COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

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

MONDAY, 12 JULY 1999

HOBART

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JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

Monday, 12 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, Stott Despoja and Payne and Mr Adams, Mr Danby, Ms Hall, Mr McClelland and Mr Price

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 10.07 a.m.

MITCHELL, Dr David Charles, Chairman, Tasmanian Branch, Australian Monarchist League, and (Private capacity)

ACTING CHAIR (Mr McClelland)—I formally 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 in June to provide for the Constitution to be altered to lead the way for Australia to become a republic. Over the last two weeks, the committee has taken evidence at public hearings in Canberra, Sydney, Melbourne, Adelaide, Perth and Broome. Some of the witnesses have presented arguments to the committee about perceived weaknesses in the bill. We are pleased to be taking evidence today in Hobart, and the committee welcomes witnesses and members of the public who may wish to observe the proceedings. Dr Mitchell, do you have any comments to make on the capacity in which you appear?

Dr Mitchell—I have put in a personal submission to the committee and I appear in person. The Monarchist League also put in a submission, which was submission No. 45. I believe that got lost in the pile somewhere. I believe it was felt in Sydney that no submission had been received, and I think the national chairman of the Monarchist League was told that no submission had been received. In fact it is No. 45, and they have graciously asked me to appear for the Monarchist League also.

ACTING CHAIR—Thank you. Although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Before we ask you questions, would you like to make a brief opening statement?

Dr Mitchell—Right at the start, I would like to say that I am sorry for addressing the secretary as 'Dear Sir'. The notice in the press did not indicate that the secretary was a lady. It was not intended as an insult.

In addition to the written submission I have made—which I presume you have in your hands and I presume you have all read and hopefully understood; if you haven't, I presume you will ask me about it—I would like to address the question of the title of the bill. There has been much discussion in this committee, according to the press, relating to the title; indeed, Mr Beazley in his speech in the second reading debate also made some comments about the title.

I would respectfully ask that the title not refer to head of state at all. I have a number of reasons. One is of course that head of state is not a term in our Constitution. It is not a term in any of our acts of parliament. It has been referred to, as far as I am aware, in one case in the High Court but it was not specifically declared who was the head of state of Australia. Indeed, head of state is a term not really known to our historic constitutional system.

ACTING CHAIR—Do you have anything else to say about that title? You do not think there should be reference to—

Dr Mitchell—Head of state at all.

ACTING CHAIR—In your submission, you suggested that the explanatory memorandum should specifically refer to the repeal of the existing preamble, which you qualify as the Constitutional Request Bill 1999. You think it is important that Australians know that that will be taken out, do you?

Dr Mitchell—I think it is important that people should know that it is happening right now—that the bill is going through the state parliaments right now. The Constitutional Convention recommended that the present preamble should remain. I think I am right in saying that your web site—the www.aph.gov.au republic web site—says that it will remain. There are bills going through the state parliaments at the moment to remove it.

ACTING CHAIR—Similarly, do you think it is important that the long title advise the Australian people of the fact that the position of the Queen would be replaced?

Dr Mitchell—No, I do not think the long title needs to say that at all.

Mr PRICE—Could you tell the committee why, Dr Mitchell?

Dr Mitchell—Why I do not think the long title should say that the Queen will be replaced? Because the purpose of the bill would be to appoint a President, and the history and the reasons should not go into the long title. They can go into the explanatory memorandum but not into the title of the bill.

Ms HALL—So how would your title read, Dr Mitchell?

Dr Mitchell—I am happy with the title that is proposed in the draft bill.

Senator ABETZ—Can I just ask a question on that: a suggestion has been made that the long title in fact be amended in a whole host of ways, but the one amendment that is interesting me at the moment is replacing the word 'chosen' by a two-thirds majority of the members of parliament with the word 'approved' by a two-thirds majority of the members of parliament. The view is that the parliament will not actually choose but it will have a right of veto, and therefore it is only the approval that is necessary as opposed to the actual choosing. At the end of the day, the choosing is going to be done by the Prime Minister and the Leader of the Opposition and, if the nominee is not chosen by those two individuals, it will not even get into the parliament. Therefore, the suggestion has been made that the word 'chosen' ought be deleted and replaced with the word 'approved'. Would you have any objection to that?

Dr Mitchell—I need to say that I have objection to the whole bill. If I say I have not got any objection to that, I do not want it to be taken that I have anything but total objection. No, I have no particular problem with 'recommended' or 'approved'.

Senator ABETZ—Can I rephrase the question and ask 'does it more accurately reflect', rather than whether you approve of the change or not? Would that suggested change more accurately reflect what is actually being proposed?

Dr Mitchell—Undoubtedly.

ACTING CHAIR—Are there any questions on this issue? Would you like to proceed with your opening statement of other issues that you would like to cover?

Dr Mitchell—I have covered most of what I want to say in the submission. You will see in the submission that I have focused very much on the new section 58. You will see that I have focused on the word 'discretion'. I am troubled by that word 'discretion', for the principles of law are that every word in an act of parliament must be given meaning if it is capable of meaning. Is it capable of meaning? I think the answer to that is yes, and it would appear that the President will have a dictatorial power. I do not believe for a moment that the High Court would say that he does have a dictatorial power. I think they would say that section 59 says that the President has to do what the Prime Minister tells him to do. If that be so, I am troubled by the word 'discretion'. I think it is misleading. This proposal is not a minimal change but a major change where a discretion is, I suggest, removed from the Governor-General, removed from the President, and the discretion is in the Prime Minister.

ACTING CHAIR—On that point, do you have any problems with the wording of the current section 58 as contained in the Constitution?

Dr Mitchell—No, I have no problems with the word 'discretion' in the current section, because you will see that the Governor-General acts as the Queen's representative in the Queen's name, and the oath of office of the Queen limits what can be done.

ACTING CHAIR—Is that right in respect of the Australian Constitution?

Dr Mitchell—Most certainly. I did not say 'almost certainly', I said 'most certainly'. Yes, it is. You see, the oath of office is part of Australian law, received in 1828.

ACTING CHAIR—So you think that the Queen's role under our Constitution is simply as a rubber stamp?

Dr Mitchell—No, the Queen has no role under our Constitution, except for appointing and dis-appointing the Governor-General.

Mr PRICE—And what discretion does she have there?

Dr Mitchell—She has no discretion there either. She acts on the advice of the Prime Minister. The Governor-General has a discretion under section 58, but his discretion is limited by the Queen's oath of office, which is to govern justly, lawfully and mercifully; and the definition of justly, lawfully and mercifully is put in the terms of the Christian scriptures by way of definition of 'justly, lawfully and mercifully'.

ACTING CHAIR—Sorry, I am just a bit unclear on this point. You have said that the Governor-General's discretion is the same as the Queen's discretion, but the Queen has no discretion.

Dr Mitchell—The Queen has no discretion. What I am saying is that the Governor-General's discretion is limited by the Queen's oath of office.

ACTING CHAIR—Does he have a discretion which is broader than the Queen's discretion?

Dr Mitchell—The Queen has no discretion herself in Australia. He is the Queen's representative, by section 2, not her personal representative. He does not have any directions from her, he cannot have any directions from her. The whole of the executive power is vested in the Queen, exercised by the Governor-General under section 61. The Queen, even if she is in Australia, has no authority here. It is the Governor-General who exercises the whole of the powers, and the Governor-General alone. But what are the limits on those powers? The limits on those powers you will see in section 58. He acts as the Queen's representative, within his own discretion but within the discretions allowed by the monarch's oath of office.

ACTING CHAIR—I am sorry; this is where I cannot understand it. You said the monarch's oath of office gives the Queen no discretion, so effectively you are saying the Governor-General has no discretion.

Dr Mitchell—No, respectfully, that is not what I am saying. The oath of office requires her to govern lawfully, justly and mercifully. If you ask, 'What does that mean?' I would go on further and explain what it means. The Governor-General's discretion is limited to be 'just lawful and merciful'.

ACTING CHAIR—If the President were required to swear a similar oath, would you have any objection to the wording of section 58 as proposed in the bill, which is essentially, as I read it, replicating the existing section 58 in so far as it refers to a president?

Dr Mitchell—I completely disagree with you that it is reflecting section 58, except in so far as it applies to a president. I think that is a great misunderstanding of many who are supporting a republic, and I really think that needs to be looked at much more carefully. Would I agree if the President were required to make a similar oath of office? I did suggest at the Constitutional Convention, at which I was privileged to be an elected delegate, that such a provision should appear; but that was not accepted. If the President's oath of office were identical to, or a reflection of, our present monarch's oath of office, I would have difficulty in objecting to this section.

Senator ABETZ—So what you are saying is that, under section 58 of the Constitution, the Governor-General, when presented with a bill, is in fact presented with a bill for the Queen's assent rather than for the Governor-General to exercise his or her own discretion about the piece of legislation. Is that right?

Dr Mitchell—No, I am saying that the Governor-General's discretion is limited by the fact that he is doing it in the Queen's name and as the Queen's representative. The discretion is the Governor-General's, not the Queen's. But the wording of the section makes it quite clear that the limitations on the exercise of the discretion are the limitations that the Queen would have were she the person who had the discretion.

Mr PRICE—Could you give us a practical example of how this difference might unfold?

Dr Mitchell—Yes. You will say this could never happen, and I hope and pray that you are right. But supposing a government with a majority in the House of Representatives and in the Senate made a law that all children after the first child were to be killed on their first birthday. I would expect the Governor-General to say, 'This is not merciful, it is not just, and it is not lawful. I will not assent to it,' even though the parliament, by an enormous majority, has sought to make it part of the law of Australia.

Mr PRICE—Do you think the High Court would uphold the parliament's ability to pass legislation like that? I accept that it is a hypothetical example.

Dr Mitchell—This is a long story, Sir, but the High Court, by various devices, is bound by the same rules of law and discretion.

ACTING CHAIR—On that point: you do not think the power of the parliament would be restricted by section 51 of the Constitution, which says that the parliament shall have power to make laws for the peace, order and good government of the Commonwealth?

Dr Mitchell—I certainly do think so. I have no doubt about that at all. But supposing they did not.

ACTING CHAIR—In that sense, don't the same powers exist? No court could sensibly say such a bill to murder children was for the peace, order or good government of the Commonwealth.

Dr Mitchell—If it got to the High Court, Sir. But, you see, it does get to the Governor-General.

Ms HALL—Why wouldn't it get to the High Court?

Dr Mitchell—Somebody might not take it there.

ACTING CHAIR—Wouldn't it get to the President the same way as it would get to the Governor-General?

Dr Mitchell—Exactly.

ACTING CHAIR—Doesn't the President have the same role?

Dr Mitchell—That is my concern about the provision of section 58 as proposed. I am really troubled by that word 'discretion'.

ACTING CHAIR—While you were talking I read through both section 58 of the bill and section 58 of the current Constitution. They are almost identical in wording.

Dr Mitchell—Respectfully, you must then have overlooked 'in the Queen's name.'

ACTING CHAIR—Naturally, the reference to the Queen has been taken out but, aside from that, they are almost identical in wording.

Dr Mitchell—I think I am not making my point. I suggest to you that those words are fundamental in limiting the discretion which the Governor-General has. If the Governor-General's discretion was not limited in that way, he would have a dictatorial power. I am not suggesting it would be exercised.

ACTING CHAIR—Sure. Any other questions?

Mr PRICE—Yes. At the moment, of course, to exercise this discretion or any power, the Governor-General receives tax-free income and does not pay customs duty. Do you see it appropriate for that to continue should we become a republic, where the President would not pay tax on his income or pay customs duty?

Dr Mitchell—May I qualify my response again? I do not see it as appropriate for us to become a republic, but if we were to become a republic, and if we were to take the line that the President was to be in exactly the same situation as the Governor-General, my answer would have to be yes. Would I like to see the President paying tax like any other Australian citizen? I guess my answer would be yes.

Mr PRICE—Isn't it inconsistent that the Queen now pays taxes whereas the Governor-General does not?

Dr Mitchell—I would say so. I would also suggest that this is not really a question for this republic bill.

Senator ABETZ—That is interesting. Would the President be paying tax on his income?

Dr Mitchell—That is what we were just discussing.

Senator ABETZ—Dr Mitchell, I want to take you to the Constitution Alteration (Establishment of Republic) 1999 Bill, to the third schedule of that bill, and then to item 5 which is entitled 'The States.' We received an interesting submission in Western Australia which suggested that that could be interpreted in the future as meaning that the states' constitutions basically receive their validity, or are sanctioned, by virtue of the federal Constitution which, of course, is putting the cart before the horse. Do you interpret item 5 in that way?

And if item 5 could be interpreted in the manner that I have just described, could that be rectified by a wording which would include 'nothing herein expressed shall be interpreted', and then go on to have the effect that I have just described?

Dr Mitchell—I do not interpret it in that way. However, if it can be interpreted in that way then your suggestion would obviously be a good one.

Senator ABETZ—But you do not think that we could interpret item 5 as meaning what I have described? I think I have done justice to the views of Jeremy Buxton, if you recall his views in Perth on Thursday.

Can I then take you to item 6 of the third schedule where we refer to 'Unified federal system'. Are you working from the original draft bill or an amended one?

Dr Mitchell—I am working from the draft bill supplied to me very graciously by this committee.

Senator ABETZ—So the heading in item 6 is 'Unified federal system'?

Dr Mitchell—Yes, it is.

Senator ABETZ—There was some suggestion that the term 'unified' should not be used but that a word such as 'cooperative' would more accurately reflect the way our federal system operates. Would you agree?

Dr Mitchell—I would agree with that most certainly. 'Unified' and 'federal' just do not link together; they have different concepts attached to them. I should have looked at this more professionally, I guess, but I had not really taken in that point.

Senator ABETZ—In your submission, under the heading of 'Explanatory Memorandum', you make the point about the communique of the Constitutional Convention, and you say:

It is not true that a majority of delegates at "the Convention supported the adoption of a republican system of government based on a 'bipartisan appointment of the President model'"

Can you recall what the votes were and what was the situation at the Constitutional Convention?

Dr Mitchell—I do not have the details in my hands. In my file somewhere I probably do have the voting numbers and I could supply them to the secretariat later on.

Senator ABETZ—There is no need for that because they are on the record anyway.

Dr Mitchell—The fact is that this proposal, to the extent that it does reflect the proposals emanating from the Constitutional Convention, is not a proposal of the majority of the Constitutional Convention.

Ms HALL—Can I refer you to paragraph 3 of section 59 of the proposed bill, the amendment to the constitution bill. Don't you think the words in that third paragraph:

The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State . . .

would prevent the President from becoming a dictator?

Dr Mitchell—Exactly, Madam. That is my suggestion to you: that the High Court or whoever would interpret the new proposed section 58 in terms of section 59 and would say that the word 'discretion' has no meaning. That may well be so. If it is so, why is the word 'discretion' there?

ACTING CHAIR—That is inconsistent with your earlier point saying that—

Ms HALL—Yes, it is so inconsistent.

ACTING CHAIR—You said that you were concerned that the President would be able to act as a dictator under the bill.

Dr Mitchell—Respectfully, Sir, I started by saying that I was confident that it would be interpreted that it had no meaning. But if it is given meaning, which is the rule of law that every word is to be given meaning if it can be, then it would appear to be establishing a possible dictatorship. I do not think for one moment that that would happen, but if it won't, why have the word 'discretion'?

Ms HALL—I just do not understand the logic of your argument. You are saying one thing and then you are saying another thing. It is just not consistent. Your thought pattern does not seem to be consistent.

Dr Mitchell—Respectfully, my point is: what do we mean by the word 'discretion'? Do we mean that the President has a discretion, or that the President has no discretion? I think, as I look at section 59, we mean he has no discretion. What then is the word there for? You would say to me, 'Well, what could it mean?' I have already told you, Madam, what it could mean. I have some fear that somebody might say, 'You've got to give meaning to the word 'discretion'.

Mr PRICE—Perhaps it might help, Dr Mitchell, if I ask: in the distilled history of our Constitution where we have had some years of practice, can you give examples of where the Governor-General has exercised discretion?

Dr Mitchell—I am aware of one example where he has exercised discretion. I do not think I am really at liberty to disclose that, for the information came to me in my capacity as a senior public servant at the time in the department involved. In fact, what happened was that the bill was withdrawn. It was not public that the Governor-General had said, 'I am not going to give assent to that.'

Mr PRICE—Would you prefer the committee to go in camera?

Dr Mitchell—I do not think I am at liberty to disclose it at all.

Mr PRICE—We may have to compel you. Everyone agrees that a Governor-General and a president—although they take advice from the Executive Council—have the right to question, the right to query, even the right to delay, but not the right to dissent.

Dr Mitchell—If he has not the right—

Mr PRICE—It is exactly the same for the current Governor-General as for the President.

Dr Mitchell—Respectfully, I think that the current Governor-General does have the right to refuse assent.

Mr PRICE—But it has never been exercised—except in the one instance you were referring to.

Dr Mitchell—That is probably true.

Mr PRICE—But did the bill come back later?

Dr Mitchell—No.

Mr PRICE—We do have procedures whereby we can take in camera evidence. It makes it very difficult when you give an example that you cannot elaborate on.

Dr Mitchell—I understand that.

Mr PRICE—Anyway, I am sure that the chairman will convene privately to determine whether or not we wish to get that information. Is it not true that under the current system a Prime Minister could appoint his chauffeur as a Governor-General; that there is absolutely nothing—other than decency and a regard for office, et cetera—to stop a Prime Minister appointing a chauffeur as Governor-General?

Dr Mitchell—There is absolutely nothing to stop the Prime Minister recommending to the Queen that the chauffeur be appointed as Governor-General. I would hope that the Queen would say to the Prime Minister, 'I have to do what you tell me, but do you really want to do this?' The Queen at present acts as a sort of buffer. That kind of discussion could take place now between the Queen and the Prime Minister about a proposed appointment of a Governor-General. The Prime Minister could even discuss his proposal with the existing Governor-General or the Executive Council. In appropriate circumstances I would hope that such a discussion would take place.

