HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Section 44(i) and (iv) of the Australian Constitution

CANBERRA

Monday, 12 May 1997

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WITNESSES

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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Present

Mr Andrews (Chair)

Mr Andrew	Mr Randall
Mr Barresi	Mr Sinclair
Mr McClelland	Dr Southcott
Mr Melham	Mr Kelvin Thomson
Mr Mutch	

The committee met at 12.04 p.m.

Mr Andrews took the chair.

BERMINGHAM, Mr Lee Michael, Organiser, Australian Labor Party, 19 National Circuit, Barton, Australian Capital Territory 2600

GRAY, Mr Gary, National Secretary, Australian Labor Party, 19 National Circuit, Barton, Australian Capital Territory 2600

CHAIR—Welcome. We are taking evidence today from a diverse group of witnesses—the Australian Labor Party; the Department of Immigration and Multicultural Affairs; Dr James Jupp, of the Centre for Immigration and Multicultural Studies; the ACT division of the Australian Democrats; and the Clerk of the Senate, Mr Harry Evans.

Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false and misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received your submission dated 9 May 1997. I now invite you to make some opening comments.

Mr Gray—Thank you. I welcome the opportunity of speaking before the committee. Many of the points that we make in our submission are consistent with points that we have made before in another committee, the Joint Standing Committee on Electoral Matters. There are two issues before the committee. The first one is the issue surrounding foreign nationality. We make a set of recommendations which are consistent, to some degree, with recommendations made by the Liberal Party on this matter, and that is a change to the Commonwealth Electoral Act to require a more proactive role by the Australian Electoral Commission in terms of enforcing the provisions of section 44(i).

I would also like to draw your attention to some subsidiary points that may be worthy of consideration, either in another place or another location. That is the matter of dual citizenship and where that impacts in the matter of section 44(i). It is possible, some say, that there are up to some three to five million Australians carrying dual citizenship at this time, and certainly by the time of the next election that figure will be a very large number of people.

It may be that the parliament at some stage needs to consider a policy choice in terms of the way in which dual nationality may work, accepting the existence of section 44(i). In that eventuality, some may argue for constitutional change to allow for the accommodation of dual nationality issues as well. In our submission we leave that open, deliberately so, but I do raise it as a point that people may want to consider at some future point. In fact, the content of our submission in terms of section 44(i) largely centres on the idea of the Electoral Commission itself becoming more proactive in dealing with the issues.

In terms of section 44(iv), on the office of profit under the crown, we can see no

alternative but that there be an amendment to the constitution to delete certain words to allow for that section to work effectively. We also, in making our recommendation for a deletion, argue that that section of the constitution should come into play at the point of sitting of a member and senator so that there is sufficient time from a decision that an individual may make to become a candidate for federal public office and, secondly, them winning an election and, thirdly, the time at which they may take up a seat in the parliament.

Of course, in the case of the Senate you do not take up your seat in the parliament, except if you are from the ACT or the NT, until July 1, in the normal event of an election, in the following year. But we do think that that point of clarification at the point of sitting is a helpful clarification, given the deletion that we recommend in our submission.

CHAIR—Thank you. I have some questions about the practical issues. Obviously, cases have come to public attention where they have been brought through an action to the courts but, in the normal preselection process within the party, is this a matter which arises commonly?

Mr Gray—Yes, it is, and it is a matter which we address in a number of ways. It arises regularly at first point of discussion with potential candidates, especially in a party such as ours which has a very diverse ethnic mix. We provide advice and counsel to our candidates on how they should deal with section 44(iv). We also provide counselling on how they should deal with section 44(i). We circulate several times, in the run up to an election campaign, a checklist. The one for the last election went out, from memory, on about 15 January to candidates to make sure that they had attended to the detail. I believe that other parties do much the same.

I think that procedure is good. It means that parties are fulfilling their obligations to their candidates. But, frankly, the area is clouded in confusion and a more proactive stance from the AEC would certainly help us in terms of the nationality issue.

CHAIR—The argument that they have put to us, fairly strongly, is that it is not their role to do that, that it is fraught with danger because they are not necessarily qualified to give legal advice. At the end of the day, even if they do give that advice, the court could decide otherwise. They envisage that they are then left in the worst of all possible situations, of having tried to do the right thing by a candidate and then finding that the court effectively overrules them.

Mr Gray—I am aware of that argument—in fact, I am very familiar with that argument. Frankly, I think it is wrong. I think it is wrong firstly on the grounds that it is possible for the parliament to legislate and therefore require of the AEC a more proactive position. They are correct to say that currently that requirement does not exist. We can fix that. Secondly, I think they are wrong in terms of the legal effect of such interpretation since what we ask for is a simple checklist against which candidates can measure

themselves. I point to a potential difficulty with that. But, certainly in the cases that have been brought to light in recent years, the situation would have been enhanced significantly had the AEC had a simple step-by-step procedure to follow. Perhaps we should also advocate a booklet for candidates for public office and some other kind of publicity material. It is a matter which can be addressed in a relatively efficient way. Currently, the AEC is correct in saying that there is no requirement for them to do so. Therefore, they cannot and therefore they will not.

CHAIR—You can also put a disclaimer on it to say that, whilst it is only a checklist, it is not exhaustive. So it does not leave them open to the accusation that what they are putting in is totally definitive. It is the best possible guide they can provide.

Mr Gray—Perhaps it could also be a requirement of the actual nomination form. Perhaps the checklist could appear on the nomination form so that a candidate for public office is then forced to read the content of what they are being asked to sign up to.

CHAIR—Just on the general issue of candidates having to be aware of this, particularly the dual citizenship requirements, has that led, in your experience, to any greater reluctance on the part of particular persons to put themselves forth for preselection or for public office?

Mr Gray—Not reluctance but it certainly has the possibility to create confusion.

CHAIR—Let us go to one of the suggestions that you make about section 44(iv). In a sense, it is the same suggestion made by the Liberal Party about changing the provisions so that the reference in the section to chosen has changed. I would like your comment on the views that have been put against that provision. For example, it seemed on re-reading the evidence from the Attorney-General's Department that it is their view that, if you made that sort of change, you potentially leave a person in limbo because the same difficulties can arise but simply at a later point of time. Mr Lindell, who is a reader in law at the University of Melbourne, made a similar point. For example, this situation could arise before a member sits. Therefore, if you have to go through the same steps after you have been elected and before you sit, are we not, in a sense, putting off the problem that exists in the first place?

Mr Gray—You are only putting off a potential problem if you do not take any action, and that was my earlier comment in reference to the point of sitting. Currently, these things are expected to be dealt with prior to the point of nomination. I might remind you that there is, as I understand it, a draft recommendation before the Joint Select Committee on Electoral Matters that deals with shortening the nomination period by one day which may make this issue even harder to deal with in the future.

Having said that, the reason I made my comment about the sitting time is that it may be possible for an individual, where there is some confusion, to deal with that

confusion before actually taking his or her seat in the parliament. That may be a proper thing that can be quite easily dealt with in time, certainly, in terms of the Senate, and even in the case of the House of Representatives. With the exception of the ACT and the Northern Territory, I would have thought that given that there is usually a minimum of a four-week gap between election day and the parliament sitting itself, you do have sufficient time to deal with matters.

Mr MELHAM—It also allows them to rectify a problem that does not automatically mean that there has to be a by-election, whereas, in the current situation, as a result of Free and Kelly, there has to be a by-election if they have not conformed. If this constitutional amendment were to go forward, it would not necessarily necessitate a by-election even though the problem might be brought to their attention later on.

Mr Gray—That is correct.

Mr MELHAM—Once it is rectified, as I envisage it, it would then allow them to sit.

CHAIR—I suppose the other advantage it has—to take up Daryl's point—is that for those candidates who are not elected then the problem does not arise. Whereas, under the present system, if you think that you have a chance of being elected—most candidates think that—you still have to do it.

If you do that, it might overcome problems in section 44(iv). But unless you recast the entire section, it would not necessarily overcome your section 44(i) problems because if you have allegiance to a foreign nation for which there is a process you must go through, following Sykes and Cleary, in order to renounce such citizenship, then it could well be that that is a process that might take many months rather than a few weeks between the election and the sitting of parliament.

Mr Gray—The point is not the sitting of the parliament. The point would be the point in time at which the elected person takes his or her seat in the parliament. If you are a Senate elected person, or even simply if you do not take your seat in the parliament until it is dealt with as a member of the House of Representatives, with some months to work with such matters, it is possible to do such a thing—messy, I admit. But it may be a possibility since, doing such a thing, allows a broader approach to candidates for federal public office, but then it is an implementable way of dealing with the provisions of section 44.

Mr MELHAM—Also, it is better than a by-election, again, because nationality would have necessitated a by-election. This way, the person cannot take his or her seat until the fault is remedied. Obviously there might need to be a trigger and, if it is not rectified within a certain time, the seat becomes vacant. We have a submission No. 27 from George Williams that indicates that there might be people who want to abuse this

process. They are nominating with no intention of actually taking up their seats should they be elected.

CHAIR—Do you think that it would be acceptable in the general community that a person who had not taken steps to renounce foreign citizenship could then be in a position where it might take many months to do so and that such a person might elect, therefore, because of that, not to sit in the parliament? I would have thought it would cause some outrage in the community that a person in that situation was duly elected and was not coming forward to take his or her seat in the parliament.

Mr Gray—Such a situation would cause some difficulties, but I do not envisage that kind of situation. Let me give another example. We have well documented government positions on conflict of interest for government ministers. These are issues that do not come into play until such a time as a person is about to become sworn in as a minister. On some occasions, these matters are not as relevant for backbench members of parliament, or even other members of the executive, and so we deal with those issues at the time that we need to deal with them. One of the consequences of what we are proposing is that the issue of office of profit can be dealt with at an appropriate time and it may well be that the nationality issue, also, can be dealt with at the time of sitting, which we would argue is the operable time for considering those provisions.

Mr KELVIN THOMSON—Is that the way the High Court has seen it? I thought that the problem of dual citizenship applied at the time of nomination and if that is the case, you are still requiring a referendum to entrench this. It seems to me that part of the problem is that any change that requires a referendum is going to be very difficult to achieve.

I think the suggestion you have put forward that the Electoral Act lists reasonable steps is a good idea. It seems to me that people out there now do not know, or are unsure, what reasonable steps are required, and for people to challenge this, they would need to challenge the constitutionality of the amendments to the Electoral Act. So there would be a way of sorting out what the High Court's requirements are and then people would be able to conduct themselves accordingly in that area. I do think that that is a worthwhile thing.

Mr Gray—I do make the point, quite freely, that in making the proposals that we do, on the one hand dealing with section 44(i) through the Commonwealth Electoral Act and 44(iv) through an amendment, there are always difficulties changing the Electoral Act. On a minor issue of allowing people candidacy, that may be able to be dealt with a referendum on election day at the next Commonwealth election, or it may be possible to deal with it at some other point. My preference would be to deal with it at the next Commonwealth election.

In terms of section 44(i), we think that it may be possible to deal with that

differently because that amendment might not be seen in the broader community as being as minor as the first and, consequently, you might end up—particularly, in the current electoral environment—with a range of other issues being thrown in that are not particularly helpful in getting a good administrative solution to a problem which is actually about allowing people a right to stand for federal public office, but at the same time maintaining the integrity of our points of allegiance to the people who elect you.

Mr McCLELLAND—Sir Maurice Byers suggested that it might be appropriate if 44(i) were deleted and simply replaced with the words 'any person who is not a citizen of Australia shall be incapable of sitting', and so forth, and if then we looked at including those exclusions in either the Citizenship Act or the Commonwealth Electoral Act—that is, where they have got to renounce their allegiance and that sort of thing. Is that a safer method whereby you do not have this problem of the High Court coming in over the top and saying that despite what you have done in the Commonwealth Electoral Act, or the Citizenship Act, the constitution, nonetheless, places this requirement and the legislation has not met that requirement?

