unconstitutionally.

Dr Hirst—I do not know.

Ms JULIE BISHOP—So you are suggesting something must be spelt out there, even in the first two paragraphs of section 62. Are you suggesting that there should be a sanction put in at that point if he does not seek the approval even though he is required to?

Dr Hirst—No. I think, if there were a sanction clearly specified if the House failed to approve of the Prime Minister's recommendation, that would be a clear indication that that process must be gone through.

Ms JULIE BISHOP—So your sanction is at the point where the House conceivably does not ratify the removal?

Dr Hirst—Yes.

Ms JULIE BISHOP—On that point, I note that you have suggested that if the House does not approve the dismissal, then the President be reinstated. Is that your suggestion?

Dr Hirst—That is just me throwing out suggestions of minor adjustments that you might make.

Ms JULIE BISHOP—The convention actually—

Dr Hirst—I know the convention did the other thing.

Ms JULIE BISHOP—I think it is quite an important point. The convention, in fact, suggested the President not be restored to office, even if the House of Representatives does not ratify the Prime Minister's dismissal action, but that he be eligible for reappointment. Would that cover your concern?

Dr Hirst—No. If he were eligible for reappointment that might be enough, I suppose, but it is pretty weak.

Ms JULIE BISHOP—Rather than reinstating?

Dr Hirst—Rather than reinstating—you have to put him through the process again. I think it would be better but I should say that I was just throwing out these suggestions. If the committee is strictly following the Constitutional Convention, you have to put in the act the no confidence provision. But if you in your wisdom, and everyone else in their wisdom, having looked at that, think that it is hard to know what that means, I think the Constitutional Convention should be given an opportunity to hear that view and to hear you say, 'When we've come to write your provision, we can't quite see what it would really mean and we have got these doubts about it.' So ask them again.

Mr CAUSLEY—This is probably a follow-on from Julie's point. I have a few problems with the bill itself and I will not go through all of them. I have been in politics long enough to see the blind allegiances of parties at times, and this dismissal process does worry me. You did mention in your statement that you believed it should come back to the parliament. Would you suggest a joint sitting of the Senate and the House of Representatives? What would be the numbers—50 per cent, two-thirds, 50 plus one or whatever?

Dr Hirst—The Australian Republican Movement's suggestion and, I think, the Republican Advisory Committee's suggestion—I was a member of that body—was that it be two-thirds.

Mr CAUSLEY—Of a joint sitting?

Dr Hirst—Of a joint sitting. Ex-governor McGarvie made great play of that as being too tight a requirement to dismiss a President. It seems to me that what happened at the convention is that they swung far too much the other way. McGarvie himself now says that the convention's recommendation went far too much the other way.

Mr CAUSLEY—So 60 per cent?

Dr Hirst—I would think half or 60 per cent of a joint sitting. But, since the convention only mentioned the House of Representatives, I thought—to be true to them—you would say, 'All right, it's the House making the recommendation just by a normal majority.' It is not much of a sanction since, if this man is a Prime Minister, he will have the support of the majority of the House of Representatives but, in my view, it would have the advantage that reasons would have to be given. The President is not sacked on the instant, which seems to me not a very satisfactory provision and one that is giving considerable disquiet to a number of people who are otherwise very firm republicans.

Mr CAUSLEY—This could well be our Constitution after November, so we need to think about it.

Dr Hirst—I agree. Some people here were members of the convention. I would guess there would not be 10 members of that convention who would support this dismissal procedure now.

CHAIRMAN—Can you tell me where in the Constitution it firstly mentions a Prime Minister, says what his job is and discusses or defines confidence or lack of confidence in such an office?

Dr Hirst—It does not.

CHAIRMAN—Thank you.

Dr Hirst—But the new document does, of course, start mentioning the Prime Minister and it also goes too far and mentions the Leader of the Opposition as well.

CHAIRMAN—Yes, we have heard you on that. The point I make is that, if you insist that it be a provision of the Constitution that it be a vote of confidence or no confidence in the Prime Minister's action by the House of Representatives following the dismissal of a President, don't you also need to spell out in the Constitution what is in fact a vote of confidence in the Prime Minister, how the Prime Minister is selected in the first place and so forth?

Dr Hirst—The Constitution is now mentioning the Prime Minister and the Leader of the Opposition without getting involved in the process of how they are created.

CHAIRMAN—It mentions them but does not say anything about confidence therein.

Dr Hirst—No.

CHAIRMAN—Which is pure convention.

Dr Hirst—I think it is a very poor provision to say this will amount to no confidence in the Prime Minister but it is the one that the Constitutional Convention chose. I would not recommend it myself. I am not defending it.

CHAIRMAN—Okay.

Dr Hirst—What I am defending is that you have to put something there. You cannot just drop what the Constitutional Convention proposed and leave a gap.

Mr DANBY—Can we return to the Leader of the Opposition and your objection. What is the essence of it? Is it because of the theoretical possibility that the Leader of the Opposition may not be definable or is it a substantive opposition to the role of the Leader of the Opposition being identified in the Constitution?

Dr Hirst—No, it is the first point. I do not have a substantial difficulty on the second point. It is much more the first, but again I am supported in this by Professor Costar, who reminds us all that quite recently in both New South Wales and Queensland, where you have had the National Party and the Liberal Party with roughly equal numbers in the House, there have been disputes about who is the Leader of the Opposition. Presumably, the parliament has provisions to determine who is the Leader of the Opposition but, if they have not worked to a satisfactory conclusion, it seems to me we are creating an unnecessary problem for the process of nominating a President if we rest it so firmly on there being a Leader of the Opposition.

Mr DANBY—But the history of the House of Representatives at the moment would not indicate that there would be a problem with that?

Dr Hirst—No, but we are legislating, we hope, for a hundred years or something.

Mr DANBY—For the future, I appreciate that.

Dr Hirst—It may not be that we have a basic two-party system; we might have five parties in the House of Representatives in 50 years time, of roughly equal numbers.

Mr DANBY—God forbid!

Dr Hirst—It is not impossible to imagine that at all.

CHAIRMAN—That is fair enough.

Ms JULIE BISHOP—In relation to the removal issue, I note you have just said that you would not be happy with the wording of the phrase, 'a vote of no confidence in the Prime Minister'. I think that is fair enough considering the communique from ConCon basically said it would constitute a vote of no confidence; they were not suggesting it be drafted that way.

The Hon. Malcolm McLelland came up with an idea and I would seek your comment on it. He suggested that the wording be along the lines that, if at the expiration of 30 days after the Prime Minister has removed the President, the House of Representatives has not passed a resolution approving the removal, the Prime Minister ceases to hold office and there would be an election. That is it essentially.

Dr Hirst—I think that is a much better provision than the Constitutional Convention had. It is spelling out what—

Ms JULIE BISHOP—The political consequence of it is probably the same but you are saying, if it in fact included that trigger, the Prime Minister would cease to hold office and then there would be, of course, writs to be issued for a general election.

Dr Hirst—Yes, I think that would be quite satisfactory. It is not the best solution. As you will remember, it seems to me to be quite close to the thinking of the Constitutional Convention and perhaps they just did not—in that last rush—get the right form of words for it.

Ms JULIE BISHOP—Yes. My recollection is that I do not think that the ConCon was suggesting that the words 'a vote of no confidence' be actually included in the bill but, rather, that that was the consequence of failing to get the approval.

Dr Hirst—But I do think it is a weakness in the document. When people pick it up, what they will see in black letter law is that the Prime Minister can dismiss the President—and the consequences if the Prime Minister makes a bad decision are not in black letter law. I think it is going to be increasingly difficult to defend the provision.

CHAIRMAN—Thank you very much for your submission and for coming here and talking to us today. We will table our report on 9 August, and we will certainly be delighted to send you a copy.

Dr Hirst—Thank you very much.

[11.14 a.m.]

RUBENSTEIN, Ms Kim, Senior Lecturer in Law, University of Melbourne; Member, Women's Constitutional Convention Steering Committee

WINCKEL, Ms Anne, Lecturer, Law Faculty, University of Melbourne; Member, Women's Constitutional Convention Steering Committee

CHAIRMAN—Welcome. Is there anything you wish to say about the capacity in which you appear?

Ms Rubenstein—I am appearing in two capacities: in my position as a senior lecturer in law and as a member of the Women's Constitutional Convention Steering Committee. I have two separate submissions in relation to my two different hats.

Ms Winckel—I am appearing both as a member of the Women's Constitutional Convention Steering Committee, although I will let Kim predominantly address that submission, and as a lecturer in law. I have also put in a personal submission, so I will focus on the aspects that are not covered by Kim's submission.

CHAIRMAN—We have received your submissions. Would you like to make fairly brief opening statements before we ask you questions about them?

Ms Rubenstein—Certainly. Perhaps I can divide my presentation into two and I will give the first part in my capacity on behalf of the Women's Constitutional Convention Steering Committee. That submission is directly relating to the Presidential Nominations Committee Bill. That submission, as you will see in the letter that we have submitted to the committee, involves suggested amendments to that bill in order to effect two outcomes that are a result of both the Women's Constitutional Convention that occurred immediately preceding the ConCon last year, and also to effect the outcomes of the ConCon.

We see that some of the outcomes of the ConCon are in harmony with some of the outcomes of the Women's Constitutional Convention, and that is not surprising. But we think that, in order to properly effect those outcomes in relation to the equal participation of women in the republic process, in particular in the nomination of a President and also in the outcome of who will be President, there are some changes that need to be made to this current bill in order to effect both those outcomes.

So that summarises, in essence, what the content of our submission is and the philosophy behind the changes to various sections of the current bill. Those amendments are to part 3 of the current bill and to part 4 of the bill. In a nutshell, they are to provide equal numbers of men and women on the Nominations Committee and also to mandate that equal numbers of men and women are placed in the list to the Prime Minister in the nomination for President. That is a summary of the presentation on behalf of the Women's Constitutional Convention Steering Committee. I am happy to answer questions more specifically in relation to that.

My other submission as a lecturer in the law school is in relation to the other bill, the Constitution Alteration (Establishment of Republic) Bill 1999, and in particular to schedule 2

dealing with the consequential amendments of the Constitution. In particular, I would like to highlight on page 12 of the bill at clauses 38 and 39 the references to section 117 of the Constitution, and the substitution of 'a subject of the Queen' with 'an Australian citizen.'

My submission is that this is quite a fundamental change in relation to the place of citizenship in Australia. This year marks the 50th anniversary of Australian citizenship and I am currently the chair of the organising committee for a major conference being held at the University of Melbourne in two weeks' time. This change, which substitutes 'a subject of the Queen' with 'an Australian citizen', then provides in section 127 for the meaning of 'Australian citizen' to be left in the hands of parliament, and states:

An Australian citizen means a person who is an Australian citizen according to the laws made by the Parliament.

This is a fundamental constitutional change, and one that does primarily, I believe, maintain the status quo. However, I think it is something that requires much more community debate than the very minor changes provided in schedule 2 of this particular bill.

Ms Winckel—I support the submissions that Kim is making and I would add to those some other submissions which relate to the appointment and removal of the President; the lack of new enacting words for the Constitution after it is changed; the appointment of the Nominations Committee; and the report prepared by the Nominations Committee.

I would also like to add another point that is not in my written submission to do with community education. All of the concerns that I have are underpinned by two main issues. One is my commitment to community education as a legal educator, and the second is my concern that the Prime Minister not be perceived to be acting under a conflict of interest, trying to enlarge his position to the detriment of the President by subterfuge. It is dangerously possible to perceive, through the ambiguity of some of these sections, a perception which is detrimental to the Prime Minister. I think that would be unfortunate. I suspect that if the words were clearer, if the intentions to do with the appointment, removal, et cetera, of the President were clearer, then that perception might be removed.

Just briefly, in relation to that perception questions have to be clearly answered, such as: does the Prime Minister intend not to be able to appoint a President? Does the Prime Minister intend to be able to appoint somebody who is not nominated by the Nominations Committee? These things are possible under the current sections. The Prime Minister needs to only consider the Nominations Committee report, not act on it, under the bill as it stands. The Prime Minister does not seem to have an obligation to appoint a President at all.

Does the Prime Minister intend to take into account issues of diversity when appointing members of the Nominations Committee and, indeed, appointing the President? Does the Prime Minister intend to be able to dismiss a President without due cause? A High Court judge cannot be dismissed without proved misbehaviour or incapacity. I believe that it would be inappropriate for a President to be able to be dismissed without due cause, and that is not clear in the changes. Finally, does the Prime Minister really intend to give the impression that a President could possibly be re-elected after being dismissed without the approval of the House? That is what the explanatory memorandum seems to suggest, but in reality it is obviously a very unlikely scenario.

In relation to community education, I am concerned that the ConCon made it very clear that the Nominations Committee was a construct to somehow try to accommodate the desire of the community to be involved in the process. Obviously, many people in the community wanted to elect a President. There were many reasons why that was not accepted as a view, but the Nominations Committee was a mechanism to bring the community into the equation. I believe that at the moment the Nominations Committee seems to almost be a straw man or a straw woman. It could be firmed up in a way where in fact the Nominations Committee has a true role, instead of just a shadow role because, of course, the Prime Minister at the moment does not have to even pay any attention to the actual report.

The other thing that I would say is that, in relation to community education, I believe it is fundamental that if the community is to make an informed decision on a referendum of this magnitude, there needs to be true community education leading up to the event and not during the campaign. I remember hearing Gareth Evans mention on a radio program that things would start to happen during the campaign, but when things happen during a campaign, everybody is very suspicious. Nobody really believes what they are hearing from the yes vote and the no vote. Everybody has an agenda. If the government is committed to informing the community, it should have been happening a long time ago, and I am concerned about that.

I would like to table one document in relation to this. It is an email that I sent some time ago to the referendum task force in relation to the home page on the web site. There is a link from the referendum home page of the Prime Minister to the Constitution. I have printed out those pages from the web. I have also printed out that version of the Constitution that appears. Twice I have emailed pointing out that the links to the Constitution provide no access to the preamble. I am doing a thesis on the preamble so I am particularly concerned about those issues.

In that particular web page, when you go to the Constitution, you cannot find a link to the preamble. Yet on the Prime Minister's home page it talks about the preamble bill. This is an example of where, just by putting a change to the web page, you can help the community find out about the preamble and what the original preamble is, but that has not been changed. Despite a reply to my email which said it would be changed, it has not been, and that has been quite a number of months. I feel that there needs to be a greater commitment to actually helping the community understand these issues.

CHAIRMAN—Thank you for that. You talk about dismissal of a President by a Prime Minister needing similar justifications for removal from office of a High Court justice.

Ms Winckel—I said 'due cause', and an example would be the High Court judges. You need proof.

CHAIRMAN—But isn't there, in fact, a very major difference between a judge that is a member of the judiciary and someone who is in the political process? Aren't you trying to define for the political process something which is perhaps undefinable?

Ms Winckel—That may be so. I agree that there is a difference between the President and a High Court justice. There is no doubt about that. But I believe that, in the current

wording of this legislation and the changes to the Constitution, the Prime Minister can be perceived to be, through a conflict of interest, increasing his own power to the detriment of the executive. Whether or not that is so, is another issue. The perception is one that is not to the Prime Minister's advantage.

Surely, it would be better that it be quite clear that the Prime Minister cannot act in a conflict of interest situation. If the Prime Minister can just dismiss the President for no reason, not get the approval of the House, and have no consequence, other than a political consequence which might or might not happen in his own government, then surely that is untenable. I cannot understand that that is an appropriate way for the Prime Minister to be able to act.

Mr CAUSLEY—How many judges have ever been removed?

Ms Winckel—I have no idea.

Ms Rubenstein—In Australia?

Mr CAUSLEY—Not many. One that I know of.

Ms Winckel—How many governors-general have been removed? Not many.

Ms JULIE BISHOP—None.

CHAIRMAN—The second point I wanted to ask you about is that in your presentation you talked about the appointment process and there being a need to require the Prime Minister to select one of those names which is put forward to the nomination process. Actually, what you are recommending is in variance with the Constitutional Convention.

Ms Winckel—Is it? I apologise. I did not realise that.

CHAIRMAN—The Constitutional Convention did not require that the Prime Minister select one of the nominees for the practical reason that, if the Prime Minister and Leader of the Opposition are unable to agree on any of those put forward, but might agree on another individual of theoretically equal stature, then the process could proceed so that we would, in fact, have a President.

Ms Winckel—Would it not be better then to put that explicitly into the legislation? If that is the case, why cannot that be said so that there is a fall-back mechanism for where agreement cannot be made?

CHAIRMAN—I am not a lawyer, but I would think the legal minds would argue that it is totally unnecessary. That process will take care of itself. The reason for the amendment bills being silent on the issue of requiring the Prime Minister to pick one of those nominated names is due to the possibility, however unlikely, that none of the names is acceptable to both sides of politics, and therefore would not get up in a vote of two-thirds of the House and Senate sitting in joint session.

Ms Winckel—I can see that that is a reasonable fall-back position and I would submit that therefore it should be in the legislation. I speak as a legal educator and as one who is interested in perceptions as well as in straight law. The legal situation is that the Prime Minister does not need to choose from the recommended list, but the community is not aware of that. The community would feel tricked if that happened and they did not know that could happen. At the moment, many people will be spreading the word that that possibly can happen and that it is another trick. I am interested in the way the community can understand the legislation and know that it is not being done by subterfuge, but it is actually explicit.

CHAIRMAN—Is the community being tricked at the moment by the Constitution being silent on the Prime Minister altogether?

Ms Winckel—I think the community lacks information about the Constitution.

Ms ROXON—I have a question to both of you. I was particularly going to ask Kim. You say that on behalf of the women's committee you have a preference and would like it to be in the legislation that there will be equal numbers of men and women on the committee and on the list.

Ms Rubenstein—Yes.

Ms ROXON—That is a view that I can understand and I understand the aim of wanting to make sure that women participate fully within the process. I do have some concern about how we as a committee could justify taking that position and prescribing that for women, but not necessarily for a whole range of other groups within the community.

CHAIRMAN—Men.

Ms ROXON—I am not so concerned about men, but young people, ethnic groups and a whole range of different community groups that may want to be involved. I wondered whether being so prescriptive is helpful, or whether actually you have a view stating that certain things should be taken into account, as in fact the ConCon did and it has not fully been picked up in this bill.

My second point relates to it as well, which is your view that the list should include as many women as men. One of the things we have heard from some of our other witnesses and have asked questions about is whether or not the list should be made public. Anne may address this question after Kim. Would making the list of nominees public put pressure on a Prime Minister to nominate someone from that list? At this stage there is no process of even ensuring that the Leader of the Opposition, let alone the public, knows who is on that list. You may not know if the person has come and been recommended from the committee or not. Do you have a view about whether that might be a more effective and palatable way of making sure the community can put pressure on the committee if there are not enough women, young people or people of different diverse backgrounds et cetera?

Ms Rubenstein—I will respond to both points. The first point that you make in relation to mandating equal numbers, as opposed to taking into account, is largely as a matter of

experience but, taking your suggestions into account, it is also incorporated in our proposed section 11. If you have a look at it, it says at the beginning:

. . . taking into account so far as is practicable, considerations of federalism, gender, age and cultural diversity.

But it then goes on to include in that the prescription for equal numbers of men and women. There is no doubt that the group women incorporates a fundamentally broad range of individuals, so they are not mutually exclusive. By mandating that you have to have equal numbers of women, we are satisfying that desire that women certainly be equally represented. And within that component there is the argument that the committee has to also take into account these other factors, which is not a problem, given that women do represent the entire range of those particular groups.

The fundamental philosophy underlying it is that history and experience have shown that, with the best of intentions, and even with the changes in generational approaches to the equality of men and women in our society, we do not see it in practice occurring in many areas of the community, and in particular political areas of the community. This way encourages that change to occur without any detrimental effect. Our argument is that there is no disadvantage in mandating equal numbers of men and women. Who could oppose having both groups of the community being equally represented? It does not preclude you from then also taking into account the other factors that you have referred to.

In relation to the question of transparency, I am supportive of a more transparent process because I think that would also provide greater confidence within the community, greater confidence of the very process being one to encourage the community's sense of participation in the nomination process. If the community is confident in that process, the transparency can only assist that. I am also mindful of the fact that there are some people who are nominated who may not wish it to be disclosed to the community. Perhaps one way of doing it is to enable transparency and enable people to have that option, but some factors being displayed to the community, such as gender, age or background of the range of people, so that the community is confident that those factors have been taken into account, even if the person's name is not disclosed.

Ms ROXON—I support the transparency issue. That assists the community in believing and understanding that a process is being done properly.