Ms HALL—Would you have any knowledge of such a discussion ever having taken place in the past? Do you have special knowledge of something like that, where the Queen may have stopped a chauffeur or had a discussion and convinced the Prime Minister that he should appoint someone else?

Dr Mitchell—I have no such knowledge. I would be surprised if it happened. We have had responsible and reputable Prime Ministers who have made very salutary recommendations for appointments of governors-general.

Ms HALL—What accountability is there in that process for the Prime Minister at the moment?

Dr Mitchell—There is no accountability.

Ms HALL—Would you say that the accountability process is greater under this proposed legislation?

Dr Mitchell—I would say it is different.

Mr PRICE—You are a hard man.

Dr Mitchell—One has to be hard. Let me not waste time.

Ms HALL—May I ask how this is, as you say, 'different' yet not more accountable? Please convince me that that is not increasing accountability.

Dr Mitchell—I doubt whether I could convince you. My father used to say, 'Convince a woman against her will, and she will be of the same opinion still.' But, be that as it may, the proposal is that some people will make a recommendation to the Prime Minister of various names. There is no proposal that those recommendations will ever become public. The Prime Minister selects from among those names, and I presume he would have the integrity to limit himself to the names that are put to him. He then discusses his choice with the Leader of the Opposition and asks for the approval of two-thirds of the parliament.

ACTING CHAIR—Unless the chauffeur had been particularly busy, you would assume that two-thirds of the parliament would not approve the chauffeur.

Dr Mitchell—Quite. I would assume that.

Mr PRICE—Would you agree that there is absolutely no formal process for the Prime Minister to determine who should be Governor-General—that that may vary from Prime Minister to Prime Minister—and that there is no transparency or accountability in that process?

Dr Mitchell—I would agree absolutely. But I would also say that Australia does not need to become a republic for that to happen. Even this very proposal for the presidential nominations could proceed without Australia becoming a republic.

Mr PRICE—Would you like to see us not become a republic?

Dr Mitchell—Yes, I would, frankly.

Ms HALL—Could I respectfully suggest that maybe you did not convince my male colleagues.

Dr Mitchell—I have not really attempted to convince anyone. I do not think you would give me time. I would need at least an hour and a half to present a full presentation, and I doubt whether you will give me that time.

Senator ABETZ—In relation to the dismissal process, there has been the suggestion that it would be easier for the Prime Minister to sack the President than it would be for him to sack his chauffeur—to develop the chauffeur analogy of Mr Price. Would you say that that is

correct and, if so, does it differ from the current position in relation to the Governor-General?

Dr Mitchell—Yes, I think it is absolutely correct. I notice in the proposal in the bill now that if the Prime Minister does dismiss the President—which he can do on his own motion without consulting with anybody at all; he does it personally—then he takes the matter to the House of Representatives and a majority of the House of Representatives does not approve of the dismissal, the Prime Minister still there—it does not cause any dismissal or removal of the Prime Minister—and it is certainly not clear whether the President comes back. If they do not approve, is he still dismissed?

Senator ABETZ—As I understand the situation, yes, he is. But would it not follow that if a Prime Minister cannot command a majority in the House of Representatives in relation to the dismissal of the President, the chances are he could not command a majority in relation to him remaining as Prime Minister?

Dr Mitchell—That might or might not be so.

Senator ABETZ—What is the current situation if the Prime Minister were seeking to dismiss the Governor-General? Is it the case that he would need to write to Her Majesty or make the request to Her Majesty but then it would take effect virtually immediately under constitutional convention?

Dr Mitchell—That is my general understanding, yes.

Senator ABETZ—So what is the substantive difference between the proposal to sack the President and sacking the Governor-General?

Dr Mitchell—There are a number of differences. The Prime Minister must go to the Queen. There is a buffer. Whether, as Ms Hall has suggested, the Queen would ever act as a buffer, I really do not know. But the buffer is there. There will be no such buffer—even a theoretical buffer—under the present proposals.

Senator ABETZ—And the President would have the power to also dismiss the Prime Minister at will?

Dr Mitchell—It would seem so.

Senator ABETZ—What would the scenario be if you were to have the Prime Minister and the President together in a room by themselves, it got somewhat heated and they both dismissed each other simultaneously?

Dr Mitchell—I have contemplated that and I have thought that it would make a very nice comedy movie. It is a very good question. What will happen? I do not know. I really cannot imagine. I think we would have a constitutional crisis.

ACTING CHAIR—We have that now. Isn't that a very important check and balance that exists in our present system? They both have the ultimate power of dismissal of each other.

Dr Mitchell—They do, but there is the buffer between them.

Senator ABETZ—The Prime Minister has to go via the Queen, whereas the Governor-General can do it immediately?

Dr Mitchell—That is right.

Senator ABETZ—So, if they do it together, the Governor-General must win out?

Dr Mitchell—Yes.

Senator ABETZ—If they were in a room together.

Dr Mitchell—As you would expect, if the Governor-General has the executive power.

ACTING CHAIR—Not necessarily. What about if the Prime Minister had directed or advised the Queen to give him ongoing approval or an instrument authorising him to dismiss the Governor-General, so that he went into the room pre-armed with the Queen's assent? Then the showdown could still occur in precisely the same manner?

Dr Mitchell—I guess it could, yes.

Senator STOTT DESPOJA—I want to return to your comments. You said you were uncertain as to what happens if there is a failure of the House to ratify the removal of the President. You express uncertainty. You genuinely are not sure. I want to pursue this idea that the failure of the House of Representatives to approve the removal of the President does not operate to reinstate the President who was removed.

Dr Mitchell—Yes.

Senator STOTT DESPOJA—That would be your interpretation of that?

Dr Mitchell—Yes, I think that is right. I think he stays gone. We are forgetting the Senate altogether in this.

Senator STOTT DESPOJA—I will return to that, too. I would like to pursue the issue.

Dr Mitchell—You have the House of Representatives saying that this man should not have been dismissed and a Prime Minister saying he should have been; the majority of the House of Representatives expressing confidence in the Prime Minister; and the government party keeping the Prime Minister there. I can only visualise chaos.

Senator STOTT DESPOJA—You would conclude that there is some difficulty in determining what happens to the President in that scenario?

Dr Mitchell—Sure. The President does not come back. It is quite clear in the bill that the President does not come back. Even if he does come back, there would still be constitutional chaos.

Senator STOTT DESPOJA—In relation to a role for the Senate in the dismissal process, is that something you support—the idea of the Senate having a role?

Dr Mitchell—The parliament is the parliament is the parliament; the House of Representatives and the Senate should each have a role in all government matters.

Senator STOTT DESPOJA—But should that role be complementary to the appointments process? Do you believe that the Senate should be actively involved in the dismissal process? Should there be a joint sitting?

Dr Mitchell—Absolutely.

Senator ABETZ—Joint sitting or separately?

Dr Mitchell—I would favour separately, but I would not object too much to joint sitting.

Senator STOTT DESPOJA—You were a delegate at the Constitutional Convention?

Dr Mitchell—Yes, I was.

Senator STOTT DESPOJA—Did you vote for amendments to give the Senate a role in the dismissal process, can you recall?

Dr Mitchell—I cannot recall, but I would say that I did not, because I was voting no to all proposals for a republic.

ACTING CHAIR—As there are no other questions, thank you very much for coming along. We will be tabling our report on 9 August and will send you a copy.

Dr Mitchell—Thank you so much. I presume that you will look at my submission in detail for there is much there that we have not dealt with this day.

ACTING CHAIR—Certainly.

[10.50 a.m.]

LOCKETT, Mr Eric John, Convenor, Reclaim Your Parliament Movement

ACTING CHAIR—I must advise witnesses that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings in the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Before we ask you some questions, would you like to make a brief opening statement?

Mr Lockett—Yes. To give committee members some background, I was elected as a non-partisan delegate to the Constitutional Convention under the title 'the voice of ordinary, fair-minded, thinking citizens', and I tried, and still try, to faithfully fulfil that role. I now appear on behalf of the Reclaim Your Parliament Movement. This is a movement that I am trying to get established in light of my experience at the convention. At the end of it I came away saying that whatever happens to the republic, there has to be a better way to run our affairs of state.

The convention was promoted as a people's convention, but in fact it was nothing of the sort. Instead of having a representative group of citizens working together constructively to formulate some republican proposals most likely to be most acceptable to most people, and then leaving it to those people to decide whether they preferred them to the present arrangements, we had a grossly unrepresentative—although fascinating and multi-talented—bunch of mostly adversarial people battling to enforce their own entrenched views on others.

Although I strongly believe that people who are not firmly committed to either side of the monarchist or republican debate make up the single largest block in our community, they were represented by only three elected delegates out of 76. Paradoxically, the appointed delegates were much more broadly representative of the views in the community at large and, I believe, more constructive in their approach. When on three occasions motions were proposed which sought to pre-empt the people's decision on whether or not we become a republic and I moved that such motions not be put, I was supported only by the late Professor Paddy O'Brien and Archbishop Peter Hollingworth.

Isn't that just what our parliaments are like? They have become the private property of powerful, adversarial, sectional interest groups. Instead of being forums representing the interests of the citizens, they have become colosseums with citizens as mere spectators largely powerless to influence the outcome of the combat. So the aim of the Reclaim Your Parliament Movement is to make our parliaments more representative, more democratic and more constructive. Later today you will hear from the lawyers and political scientists, but the perspective I bring is that of the most important people—our ordinary citizens.

There are four matters in particular I want to touch on: firstly, the question to be asked in the referendum; secondly, the content of the Constitution Alteration (Establishment of Republic) Bill; thirdly, the Presidential Nominations Committee Bill; and, finally, the

preamble. I am rather amused at the eagerness of the monarchists to concentrate attention on the Governor-General, rather than the Queen, and the republicans to concentrate attention on the Queen, rather than the republic or the President.

In general, I support the use of the current relatively brief long title in the referendum question, although there is a reasonable case that, as those ultimately responsible for the selection of the President are identified, the words 'but removable at the discretion of the Prime Minister' should be added to identify who would be responsible for his or her removal.

I do not believe that Australians are so ill informed that the question needs point out that the establishment of a republic involves the removal of the monarch. Any suggestion that an Australian citizen called the President would replace the Queen would, I believe, be downright misleading. Who is your butcher? The man whose name appears above the shop door or the one who cuts up your chops? I suggest that most citizens would identify the person who performs the function of a butcher as their butcher. Who is our head of state? The one whose image is on our coins or the one who actually performs the functions of a head of state? It is a very long time since the Queen cut up any chops for Australia and also a very long time since the Governor-General was anything but an Australian citizen.

In reality, if these proposals are approved the President would actually replace the Governor-General. The role of the monarch, absolutely minimal and vestigial as it is, would simply disappear. If my position aligns me with the monarchists, so be it, but I do not believe that the question should be manipulated to become part of the promotional campaign of either camp. They have plenty of money for that.

In relation to the content of the bill, by and large the proposed constitution alteration bill is very faithful to the recommendations of the convention. Supporters of the change will no doubt point out that the interests of ordinary citizens are predicted by, firstly, allowing ordinary citizens to nominate or be nominated as President; secondly, by keeping politics out by ensuring that nominees are not politicians or party members; and, thirdly, by ensuring that the appointee has broad support by requiring agreement between the Prime Minister and the Leader of the Opposition and a two-thirds vote of the joint houses.

In reality, these safeguards are full of holes you could drive a 40-seater bus through sideways. As an example, while ordinary citizens can nominate candidates, it is only the politicians who have the much more important final say. My proposal to turn this around while avoiding a partisan election by giving all the people the final say in ratifying a person chosen by the committee made little headway at the convention in the face of entrenched positions adopted by the main protagonists. I can make further reference to the loopholes in some of these other safeguards later if the committee wishes.

But I am not so happy about the dismissal provisions. The Prime Minister would have autocratic power to dismiss the President for any or no reason but then seek the approval of the House of Representatives, unless the process for an election has already been put in train. But the question of what happens if approval is not forthcoming is left up in the air. Nobody knows. The explanatory memoranda state that one consequence might be loss of government. I think if the people are to buy this proposal they need to know what the consequences of a

capricious action by a Prime Minister, unsupported by parliament, would be. You cannot expect the people to buy a pig in a poke. I had hoped that this one gap left by the Constitutional Convention might have been plugged by the parliament. There seems little point in inserting a requirement that a Prime Minister must seek but not necessarily gain the support of the House for such an action.

In relation to the Presidential Nominations Committee Bill, unlike the constitution alteration bill, the people will not have the opportunity to pass final judgment on this bill, so it is important that we get it right. When I supported the need for the committee to be 'of a workable size' at the convention, I never in my wildest imaginings expected this to be translated to a 32-member committee. I certainly would not have voted for that. I suspect that most people would see a workable size as meaning perhaps 10 or 12 members, certainly not more than 20.

The present proposal has all the earmarks of pandering—like someone handing out lollies to squabbling children—to politicians and parties, state and Commonwealth, with the community reps to pick up the crumbs. If the Commonwealth parliament has the final say on the President, why does it need representatives on the committee anyway? If it does, why can't it choose one or two non-partisan representatives, as the state and territory parliaments are presumably expected to?

Also, when I supported a balance between parliament and community representatives, I did not see this as meaning equal numbers. Given that politicians can be involved in every other stage of the selection process, I think it would be more appropriate to have, say, 75 per cent community representatives on the committee.

I do not know how much credit I can take for the fact that the original draft has been altered to ensure that the committee can no longer operate with 16 parliamentary representatives and no community representatives, but the change does not go far enough. We could still have 16 politicians and only eight community representatives. At the very least, half the committee should be community representatives.

The counterproposal I have put forward in my submission is for a compromise 20-member committee with about two-thirds community representatives. I believe this would be much more consistent with the original intention and much more acceptable to the community at large.

Briefly, on the preamble, I believe that a new preamble is desirable whether or not we become a republic. I do not believe that it is beyond the capacity of ordinary citizens to distinguish between the two issues if they are put at the same time. Our preamble should express what our nation is about in a simple, timeless and eloquent manner that can be supported by all Australians. I am not very impressed with the Prime Minister's effort but have prepared a draft of my own which I believe is an improvement on the one initiated by the opposition. I can provide a copy to the committee if you wish.

In summary, I support the referendum question as it is currently stated, with the possible addition of a reference to the removal provisions. I do not believe that the provisions of the Constitution amendment bill fully measure up to my criterion of the model most likely to be

most acceptable to most people, mainly because they put too much power in the hands of politicians and not enough in the hands of the people. But if the people accept it in spite of its shortcomings, as is their right, then the sun will still rise on 1 January 2001.

Mr PRICE—Thank you for that. I was worried. It makes me feel a bit better.

Mr Lockett—I do believe, though, that the people deserve to have spelt out a process to be followed should the House of Representatives fail to endorse the Prime Minister's dismissal of a President. I believe that the Presidential Nominations Committee Bill 1999 needs amending to reduce the committee size and give the people, as distinct from the politicians, more influence. Finally, I support the putting of a proposed new preamble which would be more appropriate whether or not we become a republic. For the benefit of the committee, I could now read my draft preamble.

ACTING CHAIR—We will not be looking at the preamble. Our terms of reference confine us to the two bills. If you would like to leave it with the secretary, we will certainly read it. Are you finished, Mr Lockett?

Mr Lockett—Yes.

ACTING CHAIR—Are there any questions?

Senator PAYNE—I am not familiar with your organisation, Reclaim Your Parliament Movement. So, just before I ask you a couple of questions, I wonder if you could give me more of an idea of how it is constituted, its aims and its objectives, its membership, whether it is a solely Tasmanian organisation?

Mr Lockett—So far, it is just an organisation I am trying to get off the ground in the face of the usual apathy.

Senator ABETZ—Is it fair to say that you held a public meeting on the lawns of the state Parliament House and attracted not one person but the media?

Mr Lockett—No, it is not fair to say that because it is not true.

Senator ABETZ—That is how the media wrote it up.

Mr Lockett—Do you believe everything you read in the media?

Senator ABETZ—So how many were there?

Mr Lockett—It is difficult to estimate. I was there a whole day.

Senator ABETZ—And people walked past.

Mr Lockett—Yes, and hundreds of people heard something of what I had to say and quite a few signed petitions and a number signed up to receive my newsletter. We do not

have a formal membership so I cannot state how many members we have got, but we have very many supporters.

Senator PAYNE—Mr Lockett, given your views on the current members of parliament—and one imagines senators get a guernsey there as well—to whom do you deliver your petitions?

Mr Lockett—I will be delivering my petitions through a member of parliament. It is a sad fact that there is currently only one Independent senator and only one Independent member of the House of Representatives so they are the obvious persons to choose.

Mr ADAMS—Because they are more pure than others?

Mr Lockett—No, don't get me wrong. I have got nothing against politicians or parliamentarians.

Mr ADAMS—One would find it hard to believe that.

Mr Lockett—I am not antiparliamentarian; I am pro-citizen.

Senator ABETZ—Who is the one Independent senator you are referring to?

Mr Lockett—Senator Brian Harradine, of course.

Senator ABETZ—Wasn't he on our ballot paper last time as the Senator Brian Harradine Group, with his own grouping, and not under Independents because he has a party organisation?

Mr Lockett—Yes, and that is one of the things that I would seek to change.

Senator PAYNE—I might pursue some issues in regard to your submission No. 38, particularly in reference to the Presidential Nominations Committee bill. You spend a significant proportion of your submission commenting on overrepresentation, overinvolvement, lack of trustworthiness, and so on, in relation to parliamentarians. But you do not present, as far as I can tell, any suggestions for how one might find appropriately representative members of the community to fill the positions that you think are so important to be filled by members of the community. You do not make any reference to the issues which were raised at the convention, other than federalism, pertaining to gender, age and cultural diversity to ensure an appropriate representation of a broadly diverse community. I would be interested in your proposals in that regard.