Mr Gray—That is a possible solution—there is no doubt about that. One of the problems with that solution is that it shifts a potentially messy political issue to another point of focus and, in a way, that would not be helpful, I think, in dealing with this problem since there are, as I mentioned in my report, perhaps, three million or five million people holding dual nationality. How do you deal with the problem of existing dual nationality? How do you deal with the commonly and culturally accepted position in Australia of dual nationality?

Mr McCLELLAND—So, you think that if there were a requirement that before obtaining nationality you had to renounce your other nationality, it could cause some resentment in the community?

Mr Gray—I would make the point that I have some views on that issue, but I do not think that this is the place for me to ventilate those.

CHAIR—That is fine.

Mr KELVIN THOMSON—Not the first problem but the second problem about office of profit is dealt with, for example, in the Victorian constitution through an automatic forfeiting of your state public service position. Here the jeopardy is that you lose your seat in parliament. In Victoria, if you are elected, you automatically forfeit the public service position. It deals with it in a way which seems to be quite fair and only concerns people who are successful in being elected. I think there is a genuine issue of principle that people in public service positions should not be in jeopardy of losing their jobs simply by virtue of nominating. That does seem to me to deal with the situation fairly but I am not sure how we achieve that here without a referendum. I would be interested in your thoughts on that.

Mr Gray—I think the Victorian situation is the best model—it is excellent. It does require more complicated constitutional changes than I think are obtainable given the general Australian attitude towards constitutional changes, which is why we make the recommendation that we make. As a party official, I would have to say the Victorian model is as close to the perfect model you would want in regard to that matter.

CHAIR—Could I just ask a question which is not a technical, legal or constitutional question. It is one about the politics of this. Most of the submissions, whatever the form, that recommend change come down to some constitutional change. As the secretary of one of the major political parties in Australia, what do you think the prospects are, firstly, of a bipartisan approach to this which is obviously desirable if you want constitutional change? Secondly, if there were a bipartisan approach, do you think it would be successful?

Mr Gray—If what you are after is a non-technical, non-legal and non-constitutional interpretation of issues, then I am the right person. We have tried as far as we can, both through the Joint Select Committee on Electoral Matters and now through this committee to keep our submissions within the bounds of both what we have said and where the coalition parties have been on these issues as well.

It is true to say that there is a reasonable consensus amongst the three major political parties and probably also the Australian Democrats although I am not so familiar with the evidence they have given on these matters. That being the case, I think it would also be reasonable to say that there would be a commonly held view that minor technical changes to the constitution may be deliverable but significant changes, even to attain a better outcome, would be less deliverable. A more technical change may require more explanation and the visible aspect of the three major parties on the same stage arguing the same change may produce an outcome that says, 'Well, if all three of them want it, it cannot be any good at all.'

Mr MELHAM—You only have to look at history in relation to that. The 1967 referendum on Aboriginals passed. There were other elements that were opposed by the then DLP and they failed. The same occurred with the extension of parliamentary terms. There was some dissidence within particular parties that managed to turn the opinion around.

CHAIR—I take it that, in the current political climate, changes to section 44(i) might be regarded differently from changes to section 44(iv).

Mr Gray—That is why we have drafted our recommendation as we have. I can see that the perfect solution to both are significant changes other than those that we propose, but in wearing my non-technical, non-legal, non-constitutional hat, I propose a series of changes to accommodate a situation that my party would believe, and would argue, are deliverable changes.

Mr McCLELLAND—Taking up Kelvin's point, that is where the legislation affects the termination of any office of profit under the crown or contract. If we take your suggestion of removing the words 'being chosen or of' so that it reads 'shall be incapable of sitting', it still may be worthwhile to take up Kelvin's suggestion because, after the election, it would prevent a situation where the person, upon being elected, did not do what was necessary to voluntarily terminate their office of profit under the crown. You would then perhaps have a dilemma as to whether they were entitled or not entitled to take up their seat in the parliament itself.

Taking Kelvin's suggestion, it may be worth while to have a general wiping clean of the slate so that the election of that person automatically terminates any office of profit or contract under the crown.

Mr Gray—That may be a possibility.

CHAIR—That might be more easily achievable with an office of profit in the terms of an office of profit that relates to employment. It may run into other problems in relation to contracts.

Mr McCLELLAND—I suppose that might come into placitum (v), might it not?

Mr KELVIN THOMSON—It is 44(v) anyway. We are not, theoretically, examining it.

CHAIR—Any other questions? If there are not, can I thank you both for your submission and for your attendance today.

[12:33 p.m.]

FLEMING, Mr Garry David, Director, Citizenship Policy, Department of Immigration and Multicultural Affairs, Chan Street, Belconnen, Australian Capital Territory

PAGE, Mr David Julian, Assistant Secretary, Citizenship and Settlement Branch, Department of Immigration and Multicultural Affairs, Chan Street, Belconnen, Australian Capital Territory

SULLIVAN, Mr Mark Anthony, Deputy Secretary, Department of Immigration and Multicultural Affairs, Chan Street, Belconnen, Australian Capital Territory

CHAIR—I now welcome representatives from the Department of Immigration and Multicultural Affairs. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission of 18 March this year. Would you care to make an opening statement?

Mr Sullivan—Just a short one, Mr Chairman. The Department of Immigration and Multicultural Affairs welcomes the opportunity to appear before your committee of inquiry into aspects of section 44 of the constitution. David Page and Garry Fleming, along with myself, represent the department before you today.

The department has provided a submission based on our responsibility for Australian citizenship matters. The submission covers two key issues: the first one is the possibility of Australian citizens having dual citizenship, and the second, the effect of renouncing former allegiances when migrants acquire Australian citizenship.

The submission outlines the main circumstances where an Australian citizen may hold another citizenship. It also suggests that the subsection 44(i) issue should not affect Australia's general policy in relation to dual citizenship for a number of reasons.

Firstly, the restrictions imposed by subsection 44(i) affect only a very small percentage of the Australian community. Secondly, the standard and type of integrity and loyalty expected of Australia's elected representatives is different from that expected of the general population. This was recognised by the Joint Standing Committee on Migration when it recommended removal of the current restrictions on Australian citizens acquiring dual citizenship.

Thirdly, an extreme approach of single citizenship for all Australians is not

necessary, as the High Court found that a dual citizen is not necessarily disqualified from office under section 44(i). Fourthly, there could be between four and five million dual citizens in Australia, and to implement a policy of restricting dual citizenship could take a generation to achieve and is therefore not a practical solution. Finally, the general issue of citizenship policy is to be considered as part of a comprehensive independent review of Australian citizenship to be undertaken by the Australian Citizenship Council.

The submission therefore suggests that it would not be appropriate to consider further restricting dual citizenship generally and that, in any referendum on this aspect of section 44, care should be taken as to the possible implications for wider dual citizenship issues.

The final part of the submission focuses on the question of whether it would be appropriate to reintroduce a requirement for new citizens to renounce former allegiances. The circumstances of Mr Delacretaz and Mr Kardamitsis, two of the respondents in the Sykes and Cleary case, demonstrate that this course is not a practical solution. Both these gentleman had made statements renouncing all other allegiances when they became Australian citizens. This was not enough to divest them of their citizenship and the High Court found that it was not sufficient for the purposes of section 44(i).

The Department of Immigration and Multicultural Affairs strongly recommends that, if section 44 is to remain, the most appropriate solution is to give relevant information to persons who seek to stand as a member of parliament. We understand from the Australian Electoral Commission submission that they are, in fact, doing this. We are more than happy to assist in any way we can in the deliberations of the committee.

CHAIR—Before coming to that last point, I will ask you some questions about a number of people that hold dual citizenship in Australia. I note that in your submission you say that it is estimated at four to five million, up from three million in 1986. In other submissions the numbers were estimated at three to four million. Can you elucidate how you arrive at your estimate of four to five million?

Mr Sullivan—I will get some help on that. Maybe it is important to go through it. Part of it is that people do not have to inform us at all of the fact that they are a dual national. As to how a person can be a dual national, for the biggest majority it would be that they acquire Australian citizenship and the citizenship laws of their former country allow them to retain their former citizenship.

A person may be born in Australia and acquire Australian citizenship by birth and a parent's non-Australian citizenship by descent; a person may be born overseas and acquire Australian citizenship by descent and another citizenship by birth; an adult Australian citizen acquires citizenship of another country automatically by the legislation of that country and does not lose their Australian citizenship—this may be where, in some cases, becoming a spouse of a citizen automatically entitles you to become a citizen—and

an Australian citizen may lose Australian citizenship upon acquisition of another citizenship but then resume Australian citizenship. That person will become a dual citizen only if the laws of the other country allow them to retain that.

In terms of the basis for an estimate of four to five million, this number I think has been the subject of quite some debate in the look at citizenship by the Joint Standing Committee on Migration, but I will pass it to Gary.

Mr Fleming—I do have some figures from estimates. The 1991 census data indicates that there are approximately 1.8 million overseas born Australian citizens from countries whose laws would usually allow them to retain citizenship of the country from which they came. It is also estimated that there would be about 1.8 million children born in Australia to citizens of another country, so they too may well be dual citizens. It is estimated that there are also about 1.1 million children of people who are in Australia as permanent residents and have the citizenship of another country, so those children may well be both Australian citizens and citizens of the other country concerned, and about 133,000 children born overseas to Australian citizens who still mainly live in Australia. They are the basis of those estimates.

CHAIR—If that is the basis, does that get you up to close to five million when you add all those figures up?

Mr Fleming—Yes.

CHAIR—I am interested also that you say that it is up from three million in 1986. Presumably the three million in 1986 was also an estimate based on similar reasoning.

Mr Fleming—Yes.

CHAIR—I will tell you where I am going. Ultimately, I am trying to ask what it is likely to be in the future. Should I take it that, assuming that the basis for the estimates is the same, the increase is in terms of immigration and in terms of the birth rate of immigrants?

Mr Sullivan—I think we should be careful. I am not sure that the growth in numbers of persons who are dual citizens is reflected in those estimates given in various years. I think much of it relies on the fact that this estimate is something which reflects a greater look at the issue. In particular, at one time we thought the dual citizenship issue was largely an issue for persons who have migrated to Australia, who have brought a citizenship with them and then have became an Australian citizen, and who therefore are dual nationals.

There has been clarification over recent years, including in some court cases, of the capacity of an Australian born citizen to be a dual national, particularly in relation to

being able to take up the nationality of their father or their parents. A lot of the number increase is probably explained in that estimate of 1.1 million or so Australians who, through their parents or through other means, are eligible for citizenship of another country.

CHAIR—So you would not necessarily expect an exponential increase in numbers such as that suggests from 1986 to 1997?

Mr Sullivan—No. We would also say that, of that estimate, probably a number of those people are not aware that they eligible to be dual nationals, or have taken active steps to confirm their dual nationality.

CHAIR—Is Britain one of those countries where citizenship is conferred by descent, so that Australian citizens could acquire British citizenship without being aware of it?

Mr Sullivan—It is whether they have a right to it. I am not sure whether the British have a first generation—

Mr Fleming—No. Since the mid-1970s, I think it is, you have needed an act of registration.

Mr Sullivan—So the British are probably not one of them, but certainly the Irish, Italian, Greeks and Lebanese all have a basis for citizenship on the basis of parentage.

CHAIR—In paragraph 9 you give some warning, if I can put it that way, about a referendum debate. You say, for example:

> . . . it is submitted that care would need to be taken as to possible implications for wider issues of dual citizenship. For example, depending on how the debate accompanying such a referendum was handled, a strong negative vote could result in confusion about whether the general Australian public should be entitled to hold dual citizenship.

Would you care to expand on that?