Ms JULIE BISHOP—In relation to section 22, the proposed amendments to part 4 of the bill, I understand precisely where you are coming from, but couldn't a situation occur which works against precisely what you are putting forward? You have not identified how many would be on the short list. Envisage a scenario where there are two outstanding women, streets ahead of the rest, and the list ends up only being two. Under this scenario you would have to drop off one of the outstanding women and find yourself a token male. I am quite serious about this. If you do not nominate how many on the short list, then I am concerned about limiting the number of people on the short list to four, or two, and you are then confining it to a man and woman when there could be two extraordinarily good women.

Ms Rubenstein—I do appreciate that that could be a consequence, but I think—

Ms JULIE BISHOP—Not in your lifetime.

Ms Rubenstein—It could be my eight-month-old daughter who is one of those people who is put up as being among the outstanding persons. I appreciate what you are saying, but I think that the dangers are still greater the other way. If that woman is as outstanding as we are making out in that situation, we would hope that she would be chosen over the man—

Ms JULIE BISHOP—I have got two outstanding women in my scenario.

Ms Rubenstein—That other woman might then be up for the next time. I see what you are saying, but we are ultimately not going to lose out on one of those women being put up, whereas in the other situation both those women may not even have been referred to in the first place because of the committee's mind-set of not even thinking of them.

Ms JULIE BISHOP—Would your concern be addressed if we specified that the short list must ensure at least one woman?

Ms Rubenstein—Yes.

Ms JULIE BISHOP—That is clumsy wording, but we could put it in terms of the list having to include 'at least', rather than equal.

Ms Rubenstein—It would mean that you at least have one woman considered, but I think it does undermine the sense that there are equal ranges of men and women in the community who may not otherwise be considered if you are not mandating the notion of equality. There are further arguments about the range of people we even consider as a President, and we could spend quite a bit of time talking about gendered issues involved in our notions of who would be appropriate as head of state. Part of my argument is that the community generally has not been encouraged to think about a broader range of professionals within the community who could actually be a head of state. You do not need constitutional lawyers as a head of state. Other community educators, social workers, the range where women are in higher proportions, should be in people's mind-sets as appropriate heads of state. The person chosen as the head of state really should be someone who reflects the identity and collective experience of the people. In that role, women are not thought about enough, and I believe that they should be equally thought about in that respect.

Ms JULIE BISHOP—This is only in the presidential bill anyway, isn't it? This is not in the Constitution.

Ms Rubenstein—No.

Mr McCLELLAND—Just to change tack, I was wanting to draw out, Kim, your concerns about section 117. My personal view, for what it is worth, is that this is one of the more significant changes, that we would become, instead of subjects of the Queen, Australian citizens. What are your concerns?

Ms Rubenstein—You are right. It would be recognising a current reality, which is that we are Australian citizens. My concern is that this section is essentially not questioning the

effect of section 117. If we look at section 117, the subheading of it is 'Rights of residents in states', and there have been several cases in the High Court which have questioned whether the protection from discrimination of persons—

Mr McCLELLAND—You mean permanent resident as opposed to a citizen sort of concept?

Ms Rubenstein—Correct—the distinction between permanent resident and citizen. There are cases that have questioned whether in fact this protection should be broader than subjects of the Queen but apply to residents in the states. By referring specifically to Australian citizen and allowing the parliament to define that, the potential is that there will be a group within the community who are not protected by that—

Mr McCLELLAND—That is your concern there?

Ms Rubenstein—Yes.

Mr McCLELLAND—Just on that point, as far as my reading of the Constitution goes, the two words that suggest sex are reference to the Queen and, in this section 117, a reference applicable to him if he were a subject of the Queen. Should it more appropriately be expressed, in this day and age, as to him or her?

Ms Rubenstein—Yes, or to the person. I have not looked at it to see what gender neutral language, but I would certainly be supportive of gender neutral language in the Constitution.

Mr CAUSLEY—I have a question for Ms Winckel. In your submission on section 60 you say that the Prime Minister must choose someone who has been nominated appropriately and who has been recommended by the Nominations Committee. The chair has just been through one point with you there. I think that, even with goodwill, it is sometimes a problem that people in Australia are not absolutely agnostic and therefore the Prime Minister and the Leader of the Opposition may have problems coming to an agreement.

One thing that is not spelt out here, and I suppose it is considered to be a convention, is that the position of Governor-General is also a very complicated and important position. We are not talking about an Irish president here; we are talking about transferring the powers across to the President. If the Nominations Committee came up with nominations that probably did not fit the requirements of being a Governor-General—for instance, the Australian women's hockey team or the Australian cricket team at the present time are pretty popular, but I do not know whether Steve Waugh could become the President of Australia—there may be a possibility, a rare possibility, that those people really did not fit the criteria that are necessary for President of Australia. Therefore, the Prime Minister and the Leader of the Opposition might well say, 'We have got to look for someone else.'

Ms Winckel—With respect, my submission would be that, in that event, the Nominations Committee's criteria for appointment is not tight enough and that the appointment of the Nominations Committee has not been done with enough care, because I think that committee should be well aware of the status and the requirements of the position. I still tend to believe

that if the Prime Minister and the Leader of the Opposition cannot choose from that list, other than for reasons that there is nobody appropriate on that list—and that should not happen if the Nominations Committee has been well briefed and well appointed, and appropriate nominations have been made—then the danger is that they will still come to some political arrangement or some deal, which still affects the opinion of the public in relation to the process. I would suggest that it is actually—

Mr CAUSLEY—It has not happened with governors and Governors-General, though, has it?

Ms Winckel—It has not?

Mr CAUSLEY—It has not.

Ms Winckel—You do not believe that the public are sceptical about political appointments?

Mr CAUSLEY—Maybe they are sceptical, but I think most governors and Governors-General have carried out their duties responsibly.

Ms Winckel—Absolutely, I would agree with that, but I think people are still very sceptical about political appointments. I believe it would raise the profile of the process to make it explicit, to make it transparent, rather than to have it be seen as a political deal. So to force the Prime Minister and the Leader of the Opposition to agree on somebody who has been nominated by an outside body is not necessarily a bad thing, I do not think.

Ms Rubenstein—Can I add that we need to be very careful about our assumptions about someone like the head of the women's hockey team as being an appropriate head of state. This was the point that I was trying to make earlier, that the role of head of state is both a ceremonial one and that of a constitutional umpire. In terms of that position of constitutional umpire, I think the question is more one of a basic intelligence rather than of a constitutional lawyer being able to make those sorts of decisions. In some ways we should be broadening our thinking about who would be appropriate as a head of state because those two positions, of ceremonial role, of social cohesion, should be mixed with the constitutional protector or umpire role. People can assume those roles in appropriate times, and people have many capacities.

Mr CAUSLEY—I have to say to you I do not think you fully understand the position of Governor-General or governor. Yes, it is ceremonial in some ways, but all bills go to Executive Council, and the governor or Governor-General, with Executive Council, goes through the bills as to whether they are correct or not. It is a very responsible position.

Ms Rubenstein—And that person acts on the advice of the Executive Council.

Mr CAUSLEY—No, not necessarily. I have been with governors and had questions put to us and taken back to the parliament, taken back to the cabinet.

Ms Winckel—The current legislation actually makes it clear that the President will act on advice. It is made explicit, isn't it, in the changes?

Mr CAUSLEY—Not particularly, no.

CHAIRMAN—Not on Executive Council.

Ms ROXON—Yes, it is in the changes.

Ms Winckel—The changes say that the President is to act on advice.

Mr McCLELLAND—Excepting the reserve powers.

Ms Winckel—Yes, excepting the reserve powers.

CHAIRMAN—That is correct. But he also has the right to resubmit a bill.

Mr CAUSLEY—Yes.

Senator PAYNE—Ms Rubenstein, in his submission Dr John Hirst makes a quite specific reference to the question of gender neutral language, describing the rest of the Constitution as remaining 'aggressively male', as opposed to the amendments. I would be interested in your views on whether this is an opportunity to rectify that entire process. I am also interested, following on from Mr McClelland's question, for you to elaborate further on what you think we should do about the adoption of a new section 117. You said that you thought that was one of the most significant changes. How do you think we should communicate that to the Australian people?

Ms Rubenstein—In relation to the nature of the Constitution being gendered, I totally agree. But I do not think change to language is going to be enough to change the nature of the document. One of the arguments—

Ms JULIE BISHOP—It is a start.

Ms Rubenstein—It is a start, and I would certainly be supportive of it, but there are more far-reaching issues in relation to the nature of our constitutional system that need to be addressed, including notions of representative democracy, of our federal system. I have written on this and I can send you a copy of some of the material I have written—

Senator PAYNE—The committee would be happy to receive it.

Ms Rubenstein—in relation to our constitutional system being deficient towards women. One of the issues to do with equal participation of women in the republic process comes from that research, which points out the fact that in the drafting of the Constitution women were absent and that we can see effects of that in our current Constitution. One example of that is in relation to the requirement that the seat of government be at least 100 miles away from Sydney. As Justice Evatt has said on many occasions, if women had been present at the drafting of the Constitution there would have been a lot of discussion about the realities of

having your seat of government so far away from your domestic areas—and that impacts on both men and women who have concerns over child care.

Mr CAUSLEY—I would agree.

Ms Rubenstein—In relation to section 117, currently the government has an Australian Citizenship Council looking at issues to do with citizenship. Unfortunately, it did not include in its reference the question of the place of citizenship in our Constitution. I would recommend that this be something that be brought within the inquiry on citizenship and the Australian Citizenship Act, because its relationship with the Australian Constitution is fundamental. That would be one opportunity for further public discussion.

Section 117 is one avenue where citizenship can potentially be included, but there are broader issues in terms of the rights of citizens and non-citizens in Australia that take us closer to notions of a bill of rights debate, which is a much larger debate. But I think our consciousness of this change should at least be reflected in community discussion.

Senator PAYNE—One final question, as a quasi devil's advocate, I suppose: why would you limit the participation of women to 50 per cent on either the Nominations Committee or the short list when we could potentially do 98 or 99 per cent?

Ms Rubenstein—Because I do think that men's and women's experiences need to be equally involved. If we are wanting to represent the community, even though it would be wonderful in the sense of the scenario of changes in our society to see 99 per cent women on that sort of level, it would not benefit society to not have men involved because we are wanting the process to reflect a community sense of involvement.

Senator PAYNE—We could just invert the century, though—couldn't we?

Ms Rubenstein—That is right. We could have a whole century where women are the only presidents, then we could start afresh. But, in the interests of getting a sense of equality earlier, I think that would be the answer.

Senator PAYNE—Thank you very much, Ms Rubenstein.

Mr DANBY—I have a question to Kim Rubenstein, and I want to shift the ground again. We have had a lot of concerns expressed to us over the last day, including by people who are opposed to the whole long resolution going through or being voted on, over the issue of removal of the President. Do you feel that there is a major difference between how effectively the Governor-General can be removed at the moment and the way that this bill proposes to remove a prospective President? Do you have any concerns about that and, if you do, how would you address them?

Ms Rubenstein—Thank you for your question. Unfortunately, I have not had time to go through the entire bill to give my considered response to all parts of it. My life at the moment is a balance between a variety of different responsibilities. However, in terms of the removal process, my main concern with all of it is a notion of transparency and clarity in it, so that it is entirely clear for the person who is placed as head of state and for the Prime

Minister that a code or a clear sense of the steps that need to be taken is to be adhered to, rather than leaving it as an unstated convention.

Ms HALL—I will just flip back to what we were talking about a moment ago. What you are seeking to achieve is balance, isn't it—a balance that reflects society—rather than trying to establish an inverted type of relationship to the one that exists now? It is something that you are putting up for serious consideration and something that you see should be reflected in any document that is going to be the basis of our society from hereon in. Is that correct?

Ms Winckel—I would say there are two motivations for calling for equal numbers of men and women for both the committee situation and those who are likely to be appointed: firstly, for the equal balance that you have mentioned and, secondly, to redress the imbalance that historically has been so incredibly dominant. Our society tends to choose those people who are known in a network situation, and they tend to be male in many situations. The tendency is to have more men on such a committee, and the Constitutional Convention is an example of that, where there were not equal numbers of men and women. It could well be said that, to be a true reflection of society, it would have been appropriate that there were.

Ms HALL—This is something that you are putting up in a very serious manner as something for us to consider in a very serious way—

Ms Rubenstein—Absolutely.

Ms HALL—and something that we should accept in the same way as it is given?

Ms Winckel—The Women's Constitutional Convention was far larger than the ConCon. There were many more women in attendance at the Women's Constitutional Convention. The strength of resolve and resolution in relation to these recommendations is something that I think needs to be taken with respect and, yes, with due consideration.

Ms HALL—It is fair to say that when our current Constitution was drawn up women voting was still an issue within this country. Maybe that reflects some of the issues that you have raised.

Ms Rubenstein—Absolutely.

CHAIRMAN—Thank you very much for your submissions, jointly and individually, and for coming along today.

Ms Winckel—If I may add one last thing, we have not talked about the enacting words—is that not an issue to be discussed at all? Is that something that this committee has considered at all?

Senator PAYNE—It has been raised with us.

Ms Winckel—I know that John Pyke from the Queensland University of Technology has made a submission that reflects that issue. I would just say that it is another way of making

the community feel more represented in terms of reflecting the sovereignty of the people in this whole process.

Mr PRICE—I have a question about the making public of the short list of candidates for President by the Nominations Committee. What would it be like to be one of a number of unsuccessful candidates? I know that they have the option of not disclosing the nominations, but assuming that the majority do not decline that opportunity, what must it be like? We do not do that, for example, with the High Court judges, where there is a limited consultative process in terms of gathering the names for consideration by cabinet and the Prime Minister who have a list that shows the five who made it and then the successful one.

Ms Winckel—Are you suggesting those who are on the short list who did not make it?

Mr PRICE—Yes.

Ms Winckel—I think those who are involved in the law know who the failed contenders are for the High Court. I think that is common knowledge amongst those who are lawyers, academics et cetera.

Mr PRICE—There is some speculation in the papers, too.

Ms Winckel—I suspect that the confidentiality clauses are not going to be as successful as you might want them to be. I do not think that it would be helpful for there to be surreptitious leakage of the short list. It would be better that it be announced openly and freely, as opposed to it being speculated on, leaked and/or discovered in some other way. I think that would be even more difficult for those people who are involved.

Mr PRICE—Earlier on during the debate about the republic Sir Zelman Cowen said how important it was that we did not have direct elections—people like me and Sir Ninian Stephen would never have risen above that in that process—so in the hurly-burly of public glare and voting they did not want that. But I wonder how comfortable he would have been to have it known that he was an unsuccessful candidate for the position.

Ms JULIE BISHOP—Ask him, Roger.

Mr PRICE—I will.

Ms Winckel—I agree with you about the difficulty of that point. I would have to say, like the last speaker before me, that this is not my ideal model—I am addressing a model which is not my ideal model—and I can see different scenarios that would help address that very issue. But, as this is the recommendation of the Constitutional Convention, and as this is the recommendation of the government at this point, this model is the one that we have to refine to best deal with the many issues. I think that transparency before the community is a very real and important issue to be addressed. I also agree that it is a very difficult question as to how you assist those who are eligible and worthy of the position not to be dissuaded from applying or nominating. So, I agree that that is an important issue, but that is to be balanced against others that are equally important.

Mr PRICE—I accept what you are saying.

Ms HALL—Yesterday it was put to us on that same issue that to be on the short list would in itself be a great honour.

Ms Winckel—I agree with that.

Ms HALL—So that is an alternate approach.

CHAIRMAN—Thank you. We will table our report on 9 August, and we will send you a copy.

Ms Winckel—Thank you very much indeed.

[12.03 p.m.]

GRIFFITH, Dr Gavan, (Private capacity)

CHAIRMAN—Good morning, Dr Griffith. Thank you for coming to appear before the committee and thank you for your submission. Would you like to make a brief opening statement to the committee before we ask you questions?

Dr Griffith—I would like to engage the committee, if I could. It is the best way I could be of assistance. My submission is somewhat direct and unfortunately a little bit of lawyers' corner. It may be the most useful way for me to assist the committee, rather than making a speech on my views, if I could walk the committee through the salient points of my submission to indicate why it is there are a few matters on which I feel strongly, particularly as I understand Mr Jackson is a pro-republic counsel standing in for Justice Handley as someone of the opposite persuasion.

I will also address some of the issues of the Convention in section 59. It seems to me that there are important issues and that at this stage it is the last opportunity, as I perceive it, to seek to put things in order for the next generation, although I am quite happy to increase my possibilities of practice by leaving things as they are.

CHAIRMAN—Could I ask you if you could make your remarks brief—because we will have to disband for lunch—or else we will undo the people this afternoon.

Dr Griffith—I certainly intend to. You can see from my submission that that is my inclination.

CHAIRMAN—Thank you. My colleagues will definitely want to ask you questions.

Dr Griffith—As to paragraph 2, I will let that stand as it reads, other than to make the observation that the amendments that Lionel Bowen brought forward for the Constitution—which failed a referendum—had as one of the provisions for the Constitution, 'In this section, 'month' means 'calendar month', I must say that, if there was a descendant of Abraham Lincoln around, he would be a little bit astonished. I think there is a bit of that in the present version but there is nothing much we can do to clear it up. I am concerned in two ways with the third paragraph of section 59, the executive power. I am building on what I understand from the submissions of Justice Handley, the letter from Sir Gerard Brennan which has been annexed and now given to you with Mr Jackson's short written submission, which I gather he elucidated on in more comfortable surroundings yesterday. I must say I find it surprising that in Victoria what passes as a double committee room, to pass on the new Constitution, looks like two telephone boxes to me. Perhaps there is some statement there in the venue.

Mr CAUSLEY—Tell Jeffrey.

Dr Griffith—It does seem to me that there are two problems. My submission addresses, firstly, my concern at the admixture of referring to the President acting not merely on the advice of the federal Executive Council—which is dealt with in the first paragraph which

reflects the present section 61 of the Constitution—but additionally the Prime Minister which, as we have already seen in submissions and debate this morning, is someone who previously has not rated a guernsey in the Constitution. Necessarily he must now because of the provisions for the selection of the nomination of a President. But my own view is that it should be minimal references only so far as necessary for that purpose.

I think I would probably go along with Mr McClelland's view about problems about referring to even the Leader of the Opposition. Probably the less said in the Constitution about members of parliament—whether they hold particular parliamentary office or not—the better. Although it is the case that sometimes the President acts on prime ministerial or other ministerial advice, to provide in a constitutional provision not merely a dichotomy but three sources of constitutional advice seems to me to be otiose. The system works perfectly well already with no expression about sources other than the Executive Council. It also may lead to difficulties because what happens, then, if there is disparate advice from three sources? Why have a provision that creates uncertainty of operation when the existing absence of provision has been shown for 99 years to work perfectly satisfactorily? In doing my best to read the task force report in volume 2 of the materials, it seems to me there is no particular reason advanced as to why, in implementing the Constitutional Convention's proposals, this third paragraph with its chapeau appears at all.

Having made those points, it seems to me that what comes after the chapeau is equally undesirable, for the reasons which I state shortly in my opinion—which seems to have accord at least in the minds of Justice Handley, Sir Gerard Brennan and Mr Jackson. It may well be. My own view is that probably conventions would not be frozen. I think item 8 on schedule 3 is intended to do something—although I am not sure exactly what—to make conventions ambulatory in nature. But the fact that this can be raised is an issue of uncertainty as to whether conventions will be frozen or not—and uncertainty as to whether the High Court will buy in on justiciability.

I express my view: probably not. I think Mr Jackson and Justice Handley express a view to the contrary. It does not matter much which of us is right. Why do this if we are having a minimalist approach? Why not just leave things as they are? The conventions are there. They do not have to be stated. They are capable of amplification. At the moment they are not regarded as justiciable. Why not delete entirely the third paragraph of section 59? In my view, one would have then a faithful implementation of the Constitutional Convention and not give rise to the uncertain uncertainties which I merely touch upon and say, 'I don't know what this means.' It may be posthumously; it may be never; but it will give rise to difficulties. So I would embrace, then, the submissions raising concerns about both aspects of the third paragraph of section 59 and suggest as a solution the removal of both of them.

On the issue of summary removal from office, I do make some observations in paragraph 14 and following of my submission. I think it is the case that Kerr acted because he thought he may be summarily removed. It was never possible, because at 10 o'clock in the morning when perhaps the Prime Minister sought to dismiss him summarily, the Queen would be asleep. The mechanics of operation of the possibility of instant dismissals now with the circumstances that the Queen is in England mean that in practice, were there an attempt for summary dismissal, it would not work summarily. The Queen would warn counsel and

advise. It seems to me that there is a difficulty in now expressing a constitutional mandate to a Prime Minister in extremis summarily to dismiss.