Mr Lockett—I make no suggestions in that regard. By and large, I am happy with the recommendations of the convention along those lines. Of course the bill also gives no indication as to how the community representatives should be chosen. It is purely the choice of the Prime Minister.

ACTING CHAIR—The explanatory memorandum does though.

Mr Lockett—I am not sure what the explanatory memorandum says, without looking it up.

Senator PAYNE—Given that apparently the elected members of the parliaments across Australia are so unrepresentative, I am interested in how you think you would make the community representation in this regard appropriately representative.

Mr Lockett—I acknowledge that that is not an easy question to answer, and the bill does not set out to answer it, and I am not pretending that I have a definitive answer either. The important thing is that there should be a large proportion of representative community members on that committee. That is the principle I would seek to reinforce.

Ms HALL—Do you believe that members of parliament—Australian citizens like yourself—are concerned citizens?

Mr Lockett—Yes.

Ms HALL—Seeing that you feel there is a lack of representation of ordinary Australians, do you think that parliamentarians are ordinary Australians?

Mr Lockett—Yes.

Ms HALL—I find it just a little confusing then.

Mr Lockett—The problem is that parliamentarians are ordinary Australians but they do not represent the 97 per cent of ordinary Australians who do not belong to political parties.

Ms HALL—But what about the people who vote for members of parliament? Surely they know what they are voting for. There are Independents who stand against most of us. I think I had a couple of Independents run against me, as well as people from parties like One Nation, the Greens, the Liberals, the Democrats, Call to Australia—all these parties, plus some Independents. And the Independents quite often got more publicity than I got.

Mr Lockett—I would love to go on for hours about this, because I could answer you at great length.

Ms HALL—I am interested in getting the right balance, because you talk about balance and I think it is important for us to understand your concepts.

Mr Lockett—There are two fundamental problems. One is that 40 per cent of members of the House of Representatives and 70 per cent of senators are guaranteed their seats on nomination by their parties.

Ms HALL—But people vote for them.

Mr Lockett—People vote for them because the playing field is so heavily tilted against anyone who is not a party member. It is far from a level playing field; it is more like a

cliff—and that is the thing I would like to see changed. That is what Reclaim Your Parliament is all about.

Mr PRICE—Could I just make a point? I think if you took a sample of the members of parliament here, most would say there is no such thing as a safe seat anymore. That is, the Australian voting public are far more discerning in their views. We had a narrow band of people who were prepared to change their votes at every election, and that band has expanded over time.

Mr Lockett—Seats are becoming less safe, but the figures I just quoted are based on Australian Electoral Commission data. We know that if you get first or second place on one of the major party Senate tickets, you can pack your bags to Canberra—whoever you are. We also know that the Australian Electoral Commission classified 40 seats in the House of Representatives at the last election as safe seats, and their classification was 100 per cent accurate. Not one of them changed parties.

Senator ABETZ—Mayo was one of those safe seats that was won by Mr Downer by a few hundred votes—400 votes or something—in the end.

Mr Lockett—I cannot quote specific seats. I just went through—

Mr PRICE—We can give you examples—I can only talk about my own state—where so-called safe seats of 20 per cent, 15 per cent or 10 per cent were lost by a sitting incumbent. Whilst the library classifies seats as safe, I think that anyone who believes in the theory of safe seats is a fool waiting for an accident to happen.

The other point that I would like to make is: I would have thought that the citizens very strongly express points of view. For example, in the 1996 federal election the citizens of Australia voted overwhelmingly for the coalition—in my view rather sadly, but I suspect they got it right. Equally, in 1983 there was a huge swing to get the Hawke Labor government in. Isn't this citizens expressing their view in a rather dramatic and startling way?

Mr Lockett—It is citizens saying, 'I would less like to have this major party in government than that major party.' It is not citizens saying, 'Of all the people available throughout the community, these are the ones who most closely represent my views.'

ACTING CHAIR—The point has just been made by Senator Abetz that we might like to focus on the bill.

Senator ABETZ—I was guilty as well.

Ms HALL—It is important for our overall understanding of your concepts and where you are coming from, and then we can put it into your submission.

ACTING CHAIR—Dick, you had a question.

Mr ADAMS—It was along those lines. Mr Lockett has a certain dislike of politicians and political parties. I wanted to take up the community point which my colleague made: what does make up community members? Are they members of the RSPCA, members of a political science group, or whatever? You certainly have a view on that. I also wanted to ask: are there any other democratic processes in the world where there are no political parties, or do you see political parties as a hindrance to democracy? There are some countries in the world where there may be 40 political parties, and in Italy they have an election every year or every 18 months because of instability. I am just wondering whether you have other views. You made a major attack on politicians, but we are open to be attacked.

Senator ABETZ—On parties, I think, not politicians.

Mr ADAMS—Yes, not individually. Most of us feel that we do represent people. We come from seats where we might represent 1.3 per cent to seats where we might represent 10 per cent. You expressed very strong views on that. Is there anywhere else in the world where you see there is a better structure?

Mr Lockett—Firstly, with respect to the method of selecting community representatives for the committee, as I acknowledged earlier, I have some difficulty coming up with a good system. You could nominate that people who hold certain offices should be ex-officio members, but who is to say that those offices will still exist in 10, 20 or 50 years time? Unless someone can come up with a better formula, this is something that simply has to be left to the discretion of someone. At the present time it is at the discretion of the Prime Minister. I am not sure that he ought not have some more formal input from others.

Getting back to the question of politicians and how they represent the people, I want to make it perfectly clear that I have no objections to political parties. I think they have a valuable and useful function to serve in our parliament. I think they are necessary. But the problem in Australia is that the parliamentary members of those parties are not free to act according to their convictions as to what is in the best interests of the community at large—with due deference to Senator Stott Despoja and her recent experience. By and large they almost invariably vote en bloc.

Ms HALL—Getting back to community representation, if people were appointed according to office, wouldn't that get away from your concept of ordinary Australians? I think we need to define, and I need to understand when I am considering your submission, what you mean by 'ordinary' Australians so we can look at that when we are looking at recommendations relating to the community representatives.

Mr Lockett—Yes, I take your point. As I said, I have some reservations about appointing ex-officio community representatives. It is difficult to define beyond the general broad guidelines that the convention has set down as to how you decide who should be community representatives. The general principle, I would think, should be that they represent a geographical range and perhaps a sociological and professional range of interests typical of the community at large.

Ms HALL—As I come from the Hunter, perhaps we should have a miner or someone like that representing us—or a nurse or a schoolteacher or somebody who works in the ports.

Mr Lockett—They are all possibilities to be considered.

Ms HALL—A lawyer?

Mr Lockett—I suspect that we are going to have plenty of lawyers there anyway.

Ms HALL—So, no lawyers?

Mr Lockett—I would not exclude anyone.

Ms HALL—I am not a lawyer, by the way.

Senator ABETZ—Mr Lockett, if I could take you to the Constitution Alteration (Establishment of Republic) Bill 1999, there has been some discussion about the long title. I understand that in general terms you are happy with the long title being on the ballot paper. Is that correct?

Mr Lockett—Yes, that is correct.

Senator ABETZ—A suggestion has been made that the word 'chosen' be replaced by the word 'approved' in the third line as that more accurately reflects the model. Do you have any comment on that—that really the parliament only vetos, it does not do the actual choosing? I daresay that it is the Prime Minister and the Leader of the Opposition who ultimately do the choosing.

Mr Lockett—Yes, I would find that amendment perfectly acceptable. I take the point that it does more accurately reflect what would actually happen.

Senator ABETZ—Thank you. In your opening comments you made some comments that a capricious Prime Minister could dismiss a President at will. Could a capricious Prime Minister dismiss the Governor-General at will, at the moment?

Mr Lockett—Given the reservations about the role of the Queen, I say that is entirely possible.

Senator ABETZ—If that is the case, what is the difference between the current system and the proposed system in relation to the dismissal of the President?

Mr Lockett—The difference between the current and proposed system is that I believe the proposed system does have a nominal safeguard in that the approval of the House of Representatives is required for such action.

Senator ABETZ—It does not have to be approved, does it?

Mr Lockett—No, it does not have to be approved—the approval has to be sought but not necessarily granted.

Senator ABETZ—Even if the Prime Minister were to be defeated in the House, it would not act to reinstate the President.

Mr Lockett—No, but I would make this point: while under the present arrangement a capricious Prime Minister could conceivably dismiss the Governor-General, I would suggest that, although there is a distinct possibility that these proposals will be defeated in the forthcoming referendum, if the current position where the Prime Minister has the power to dismiss the Governor-General were put to the people, starting from scratch, the chance of that getting through is only slightly more than nil.

Senator ABETZ—But it did get through originally.

Mr Lockett—Yes, it did get through originally.

Mr PRICE—You mentioned that you saw a safety net in the proposed arrangements. What is the safety net in the current arrangements?

Mr Lockett—The only safety net is the role of the monarch, I suppose. I do not think that is satisfactory.

Mr PRICE—There is no safety net. Every person who has appeared before the committee has said that once the Prime Minister makes the decision and communicates it to the Queen, that is it—he's gone. There is no other follow-up procedure other than perhaps the monarch requesting written advice in addition to the telephone call.

Mr Lockett—We can only speculate on what the role of the Queen would be under those circumstances, as Dr Mitchell indicated. It has never been put to the test.

Mr PRICE—That is true. I am just relating all the advice that we have had from experts.

Mr Lockett—My position—and, I believe, that of most citizens—is that I do not find it satisfactory that the Prime Minister can capriciously dismiss the Governor-General.

Mr PRICE—For the record, no Prime Minister has, and one cannot see why, having failed to exercise that power in 99 years, they would suddenly want to. Would you just, finally, on this point agree with me that there are no safeguards in the current system, but there are safeguards in the proposed republican model?

Mr Lockett—I do not think either statement is entirely true.

Mr PRICE—Let me put it this way: there is at least a procedure following the dismissal where the Prime Minister needs to seek the approval of the House, whereas at the moment Prime Minister Howard in New York can ring her Majesty and, if the call is put through,

and he says, 'I wish to dispense with Governor-General Deane,' then that is it, other than her requesting written confirmation—or an email if she is on the Internet.

Mr Lockett—Yes.

Mr DANBY—Mr Lockett, regarding the Presidential Nominations Committee, you expressed some concern about the people not being able to ratify the nomination that came out of the committee. Can you explain to me a bit more about that? Do you mean that you would like people to, in an election style vote, ratify the nomination or that you would like the short list voted on? Wouldn't that be a quasi-election if that were the case?

Mr Lockett—The proposal I put forward was one for the committee to come up with a single recommendation as the Prime Minister and the Leader of the Opposition would under the present proposal but, instead of it being approved by the joint houses, it would be approved by all the people. They have the right of veto, in effect. They have the final say. If they did not approve of the choice, then the committee would have to go back and find someone more suitable.

Senator STOTT DESPOJA—When Senator Payne asked you specifically about what qualities members of the community should bring to the Nominations Committee, you suggested that you were happy with the Constitutional Convention's communique that specified and recognised diversity.

Mr Lockett—Yes, I think that constitutes a fairly good, broad guideline. I do not think you can give much more than broad guidelines.

Senator STOTT DESPOJA—Should that guideline be enshrined in the bill? Should it be in an act?

Mr Lockett—I am not sure about that. I would have to look more closely at the detailed wording of it before I could give a considered judgment on that.

Senator STOTT DESPOJA—Given your views on representation and no doubt electoral systems, do you believe the Senate should have a role in the dismissal process and take Senator Abetz's point as either a joint sitting or a separate session or neither?

Mr Lockett—I think, as a matter of principle, it would be desirable for them to be involved.

Senator ABETZ—As a joint or separate sitting?

Mr Lockett—I think, if I had to choose, I would probably say preferably in a joint sitting.

Mr ADAMS—That is a bit inconsistent. I think you said that you did not think the Senate was that representative of the people.

Mr Lockett—I think the Senate is more representative of the people than the House of Representatives is.

Senator ABETZ—I am more representative than you are!

Senator STOTT DESPOJA—On that note, can I pursue an idea. As a Tasmanian, I wonder if you would therefore have concerns about the level of representation for Tasmanians in that dismissal process, given that members of parliament from Tasmania are, of course, fewer than the number of senators who represent this state. Is there a geographical or a states rights issue in that for you?

Mr Lockett—I am not too hung up on the geography of it. I think, as long as the people are reasonable people and are genuinely seeking to represent the citizens of Australia, that is more important.

Mr ADAMS—But you would like to choose. Some people are better than others, in your opinion, to be representatives of the parliament.

Mr PRICE—I am not game to ask that question after being assaulted by my colleague.

Ms HALL—So I attacked him!

Mr Lockett—It is not a matter of the people. I think politicians, by and large, are committed people who have a genuine desire to serve the citizens of Australia, but it is the way the system works that creates the problem. They are not free to act according to their convictions.

Senator ABETZ—That is a very positive note to end on!

ACTING CHAIR—Thank you for coming along, Mr Lockett. We will be tabling our report on 9 August, and we will send you a copy. We now have a member of the public, Mr Michael Hodgman, who would like to give brief evidence. I understand Dr Chapman, who is here, has agreed to stand down the list for a brief period to enable that to occur.

[11.28 a.m.]

HODGMAN, the Hon. Michael QC, Legal Director, Australians for Constitutional Monarchy, Tasmania

ACTING CHAIR—Welcome. Is there anything you would like to say about the capacity in which you appear?

Mr Hodgman—I thank you, Mr Acting Chair, and I apologise. I thank my friend Senator Eric Abetz, whom I rang this morning, for allowing me to even come before you. I would like to reserve the right, if I may, to put in a written submission which I will arrange to be sent to you within the next few days, if that is convenient.

ACTING CHAIR—Yes. Before we ask you to give a brief statement, I should formally advise that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings in the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Having noted the formalities, would you like to make a statement before we ask questions?

Mr Hodgman—Certainly. Out of deference to Dr Chapman, I will be quite brief, if I may. I have the distinction—for want of a better word—of having served in the Legislative Council of Tasmania, the House of Assembly in Tasmania and the House of Representatives. In answer to those who would question why I have not yet stood for the Senate, one would probably have draw the line somewhere. But, having said that, I am firmly committed to our present Constitution, which provides for one indissoluble federal Commonwealth under the Crown. And unless and until I am persuaded that it would be in Australia's interests to change that Constitution, I am against the change to a republic, even to what has now been described as the minimalist republic. I attended the Constitutional Convention in Canberra last year as the delegate for our then Premier, the Hon. Tony Rundle, who of course is a republican. I was elected by my party to be his delegate and, as you will see from the *Hansard*, I spoke in support of the current system.

Can I make three very quick comments. The model which has been put to the Australian people I think is roughly represented in this legislation as the model that was passed by the convention. But I want to repeat that it did not gain majority support on the floor of the convention, and it is my genuine belief that it will not gain majority support nationally or in a majority of states at the forthcoming referendum. When staunch republicans like my friend Professor George Winterton describe it as flawed and Professor Cheryl Saunders describes it as significantly flawed, I have to say that, if I were a republican, I would not support this model. I would be quite blunt: if I were a republican I would suggest that, along with 60 out of 69 republics in the world, people should have the opportunity to elect the President directly.

I do not like the proposal one little bit, and I have to say—without being in any way offensive—that, when it is explained to the people of Australia that they will not have a vote but that their President will be picked by the politicians in Canberra, you will find—and this is not just my view; it was expressed by people as diverse as Ted Mack, Clem Jones and

Phil Cleary—that the people will not have a President who is picked by politicians in Canberra. I do not take it any further than that. The three major public opinion polls on this issue have shown findings in excess of 70 per cent opposition to the proposal and that, for what it is worth, of those people who believe we should become a republic, three out of four say we should pick our President.

I do know the difficulties. I am not advocating, because I do not support any change, any particular type of republic. I happen to believe that there is an inherent danger in changing our Constitution at all. I believe that, when you get into that core commitment of one indissoluble federal Commonwealth under the Crown, if you take one thread out of that fabric the risk is that it can spread, and other issues, such as the federal compact, would go.

Last but not least, I am concerned when academics far more brilliant than me have expressed an opinion in relation to the inability of the people of Australia to amend the first eight sections of our Constitution. You will recall in 1981 Prime Minister Trudeau wanted to bring in the new Canadian Constitution, which became the Canada Act. That was in fact passed through Westminster—it had to be. In view of the implication for the Australia act, I do not believe that Westminster could now, nor indeed should we ask it to, amend our Constitution. My concern is simply not a legal one but a substantive one, because academics have raised this question. If you cannot amend those first eight sections, what does that do to the overall question of the ability to amend?

Finally, on the issue of reserve powers—and I will put this in my submission—my main concern is pointed out by Professor Winterton in his book *Monarchy to Republic* on pages 120 and 121. I have them here and I will leave them with you. He points out the difficulty of codifying the reserve powers, and he further points out that in Ireland in 1921 they abolished the royal prerogative and caused quite a constitutional problem in relation to taxation having priority over other debts.

I will not bore you with the details, but I am yet to be convinced by anybody that the current reserve powers and the rights and freedoms protected by the prerogative writs could be retained in a republican system. Having said that, I am happy to answer any questions. I apologise for not being prepared, but I welcome you and thank you for coming to this state which does have a significant interest in the Constitution.

ACTING CHAIR—Are there any questions?

Mr PRICE—Yours is not an unexpected contribution, Michael, if I may say, and it is nice to see you. I am at a bit of a loss to understand that last point you are making about taking the prerogatives out.

Mr Hodgman—I have the passages here. Professor Winterton's book really speaks for itself. It is quite a short section, but if it would help you I will give it to you. Basically, one of the strengths of the English Constitution, and probably its greatest strength, is that it is unwritten. It is said that constitutionally one of the great strengths of our Constitution is that the reserve powers—the royal prerogatives as they are commonly known—are unwritten, and not even the parliament can prevent the High Court from receiving a prerogative writ.