Mr Sullivan—It relates to a concern that we have, in that the general policy of dual citizenship is one that has been now in the public domain for some years, and this government has proposed to refer it to an Australian council on citizenship to offer some advice. Our concern was about the lead-up and the explanation to people on a referendum question which would attempt to limit its discussion to dual citizenship and entry into parliament, recognising that there is probably a community desire to have issues of nationality more narrowly defined for people who are entering the parliament than in the general population. You could find the debate on that issue sending confusing signals in terms of the debate on the broader issue.

It would be a difficult one to say that we do not mind general community members being dual citizens but we do mind, for persons who enter the parliaments of this country, there being any suggestion that they may have an allegiance to another flag or to another state. It was probably flagging that, while this debate has been started in terms of the general community and a mechanism has now been developed by the government to carry it forward, care should be taken to be able to get separation of the issues while there is community debate about it.

Mr McCLELLAND—I gather from all this that your inclination is not to go for a constitutional amendment to placitum (i) dealing with dual citizenship and foreign allegiance but to focus instead on the Commonwealth Electoral Act and procedures to inform candidates as to what is required of them.

Mr Sullivan—That would be our preference.

Mr McCLELLAND—Would it be helpful if, nonetheless, there was a constitution amendment, which was suggested earlier, that these restrictions apply as at the date of sitting as opposed to as at the date of being chosen as a member of parliament? In other words, if someone had a very brief nomination period—five days, seven days, whatever it might be—and did not have time within that five days to take all reasonable steps to renounce their citizenship, nonetheless they would have more time during the period immediately after the election until they actually took their seat in parliament. Would that be appropriate, do you think?

Mr Sullivan—I do not think that is a matter for our portfolio, but certainly it seems that the greatest period when this becomes very contentious is between nomination and actual sitting. I guess, more from a personal viewpoint, that would seem to be sensible.

Mr MUTCH—It is interesting that you said that members of parliament should have a high standard of integrity and loyalty is to be expected. Looking at it from the other point of view, perhaps the requirements in section 44 and some of the other sections are a little bit anachronistic—for instance, if somebody is an undischarged bankrupt or insolvent. Henry Parkes once said, 'I am utterly unfit for business but the fittest of all men for parliament.' It seems to me that political enemies could in fact make you a bankrupt in order to get you out of parliament. Have you looked at the possibility of reforming section 44 to make it more accessible for Australian citizens to become members of parliament?

Mr Sullivan—I think you have got to remember, of course, that when section 44 of the constitution came about there were not any Australian citizens. The notion of an Australian citizen has come later than the section 44 issues. I am sure that the constitutional fathers, when they put in section 44, would not have foreseen any of the difficulties of people today who have an entitlement to dual citizenship and who find it very difficult sometimes to get rid of that entitlement for dual citizenship, understanding

what section 44 requires. I think there is a lot to be said for saying that, for an element of the constitution built in a day when even the notion of Australian citizenship was not a developed one, there must be room now to have it reflect today's vision of Australian citizenship.

Mr MUTCH—A good point.

Mr Page—If I may add to that, I think you are touching on an aspect of our submission which expresses this portfolio's responsibility for the Citizenship Act. What the eligibility criteria are for some other focus—for example, representation in parliament or the Public Service—are not of themselves factors of the Citizenship Act. That is how we reach our logic for not advocating a constitutional change, not advocating a change to the Citizenship Act, but rather some action under the Electoral Act. And that is why we are saying that, if the committee decides that a higher standard of integrity is required of a representative in parliament, it can then deal with that problem rather more narrowly than it can deal with all citizens' obligations and rights.

Mr BARRESI—I apologise for being late, because these things may already have been discussed. On page 4 you say that there are wider issues that need to be considered if we are to remove dual citizenship, in that it is in conflict with Australia's cultural diversity and that also it goes against the international trend towards allowing dual citizenship. Is there a trend taking place? The last time I looked at the list a considerable number of countries do not recognise dual citizenship.

Mr Sullivan—There still is a considerable number of countries that do not recognise dual citizenship—

Mr BARRESI—Particularly in South-East Asia, I understand.

Mr Sullivan—We can leave you with a list of those countries. However, I think there is a trend. It seems to be a difficult issue to address legislatively. For instance, in the United States of America it is an issue that has been addressed through the court system rather than legislatively. The rules have not changed but really the Supreme Court of the United States ruled that, if an American citizen takes out the citizenship of another country, that in itself is not an act of renunciation of American citizenship. What is required is a far more overt act of saying, 'I do not want to be an American citizen' to lose your American citizenship. This has resulted in many millions of American nationals now being able to become dual nationals.

Britain is not part of the trend. Britain has always had a policy that, no matter what you are, you are a British citizen. You can be a citizen of as many countries as you like as well as being a national of Britain. But some countries, and you are right to say a number of countries in South-East Asia, and in Europe—I guess, in a way, old Europe—have very strict laws. Germany has one of the strictest regimes of single citizenship of any country

in the world. But I think it is a fair statement to say that the trend is towards a greater tolerance of dual nationality.

Mr Page—If I can make an additional point to that, which comes back to the chair's question, it is a factor of mobility. The trend arises, in part, because people are able to and, in fact, do reside in a number of countries rather more than they would have 20 years ago, 50 years ago or whatever. I think that illustrates why we are talking of trends and we cannot be mathematically rigorous about it. But the prospect of people acquiring one or more citizenships is much greater than it would have been, particularly for Australian residents, 20 years ago or 30 years ago.

CHAIR—If you table that we will accept it as an exhibit. Do you also have details of those countries which apply a more restrictive regime to their elected officials than they do to citizenship generally?

Mr Sullivan—No, we have not looked at that. You would probably need scrutiny of the various electoral laws of countries rather than the citizenship laws. Some countries have quite restrictive rules. Personally, I know the United States has a very restrictive rule that requires birth, not only citizenship. I guess that is one way to have a very easily and clearly definable rule, but I am not personally aware of what other countries' requirements are.

CHAIR—Can I come back to the matter you mentioned at the end of your opening comment about providing information to the Australian Electoral Commission. I would be interested to know what you had in mind by way of information that you could provide to the commission.

Mr Page—I think we were just referring to the submission that you had from the Australian Electoral Commission in which they indicate that they are producing material that would inform prospective candidates of their obligations. I think we are supporting that view but we are not necessarily supporting what goes with it. I think the commission believes that it is a matter for the candidate to satisfy himself or herself that they are meeting qualifications. We are saying that the step in the right direction is to give them the information essential to make that judgment. It is not information about the Citizenship Act, but about the Electoral Act.

CHAIR—Part of the information that a person who holds dual citizenship would require, following the decision in Sykes and Cleary, is knowledge of the procedures in the country in which the other citizenship is held of how one goes about renouncing it. That actually could work in a contrary way, if I can put it that way, because if there is a country that has quite an elaborate procedure which you have to go through, which could take longer, you could actually be disadvantaged in the situation where a simple letter to the ambassador in Australia would be sufficient to satisfy the test of taking reasonable steps.

Mr Sullivan—There is no doubt about that. There was a requirement for people to go through the proper process of renunciation of a citizenship. For example, in terms of the time frames between an offer of endorsement of a candidate to a nomination date, if someone wrote to the Australian government renouncing their Australian citizenship, our processes would take weeks. It would involve getting the necessary information from that person and assuring ourselves that the person was making an informed judgment and understood what they were doing. Concluding that arrangement would take several weeks of work.

Certainly, in the discussions between the AEC and ourselves and the Department of Foreign Affairs and Trade, we have said that between us we can provide potential candidates with what those processes may be. If there was a process which was a simple process which then withstood the scrutiny of the courts, it would seem to be a very easy way.

CHAIR—As I understand Sykes and Cleary, and perhaps as we understand Sykes and Cleary, the problem is that the High Court said that the process of renunciation is dependent upon the law of the country in which one wishes to renounce one's citizenship of. Therefore, in order to be able to take reasonable steps one needs to know what that process is for each particular country. Therefore, is it feasible for your department, either acting itself or in association with other departments such as the Department of Foreign Affairs and Trade, to be able to provide the details of what is required for renunciation in each of the other countries of the world, or is that—to use a football cliche—a big ask?

Mr Page—It is possible case by case, and it would be desirable that it were done case by case rather than set up a complicated regime that became, of itself, a mechanism to delay a decision in another country. We cannot publish details of every country in the world just in case they are needed, but we could find out in the context of particular circumstances presented. With hindsight, using the examples in the Sykes and Cleary case, we could have found out and advised, and we would do that.

You are also illustrating that this issue only arises when the timing of the individual's decision is crucial. If the individual wishes to do this well in advance of nominations being called for an election, the problem does not seem to be as acute as if they had left it until wishing to nominate.

CHAIR—So any information is going to be provided by the Electoral Commission in order to be of most use would have to be information that is provided long before the nomination period for an election, otherwise—as you illustrate—the person walking into the electoral office in a particular district on the day before nominations close, or even on the day nominations close, even if the information is provided there, is unlikely to be able to use it in a way that would satisfy the law.

Mr Sullivan—Often that advice would be that you write to this ministry in this

country and you seek this and then processes will proceed. We would be confident to say that many of those processes would take months.

Mr Page—And may not have a visible outcome.

Mr MUTCH—The requirements to become an MP seem to be curious to me. For instance, does the Secretary of the Department of Immigration and Multicultural Affairs have to conform to the same sorts of requirements as section 44, or can we have a foreign agent infiltrating the department—a Sir Humphrey?

Mr Sullivan—If I could use public servants generally rather than the secretary, who is a statutory official, public servants generally must be Australian citizens or making efforts to become an Australian citizen. So a person who, for instance, is not yet eligible to become an Australian citizen can join the Australian Public Service as long as they have a commitment to becoming a citizen once they become it.

Mr MUTCH—So there is a lesser requirement for them than for MPs—even though they have got more power?

Mr Sullivan—Yes. There is no constitutional requirement for a public servant in respect to public servants and citizenship.

Mr BARRESI—You threw that second part in there very quickly.

Mr MUTCH—Everyone accepted it without demur, too.

Mr Sullivan—I do not think it has lessened the quality or calibre of the Public Service, I am sure, Mr Mutch.

Mr BARRESI—On page 5, section 11 says that in many countries, as in Australia, renunciation requires a person to meet specific legislative requirements. I was not aware that there were legislative requirements for renunciation of citizenship.

Mr Sullivan—In Australia?

Mr BARRESI—Yes.

Mr Fleming—Yes, there are.

Mr Sullivan—In the Citizenship Act.

Mr BARRESI—This is actually going beyond the Citizenship Act, is it not? We have already said that the Australian Citizenship Act itself is not sufficient in order to circumvent section 44(i).

Mr Sullivan—What we are saying here is that, if this was applying to an Australian national abroad, Australia would have a legislative requirement of how to go about renouncing Australian citizenship. Several countries have similar legislative requirements in their own laws saying that, if you are a citizen of country X, this is how you go about renouncing your citizenship—for some, there is no basis whatsoever.

Mr BARRESI—But the renunciation steps that are outlined in the legislation do not go far enough in terms of the reasonable steps argument. That is correct, is it not?

Mr Fleming—They are talking about two different things. What they are talking about here is what you have to go through to renounce Australian citizenship, giving that as an example, whereas the other issue you are talking about goes into how Australians go about renouncing their other citizenships.

Mr Sullivan—When the court looked at the issue it said that, where people had taken what they believed to be an everyday way of renouncing their citizenship—that is, writing to a representative of that country saying, 'I am no longer a citizen'—where that country had laid down legislative requirements of how to go about renouncing citizenship, it was not sufficient to take the layman's approach to renunciation. You had to pursue the process as laid down in that country's legislation and that is where you get into a very involved process at times.

Mr BARRESI—In section 16, in terms of remedies, it is suggested that an effective remedy would be to make migrants actually take all reasonable steps prior to being granted Australian citizenship. However, you have got reservations about its effectiveness. Would not an effective remedy be that they would have an option at the time of Australian citizenship to take reasonable steps in order to meet other office requirements? So rather than making it mandatory, it becomes an option which the candidates would be aware of at the time of becoming citizens.