I am not sure what the solution is to that, because that would appear to be the recommendation of the Constitutional Convention. I merely note that it is a matter of change to the Constitution in a way which one would say should not be material. No Governor-General has ever been summarily dismissed, but it may be material because certainly Sir John Kerr—after the joking aside made by Gough Whitlam on cup eve in Government House in Melbourne—clearly thought, and he took the view to his grave, that he was exposed to that risk. To my mind, it remains a substantial explanation to what occurred in 1975.

But I am unable to assist the committee with its mandate to reflect faithfully the recommendations of the Constitutional Convention, other than to say that is a concern that one has no time delay, no opportunity even for the President to counsel, warn or advise before his own dismissal might occur. If there is a possibility of putting in a bit of time lapse there, it usefully could be picked up.

I should add also that I notice that Richard McGarvie has made a submission dealing with his concerns on the issues with respect to the expression of prerogative power. So there does seem to be a balance of authoritative submission to the committee on that issue that I have already dealt with.

The other matter of concern I deal with in paragraphs of my submission on the main proposals for amendment deal with the dichotomy between Acting Presidents and deputies. In fact, I must say it took me a few minutes to find section 128 when I started reading about Deputy Presidents. One overlooks the fact that there is a provision now for deputy governor-general. To my understanding, I think it is used basically to enable the chief justice to swear in parliamentarians at the opening of parliament. But, by and large, the administration of Australia proceeds on the basis that one has an administrator acting in default of a governor-general unable to act. It seems to me there is no reason why one cannot express, by reference to the concept of an Acting President, entirely the requirements to cover situations when a President is overseas, on holiday or otherwise unable to act.

The provision for deputies in section 128 was probably put there by reference to the concept of horse and buggy days—that, when the Governor-General was absent was Melbourne, it would not be possible to communicate with the Governor-General even for the ordinary signatures which may be required. Nowadays, with faxes and communications, such provisions seem to be unnecessary. But my submission makes, I hope, a strong case to say that this entire juxtaposition of the concepts of Acting Presidents and Deputy Presidents should be reworked, so that one just has a simple expression of a provision for an administrator to act if a governor-general is incapable, overseas, on holiday or otherwise unable to act.

There is also the circumstance that may happen that, if some states retain a monarchical constitution, one is uncertain of who might come in riding on the white horse of being a deputy. There is another issue of whether or not the provision for appointing deputies is one

which must be exercised on the advice of the Executive Council, the Prime Minister, a minister or whatever section 59 may provide with respect to that.

One suggestion to deal with practical issues may be to adopt, as is adopted in the present Constitution, provisions that say, 'Until parliament otherwise provides, these shall be the provisions for an Acting President.' It should be a matter—as, for example, issues of disqualification of parliamentarians—which could be made the subject of subsequent legislative schemes, just as the issue of nominations of President is being made the subject of a separate act and not part of the Constitution.

I would strongly submit to the committee that, as a matter of form, this whole issue of provisions for Deputy Presidents and Acting Presidents should be reworked. My submission is that, in conformity with the recommendations of the Constitutional Convention, the simplest thing is to adopt the concept of an Acting President and to delete any provisions for a Deputy President. They are unnecessary, but what is there would seem to be somewhat of a mess.

Can I then say something shortly about section 64. It is the case at the moment—and this is dealt with in schedule 2—that the Constitution provides that ministers of state may administer departments of the Commonwealth. With the provision now of superministries, it is the case that there are several ministers sworn in to administer the one department. So, for example, the Minister for Foreign Affairs is a minister of the department, and also an equal minister of that department is the Minister for Trade. He is regarded as the junior minister, but he is sworn in completely to administer the same department as Mr Downer. In that situation, it could be argued that there is no constitutional capacity to have more than one minister administering a department of state. As I note in my submission, the only authority to say that you can have more than one minister of state—somewhat immodestly—is the opinion that I gave to the government some years ago on this issue.

Mr PRICE—You are not walking away from that?

Dr Griffith—I think I am right. I thought I was right on cross-vesting. I still believe I am right on the corporations power. I would like to recommit that. But, the consequence of me being wrong—and the High Court has said I was wrong on cross-vesting, so at the moment I am not winning—would be merely someone saying, 'Griffith has got it wrong again.' The consequence for the relevant ministers is that they would all lose office and they would probably have to repay their pay as well. So this is, in effect, a litigation waiting to happen. Sometime perhaps a common informer could use the procedures to have a shot at them and say, 'These ministers have forfeited their office because they are holding an office of profit under the Crown and they are not validly appointed ministers. Therefore, the profit that they take is one which gives rise to the constitutional prohibition.'

This is not fair square within the Constitutional Convention's mandate, but whilst you are fixing up section 64, I would strongly suggest that there be a phrase included which enables more than one minister be appointed to administer a department of state. Perhaps I should not have made this submission at all, because it has livened up something which has been happily overlooked for the last 10 or 12 years, but it is a sleeper which is there. I remain of the view that my opinion is and was correct. I refer you to my form in the High Court in the

corporations case and cross-vesting and say that perhaps you should not take my word for it. I think in conformity with the spirit of what is intended by these amendments, an improvement of section 64 to that extent would be worth while.

The last matter I would like to turn my wrath to—and this really begins on paragraph 32 and following in my submission—is this whole concept that it is possible for states to remain monarchies after Australia becomes a republic. Unfortunately, I was serving Australia overseas, writing a report which has been implemented to reform the legislative structure of the United Nations for which I signed a contract to be paid a dollar. As an aside, I was never paid the dollar, so I took the under secretary-general for management and administration out to lunch—it cost me $87.00—and said, 'Joe, I never got the dollar.' He wrote a letter and said, 'We've lost the contract.' It costs $67.00 to write a cheque for one dollar in the United Nations. The next thing, through the fax, the under secretary-general for legal affairs faxed me the dollar. So I now have that as a memento. I might not be much good, but I am cheap.

In my absence, an advice was given by the person acting in my stead in office to indicate that it was conceptually possible to have the Queen as head of state in a state when Australia was a republic. We have just had a little advance and there was a very good Pryor cartoon the other day with the Queen applying for a visa saying, 'The purpose of my application is to visit my subjects.' This is an issue now which will become, on Australia becoming a republic, a very real one.

Of course it is intended that the states should all act together. My own view is that constitutionally that is mandated. I see no role for the Queen as the head of state of a state any more than I mentioned in this opinion that you could have President Carter the King of Spain, or President Milosevic the head of a state. It must be conceptually incapable of achievement to have a foreigner the head of a state within a republic. One could do it at the moment where we are not a republic. We can have the Queen, as a foreigner, the head of state because we say, 'It is all right, she is the Queen of Australia.' We all go along with that little joke. But it is something that we cannot go along with any further once Australia becomes a republic.

There are two ways to deal with that. I mention the radical way in which one can deal with it in paragraph 32 of my opinion. When the Australia Act was being drafted the Commonwealth took the view, particularly after the decision of the High Court in Kirmani v Captain Cook Cruises, that the Commonwealth had power to go it alone and sever all residual links under the external affairs power on the basis that any links with the United Kingdom were links with a foreign power. And the recent decision on disqualification would seem to indicate that the High Court is still of that view.

Were Australia to become a republic and the states were to retain the Queen as the head of state, notwithstanding what is in the Australia Acts as amended, notwithstanding what is in the rest of the Constitution, and notwithstanding what is in the constitutions of the states, my own view is the Commonwealth could act to override any state constitutional provision and remove the foreigner as the head of state of the state. But one must hope that there must be a better mechanism than that to achieve the result.

Unfortunately, I believe the Convention received incorrect advice in proceeding in its debates on the assumption that it was a simpler process to get agreement not to buy into the states with the Queen as the head of state issue and let it go through with pious statements to say, 'It is hoped that all the states will act at the same time and resolve these issues.'

If that course is taken, if the new Constitution for a republic says, in effect, that you can have a Queen as a head of state, because it says it, that will be lawful constitutionally—because in a constitution you can say black is white if you want to. It is something that I remain very uncomfortable about because it seems to me that it is self-evidently a nonsense to talk about a role for the Queen of England as being the head of a state in an Australian republic.

Having stated that, having regard to the mandates of the committee, there is probably not all that much that the committee can do other than join the chorus to say, 'The states should simultaneously put their houses in order.' If that were done then one does not face this constitutional difficulty as a result of a strong minded federal government, withstanding all these checks and balances of the Australia Acts and the present Constitution, nonetheless legislating to remove.

Mr Chairman, they were the main matters I intended to refer too. I am quite happy to answer any questions.

CHAIRMAN—Thank you very much for that.

Mr DANBY—The Victorian government on 5 May initiated in the Assembly the Australia Acts (Requests) Act 1999. Would that be the ideal way for each of the states dealing with that problem of the states and Queen of England?

Dr Griffith—The states have got home pride on this issue. In the case of the Australia Acts, the Commonwealth took the view that we could pass an act severing residual links. Because the states wanted to be involved we did a side deal there with them, firstly, to continue imperial honours indefinitely, although that has fallen by the wayside on the initiative of the Queen. Secondly, the Commonwealth said, 'If you like, you can pass an act requesting us to pass an act to request the British government to pass an act.' So that indeed happened. The United Kingdom passed an Australia Act in exactly the same terms as the Australian Australia Act. We said, 'We'll bring them into force at exactly the same time and then no-one will know which one did it.'

The effect of that is that the Queen as the Queen of England signed a proclamation to bring the English act into force at 3 a.m. Greenwich Mean Time on 6 March 1986, and as the Queen of Australia she signed in Government House an act to bring the Australian act into force at the same time. So, to my mind, they were the only acts of Australia to come into force at a time, at Greenwich Mean Time.

I see there is a submission from Mr Stuart Hamilton complaining of the fact that it is intended that Australia should become a republic at 3.00 p.m. rather than at the commencement of 1 January.

Ms ROXON—There was a comment about it.

Mr CAUSLEY—My question is a little bit of a variation on this. Under our present situation we have a federation of sovereign states, as we call them at the present time.

Dr Griffith—You might.

Mr CAUSLEY—Seeing this is the minimalist approach, the states will be very keen to see that they are independent. As we have governors and Governors-General at the present time, the states will continue to appoint their own heads of their particular states. What are we going to call those? Are they Deputy Presidents? Do you have any precedents or—?

Dr Griffith—We can call them 'Administrator'. We can call them 'Lord High Admiral'. It does not matter. We can call them anything that the states feel comfortable with as long as it is not the King or Queen of England.

Mr CAUSLEY—But they will have to have those as they are independent states.

CHAIRMAN—Why can't they still be called 'governor'?

Mr CAUSLEY—They could be.

CHAIRMAN—They are in the United States, which is where we took the Senate from anyway.

Dr Griffith—Yes.

Mr CAUSLEY—It is an interesting point. I have been thinking about the state situation for a while, actually.

Dr Griffith—The best thing the states could do is to get on with it so that they do not create any constitutional confrontations and get a nice republic system in operation that suits the states. They have got autonomy to do that.

In my view, constitutionally, to retain a foreigner is something which should not be open. If we do it as a one off, if the Constitution says you can do it, then you have done it, but it remains discordant until eventually one falls into line.

Mr PRICE—What if someone took it to the High Court that it was inconsistent to have an Australian republic and a monarchical state in the one system? You are not good at tipping High Court outcomes but—

Dr Griffith—It would be a great brief. I think the High Court would duck it and say it is non-justiciable. If the Commonwealth parliament passed an act overriding the state constitutions then it would be justiciable, but I think they would have to have a go—

Mr PRICE—Until—

Dr Griffith—They could pass it but not proclaim it and have a go.

CHAIRMAN—Can you do something about that word 'justiciable'.

Dr Griffith—Call it 'actionable.'

Ms JULIE BISHOP—Dr Griffith, the Convention danced around this issue because we were starting to get into circumstances where state executive power was becoming a matter of federal jurisdiction and there was a great deal of consternation about that.

Concerning section 106 of the Constitution, I know it is controversial but in my state of Western Australia they read that as affirming the existence of state constitutions. As an example, section 73 of the Western Australian constitution, which of course pre-dates the Commonwealth Constitution, requires a state referendum to approve any alteration in the constitutional position of the state governor. If there is a no vote for the general republic question in Western Australia yet it is passed elsewhere, it is not incumbent on the government of Western Australia to hold another referendum to determine the futility or otherwise of remaining a—

Mr CAUSLEY—It would have to be passed in the others states by a majority.

Ms JULIE BISHOP—Say Western Australia is the only state.

Mr CAUSLEY—It would fail.

Dr Griffith—No, it would not. It would pass in a majority of states.

Ms JULIE BISHOP—I am saying that if only Western Australia—I could say only Queensland, but I just happen to know about Western Australia—votes no, yet there is a republic at the Commonwealth level, there is nothing incumbent on that state to hold a referendum to ask the people, 'Do you want to change your state governor to be something else to align yourself with the Commonwealth republic?'

Dr Griffith—Well, of course not. As far as section 106 is concerned, if it makes you happy in Western Australia, well stay happy, but remember the words in line 2:

.. shall, subject to this Constitution—

That is, section 106 means whatever the High Court says it means, embracing what is in the entirety of the Constitution.

Ms JULIE BISHOP—Except if you take into account item 5 of the proposal. That is drawing comfort for those in Western Australia who like to think that they have a state constitution.

Dr Griffith—It is a hot water bottle, or whatever it is!

Ms JULIE BISHOP—Practically, realistically, what do we do in that scenario?

Dr Griffith—Realistically, from a political point of view, if Australia becomes a republic, each state should face up to its personal preferences as to whether, in the circumstances, it should at the same time move to establish a republican model. If it is merely changing the name of the Governor to be the 'Governor, head of state government' so be it, but get rid of the foreign head of state. It should be done in conformity with the national development, without the state losing anything at all.

Ms JULIE BISHOP—We will not be able to do it by legislation.

Dr Griffith—Of course, you could do it several ways.

Ms JULIE BISHOP—We could do it by legislation, but it is required to be done by referendum, and then you are back with the people who have already voted no at a republic level, hypothetically.

Dr Griffith—One way is to say, 'If you don't vote yes, then the Commonwealth might be able to do it for you.'

Mr CAUSLEY—That does not appeal.

Dr Griffith—It is a pity in a way that the Convention was given this easy route out, because then it failed to face up to the hard realities. It is the same position, Mr Chairman, as your home nation; how could you have the Queen of England still the head of state? I was sitting next to a man in a conference at New York University the other day, and he said that he represented the Commonwealth of Virginia. Tell me about it.

CHAIRMAN—After that time, though, they did try to divide the place up, and there are still people who fly the Confederate flag.

Mr CAUSLEY—That is right.

Dr Griffith—Yes, they do. Or you can fly the Western Australian flag, but do not have the Queen's face smiling out at them.

Ms ROXON—I have one question. You might be able to put at rest some concerns that other people have expressed to me about what will happen if the states do fail to acknowledge this—not just on the question of whether they retain a governor as representative of the Queen but on the impact it might have on all sorts of things, like the concept of crown land. I think this is a bit of a misleading argument, but it would be helpful to me if you perhaps could just give me your view on that.

Dr Griffith—If the states do nothing whatsoever, the Commonwealth can still become a republic. If the states remain monarchical, that is something to be sorted out, one hopes, politically. As to issues such as reference to the conventional British structure being devolved from the Crown, there could be no legal disadvantage arising to a state that stood out of the process, none at all.

Ms ROXON—No, my question is: if in the situation of whether you keep the Crown or you do not—so, say, Victoria passes its act and we have a CEO, or whatever we decide to call these people, and New South Wales does not and they keep a representative of the Queen—

Mr PRICE—That is a slur.

Ms ROXON—I am not suggesting you would—can there be any argument about the concept of whether crown land continues to exist, for example? It is a nonsense argument, isn't it?

Dr Griffith—I am sorry; I thought I was answering your question. The answer is that it is a nonsense argument.

Ms ROXON—That does not exactly help me in arguing with those other people. I was hoping you might expand on it a little bit for me.

Dr Griffith—You can say you got a free opinion from the former Solicitor-General.

Ms ROXON—Okay—he who normally gets the High Court wrong—that would be great.

Mr CAUSLEY—It raises an interesting point, though. What about the acts of parliament? Obviously, the titles refer to the Crown. Can there be one act of parliament to change all of that?

Dr Griffith—The states?

Mr CAUSLEY—Any parliament, because at present the acts of parliament refer to the Crown.

Dr Griffith—Yes. For example, in England two months ago Lord Woolf's reforms were brought into the courts, and the whole concept of writs have been abolished; no longer are they expressed to be in the Queen's name, although it runs back to 1066. England has got rid of the Queen's name from a writ; we could get rid of the Queen's name from an act of parliament.

Mr CAUSLEY—Just with one act of parliament?

Dr Griffith—We would have to have it signed off by the head of state.

Mr CAUSLEY—Yes.

Dr Griffith—But there is no need to have it in the chapeau.

Mr McCLELLAND—I understand that all the state Solicitors-General have agreed on a scheme whereby it is proposed that each state government will request the federal government under subsection 15(1) of the Australia Act to amend section 7 of the Australia Act so that each state will be enabled to enact a section to make the first five subsections of

section 7 inapplicable to the state if they so wish—the first five subsections dealing with the role of the monarch in respect of those states. What is your view? Firstly, is that a means around this? Do you know if the states are pursuing that? It has been suggested in Victoria that it is.

Dr Griffith—I agree; it is a means to get the result. It means that there is a clear legal mechanism to turn the states into republics contemporaneously. It is quite a useful process, because that brings the states into the process, as did the Australia Act. Passing the two request acts for the Commonwealth to pass an Australia Act and for the Commonwealth to request the imperial parliament to pass an Australia Act was a coherent nationwide process. The price secured for that was, as I mentioned, a side deal with the states to continue imperial honours for ever.

As a byway of history, I do not know whether the committee is aware that, although the Commonwealth honoured that arrangement, after five or six years the Queen said she had had enough of it. She wrote to each state requesting the Premier and the Leaders of the Opposition to express concurrence and discontinuance. I think all but the upper houses or the oppositions in South Australia and Western Australia concurred. Western Australia said they would concur only if she insisted and she said, 'I insist.' South Australia said they would not agree, and she said, 'I don't care particularly.' That was completely beyond her powers as sovereign to do that, but I think she did us a good turn. So, the only knights of Australia now are those residual ones, including Sir Ninian Stephen and Sir Zelman Cowen, whom you will hear from.

One other sideway is that some of the submissions, including Sir Ninian's, deal with the issue of what happens if you have a state governor who is not an Australian citizen. Of course, it is the case that it used to be regarded as a qualification for office to be the head of state of Australia that you were an Australian citizen.

Mr PRICE—It shouldn't be.

Dr Griffith—Indeed, as I understand it, Sir Ninian Stephen himself is not an Australian citizen. But perhaps you can ask him.

Ms JULIE BISHOP—Could I ask—

CHAIR—Hang on—

Ms JULIE BISHOP—Don't you get touchy about this.

CHAIRMAN—No, I am not touchy.

Ms JULIE BISHOP—You, with your American accent.

CHAIRMAN—It is fascinating that we could conceivably have not only the Queen—a foreigner—as a regent of a state but also a governor of a state who also was a foreigner.

Dr Griffith—Ninian Stephen says in his submission that some at the moment are not—

CHAIRMAN—But the implications of that is that person could, on the absence of the President, be required to fill the office of President.

Ms ROXON—They might be ineligible.

Dr Griffith—That is in Sir Ninian's submission, which he can no doubt enlarge on.

CHAIRMAN—I got the implication about the Queen; I did not get the implication that a governor could be a non-citizen and, as a non-citizen, be asked to take the chair of President. I do not remember anybody putting that to us.

Ms ROXON—They raised the issue of whether that meant that the requirements were less stringent to be appointed as an Acting President than to be appointed as President. I am sure that that was mentioned.

Dr Griffith—It is in Sir Ninian's submission, page 320 in volume 2.

Ms JULIE BISHOP—Can I just move to proposed section 59. As you rightly pointed out, Mr Jackson did say yesterday that he would rather that the third paragraph be removed so that there is no reference to the reserve powers and conventions. I put that proposition—and I apologise for paraphrasing what other people say in these hearings—to Professor Winterton, who seemed quite taken aback that there would be no reference to it. He felt—and these are my words, not his—that there would be a danger in the transformation from the position of Governor-General, which ceases, to President, which is created, without there being an explicit transfer of the reserve powers and the conventions that surround them. He was not too concerned about the justiciability of the position as a result.