My friends Dick Adams and Eric Abetz would recall that the famous Karen Green case went to the High Court of Australia by prerogative writ. It set aside the Fraser government's decision—of which I was a member—that no school leavers would receive unemployment benefits until they had been out of school for six weeks. Sir Ninian Stephen, the judge at first instance, said, 'You can't do that.' The case of Queen v. Heatley ex parte Nielsen, the Tasmanian Racing Commission, was a prerogative writ which laid down the rule that, in dealing with proprietary rights, you must comply with the principles of natural justice and brought Rydge v. Baldwin, a famous English case, into Australia law.

ACTING CHAIR—On that point, section 70A specifically will say under this Constitution:

Until the Parliament otherwise provides, but subject to this Constitution, any prerogative enjoyed by the Crown in right of the Commonwealth . . . shall be enjoyed in like manner . . .

In other words, it continues.

Mr Hodgman—Yes.

ACTING CHAIR—How can the wording be clearer than specifically stated? It is the same thing for reserve powers and conventions in section 8 of schedule 3. It is as clear as you can say it in writing.

Mr Hodgman—That is completely correct. I do not dispute what you are saying. My concern is with the proposal to appoint a President with the right to dismiss, such as we are going to be presented with. I do not necessarily agree with Professor Winterton's comments in view of what you said earlier when Mr Lockett was being questioned about the current position of a Prime Minister dismissing a Governor-General. Professor George Winterton in the University of New South Wales *Law Journal*—which I am sure has been referred to your forum—volume 4 No. 2 1998 says:

The conventions model is flawed. Its presidential removal mechanism is both structurally unsound and entirely inappropriate.

ACTING CHAIR—That is a different point. That is not addressing the point I just asked you.

Mr Hodgman—No, but then on the other side of the coin you have former Chief Justice Sir Harry Gibbs, pointing out that under this proposal if you had a President and a Prime Minister of like mind—which is not impossible to achieve—they could exercise jointly far greater power now than even the Prime Minister or the Governor-General under the current system.

ACTING CHAIR—Are there any other questions?

Mr PRICE—Why couldn't that be the case now? The Prime Minister can appoint his chauffeur to be Governor-General; not that any Prime Minister has done that, but could.

Why couldn't they do that, providing the Prime Minister controlled the cabinet and had the numbers in cabinet?

Mr Hodgman—I have to say the answer is similar to what the chairman said a moment ago to Mr Lockett. They could have, but they have not. With great respect to our Prime Minister—and I am very staunch member of the party—I do not like, and you will see why, the way this Presidential Nominations Committee is set up. I just do not like the concept. For example, why should we exclude people like Sir Paul Hasluck, who was not only Governor-General appointed by a Liberal government, but was offered an extension of term, I am informed, by the Hon. Clyde Cameron in the Whitlam government, and declined only because of the health of Lady Hasluck, or Sir William McKell? You have it that a politician resigns the day before he or she is nominated.

ACTING CHAIR—Do you think politicians should be able to be nominated?

Mr Hodgman—Absolutely. I personally can think of members—and I am not going to express it—of Australian Commonwealth and state parliaments who in my humble opinion could do a very good job as President.

ACTING CHAIR—Name them.

Mr Hodgman—I am not going to. But I will say this—and it is on the public record, and if you check with him you will find out—that, from the moment of his appointment, the Hon. Bill Hayden received from me, and from people of like mind to myself, support in his position as Governor-General of Australia, because that is the way the system went, and I had no problem with him at all.

Mr PRICE—At the moment the Governor-General receives his emoluments tax free and does not pay customs duty, ironically at a time when the Queen has decided it is appropriate for her to pay taxes. Would you believe that, if we did go to a republic, the President should continue to have those rights, or should indeed pay tax like everyone else?

Mr Hodgman—I have not thought of it, to be quite honest. I will say that I, believing in the constitutional monarchy, would conclude by saying, can I put that in my submission? I also add that, while Tony Blair would have become Prime Minister of Great Britain anyway, I believe the thing that made it certain that he would become Prime Minister of Great Britain was when he called on Her Majesty three weeks before the election and said, 'Ma'am, if my government is elected, I can assure you the monarchy is not under threat, but I intend to do something about the House of Lords.' Apparently, Her Majesty said, 'Quite right.' People who think that we could still be a constitutional monarchy and that England becomes a republic ahead of us are not on this planet. I will think about it carefully. It is a very interesting question. I just do not know the answer.

Mr PRICE—Is it possible for a state to have a referendum on its own to become a republic, and could it remain a republic yet federally we still remain a constitutional monarchy?

Mr Hodgman—It is quite possible and the converse is quite possible. Do not misunderstand me when I say this; whether it is constitutionally appropriate is a totally different matter. But I think you will have had clear advice—and I believe it to be the fact—that Australia could become a republic under the Australia Act and other conventions; a state could continue to remain a constitutional monarchy with a governor appointed by Her Majesty, the Queen. In fairness, the Queen made it very clear when the states abolished imperial awards that she would not grant imperial awards in Australia. She has one tiny area, the Royal Victorian Order, and—as Eric would be aware—she awarded one of the lower ranks of the Royal Victorian Order to David Pitchford at Government House here for work on royal tours.

It is constitutionally possible for a state to become a republic and for the Commonwealth to remain a constitutional monarchy, and vice versa. I do not think it is desirable. If I were a republican, my sadness is that I think the model they are putting out to the public will be defeated in November and I do not know where they go from there. Had they listened to even people like Christine Milne, who argued very strongly but got nowhere, as to alternative models or whatever. I feel sorry in one sense for republicans who genuinely believe in it. It may well happen—I do not know—but this is not the model that will get through. I genuinely believe that.

Mr PRICE—If the member for Gellibrand were here she would say that we can go for this republican model. It does not preclude at some later date having a direct election presidential model should that be the wish of the people. But given your experience and knowledge of how difficult it is to get a referendum through, there would be many who would fear I think going from our current system straight to a direct election model. Whilst you might win over some, you would lose maybe even more.

Mr Hodgman—I am not being in any way personal, but I think Malcolm Turnbull carries a major responsibility for what has happened. My personal feeling is that if this referendum is defeated, as I think it will be, it will not be touched for some time—probably the year 2038, which is the 250th anniversary of European settlement. That may be a date. I do not know.

Mr PRICE—I do not think I will be a member then somehow.

Mr Hodgman—I hope you still are. I have a very healthy regard for both our Prime Minister and the Leader of the Opposition, and whoever is Prime Minister in 10 years or five years time I do not think they are going to pick this issue up. Funnily enough, I have to say frankly that I do not think there is the interest in the debate out in the electorate that I expected. Just as a betting man I would tell you statistically that I think the chances of this getting up are now nil and the split in the republican movement is not the only reason; there are a number of others.

ACTING CHAIR—Thank you for coming.

Mr Hodgman—Thank you very much. I really appreciate it.

[11.45 a.m.]

CHAPMAN, Dr Ralph James Kinder (Private capacity)

ACTING CHAIR—For the record, I must advise you as a witness that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings in the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Before we ask questions, would you like to make a brief opening statement?

Dr Chapman—Yes, just a very brief one. I think you probably have got a copy of my submission, but you may not have had time to read it. It is purely and simply a fairly narrow approach that I have taken, intending to draw attention to what I perceive to be a mismatch between the existing system and the proposed change to that system whilst retaining what appear to be the major features of the Westminster model. I am concerned by the way in which the legislation appears to give to the President executive powers in a way which does not restrain them. This may be somewhat different from people who come along and say that they are worried about the powers given to the Prime Minister.

I think one of the problems that arises in trying to build a republican parliamentary model into a Westminster parliamentary model is that distinction which is not drawn in Westminster between the executive powers of the Queen, the monarch, and the powers of the President. You cannot, it seems to me, transfer the powers of the Queen, who is the sovereign authority in a monarchy, to the President in a republic when in fact the sovereignty in a republic resides with the people. The only powers that the President can have are powers given by the people through a Constitution, which is approved by the people.

It is the sort of issue where you cannot say that obviously the situation is going to be that the President will automatically be an executive President like the President of the US, for example, under the amendments to the Constitution. My worry is that the potential is there and there is nothing to stop it. All you have got is a situation in which the Prime Minister and the President can sort of stand off one another and try to dismiss one another first. That kind of volatile situation seems to me to be one which no constitution should be predicated on.

Ms HALL—Isn't that the case now?

Dr Chapman—Sure. I do not believe it should be. That is what I do not want to perpetuate. Just because we have something now is not a reason to carry it on into the future in a totally different context.

Mr PRICE—Haven't we carried it on to the future with some safeguards?

Dr Chapman—Such as?

Mr PRICE—A Prime Minister, having dismissed a Governor-General, needs to seek the approval of a house.

Dr Chapman—Yes, but you yourself just now in talking to Michael said that it is a situation of the Internet or the telephone, picking it up and who gets in first.

Mr PRICE—This is the current situation.

Dr Chapman—Yes.

Mr PRICE—Absolutely.

Dr Chapman—Why perpetuate it?

Mr PRICE—Because if a Prime Minister dismisses a President he then has to go back to the parliament, to the House of Representatives, and seek approval of the House within 30 days.

Ms HALL—There is greater accountability.

Mr PRICE—There is no such provision now.

Dr Chapman—No, that is true. It is a step forward. I do not dispute that. But the issue is not what the Prime Minister might do to the President; it is what the President might do to the Prime Minister.

Ms HALL—In that 30-day period?

Dr Chapman—Yes. If the President has the reserve powers, then he can do that.

Mr PRICE—But the Governor-General has reserve powers now.

Dr Chapman—Yes, I know. I am not happy with either of those situations. That is what I want to avoid. So I want to reduce the powers of the President. I want to ensure that the reserve powers of the President are not reserved but are expressed in the Constitution. I want it to be quite clear in the Constitution what the powers are.

ACTING CHAIR—Isn't it also an improvement in the third paragraph of section 59 which says that, save in the exercise of the reserve powers, the President must act on advice, which is not currently contained in the Constitution.

Dr Chapman—That is right. There are things in there which do present a possibility for changing what we now have, but it does not in the long run alter the fact that if the President does not take advice what are you going to do about it?

ACTING CHAIR—So you are all about strengthening the role of the High Court, making these matters justiciable?

Dr Chapman—Yes. That is the ultimate.

Senator ABETZ—You would like them to be justiciable?

Dr Chapman—Yes, absolutely. For that reason they have to be expressed, they have to be stated and clearly defined.

Senator ABETZ—How does that reflect the Constitutional Convention's communique? To a large extent our task is to try to match up the proposed legislation with what the Constitutional Convention decided, and the Prime Minister at the end of the convention said basically that the model being proposed will be put to the people. So would you encourage us to ask the Prime Minister to break his word and put a completely different model to the people?

Dr Chapman—No. I think that, if I may say, is actually creating a barrier to a proper discussion of what we should have in the future as a republic. I am not stating my position either for or against. All I am saying is that if you want to move to a republican parliamentary system you cannot trammel it, you cannot constrain it, you cannot undermine it in one sense, by trying to maintain a constitutional monarchy as well, which is what you are trying to do except that you are making the President a monarch basically in terms of the powers the President will have.

ACTING CHAIR—I am trying to preserve the Westminster system, the division of powers, the executive, the parliament and the courts. Isn't that what the bill proposes to do? It proposes to continue that.

Dr Chapman—Yes, it does.

ACTING CHAIR—You are arguing against that.

Dr Chapman—I am not arguing against it; I am suggesting that it does not do it adequately because it tries to maintain too much of the Westminster constitutional monarchy system within the republican parliamentary system.

ACTING CHAIR—Yet you have acknowledged two improvements at least—a degree of accountability in the dismissal and the specification that the President must act on advice save in so far as the reserve powers are concerned.

Dr Chapman—Absolutely. If I would characterise them, I suppose I would characterise them as transitional arrangements rather than as final arrangements. If we were talking about the sort of model which says, 'We will go for this and then we will talk about how it really should work,' which is what some people's view is, then that is the kind of model that we may say, 'Okay. This is the first step towards a real republic.'

Ms HALL—If this referendum question does get up, then in three years time there will be another convention. That gives us room to develop the model and develop the system that we will have here in Australia.

Dr Chapman—That is a lovely thought.

Senator ABETZ—Is your bottom line, Dr Chapman, that we cannot have a minimalist change to a republic—it has to be a wholesale change which will require a lot more change than is being suggested?

Dr Chapman—I have made some suggestions which I think would improve the existing legislation to make this situation less tendentious, as it were. The statement of what the powers of the President are, for example, is not going to be something which is at odds with the parliamentary system as we have it now. It merely characterises what those powers are rather than leaving them in limbo in terms of reserve powers. Most of the powers that the President has, as I make the point here, are stated in the Constitution now but they are not powers in the executive sense; they are powers purely and simply of an administrative nature, to make sure the institutional arrangements continue and oil the wheels, as it were. They are not the sorts of reserve powers of saying to a Prime Minister, 'Out.'

ACTING CHAIR—They are, aren't they? Specifically the Governor-General does have that power.

Dr Chapman—Yes, I mean all those other powers like sections 5, 7 and so on. They are not related to that final reserve power. Even section 59 that you mentioned just now about taking advice of the Prime Minister—

Ms HALL—You were saying that this will not be a republican model?

Dr Chapman—Yes.

Ms HALL—There is not one republican model. There can be many, many different types of republican models. Couldn't this just be another type of republican model?

Dr Chapman—No.

Ms HALL—Why?

Dr Chapman—Because when you talk about a republican model you are broadening the notion that I am talking about. I am talking about parliament and the role of the parliament and the President and the role of the parliament, the President and the ministers of state and all of those relationships which make up what is really the key of the Westminster system. In a Westminster system those relationships are not consistent with a republican parliamentary model in which the sovereignty rests with the people, not with the Queen, not with the President.

Ms HALL—There are many, many different types of republican models though. You can go anywhere in the world and you can find that they operate differently. To say that because we are going to look at incorporating the Westminster system that it will not be a republic, I do not think that washes because you can have republics that are dictatorships and at the other end you can have republics which have all the power vested in the people.

Dr Chapman—Constitutional monarchists.

Ms HALL—So this would be one that was in the middle?

Dr Chapman—No, it would not be, with respect. It would not be one that is in the middle because it would not be a republican parliamentary system; it would still remain a vestigial constitutional monarchy.

Senator ABETZ—What are the bare bones for a republic?

Dr Chapman—The bare bones for a republican parliamentary arrangement?

Senator ABETZ—Yes.

Dr Chapman—The bare bones of that is a President who has a dignified role—that is to say a non-executive role, a role that has to do with maintaining the institutional viability—a Prime Minister and his ministers who are in an executive position with powers expressed in the Constitution identifiable as executive powers and equally justiciable, and a set of arrangements which is created so that there are opportunities for the arguments that may arise between a President and a Prime Minister to be, shall we say, resolved through a constitutional court.

Senator ABETZ—Would that include dismissal?

Dr Chapman—Yes.

Senator ABETZ—So you would need a special provision for impeachment of a President, for example?

Dr Chapman—You may. I do not see why not.

ACTING CHAIR—You would advocate that all those matters should be codified, that they should be written down, that we have a whole process that covers dismissal?

Dr Chapman—It is not hard. There are only four according to the explanatory memorandum. It should not be hard.

Mr PRICE—I can understand your desire for codification, but why doesn't that jam up the current system?

Dr Chapman—Why because it is not codified, do you mean? It does not jam up the current system because we operate a constitutional monarchy.

Mr PRICE—How does that save us? Do we have the Queen ringing up the GG saying, 'Give us your monthly report. How are we going? Five out of 10 for this. Nine out of 10 for that'?

Dr Chapman—What that view fails to recognise is that the constraints in a Westminster parliamentary system are constraints of convention and operation and practice which have occurred over the last 300 years.

Mr PRICE—I agree with you totally.

Dr Chapman—You have not had a situation in which you are going to a republican model and impressing upon that republican model a Westminster system of parliament.

Mr PRICE—I would have thought that precisely what we are trying to do is just transfer all those things to the republican model. With the same goodwill, sense of history and practice, it will operate precisely the same with additional safeguards.

ACTING CHAIR—And you are saying, Dr Chapman, that that cannot work, basically.

Dr Chapman—I am not saying that it cannot work; of course it will work. We will make it work. But it will not work as a republican system of government; it will work in some kind of mishmash of ideas about what the executive power of the President should be or what the executive power of the Prime Minister should be. There will be no clarity. It will be: we will operate this according to some kind of practice that will emerge.

ACTING CHAIR—That is precisely what we are doing now.

Dr Chapman—No, no. With respect, it is not what you are doing now. What you are doing now is operating within a very clear framework that has been set by convention against which you will move at your peril.

ACTING CHAIR—In respect of that, we have section 59 which says that, save in so far as reserve powers, the President shall act on advice. We have section 78 that specifically preserves the current Crown prerogatives. We have section 8 of schedule 3 which specifically refers to the continuity and development of conventions. How much clearer can you get than specifically stating those factors are preserved before we move into the next system? You cannot do better than that, surely?

Dr Chapman—I think you can, yes. I think you can do better than that. I think you can move to a republican system without those necessary—

ACTING CHAIR—Are you advocating that occur?

Dr Chapman—What?

ACTING CHAIR—That we move to a republican system.

Dr Chapman—No, I am not advocating that at all. I am saying that if you want to you have to do it right.

ACTING CHAIR—For your particular model of republicanism.

Dr Chapman—For a republican system. I do not have a particular model. I have a view about what is involved in actually being a republic.

ACTING CHAIR—Just to get this clear: by coming here today are you advocating that the status quo remain or that the system change?

Dr Chapman—I do not like the present Constitution. I want the present Constitution changed whether or not we remain a constitutional monarchy.

ACTING CHAIR—But aren't you being unrealistic to say, 'Unless I get a Dr Ralph Chapman's version of a republic, I am going to oppose each and every proposal that comes up'?