Mr Sullivan—But again, renouncing your citizenship of another country in the Australian citizenship acquisition process would seem to fall short of what the court requires you to do in respect of what the other country's legislation requires you to do. Until 1980—

Mr BARRESI—What is the difference between whether you do it at the time and whether you do it a couple of years later because you are standing for office? I did mine 30 years later. Why is that any different from doing it a week or minutes before the citizenship ceremony itself.

Mr Sullivan—Do you mean following the correct procedure to renounce?

Mr BARRESI—Yes.

Mr Sullivan—You are right. That could be done at any time. A person who follows the correct procedure in renunciation is never going to strike a problem in standing for public office. But we do not see the linkage between the taking of Australian citizenship and that renunciation process. We prefer your line of saying you can either do it while you are contemplating Australian citizenship or not. Some people just want to be mono-citizens.

Mr BARRESI—Would it not be appropriate, at that time of making an application to become an Australian citizen, that you are given the option and told of the steps that are required in order to do it?

Mr Sullivan—We probably should provide advice to people when they become Australian citizens: 'Should you wish to stand for political office, the question of nationality is an important one.' It would be a very large administrative burden to provide, every time someone applies for citizenship: 'These are the procedures for you—and they vary in some countries as to whether you are a native-born citizen or a citizen by descent or a citizen by some other means—of how you may renounce your citizenship if you wish to.'

Mr McCLELLAND—Would it be such a burden after someone was elected?

Mr Sullivan—No. We do not see it as a burden in respect to those cases where between them and the Electoral Commission it is raised as, 'You have a potential issue and we will help you pursue the remedy for that issue or find out what the process is.' Then that is not a burden. We make citizens in this country of over 100,000 people a year.

Mr McCLELLAND—Do you think there could be some—taking up the chairman's point—procedure whereby some sort of identified proper officer of the department could certify that someone had at least initiated the appropriate steps to renounce his citizenship?

Mr Sullivan—I guess what you are looking at is the fact that at the moment the courts seem to have taken a fairly hard line on what that process would be.

Mr McCLELLAND—Yes.

Mr Sullivan—If a process is developed which is sustainable through the courts and which involves some other authority, particularly, say, the Electoral Commission, and ourselves, saying that yes, this person has started doing this, then that is fine. The question you are grappling with is, 'Is this going to be a sustainable matter if the courts get hold of it again?'

Mr McCLELLAND—Yes.

Mr Page—May I add, Mr Chairman, that we would seek to contain the numbers that we were commenting on to the absolute minimum. If we had to certify 120,000 applications a year we would quadruple our administration. We would have to first of all establish that the people were or were not dual citizens before we established whether or not they needed to renounce that.

CHAIR—I take it that what you are saying in the context of these remarks is that it would be possible for the department, in the information provided to new citizens upon being naturalised—if I can use that expression—to say, 'Should you wish to stand as a senator or a member of the Australian parliament and you have dual citizenship or you are eligible for dual citizenship, then you would need to take certain steps to renounce that citizenship in order to meet the requirements of the constitution. If you are so minded, you should seek advice from the Australian Electoral Commission.'

Mr Sullivan—I think that is a fair comment to make. Certainly we promote to new citizens that one of the privileges of citizenship is the capacity to take political office. It is probably fair that we should have some general thing in there which says that you need to look at the issue of citizenship with the Australian Electoral Commission if you are contemplating such office.

Mr SINCLAIR—One thing that has always had me intrigued on the eligibility side of things is citizenship of a foreign power, and another is office of profit. Just to look at the citizenship side of things: prior to the introduction of the Australian Citizenship Act, all Australians were British subjects. Were there any decisions with respect to persons not being eligible to stand for parliament because of section 44(i), prior to that legislation?

Mr Sullivan—I think there was one case which suggested that someone had a greater allegiance to Rome but it was thrown out by the courts as being vexatious. Before that, I do not think there was one. I think it was based on religion rather than allegiance to Rome.

Mr SINCLAIR—The peculiar consequence of our Citizenship Act seems to have been to give a new definition to a foreign power.

Mr Sullivan—Yes. As I was saying to Mr Mutch, in 44(i) of the constitution there was no such thing as an Australian citizen. Then 50 years later we introduce a concept of an Australian citizen, with legislation around it. It really is only in the last 20 years that we have started to see conflict between whether this person is only an Australian citizen and the old section 44(i).

Mr SINCLAIR—I confess I am negligent because, as a lawyer, I have not read the detail of Sykes and Cleary. But it does seem to me that at some stage—whether it was prior to 1948 or whether it was the Enoch Powell introduced amendments, which I think were about 1966—the words of 44(i) would have had an entirely different meaning. If the

constitution means what it was meant to mean in 1901, when it was adopted, I suppose there is still a power for the federal parliament to legislate in this area and therefore citizenship could be given a different meaning.

Was that considered at all by the courts, and the fact that there were these implications of our having been British subjects and now no longer being British subjects? Is it that people today, who are British subjects, are not entitled to stand for the federal parliament? This all sounds bizarre when you look at it in that light.

Mr Sullivan—I do not know. I think Dr Jupp, who is still in the audience, might be a better authority than I am on this issue. I know his submission covered the fact that, as you said, it was really when the constitution was drawn up that we were British subjects or aliens. If I have him right, I think it was the fact that 44(i) was aimed at the Germans and the Chinese.

Mr SINCLAIR—It was. Part of my worry is that if, as a product of CER and its evolution, we decide that not only in matters economic but in matters of citizenship—we already have a no-frontiers policy with New Zealand—we accept that a person could be a citizen of Australia and New Zealand, then all those court decisions would be reversed as well. There is the example of Jackie Kelly—although they did not actually reach that decision—where it was suggested that that was one of the reasons why she would not be eligible to remain a member of parliament.

Mr Sullivan—I think we are going to get more complex. We have talked before about this trend towards dual citizenship. Let us look at the reverse of it. For a time, if a person applied for, say, an Irish passport, we regarded it that that application for citizenship was an act to take out the citizenship of another country, and therefore they would lose their Australian citizenship. It has now been defined that it is not an act to take out citizenship; it is only an act to endorse that you are a citizen.

The point I made right at the start in our estimate of this thing is that we believe there are probably quite a number of the four or five million dual nationals in Australia who are not aware that they are dual nationals. But this interpretation has actually said you are a citizen. You endorse the fact that you are a citizen when you finally apply. It is our understanding that, if your grandfather is Irish, you are Irish despite the fact that you do not decide to take out an Irish passport. When you do, we have already said that it is only an endorsement that you are an Irish citizen. There is certainly room in the future for this to get more complex, because I am sure you are going to get someone one day who will say, 'I didn't even know I was a dual citizen. How can I renounce what I don't believe I ever was?'

Mr SINCLAIR—I do not know what the percentage would be but I suspect there are many who were born in the United Kingdom and who have never applied for a passport, and therefore are not aware that they are not Australian citizens. They have lived

here most of their lives—

Mr Sullivan—We strike them every month.

Mr SINCLAIR—I do not know what the percentage of people is, but they have certainly never seen themselves within the terms of 44(i). Has the department looked at the terms of the Australian Citizenship Act in light of 44(i) or has the decision with respect to the Australian Citizenship Act really been taken on matters like the Enoch Powell matter or some other reaction to what somebody else is doing? Therefore, is it possible that if we looked at the Australian Citizenship Act, per se, without looking at anything else we might be able to overcome some of the implications of 44(i)?

Mr Sullivan—Our view is that the Citizenship Act does not give you the remedy; it needs to be the Commonwealth Electoral Act or the constitution that give you the remedy.

Mr SINCLAIR—I suggest to you that this is not a section of the constitution that you would have great acceptance in the community at large to change, so I think you can forget that.

Mr Sullivan—I accept your view on that.

Mr McCLELLAND—If Mr Sinclair is right, it may be that 'citizen' at the time the constitution was drafted meant a citizen of the United Kingdom, a British subject, and hence not only New Zealand but—

Mr SINCLAIR—Canadians and a few others.

Mr McCLELLAND—Yes, a few others including African British colonies and they, much to the chagrin of certain politicians, could have been eligible. That is academic, but it shows the complications as to what was intended and how we have moved, I suppose.

Mr SINCLAIR—Have you had, specifically, advice from A-G's or the Solicitor-General regarding the implications of the Citizenship Act for 44(i)?

Mr Sullivan—I do not believe so, Mr Sinclair, but I will check.

Mr SINCLAIR—Would you mind checking, and if there is I would be very interested to see it.

Mr Fleming—In a less formal than usual sense, when the Joint Standing Committee on Electoral Matters looked at this issue, the action that flowed from that, one of the final responses by the Minister for Administrative Services was a joint one between

this portfolio and the Attorney-General's Department.

Mr SINCLAIR—Presumably, as it was a joint committee, that would be available for our purposes.

Mr Sullivan—We will get whatever there is.

Mr SINCLAIR—Thank you very much.

CHAIR—Let me follow up your Irish example. If the grandfather of a person was a citizen of Ireland, as you said, and the grandson or granddaughter then applied for an Irish passport, you are suggesting that could be granted and therefore that person would be deemed to hold Irish citizenship. Is that correct?

Mr Sullivan—What I was saying is that we regard that application for an Irish passport not to be an act of taking out citizenship of another country. We regard it as being simply the endorsement that the person by birth had an entitlement to citizenship.

CHAIR—If it is the case that the grandson or granddaughter has citizenship of Ireland, in your example, does a child of that person then have an entitlement to Irish citizenship?

Mr Sullivan—No. In the Irish case it is grandfathers. In some other cases it is male and in some other cases it is parents.

Mr SINCLAIR—You would, as an Australian, have to take action before you would be in a position of even recognising there might be a right to citizenship because there would be two actions, one would be the application and the other would be the acceptance or rejection and the criteria that applied at the time, in this instance, in Ireland. That would mean that if you did not do that then surely that would be outside the provisions of that.

CHAIR—I understand that, but once that person—the grandchild—obtains citizenship, the person is a citizen of Ireland, in this example. Why then does that not flow? Why can the son or daughter not claim, on the basis of the same law, citizenship of Ireland?

Mr Sullivan—It is complex, in terms of who was born in Ireland. I think there is a birth in Ireland—

CHAIR—Qualification?

Mr Sullivan—Yes.

CHAIR—Does that generally apply to other countries?

Mr Sullivan—No. Ireland has probably got one of the more generous requirements. Certainly I think that Lebanon has quite a similar thing, again male parent based, and I think the Italians are reasonably generous.

Mr BARRESI—So there has to be a birth link in Ireland?

Mr Sullivan—Yes. For the Irish there has to be a birth link; a grandfather born in Ireland—

Mr BARRESI—So a German going across to Ireland as a five-year-old, living their life there until they are 40, 50 or 60 years old, and taking out Irish citizenship and living there would not constitute a heritage line?

Mr Sullivan—You are very much testing my technical understanding of Irish citizenship. I think there is a birthplace and a male lineage requirement.

CHAIR—My question was more concerned with whether you could continue to just leapfrog off it for one generation after another.

Mr Sullivan—No, you cannot. You cannot really say, 'I'm seventh generation Irish. I really am.'

CHAIR—If that were the case it would have profound implications for Australia, wouldn't it?

Mr Sullivan—Yes.

Mr Fleming—I think our number would be higher than four or five million in that case.

Mr McCLELLAND—Although there could be a simple blood test to ascertain how much Guinness flowed in their veins!

Mr BARRESI—I go to section 15 of your submission, where you are raising concerns about removing dual citizenship as a blanket option. You are saying that it may discourage potential applicants for citizenship who do not wish to make a statement of renunciation. How big a problem is that possible discouragement that you fear may take place?