Dr Griffith—It might have been that he was jumped upon without having a chance to think it through.

Ms JULIE BISHOP—I think that might have been the case.

Dr Griffith—But it does seem to me that sections 60 and 61—particularly section 61—express completely all that is required for a workable operation and for executive power embracing the concept of advice by other than the executive council itself. Sections 60, 61 and 62, and perhaps 63, express completely all that is required for the exercise by the Governor-General of reserve powers. If one substitutes 'a President' for 'the Governor-General exercising powers on behalf of the Queen', it seems to me self-evident and incapable of contrary argument that, whatever reserve powers that person may have exercised, those powers must devolve in equal form upon the new presidential head of state. So I cannot see the basis for his concern. And, if there is a concern which can be articulated, I would seek to balance against it the problems which can be seen to arise by attempting to spell it out—whether you freeze it or whether you make it actionable—and the other issues which arise once you seek to express that.

Ms JULIE BISHOP—Or whether you spell out the actual reserve powers?

Dr Griffith—The recommendation of the Constitutional Convention was to spell them out if possible. No-one is saying there is an attempt to do that. Some people say there are four reserve powers; others say there may be more, there may be less. There is no attempt to do that. It seems to me when you read the task force report it ducks the issue. They are instructed to, 'Spell them out if you can.' They do not spell them out, but they put in what I call these mealy words which only create uncertainty, that cannot add to any transmission but which may make it hard to say what you have done by so transmitting.

Ms JULIE BISHOP—I do not know that the ConCon actually wanted them spelt out. I think they, likewise, mentioned them because they want to ensure that the reserve powers are translated as they currently stand. But there was a great debate against any attempt to spell them out or codify in any way.

Dr Griffith—You must be right—I was not there. I was just picking this up from the task force summary of what was intended.

Ms JULIE BISHOP—I do not know that it was a sensible conclusion to come to, though, I have to say—to mention them but not say what they are.

Dr Griffith—I cannot see that there could be any advantage in spelling them out in these terms, notwithstanding Professor Winterton's answer to your queries on that.

Ms JULIE BISHOP—So it is just a question of deleting that third paragraph.

Dr Griffith—But I would have thought there could be no sensible opinion to say that by deleting it anything could be lost.

CHAIRMAN—As we have all finished, thank you very much. I will change my closing address and say we appreciate your submission, we appreciate you coming and talking to us today. We will report on 9 August in the House of Representatives, and we will certainly send you a copy of our report.

Dr Griffith—Mr Chairman, may I put in another request to fix up the two ministers issue—the two ministers of one department? It could be quite important.

CHAIRMAN—We heard you.

Mr McCLELLAND—And parliamentary secretary.

Dr Griffith—And parliamentary secretary? No, they do not get a salary.

Mr McCLELLAND—Yes, they do. They get an allowance.

Dr Griffith—But they do not get a salary.

Senator ABETZ—Take the tip: they do not get a salary.

Mr McCLELLAND—Speaking from experience?

Senator ABETZ—I agree with you. We should be made ministers, but junior or vice or something so our lowly status is recognised. If we became ministers it would make life a lot easier.

CHAIRMAN—We will adjourn for lunch.

Proceedings suspended from 12.42 p.m. to 1.43 p.m.

DORAN, Ms Jennifer Anne, Senior Industrial Officer, Australian Council of Trade Unions

CHAIRMAN—Thank you for coming to talk to us today. We have your submission. Would you like to make a brief opening statement to the committee before we start to ask you questions about the issues that you raised?

Ms Doran—The ACTU and its affiliates are strongly supportive of a republic and have always been so since this matter has been placed on the political agenda. Our concern in terms of the legislation that is now proposed for the referendum to be held in November is based on two basic principles. Firstly, we believe that everything should be done to make what is for many people, including trade union members, a complex issue as transparent and as simple as possible. Therefore, in our submission on the Constitution Alteration (Establishment of Republic) Bill 1999, we are concerned about the long title to make sure that that is as explanatory and as simple as possible.

In terms of the Presidential Nominations Committee, we are very keen to ensure that the wishes of the Convention—at which the ACTU was represented by its President, Jennie George—are met, and that is to ensure that as broad a cross-section of the community can be involved in the nomination process. We have some concerns about the way the Presidential Nominations Committee Bill 1999 is currently structured in terms of how it reflects the wishes of the Convention to ensure a diversity of views is present. A whole range of things are involved in the membership of that committee.

We want to keep the processes as simple and as accessible as possible so that all Australians can make an informed choice at the republic referendum in November and that, should we become a republic, that process of nomination for President is as open as possible so that our constituents will be as involved in the process as anybody else.

CHAIRMAN—Ms Doran, in your submission you have said that the Prime Minister should be under an obligation to move that a named Australian citizen be chosen as the President. The question I have is: if a short list is put forward to the Prime Minister and the Prime Minister and the Leader of the Opposition are unable to agree on any of the names on that short list, but are able to agree on another eminent person who did not appear on the list who is also qualified to serve and agreed to serve, would it not be better the way it is written in the bill than to have a stalemate?

Ms Doran—That makes my concern about the matter even more apparent. When I looked at it, I did not think that there was any suggestion that the Prime Minister and Leader of the Opposition could bypass the Presidential Nominations Committee. I would think it was completely inconsistent with the wishes of the Constitutional Convention if there was any possibility that that could occur. My concern was that you might have a Prime Minister who just does not want to make a nomination for President, and then what happens?

If you had another proposed person who was agreed by the Prime Minister and the Leader of the Opposition, I think the Presidential Nominations Committee procedure is open enough to convene that committee again and request that they consider this person. If the committee in that scenario you paint says, ‘They didn’t like any of our other ones, but here’s

somebody else,' and we can agree that this is an eminent person who would be suitable for the position, then the Presidential Nominations Committee could give its approval. I see the Presidential Nominations Committee as critical to the process of choosing a President. Any suggestion that it could be bypassed by a Prime Minister and Leader of the Opposition would be very adverse.

CHAIRMAN—As I understand the model put up by the Convention—and I am not a lawyer—the intent was to make the model as close to what we have in practice today without unduly tying the hands of the executive or changing our conventions and the way we operate. In that context, I mention the fact that we do not even have a Prime Minister mentioned in the Constitution at all. It seems to me that, if you require the executive—and in this case the opposition as well—to choose from a list recommended by the committee and give them no other option should they fail to agree on any of those names, you put us into a constitutional situation from which there appears to be no exit.

Ms Doran—The Constitutional Convention certainly did intend changing the way things are done at the moment. This is the process they came up with. I think it can be accommodated by still maintaining the integrity of the Presidential Nominations Committee. Proposed section 60 says:

After considering the report of a committee established . . . the Prime Minister may, in a joint sitting . . . move that a named Australian citizen be chosen . . .

It does not make it clear—although I was just assuming it was—that consistent with the whole framework between the two bills that that would have to come from that report. When you look at it, it may not be. It may not in fact have that impact, but we would certainly say that it would be consistent with the intentions of the Convention that it should.

CHAIRMAN—On the second issue, you suggested three areas where the long title of the bill is inappropriate or negligent, in the ACTU's view. Could you tell us if you have drafted an alternative?

Ms Doran—I have them in the submission.

CHAIRMAN—Sorry, I was looking at the brief, not the full submission.

Ms Doran—It may have been improved on by the Australian Republican Movement, which I have seen reports of in the press. But I think that it is important that the long title—because it is what people will have before them when they cast their vote—is as simple and as comprehensive as possible. My knowledge of long bill titles—I have a little bit of experience with them—is that most of them try to say as comprehensively as possible what is in the bill. So I have said in one point that you state what it is doing, which is to provide for an Australian citizen as head of state, including a mechanism for selecting the President, naming the powers of the President, removing the monarchical references from the Constitution and making transitional arrangements.

That covers everything that is in the bill, and it is the normal thing for a long title. If you wanted to just ask, 'What is this really about?'—it is about replacing the Queen with an

Australian citizen as head of state with the same powers as the Governor-General. That would be an appropriate one, I think.

CHAIRMAN—You mentioned Malcolm Turnbull.

Ms Doran—I did not.

CHAIRMAN—I thought you did.

Ms Doran—The Australian Republican Movement.

CHAIRMAN—In any case, I have some difficulty in understanding why the Australian Republican Movement all of a sudden wants to remove the word 'republic' from the title of the bill that would make us a republic.

Ms ROXON—As I said when this question was put to the last witness, it would be appropriate for you to accurately reflect what was said in the hearing.

Mr CAUSLEY—I challenge you to—

Ms ROXON—I think that the newspaper reports were not that accurate. We do not have the *Hansard* yet, Ian.

Mr CAUSLEY—We will check the *Hansard* after.

Ms ROXON—We will all have to look at that. Before the witnesses answer, they should at least have the two points of view if there is not agreement. There is a report in the paper which says they are running away from the republic. We had an answer to a question yesterday which said they do not have a problem with the republic; they just think people do not understand it as clearly as they understand an Australian as head of state. It would make it easier for the witnesses if they at least had both views of the committee about what was said.

Ms Doran—In any event, I am not here to speak on behalf of the Australian Republican Movement. I am here to speak on behalf of the ACTU. From discussing this matter across Australia with union members, our view is that there is a great deal of confusion about what is meant by the term 'republic' and that people think you are talking about an executive president, a-la America. If you put in the long title something that begs the question, it just begs a further question.

I know it is going to be preceded by some education material that will go out to people from the government—and that may or may not assist the process—but I think there is an obligation on us to try to get all the documentation along the way that is to go to people as transparent and as self-explanatory as possible. So, to have something there that says that we are to move to a republic, that on its face does not say what that means and you would say, 'What does it mean to be a republic?' This republic means not having the Queen as our head of state and having a President who has the same powers as the Governor-General. That is, at least on the face of it, self-explanatory.

Mr DANBY—Ms Doran, can I just turn to the nominations process for a second. We have constantly heard of difficulties about this over the last couple of days, including from people who are opposed to the whole process. The obvious question to ask you, and it has not been asked of anyone yet, is: do you know what the process is at the moment for selecting a Governor-General? There is not any open nomination process. There is not any committee that decides anything like that. However we proceed, it is an improvement on the current system.

Senator ABETZ—That has been commented upon by other witnesses.

Ms Doran—In any event, we see the process that has come out of the Constitutional Convention as very important in opening up the process for nominations for the head of state of Australia. I think it was Dr Lowitja O'Donoghue at the Constitutional Convention who made the point that this process was more likely to result in an Aboriginal Australian being made head of state. I would say it was probably more likely that you could have a woman as head of state. We believe that this nomination process is as simple as it can be made. It is as accessible as it can be made, and we strongly support it.

Mr CAUSLEY—On the nomination process as well, I think you said in reply to a question from the chair that, if the Prime Minister and Leader of the Opposition could not agree, you believed that any selection by them should go back to the committee. I understand the Convention rejected popular election of a President. Aren't you in a de facto way trying to achieve that? In other words, it is often difficult to get the Prime Minister and the Leader of the Opposition to agree. Are you saying that any nomination by them must go back to the committee before it goes to parliament?

Ms Doran—I think the Presidential Nominations Committee is integral to the integrity of the process that was agreed to by the Constitutional Convention, and that enabled the Australian community to have a say in who would ultimately be put forward for the approval of parliament as our head of state. To have any suggestion that the political leaders could get behind doors somewhere and agree on an alternative than that put forward by the Presidential Nominations Committee is a problem.

Mr CAUSLEY—It can be a problem of backwards and forwards too, can't it?

Ms Doran—That is why the Presidential Nominations Committee procedure is not proposed to be in the Constitution—to enable us to learn from the experience and if there is any necessity for more flexibility in the process. Frankly, I think we are jumping at hares. I think that, if you have all these eminent people from the community and eminent politicians, they will come up with a responsible short list that will be acceptable to the Prime Minister and Leader of the Opposition. Both those parties are represented on the Presidential Nominations Committee.

I think it is terribly important that you have a process that enables ordinary Australians to have some involvement in it, which we do not have at the present time. If you end up with a deadlock every time the Presidential Nominations Committee presents somebody as a nominee for the presidency, amendments can be made to that system. I do not think it is likely to happen in practice, and I think the flexibility is there in the way this is being

approached because the Presidential Nominations Committee, in an ordinary act of parliament, will enable that flexibility.

Mr CAUSLEY—So you are saying that people do not trust either the Prime Minister or the Leader of the Opposition?

Ms Doran—I think there is plenty of evidence to suggest that that might be the case. It is not a view I support because I believe that strong party government has served us well, but I think there is some measure of concern in the community about that.

Ms JULIE BISHOP—Ms Doran, in relation to the long title which will become the question, I guess it is a matter of emphasis. But, if we are to be true to the Constitutional Convention and the intent of the Convention, in fact this model was called the bipartisan model throughout. The emphasis by the ARM, which put forward the model, was always parliamentary election by a special majority. It was not until the dying moments of ConCon that this nominating committee was attached to it.

The question of whether or not the Prime Minister would be able to nominate beyond the nominations put up by the committee was expressly put at the Convention, expressly debated and people acknowledged that there could be a circumstance where the Prime Minister could disagree with whomever the committee put up and make his own nomination. It might be an ugly truth today, but that is in fact what occurred at the Convention.

To the point that the communique describes the model as 'parliamentary election by a special majority', it goes on to say, 'We support Australia becoming a republic—the adoption of a republican system of government on the bipartisan appointment of the president model.' Would it not be fair to say that the long title encapsulates the ConCon's communique—a republic and bipartisan appointment?

Ms Doran—I think that was the whole point of the Constitutional Convention and I suppose the reporting of it perhaps did not accurately reflect this—the Australian Republican Movement did not get its own way. The model that was proposed by the Australian Republican Movement was not accepted by the Convention. There was a compromise, and I think it was a very good compromise. And, since I have gone back to the ACTU and our constituents, it is one that is strongly supported by our ordinary rank and file members—that there should be a public process involved in the nominating process.

I did not go to the Constitutional Convention with any notion of a Presidential Nominations Committee. It is a form that came from the Convention and I think seeing it in legislative form shows the strength of it. It has reaffirmed, I think, a growing interest in it and how important it may be. I think it would be a breach of trust of the Convention, the spirit of the Convention, in adopting a Presidential Nominations Committee if you go away and say, 'Okay, we have given you this committee, but no-one has to take any notice of it, and we do not expect them to.' I am not going to go out and say that to anybody. I am going to go out and say, 'You make this Presidential Nominations Committee as open and as accessible as possible.' We must insist that it be an important part of the process and so important with such eminent people on it that a Prime Minister and a Leader of the Opposition together ignore the recommendations of it at their peril.

Ms JULIE BISHOP—I think it was put at the Convention that they would ignore it at their peril, at their political peril, but it was never to be mandated that they had to be bound by the nominations list.

Ms Doran—Yes. I know that you are going to my point about 'shall'. I am concerned the Prime Minister may never—the comments in our submission did not go to this point, I must say—

Ms JULIE BISHOP—It has been raised by others.

Ms Doran—Yes. I would support anything that made it more imperative for the Prime Minister to take note and to only make a nomination on the basis of the committee. I think the Constitution should say he, presumably, has to make a nomination. It is a bit of a bother if you get a Prime Minister who refuses to make a nomination. That is what my point in my submission was going to.

Mr McCLELLAND—Just jumping to the Presidential Nominations Committee procedure, your views, or views like yours, have been taken into consideration in a redraft of the bill in respect of the quorum of the committee. There must now be at least 16, eight of whom are community members. I think that was in paragraph 2.9 of your submission. But you also submitted that there should be a requirement for the Prime Minister to have regard to things such as cultural diversity, federalism and so forth. Can you just expand on why you think that is important?

Ms Doran—I think the whole thing about the Presidential Nominations Committee, as it was envisaged by the Convention, is that it should be representative of the community. There was quite a bit of debate about what to put in. I think the Convention took a minimalist approach about a whole range of things that should be taken into account, so it came up with four: federalism, gender, age and cultural diversity. I think the whole thing about the Presidential Nominations Committee and the major problem I have with how it is expressed in the legislation is the predominance of politicians on it. I think it should be weighed more heavily towards members of the community. I do not know why you need to have federal politicians on it when they are in fact involved in making the ultimate decision and, in particular, given the requirement to have—

Mr CAUSLEY—People might be acceptable to the Prime Minister and the Leader of the Opposition.

Ms Doran—That would be a strong criterion for the committee to take into account, knowing that they have to get the Prime Minister and the Leader of the Opposition's support, I believe. I think there are too many politicians on it. I do not think you have to have equal numbers. It is not a numbers thing, I do not think. If it turns into a numbers thing, then we are all lost. It is a question about getting broad agreement about a very important figurehead for the country. So if it is going to turn into who has got the numbers on the committee, it is hopeless. I think it must properly reflect the community. Again, if you are saying, 'This is important for community involvement in the nomination process,' I think it is important that the community does not see themselves being outnumbered by politicians and those sorts of concerns.

Ms ROXON—I have a question about the nomination process as well. As the draft currently stands, there is not any provision for the committee's recommendations that are made to the Prime Minister to be public, let alone for them to be made available to the Leader of the Opposition. Do I assume from your view that you would support transparency, that you actually think that would be helpful? Do you want to comment on that?

Ms Doran—I think it has to be balanced. This was debated at the Convention. I do not know that you need to have everybody's names up in lights if it is going to prevent people putting their name up there.

Ms ROXON—We have not actually had any explanation of why that would be a difficulty, why it would not be regarded as an honour to be nominated.

Ms Doran—I have heard Sir Zelman Cowen talk about it and you will be able to talk to him directly. He said he would not mind his name going forward. I think in that context he did not mind it being known that it was going forward. He was making the point that he would not have stood for an elected position. I think if you have got a committee of integrity which is respected by the community, it is not so important to have the names published or publishable.

Ms ROXON—How do you know if the Prime Minister is accepting the committee's advice? How do you know whether the Prime Minister does not, with the agreement of the Leader of the Opposition—the Leader of the Opposition will not know whether they are on the list or not—support someone?

Ms Doran—At the moment you have all the political parties on the committee.

Ms ROXON—That is one way. You are suggesting that that is not necessary.

Ms Doran—They can tell them. I think if you have a committee with integrity that should answer it. I am not fussed about not having them known. I think there should be a balance.

Senator PAYNE—Ms Doran, it seems to me from the communique of the Convention that the six clauses that pertain to the nomination procedure indicate that the Convention certainly took it seriously, and the single clause that pertains to the appointment or election procedure also indicates that that is important. In terms of your submission and the suggested long titles that you make, could you indicate for us which of those is, as far as you are concerned, the most accurate representation of the Convention outcomes and the one that you think would most effectively take the question forward? In responding to that if you want to make reference to the long title as it stands, that would be helpful.

Ms Doran—I had thought in our submission originally 1.10 had to say something about the nomination process. I know that I have just said there a 'bill' and I have not said what the President is. I suppose a combination of 1.11 and 1.10 of the ACTU submission would be an appropriate one. Again, I would change 1.11 to say that it has the same powers as the Governor-General.

Senator ABETZ—You indicated in your opening remarks that you had detected confusion amongst trade unionists with the term 'republic'. When was this confusion first picked up and detected by the ACTU?

Ms Doran—I think it has been there ever since we started the debate. As people are talking about it more, it is becoming more apparent.

Senator ABETZ—You also told us in your opening remarks that the rank and file ACTU members had supported the republic right from the time the topic came up for discussion. It seemed to me a conflict, with respect, to assert that the ACTU rank and file supported a republic from day one, yet now when we are virtually on the edge of a referendum all of a sudden they are terribly confused and no longer understand the term.

Ms Doran—I think amongst trade union members you would get support for a republic regardless of what sort of model was put up. It is not a big issue. You do not have screaming rows amongst trade union members about whether or not we should remain a monarchy or a republic. You may have some debate about what sort of republic you would become. Now that there has been more debate about the different models, we are saying, 'What do you mean when you say a republic? What sort of republic am I voting for in this referendum?' I think that is the purpose of having a long title on the ballot paper to explain to them.

Senator ABETZ—Yes, but at the Constitutional Convention when the first question was asked, 'Should Australia become a republic?', the ACTU representation would have supported that motion?

Ms Doran—Absolutely.

Senator ABETZ—Would have supported the communique which continually used the term 'republic'?

Ms Doran—We do not have a problem saying 'republic', but it just leads to another question: what sort of republic? People say yes, but our people do not say, 'Hang on, I have to know what sort of republic before I support it,' because they support a republic. I think there is very strong support for a republic. But now we are getting to the crunch time of voting on one and they say, 'What sort of a republic am I being asked to vote for? I would like to know.'