Dr Chapman—You may say that if that is what you feel. I thought the purpose of this committee was that you wanted to hear some evidence about other kinds of ideas. If you don't, that is fine. I will go away.

Ms HALL—Please, don't go away. Stay with us.

ACTING CHAIR—The point I am trying to make—and I was not being disrespectful—is that we are precisely receiving that. We are receiving evidence of a number of different proposals. The nature of the democratic outcome is that it is never perfect to any individual.

Dr Chapman—Of course not.

ACTING CHAIR—It, of necessity, involves compromise and tweaking at the edges. Having regard to the fact that this is designed to be an accommodation of diverse interests, do the bills propose a model which has advantages over our current system?

Dr Chapman—Yes, and that is why I proposed some amendments to it.

Senator STOTT DESPOJA—I was going to ask for the same clarification—that is, whether or not you supported constitutional change per se as in that you would like to see improvements made to the current Constitution along the lines you have specified. I am curious about this notion—it is almost a purist sense of republicanism. I understand your point about a republican model—the people being sovereign—but aren't we living in a mishmash of political systems? Aren't we more a 'Washminster' system than a purist Westminster system, anyway?

Dr Chapman—Yes, if you take the notion about the Senate and so on. But if you concentrate on the notion of the relationship between a Governor-General, a parliament and the ministry, then you recognise that what you have is a system in which all of those are constrained by the notion that there is a sovereign over and above them all who is the monarch.

The question of the elections and the parliamentary process coming from the people does not actually combine the total thing. What happens when you get to a republic is—at least as

I understand it—that you get the people replacing the Queen, the monarch. That is where the sovereignty lies.

Senator STOTT DESPOJA—I understand, and I do respect that point. But I guess it gets backs to what Ms Hall was saying, and that is that there are so many different models. But I do understand the theoretical point.

Dr Chapman—There are not actually that many different models when you look at them.

Senator STOTT DESPOJA—No. I think we have been through most of them now.

Dr Chapman—That is not the case. There are very, very few. The only model I know of that actually combines Westminster with a republic is the Indian model. The Indian Constitution attempts to address it in a very specific and clear way, but it is about 3,000 pages long; it is enormous. If you want to look at what they have done there, there is an element of that combination there. I prefer the Irish Constitution, which, as I would see it, is a much cleaner solution than this one.

Senator STOTT DESPOJA—Does the Indian model have an effective transfer of that power, that sovereignty?

Dr Chapman—The Indian situation is so difficult and so volatile that it is hard to make any judgment on those sorts of things, really. You never know; it is not really possible.

Mr DANBY—I was interested in your comment that you are mainly concerned about the dismissal provisions in the sense that you are worried what a President might do to a Prime Minister. Most of the testimonies we have had to date have been—or to the extent I have been here—the other way around. It is a very interesting point. Can you draw out what you think might happen if a President sacked a Prime Minister? Wouldn't you get a new Prime Minister just going back to the House of Representatives, getting another vote of confidence and then, if the stand-off persisted with the President, getting rid of him and the provisions in the existing bill, or strengthened ones that we might consider, would then operate?

Dr Chapman—The situation may be like that; it might work like that. That would be the least offensive outcome. But in a situation where you would expect a President to take the enormous step of dismissing a Prime Minister, you would have a volatile political situation; it would not happen outside that volatility. Therefore, to think that the President would then appoint another Prime Minister who would be acceptable to the House would I think be quite unrealistic. It would be a situation in which that political volatility led to the President dismissing—

Mr DANBY—So, in a sense, you are suggesting that, in those circumstances, the President would cast a question over the majority in the House of Representatives, as embodied in the Prime Minister?

Dr Chapman—Yes, absolutely.

Mr DANBY—To say that he was acting in the public interest and that there was evidence that a majority of the House of Representatives was correct or something like that, and therefore he was taking action in the public interest?

Dr Chapman—Yes.

Mr DANBY—At a hearing in Melbourne, Malcolm Fraser suggested that, in the event of the dismissal of a President, it was imperative that an Acting President be appointed immediately.

Dr Chapman—Yes.

Mr DANBY—Do you have any comment on that?

Dr Chapman—The 30-day period is obviously problematic. But, the way I read it, there would in fact be an automatic stand-in.

ACTING CHAIR—In section 63.

Dr Chapman—Yes, that is right. Once the President had been dismissed you would have maybe the senior governor or senior whatever it was. That is in there. So it would not be a matter of having to wait to appoint an Acting President; it would be automatic. Somebody would step into the breach, and it would be done. I think that is a sensible situation.

Mr PRICE—Can I just follow up on Michael's point. In the situation where the President has dismissed the Prime Minister, is it not the convention that he then invites the majority party to see whether or not that party has a leader who can command a majority? But I suppose in the only example we have of dismissing a Prime Minister the Governor-General did not do that; he appointed an Acting Prime Minister on the basis that he would recommend or advise an election. Aren't those two procedures perfectly reasonable in terms of determining a constitutional crisis—or 'volatility', as you describe it?

Dr Chapman—Yes. In those circumstances it is the President who is creating the crisis; it is not the parliament. At that point, in 1975, there was a majority in the parliament for the government of the day. But that was never tested, and it should have been.

Mr PRICE—Not that I wish to defend Governor-General Kerr, but the ultimate test was taking the matter to the people.

Dr Chapman—Absolutely; no question about that.

Mr PRICE—Really, it is pretty hard as a democrat to argue against that as being an ultimate test.

Dr Chapman—No, I do not argue about that. Fair enough; that is fine. But if you take the scenario Mr Danby just mentioned, then you may find yourself in a situation where the President produces a Prime Minister who is not willing to go to an election.

Mr PRICE—He has to invite someone whom he believes will have a majority on the floor of the House of Representatives. But, if not, I presume he must appoint someone conditional on the fact that they will advise an election.

Dr Chapman—Where is it set down that he must do that?

Mr PRICE—Where are any of the conventions set down?

Dr Chapman—That is a convention now.

Mr PRICE—Is that not the strength of our system, and aren't we merely trying to transfer that?

Dr Chapman—Yes, I know that is what you are saying and that is the intention, but my argument is that it will not happen. I cannot make this point strongly enough: immediately you move from an external sovereign—over whom you have no control and over whom you have absolutely no knowledge of what that person is going to do in any situation at all, other than the knowledge that you operate within the conventional context—and you get to a situation where you have a President, however he is appointed, who is there in that context with no history of operating according to convention, with no background in that situation, no 300 years of sovereignty behind him—

ACTING CHAIR—Again, what about section 8 of schedule 3 that we have referred to?

Dr Chapman—Advice and so on.

ACTING CHAIR—No, it specifically refers to conventions continuing.

Dr Chapman—Yes, I know.

ACTING CHAIR—How can legislatures do more than specifically provide for such conventions to continue?

Dr Chapman—They cannot, except by writing them down and saying what they are, so that we then know.

ACTING CHAIR—We do not know now.

Dr Chapman—I know we do not, and that is the whole point. The whole point is we do not know now. But we allow it to happen because we know that the Queen is not going to travel down to Australia and meddle in our affairs. But if we have a President who is here, sitting on the spot, as a person who is elected to the position—indirectly or directly, whichever—then that person is not going to treat the situation in the same way that the Governor-General now treats the situation. The Governor-General is not our head of state; the Governor-General is a representative of the Queen. He is a delegate.

ACTING CHAIR—The best evidence from the academics that we have received is that the Queen would do nothing; the Queen would act on the advice of the Prime Minister.

Dr Chapman—That may well be right. In fact, by tradition, that has been the case. But that is not necessarily the case in terms of the President.

Senator ABETZ—If I understood you correctly, in response to a question from Mr Danby as to the need for an alternative person to be appointed in the event the President was sacked, you referred to the 30-day period. I was just wondering if you could expand on that, because my understanding is that, if the President is sacked, the President remained sacked throughout that 30-day period, even if the parliament—

Dr Chapman—Yes.

Senator ABETZ—So, what was your point in relation to the 30-day period?

Dr Chapman—The assumption of that sacking is that the President will just sit back and say, 'God, I've been sacked. I will go away and hide.' People with power like to retain that power. It is part of the nature of the political system. If you have power, you want to retain it. So my view is that during that 30-day period the President will be hassling around like mad, trying to get hold of sufficient support in parliament to prevent the Prime Minister dismissing him.

Senator ABETZ—But he is already dismissed.

Dr Chapman—Yes, I know.

Senator ABETZ—The point I was making was that he is dismissed.

Dr Chapman—Yes, he will not come back in the sense that he will not come back in the immediate future in that context. But we will have to go to another President—we will not sit with an Acting President—so that President, if he is anxious to retain power, will lobby and so on and increase the political volatility. It is not going to reduce it.

Mr DANBY—Wouldn't we simply resume the system of the Presidential Nominations Committee and the nomination having to be approved by two-thirds—

Dr Chapman—Yes, you would go through that process again.

Mr DANBY—In the meantime—I do not like to use the expression, but in the interregnum—you would have the Acting President there.

Dr Chapman—Yes, the Acting President would be hamstrung in terms of what he could do. He would be a lame duck President, if you want to put it that way.

Senator ABETZ—Why?

Dr Chapman—Because he would not be in a position—and he would not consider himself to be in a position to do this—to undertake anything in terms of executing the powers under the Constitution.

Mr DANBY—But he could not be removed either.

Dr Chapman—No.

Senator PAYNE—Is it not a matter that goes to a case-by-case scenario? I do not think you can make a generalisation that he could not or he would not.

Dr Chapman—Everybody is making generalisations to me about the existing system; I do not see why I cannot do it for that.

Senator PAYNE—In the context of what you just said, I was just asking whether—

Dr Chapman—Of course it is always case by case, but that is how conventions are built up.

Senator STOTT DESPOJA—On that issue, is there not a natural justice issue there—the idea of ratification occurring within 30 days, yet someone is effectively sacked, regardless? Is that an issue?

Dr Chapman—That is an issue of detail, which I would not want to go into. I think that in a situation of this sort that kind of arrangement may be appropriate; I do not know. But certainly the President knows what he is going into if he goes into it on the basis of the existing Constitution, so he knows that he is in for that. Maybe that is as much as you can say.

ACTING CHAIR—As a final question, isn't this argument about codifying the reserve powers, codifying the prerogative, codifying conventions, much like the argument as to whether you should codify our common law system? Isn't our common law system something to be cherished, in the sense that each case is looked at on its own facts? It is very, very rare that you get a case with identical facts coming up as a precedent. But, nonetheless, those precedents are used as guidance in coming to a just and sensible outcome. Would there not be a danger in anyone attempting to codify our common law that it would be too rigid and ham-fisted in addressing those specific facts as they occur each time?

Dr Chapman—I do not think, with due respect, that the parallel is there because the common law is decided by judges. In this particular context, who is going to decide it? Who is going to decide what the appropriate conventions are?

ACTING CHAIR—It will be the person exercising those.

Dr Chapman—Exactly, yes. They are the people who should in fact be subjected to some kind of control by precedent. That is why I am arguing for a constitutional court.

ACTING CHAIR—But there is none now.

Dr Chapman—No, but that does not mean to say that there should not be one.

ACTING CHAIR—There being no further questions, thanks very much for coming along, Dr Chapman.

Dr Chapman—Thanks very much.

[12.21 p.m.]

PAKULSKI, professor Jan (Private capacity)

ACTING CHAIR—I welcome Professor Jan Pakulski. As you have heard me advise previous witnesses, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would you like to make a brief opening statement before we ask you questions?

Prof. Pakulski—Yes. Thank you very much for the invitation. I am not a constitutional lawyer, nor am I a political scientist familiar with the intricacies of the Constitution and the political system. Being a sociologist, I am more familiar with the area of the conduct of the referendum and securing a decision which is made through the referendum which constitutes an informed choice of the public. This is one short reason why I agreed to appear before the committee.

It seems to me that there are three major conditions which make a referendum an informed choice of the public which need to be fulfilled in order to secure such an informed choice. They are: that the proper and correct information is given to the public before the referendum, that the questions of the referendum are clear and simple, and that the public is aware of their options in the consequences of making those decisions. These are the three areas of my concern. I welcome your questions and queries in those areas.

ACTING CHAIR—Thanks very much. In relation to the current proposed long title, which will be the question that people vote on, do you think it adequately reflects those points which you wish to make?

Prof. Pakulski—I have some doubts about it. It seems to me that a simpler question following the text of the constitution amendment bill would secure a better result in terms of informed choice. It seems to me that, in order to make such an informed choice, the public will have to have an option outlined. I think it is necessary to have the text of the constitution amendment bill, but it can be followed in the referendum by an option. For example, 'I approve the proposed alteration,' resulting in Australia becoming a republic, or 'I disapprove of the proposed alteration,' resulting in Australia remaining a constitutional monarchy. In my view, such an option would give a better and more informed choice to the public than the current arrangement.

ACTING CHAIR—Are there any questions?

Senator STOTT DESPOJA—Could you elaborate on the points you made, specifically in relation to the information process for members of the public. Could you give us your assessment of how that is going, the community feel and what needs to be done by either parliament or the various 'yes' and 'no' committees in order to ensure that people are properly informed before they get to the ballot box.

Prof. Pakulski—I am familiar with the preparation for the more extensive and intensive educational campaign which will precede the 6 November referendum. I welcome such a campaign, especially in the light of the current rather limited and, in many cases, misleading information, which is circulated through the mass media. May I give as an example coverage of the debate on Wednesday, 7 July in the *Australian* where a number of distortions were offered to the public. It is particularly important at this time, when uncertainties related to the processes of economic globalisation and political tensions make people very fearful of both changes and uncertainties of life. That might skew the public choice towards the maintenance of the status quo. My experience is that if people are uncertain that the change is good, and if the consequences of the change bring uncertainties, they will vote as Australians traditionally vote in a referendum—for the maintenance of the status quo. If that happens, we might blame ourselves in the future for missing an opportunity for the modernisation of our political system.

Senator ABETZ—So you in fact favour a republic?

Prof. Pakulski—I must declare a slight favour for the republican case. However, I hasten to add that I also take the argument, which has been summarised as 'don't fix it if it ain't broken', very seriously.

Senator STOTT DESPOJA—You sound most concerned that people make an informed choice. It seems to dominate your submission today—that people are appropriately informed. Do you have an opinion about deliberative polling in relation to this issue—whether it would be appropriate, influential or of benefit?

Prof. Pakulski—Yes. I think it would be entirely appropriate and most beneficial. Deliberative polling, which is planned in Australia before the referendum, conducted by Professor Fishkin and Professor Higley from the University of Texas, revealed the importance of information and consideration through debate in making an informed choice. The results of this experiment should be publicised very highly because they will be crucial from the point of view of securing conditions for informed public opinion.

Mr DANBY—Could you elaborate a bit more on what deliberative polling is.

Prof. Pakulski—In deliberative polling, the selected representative sample of the public is exposed, over a prolonged period of time, to the pro and con arguments. They are also allowed to discuss pro and con arguments and, following that, through the sequence of polling, the formation of their opinion is studied and revealed. At the end of the day, as a result, the first findings of Professor Fishkin's study are that the public forms a proper opinion that is a lasting point of view, which is not fickle, which does not change, and which the public is ready to defend.

Mr DANBY—How large is the sample and how long is the period of study?

Prof. Pakulski—It is not so much the size of the sample as its representativeness which is important. For consideration in the deliberative polling experiment, smaller samples are selected for practical reasons, but the size can be regulated depending on the time devoted to deliberations.

Mr ADAMS—Can you give me a little background on the actual polling. Do you have experience of this?

Prof. Pakulski—No, not first-hand; I have just read about the way in which these experiments have been done by Professor Fishkin in Texas, and I know Professor John Higley, who will be conducting the deliberative polling in Australia. From their report, the following picture emerges: while in normal polling you just ask people the question and rely on information from other sources, in deliberative polling you provide this information under controlled conditions, which means all the arguments—pro and con—are presented to the public. Then you allow also for the exchange of opinion, which allows people to firm up their point of view and opinion.

Senator PAYNE—You said, in relation to an informed choice of the public, that the questions need to be clear and simple. Much of the evidence that the committee has taken has been in relation to the long title—what might be added and what might be subtracted. There is a suggestion that it should include a reference to the nomination process by which the people can participate; that, rather than saying 'a President chosen by two-thirds of parliament', it would more accurately reflect the situation if that referred to 'approval'. How important do you think it is to contain each of those issues in the long title to provide as much information as possible?

Prof. Pakulski—I think it is very important that such information is provided, but it is also important that the question that follows is simple and indicates to the people the consequences of their choice—that is, either the institution of a republic or the maintenance of the constitutional monarchy.

ACTING CHAIR—I make the point that the long title will be the question. 'Referendum procedures bill' is not the correct title of the bill. We will require people to vote on the actual wording of the long title as the question. There will not be the long title as a summary and then a proposal of different questions; it cannot be, under the legislation. So the content of the long title is very, very important, because it will be the question. Given that fact, do you think there need to be changes to the long title?

Prof. Pakulski—Does the legislation allow for additional questions to be added?

ACTING CHAIR—It doesn't.

Prof. Pakulski—In that case, I think as much information as possible should be given in the title.

Mr DANBY—You mentioned before that there were some distortions in the media reporting of this debate on the referendum last Wednesday. I might say that I was at the committee hearing, and I was not sure that I attended the same thing that was reported on the Monday and Tuesday. Can you give me some indications of where you thought the distortions were in the reports that you examined?

Prof. Pakulski—For example, it was suggested that already Australia is a republic in all but name and that already the head of state in Australia is an Australian citizen—that is, the

Governor-General. I do not think this is correct information. Another example refers to the destabilising consequences of change, which also is not accurate. As Dr Ralph Chapman has already mentioned, I think the question of stability of Australian institutions is a matter of both those institutions and numerous conventions which allow the decision makers, the elites in Australia, to operate in a consensual manner. I do not think the change of the Constitution and the change of the legislation would endanger the stability in Australia.