Mr Sullivan—We think that, in terms of citizenship in Australia and the seeking of a person who wishes to become a citizen of Australia, a commitment to Australia and the differentiation between that commitment to Australia and having to renounce your

previous country has made the citizenship decision easier for many people. They can understand and cope with the fact that they have a citizen commitment to Australia, while at the same time they have their roots in another place and remain a citizen of that country. It would probably deter a good proportion—I could not put an estimate on it—

Mr BARRESI—This is a judgment rather than from some feedback that you have had or research you have done through the department?

Mr Sullivan—It is a judgment. It is only anecdotal but certainly there is a lot of feedback to us such as, 'If I had to give up my citizenship of Britain'—or Italy or the United States—'I might not have done this.' We have had, for instance, a surge of Americans now applying for Australian citizenship, on the grounds that the American government will not take away their American citizenship but they can hold two.You could probably turn some qualitative feedback to us into a quantitative thing in respect of some nationalities.

CHAIR—There being no further questions, I thank you very much for your submission and also for appearing today.

Resolved (on motion by Mr McClelland):

That the committee authorises receipt of the document entitled *Countries which prohibit dual citizenship and countries which allow dual citizenship* as an exhibit to the inquiry.

[1.28 p.m.]

JUPP, Dr James, 5 Wisdom Place, Hughes, Australian Capital Territory 2605

CHAIR—Welcome. In what capacity are you appearing before the committee today?

Dr Jupp—As a private citizen. I am an academic at the Australian National University but I am appearing here as an individual.

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings in the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament.

We are in receipt of your submission of 10 February this year. Would you like to make some opening remarks?

Dr Jupp—I wrote this on 10 February, which is three months ago, and since then I have discussed this with officers of the British High Commission and the Irish embassy so I have a little to say on that. Also since then I have read the submissions which you have had to your committee.

I am not appearing here as a lawyer because I am not a lawyer, but my reading of the submissions suggests that my position is closest to that of Attorney-General's and Kim Rubenstein—that would be the closest of the legal submissions. I would also say, following on from what we were talking about before, that I am apparently ineligible to sit in the Australian parliament. As I do not wish to, it is not perhaps a serious matter. But I am a dual citizen: I hold a British passport and an Australian passport. I am also eligible for an Irish passport. My grandfather had the good sense to leave Northern Ireland at the age of two but that nevertheless entitles me to have one. I would say, however, that the Irish embassy claims that you have to apply for Irish citizenship first in order to get the passport, so that is a slight modification on what the immigration department was saying.

My main purpose in this submission was not to go over ground which I am sure you have been over before, and previous committees have been over before, but to draw attention, firstly, to the very large number of people who could be deemed ineligible. My figure is not quite the same as the immigration department's but basically we are talking in terms of millions—three or four million would be a consensus between us. I refer particularly to the issues raised in the Cleary case and the problems that might arise if someone were to take to court some or all the members of parliament who were born overseas. I have a table here which I will submit to your committee, if you wish, showing

the overseas birth places of members of the House of Representatives and members of the Senate since 1975. On my account, which I think is accurate, there are 19 members of the present parliament who were born overseas and who could therefore conceivably come within the Cleary judgment.

If someone were to challenge any of these in court, or any subsequent people of similar background in court, this could raise problems for the parliament. So the larger problem is the potential disfranchising, or at least invalidation for millions of Australians. But the problem closest to your concerns is the possibility that any one of these 19 might be challenged. It is my understanding that certainly in the past a number of people did sit in this parliament who were not eligible. As I remember, the ALP whips had a bit of a shock at the time of Cleary when they found that several of their members were not eligible. They spoke to them rather strongly about it and they took the appropriate steps.

The difficulty, I think, lies partly in the point that Mr Sinclair was raising, that this is anomalous in that when the constitution was drawn up the reference was to British subjects. It is quite clear now, and I perhaps do not make that as clear as I ought to in my submission, that the United Kingdom and indeed all other British Commonwealth countries are foreign powers. That was made clear in the case of Mr Wood who, some of you may recall, was elected to the Senate for the Nuclear Disarmament Party and was then discovered not to have taken out Australian citizenship. That was his fault, clearly, and I will not comment on a person who runs for parliament and does not take out citizenship.

Nevertheless it is clear from then onwards that the United Kingdom is a foreign power, just in the same sense as any other country, despite the fact that when I took my citizenship out I swore allegiance to Queen Elizabeth who, of course, I already owed allegiance to as a citizen of the United Kingdom. That is no longer the case because the oath of allegiance has been changed. I wanted to draw attention to that very large number of British born and British entitled people because they make up the largest number of Australian citizens whose eligibility might be in question. Also, of course, members of parliament who were born in the United Kingdom have always made up the largest number of members of parliament who were born overseas.

I also wanted to draw attention, and Immigration has dealt with this to a certain extent, to some of the problems involved not merely in dual citizenship, which has been fairly well canvassed, but also in entitlements to citizenship which are not necessarily the same as dual citizenship. For example, as a holder of a British passport, I am now also entitled to enter, reside and work in all the member states of the European Union. This is a great extension of the notion of entitlement. Probably the majority of second generation Australians, not overseas born, do have some sort of entitlement. This is most clearly understood in the case of Greeks. It is extremely difficult to lose Greek citizenship in the second and even, I think, in the third generation. This has been found in the past by a number of Greek Australians who returned to Greece and were promptly called up into the army, much to their surprise and indignation.

It also applies, perhaps more relevantly in recent years, to Chinese citizenship. The whole attitude of China towards ethnic Chinese is complicated. Certainly with the Chinese takeover of Hong Kong next month, there will be a very large number of Chinese Australians who could very well find themselves regarded as Chinese by the Chinese government, whatever their Australian citizenship position may be. So there are some very large groups where the acquisition of Australian citizenship is not regarded in their home country as in any way exempting them from their duties to that country should they return.

There is a third issue which we perhaps have not canvassed very much. That is that a number of countries under the so-called jus sanguinis—citizenship by ethnic origin—have extended the notion of entitlement to all those of common ethnic origin. Israel is the obvious example where all Jews, once defined as Jews—and that is a complexity—are entitled to reside in and become citizens of Israel. This principle is also employed now by Germany. Germany has been taking in very large numbers of people from Russia and Romania, particularly, who settled in those countries literally hundreds of years ago but are of German ethnic origin and are therefore entitled to return to Germany.

So there is the question of entitlement there for people who may have been born, bred and brought up in Australia for two or three generations. Because of that, my preference and that of a number of the other submissions is simply the referendum amendment of section 44(i). Of course, we are all aware of the difficulties of amending by referendum, particularly in the present political climate. That is indicated in some of the submissions which express considerable hostility to people unfortunate enough to be born overseas, for example. One of them wished to invalidate all overseas born from sitting in parliament, which would disenfranchise a quarter of the adult population.

I think the problem is simply a political one and a matter of judgment whether such an amendment could get through in the referendum process. My personal judgment is that, at the present moment, it would not if it stood alone although it might get through in a package. I think that would solve the problem. Otherwise the problem can only be solved by a number of expedients which may be queried in courts, or may not. That cannot be predicted because courts reach all sorts of conclusions.

It seems to me that, as already discussed this morning, some form of renunciation needs to be developed that would be acceptable in the courts, to adhere to that procedure, to sign the form and to go through the necessary procedures. If you could get a form of procedure which would be accepted in courts, either through the Citizenship Act or through the Electoral Act or through a separate piece of legislation, that would be the second rank of attacking this problem other than the amendment to the constitution.

I think the Electoral Commission does need to take greater responsibility. It does give a very substantial warning, which I have read, and there is no doubt that they have met their obligations in doing that. But I think it does need to refer more specifically to

British subjects—or what used to be called British subjects—and point out specifically that they also can be deemed dual citizens or ineligible because, as was said this morning, many people are not aware of that fact, particularly those who came here before 1983 and still exercise the franchise, because they still have that.

The other thing that needs to be pointed out by the Electoral Commission is that this does not apply only to immigrants. The whole discussion is focused on immigrants, but in fact it could easily apply to people who are born in Australia. I think that does need to be underlined in the AEC warning. As has been said already this morning, that could be written into the forms for nomination advice and it certainly should be a responsibility of the political parties, although not all candidates are nominated by political parties and not all candidates that are likely to get in will necessarily be nominated by political parties at the present moment.

There is also a need, as was discussed with the immigration department, for some sort of checklist or database of the citizenship laws of other countries. It does not necessarily have to be published but could be kept by one of the Commonwealth departments—preferably, I would have thought, either by Attorney-General's or by Foreign Affairs. I suggest Attorney-General's because they have the legal capacity to understand these matters and I am not entirely clear that the immigration department does. They also have links with their equivalents in other countries. I suggest Foreign Affairs because most of the problems with dual citizenship arise outside of Australia, when people go back to countries which claim them as citizens. Therefore every Australian overseas post really has the responsibility to collect information of that nature.

I will leave it there—I have spoken for rather a long time—and I am happy to answer any questions or develop any of those themes.

CHAIR—Dr Jupp, thank you. On the point of the 19 members of parliament born overseas, presumably that is only a problem if they did not take any steps prior to the latest occasion on which they were elected.

Dr Jupp—Yes. It is just a guide to the numbers, the proportions. That is 8½ per cent of the present parliament of both houses born overseas. It has not changed very much. In fact, the British numbers have dropped since the 1980s, so there is not actually an escalating trend. But there could be. There has been quite a change in, say, the Victorian state elections. In the last Victorian state election there was a sudden increase in the numbers getting into the state parliament. You are looking at about eight or 10 per cent of parliament, for the last 20 years, having been born overseas.

CHAIR—I take it that, even though the most effective remedy that you refer to—namely, a constitutional change—would be one best to deal with the issue, should I understand from what you said that in your opinion it is unlikely that such a constitutional amendment would succeed at the current time?

Dr Jupp—If it stood on its own, I think it would be seized upon by some of the people represented in some of your submissions, who would simply see it as privileging foreigners. I think the present political atmosphere is very favourable to that point of view. That is just a personal judgment. The politicians would have to make a decision at the time.

If there is going to be a whole package of reforms surrounding the centenary of Federation, then definitely put that one in; but if it stood on its own it could promote a divisive and destructive campaign around the issue, because people will not understand—it is extremely hard to understand anyway—what it is about.

Mr MUTCH—Perhaps if it was pointed out that it was UK citizens the tenor of the argument might change abruptly.

Dr Jupp—It might, I do not know. But certainly the whole anomaly arises because the intention in 1901 was quite different from the situation as it is now, as Mr Sinclair pointed out.

Mr SINCLAIR—There is one part of your evidence that I am not 100 per cent sure of. Have you turned your mind to whether there could be some legislative correction of the problem? I note your recommendation with respect to the wording of 44(i) to which the chair just referred. Obviously, a lot of the problems have emerged because of legislation produced by the Australian parliament. Have you thought of some possible legislation that might identify or redress the problem?

Dr Jupp—I mentioned the two acts that seem to me relevant, the Citizenship Act and the Electoral Act. It would, I think, be desirable to write into one or other or both of those some form of renunciation. But it would still need to be tested in the courts at some point. If you could get a formula written into those two acts which the court has accepted, I think that would go a very long way to—

Mr SINCLAIR—I noted that. I know it has not been tested by the courts but have you considered whether the problem might be overcome by, for example, an amendment to the Electoral Act which said that some form of renunciation, which it might identify, would be sufficient to meet the criteria under 44(i)? In other words, in the Electoral Act, for a person to be a member of parliament, prior to lodging their nomination they would be required to make some declaration, affirmation or whatever, stating that they owed no allegiance to anybody or that they hereby renounced it.