Senator ABETZ—The sort that the ACTU voted for, as I understand it, was described as the bipartisan appointment of the President model, as per the communique.

Ms Doran—Yes.

Senator ABETZ—But you would not want that in the question either.

Ms Doran—You have to have an accurate depiction of what sort of model it is. It involves more. What is the bipartisan model? The bipartisan model involves all of these—

Senator ABETZ—That is what you voted for.

Ms Doran—Absolutely, and it involves an open nomination committee process involving all citizens, the replacement of the Queen with an Australian citizen with the same powers as the Governor-General—all of those things are encompassed in the bipartisan model of a republic. I think there is an obligation on us now when you are saying to people, 'Vote here and now for this or that,' to try to be as explicit as possible. I suppose that is what I am saying.

Senator ABETZ—I agree with you. That is why I am tending towards the word 'approving' rather than 'chosen' and I think there is a very strong argument for that. But with respect to the nomination bit, that being the only bit of the process that can be completely and utterly bypassed, to put that into the question as the shining light is, with respect, misleading to the Australian people, whereas that can be completely bypassed.

Ms Doran—I would agree with you if you put it in as the only thing. But no-one is suggesting you put it in as the only thing. It would be misleading to say that we are going to have an Australian President nominated by the Australian people through a Presidential Nominations Committee—full stop. That would be misleading. I think it is just as misleading to say you are going to have it approved by parliament.

Senator ABETZ—Should we not spell it all out then—a nomination by the Nominations Committee, which can be ignored, or a nomination by the Prime Minister, seconded by the Leader of the Opposition and two-thirds approval by the parliament—because, realistically, that is what it is?

Ms JULIE BISHOP—What about the dismissal?

Senator ABETZ—Dismissal is another thing. I have had my fair share.

Ms Doran—And powers.

Senator ABETZ—Yes, exactly.

Ms Doran—I think as much as you can put in you should put in.

Mr DANBY—Ms Doran have you seen the report in today's paper about the ARM's proposed—

Ms Doran—I did, but I must say I did not commit it to memory.

Mr DANBY—No. I was not asking you to. Do you think a new long resolution would communicate itself better to your members?

Ms Doran—The long title proposed by the ARM?

Mr DANBY—Yes. And/or would you suggest that the word 'republic' be included in that? Which of the variations that are in your submission—

Mr PRICE—You are not allowed to lead the witness.

Ms Doran—Well, I think that is okay.

Senator ABETZ—Just for the benefit of Hansard, you are referring to the front page of the *Australian* and Malcolm Turnbull's suggested question.

Ms Doran—Mr Turnbull's suggestion does not refer to anything about the public nomination process, which I am quite keen on and which I have included in 1.10—chosen from among nominations submitted by the people and approved by a two-thirds majority of both houses of federal parliament.

Mr DANBY—So your improvement on that would be to include reference to the nominations.

Ms Doran—Chosen from among nominations submitted by the people.

Mr DANBY—Would you address Julie Bishop's concern by including the word 'republic' in that ARM longer title?

Ms Doran—I do not think there is any problem with the term 'republic' so long as people have an explanation of what it means.

Mr DANBY—In your view, you could have both.

Ms Doran—I think so, yes.

Ms ROXON—Senator Abetz asked why would you put the nomination process in the short title when it is the only thing that can be bypassed. Section 60 of the Constitution Alteration (Establishment of Republic) Bill actually starts with a requirement before the President is appointed:

After considering the report of a committee established and operating as the Parliament provides to invite and consider nominations for appointment . . .

Could you comment? From my point of view, there is a reference to a committee and a nomination process and that is a change to the current situation. I would have thought that that is an important thing to put in the long title.

Senator ABETZ—That can be bypassed and that was my only point.

Ms Doran—No, considering the report cannot be bypassed.

Senator ABETZ—The recommendation can be ignored.

Ms ROXON—It can be ignored but it has to happen.

Senator ABETZ—Great. That is reassuring.

Ms HALL—That is more than I have got now.

Mr PRICE—I thought it was to the Prime Minister's credit when he set up the Constitutional Convention—and I must say I was not too happy about the appointment mechanism used but in fairness it seems to work well. He said, 'I would accept the outcome of the Convention provided it was by a majority.' To his credit, this is why this committee was formed. Why would a Prime Minister who appoints all 16 members of the community to the Nominations Committee, plus he would have a sizeable swag of the Commonwealth members—and I suspect one or two would be state and territorian members—issue a press release saying, 'I have appointed these illustrious and wonderful people, but I'm not going to take any notice of their nomination'?

Ms JULIE BISHOP—There might be a change of Prime Minister in between.

Ms Doran—I think that misses the point. If it relies upon the numbers on the committee, if it is seen as a bipartisan way of getting your person up as President, it is not going to work. If there is a change of Prime Minister it should be a committee of such integrity that, regardless of your political leanings, you would be happy enough to accept at least one of the nominees that have come forward in a report. I would think it would be highly unlikely. It all depends on maintaining the integrity of that committee.

Mr CAUSLEY—I would like to take you up on that point. Under the bill at the present time, the Prime Minister appoints the federal representatives and the community representatives. You are saying that you would prefer more community representatives rather than politicians but they would be appointed by the Prime Minister.

Ms Doran—I have not said no to their being appointed by the Prime Minister.

Mr CAUSLEY—That is what the bill says.

Ms Doran—That is what I am saying. They are going to be appointed by the Prime Minister.

Mr CAUSLEY—Therefore they would be political appointments. How are you going to get the Prime Minister and the Leader of the Opposition to agree to that?

Ms Doran—One would hope that they would not be political appointments.

Mr CAUSLEY—I dare say that through the history of governors and governors-general there has always been a criticism from the other side of politics that they were—

Senator PAYNE—That is your view of the Constitutional Convention appointments then, that they were political appointments.

Mr CAUSLEY—They may well have been.

Senator PAYNE—I am asking you.

Mr CAUSLEY—That is the point. They can be.

Ms Doran—That goes to my point about the integrity of the committee. If a conservative Prime Minister puts all these highly politicised conservative figures on a community committee and says, 'Give me a nominee'—you will have at least four Labor appointees—you are going to polarise opinion. It is unlikely you would get a nominee who would be seconded by the Leader of the Opposition. It is a recipe for madness for a Prime Minister to do that. I know Prime Ministers can be mad, but I do not think it is likely.

Mr CAUSLEY—I am sorry, but it can happen.

Ms Doran—But it is not likely and this framework allows modification to the committee process because it is just set in ordinary legislation.

Mr PRICE—But the most recent example of that, wouldn't you agree, was the Constitutional Convention? There were people like me who thought that the Prime Minister, appointing a whole swag of them, would compromise the Convention—it didn't; it worked.

Ms Doran—I would agree with that.

Ms HALL—Wouldn't it be fair to say that, even if the Prime Minister did appoint 16 people who he thought were people who would agree with him, in actual fact if you get 16 people who sit down anywhere there is always a variety of opinions. The other point is: isn't it a lot fairer than the situation that we have now where one person selects who is going to be the Governor-General? Isn't it fairer that there is at least some consultation with the community where we have none currently?

Ms Doran—I agree with that. I do not expect problems to arise. I suspect that there are a whole lot of examples in the past where you have Prime Ministers not acting in a silly political way that would undermine an outcome that they needed to get. If those problems arise, then they are capable of being fixed.

CHAIRMAN—The bill, at the wish of the Constitutional Convention, says that an appointee to the office of President may not be a member of a political party. I would remind you that Bob Hawke appointed Bill Hayden as Governor-General. I must admit that at the time I was rather outraged. However, over time I came to the view that Bill Hayden, in fact, was one of the best Governors-General we have ever had.

Ms JULIE BISHOP—Sir Paul Hasluck is another example.

Ms Doran—I understand that. I support them not being a member of a political party.

Senator ABETZ—What about the ACTU?

Ms Doran—Yes. Could I just make one last comment because I did not raise it in my submission and I thought I should have. It is about the dismissal. I had considered putting in the submission something about the vote of no confidence. I suppose I was a bit persuaded by the explanation that this would always happen. It is on the basis that it would always

happen. I am not sure that any vote against a Prime Minister is always taken as a vote of no confidence, but I suspect it is better to have it in the Constitution to reflect what was said at the Convention, that it was intended that such a vote would constitute a no confidence motion.

Ms JULIE BISHOP—Does that mean that, if it is a vote of no confidence in the Prime Minister, it would be up to the party to elect another, or would it trigger the fall of the government?

Ms Doran—I think it is up to the party.

Ms JULIE BISHOP—McClelland's view is that it should actually trigger an election.

Mr CAUSLEY—The Convention said that if he loses a vote in the House he resigns.

Ms Doran—That is right. I suspect that at the Convention there was a feeling that you would go to a general election, but I think the truth of the matter is it is a matter for the party.

CHAIRMAN—Thank you very much for your submission and for coming and for so pleasantly answering our questions. We will report on 9 August and we will send you a copy of our report.

[2.28 p.m.]

GALLIGAN, Professor Brian John, Director of the Centre of Public Policy, Department of Political Science, Melbourne University

CHAIRMAN—Welcome. Thank you for coming to talk to the committee today. We have not received a submission from you but we would be pleased for you to make an opening statement and tell us those issues about which you have concern and allow us some time to ask some questions.

Prof. Galligan—Thank you, Mr Chairman, and I apologise for not putting in a submission. What I would like to do is make some preliminary points which I think are perhaps of significance in going to this whole question of confusion and then make very specific suggestions.

On the meaning of a republic, a republic classically has had two meanings, one meaning literally no queen or monarch, but the other one, in a sense the more reputable one that comes from Montesquieu and others, means no monarch or queen above the law. It used to be thought until fairly recently that you could actually have a republic, and Montesquieu thought this the best way to have the executive, with a king or a queen but subject to the law.

There is another obvious distinction, and that is between form and substance. If you go back to Bagehot's *The English Constitution*, 1867, he says that the British system is, in effect, a republic disguised by the formal features of a monarchy. If you look at Australia now, you can see that we are very much down that course, and I draw reference to the pledge of citizenship used today. Up until even 1988, I think, it was expressed, both in Commonwealth citizenship ceremonies and so on—for example, in a 1998 Commonwealth Australian citizenship ceremony booklet—that the first responsibility of a citizen was to take an oath and make an affirmation of allegiance to 'Her Majesty the Queen, as Queen of Australia'. That has simply, since 1993, been dropped completely, so that you pledge your loyalty to Australia, to its laws, to its democratic beliefs and so on. This is yet another indication that we are in substance and in our citizenship formulation a republic. We have been for a long time in most respects.

So what we are talking about here is regularising the republic or republicanising the head of state; it is not this talked up and exaggerated issue—on both sides—of what is actually entailed. But technically it is a large task, because our Constitution was written—at chapter 2, as you know—not in realistic terms but in very formal monarchic terms. So, in a sense, we are wanting to republicanise the head of state without properly redrafting the executive section, which only makes sense really when it talks about a monarch in that very traditional sense. I think that is at the basis of a lot of the confusion.

I want to talk about just a couple of things. The republican model—or the ConCon model—purports to be minimalist and essentially a model for bipartisan appointment of the President. It eliminates the monarchy. It retains parliamentary responsible government as we have known it, in which the office of head of state is largely formal, acting on the advice—

and we are going to have it in the Constitution, if this gets up for the first time—of now not only the Executive Council but the Prime Minister and ministers; that will be an addition. According to conventions, they are going to be put in the Constitution—or at least the term, not the conventions themselves—and yet that position retains the discretions with respect to appointment and dissolution of parliament. The whole purpose, obviously, is to create a non-political or a non-partisan office—and I assume it is not up for discussion—so let me just come to the old question of whether it would be better to elect the head of state.

Let me come to the model that is proposed. It seems to me a bit misleading to think of it as a minimalist one because, in fact, it is a very substantial change from what we have had. This new Australian President will formally represent the Australian people; occupy the top constitutional position; be the seat of executive power; be formally Commander-in-Chief of the armed forces and so on; and I think this is the really worrying thing—have unspecified powers that are potentially enormous; and, be advised by a federal Executive Council, but that council, according to the draft bill, holding office during the pleasure—and I will have something to say about that soon—of the President. Acting on the advice of the federal Executive Council the Prime Minister administers, but in accordance with constitutional conventions and, of course, they are arguable.

What has been done? I think, rather than simply changing the name, we have created a much more legitimate and powerful office. It is almost as if, in anticipation of the potential dangers of that, we have given an enhanced power to the Prime Minister to dismiss instantly the holder of this new enhanced office—to slay the monster, as it were—if there are any untoward tendencies or stirrings. So we really have a very different ball game to that which we had before. If it was the intention of the bill to reproduce what we had before then, in effect, it has not done that, nor did the Constitutional Convention.

In particular, let me make a few points—just going through the bill, it is a bit surprising that these have not been pulled out before. Even if we accept basically what the bill does, we can still take out a lot of the exaggerated, antiquated, absolutist, monarchic language and also the obsolete practices that are still there. We should not convert those into republican ones. Let me give you some examples. Section 59 says: 'Members of the executive council shall hold office during the pleasure of the President.' We do not need to say 'during the pleasure of the President'. We do not mean 'during the pleasure of the President' at all. That was appropriate when we were talking about a monarch in antiquated monarchic language. We should simply strike out 'during the pleasure of' and put 'during the term of the government' or something like that.

You could go further and change 'chosen and summoned by the President' to 'as constituted by ministers of the government'. We do not need to literally retain this sort of antiquated absolutist language now with respect to a President. Take section 64—this is the closest the Constitution traditionally went to mentioning ministers: 'officers to administer such departments of state' and the proposed individual shall hold office 'during the pleasure of the President'. We do not mean 'during the pleasure of the President', so we should not leave it in there. We should put 'during the term of the government' or something like that. They are examples of language which is now entirely inappropriate being left in there and applied to an Australian President.

Let me give you an example of an obsolete clause that simply should go out. Section 58 is the old obsolete clause that said that the Governor-General could reserve for the Queen's assent—the monarch's assent—bills otherwise passed by parliament. The memorandum says that reservation to the Queen ought not to be there, but proposes instead to put in a reservation to the assent of the President. The best thing would be to simply strike that out altogether, because we do not want to retain an obsolete clause and now, as it were, reactivate it by saying it applies to the new President. That would be silly, and yet it is in there. They are relatively small but, I think, significant improvements. The larger worry remains as to whether having an office articulated in these formal monarchic ways, even if those small changes were made, was something that one would want to trust and constitutionalise.

Let me come now to one of the main problems with what is proposed: the so-called prime ministerial power of dismissal. The Prime Minister may, by signed notice, remove the President with immediate effect and then seek approval of the House of Representatives in 30 days. It seems to me that this is quite an extreme measure. Obviously, the Prime Minister previously could not dismiss the Queen—the Queen does not live here, and he has no control of that—nor could he dismiss the Governor-General. He could only technically recommend that, and that is a once removed process. It is rather different to give the Prime Minister an instant power of dismissal. I think the reason for it is what I have suggested before—because we have created a rather more powerful office which we do not quite trust, so we have to boost the Prime Minister's control, which I am not sure is such a good thing to do.

On the appointment procedure I must say, just from listening in to the previous discussion, it seems to me this whole move to have an enhanced nominating committee—appointed by the Prime Minister, but somehow apolitical, anti-political or more representative of the community—is going down a somewhat naive and foolish path. If we are going to have a proper parliamentary appointed model, then it seems to me that you do not have to go much further than parliament itself, particularly when you are building special majorities that are two-thirds, bicameral and bipartisan. So I would not be fussed at all about the nominating committee. I would approve the fact that the Prime Minister does not have to accept the nomination of the person nominated by that committee.

To sum up briefly, the issue or the worry I would have—and I think many Australians might have—is that we have created a too powerful office with unspecified powers. Nevertheless, the proposals that are on the table can be corrected somewhat by at least taking out some of the absolutist language, some of the obsolete provisions, such as the one I mentioned. In order to correct that, as it were, we have given a too extreme dismissal power to the Prime Minister. I think the dismissal power—but this would be to collide with the Constitutional Convention's opinion—ought to have been simply the obverse of the appointing procedure.

Finally, let me make the obvious ironical point that politicians and certain elites are trying to maintain that this office should be apolitical; nevertheless, the gift of politicians. They would not like popular election because that would make it political. They say the people should not be allowed to choose by election because they might choose a politician—they might not, of course—so let the politicians choose and try and make sure the process will produce a non-politician. It seems to me this is deeply ironical. If there is trouble and a

bit of confusion in selling it to the Australian people, I think it is because of some of those ironies and contradictions.

Finally, it is interesting to reflect on history. The 1891 convention, which was appointed, produced a reasonably good draft Constitution, but it was not one that was geared to acceptance by the people. It was aborted. The 1897-98 Constitutional Convention was elected and produced a document which had to be ratified by the people. The delegates were looking over their shoulder all the time. That is the one that got up and which we still have. If this proposal fails, as it likely will because it is not giving the people what they want, then we have probably got another chance next time around.

CHAIRMAN—Thank you very much for that Professor. You talked about the dismissal procedures boosting the Prime Minister's control, implying or stating that that was inappropriate. As I understand the position at the moment, of course the Prime Minister cannot sack the Queen—nobody can sack the Queen—but the Prime Minister's recommendation to dismiss a Governor-General undoubtedly would receive royal permission straightaway. How would you propose to replace the Governor-General/Crown combination with an individual—that we now call the President—without allowing the Prime Minister to resolve a significant political impasse through such a mechanism?

Prof. Galligan—Why make the Prime Minister the arbiter and judge in this case? Normally it would be an issue—one would assume—between the Prime Minister and the Governor-General, so you give the Prime Minister a trump. It seems to me the appropriate way to do it is the normal sort of way of getting rid of High Court judges or whatever: through some sort of a petition and a parliamentary vote.

Mr CAUSLEY—But you cannot get rid of High Court judges either.

Prof. Galligan—Then the commission is withdrawn.

CHAIRMAN—With respect to judges, though, through the Constitution we have made every effort to remove the judiciary from the legislature and from the executive. We have built a wall—if you will—between the two.

Prof. Galligan—Yes.

CHAIRMAN—There is no apparent wall between the so-called President and the Prime Minister because, regardless of what we say, they are both political figures. The President might not be a political figure when chosen, but once he takes office he is a political figure, as a matter of fact. How do you resolve a political conflict, with somebody else acting as a court of review on which of them is right? I have some difficulty with that concept.

Prof. Galligan—This is the important power of dismissal. It is not just deciding an issue. It seems to me there is not a wall of separation between the two but nor would we want to have the two completely collapsed into each other. If we wanted that, we would simply have the Prime Minister also as the head of state. We do not want that. It just seems to me it is demeaning of the office to have this office beholden to a power of instant dismissal by the Prime Minister. It tilts the thing too much the Prime Minister's way.

Mr PRICE—We have never had a dismissal of a Governor-General. But what would you imagine the Queen would do if the Prime Minister wrote requesting the dismissal of a Governor-General?

Prof. Galligan—I would imagine that in due course it would be complied with, but there are a couple of key parts there. The Queen and the Queen's office is once removed. There is a bit of time. There is a little bit of sober second thought.

Mr PRICE—So is time the critical principle?

Prof. Galligan—I thought the proposal overall of McGarvie, the ex-Governor of Victoria, was not a terribly compelling one. But at least I thought it encapsulated something which was important, in having three old fogies—in a sense—once removed, who actually received the nomination and received the suggestion for dismissal. There is a point in that: it is not the Prime Minister actually doing it but recommending to some other body. It removes it a little bit. It seems to me the instant dismissal is a too powerful instrument, which demeans that office.

Mr PRICE—You would be happy if there were a notice of dismissal, so that he signals his intention formally to dismiss him within a period?

Prof. Galligan—Yes. And why can't that be reviewed by the parliament?

Mr McCLELLAND—I gather you are more in favour of a direct election model; is that right?

Prof. Galligan—I am not sure. I just know that, whenever I look at the polls, that is what most Australians say they want.

Mr McCLELLAND—But you have said, for instance, that this bill proposes a system whereby politicians ultimately approve the President to avoid a non-politician getting up. But the converse is that, if there were a popular election, of necessity only a politician would win that. If they did not start out as a politician, by the time they went through such an intense campaign they would be politicians at the end of it—indeed, very successful and possibly ruthless politicians.

Prof. Galligan—Perhaps they would be. Or they might be distinguished women professors of constitutional law who—

Mr McCLELLAND—Who wouldn't campaign, wouldn't arrange shoots with the media and wouldn't go and arrange doorstops? They would sit there. There would be no-one at polling booths?