Senator ABETZ—You said you came before us as a sociologist, not as a constitutional expert. On what basis do you make the assertion about Australia's head of state at the moment not being an Australian citizen, because there are some eminent constitutional experts that would, in fact, assert that—and, might I add, just as eminent on the other side of the argument arguing the opposite? It seems strange, with respect, that somebody who claims to have no expertise in the area and who is saying he is a sociologist would take one side of the argument as being 'true' and, by definition, therefore, the other side as being 'untrue'. It really sounds to me, with respect, like you have got into the debate and you are taking one side of the argument and not allowing these things, by debate, to be washed out and discerned by the Australian community.

Prof. Pakulski—When I swore allegiance, I swore it to the Queen. When we toast the head of state, we toast the Queen. When we send pictures of the head of state to the embassies around the world, we send a picture of the Queen, not the Governor-General. That is my experience and perception, and the basis on which I made the statement. I agree that this is something which is currently being debated, although it seems to me that the argument that the Governor-General is the head of state is misleading, although I emphasise I am not a constitutional lawyer.

Senator ABETZ—But isn't that the real danger, with respect—albeit you come to us with the greatest of intentions, saying that the debate has to be 'true' and true information submitted to the people? What public discussion is there within this country where there is a 'true' presentation of the facts? For example, on tax reform during the last federal election campaign, you could have got as many economists on one side as on the other. The same is true about constitutional change—there are as many people stacked on the one side as there are on the other—and you present yourself as a knight in shining armour, going through the middle—

Mr ADAMS—That is a bit harsh.

Senator PAYNE—I think that is unfair.

Senator ABETZ—With respect, you said, 'The true position has to be put to the Australian people,' and, by implication, therefore, you are saying that Bill Hayden, for example, is not telling the truth to the Australian people.

Senator PAYNE—I do not think you can extrapolate that out of Professor Pakulski's evidence.

Senator ABETZ—That is, with respect, just as unfair.

Mr ADAMS—With respect, Chairman, this is a statement; it is putting a political position; it is unfair.

Senator PAYNE—It is unfair extrapolation.

Senator ABETZ—No, it is not. If it is, I am sure Dr Pakulski will be able to defend himself a lot better than you will be able to, Dick.

Ms HALL—Just for the record, I think sociologists have something to add to the debate, and it is good to have a different perspective.

Senator ABETZ—Of course he has.

ACTING CHAIR—I am sure Dr Pakulski will handle himself well in response today.

Prof. Pakulski—Thank you very much indeed for your trust. My reading of the Constitution is that the Queen is the sovereign and the head of state, and I base my interpretation on that. Indeed, I do see the importance of many points of view floated in public debates.

ACTING CHAIR—You are not proposing—in fairness to you—that your point of view be included in the question; you are saying that as much information as will possibly inform people should be included.

Prof. Pakulski—That is indeed my intention.

Senator ABETZ—What do you mean by the term 'true' then, considering your opening comments? Because that is what I latched onto. If I have misinterpreted that, I apologise. But I thought 'true' basically means 'it is absolutely right, and there is no argument about it'. If you are saying 'true' is a bit fuzzy around the edges as well, then that is fine. But my interpretation of 'true' was like, with respect, when somebody came before us in Perth to tell us about the 'true republic', and there was no diversion from that; his was the only true republic. That is pretty definitive. Similarly, when you used the word 'true', I thought you were being pretty definitive and prescriptive as to the sorts of arguments that ought be allowed to go forward.

ACTING CHAIR—Again, you are not saying that you want arguments included in the question, as opposed to a statement of facts.

Prof. Pakulski—That is correct. My answer is that a statement of facts, rather than interpretations, should be included in the information.

Senator ABETZ—Are you aware that there will be a publicly funded yes and no case, which will go to every household?

Prof. Pakulski—Yes.

Senator ABETZ—Can I ask you then: who could better determine all of the best arguments for the yes case, and who could better determine all of the best arguments for the no case, than those people who want to advocate the yes and no cases?

Prof. Pakulski—My comments also referred to statements about the destabilising effects of change, in which case the establishment of truth is impossible and we can only rely on our experience and observation of similar processes in other countries. In my research and in the publications I looked at on constitutional change in about a dozen countries in eastern Europe following the collapse of communism, in most cases the change, which was instituted by consensual elites—that is, leaders who made up their minds about playing the democratic game—progressed in a smooth fashion.

ACTING CHAIR—What are the consequences if people down the track feel as though they were not presented with the full details and that they proceeded to make a decision on the basis of inadequate or incomplete information? Is there any social feeling that comes into play down the track?

Prof. Pakulski—The sociologists suggest that in such cases the institutions will lose their credibility and support, that the decline in the support and credibility of institutions is related to the situation whereby decisions were not made in a way which secured the informed choice of the people.

Senator ABETZ—Is that not really the whole argument in the body politic in Australia, that people say that if there was truly informed choice people would vote for tax reform or not for tax reform; they would say the current system works. 'Truly informed' is an academic concept, but does it exist in reality? That is what I am trying to get to.

Prof. Pakulski—We very often use such concepts, even in natural science. Physicists talk about a perfectly black body—the sun—when in reality that does not exist. We coined the name in political sociology, following the sociological tradition. We call them 'ideal type concepts', and this is an ideal type concept.

Senator STOTT DESPOJA—I am curious to know if you have done any analysis of the media presentation of this debate thus far or if you have any intention of doing that between now and the referendum taking place. Do you monitor the articles or debates that have taken place, because I am sure we would benefit from your—if not now—submitting some of those views? I would be very keen to see something that reflects that.

Prof. Pakulski—I do monitor that. A colleague of mine has conducted a study—not of the mass media coverage, but of the public opinion polls, based on Australian election surveys and on the national social science survey. I can submit the results of the study to the committee at a later date.

Ms HALL—I am very interested.

Senator STOTT DESPOJA—I would appreciate that.

Senator ABETZ—Yes, that would be very much appreciated.

ACTING CHAIR—Thank you very much for coming along. We appreciate your time. We will be handing down a report on 9 August, and we will send you a copy.

Proceedings suspended from 12.44 p.m. to 1.54 p.m.

STOKES, Mr Michael David (Private capacity)

ACTING CHAIR—Welcome, Mr Stokes. I advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would you please state the capacity in which you appear before the committee. You would also like to table a supplementary submission, would you?

Mr Stokes—I am here as a private citizen, but I am a lecturer in constitutional law at the University of Tasmania. I have not actually put in a submission in writing, but I do have a submission—

ACTING CHAIR—Is it the wish of the committee that the submission be accepted? There being no objection, it is so ordered.

Senator ABETZ—I was happy to move that my former lecturer's submission be adopted, but I do not think he would necessarily lay claim to my political views!

ACTING CHAIR—Mr Stokes, would you like to make a brief statement before we ask questions?

Mr Stokes—Certainly. I have commented on a number of things in the submission basically relating particularly to the constitutional amendments which are proposed. The first was about the long title of the act, because I noted that there has been some public debate—and I thought it was rather point scoring public debate—about the long title. It seems to me that the only way to avoid this type of point scoring is probably to have a title which is a bit longer but which does attempt to really summarise, as impartially as possible, what the act actually does. I have attempted to do that there. I think it is doubtful whether these changes actually create a republic but it is clear that they abolish the monarchy, so, instead of talking about a republic, I put it in that form—

Senator ABETZ—Is there a halfway house?

Mr Stokes—I do not think that it particularly matters, but certainly I was talking to a couple of American friends of mine the other day and they said, 'This is not a republic.' I thought it was probably better to put it in the negative. It clearly abolishes the monarchy and it also abolishes the office of Governor-General. Then it establishes the office of President of the Commonwealth of Australia. It confers on the President the legal and conventional powers of the Governor-General. I included the words 'legal' and 'conventional' there because I noted that there has been some comment that the President would not be in the position to actually exercise the political power of the Governor-General because of the ease of dismissal. I thought it was better to make it clear that these are legal and conventional powers rather than practical, everyday political powers. 'Provide for the appointment of the President by a two-thirds majority of the members of the Commonwealth parliament'—I thought, once you start adding details to that, you can go on forever. There are so many

aspects to the appointment and dismissal which people might see as controversial. So, for brevity, I thought it was better just to have that.

ACTING CHAIR—Would you like us to ask you questions on these separate points before we move on to the next?

Mr Stokes—Yes, if that is convenient for you.

ACTING CHAIR—It may be convenient, actually.

Senator ABETZ—Just as long as we do not lose track of time, in fairness to the witness.

ACTING CHAIR—Yes. Are there any questions about the long title?

Senator PAYNE—I know you said that it is important not to add too much information or too many details, but one which has been discussed at length around this table over the past few days is the nomination process—to perhaps insert something about the calling for nominations and the consideration of those. In point 5 of your suggestion, you have the words 'appointment by a two-thirds majority', which we have discussed at length based on the current long title saying 'chosen'. Should it be 'approved' as opposed to 'appointed' by the parliament? They are two things I would ask you to comment on.

Mr Stokes—I think it would have to be either 'appointed' or 'chosen'. If it is merely 'approval', that means the appointment is by someone else. For example, in America officers of state are appointed by the President and then approved by the Senate. The use of the word 'approval' really indicates that there is somebody else making the appointment, so I think it has to be either 'appointed' or 'chosen'.

Senator ABETZ—Can I just put this to you: in fact, a nomination will get up only if chosen by the Prime Minister and Leader of the Opposition. Thereafter, the role of the parliament is only a veto power. The parliament does not actually do the choosing in that sense, does it? It approves the suggestion being put by the Prime Minister and the Leader of the Opposition.

Mr Stokes—You could put in 'nominated by the Prime Minister and the Leader of the Opposition'. So it could be 'appointment of the President by a two-thirds majority of the members of the Commonwealth parliament of a nomination of the Prime Minister and the Leader of the Opposition.' That could certainly be added, and I think that is reasonably accurate.

It was difficult to know exactly what to put in and what to leave out of that. I left that point out, which I can see is reasonably important, but then so is the dismissal, effectively, by the Prime Minister. The nomination process could also be seen as reasonably important, so I would not object to that going in, but there is the question of brevity.

ACTING CHAIR—In one sense, the method of appointment is going to be a regular occurrence, whereas the occurrence of a dismissal will be rare.

Mr Stokes—From my point of view that was extremely important because it seemed to me that there was a lot of talk about the Governor-General: 'If it ain't broke, don't fix it.' The one situation where, by the evidence of the Governor-General in office at the time, that office was 'broke' was in the method of dismissal. What I thought was really wrong with 1975 was not that the Governor-General intervened but that he could not tell the Prime Minister beforehand the nature of the proposed intervention. That was because of the lack of tenure and, of course, this actually exacerbates the problem.

ACTING CHAIR—Will you want to move on to the dismissal issue down the track?

Mr Stokes—Yes.

ACTING CHAIR—Would you like to go on to the next topic of your presentation—'The Office and title of the President'?

Mr Stokes—It seemed to me that the Constitution should probably indicate the title of the President. There are two choices: the President of Australia or the President of the Commonwealth of Australia. Given that the states are to retain, in one way or another, their own separate 'head of state'—for want of a better term—it seemed to me that the better title would be President of the Commonwealth of Australia. I thought it would enhance the status of that title and probably the status of the President if the title were actually in the Constitution.

ACTING CHAIR—Are there any questions on that issue? No, that is accepted. The next point is section 59, 'The President to act on advice'.

Mr Stokes—I thought there was a major constitutional question here about existing understandings of how the Governor-General acts, and that is whether there is really any situation in which a Governor-General would be able to act on the advice of one minister who was not the Prime Minister. There are some situations, for example, the calling of a general election, where the convention is that the Governor-General acts on the advice of the Prime Minister. But I thought it would have been extremely improper for the Governor-General to have acted on the advice of a minister rather than on the advice of the Executive Council.

Mr DANBY—Wasn't the idea that that minister be appointed by the Executive Council?

Mr Stokes—What is the quorum of the Executive Council? Is it two?

Senator ABETZ—Two. I have been to those meetings once or twice where we advise His Excellency on what to do in signing off on bills and regulations, et cetera. But, as I understood it, a minister can also seek—

Senator PAYNE—Advice on the administration of a department, as I understand it.

Senator ABETZ—And appointments? That is why it is in there like that, albeit some people have pointed out to us that there could be a situation where a minister could advise

the Governor-General or the President, 'Don't sack me', whereas the Prime Minister could be advising a sacking. So there could potentially be conflict.

Mr Stokes—I wondered whether that was in for the administration of a department, but even then I thought there was a reasonably strong convention that, where the power was exercisable by the Governor-General, that was an indication that that question was really one for cabinet rather than just for the minister and that therefore it was appropriate that it be the Executive Council.

I think that used to be the case with statutory powers. It may have been fairly much abandoned. You blokes work with it every day; I just read what happens. The High Court have certainly indicated that, for example, in the cases where they were discussing whether the Governor-General's discretion is reviewable, they make that clear distinction that the vesting of the power in the Governor-General is an indication that it is a cabinet matter, whereas, when the power is vested in the minister, it is not. If it is a cabinet matter, even if it is departmental, it is really appropriate, it seems to me, that it go through the Executive Council rather than a particular minister.

ACTING CHAIR—Is there anything else in respect of section 59 about the concept of acting on advice? At the moment, in our current Constitution, there is no specification that that is to occur. It occurs through custom.

Mr Stokes—I really think it is good that it has been put in, because the more you can make these rules public—in the sense of their being in the Constitution so that the Constitution reflects what happens in reality—the more ordinary people are going to understand what goes on, particularly with respect to the Constitution. It will lose that mysticism that it has a bit at the moment. If you look at the American one, you still get some idea of what happens by reading it, whereas, in Australia, you would think the Governor-General was some sort of potentate.

ACTING CHAIR—Sure. Are there any other questions on this section 59 issue?

Senator ABETZ—There was an interesting question that you, Mr Acting Chair, raised with Dr Chapman before lunch. Would you say the same about the common law—that it is not codified, yet there are certain principles and standards by which cases will be decided which do allow for growth and for individual circumstances to be taken into account?

Mr Stokes—Maintaining all of these sorts of under-the-table, conventional practices certainly does allow for change in that sense. If you look at what has happened in America, there has been a huge growth of convention as well. I do not think it stops that. But, here, the fundamental document setting out what are supposed to be the ground rules of government really should reflect reality; otherwise, the message that goes out to members of the public is, 'This is not for you. Leave this to the experts because you're not meant to understand this. It's written in a way that you can't understand. It's a mystery and only for people with expert training.'

Senator ABETZ—So is that a deficiency of our common law system generally?

Mr Stokes—Perhaps, but the common law generally is not quite so fundamental. It does not have quite the basic status of setting out the ground rules of government that the Constitution has or should have.

Senator ABETZ—It is not that we are without a constitution. There is a fair bit in the written document as to how it works.

Mr Stokes—Yes.

Senator ABETZ—Those areas that are not talked about specifically within the Constitution are those that deal with those circumstances that we hope would arise once every 100 years.

Mr Stokes—Sure. Some parts of it are absolutely positively misleading, if you read it at face value. For example, if you take realistically the idea that ministers of state are appointed at the Governor-General's pleasure, it suggests that the Governor-General can appoint ministers, the only limitation being that they must be members of parliament, and that there is no requirement of parliamentary responsibility at all. As to the Governor-General as Commander-in-Chief of the armed forces: we do not want the silliness that happened in 1975 where certain irresponsible people were able to suggest, to a public who did not know better, that the Governor-General was on the point of calling the Army out. That sort of thing seemed to me to be irresponsible but was made possible by the fact that the Constitution does not explain what it means on its face.

ACTING CHAIR—I suppose there are a lot of anachronisms there. For instance, the power of the monarch to disallow a bill or an act within 12 months has never been used.

Mr Stokes—That is right.

ACTING CHAIR—Do you think it is better that those anachronistic provisions are modified or removed?

Mr Stokes—To a great extent, it would be. I thought one which could have been cleaned up here fairly easily, particularly given that section 59 does have these requirements of advice, is that some of the other provisions about the executive refer to the distinction between the Governor-General acting on the advice of the Executive Council and the Governor-General not acting on the advice of the Executive Council, which basically goes back to the time of George III. It was maintained in our existing Constitution because the drafters in 1900 did not want to be thought of as ignoramuses when it was looked over by the British Colonial Office. They wanted to show that they understood the distinction, which goes back to George III, between those powers which legally had to be exercised on the advice of the Executive Council and those which did not. Of course, by convention, they are all exercised on the advice of the ministers. I thought there could have been some cleaning up there. It is a bit odd, when you have that section 59, that some of the powers of the Governor-General are exercised on advice of the Executive Council and some are not.

ACTING CHAIR—It is all bar the reserve powers in 59, isn't it?

Mr Stokes—Yes. Still, there are examples in some of the provisions, but I would need some more time to actually find them, I think.

ACTING CHAIR—Section 5 on the prorogation and dissolution of parliament is not on advice.

Mr Stokes—That would generally be on the advice of the Prime Minister anyway, wouldn't it?

ACTING CHAIR—Yes, but there is no specification. I am not sure about the military one.

Mr Stokes—The military one just says 'Commander-in-Chief of the armed forces'. I know there are some powers in here which are exercisable on advice and others which are not.

ACTING CHAIR—I think another witness has made that point to us as well.

Mr Stokes—I do not particularly want to ferret around for them at the moment.

Senator ABETZ—Could I have the indulgence to ask one quick question on section 59. You do not address it, but I would be interested in your view. In the third paragraph, we are told that, in effect, the President will be clothed with the powers of the Governor-General. It says:

A power which 'was a reserve power of the Governor-General'. . . in accordance with the constitutional conventions relating to the exercise of that power.

That is framed in the past tense. As I understand it, the reserve powers and the conventions have been evolutionary in nature. Does this mean that they will be snap-frozen, not to be added to or detracted from by the evolutionary process of the law, as a result of this terminology saying that it was a reserve power at the time?