Dr Jupp—And that they had taken steps. You can renounce your allegiance to a foreign power and the foreign power will pay no attention and still regard you as owing allegiance to them. That is really the basic problem; it does not really matter what the Australian citizen says. If Russia, China or whatever it is says that you are a Russian or a Chinese then you are a Russian or a Chinese in their eyes. But I think that it is a fall-back

position rather than an amendment to write into those two acts some form of procedure which would constitute renunciation. You would have to do more than simply sign a form saying, 'I have renounced.' You would have had to certainly do this through an embassy or embassies. I can think of one member of this parliament who has four potential foreign allegiances. I am not going to name him but I think he does. I have three. Anything up to three or four could be quite normal. He would have to take steps to close off all the loopholes.

Mr SINCLAIR—One of the problems that I have is in the case of Delacretaz. It seems that apparently he could have renounced his citizenship—and I am quoting from a briefing to us—by making a demand in accordance with Swiss law to be released from Swiss citizenship. In that case he did not do so. It makes it very difficult if you are required not only to be familiar with the nuances of the Australian constitution and the Australian law, but also those of your country of origin. Most people, particularly if they have lived here for some period of time, would have no idea of Swiss law. It is a possibility, but you have not tested it and have not pursued that solution in any way?

Dr Jupp—No, I have not pursued it in detail. It should be necessary for a candidate to sign some statement, if there were any doubt as to his eligibility under this section, that he had taken the necessary steps with other governments to renounce any allegiance or entitlement. The problem comes not so much in the allegiance as in the entitlements.

Mr SINCLAIR—I agree with that.

Dr Jupp—You could be entitled to all sorts of things that you know nothing about whatsoever.

Mr SINCLAIR—One of the circumstances that strike me is that an American citizen is always liable to tax, as we all are, for income earned outside Australia in that jurisdiction. If you were to pay income tax on some residual estate that you might have inherited, what would that say? It is an entitlement in a strange way. That is why I would worry about your definition of what you do in the Electoral Act. I think you would have to say is, probably, 'I authorise the government to take whatever steps are necessary to ensure that my renunciation is final.' You might have taken what you believe to be reasonable steps, but because of the unknown characteristics of the law of the land from which you or your forebears might have originated, you might not have met them.

Dr Jupp—Yes. That is why some department of government needs a database which could be used as a reference point and someone with concerns could go to DFAT or DIMA, or whoever it is, and ask, 'What does your database say about Mongolian citizenship?'—or whatever it may be. I do not think it would stretch the resources of those departments too much to keep updated information. There is no need to publish it, but it could be something that could be referred to.

Mr Sinclair—It would be available. Thank you.

CHAIR—I think we have exhausted our questions, Dr Jupp. I thank you very much for your submission and for coming this afternoon.

Resolved (on motion by Mr Barresi):

That the committee authorises that table 10.2, on page 86 of the publication *The Politics of Retribution*, be accepted as an exhibit to the inquiry.

[1.53 p.m.]

BELL, Mr John Charles, President, ACT Division, Australian Democrats, PO Box 438, Civic Square, Canberra, Australian Capital Territory 2608

COATES, Mr James Robert, Executive Member, ACT Division, Australian Democrats, PO Box 438, Civic Square, Canberra, Australian Capital Territory 2608

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission dated 9 March 1997. Would you like to make any opening statements?

Mr Bell—To start with, I would like to make sure that it is understood that we are speaking on behalf of the ACT division. I believe Senator Murray has addressed you before. In the ACT, we believe that the section 44(iv) is perhaps of more relevance to us because of the numbers of public servants and that is why we would like to make our own comments. I do not have any specific comments about the wording, but we would like to add a couple of points to the presentation today.

The points of concern that we wish to raise all fall under an umbrella of what we could call equity—that some people have more or less opportunity to stand and to contest positions in federal elections than others. I will give a fairly short list here: there is the case of migrants who have different forms of allegiance to other countries, as Dr Jupp mentioned—and Jim would like to talk about this in more detail in a few minutes; and there is the point that public servants in general, if they have to resign their employment, are not being treated in the same light as other people, who wish to contest a seat, who do not necessarily have to resign from their employment. That matter of equity seems to flow through all our comments.

I would like to note that the Public Service has established guidelines to allow staff to resign to contest elections and to be reinstated with their full entitlements of leave, length of service, superannuation, et cetera. It seems to me that that is a way around the constitution rather than necessarily what was intended in the first place. We believe that the constitution should be trying to avoid a conflict of interest by those who have been elected, not particularly constraining those who wish to contest.

There is also the point that these guidelines that the Public Service and some statutory authorities have are at the discretion, as far as I understand, of the department head, so different parties or statutory authorities would not necessarily give approval for these guidelines to be used. I understand they are considered to be a form of leave, so

they need to be approved by a department head. So in certain circumstances, there may or may not be equal opportunity for people to contest even though all else is equal—other than where they work. There is also likely to be a change there, with the introduction of workplace agreements. These guidelines for the Public Service and the statutory authorities may no longer exist once workplace agreements have been initiated. They are probably going to be one of the bargaining points as other forms of leave are in those agreements.

The last point is that the smaller parties, like the Democrats, I believe, suffer disproportionately from the constraints in both of these constitutional clauses that we are considering here. Because of the smaller number of candidates we have, we often have only one choice for a particular House of Representatives electorate. If they cannot contest, it is a bigger handicap to us than the larger parties where they probably, in most cases, have a larger pool of candidates to draw from—and that is really the point that the ACT division wanted to put specifically. We have a lot of public servants here and it seems to affect us more frequently than the other parties, and in a more severe way. If somebody feels that they cannot get the approval to resign and be reinstated and they do not stand, we have lost a candidate and that person may be the only nomination for a particular seat.

CHAIR—Thank you. Can I take up the point about the guidelines and the public servants. There has been some discussion before the committee about the effect of those guidelines. It has been suggested that, because the guidelines are discretionary, they do not overcome the impediment of section 44—that is, if the guidelines work so that a person resigns on what is a temporary basis on an understanding that, if they are not elected, they are going to be returned to their position, then, in fact, they may not have met the requirements of section 44. Have you have looked at that?

Mr Coates—We have not looked at it closely. I understand the Public Service Act is currently in the process of revision. If it was made mandatory that public servants who were standing in the future would have an automatic right to regain membership if they were unsuccessful in an election, I think that would help solve the problem.

CHAIR—But would it? Because if you have an automatic right to reinstatement, is it not open to the High Court to say that you are still caught by the spirit of section 44?

Mr Coates—That is a problem, yes.

Mr Bell—I would say yes. To me it seems to be a work-around that has allowed some people to reside and contest elections. I would not be surprised if a court actually considered that it was not a legitimate procedure.

CHAIR—What I am asking is this: that is an argument that has been put and we can all have an opinion about it. Do you know if there is any legal advice that has been obtained by or on behalf of any public servants about that issue?

Mr Bell—No, not personally, I do not.

Mr Coates—We have had some legal advice from the Electoral Commission on our eligibility to stand for the ACT election but we have had none on federal parliament.

CHAIR—Forgive my ignorance, but is the ACT requirement different from section 44?

Mr Bell—It is. The ACT legislation states quite clearly that public servants do not have to resign to contest the elections. They have to resign to take up a seat.

Mr SINCLAIR—They exercise that power by virtue of federal legislation while they are a territory. Could there be some doubt about the validity of that? I do not know whether anybody has tested it. It just struck me that that might be so. I am not canvassing anything; I just raise it with you.

Mr Coates—If there is any doubt, quite a number of the members of the current legislative assembly could not be elected, and some of the previous ones too.

Mr Bell—It seems to me that the whole idea is a work-around. It is not a solution to the problem; it is a way of allowing some public servants to stand. I believe that it has been used, that people have resigned under these conditions to contest a seat. It seems to me that it is not really complying with the expectations of the constitution.

Mr Coates—The count for the first ACT legislative assembly election took several months, as you may remember. Some of the members of the assembly went back to work as public servants while the count proceeded, until they found out what the result was.

Mr SINCLAIR—Under your present electoral laws the time has been increased rather than reduced, hasn't it?

CHAIR—The other approach that is adopted—for example in Victoria, as I recall—is that the legislation provides that a person is deemed to have resigned upon being elected. Have you looked at those provisions?

Mr Bell—Yes. In principle it seemed to me quite reasonable, but I am not a lawyer. I do not think that I am really qualified to comment on the legitimacy of it, but it seems to me in principle a reasonable decision that they must accept when they nominate, that if they are elected that they are no longer employed by the Crown. How it could be worded is not something I am qualified to address.

CHAIR—Leaving aside the legal and constitutional issues—I think I have put this to other representatives of political parties but I do not recall putting it to Senator Murray, because it had not arisen in our discussions then—I will put this to you: what are your

thoughts about the political climate for any proposed changes to section 44?

Mr Coates—I think there would be a fairly sympathetic climate for changes in the requirements for migrants, because more and more Australians are requiring dual citizenship. I think the department of immigration estimated that there were about five million people, so I think that there would be a sympathetic understanding about public servant. I would hope there would be a sympathetic understanding, but—

Mr Bell—I guess I would have to be a bit more cynical and say that I think it depends on the approach taken by the major parties, whether they wish to promote or otherwise the particular constitutional change. I think it would be much more important than, perhaps, whether Pauline Hanson or somebody else is in the media a lot at the moment wishes to do so. I am sure the Labor and Liberal parties, if they put their minds to it, could overcome that on a particular constitutional question.

Mr MELHAM—The history has been that, even if you had individual senators or members of parliament opposing, they have managed to defeat changes of referendums. The DLP played up in 1967 and one of the referendums was defeated, and I think that in 1977 some of the Fraser recommendations were defeated—the ones to do with four-year terms and breaking the nexus.

Mr Coates—The current provisions of the constitution mean that quite a large number of Australian citizens are not eligible to stand for parliament. Many of them could not, in the normal process of events, go through the process of fully renouncing their citizenship in time to stand if an election is called.

Mr MELHAM—I accept that but there is also a view that, if you want to sit in the national parliament, there should be no question that your allegiance, and your sole allegiance, should be to Australia. That is a pretty powerful argument.

Mr Bell—I would still think that the person concerned is the only one who can make that declaration. To have to rely on another country's legal system to determine whether you can make that declaration seems to me a bit unreasonable.

Mr MELHAM—But if it is harsh or oppressive in terms of renouncing citizenship, the High Court leaves the way open for you to take reasonable steps. It becomes then a very much subjective thing. The argument is a policy argument: whether you do allow people who retain dual citizenship openly to actually sit in the national parliament.

Mr Bell—In our discussions, within the ACT division at least, the feeling is that if people are prepared to make an unambiguous declaration of their allegiance to Australia and of the wish to work for the benefit of Australia, that should basically be enough. That is, their statement that they will make an unambiguous decision that they are Australian

citizens and will work for the benefit of Australia should be what is required.

Mr MELHAM—And the fact that they retain citizenship with another country is not a bar? It is as far as the current constitution is concerned.

Mr Coates—It depends on the country—

Mr MELHAM—So we now qualify the country? So Iraq we might not accept, but we will accept the United Kingdom? We might not accept Malaysia? Isn't that a problem?

Mr Coates—The problem is the current arrangements, whereby people of different countries have different processes by which they renounce their citizenship.

Mr MELHAM—I accept that.

Mr Coates—In some cases it is extremely difficult, and perhaps almost impossible, to fully renounce your citizenship.

Mr MELHAM—But the court has said in those instances that, providing reasonable steps were taken, they will have been taken to have renounced. The fact that the other country might not recognise it is not, in the end, a bar to your standing if you have taken reasonable steps. But if you have taken no steps it could be different.

Mr Coates—I think the court's decision in the Sykes v. Cleary case, with the Greek fellow and the Swiss fellow, left it open to question as to how far they had to go to renounce their citizenship.

Mr MELHAM—Sure. There was also one judgment—I forget who it was—was that if it is a repressive regime there is no way they cannot stop you, in effect. That is my understanding; it has been a while since I have read the judgment. If it is repressive, it then becomes a question of what the reasonable steps were that were taken.

CHAIR—Objectively determined by the court.