Prof. Galligan—It is all a little bit implausible, I know. But it just seems to me deeply ironic to have a process where politicians very firmly advocate, 'We do not want a political head of state so leave it to us politicians to choose the person.'

Senator ABETZ—They have definitely done that with Governors-General. Throughout the history of Australia, politicians appointed Governors-General. And hasn't that worked to date?

Prof. Galligan—It has not worked too badly. That is right. But I am just saying if—

Senator ABETZ—Why would that not continue?

Prof. Galligan—I would say the main issue would be whether the Australian people would endorse it.

Ms HALL—Would you say that they are political appointments at the moment?

Prof. Galligan—They sort of are and they sort of aren't. I have written a book entitled *Politics of the High Court*. I do not mean 'politics' in that they are like all of you distinguished people—

Mr PRICE—Just more effective.

Prof. Galligan—in actually being in parties and electioneering and whatever.

Senator ABETZ—They can change the Constitution without going to a referendum.

Prof. Galligan—But it seems to me the High Court is involved in a profoundly political exercise in, in a sense, reinventing or interpreting at the margins, in important ways, the constitutional system—as obviously any of these senior offices would be. They are political.

Ms HALL—It seems to me really inconsistent that you can say that, if a Prime Minister or the parliament et cetera appoints a President then it is political—and given that there will be more community consultation. But, if the Prime Minister appoints or recommends to the Queen that a Governor-General should be appointed, that is not a political appointment. Following on from that and looking at that whole picture, how many times has the Queen declined to appoint the recommendation of the Governor-General?

Ms JULIE BISHOP—You don't know; you wouldn't know.

Prof. Galligan—You know the famous instance, to their credit, of Scullin and Brennan insisting that Isaac Isaacs be the first Australian and Jewish—although that did not matter for them; apparently it did for the king—Governor-General.

Ms HALL—How will this be more political than the current situation?

Prof. Galligan—I am not sure I was saying it was more or less political. I was making the point that the proposal in this is similar, in a sense, to the current situation of the Prime Minister simply nominating and that being accepted. Over the last 50 years that has surely been the way the head of state has been elected. Or otherwise it has been done a little bit more deviously, perhaps. If you read Bill Hayden's biography, for example, he had to go and

see Graham Richardson—or at least that is what is said—when he wanted to become Governor-General, and Graham said—

Mr CAUSLEY—He was the king!

Prof. Galligan—In any case, presumably those sorts of things have all gone on of a certain Prime Minister consulting colleagues and whatever. It seems to me that this process recommended for the President is certainly a much more open and a much more consensual process because it requires the Prime Minister, the Leader of the Opposition and the two houses of parliament with special majorities. It seems to me that makes it a very open and transparent thing. That is why I have less hankering after this more elaborate sort of nominating council or whatever, because I think that is what a parliament is. I would not be fussed if they did not have a nominating committee.

Ms HALL—Just picking up on the dismissal process, you say that it is different because you have got that time factor. What do you think would happen if the Queen failed to dismiss a Governor-General that the Prime Minister of the day recommended should be dismissed? What do you think the consequences now would be, particularly if there was—

Prof. Galligan—The answer would surely be, 'It depends.' If the Prime Minister was going out on a limb and being a bit silly then that might be appropriate—we do not know. You assume that, yes, the Queen would simply, after checking things and whatever and perhaps dragging her feet a little bit—

Ms HALL—And there is no precedent for her refusing to accept any such recommendation?

Prof. Galligan—No, there has never been a case of it being done or not done. There was a minor case at state level, I guess, but not at this level. It just seems to me that what we have done has in a sense conflated things a little bit here and taken an extreme form which does not quite get the sorts of nuances of the current thing and said, 'We will give it to the Prime Minister.'

Ms HALL—You do not think it is just formalising the situation that really is working at the moment?

Prof. Galligan—No, I think it makes a reasonably significant important difference, both in terms of the honour and dignity of that office and tilting the balance in favour of the Prime Minister. The Prime Minister has always got in his pocket a letter of dismissal. In a sense, what chance has the head of state got in keeping the Prime Minister honest if that is required in these sorts of reserve power situations.

Ms HALL—You can argue that is the situation now. You have not convinced me, sorry.

Prof. Galligan—It is not quite the situation.

Ms JULIE BISHOP—Professor Galligan, you have published extensively on a number of topics, including notions of federalism. I would be rather interested in your view, if you

have considered it, in relation to the position of the states. The Constitutional Convention more or less left it open. They tried to grapple with the issue but it all got too hard and the communique said, 'We will just hope that all the states do whatever happens at a Commonwealth level,' effectively. Then we find in the Constitution Alteration (Establishment of Republic) Bill 1999, in item 5 of schedule 3, the transitional provisions, the statement:

A State that has not altered its laws to sever its link with the Crown by the time—

that is, by the time we become a republic—

retains its links with the Crown . . .

Conceivably, you could have one state that votes no at the Commonwealth referendum and the other states voting yes. I use Western Australia as an example because it can only change its constitution by way of referendum. So the only way it could alter the constitutional position of the state governor is by a state referendum. Do you see any difficulties leaving it in this current position? Are there any changes you would recommend to this legislation vis-a-vis the states' position?

Prof. Galligan—This has always been a nice question and potentially a very messy one. It seems to me that really the only thing you can do if you are going to try and have a fair election and not alienate particularly Western Australians or Queenslanders is leave it completely open for them to make a decision, not thinking that they are going to be corralled into the opposite. For example, if a state can vote no on this republic referendum and yet know that it is going to be overridden if enough of the others vote yes, I think it puts it in a potentially antagonistic position. It seems to me that in the longer term it is just inconceivable that a state could hold out. Nor do I think that the Queen would want to remain in.

It seems to me that whatever the procedures are that a state has to go through, it has to be left to its own timetable and its own decision to do that. I just do not see that it is conceivable in the longer term for it not to go with a republican decision, if that is the outcome.

Ms JULIE BISHOP—So you do not see any necessity to change the legislation as it currently stands beyond that item 5 in schedule 3?

Prof. Galligan—As I read it, on the face of it, it just says that the states can go on.

Mr PRICE—Could she abdicate from Western Australians?

Prof. Galligan—Some of my Australian colleagues tell me the Queen cannot. But if you are a good, royalist state and the Queen said—as she was said to have said—to Queensland when the last titles were around and they had a few of the white-shoe brigade people going through, 'No more nominations from Queensland.' The other thing is that you have to think of the Queen's dignity in all of this. She will not want to be retained by Western Australia or Tasmania—

Ms JULIE BISHOP—Why not?

Prof. Galligan—if the rest of Australia has gone republican. I would have thought that she would surely, one way or another, let it be known that this was an intolerable situation and presumably that royalist state would comply with her wishes.

CHAIRMAN—Professor, I am advised that it has been put to us that in the event of a state remaining under the Queen and the President getting run over by a bus or whatever and requiring the longest serving state Governor, or whatever they are called by that time, to become the Acting President, and if that person happened to be from that recalcitrant state, and if that person who was the Governor of that state not only was subject to the monarchy but also was not a citizen of Australia, would that cause us potential constitutional problems in such a non-Australian be appointed Acting President of the Commonwealth?

Prof. Galligan—Your question is: what happens if you have a non-Australian as the Governor of this recalcitrant state? I would not think it would cause a constitutional problem, no. I think either the person would decline to serve or they would not be acceptable. We do not have it in the Constitution. We may have to change some of the enabling acts. There would be no Letters Patent after this point. You probably heard that, from a constitutional lawyer, they get—

CHAIRMAN—I am not game enough to say who I heard it from for fear somebody will say, 'No, you didn't.' Anyhow, I think I am advised I heard it from someone.

Mr McCLELLAND—Just on that point, that arises in the context of section 63 of the proposed legislation saying:

. . . the longest-serving State Governor available shall act as President . . .

Or a deputy. Would there be merit in defining that term 'longest-serving State Governor available' to mean a state Governor who is otherwise qualified to be chosen as President?

Prof. Galligan—That would be one way of doing it, sure.

Mr DANBY—Professor, I am sorry to be rather more blunt than other people but your suggestion was that, because opinion polls showed that people were in favour of a direct election, that was the basis of your argument. You could equally argue that because—

Prof. Galligan—It was not the basis of my argument, no.

Mr DANBY—Well, because a majority of people favour capital punishment you could also argue in favour of the same kind of thing.

Senator ABETZ—With respect, I do not think he based his argument on the opinion polls; I think it was an aside that the majority supported something.

Mr DANBY—That may be my misunderstanding. Whatever, I think that your view of the vastly expanded powers of the Prime Minister are very overdrawn, and that you

underestimate the power of parliament to restrain any Prime Minister in those circumstances. It is like Professor Flint yesterday who argued that the Prime Minister could dismiss a President at the scratch of a pen. I really think that is very overstated. I would like you to comment on that, first of all.

Secondly, I would like to read you something that explains perhaps why politicians or parliamentarians favour the system that is proposed in the recommendation of ConCon. It says:

. . . if the President of Australia is directly elected by the people, he or she will be the only holder of public office who is so elected, the only person with that direct democratic legitimacy. The Prime Minister, after all, is indirectly chosen by the people, as the person best able to command the confidence of the House of Representatives, which the people elect. It may well be that, especially in a crisis, a directly-elected President will read the powers of his or her office expansively. If the people have chosen the President, then he or she—emboldened by an election victory after a stirring campaign—may feel entitled to assert the powers of the Head of State. We may find that over time, gradually in day-to-day governance and perhaps dramatically in a crisis, we have created a presidency which challenges the Prime Minister and the Parliament. Who knows what form of executive or semi-executive presidential system we could end with? Certainly, it is clear to me that the stable continuation of our present parliamentary system would be prejudiced by the direct election of the President. As someone who—to repeat—wishes to see the continuation of our parliamentary system but with a genuinely Australian head of state, that seems to me most undesirable.

Could you comment on that, please?

Senator ABETZ—When did you give that speech?

Mr DANBY—It was given by Sir Zelman Cowen on 9 June.

Prof. Galligan—I will make a few points. I did not base anything on the preference for direct election, and I share a lot of the reservations about it. The only point I was making was the throwaway point at the end—that most times when I look at the polls that is what most people say they want. I know a lot of people say, 'Well, they're stupid; if they only listened to us then they would know better.' The referendum campaign will tell.

Mr DANBY—I certainly do not say that.

Prof. Galligan—I did point out that there are some subtleties and ironies in this whole position which I think make it a little difficult to sell. Even if you did have a full-blown Nominations Committee, and even if—as is not the case, as was strongly pointed out—the Prime Minister was required to take more notice of it, it seems to me that for most of the time these things run their course and, prudentially, people of goodwill and sense and so on do the right thing. So it is not as if you would have a Prime Minister running around dismissing Presidents with scratches of pens and whatever.

It seems to me that, in structuring the office in an institutional way—and that is what we are doing, and it is going to go on for perhaps another hundred years before people get back to it—we ought to be very careful and make sure we try to put it in the best institutional embodiment we can and be careful when we are bringing in something novel and new, or at least if we say we are not bringing in anything novel and new but we are simply retailing or

reproducing in a somewhat different form from what we have had before, to be very sensitive to the changes we are making.

If you say that the Prime Minister can 'instantly dismiss the Governor-General'—and they say that here—then it seems to me that that is what the case is. I am not saying they would usually do that or they would do that without good cause, but in a crisis situation that is the sort of power we are talking about. It seems to me that that casts a shadow and demeans somewhat the highest formal office we have, and we ought not embody it in that way.

Mr DANBY—You do not think parliament would have something to say about.

Prof. Galligan—Well, it is not parliament, is it? If you read that clause, it says 'parliament' but it is the House of Representatives, and that is rather different. One proposal would be to say 'parliament and both houses of parliament'. You can assume that a Prime Minister, unless he has gone way out on a limb, is going to control through disciplined party politics his own house, the House of Representatives. Why not make it, properly, parliament? That would give at least some check and some probability that it might be more openly considered.

Mr PRICE—The two houses individually, or a joint sitting of the two of them?

Prof. Galligan—Either way, but if it is just the Prime Minister's house, the House of Representatives, I think that is unduly narrow. But that would be one small but significant change I would think could be made.

Ms JULIE BISHOP—On that point, it has been put that the reason the Senate is not included in the dismissal process, and this came up at the Constitutional Convention, is that it might be the composition of the Senate that has given rise to the crisis in the first place—that the Senate is refusing to pass supply bills, the President is refusing to prorogue parliament and, for that reason, the Prime Minister acts in dismissing the President. But, to try to get the Senate on side could be the very reason for the crisis, and that was the scenario that was painted which seemed to sway the members of the Convention against including the Senate in the dismissal process.

Prof. Galligan—All the more reason, because if it is that sort of stand-off between the houses, why give the whistle to one house?

Ms JULIE BISHOP—Because it is the elected house.

Prof. Galligan—It is not the people's house. The Senate is just as much the people's house as the House of Representatives.

Senator ABETZ—Hear, hear!

Mr PRICE—Stop sucking up.

Senator PAYNE—An appropriate observation.

Ms ROXON—I only came back into the hearing when you had already started, and you were talking about citizenship and the changing oaths that people have been able to make as Australian citizens. You were not overly fussed about the desperate rush for us to accept this model, because we are effectively an independent nation anyway. I have had the misfortune of twice, probably at the two most important changes in my life, having to swear allegiance to the Queen, which I did with the appropriate sincerity. I am a barrister and solicitor of the Supreme Court.

Prof. Galligan—Before 1993?

Ms ROXON—No, not before then. The second was on becoming a member of parliament. Because of your background, I just would like your political comments—not the legal, technical sorts of arguments—about why you think that the symbolism of actually being able to declare that you will uphold the laws of the state when you are becoming a barrister and solicitor, or declare your allegiance to the people of Australia or Gellibrand or whatever when you are elected to parliament, would not be a more appropriate thing to do. I was surprised by your view that this is kind of an irrelevance.

Prof. Galligan—It just seems to me that the barristers' fraternity and the parliament in its wisdom have not quite caught up with where they should be, which it seems to me is encapsulated now in the post-1993 Citizenship Act and pledge of commitment. It is now no longer an oath of allegiance.

Ms ROXON—I understand that and I support that. I am just saying there are a lot of remnants of there still being circumstances where you are required to swear your allegiance to the Queen, and until there is actually either this model or another adopted we are going to be continuing to do that, for whatever old-fashioned reasons they might be. I think actually in parliament it is for constitutional reasons, not for old-fashioned reasons.

Prof. Galligan—Yes.

Ms ROXON—I think it is different for barristers and solicitors in Victoria or anywhere else, who could change their mind whenever they want to but they choose not to.

Prof. Galligan—Yes, they could.

Ms ROXON—Do you have a comment on that?

Prof. Galligan—I have been a republican all my life. I support regularising the republic; getting rid of all of those things, particularly as now—

Ms ROXON—Your evidence just did not sound like you were. I was wondering.

Prof. Galligan—I just do not think it is all that it has been talked up to be, but I suppose you do not get the Australian people marching—they are not marching to the tune of this proposal anyway—unless you talk them up a bit.

Mr CAUSLEY—Just a quick question, Professor, on the argument that the parliament would control the Prime Minister, that we have not got a worry. Doesn't history teach us that powerful and popular people can often do extraordinary things if you have not got checks and balances in the Constitution to contain them?

Prof. Galligan—Absolutely. That is why I would prefer to have parliament rather than simply the House of Representatives, if you are going to retain this instant dismissal, and that is why I do not like the instant dismissal bit. I would rather have it a more structured representation and review by parliament of the dismissal process itself.

CHAIRMAN—We are going to have to move on.

Mr PRICE—Could I make one more point: of course, for half of its life the Senate was a creature of whopping majorities, and usually government majorities. It was no check at all.

Prof. Galligan—Two is better than, that is all, and even if they are both controlled by the same party, that is as it is; but it is unlikely, under the current situation, that it will be.

Mr PRICE—I accept your point.

CHAIRMAN—Professor, thank you very much for coming and talking to us today. It has been enlightening and enjoyable. We will table our report on 9 August, and we will certainly send you a copy.

Mr PRICE—What time will it be?

CHAIRMAN—It will be 12.30 p.m., after prayers.

[3.10 p.m.]

COWEN, Rt. Hon. Sir Zelman (Private capacity)

CHAIRMAN—Sir Zelman, we welcome your appearance before us this afternoon. Would you please state the capacity in which you appear before us and also if there is anything you would like to say to us before we ask you questions that relate to some of the submissions we have had and issues that have been presented to us by other Australian citizens.

Sir Zelman Cowen—As to the capacity in which I appear before the committee, I am not quite clear. I am a former Governor-General and an interested citizen. I naturally have an interest in the whole matter of the republic and of the Australian constitutional structure. I am a lawyer, with a special interest in public law and constitutional law. I have long been interested in issues which are cognate. For example, I gave the Commonwealth lectures at Cambridge years ago on the Crown and its representatives. That was subsequent to my being the representative myself. I was Governor-General from 1977 to 1982. I suppose I could say, from all of that, I have naturally had an interest in all constitutional matters and particularly these constitutional matters, particularly so far as they govern the head of state.

I should also say that I was chairman of the committee which was concerned with the executive in 1985 to 1988. You will remember that, in 1985, the then Prime Minister, Mr Hawke, announced the new body which would consider constitutional change and report in 1988. That was the Constitutional Commission. The Constitutional Commission was itself advised by a series of committees. One of those committees was the committee on the executive power and I was designated as chairman of that committee. I was then not living in Australia. I was then head of an Oxford college—Provost of Oriel. I came out from time to time to meet with the committee and we furnished a report. That report included a variety of matters which of course included the head of state. It said an interesting thing about the republic. There were, without doubt, a number of republicans on that committee, but the view of the committee as a whole was that there was no point in recommending any change towards a republican status because it would not be likely to command referendum support in terms of a constitutional change and it might, if put forward, taint and imperil other constitutional provisions. So no recommendation was made with regard to this matter, although our discussions were quite full on the issue of a republic.

CHAIRMAN—Have you read the bills that are now before us in parliament?

Sir Zelman Cowen—I have read them briefly. I have not studied them. I should say, in this context, that originally my possible appearance before the committee was suggested to me by Mr Danby. I subsequently looked at the documentation and saw that the documentation focused on the bills. I have not focused on the bills, so yesterday I telephoned to the secretary—or it may have been the assistant secretary—saying that, if your concern was the bills, I was not the appropriate person, simply because that has not been the focus of my interest.

My interest has been particularly expressed in a series of lectures which have been printed over the last five or six years. I have one of them here, the Menzies lecture, ‘Further

reflection on an Australian Republic' in 1995. Another one I have here is called the Melbourne Lecture, which was given at Georgetown University in Washington and entitled 'One hundred years a nation: Australia looks to 2001'. That was given in February 1997 and included, among other things, a discussion of the republic. At that stage, I expressed myself as persuaded—having moved quite a way over the years—of the proposition that Mr Keating had stated, in the mid-1995 statement of government policy, on an Australian head of state. That was 1997. Only the other day, 9 June, I gave the Hawke Lecture. The Hawke Lecture was given in the University of South Australia, which has the Hawke parliamentary library and centre. I gave the Hawke Lecture, which I entitled, 'An Australian republic—a guide for the perplexed', in that centre.

CHAIRMAN—The legislation that is before parliament now, in introducing a President and replacing the monarchy, gives the Prime Minister unfettered power to dismiss the Governor-General and without statement of purpose or cause or reason. Could you comment on those provisions?

Sir Zelman Cowen—I comment, as I say, by saying that I have not really particularly directed my mind to that. My interest has very much been on the issue of, first of all, whether a republic, and, secondly, how a head of state should be chosen. They have been the main focuses of my concern. I have not, to the same measure, been concerned nor indeed written about the matter to which you refer. So far as I have thought of it—and of course I have—I could say that I am troubled root and branch by the notions expressed in the dismissal of a President.

I will start it off. Will you please accept this as not a concluded thought, for the reasons that I have indicated, but my general thinking. It seems to me that, once you have elected, by some form or another, a head of state, it is very curious that he could be dismissed in this peremptory way. I have thought that you might much more reasonably have got to a notion in which a head of state, having been elected and having been established as head of state, ought to have much more protection than that. I would have thought that you might start with grounds, if you like, for termination or dismissal; call it which you will. Sometimes the word dismissal sounds ill if you are talking about failure of physical capacity or the like. You could talk about termination. I think nothing much hangs on it except a terminology.