Mr Stokes—Realistically, I do not think so. The content of the reserve powers is always going to be the subject of argument in particular cases. You are very likely to get mirror images of events which have happened in the past. The way that they get adapted and modified is when you have a slightly different situation; what do you do? I think that process will inevitably continue, simply because there is really no alternative.

ACTING CHAIR—Is section 8 of schedule 3 consistent with your view? It says 'to the effect that nothing in this proposed bill prevents conventions developing'. It is a very inaccurate recording, but it is along those lines.

Mr Stokes—I think section 8 actually makes it fairly clear. I had forgotten about that. It makes it fairly clear that, even though the word 'was' there is in the past tense, these conventions are seen as ones which are going to evolve. I think that is inevitable because there will always be new situations.

Ms HALL—I think the section you were looking for in the Constitution was 68. If you want to touch on that, you can, but I also want to talk to you a little bit about section 62.

ACTING CHAIR—We are moving on to that one now. I was just doing it in stages. Are there any more questions on section 51?

Ms HALL—No, I thought you had moved on.

ACTING CHAIR—We will move on to your next subheading, section 62, if that is convenient.

Mr Stokes—It seems to me that section 62 of the proposed bill—'Removal of President'—provides for the removal of the President by the Prime Minister. That really was not the recommendation of the Constitutional Convention. Section 62 does reflect that, to this extent. The recommendation of the Constitutional Convention was that if the President were removed by the Prime Minister then that removal, even if parliament voted not to accept it, was effective—so the President was gone. But it also made it clear that if parliament voted against the Prime Minister's removal, that is a motion of no-confidence. It seems to me that that has to be in section 62 of the Constitution; otherwise there is always going to be a very strong argument that, by excluding it, we have deliberately chosen not to adopt the recommendation of the Constitutional Convention on that point. It seems to me that that is absolutely crucial, because if you are going to have any reserve powers in the hands of a President, which this provides for—and they will particularly apply to situations of dismissal—you have to provide for some sort of tenure in the hands of the President. Otherwise the President will be forced again into secrecy. That was Sir John Kerr's justification for secrecy: 'I could have been removed, therefore I could not take the risk of warning the Prime Minister.'

Ms HALL—I have a question on section 62. In the first line of your paragraph about section 62, you say:

Under the proposed s 62 the President may be removed by the Prime Minister.

Is that the situation now?

Mr Stokes—That will be the situation under the legislation going to a referendum.

Ms HALL—No, currently. Under our current Constitution, the Governor-General can be removed by the Prime Minister.

Mr Stokes—The current situation is that there is no specific provision about removal, but it is generally accepted that if the Prime Minister contacted Her Majesty, she would accept the Prime Minister's advice. But it could take a period of weeks.

Ms HALL—Malcolm Fraser put to us in Melbourne that when the Prime Minister contacts the Queen and says, 'The Governor-General is to be removed' and the moment that he advises the Governor-General that he or she is to be removed, that person is no longer Governor-General.

Mr Stokes—That would have to be wrong, because the Governor-General has a commission from the Queen—the monarch—and that commission remains in effect until the monarch revokes it.

Ms HALL—He stated that, effectively, he would be just a token. He would have no power. He could refuse to accept the Prime Minister's direction, but it was just a formality and his action would very quickly be endorsed by the Queen, who would just rubber stamp the proposal of the Prime Minister. In saying that, can I ask you whether you can give me an example of when that has not happened in the past?

Mr Stokes—No. We do not actually have an example of this situation, which makes it difficult. There has been a situation in the past—and admittedly you have to go back to 1930. There was a dispute in 1930 which went on for some considerable time, between the monarch and the Australian Prime Minister, over the appointment of the Governor-General. The appointment recommended was Isaac Isaacs, by Mr Scullin. Certainly at that time—and admittedly it was just before the passage of the Statute of Westminster, but it was after the Balfour Declaration—the monarch acted as if he had discretion in the matter and eventually bowed, because Scullin kept insisting.

Ms HALL—In actual fact, the monarch agreed with the Prime Minister's recommendation.

Mr Stokes—Yes, but not immediately, and the monarch certainly acted as if in that matter he had the power to warn, encourage and advise the Prime Minister. To use the technical language which is often used to refer to these matters, it is the residue of discretion in these matters which is vested in the monarch or the monarch's representative. I think if the Prime Minister wanted to sack a Governor-General, you would have the monarch again exercising the power to warn, encourage and advise.

Ms HALL—Can you give me an example of where that has ever happened?

Mr Stokes—With the dismissal of a vice-regal officer?

Ms HALL—Where the Queen has ever even questioned the Prime Minister on such a thing in this country?

Mr Stokes—No, it is a bit difficult here, because we can go back to 1930, where the King certainly questioned the Prime Minister.

Ms HALL—But they bowed to the Prime Minister's wish.

Mr Stokes—Eventually; not immediately, though. This is the point.

Ms HALL—But did not feel in the long run that they could disagree with the wish of the Prime Minister.

Mr Stokes—No, in the long run, that is right. But they were certainly given enough time for the Governor-General to have sacked the Prime Minister in the interim.

ACTING CHAIR—I am just conscious that the way I have been going through may have actually prevented Mr Stokes from completing his summary. We might do that and then come back, if we have got time. We will move on to proposed section 127.

Mr Stokes—It seemed to me here that the definition of 'a state' was too narrow. This is only a fairly minor point. Why it seemed to me to be too narrow is that, if we go to that definition, it says:

The States means the original States, and such territories as may be admitted into or established by the Commonwealth as States.

The term 'territories' would seem to have in mind, particularly, the Northern Territory, for example. Under the Constitution at the moment, that does not seem to reflect the possibilities for creating new states under sections 121 and 124, which would first of all allow for a state which was not part of Australia at the moment—for example, New Zealand. In particular, section 124 allows for the creation of a new state out of the territory of an existing state—a state of North Queensland, for example. There have been movements at various times in Australia to create new states out of the territories of existing states. It just seemed to me that that definition of a state was too narrow and inconsistent with the constitutional possibilities for creating new states. I thought for consistency that I would suggest a change. That is really all I wanted to say about that one.

Finally, this is a little difficult because I am not quite sure how to amend this one, but I am sure a drafter could do it. Recommendation 31 of the Constitutional Convention in part was that any provisions of the Constitution Act, the covering clauses, which have continuing force should be removed into the Constitution. Certainly, some constitutional experts believe that covering clauses 3 and 4 still have continuing, and quite crucial, force, and they have not been removed into the Constitution.

Unfortunately, I did this fairly quickly because I have a lot of other things on my plate at the moment, but I know there was an article written about secession a few years ago. It may have been by Greg Craven, but I do not think so. I suspect it was not by Craven, but at any rate the argument was that the provision of the Constitution which prevents a state seceding, and makes it illegal for a state to secede, is the continuing effect of covering clause 4. Covering clause 4 refers back to covering clause 3—and this is why I bracketed the two of them—and says:

The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed.

His argument was that the word 'after' is crucial there, because the effect of section 4 is what gives the Constitution its continuing effect. It not only takes effect on the day proclaimed—and this is the day proclaimed for it to take effect in section 3—but it continues, in effect, after. So he saw covering clause 4 as being quite crucial in maintaining the continuing effect of the Constitution. Also, combined with clause 3, it prevents any argument that the states have a right to secede by maintaining the continuing effect of the Constitution over them.

Personally, it is not a view that I support. I think the Constitution is maintained in operation by covering clause 5 quite effectively by itself, and that has been brought into the Constitution as a new section—section 126. But even though it is not a view that I accept, I think it was important to point it out to the committee.

Senator ABETZ—This question is in relation to removal of the President and your suggestion that the Constitutional Convention suggestion be included. In practical terms, wouldn't it stand to reason that, if a Prime Minister could not command a majority on the floor of the House on the dismissal of a President, that Prime Minister's hold on office would be similarly tenuous and would therefore undoubtedly be facing a motion of no confidence anyway? So putting it in will have no practical effect.

Mr Stokes—There has to be a strong argument that a Prime Minister who cannot get a vote on a question like that is in deep trouble, to put it mildly.

Senator ABETZ—So would those words add anything?

Mr Stokes—Yes. It makes it clear that there are constitutional consequences for a Prime Minister who does this. It will make it clear to the average layperson in the street that that is the case. I would personally like to see it spelt out in black and white for myself. I do not think there can be any real objection on the grounds that the Prime Minister is not recognised in the Constitution, because now he will be, with particular reference in—

Senator ABETZ—I understand that argument.

Senator PAYNE—In my reading of the submissions so far and in the number of hearings I have attended, I am not sure that anybody has referred to the definition of the state issue before. For what it is worth, I would say that the value of these hearings in many ways is the raising of issues such as that one. I think that is very valuable for our consideration. So thank you, Mr Stokes, for particularly pointing that out.

ACTING CHAIR—I think that is right. Are there any further questions?

Mr Stokes—Can I raise one little issue which I think needs to be raised in a public forum. It is a bit off the point of your committee's major functions, but it needs to be raised. I have concerns about the constitutional position of our monarchy, if we remain a monarchy. There are two crucial issues. The first one is absolutely clear: if the Queen collapses and is incapacitated but remains Queen, a regent cannot exercise her constitutional functions under the Constitution. There really would need to be a constitutional amendment to allow that. I think that is a fairly important issue.

ACTING CHAIR—That is significant, isn't it, because unless the Queen abdicates, there cannot be a successor. There would have to be a regent until she died.

Mr Stokes—The British have regency legislation which applies for them but, to the best of my knowledge—and I have not been able to get to all the documents to check this out—they advised Australia to pass its own regency legislation. But nothing was ever done because of the constitutional difficulties.

Senator ABETZ—When was that?

Mr Stokes—In 1937.

Senator ABETZ—That is why I do not remember it.

Mr Stokes—It was around the time of the crisis over Edward VIII.

ACTING CHAIR—That is an interesting point.

Mr Stokes—And the other is that we really have no easy mechanism—it would be fairly complicated—to change the law of succession to the throne of Australia if the British decided to change theirs.

ACTING CHAIR—It is not possible, as I understand it, for us to unilaterally do that.

Mr Stokes—Yes, we can, by amending covering clause 2 of the Constitution Act.

ACTING CHAIR—Could we?

Mr Stokes—Yes. We could amend that.

Mr DANBY—We could have a continual monarchy in Australia if the British abolished theirs?

Mr Stokes—If they abolished theirs, we could. But if they changed the law of succession, as they are currently proposing to do, it would be rather foolish if we had a monarchy and ended up with a different person.

There are all sorts of ridiculous things. One change the British must consider is getting rid of an archaic 18th century piece of legislation called the Royal Marriage Act. If that applies in Australia, the effect of that is that, if the marriage of a member of the royal family is not approved by the monarch under the Great Seal and the approval lodged with the Privy Council, then the marriage is void and all the children are illegitimate. Of course, we do not have the status of bastards any more in Australian law, but we could have. The only bastards in Australia would be the royals.

Mr ADAMS—I think the House of Lords has got 40 per cent in that regard.

Mr Stokes—It would be a bit odd. The other really interesting thing is that any person who attends a royal marriage which does not go through the correct procedures is subject, under Australian law and the Royal Marriage Act, to outlawry or imprisonment for life. The penalty is forfeiture of all property to the Crown, outlawry for life or life imprisonment. They have never been able to bring a prosecution because nobody has ever come forward as a witness because they are immediately subject to the penalties. Of course, if it is not an offence in British law, and you go along and attend the royal marriage as official Australian delegates and we still have this legislation in Australia, you are in trouble. We should have the power to clean these things up and it should be regularised if we remain a monarchy.

ACTING CHAIR—What is your knowledge of the rules of succession? Are you any good on that?

Mr Stokes—Reasonably.

ACTING CHAIR—As I understand it, the main criterion is that a monarch has to be an heir of the body of Princess Sophia of Hanover?

Mr Stokes—That is right.

ACTING CHAIR—That is a precondition?

Mr Stokes—Yes.

ACTING CHAIR—And there are other preconditions relating to religion as well?

Mr Stokes—Yes, that is right.

ACTING CHAIR—What are they?

Mr Stokes—If the monarch is a Catholic or marries a Catholic, then everybody is immediately relieved of their allegiance. So the monarch ceases to be monarch and, in fact, you are entitled to rebel at that stage, or at least your allegiance to the monarchy ceases. That is the Act of Settlement.

Ms HALL—Can I ask a side question? With our antidiscrimination laws, it is wrong to discriminate on religious grounds.

Mr Stokes—The whole principles of the law of succession—and this is one reason why we should be in a position to change ours as the British do if we want to remain a monarchy—are based on religious prejudice and sexism, because boys succeed before girls.

Ms HALL—That is exactly right.

ACTING CHAIR—Is that still the case? There was an attempt to change that.

Mr Stokes—To put women on the same basis?

ACTING CHAIR—Yes.

Mr Stokes—I know that the British are proposing to do so, but I do not think they have done it yet.

ACTING CHAIR—It would require the consent of all dominions, wouldn't it?

Mr Stokes—No, it would not. That was only a convention and it is now recognised that that convention is dead. So the British can change, and they will do it without reference to

us. But, unless we are in a position where we can change, at that stage we have got different laws of succession.

Mr DANBY—Imagine that Charles III was about to accede to the throne and that in Britain there was a period of great unpopularity, so that they decided to change royal houses and reinstitute the Stuarts, or something like that. Would that place Australia in an absurd position?

Mr Stokes—The consequences of that would be that Charles III would be Charles I of Australia.

Mr DANBY—Unless we change the laws, the House of Windsor would continue here with the Stuarts ruling in England?

Mr Stokes—Yes. A consequence of the Australia Act is that the law of succession to our throne can no longer be changed by the British for us. We have to do it for ourselves. So if we remain a monarchy—if that is the people's vote—we really ought to look at these issues. I thought this would be a good opportunity to put them on the public record because there are some really quite absurd possibilities.

ACTING CHAIR—Thank you very much for coming along and giving us your knowledge.

Mr Stokes—Thank you.

[2.35 p.m.]

HERR, Dr Richard Allen, (Private capacity)

ACTING CHAIR—I formally have to advise all witnesses that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would you like to make a brief opening statement before we ask questions?

Dr Herr—Yes. I apologise to the committee. Today is the first day of the start of university and I apologise for not giving you the courtesy of a written submission. I just have some thoughts and, if you do not mind, I will share those with you. If they are relevant, fine; if they are not, we can go for an early coffee.

The two bills I have looked at are somewhat repetitive. On the long title of the Constitution Alteration (Establishment of Republic) Bill 1999 I find it odd that it refers to the President chosen by a two-thirds majority. Using a plain language interpretation of the act, none of the dictionaries I consulted regarded an act of affirmation as a choice. The old salts at uni used to do that. You would put up one candidate and, if enough people struck out the name, the party went back and tried again. But most of us did not regard that as a genuine act of choice. I think there is a problem in that concept there of choice. It seems to me in that the way the bill reads that, in fact, the choice is made by the Prime Minister, seconded by the Leader of the Opposition, but the choice is made by the Prime Minister and then the parliament affirms it.

The reason for raising that issue, along with some of the other ones, is simply that one suspects with the passions in Australia on this issue—not necessarily with these two bills but over the issues—that somebody is going to raise litigation about it. In terms of what you are doing at least, the bill should not have easy points of criticism on the basis of a misunderstanding. That is independently, of course, of any confusion that might arise from the referendum that would follow from the bills. That was one of the things that struck me.

I was concerned also later in the bill by the way in which the affirmation of the choice was to be pursued. As I read it, it does not really provide for what happens if it fails. If the process fails, do you go back to square one, back to the committee, back to the Prime Minister or what? Again, these are things that you would not expect normally to happen. We would assume that in most cases it would not get to the stage of going to the parliament for affirmation, unless the Prime Minister and the Leader of the Opposition were in agreement on who ought to go forward. But then again, 1975 probably should not have happened either, but it does. There is certainly no point in making a bill weaker than it should be. So it seemed to me that in section 60 something should be done to make it clear what precisely happens in the case of a failed affirmation by the parliament. It may be that a name goes forward during the period of time that it is under debate or examination by the two houses, something comes up and they knock it back.

ACTING CHAIR—I think the currently occupying President would stay.

Dr Herr—Sure. Once we get a first one, but it still does not say at what point the process starts over again. Does it start over again with a committee? Do they reopen all of the possibilities for nomination, or do they just go back to the short list and say to the Prime Minister, 'Your first candidate failed. Do you want to try again?' It is not clear that it would be treated like the short list for a job.

ACTING CHAIR—That may be a reason for expressing the fact that the Prime Minister has the discretion to select from the list of candidates, and the President may nominate from that list.

Dr Herr—That is right.

ACTING CHAIR—That may overcome that problem.

Dr Herr—It may, but it also raises points which will certainly come up during the referendum debate, and that is the huge degree of discretion the Prime Minister has. It is a point I want to come to with the second proposed bill as well. But, certainly, the area of discretion for the Prime Minister is fairly large in the bill.

Again, it seems to me that to that extent, in so far as one chooses the head of state to help reflect the community and have the legitimate support of the community—which is what the objective of the whole process is—the more it can be tarnished by particular partisan or unworthy influences, whether they are partisan or not, the more it raises doubts and people wonder whether or not the process was flawed. This is why you are looking at the bill and are asking for advice on it, so that you can pick up errors that might have crept in, see why people like me misunderstand it and make sure that the next time around we understand it better.

Ms HALL—Would you say that the Prime Minister at this particular time has an even greater degree of discretion than he would under the proposed legislation?

Dr Herr—Yes. Clearly, at the moment the Prime Minister, in recommending the name of an individual to become Governor-General, has a huge amount of discretion, more so than this provides for. Certainly, it is not as transparent. Again, your point is not to make a flawed process only slightly less flawed. You want to tidy it up so that it does not create again the sorts of divisions that might divide the people of Australia unnecessarily, because the parliament did not do a good enough job of drafting the instruments by which we get the head of state. Again, I am expressing personal opinions here, but I find that a source of concern.