Mr Coates—Another interesting case was that of a British subject who was called up for national service but elected not to go and went to gaol instead. He then thought he was entitled to stand for parliament, stood and was elected, but then was disallowed because he retained British citizenship, even though he believed he had always been an Australian.

Mr Bell—We are still talking about the decisions of other people. It is still my view that the person who is nominating as the candidate should have the right, basically, to make a declaration that they owe no allegiance to another country and their prime consideration is the benefit of Australia. If they are prepared to do that, why shouldn't

they then be entitled to stand for the parliament?

Mr SINCLAIR—Would you be happy if they were also required, in that declaration, to say that they renounce any allegiance—or whatever the word is—or any rights or privileges they might knowingly or unknowingly enjoy as a subject or citizen of a foreign power, and, secondly, authorise the Australian government to take whatever steps might be necessary to ensure that that position was so?

Mr Bell—That is reasonable. I expect them to make a significant commitment. But I think that to allow the possibility that there are barriers which they do not know about is a little unreasonable. They must make an unambiguous and definite commitment to Australia as an individual, but I do not see why they should then be constrained by known or unknown decisions by other countries.

Mr McCLELLAND—Mr Sinclair's suggestion is probably a good one, isn't it? As he said earlier, it would place the onus on the Australian government rather than the candidate if they said something like, 'and in so far as it may subsequently be determined that additional steps are necessary to formally renounce my citizenship of another country, I hereby authorise the Attorney-General of the Commonwealth of Australia to take all such steps as may be determined,' or something along those lines.

Mr Bell—Yes. It is, I guess, putting the paperwork back on the government as well. If a candidate declares their allegiance to Australia and declares that they no longer have any allegiance to another country, then the other country does not know about it either unless the Australian government or that individual informs them.

Mr SINCLAIR—My concern arises from the Delacretaz case. There was a change to Swiss law which put Delacretaz in a very difficult position of which he would not have been aware. He had already renounced his citizenship, as he believed, but Swiss law had changed and therefore there were additional steps required. That is why I was trying to look at that exigency.

I would like to ask a question on another issue. One matter that has been raised relates to the changes in industrial law and the possibility of public servants being employed by contract rather than as they are presently employed. Have the Australian Democrats, or any other party, as far as you are aware, sought in any enterprise bargaining to have included in the contract of employment some clause which perhaps might pick up re-employment under 44(iv)? You would have to have in mind the requirements of 44(iv), but you might have some clause which said, 'If I should subsequently seek to stand as a candidate,' et cetera, 'there would be an opportunity for an offer to be made back to me were I to be unsuccessful, so that I might be employed again.'

It has not been tested and I wondered whether somebody had thought of a form of words within a contractual arrangement, which might give perhaps greater certainty than is

now the case with public servants. You would have to have it in mind, of course, that you would not breach 44(iv) by putting it there. I wondered if you had thought about it and if any advice had been taken on a possible form of words to be offered by the employer, who I presume would still be the Commonwealth in one form or another, in an enterprise bargaining situation?

Mr Bell—No, I do not believe there has been any discussion.

Mr McCLELLAND—On that point, there might be some statute for the election of public servants, whatever it might be called. There might be a clause in there that said, 'In the event of your nominating for election as a member of the House of Representatives or a senator, your contract of employment with the Commonwealth shall be suspended and, in the event of your election, shall be terminated as at the date of election.' What about that?

Mr SINCLAIR—They would have to be terminated but an offer would be made. I think you have to be careful of the words and that is why I was thinking my way through it. If he was suspended I think he would still transgress, but if employment were terminated and then you had a requirement that an offer be made, you might be able to get away with it. You just have to be careful of the word 'suspended'.

Mr Bell—I do see a problem there in the concept of the democratic system, where we must expect a fairly significant number of the candidates, even in House of Representatives seats, to be contesting as a way of supporting a minor party or as an independent with a particular message, with no real hope of getting elected. Probably a majority of the House of Representatives candidates in any election must really have no significant hope of ever getting elected, but they still wish to stand.

So you have a lot of people in that position who then, if they are forced to resign, are forced to take on a fairly large financial burden for the sake of being a minority candidate or an independent. Even on a Senate seat there must be, I presume, in the major parties and the minor parties, a number of people who stand for the sake of having a name on a ticket but actually do not take much part in the campaign. They continue to work. You would, in that case, be forcing those people to take that period of unemployment and, therefore, no income. I would rather try to avoid that if possible.

Those that are going to campaign seriously must, obviously, stop work, because I do not think there is time to do both. But there would be some who would be tail-end candidates and who would not normally, under present circumstances, expect to resign or stop work except perhaps for the last week or two of a campaign.

Mr KELVIN THOMSON—One of the witnesses suggested to us that an automatic right to return might transgress the provision, and indeed the philosophy behind it, every bit as much as the existing situation. The question of a right to return, perhaps,

calls up the conflict of interest problems with the executive even more strongly than having an office.

Mr SINCLAIR—That is right, and I was not going that far. It dawned on me when I heard Mr Coates's words in talking about enterprise bargaining. An obligation to make an offer is different, because an offer does not guarantee that you are going to be employed. I was really putting it in the way of a question on legal advice, because it seemed to me that you might be able to look at a form of words in the new enterprise bargaining situation which at least you would need to take advice on. I had not even thought about it before now, but it seemed to me that you might be able to get something in that way. You are quite right that if it were an offer it would transgress. But if it were something short of that—

Mr McCLELLAND—That is interesting. In my former life I was involved in the Super League litigation, and because of the Federal Court injunctions on Super League they were not able to offer contracts with Super League to any ARL clubs, but they worded these convoluted conditional offers. That may be an avenue.

Mr Coates—I will give an example of the difficulties some people in the ACT have in standing for parliament if they have had multiple citizenship. A candidate at the election in Fraser this year was born in Palestine in 1938. His parents came from Danzig, which was then part of Poland even though they were German speaking and regarded themselves as German citizens. He came to Australia in 1950 and became an Australian citizen in, I think, about 1960. So he had been an Australian citizen about 35 years.

When he stood for Fraser he suddenly realised that he had to renounce his previous citizenship, and he said he had a great deal of difficulty. It was a matter of only a few weeks. He got access to the German ambassador and managed to renounce his German citizenship. He got the papers for the Polish citizenship but did not really have time to complete the process. He did not pursue the matter of Israeli or Palestinian citizenship. So I suppose technically he could have been declared ineligible, or incapable of being elected. Fortunately, he was not elected. But in a matter of weeks he had to spend a considerable amount of time, and a lot of his own money too, endeavouring to renounce all his other citizenship to stand for parliament. It is an unreasonable obstacle for people seeking to enter parliament, and it affects some members much more particularly than others, if potentially they have citizenship of several other countries.

CHAIR—Do you have any comments on the sufficiency of the information provided by the Australian Electoral Commission?

Mr Bell—The greatest problem is the lack of certainty, which is presumably why we are all here today. The Electoral Commission advice that we have received is basically just a copy of the wording in the act. They tell us then to go and get our own legal advice about the interpretation of it.

Once again, for the parties that is not too big a job, but for independents it is quite an ordeal. You are still not in a position of knowing for certain whether you are really eligible or not, under a number of circumstances. I have not been personally worried about the citizenship, but as a public servant I have had to consider it. As we said here before, it is a matter of knowing whether accepting these agreements with the CSIRO, where I work, is enough. I have no definitive legal advice over that question. All I could do would be to ask an opinion and hope it was a correct opinion.

CHAIR—I thank you for your submission and for coming along this afternoon.

[2.25 p.m.]

EVANS, Mr Harry, Clerk of the Senate, Department of the Senate, Parliament House, Canberra, Australian Capital Territory

CHAIR—Welcome, Mr Evans. Given your position, I will dispense with the usual warning in relation to false or misleading evidence to the committee. We are in receipt of your submission of 4 March 1997. I invite you to make any comments in relation to your submission.

Mr Evans—I am happy just to make the written submission. I am sure I cannot tell the committee anything that the committee does not already know, but there it is.

CHAIR—Thank you. You say in your submission that obviously section 44 will need to be changed at some stage. What changes do you envisage that we need to make?

Mr Evans—As I said, if there is going to be a republic referendum, this section will have to feature in it because of the references to the Crown. If we were writing paragraph (i) now we would probably draft it in a different way to achieve the same purpose. You would have to deal with the question of dual citizenship, which was not much in contemplation in 1901, in some way. You would have to redraft that to achieve the same purpose.

Similarly, in relation to paragraph (iv), particularly referring to the Crown does not clearly convey what it is all about. You would have to have something like referring to holding office in the executive government of the Commonwealth or of a state or territory, or something like that, to make it clear what it means. Of course, obviously the proviso is now well and truly out of date, particularly referring to state ministers and the imperial forces. So that would need to be updated, too. But unless there is going to be some more substantive question put to the electorate, I do not think you would get away with a referendum just to tidy up this section.

CHAIR—I take it that it is your view that anything short of amendment to the constitution, such as some procedures in the Electoral Act or the Citizenship Act that went to, for example, renunciation, would not be sufficient to overcome the difficulties that have arisen in recent years?

Mr Evans—I do not quite follow how that works. I know one of the High Court judges virtually invited the parliament to do something legislatively. It seems to be in contemplation that you would fix up the problem with paragraph (i) by altering the citizenship law in some way and dealing with dual citizenship in some way in the Citizenship Act. But I am not quite sure how that would work.

In relation to paragraph (iv), I think there is already legislation providing for the

reinstatement of public servants who leave their employment to contest elections. I think that is in all jurisdictions now, unless I am mistaken, and that solves the problem in so far as it can be solved legislatively, as I understand it.

CHAIR—There has been evidence that that sort of provision, which allows for reinstatement, may in fact not solve the problem legislatively because it is still open to the court to find that section 44(iv) has been breached. That is, if those provisions provide for the reinstatement of the person, then because of that you have not met the objective, or you have not met the spirit at least, of section 44(iv).

Mr Evans—That point only makes it more difficult for me to understand how you can fix up the problem of paragraph (i) by any legislative means, because the court is bound to interpret the text of the constitution. But my assessment, for what it is worth, is that that legislation would be unlikely to fall foul of a judicial interpretation of paragraph (iv). Although it is a technical means of avoiding it, it is not entirely technical because the whole purpose of paragraph (iv) is to ensure that members or candidates are not under an obligation, as it were, to the executive government. By their being able to leave their office and then stay out of their office if they are successful, obviously, and then being statutorily reinstated, you do achieve the purpose of paragraph (iv). So it is not entirely a technical—

Mr McCLELLAND—Do you know if that legislation is discretionary, or is it mandatory? It might be okay, for instance, if the legislation said that a public servant who has resigned from office for the purpose of contesting an election 'may be reinstated' with full accrual of entitlements and so forth. That might be something which is acceptable, whereas something which said that a public servant who resigns 'shall be reinstated' might infringe the section. Have you got any views on that, or do you know how the legislation is expressed?

Mr Evans—I have not followed up the various bits of legislation through the various jurisdictions, so I do not know how it works, but I would have thought it would be the other way around. If you 'might' get your office back you would be under an obligation to the executive government which you would not be under if you automatically got your office back. The second option would seem to me more in accord with the purpose of the provision rather than the first.

As I understand it, the whole purpose of paragraph (i) is to establish the independence of both candidates and members from the executive government—that they are not under an obligation to the executive government. If they are currently employed in a government job, they are under some obligation to the executive. If they leave their office to contest election but they are automatically reinstated, that would seem to me to—

Mr McCLELLAND—One of the lawyers who gave evidence thought that might fall foul, however, because there is an underlying arrangement which could fall into the

definition of an ongoing holding of an office of profit.

Mr Evans—I would be interested to see that advice, but I would have thought that, if the provision said that you might be reinstated and it was a conditional thing, then you were more likely to be in a condition of being under an obligation to the executive government than if it were automatic.