I would have thought, broadly, that a head of state could not be dismissed except for cause. And I would have thought you would have started with a notion of what are the grounds on which he could be dismissed or terminated: physical or mental incapacity established, or, if you like, something like—and again no precision—high crimes and misdemeanours; and that that dismissal would ultimately be determined by the parliament, but by the parliament after a due hearing and a due hearing, if you like, by a body like the High Court sitting in the capacity as a body to investigate the questions of: is there mental or physical incapacity or is there other cause? I would have approached the matter from that way. I find the way in which it was proposed by the convention troublesome.

CHAIRMAN—Thank you for that. I am sure my colleagues are anxious to ask you questions, but I will ask one more. With your long experience and your experience of having been a Governor-General who had at his control the exercise of what we call the reserve powers, do you believe that, if we are to become a republic, their transfer from unwritten,

unstated conventions to still undefined but yet stated in the Constitution as conventions is appropriate?

Sir Zelman Cowen—I am not unduly troubled by it.

CHAIRMAN—Thank you very much.

Mr McCLELLAND—In respect of the class of people eligible to be appointed as a President, under section 60 of the bill—and I appreciate you have not studied the bill—to be eligible to be chosen, you must be qualified in the same terms as someone qualified to be a member of the House of Representatives. Therefore, you cannot hold an office of profit under the Crown. Indeed, under section 20 of the Presidential Nominations Committee Bill 1999, when you accept a nomination you must provide a statement indicating whether you are qualified to be selected as President, so it would seem that the eligibility criteria go back to the point of nomination. Is that appropriate? For instance, if I am correct, you were a vice-chancellor before, so, in that context, you held an office of profit under the Crown.

Sir Zelman Cowen—Is it so?

Mr McCLELLAND—I would think, probably.

Sir Zelman Cowen—I would have thought not.

Mr McCLELLAND—Perhaps we will pick another position. A court judge or, indeed, a state Governor are good examples of persons who hold an office of profit under the Crown but who may be good choices for President. The first question is: is that qualification appropriate? Do you think the qualification is appropriate, extending right back in the process to the point of nomination?

Sir Zelman Cowen—I had not thought of it. I would certainly be very much troubled if a judge of eminence, for example, was not eligible for choice as a President. I find it very difficult in principle to see why he should be excluded. I feel it is to the contrary.

Mr CAUSLEY—Sir Zelman, I have two questions. One in particular is about the position of President, which is really taking over from the present position of Governor-General. Do you agree that a person who takes that position has to have a fair knowledge of the law and parliamentary procedures to carry out the office? The second question is quite different, so I might let you answer that one first.

Sir Zelman Cowen—I would say it is very desirable that he should have it. I would not prescribe it. Sir Paul Hasluck expressed the view in an essay that a person who would be designated as Governor-General should appropriately have, if not specialist knowledge, at least substantial knowledge and a substantial background in it. I would not be fussed in the same way. I do not see why an eminent surgeon could not become President or Governor-General. Why? He has an intelligence. He can learn. He can take advice from all the areas in which it is appropriate for him to take advice.

Mr CAUSLEY—The second question, Sir Zelman, is: in your position as Governor-General, what did you understand to be the position if in fact the Prime Minister requested the Queen to remove you? How quick would that process be and would there be questions asked or would it be automatic?

Sir Zelman Cowen—First, you will forgive me for saying that while I was in office it was not forefront in my mind.

CHAIRMAN—Well said.

Sir Zelman Cowen—It did not really cross my mind.

Mr CAUSLEY—Do you have an opinion on it?

Sir Zelman Cowen—Yes. I have got an opinion. If, in 1975, Mr Whitlam had reached for the telephone and had got through to the palace and said, 'Dismiss Sir John Kerr', the Queen could have said in her own language, 'That's no way to talk to me and I don't know for sure who is talking to me in the first place.' Consistent, if you like, with the dignity of the monarch—using the word 'dignity' not in a pompous sense—brought face to face with that, the Queen is entitled to consider it and to establish, as I have indicated, that it is real in the first place and that it comes from an authentic source. I think it is perfectly consistent with the proposition that ultimately the Queen would take the advice of the Prime Minister that she should say, 'I would want to consider this properly, and see writing if need be, so that I could form a considered opinion.' Then she will ultimately take advice in that way. She is not to be dealt with peremptorily.

Mr DANBY—Sir Zelman, it is a fairly profound change of view to have gone from being Governor-General of Australia and therefore the Queen's representative to advocating an Australian republic and an Australian head of state. Was there anything dramatic that caused you to change this view or could you describe the events or thoughts that led you to this change of view?

Sir Zelman Cowen—First of all, having the opportunity to serve as Governor-General and having served as Governor-General is the great experience of my life. I have said that in many places and I say it again now. It was a very enriching experience and it was a very fulfilling office to serve.

I changed my position in the way in which we are talking over a long period. I suppose that my thinking was originally conditioned by the fact that we had the substance of a republic. We certainly had the substance of independence. The fact that we retained the monarch in the way in which we did retain the monarch did not in any significant way prejudice that independence.

I said to myself and in what I wrote, 'I don't see the need for change. We have got the substance of what we want. Introducing change under these circumstances would be divisive.' I again could not see the reason for it. That is expressly stated even in the Hawke Lecture the other night. I said that that is where I had got to and I quoted the words that I used at that time. I suppose the best way I can give you an answer is by reading—if you will

permit me to read what I wrote. First of all, in September 1997, in the Georgetown lecture, I said this:

There is no doubt, in my view, that the monarchy has served Australia well, and I am proud to have served as Governor-General, as the Queen's representative in Australia. I now believe that the time has come, in the evolution of Australia's independent national identity, for us to have a truly Australian constitutional Head of State. It is important to understand the point that we would not be changing in any fundamental respect the way in which our country is governed. We do not contemplate an American style executive presidency, and we would retain our parliamentary system unimpaired. We would, however, have a Head of State who is an Australian citizen and resident, who is exclusively ours, and who fully and unequivocally stands for and symbolises our nation.

As best as I could use words, I did.

CHAIRMAN—Exquisitely.

Sir Zelman Cowen—You are very kind. My answer to your question is that I came to believe that; that, while it represented a very big change in one way, it was a change which when made produced the outcome that is right—I mean in my mind. I may say that, before I delivered this lecture in Washington, I sent a copy to the Private Secretary to the Queen, because I thought that it would have been an abominable thing if they had read that without having known that it was going to be said.

CHAIRMAN—Thank you. Marise.

Senator PAYNE—Sir Zelman, I know from a reading of your Hawke Lecture that you have given some thought to the value of the public nomination process envisaged in these bills for potential nominees for the presidency. I would be interested in your elaboration on that for the committee. Secondly, in more general terms, the view has been put that Australia making a decision to become a republic may cause the Commonwealth of Nations to react as they did in the cases of South Africa and Fiji. I would be interested in your views on that.

Sir Zelman Cowen—Taking the second question first, do you mind if I read something? It may not be wholly responsive. If it is not wholly responsive you can tell me and I will try and do better:

Of course there are other matters which merit attention. There is one I would like to mention in closing. It is the question of whether Australia's becoming a republic has any implications for Australia's continued membership of the Commonwealth. Bob Hawke's active participation in Commonwealth affairs as Prime Minister, including his very successful involvement at Commonwealth Heads of Government Meetings, is recounted in his memoirs. I have myself maintained an interest in the Commonwealth as an observer and writer, and I share with many other Australians a desire that our involvement in the Commonwealth should not be diminished by a change in our constitutional arrangements.

The point can be simply put: Australia's becoming a republic is entirely consistent with our continuing membership of the Commonwealth. The point was established almost exactly fifty years ago, when the consequence of a member state of the Commonwealth becoming a republic was considered by the Commonwealth Prime Ministers meeting in London in 1949. It was there resolved that India, which had put the matter before the Prime Ministers, might maintain membership of the Commonwealth as a republic, and that India would for its part recognize the monarch as Head of the Commonwealth. The resolution was then specific to India and to King George VI. Principle pointed to a more general application, and so it was that a general rule was adopted. The upshot is that the modern Commonwealth

includes states which are republics—the majority—those which have their separate monarchs, and a substantial minority which retain the monarch, among these Australia.

To one like me, who had accepted as mother's milk the doctrine that membership of the Commonwealth required allegiance to the Crown, and that the bond of association was one of common allegiance, the new doctrine, though practically beneficial, came in 1949 as a surprise. To Sir Robert Menzies, still in opposition on the verge of his long career as Prime Minister, there were great historical difficulties in accepting it. I remember that soon after the decision of the Commonwealth Prime Ministers was made public, I—then a young Oxford law teacher—was sitting alongside Mr Attlee, who was then Prime Minister of the United Kingdom, and a party to the London Agreement. A youthful purist (some might say pedant), I asked whether in view of all the history, he had difficulty in reaching his conclusion. The most laconic of men, he answered directly to the point, 'No.' That was all.

I do not know whether that is responsive to your second question.

Senator PAYNE—Yes, indeed.

Sir Zelman Cowen—The first?

Senator PAYNE—It was in relation to the public nomination process for potential candidates for the presidency.

Sir Zelman Cowen—As to that, I had not thought very carefully about that. Although I would like to go away not having particularly thought about it, I certainly do not have an objection to a public nomination process. What I am emphatically opposed to is direct election, and I spell out this as a greater part of the Hawke argument. Once I have got over that, a formula which, in a process other than direct election, enables the public voice to be heard in some workable way in getting nominations up does not seem to me to be objectionable.

CHAIRMAN—To follow on from that, if we were going back in time and you were a person whose name was put up to the Prime Minister and the Leader of the Opposition for consideration, would you have minded your name being public?

Sir Zelman Cowen—No. Again, I think I would have said that specifically. When talking about direct election, I said: What sort of person would stand for election as President under such a system? It seems it would be someone who is willing to be subject to a national political campaign of self-promotion, and—it may be—denigration of others or by others. I very much doubt whether the non-partisan figures who have held the office of Governor-General would have been willing to take part in, or be subject to, such a campaign. This is partly because those who may best serve us as President are not by nature campaigning politicians. They are likely to hold positions from which it is not appropriate or proper to campaign in such a way.

Mr McCLELLAND—You were talking in that passage you just read out about a direct election procedure?

Sir Zelman Cowen—Exactly. The passage continues:

For myself, I can safely say that, although I would have been willing to allow my name to go forward with bi-partisan support to a joint sitting of Parliament, I would not have agreed to take part in a nation-wide election campaign, struggling for media interest and the support of this party or that pressure group.

CHAIRMAN—Sir Zelman, that certainly answers the question. Thank you.

Mr PRICE—If your name was one of six that went forward to the Prime Minister from the Nominations Committee, would you have any difficulty with your name, together with the others, being made public before the decision?

Sir Zelman Cowen—I think not. If I were in the last six I would regard myself as—

Mr PRICE—Some people have commented about the role of Commander-in-Chief. You have been a Commander-in-Chief. Do you see any change in the role that you fulfilled in your time as Commander-in-Chief compared with the one that a President might fulfil?

Sir Zelman Cowen—You never know—I do not think it would worry me. I have always thought that the Commander-in-Chief, which the Governor-General exercises, is a Commander-in-Chief in an honorific sense. Let me say that I gave it a good deal of attention in that I went out on a military exercise. I was involved in many ways with the services, which was meant to say I care; that is all. But that is not responsive to your question. You can never be sure, but I would like to take that risk.

Mr PRICE—Were there any decisions that you took as Commander-in-Chief that were not on advice?

Sir Zelman Cowen—I did not make any decisions except the decision to go to Rockhampton.

Mr McCLELLAND—Just on that point, if I may. When you were Governor-General it was accepted that, should you be called upon to exercise in a formal sense your role as Commander-in-Chief of the Armed Forces, you would do so on advice. That was the accepted custom?

Sir Zelman Cowen—Yes.

Mr McCLELLAND—And that would be the same for a President?

Sir Zelman Cowen—Of course.

Ms JULIE BISHOP—Sir Zelman, you have expressed concern about the removal of the President, and without taking you to the provisions of the bill, essentially the Prime Minister can remove the President with immediate effect and then, within 30 days, he must put it to the House of Representatives for approval. There is no sanction specified if, firstly, the Prime Minister does not put it to the House for approval, or, secondly, if he does not get the approval of the House. One might assume that he would but, in the event that the Prime Minister does not, do you believe it would improve the provisions of these bills—and you suggested something along the lines of the ability to address the houses—if there was something along the lines of the removal of High Court judges procedure that we currently have in the Constitution? Or were you alluding to something more along the lines of an impeachment process—more of a trial?

Sir Zelman Cowen—I think not an impeachment process but more the process for the removal of a judge. I am cautious here because, as I said, I have not really thought about it.

I do not know why I have not, because it is a very important provision. Maybe I am just slow, and I will get there in due course. But I think that what is proposed is prima facie very disturbing. While the judge and the head of state are not necessarily in the same part, I would have thought that the processes for removing an elected head of state—an elected President—would have to be very careful ones and in a sense would have to be very elaborate ones protecting him because he is the elected President.

Ms JULIE BISHOP—To give some tenure to the position.

Sir Zelman Cowen—That is right. In the first place you start with the notion of tenure. You are appointed for five years. You do not do what you do with the Governor-General—appoint him during pleasure. You know the term—and I think it was said that Sir William Deane was to have four years—is purely conventional. If it were attempted to make it a four-year term precisely, it is unconstitutional.

Ms JULIE BISHOP—So, perhaps, if the removal would be by way of a motion from the Prime Minister and debated in the House, would that be more along the lines?

Sir Zelman Cowen—Yes, but I would certainly like to introduce some notion of due process so that a President can defend himself.

Ms JULIE BISHOP—Yes; otherwise we would be denying him natural justice.

Mr PRICE—Sorry, I misunderstood the point you are making about the Governor-General's term. Are you saying it is for the Queen's pleasure, so it is unlimited, in theory?

Sir Zelman Cowen—It is not consistent. Saying 'you hold office during pleasure' and 'you hold office for five years' are not consistent.

Mr CAUSLEY—Sir Roden Cutler was governor for 20 years, wasn't he?

Sir Zelman Cowen—But he was a state governor.

CHAIRMAN—Sir Zelman, thank you very much for talking to us today. We appreciate your advice and your wisdom and we thank you for your words. We will report to the House of Representatives on 9 August, and we will certainly send you a copy of our report.

Sir Zelman Cowen—May I presume to wish you well in what you do.

CHAIRMAN—Thank you very much. We are taking this job—I am sure you understand—quite seriously, because they are serious matters.

[3.57 p.m.]

FRASER, Rt Hon. John Malcolm (Private capacity)

CHAIRMAN—Mr Fraser, thank you very much for taking the opportunity to come and talk to our committee. Would you have an opening statement that you would like to make to the committee about these bills into which we inquire?

Mr Fraser—Only a very brief one, Chairman. I would like to thank you for the opportunity of being with you for a few minutes this afternoon. I would also like to apologise for being late. I have been having a procedure done to a knee and I was kept waiting a bit longer in hospital than I thought I would be, so I am sorry for that. I would like to make two main points. I hope the first is relevant. Are you talking to people about the preamble also, or just the bill?

CHAIRMAN—You can talk about anything.

Mr Fraser—I do not believe the preamble should be put before people for a vote until after the referendum on a republic or otherwise has been held. There is a very simple reason for that: if a decision is taken to move to a republic, that should be reflected in the preamble. I think it is absolute nonsense to make this kind of change to the structure of Australia's government and at the same time to say it is not relevant to the preamble. To me it is highly relevant. You cannot hide the issue and I think it is wrong to hide the issue by saying you can have a monarchy/republic neutral preamble. That, to me, is a piece of arrant nonsense.

Also, I do not like the proposed preamble. I think the word 'mateship' represents a part of Australia: Australians at war, Australians in the bush, Australians in a condition of hardship. It is not a term that I think women use, although women would be able to judge that much better than I would. It is not really a term that is relevant to the growth of great cosmopolitan cities. It represents a very specific part of Australia and something that is very important. But something in the preamble should be more general in its application.

I also think we ought to mention the words 'former custodian' in relation to Aboriginals. I can see no harm in that; it has no legal implications. Not enough has been done to redress the practical matters effectively. The question of reconciliation cannot be achieved unless matters of the spirit are also addressed. Unless older Australians—I suppose of my generation, or whatever—can understand that there are two sides to the equation of reconciliation, the achievement on reconciliation is going to recede and be pushed further and further into the future. It might be easier to refer to the question of the 'former custodian of Australia' after the major issue has been resolved one way or another. That, to me, is another reason why the preamble should not be part of the referendum at the end of the year. I think it is a total misconception.

The other remarks I would like to make really relate to the transition. Turning to pages 23, 24 and 25 of the explanatory memorandum, or section 62, 63 of the bill itself—I think it is on page 5—I believe these sections of the legislation need to be looked at very closely to make sure that there can be no ambiguity, no obscurity and as little as possible question for dispute about the meaning of the clauses at some future time. I know, in framing a

constitution, people hope that a Governor-General will never have to dismiss a Prime Minister, but it did happen once.

CHAIRMAN—We recall.

Mr Fraser—The legislation envisages the potential for it to happen again. If it happens, it is obviously a time of crisis—a time of acute difficulty, whatever the cause. Therefore, in framing the legislation, it is important to look at it as carefully as possible to make sure that the act itself is not ambiguous—not capable of differing interpretations—and that it will help to resolve a conflict, or it will help to point to the way in which a conflict would be resolved, with the process being beyond argument.

There are one or two things that are quite obvious. If somebody is dismissed as the senior governor or President or whatever of a state—and I am not sure that it is clear from the words in section 63—I want to make sure that, from the moment he is dismissed, not from the moment it is reported in the parliament for approval by the House of Representatives, there is no possibility of argument which could leave a gap. You would not want a Prime Minister arguing that, until the dismissal is approved by the parliament or by the House of Representatives, he has the powers of the President as well as his own for that interregnum. So clarity on that point I think is very important.

The words of the legislation also envisage a situation in which the senior person in a state might be somebody who has already been dismissed by the Prime Minister, and such a person would be ineligible. That is fair enough, but you do not want a situation in which one person can be dismissed and another person immediately dismissed and another person immediately dismissed—a Prime Minister's capacity to dismiss should run out.

Here you are talking at the edges. No words can guarantee sensible behaviour, but you have to assume a certain level of commonsense and rationality. Nevertheless, the legislation needs to cover the options as well as it can. I am not sure, in reading section 63 and the explanatory memorandum, whether the options have been covered as well as they could be. I have no proposals to put before you. I am trying to raise questions which, if you are interested, you can then look at and make sure that they are resolved in the most satisfactory way possible.

CHAIRMAN—There have been a number of respondents to this inquiry that have raised the dismissal issue. I think I would be judged fairly if I said some are not troubled by it and some are. I think the committee would be interested in your view of whether the unchecked ability of a Prime Minister to instantly dismiss a President puts too much power into the hands of one individual.

Mr Fraser—It has to be approved by the House of Representatives but, unless the Prime Minister has got into real trouble with his own party, he presumably will get the approval of the House of Representatives. What you described in your question, Mr Chairman, is the current situation, because a Prime Minister could dismiss a Governor-General and, from the moment that is reported to the palace, the dismissal would effectively be in place. Her Majesty could say, 'But I need this in writing. I need reasons—I need this, I need that,' but all that would do would be to buy a little time until something was put to her in writing,

which she would be entitled to ask for. But she could not delay it beyond that. Effectively, from the moment of the request going to the palace by a conversation, the request would be effective.

Mr CAUSLEY—If the senior serving partner comes forward, what happens then?

Mr Fraser—When I say the request would be effective from the moment of the phone call—

Mr McCLELLAND—I think, in fairness to Mr Fraser, he was talking about the current situation.

Mr Fraser—Yes, I was talking about the current situation.

Mr McCLELLAND—I am talking about the current situation too.

Mr CAUSLEY—If the Governor-General is not available, having been sacked, wouldn't the Acting Governor-General be the longest serving governor of a state to take the place?

Mr Fraser—Theoretically, yes. But, again, you could have something that is blurred, because convention is very loose in this area—there is not much experience of it. While the formal processes of dismissal would presumably have to wait until the Prime Minister had written to Her Majesty and Her Majesty had replied—and that is going to take a few days—it could be argued that the senior governor of a state cannot be in place until those processes are complete. So you could have an interregnum of three or four or five days, and again you would not want a Prime Minister claiming to have a Governor-General's powers because the Governor-General would feel unable to act, having been dismissed.

CHAIRMAN—It was argued by some that the dismissal power should be more of a judicial process, like the process set up for a dismissal of a judge for proven incompetence or mental incapacity or whatever reason. Could you tell us the real life political dynamic dimensions that that question poses in a situation where there is a real conflict between the office of President and the office of Prime Minister?

