HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

MELBOURNE

Tuesday, 10 April 1997

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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Dr Southcott
Mr Tony Smith
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Matters referred to the committee:

Section 44(i) and (iv) of the Australian constitution

WITNESSES

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

MELBOURNE

Thursday, 10 April 1997

Present

Mr Andrews (Chair)

Mr Kelvin Thomson Dr Southcott

The committee met at 12.14 p.m.

Mr Andrews took the chair.

CHAIR—This is the first public hearing of this inquiry to be held outside of Canberra. I welcome those who have come along to give evidence to the committee today and any others who may be attending this meeting.

Today we are taking evidence from two academics of the Law School of the University of Melbourne, Ms Rubenstein and Mr Lindell. Hopefully we will be hearing also from Mr Phil Cleary, who has the singular distinction of being the first member of federal parliament to lose his seat following a challenge, under section 44(iv) of the constitution, to his qualification to sit as a member of the House of Representatives.

We have previously taken evidence in Canberra from political parties and have heard of some of the practical problems they have encountered in ensuring that candidates comply with section 44. This afternoon we will have an opportunity to hear about the difficulties faced by an independent candidate for election.

[12.15 p.m.]

RUBENSTEIN, Ms Kim, Lecturer, Law School, University of Melbourne, Parkville, Victoria 3052

CHAIR—Ms Rubenstein, I thank you for your submission and also for coming along this afternoon. Although the committee does not require you to give evidence on oath, I should advise that these 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. Would you like to make an opening statement for the benefit of the committee?

Ms Rubenstein—I am appearing here in a private capacity. As my written submission states, I am concerned with section 44(i), and my submission is in relation to the question of dual citizenship. It is an area in which I have a particular research interest as well. As a constitutional lawyer and a lawyer writing in citizenship law, this section is particularly pertinent.

Essentially, my argument is that dual citizenship is an essential part of Australian democratic society as it exists today. As a result, the most fundamental way of ensuring that that is properly represented in our constitutional system is to preserve that within a constitutional framework which, as an extension of that, would mean having to change section 44(i) of the constitution so that dual citizens would not be disqualified from being members of parliament.

My submission gives several reasons or grounds for reaching that conclusion. Essentially, they are related to notions of equality of citizenship and notions of democracy in modern Australian society, and also international moves on the grounds of citizenship, that dual citizenship and the advent of globalisation and internationalisation have ensured that this is a current issue not only within Australia but around the world and that, as a result, we need to be rethinking how our constitution sits in our own society today as opposed to how it was in its framing in the late 1890s, early 1900s.

CHAIR—Going back to the 1890s, what do you understand was the policy behind section 44(i)? Precisely, what mischief, if you can elucidate it, did the framers of the constitution seek to address? Also, if there is a need for some provision around this area generally, what policy do you believe should underlie it?

Ms Rubenstein—In the 1890s and in the convention debates themselves, there was no significant discussion about the insertion of this section. As I have said in my paper, it was very briefly dealt with in relation to the notion of dual allegiance. The clear statement was that one could only have allegiance to one country, and that the notion of having allegiance to more than one country was unacceptable in an appreciation of the role of the nation state and the position of the nation state. So, in a sense, it was almost putting it like treason: if you had allegiance to another country, that of itself then denied your allegiance to Australia.

As I also have said, it is quite interesting that the South Australian delegate Glynn was keen to leave this matter to parliament to decide. I think this is one option that can clearly be considered: changing the constitution so that it is similar to the qualification provisions which the constitution set out but then left for

parliament to otherwise decide. You could, in fact, have a mirror provision with section 44 setting up standards for the present society but giving parliament an option to alter those without us having to consider, as we are now, any constitutional amendment. So those policies, I think, as far as we can glean from the convention debates and notions of the nation state in the 1890s, were solely to do with the idea that you could not have more than one allegiance.