Mr McCLELLAND—That conditional reinstatement, that discretion to reinstate, though, would only be in the event of your having lost.

Mr Evans—Yes, that is true.

Mr McCLELLAND—So then you would not be entitled to any benefit or manipulation at that point, after you had lost, in your capacity as a member or senator.

Mr Evans—No, but, to put a worst case scenario on it—as they say—if it were a discretionary thing then somebody in the government could say, 'We'll make sure you get your job back, providing you don't seek election again,' or, 'providing you don't run for that particular party again.'

Mr McCLELLAND—Or, 'providing you run dead in the election,' or something like that.

Mr Evans—Something like that, yes. That could, in other words, be used to influence a person in relation to a candidature for the parliament and would therefore be more contrary to the purpose of paragraph (i) than the automatic reinstatement.

Mr SINCLAIR—Isn't the problem with that that you are referring to the purpose and the purpose is not in the clause—the clause does not refer to the purpose? I agree with your conclusion about the purpose but the clause itself is far more precise.

Mr Evans—Yes, although I would hope that the court would always have regard to the purpose of the clause in interpreting it, which is what should happen.

Mr SINCLAIR—Yes, but surely that creates all the problems you have in 44(i) of the different circumstances that existed in 1901 when it was enacted and you were either British subjects or aliens. It was an entirely different context.

Referring to the point the chairman raised, talking about changes, if we were going to have some change as a result of change to a republic, would you be for a minimalist or a substantive change in each of these particular clauses? Or are you more of the general category and you would put some general saving clause in the introduction in the form of, say, 'until the parliament otherwise provides'?

Mr Evans—I would hope, if a referendum on a republic is put, that the electorate will allow whoever is drafting the changes, in addition to simply making the change, to do a little bit of tidying up here and there in the provisions. This section is an area where you could do a bit of tidying up, I think, particularly in the proviso.

Mr MELHAM—But even if you were tidying up, I took the sentence in your submission, 'The purposes of the provisions are still valid and important' to be your view that there is still a need for those provisions. You might tidy up the language but the fact is that if you hold a foreign allegiance you should not sit in the parliament and if you have an office of profit you should not take your position in the parliament.

Mr Evans—Yes.

Mr MELHAM—There is an argument about whether it should be at nomination or the time that you sit.

Mr Evans—Yes, but I was thinking that rather than just substituting 'executive government' for 'Crown' in (iv), you would tidy up the rest of the wording.

Mr MELHAM—I accept that.

Mr SINCLAIR—So you would not go for a change to the introduction? The proposition was that you put some saving clause like, 'until the parliament otherwise provides'.

Mr Evans—You would have to be careful that you could not allow a parliament to legislate the restrictions away.

Mr SINCLAIR—Precisely. That would be my worry.

Mr Evans—If you just had 'until the parliament otherwise provides', the parliament could legislate those restrictions away. You would have to have the restrictions entrenched in some way.

Mr SINCLAIR—So you would be looking, as you have just suggested in response to Daryl's question, with (iv), of tidying up more than 'under the Crown'—

Mr Evans—Yes.

Mr SINCLAIR—Would it go so far as including the rather strange animals, senators-elect, in specifically referring to them?

Mr Evans—Yes, you would have to try to cover that little gap, if there is a gap. You would have to try to cover that in some way.

Mr MELHAM—But it is your view, I take it from this submission, that senators-elect are covered by this provision and so someone like Senator Ferris really would have had all sorts of trouble if that was taken all the way to the High Court.

Mr Evans—That is certainly my view. If asked the question, the High Court would do a construction of the provision having regard to its purpose and would say that, having regard to the purpose of the section, it should apply to senators-elect, and does apply to senators-elect.

Mr MELHAM—And that with Senator Ferris, her resignation and subsequent reappointment would not have solved the initial problem, because she cannot resign from a position she was ineligible to have been elected to in the first place.

Mr Evans—That is exactly right.

Mr SINCLAIR—But with the words, 'shall be incapable of being chosen or', if you deleted the words 'being chosen or' rather than the text itself, that would cover senators-elect, would it not?

Mr Evans—I am not sure. I am not sure whether that would be sufficient to do it. That raises the question of whether it should apply to candidates as well as members, which Mr Melham referred to a moment ago, but I am not sure that just making it not apply to candidates would be sufficient. You could still say that a senator-elect is somewhat in the position of a sitting senator and should be subject to it. You would have to have some specific words to try to cover that situation of senators-elect.

Dr SOUTHCOTT—Just on that point, the position of senators-elect has never been tested at the High Court so we do not know what the High Court would determine as regards senators-elect.

Mr Evans—No, we do not, but they have always been strongly advised not to hold a government job while in that position and most of them have heeded that advice.

Dr SOUTHCOTT—Sure. Daryl mention the case of Senator Ferris. Is that a personal view as regards the fact that Senator Ferris could not resign from a position which you say she could not hold?

Mr MELHAM—That is your considered view?

Mr Evans—Yes, I think you could say that is a considered view, and it would seem to me necessarily to follow from the whole situation. If she was not validly elected in the first place, if her election was void in the first place, then how could she resign from the position and have it filled as a casual vacancy?

Mr RANDALL—But is that not something that could only be considered by the High Court as the court of disputed returns?

Mr Evans—Certainly. If someone were to take her case to court now, I suppose there is a possibility of the High Court saying, 'Well, the time has gone—it is too late now to go back and try to remedy the original defect.' But my tip would be that they would say it was not a valid election in the first place and therefore the resignation and filling of the casual vacancy was not valid.

Mr RANDALL—So was Sir William Deane, a former judge of the High Court, wrong to accept her resignation?

Mr Evans—No, I do not believe so because, as you say, only the court can determine the legal question. I think he had to just go on what the de facto situation was and leave it to the courts to determine whether she could in fact resign.

CHAIR—There is a problem with that, though, and what runs contrary to that interpretation was not only Sir William accepting the resignation. I understand your point that by virtue of his office he may be bound to accept what is presented to him, so to speak.

Mr MELHAM—But that happened in the 1974 double dissolution bill—

CHAIR—There is another point I want to come to. If the South Australian parliament—or any parliament in that situation—then acts on that basis, that seems to be a contrary indicator, if I can put it that way, to the position you are putting.

Mr Evans—I do not think so. The South Australian parliament is in exactly the same situation as the Governor-General. It is not up to them to say, 'We're not going to replace this person and fill this casual vacancy because the election wasn't valid in the first place.' They have to act on the de facto situation and say, 'Here is a senator for South Australia, duly returned, who has resigned and we have to fill the vacancy.' The fact that that all might be void is a matter for the courts.

Mr RANDALL—It depends on what the High Court decides as the court of disputed returns.

Mr Evans—Certainly.

Mr MELHAM—It would be different if there was a decision and, on the face of it, the nomination flew in the face of a current decision, but at the moment there is no decision. But there is no doubt is there, in your mind, Mr Evans, that there is a very strong case that her resignation did not cure an earlier defect?

Mr Evans—That is certainly my strong view, yes.

Mr BARRESI—Can I move away from—

Mr MELHAM—I was going to say, we are not going to solve that here so—

Mr Evans—Just one other point in relation to Senator Ferris's situation: the writs had not been returned when she took up her job so technically she may not have been a senator-elect; she may still have been a candidate at the time when she took up her job. That is another interesting question.

Mr MELHAM—So she would still have fallen foul of the office of profit as a candidate rather than as a senator-elect.

Mr Evans—Yes.

Mr RANDALL—Just one final question on that point: it is true that there is quite a range of legal opinion as to whether she was able to resign from that position.

Mr MELHAM—Where you have more than one lawyer, there is always a range of legal opinions.

Mr Evans—I have not seen a range of legal views about that. The only point of substance that was raised by advice in her favour, as it were, was that her appointment had not been validly made. Her appointment as a member of staff of the parliamentary secretary had not been validly made. I mentioned that point in the submission, that I do not really think that cured the problem, either. That was the only really substantial legal point that was produced in her favour, as it were, during the argument about the matter. I certainly did not see any firm opinion that her resignation and reappointment solved the problem. There may be opinions, but I have not seen them.

Mr BARRESI—I want to ask a question on Jackie Kelly in regard to reserve forces. You say that a way out would be if they transferred to reserve forces before nominating. Do you have an opinion, legal or your own, to say that if the only office that you hold as a candidate is in the reserve force—and that is the only money you are getting when you are a candidate—then it is a breach of section 44(iv)? There is no other income that you are receiving except the reserve force income.

Mr Evans—Yes. The provision refers to a person whose services are not wholly employed by the Commonwealth. You are allowed to receive pay as a member of the forces of the Commonwealth, providing that your services are not wholly employed by the Commonwealth.

Mr BARRESI—I do not see the word 'wholly'. It just says 'hold any office'.

Mr Evans—In the proviso.

Mr BARRESI—Down at the bottom on the right.

Mr Evans—It says that the subsection does not apply to the receipt of pay as an officer or a member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth. That seems to me to be a fairly clear reference to a person who is, in some sense, on the reserve. He is still receiving pay but is not actively employed by the defence forces.

Mr BARRESI—The definition is from the employer's perspective rather than from the employee's perspective.

Mr MELHAM—You are just drawing it from the words of the constitution.

Mr Evans—I do not know whose perspective it is from but you only have to show that you are not being fully employed by the Commonwealth. It does not matter that you are an officer or a member of the forces and receiving money for it. I think the conventional interpretation which was accepted in the Kelly judgment is probably correct, for what it is worth.

Mr RANDALL—Just on a few other matters: what do you think the position would be of, say, a medical practitioner who is in receipt of cheques from Medicare? Would they be holding an office of profit under the Crown?

Mr Evans—No, I do not believe so. I think it would be the generally accepted interpretation that simply receiving payments from the Commonwealth does not indicate that you hold an office. You could not make out a case that a doctor holds an office in any sense.

Mr RANDALL—Would they have problems with section 44(v)?

Mr Evans—That is a different question. Section 44(v) is a very difficult provision. You are lucky you are not inquiring into that because that is a very difficult provision.

Mr RANDALL—Garfield Barwick cleared it up 20 years ago.

Mr Evans—People were raising points about members when the dining rooms here were not contracted out, as to whether members were entering into a contract with the Commonwealth by dining in the dining room. It is a very difficult provision and one that would have to be seriously redrafted if you were doing this section.

Mr RANDALL—In a constitutional amendment, what do you think should be the critical day for members of the House of Representatives and senators?

Mr Evans—The nomination day is probably fair enough. If the purpose is to ensure that a person is independent of the executive government and not subject to influence by the executive government, then candidature should be covered as well as actual membership. Otherwise, theoretically, the executive government could influence a candidate in the candidate's conduct as a candidate, which could subsequently flow over to their conduct as a member. I think it is fair enough that it goes from candidature.

Mr MELHAM—It could also result in a whole range of candidates. You could have state members of parliament actually running as senators or members for the House of Representatives and not having yet resigned. You could have senators, judges and judicial officers doing the same thing—the DPP, for instance, could run and not resign—and it could create all sorts of problems. I know everyone is sympathetic to teachers and other public servants, but you have got these high profile positions that would then also be allowed.

Mr Evans—Yes, it could create enormous conflict of interest problems, obviously. To take one of your examples, if the DPP was running as a candidate and at the same time making decisions about politically sensitive cases, it would give rise to enormous problems, obviously.

Mr MELHAM—I raise that because there is a line of argument, and some people have put it, that it should be the date of when you are sitting as against the date of nomination.

Mr Evans—I think that, having regard to the purpose of the provision, it is fair enough that it dates from nomination.

CHAIR—There being no further questions, I thank you for your submission and for your attendance this afternoon.

Resolved (on motion by Mr Kelvin Thomson):

That, pursuant to the power conferred by section 2(2) of the Parliamentary Papers Act 1908, this committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 2.51 p.m.