Mr Fraser—I do not think you can have a process that would be appropriate to a judge or a judicial inquiry against established criteria. That would probably make it very difficult indeed for anyone ever to be dismissed. The problem with our Constitution is that, having regard to the powers that the Governor-General technically has, in reading the Constitution, the only thing that civilises those powers and makes them acceptable in a democracy is the capacity to be instantly dismissed, and that really is the convention. That is the thing that brings the Governor-General's powers back to a democratic situation and which makes sure that he cannot exercise the powers which appear to be attributed to him in the Constitution, unless it is so recommended by the government and the Prime Minister.

Senator ABETZ—If I could take you up on that point, Mr Fraser, you have indicated previously that if the Prime Minister were to make that phone call to the palace then in effect the Governor-General would be dismissed immediately. But in fact wouldn't there be a few days before Her Majesty would sign a document or indicate that that in fact occurred,

and during that time surely the Governor-General would still be legally clothed with all his legal entitlements, including the right to sack the Prime Minister?

Mr Fraser—No, in practical terms not. In theoretical terms maybe, but in practical terms, once it has been reported that the Prime Minister has approached the palace and sought the dismissal of the Governor-General, the Governor-General would not be able to use his powers. Effectively the powers would be frozen, as it were, and that would be the reality of it.

Senator ABETZ—On what basis?

Mr Fraser—On the basis of the way people act and react. You cannot put down every element of a constitution on a bit of paper. A lot of what happens is governed by convention, governed by determination, and let me only put it to you that, if it is known to the body politic that the Prime Minister has sought the dismissal of the Governor-General on whatever grounds, that Governor-General would not be able to act or exercise his powers effectively from that moment onwards. At the moment, therefore, if you had this kind of dispute there would be an interregnum of three or four days until the reasons had gone one way and the result had come back the other way.

There is no doubt that Her Majesty would accept the Prime Minister's advice, even if she thought the reasons were hopeless and wrong and whatever. There would be no question that she would argue the point with him. She would not argue the point with him; she would accept it. And, knowing that it was going to be accepted but there were some formalities to proceed, it would just make it quite impossible for a Governor-General in those positions to exercise the powers that he formally has. So you are not going to have a Governor-General turn around and say, 'I am going to sack you as Prime Minister'. It is just not on.

Mr DANBY—Mr Fraser, do you have any views about the long title, in particular the alleged major difference between the Australian head of state being cited in the long title or a republic? Would you favour both or neither?

Mr Fraser—I saw that in the newspapers this morning. I do not mind the question as it has been proposed. I think people need to be faced with the reality of it. Where have you got the long title now? Constitutional Alteration (Establishment of Republic) 1999—

CHAIRMAN—The title reads:

A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic with a President chosen by two-thirds majority of the members of the Commonwealth Parliament.

Mr Fraser—I do not have any problem with that.

Mr DANBY—Do you have any problem with the alternative that was proposed—by the Australian Republican Movement? It includes the nomination process and refers to an Australian citizen being—

Mr Fraser—That, to me, fudges the issue. It all should be on top of the table. If we are going to move to a republic, we have to say so. We cannot have a constitutional question that pretends that that is not so or that only has it so by implication while being silent on that point.

Mr DANBY—You do not think calling for an Australian head of state explains it more profoundly to people who may not know what a republic is and who may fear a republic refers to an American style republic?

Mr Fraser—If you want to. I would certainly think that as well as a republic with a President chosen by a two-thirds majority you could also put into the question, while leaving the mention of the republic there, the mention of an Australian head of state. That would mean going for a third option.

Mr DANBY—Do you have any view about the nomination process being mentioned in the long title?

Mr Fraser—Chosen by two-thirds of the parliament?

Mr DANBY—No, this citizens committee that the Prime Minister would nominate and then would suggest a number of people that would be suitable for choosing, first of all by the Prime Minister and the Leader of the Opposition, and then by two-thirds?

Mr Fraser—I would sooner that not be in the question. With all respect, the processes that came out of the convention I believe are workable but they are also a bit messy. Because they are messy, I do not think they should be enshrined in that way.

Mr McCLELLAND—You made some comments regarding some words which should be in a preamble, but primarily you said the preamble should not be considered until after the republic referendum. Assuming that these bills are endorsed at the referendum, do you think there should nonetheless be a broad consultation process to develop a preamble rather than it being created by the politicians of the day?

Mr Fraser—In the end the politicians of the day have to approve it. But the preamble needs to be something which is inclusive. With the one exception of reference to the Aboriginal population as prior custodians, any part of the preamble I believe should be inclusive of all Australians and not picking out groups here and groups there. It would be nice to have some words that really soared with the spirit of a new republic. I am not sure that in any of the versions we have got we yet have that. The draft that I understood to be Gareth Evans's draft seems to me to be abrupt and very difficult to read. If you try and read it out aloud, it is not the easiest sentence to make sense of and to get the emphasis right.

I do not mind how the words are arrived at, whether it is by consultative process or by a poet who can really put the words together in a way which flows and captures people's hearts and imaginations. I do not mind, but a committee is not going to write good poetry.

Ms JULIE BISHOP—Mr Fraser, in relation to the constitutional alteration bill, you said that there is obviously a need for there to be non-ambiguous statements and that we remove

as much ambiguity as possible. In relation to the proposed clause 59, executive power, the third paragraph of which commences 'The President shall act on the advice of', there have been a number of submissions which have suggested that, by mentioning the reserve power and requiring the President to constitutionally act in accordance with the constitutional conventions relating to the exercise of the reserve power, we are creating problems; that we are referring to phrases that are not otherwise defined and there is no specific agreement as to what is a constitutional convention at any particular point in time. It has also been suggested that we could as easily delete that phrase so that there is no reference to the reserve powers and the conventions and that we could just assume that the Governor-General's powers will be translated, if you like, to the President. Do you have a comment on that?

Mr Fraser—I think you should be explicit in making it clear that the Governor-General's powers are translated to the President. I also would be opposed to any attempt to define or codify this element of the Constitution because it is a living document that has moved and changed quite legitimately over time. If you sought to codify those powers then it is going to be extraordinarily difficult and I believe would take the best constitutional lawyers a very considerable time to get right.

Ms JULIE BISHOP—I doubt they would all agree anyway.

Mr Fraser—I do not think they would all agree and I think they would get it wrong. I really do. There is a lot of artistry in the Australian Constitution, not only in what is said but also in what is not said. By and large it is an instrument that has served Australia pretty well, but there is a lot that is not said. I do not think the Prime Minister is mentioned in it, is he?

Ms JULIE BISHOP—No. Can I just elaborate on that: if we are therefore for the first time in the Constitution making reference to reserve powers and constitutional conventions just as phrases, are we not creating situations where this must be justiciable in order to determine whether a President has in fact acted in accordance with convention?

Mr Fraser—In doing what?

Ms JULIE BISHOP—Whatever exercise of power he may make. By saying it must be in accordance with constitutional conventions, are we not then leaving it open for that to be interpreted judicially?

Mr Fraser—The world changes and things that were not justiciable become justiciable as we go into different decades—not always to our benefit. But, if you do not mention it, you run a different kind of danger. Some people might say, 'We have a President and presidents do not have the reserve powers. They belong to the monarchy, to the Governor-General,' even though in a sense very significant powers are not reserved; they are just implied in the words of the Constitution.

I think it is better to mention the words. Words, phrases and clauses can only go so far in writing a constitution. Good people can make any constitution work, and make any constitution work well. If you have the wrong people they can muck up the best constitution.

That is only saying that at the end of the day you have to rely, to a significant degree, on commonsense prevailing. It does not necessarily mean that everyone is going to agree with what is done but you cannot cover every option in the words. You can cover as much as possible but if you seek to cover every option you still won't, because somebody will think of something at a future time that just escapes the words that are written.

Ms JULIE BISHOP—So you are satisfied with that section 59?

Mr Fraser—Broadly.

Ms JULIE BISHOP—In general terms?

Mr Fraser—In general terms, yes. I read it and was happy enough with it. Noting the point you have made, I think again you want to look at the words very carefully.

Ms JULIE BISHOP—For example, there is another concern that has been expressed on that paragraph, and that is the importation of the Prime Minister or another minister of state in terms of the spheres of advice that the President shall act upon. Instead of just 'federal executive council', there has been added 'the Prime Minister or another minister of state'. There is concern about that causing ambiguity or confusion. If the President were to receive conflicting advice, for example, whom does he rely upon?

Mr Fraser—There have been occasions when governors-general have had conflicting advice.

Ms ROXON—Even one of the ministers.

Mr Fraser—Ministers and Prime Ministers—sometimes ministers have given governors-general advice or warnings.

Ms JULIE BISHOP—This gives it a constitutional status: he shall act on the advice of the Prime Minister—

Mr Fraser—What it is meaning there, isn't it, is a minister of state who is chairman of the executive council. That is what it is in fact meaning. But there was an occasion once when the Governor-General refused to accept advice from a Prime Minister and a minister and did not act on it because he had been advised that due process had not been followed. That is not covered under the current Constitution, is it?

Ms JULIE BISHOP—No.

Mr Fraser—But it was the Governor-General acting with significant commonsense, and he made sure that due process was then followed.

Ms ROXON—Mr Fraser, you have expressed some concerns on the bills as they are currently drafted. As you have expressed them, they are not major concerns, I think. Would you be able to explain to the committee whether you are relatively content with the model that is currently before us? Put it this way: are you content enough that you would be

campaigning for a republic in this format? Do you think that there are significant things that need to be changed before you would do that? Are you opposed to it? I think it would be helpful if you could explain your position to us.

Mr Fraser—Let me just say at the outset that the point about leaving a vacuum I think is very important. I think that needs putting to the draftsman quite directly—that there must not on any account be a vacuum if a President is to be dismissed, and somebody needs to be able to exercise those powers literally from that minute that the President is notified of it by the Prime Minister, not from the time it goes into the House of Representatives for approval or whatever. I think that is an important point and needs to be made very clear.

On campaigning, I have said I am in favour of Australia moving to a republic at some point. I am, and I believe it will. I am not sure about this particular proposal because republicans themselves are divided, so some republicans are actually going to campaign against it because they want an elected President. One very good argument for supporting this legislation is that a subsequent proposal in some years time might be less responsible. I do not believe you can blend an elected President into our system. I think it would be an absolute disaster. I also believe that the American system of government is three-quarters of a disaster—

CHAIRMAN—So say many of us.

Mr Fraser—But in the past people have said we should move more to the American model. I really do believe that the Westminster system, the concept of a responsible government in which the executive can be dismissed by the parliament, is infinitely better. It might involve people changing parties, and that might be difficult, but it is very important that the theory be maintained. It has happened at different times and, who knows, there might again be two Independents in the House of Representatives who can change government, as they did in the early wartime years. It is a reality.

It is a danger to take any steps that would establish an alternative power base, to make people think, 'We do not like politicians. We do not like prime ministers, just by definition. The present one might be all right, but we do not like prime ministers. We do not like politicians. So let us have our own President to protect us from all of them.' If you had an elected President, people would try and sell it very much on that sort of basis, and it would be a disaster; it would be establishing a second power centre. And it would really muck up our Constitution in a major way and require a rewrite which would take, I believe, two or three years of the best constitutional lawyers, and even then we would end up with a constitutional instrument much less effective than the one we already have.

I will be voting for this proposal. Whether I want to go out and actively campaign for it might be another matter. I do not think the republicans have been good at explaining it, and some of their publicity and campaign techniques have been positively counterproductive. The republicans, in some of their operations, have quite deliberately ridiculed Her Majesty. That is a way to lose about a million votes of people who might otherwise support it, because I think people have a great respect for Her Majesty and do not want to see denigrated something which we are proud to have been part of. If we are going to make the change, we should be doing it with a unifying sense of purpose, not with a sense of, 'At last we've

escaped from the monarchy, from Britain or whatever.' We have a lot to be proud of in our history and a lot to be proud of as a constitutional monarchy, but we think it is time to move on. It does not mean to say that what has been there before was wretched or lousy or that the monarch was bad. That sort of approach will lose support, quite apart from the fact that I think it is mistaken. I really do believe people respect the Queen and basically respect the institution.

Mr CAUSLEY—Mr Fraser, you have partly dealt with this, but in the bill I have some grave concerns about the balance of power between the Prime Minister and the President. You have said clearly that you believe that the bill faithfully reflects what we have at the present time. That has a bit of a concern for me. It is almost a good script for John Wayne or Gary Cooper—who draws the gun first.

Mr Fraser—Who are you saying has too much power at the moment?

Mr CAUSLEY—I would have thought the Prime Minister, in this bill that we are proposing.

Mr Fraser—Because he has power to dismiss.

Mr CAUSLEY—Yes.

Mr Fraser—He has that power to dismiss now. He really has.

Mr CAUSLEY—What you are saying to us is that if Whitlam had got in first he would have sacked the Governor-General but the Governor-General got in first. It is who drew the gun first.

Mr Fraser—It might well have been, in that situation.

Mr CAUSLEY—I would have thought that in a crisis that was not a very good constitution.

Ms HALL—That is what we have got now.

Mr CAUSLEY—I know, and we are trying to talk about renewing it.

Mr Fraser—Whatever one says about the rights or wrongs of it, it reflected the will of the majority of Australians. It was what the majority of Australians wanted, as elections showed.

Mr CAUSLEY—If the Prime Minister had the power to sack the President, then the majority of Australians would not have had the chance to have a say, would they?

Mr Fraser—I think it would have created very considerable difficulties. I know some people have suggested that the power to dismiss should require support in both houses. That might put the balance too much in the President's court.

Mr CAUSLEY—What if it was a joint sitting with, say, a 60 per cent majority instead of two-thirds? Would that bring the balance back a little? Or a percentage—

Mr Fraser—Yes, it would. I do not think I would be in favour of both houses agreeing, sitting in their own right. Australian politics being what it is, the minor parties would probably decide against whoever was the government of the day. This situation is only going to arise if there is a very divisive debate around in the body politic. In those circumstances the minor parties will probably go with the opposition. That would mean that the Prime Minister's power did not exist, and that would put the balance too much in the Governor-General's court. So I am not in favour of that. In relation to a joint sitting, a slightly reduced majority, it would be worth while sitting down and doing some sums within the parameters of likely compositions of the representatives in the parliament. If it is 60 per cent, and we assume the opposition would vote against, what sort of majority does the Prime Minister then need in the House of Representatives to carry it? It might be very difficult.

CHAIRMAN—How on earth would one run such calculations for the year 2050?

Mr Fraser—It would be very hard. I do not have a major problem with the current situation, providing there is no void, no gap. A Prime Minister cannot run through six state governors. He really cannot. The person who takes the place of the President will immediately have the powers of the President and would obviously want to look into the circumstances of what had happened and why the President had been dismissed, and would have to take that into account in any decisions that he or she made. It is a simple majority of the Representatives at the moment, isn't it?

CHAIRMAN—Yes.

Mr Fraser—Your idea of a joint sitting with a 60 per cent majority would probably make it too difficult.

Mr CAUSLEY—A simple majority at a joint sitting.

Mr Fraser—I would like to have a look. If you assume that all the opposition parties in the Senate were going to vote against the government of the day, what sort of majority do you then need in the Representatives before this can apply?

Mr CAUSLEY—It would always vary, wouldn't it?

Mr Fraser—It will always vary, but in those circumstances the President would be able to work out very clearly whether he ran the risk of the Prime Minister exercising that power or not, because he could do the sums for the parliament of the day.

Mr PRICE—A simple majority in a joint sitting is still a tougher requirement.

Mr CAUSLEY—Yes. It is.

Mr Fraser—It is a much tougher requirement. It might require a majority of a dozen or 15 in the Representatives. So for a large part of Australia's history the Prime Minister would not have that capacity. It might be too tough.

Ms HALL—Mr Fraser, I think you have probably answered the question that I was about to ask you. Given the two scenarios that have been put to you, do you favour the scenario or proposition that is set out in this bill rather than the majority of the two houses, if you were looking at a dismissal process?

Mr Fraser—I think the current situation is better. How many minor party members or Independents are there in the Senate?

Senator ABETZ—Twelve.

Mr Fraser—So to have the power effective, a Prime Minister would need a majority of more than 12 in the House of Representatives.

Mr PRICE—It is 12 at the moment.

Mr Fraser—Yes, but for a lot of Australia's history we have not had a majority of 12.

Ms HALL—So you would favour transferring the current situation to the republic, the situation where the Prime Minister would have the power to dismiss the President rather than a dismissal going through the two houses of parliament?

Mr Fraser—Yes. I think it would make it too difficult and that would lead to too great a power on the part of the President.

Mr PRICE—Mr Fraser, there has been a lot of speculation about the role of the Nominations Committee and the extent to which a Prime Minister would avoid choosing someone who is on that list. I know it is a hypothetical question, but in the situation where you have appointed the 16 community representatives, had your own party representatives on it at a federal level and presumably some of the states, wouldn't you be inclined to make a choice from the lists submitted to you, or do you think a Prime Minister would always want to exercise the prerogative of choosing his own man and putting it forward?

Mr Fraser—I think that if you have a good person coming through the nomination process, that is fine. But I do not think you should bind a Prime Minister, because it is Prime Minister and Leader of the Opposition, isn't it? It means them both saying, 'Look, there is somebody much better who has not gone through this process. We think we should put him forward, and his name will stand in its own right. People will support it.' I do not think they should be denied that opportunity.

Ms ROXON—On that, the way the proposal currently stands, the nominations from the committee would not be made public. If you were in the situation where you might like to suggest a person yourself, would there be any difficulty with saying, 'Look, I am quite happy for the committee's recommendation to be made public. I am fully confident that this

other person actually is much better, and you will see that by my setting out who was recommended and who wasn't'?

Mr Fraser—I think it is better for the names to be confidential. If it was an elective process, there are a lot of people who just would never go through an election. Ninian Stephen, Zelman Cowen would never go through a general election to become Governor-General, and I think they have both been very good governors-general. Even Gough Whitlam agrees with me that I appointed better governors-general than he did.

Mr McCLELLAND—Cheap point!

Mr Fraser—He said it.

Ms ROXON—Sir Zelman this morning did say that, if it was not an elective process, he would have been happy for his name to go forward, and would have been quite happy if he was on the short list. He would have regarded that as an honour and would have not had a problem with it being public. I am just concerned about how you have some sort of accountability at all in the process of a nomination committee that can be ignored, but we do not know whether it is being ignored or not.

Mr DANBY—By it not being public.

Mr Fraser—How many people are on this Nominations Committee?

Ms ROXON—As it currently stands, 32.

Mr Fraser—There is no way it will stay private.

Ms ROXON—That may be the reality, but it would be nice if it was technically okay.

Mr Fraser—If there are a lot of names going forward, I think it would be better if they were private, rather than having people who are passed over. You might have a dozen or 15 names or more—you might have 50 names bandied around in the committee.

Ms ROXON—Sorry, my question was directed not towards people that were nominated but people that the Nominations Committee put forward.

Ms HALL—On the short list.

Ms ROXON—Yes. But it is still true that it might be a lot of people.

Mr Fraser—I think that is a real question. If there are really good people on that list, I think the Prime Minister and the Leader of the Opposition have got to have somebody that they demonstrate is better. I hope the nominating committee will also, in discussing people—I am not sure that all the debates at the Convention really reflected this—take account of the fact that some skills are required for the job. Being a national hero or heroine is not really an adequate qualification.

CHAIRMAN—Roger, the last question.

Mr PRICE—Mr Fraser, without wishing to be impertinent, and pardon my ignorance, under the current system what is the process of gathering the names of candidates from amongst which you would choose your nominee to be Governor-General?

Mr Fraser—There is no orthodox process. Different Prime Ministers would have done it quite differently. In Menzies' time, Menzies would have had somebody in mind, would have made the approach and would have informed his cabinet. I would have sought names, maybe from my private office; I would have had people in mind myself. I am not quite sure what the record will show, but I think I would have informed the cabinet and given people an opportunity to say, 'Well, were there any problems?' But if you are confident in the person you are putting forward you will know that they are not going to have any problems, because, again, they stand in their own right. I do not think, with any Prime Minister, it would have been a question of arguing names around the cabinet table. I do not know about that, but I doubt it.

CHAIRMAN—Mr Fraser, thank you very much for coming and talking to us today. It has been informative and instructive. We will report to the House on or about 12.30 p.m. on 9 August, and we will certainly send you a copy of our report.

Resolved (on motion by **Senator Abetz**):

That the exhibits which were tabled by Sir Zelman Cowen be accepted as exhibits.

Resolved (on motion by **Ms Julie Bishop**):

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

Committee adjourned at 4.47 p.m.