Another area of concern is the removal of the President. This is not really any different from the present system at all, it seems to me, except it is slightly more transparent, I suppose. It is entirely within the Prime Minister's office to remove a President. That seems to me to be a matter of some concern. I agree with my colleague John, whom you have already had testimony from, I believe, on the point that at least there ought to be a requirement of some statement. The idea that it has to go to the parliament or House of

Representatives, with the exception of two cases, does not change the fact that at least under the act it is not clear that, if the parliament disagrees, what happens? Presumably, it just proceeds. It goes ahead.

We now know that the parliament disagreed and, presumably, if a Prime Minister feels strongly enough about it, there will be a dissolution and maybe the public can vote on it. But it is not as if the act itself says, 'If there is a disagreement, there has to be some resolution of the disagreement.' As it looks here, at least the Prime Minister wins; the President is sacked and the President stays sacked.

Ms HALL—Would I be correct in assuming that you see the fault as being that it is maintaining the current system? Even though, under the proposed legislation it will be a lot more transparent, you feel that we would be better served if we had something that moved away those ambiguities and areas where disputes could arise?

Dr Herr—In the case of a situation like Papua New Guinea today, where maybe the Prime Minister deserves to go rather than the President, stacking the deck in favour of a Prime Minister is not a sensible thing to do.

Ms HALL—But do you see this as mirroring the current situation?

Dr Herr—To some degree, yes. It does at least have the same problem that we were looking at in 1975 when Sir John Kerr said, 'I had to sack the Prime Minister otherwise he was going to sack me.' That sort of thing. In this case, it is solving the problem to some degree by saying that the Prime Minister will be able to carry out the removal no matter what. It is the 'no matter what' that bothers me.

Basically, yes, we want a head of state that is removed from the political process to a reasonable degree, but equally, because of the way the Constitution is going to be changed or not changed, there are some powers that the President will have. It just seems strange to exacerbate a problem by ensuring that perhaps someone who is pursuing mischief is guaranteed of being able to pursue it completely. I do not think it matters whose side you are on in this regard. It overhangs the presidency to the extent that every President would know that, at the end of the day if they do not please the Prime Minister and the Prime Minister is willing to wear the heat, the President can be sacked.

Ms HALL—Would you rather have a system of impeachment?

Dr Herr—No. I am quite happy to have a relatively simple procedure. What I would like to ensure is that at least somewhere in the process the President gets a chance to defend him or herself and say, 'Well, this is why we acted as we did.' It just does not seem to me that it is there. When you get into the mechanisms for doing it, there are problems. But, on the other hand, the idea that it says that it must seek the approval of the House of Representatives, perhaps there ought to be—

ACTING CHAIR—Would you feel more comfortable if there were specific provisions that disapproval of the Prime Minister's actions constituted a vote of no confidence or something along those lines?

Dr Herr—Yes. I do not want to pick on Papua New Guinea unduly, but it is in the news at the moment. If a President were sacked doing his or her duty, and the Prime Minister was thinking, 'I have another 18 months to ride this out. I will just sit tight and my party has got to stick with me, because if they do not, we are all down the gurgler,' things could be swept under the carpet. I do not think it is going to happen all that often. It would be a matter of very great occasion for the state of Australia if the head of state were to be removed. I do not think it is too much to say that there ought to be some mechanism where at least the people can decide the merits of it fairly soon.

Senator ABETZ—Wouldn't the tactic, nevertheless, be that, if the Prime Minister could not command a majority in the House of Representatives in relation to the dismissal of the President, then the chances are that the Prime Minister could not command a majority in relation to a vote of confidence, and, therefore, adding those words would not be of any material difference?

Dr Herr—Again, it is a case of justice not only being done but being seen to be done. There is an element there where it is appropriate and reasonable to say that this is an office of considerable respect. One does not want to elevate it to the level of regicide, but you are removing the head of state and you want to make sure that you do it for reasons which are likely to—

Senator STOTT DESPOJA—What was that?

Senator ABETZ—Regicide?

Dr Herr—Sorry. If I did not speak clearly, I apologise.

Senator STOTT DESPOJA—I want to go back to your earlier point in relation to justification of the Prime Minister's action. Are you advocating minimal justification in the form of a written statement? Also, do you see it as appropriate for both houses, in either separate or joint sittings, to be involved in the ratification of the dismissal?

Dr Herr—To a certain extent, I am persuaded by the American Supreme Court's decision on the role of the Senate in ratifying presidential appointments. They came to the conclusion that, while you needed the advice and consent of the Senate to appoint, basically the power to appoint was also the power to fire. You could not go back, and the Senate did not have a right to protect a thorn in the President's flesh because they liked the mischief that was being created.

Equally, it seems to me on reading this that there are some ambiguities. You can see that outlets are provided all along the way, so a Prime Minister can be in trouble with a President. The President might be behaving honourably and trying to do his or her job to expose a government that was behaving either corruptly or in a way which was putting the interests of Australians at risk. It still overhangs the whole of Australian politics. John Kerr believed genuinely that it was his job or the Prime Minister's, and that his job was more important than the Prime Minister's. In his case, he had the power to remove and he exercised it.

It just seems to me that, when you reach the situation where the two leaders of Australia reach an impasse and one or the other has to go, it ought to involve more than who can pull the trigger first. That is all. That means perhaps making sure that the parliament gets the information clearly so that there is time for reflection—for public attitudes to say, 'Hey, wait a minute, Prime Minister. Think about this again. This may not be the most politically astute thing for you to do.' That is all I am saying. This is too quick.

I guess I have not come prepared well enough to give you my personal answer on it, other than to say I think it is a problem. It think it needs to be entrenched rather more than it is here. I think I like the idea, at least at first blush, that if a sacking is to occur, maybe it is a bit like the double dissolution between the houses; when they reach that kind of impasse, maybe it should go to the public for a resolution of the rights and wrongs of it. I am not pushing it that far; I am just saying that I think it is one of the reflections that I had.

ACTING CHAIR—I am conscious of the time. Do you have other points you want to make?

Dr Herr—Yes, I will leave that for the time being.

ACTING CHAIR—Members can return to it if they want to.

Dr Herr—I will come to the Presidential Nominations Committee Bill 1999. Again, this reinforces the point I was making about the problem with the long titles. In here it refers to the 'appointment' of a President, not the 'choosing' of a President. Again, I think that is where the two bills are not actually consistent in the imagery they are trying to create and that needs to be sorted out. I do not think the word 'chosen' does genuinely apply. I think we are talking here about an appointment process. I do not like the apparent contradictions between the two bills on that score.

Further down the track when the referendum is held, I think it is also going to create unnecessary grounds for suspicion in the public's mind about the process and the role of the public in the process: are they really going to be engaged in the choosing of a President or having a prime ministerial appointment which is in effect ratified by two-thirds of the joint houses of the parliament? I just think that should be sorted out and made clearer because it will make for a fairer referendum when the time comes.

Section 11 of that bill talks about the appointment of community members. The absence of defined constraints on this part of the process is a source of concern. In fact, I find it very surprising when you look at the other two, which are fairly clear about making sure how the appointments will be made and trying to get some degree of partisan fairness in the process of the 16 members elected from the federal and state parliaments. Even there, I do not particularly like this constant entrenching in our Constitution of the role of parties. I very much objected to the 1977 referendum on that. The idea that informal political structures are given constitutional form by inclusion in the Constitution is a source of concern. I do not see why parties have to be entrenched into the Constitution in this mechanism.

ACTING CHAIR—This bill won't be—the presidential selection.

Dr Herr—No, I realise that. But it still attaches to the Constitution in the way in which it is going to operate. It could be changed, I agree, but it is still there, and this is a general source of concern to me. It is the Prime Minister who is appointing these community members, and the bill seems to be a bit coy about coming out and saying so. I suspect this is a way of being delicate about the whole thing. This worries me because, in fact, the way the sections on appointment work out, 20 members of this committee are likely to be appointed by a Prime Minister. It only requires 16 for a quorum. If the process is flawed, it can be flawed right at the start.

I know that there are problems and I certainly would not want to set out quotas for minority groups, urban and rural groups and all the different community interests that might need to be represented to make it legitimate. That is a very difficult thing to do, but equally, as open as it is now, a Prime Minister who sacked a President and wanted a compliant replacement can do it fairly easily, at least in terms of controlling the nomination. Then we come back to the other problem about the nomination: the Prime Minister chooses the short list. Does parliament keep going through the short list of the Prime Minister's preferred candidates until they get the one that the Prime Minister wants? It seems to me that this section on the appointment of community members does need to have some sort of built-in requirement of community fairness, of community representation. As I said, I would not want to do it on the basis of quotas for this gender or that gender or this race or that race.

ACTING CHAIR—I think the explanatory memorandum refers to the criteria. Natasha, you are more familiar with those, aren't you?

Senator STOTT DESPOJA—Actually, I would like to ask you a question about it. Have you thought about the very idea you were rebutting—that it should specified or enshrined?

Dr Herr—Things will change over time.

Senator ABETZ—How should they be chosen then: through a direct election or what?

Dr Herr—One way of doing it is to take it partially out of the Prime Minister's hands. You could have a certain number selected by the leader of the major party—I am trying to avoid parties—by the Prime Minister, the Leader of the Opposition or, even better, make it the Presiding Officers—not that they have shadows—or leaders of the opposition in the two chambers. It should be something that, in fact, compels a wider choice—a choice that, at the end of the day, means the quorum cannot be dominated by the nominees of a single individual.

Senator STOTT DESPOJA—Are you advocating that that be enshrined? In some ways, the flexibility or, almost, the ambiguity of this bill is that it could allow for such a process. Do you think it is better that it is enshrined in some way?

Dr Herr—I would be happier if more than one individual was responsible for choosing the community members, yes.

Senator STOTT DESPOJA—I plead guilty: I moved amendments at the Constitutional Convention to allow for party status. Obviously, the reason for that was to guard against domination—

Dr Herr—Yes, from being excluded.

Senator STOTT DESPOJA—I take your point on that, but I just wanted to explain.

Dr Herr—No, I was not having a go. It is a hobbyhorse of mine especially since, over the last 20 years, public support for parties has been in decline. I get worried when more efforts are made to entrench parties when membership, public financial support and all sorts of things are in decline. There may be other structures that emerge which have better legitimacy—I do not know. But the point is, at this stage at least, that in terms of section 11, yes, I would like to see it entrenched that there was more than one individual. Since the Prime Minister and the Leader of the Opposition both have roles in nomination and seconding, I do not see any problem with both having roles in the appointment of community members.

It would be a fairly simple mechanism for ensuring that no single individual completely controlled. I hasten to add that I am not trying to invent problems to solutions because I think, in most cases, this process indeed is the process of selecting governors-general has generally been—it has been fairly good and well respected by the community. I do not think that any Governor-General has actually gone into office with the opprobrium of the Australian community. They have sometimes had problems in office, but not in being selected. So I do not think the process of selection has been that controversial. But, equally, to avoid problems and to ensure that the public approve and are willing to approve the process, some of these things could be done to make the act better.

Finally—I will hurry along because I am parked at a parking meter; you also have limited time—sections 24 and 25 worry me. For three years, I was the Chairman of Crime Stoppers. Maybe it comes from having had too much to do with the police—I do not know—but sections 24 and 25 worry me.

Senator PAYNE—On confidentiality?

Dr Herr—Yes, it is on confidentiality, but there appear to be no penalties for breaching confidentiality.

Senator PAYNE—Shoot them!

Senator ABETZ—That is a start.

Dr Herr—There are no penalties there. I think that, if you say that something should not be done, we should know at what level that should not apply. Is it a mortal sin or just something venal? I do not know.

Ms HALL—What do we do if it is a mortal sin? How do we assess that?

Dr Herr—I do not know. The example I used with the Commissioner of Police earlier today was that, if I were speeding—not that I would—I would get to think about whether it is worth two or three points to me or what level. I do not know on this one what breaching confidentiality would be worth or not worth to me. Similarly, there seems to be no provision in here for removing members of the committee for misconduct. It seems to me again somewhat odd—with the exception of section 11—that so much effort has gone into providing for the selection of these committee members, and yet there is no provision for dealing with members who engage in misconduct who may need to be removed, replaced or whatever. Again, that whole process is a worry because, if you start removing and replacing people, you start tampering with the possible outcomes.

Ms HALL—I am sure they would pay them.

Dr Herr—I am not sure whether payment is a punishment.

ACTING CHAIR—If they were found in a hotel—there has been evidence that cricketers, for instance, have been caught after hours there—they may say that they are just looking for candidates.

Dr Herr—There are all sorts of plausible—

Ms HALL—That is very plausible.

Dr Herr—In terms of what I have offered you, obviously I am only looking at the bill to a certain extent in its drafting and in its effects. I think these fairly narrow observations have possible downstream consequences because, at some point, if the bills become acts, the acts will then be the basis on which a very serious national debate takes place in a referendum. It ought to be easy for people to exercise their rights of citizenship without being confused or not being able to make the choice that they would like to make.

Senator PAYNE—The Convention communique says, 'Parliament shall establish a committee which will have responsibility for considering the nominations for the position of President. The committee shall report to the Prime Minister.' The bill says, 'The Prime Minister must appoint,' et cetera, as you know. Senator Abetz and I were discussing briefly whether the Convention communique went to parliament establishing a committee by virtue of this very bill, or whether it went further to take up the point that you were making—that the committee should be established in a more public and transparent manner involving more than just the Prime Minister. Have you had a look at that?

Dr Herr—I was not thinking of it in the way you are now raising it, but it would address some of the concerns I had about the role of the Prime Minister being too dominant in the process.

Mr DANBY—I want to take you outside the more narrow focus that you talked about in your submission—which I am not criticising at all, by the way. Just for your own information, a lot of people have come before this committee who have made very valuable suggestions. They understand that the purpose of this committee is to refine the bill so that we get to something that a large number of people could at least have an understanding of

when they vote. I want to take you to a couple of things that I have heard people say about this bill in particular and to something that was in a newspaper a couple of days ago. In testimony to the committee this morning, Mr Hodgman said that, if this bill in its general form were to fail, he could not imagine that there would be discussion on this issue to the year 2038. Prime Minister Hawke stated last night that, if it failed, it would not be discussed again until the death of the current monarch. There are a couple of suggestions there.

Last week the Associate Editor of the *Melbourne Herald*, who is a conservative columnist who I normally would not suspect of supporting the bill in its general form, said that the reason he was reluctantly going to support it with refinements was that he feared that, if the bill were not passed in its general form now, when it came back at a later date, it would come back in the form of support for a direct election of the President.

There are a lot of people, including this person and Sir Zelman Cowen, who have testified to us in more detail about the potential division between an elected Prime Minister and an elected President and who fear that scenario. I am talking to you now with your wide experience as a political scientist. If the bill in its general form—without the specifics that you have criticised, probably quite rightly—was defeated now, what is the scenario for its coming back? When? And do you think that it would come back in a direct elections form?

Dr Herr—I will take them serially. As far as speculating when this might be returned, for me at least it would very much depend on why it was defeated. If it was defeated, as a lot of referenda are in Australia, because of the attitude of, 'Until we get used to the idea, it is safer to vote no than anything else,' I do not think it would be all that long before it reappeared. I think that there is a kind of irreversible tide which basically says that we have a destiny which makes it harder and harder for us to rely solely on historical linkages to justify what we do. That is not to be critical. It is simply to say that some of the issues of succession and the rest of it have been there in the Constitution, but we have not worried about them for most of this century. But now they are very much in the public domain, they will keep nagging away and sooner or later something will happen.

On the other hand—this is where I have trouble with the succession issue—if the reason for its defeat was purely that we love the present Queen but we are not so sure about the next possible King, that would be admitting, in effect, that the change is going to have to be reconsidered, and again it is going to be fairly quick. So I do not see it as being a long-term thing. That brings me to the second point: whether or not it will be direct election. I have problems with the direct election of the head of state because I believe that any time anyone is elected they have to be elected for a reason. We give confused signals as to what we expect government to do. People do get confused between big 'G' government and little 'g' government, between this whole business with the mandate, which, with due respect to all of you, and I do not know what your positions are—

Ms HALL—Varied.

Dr Herr—But, on the question of the mandate, most people in Australia have absolutely no idea what a mandate is. A mandate, in terms of its historical development, was originally a reformist mechanism to justify the control of party representatives in the parliament. It was not there to shut the community up and tell them they could not change their minds or do

anything else. If anything, the mandate was always a pledge by a party: 'If we are elected, we promise we will do this.' It does not say, as the Prime Minister tried to suggest, that they have to have the power to deliver it. That is not what a mandate is. A mandate is a pledge from a party to do a specific thing and, if they cannot do it, as long as they have tried, they have kept faith with the promise they made.

Again, as Mary Robinson found in Ireland, she had a certain set of objectives that she brought with her when she was elected and she used not the powers but the moral suasion of her office to try to pursue those aims. She had, I believe, every right to; otherwise, why was she elected? Why did people express a preference for the things that she was promising? But you people are the parliament. You are the ones that I elect to do things, and I do not want to get to a situation where I am confused as to whether I have elected some of you to do things, others of you to stop you from doing things and whether I meant it to be this objective this year but then something else.

In order to control the parliament and the outcomes of the parliament, I need a certain degree of certainty. To that extent, a mechanism other than direct election seems to me to make sense. To that extent, I would rather you got the bill right—that it was something that the community could accept as a reasonable degree of reflection that the head of state that is appointed will be someone whom we can respect and will do the job with a reasonable degree of confidence in the community, not because the community has said, 'We're electing you on the basis of this promise or that promise, but rather because we know that enough of us have been involved in saying what we expect of a head of state. But, yes, you pretty much fit the bill.'

ACTING CHAIR—Thanks very much, Dr Herr, for coming along and giving your evidence. We will be handing down our report on 9 August and we will send you a copy.

Dr Herr—Thank you.

Resolved (on motion by **Senator Payne**):

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

Committee adjourned at 3.17 p.m.