My argument is that in current society the notion of allegiance is not an absolute notion and that we can have an affiliation or commitment to more than one place, as we do as individuals in relation to familial members or to our relationships and commitments within Australian society. We have various connections with which we identify, and the fact that we identify with more than one group does not mean that we undermine another group. I think that also can exist in an international context, and that people who are born in another country or who have some connection to another country can still have a feeling of commitment and connection to that country without it undermining their ability to have a commitment and connection to Australia.

If we take that a step further in relation to representing Australians within the community, it comes down to, I think, perhaps different notions of democratic principles. But if we believe that our parliament should be a representative body—that is, representing the people on whose behalf they are there to govern—then they have to reflect the membership of the community, and in this instance members of parliament are treated differently from members of the community. That is, members of the community can hold dual citizenship with it not undermining anything that happens to them in connection with their civil, political and social rights within the community, but they cannot become members of parliament if they have not followed through these procedures which essentially ask them to renounce their former citizenship in its fullest possible sense, which means according to the laws of the other country's citizenship laws.

I would suggest that with current world values, politics and realities the only situation where there is a direct concern is when Australia is in some form of direct warlike opposition to another country and where there are decisions directly related to that conduct between those two countries. In that situation, I think there are two ways of perhaps dealing with it.

I think one would be that the Citizenship Act, which provides for who is entitled to the status of citizenship, could have a provision which deprives a person of their citizenship in a particular period of time, whether it be in a state of war or whether there is some direct harm that Australia can foresee by an individual—whether a member of parliament or not—holding another country's citizenship. In a parliamentary sense, if that person were a member of parliament and something occurred which meant they lost their Australian citizenship, they would then no longer be qualified to be a member of parliament because, as I would maintain, being an Australian citizen is a prerequisite to being a member of parliament.

So one way of changing the constitution would be for there to be a provision which either got rid of section 44(i) or in its place put a section that the person has to continue to hold Australian citizenship. So not only to qualify to become a member but in order to continue they must maintain their Australian citizenship. Then we could put a provision in the Citizenship Act which essentially would deprive them of their citizenship in the event of certain circumstances.

CHAIR—So the alternatives are: delete section 44(i) or replace section 44(i) with words to the effect 'who is not an Australian citizen'?

Ms Rubenstein—Yes, that is right.

CHAIR—'Any person who' and then for there to be a series of disqualifications.

Ms Rubenstein—That is right. Of course, you need to be an Australian citizen in order to become a member of parliament. So it either is not or loses their Australian citizenship.

Dr SOUTHCOTT—In the second part of section 44(i), it states 'or entitled to the rights or privileges of a subject or a citizen of a foreign power'. As I understand it, that has not been tested in the High Court. What is your interpretation of the second part of the phrase?

Ms Rubenstein—I think this adds to the whole complexity of the notion of citizenship law. Each country's laws differ in relation to what are the rights or privileges of a citizen. In fact, the rights or privileges that flow from Australian citizenship are not very clear at all. The case of Wood, for instance, is interesting: non-citizens, people who are not Australian citizens, can be called up or conscripted to serve in our Australian Army. That normally would be a notion that most traditional views of citizenship would include as a citizenship responsibility or right.

The notions of rights and privileges associated with citizenship are extremely unclear within Australia and in other countries. So that would add to the difficulty of who is disqualified from membership of parliament, because in some countries that could be the right to vote or the right to hold a passport or it might involve certain social security rights or entry or migration rights and so forth. But they vary from state to state. You would need to look at the laws of the other country in order to say what the rights or privileges of that person are in the other country.

Dr SOUTHCOTT—Justice Gaudron, in her judgment in Sykes v. Cleary, felt that parliament could legislate to say that all that is required for renouncement of foreign citizenship is to comply with something within Australian law. I know you have been arguing that it should not be a requirement, but what do you think of the practicality of that in terms of legislation?

Ms Rubenstein—The ultimate problem there is that it is still subject to the court's interpretation of the breadth of section 44. Because it is a constitutional provision, it is not within the realm of parliament to make or have an absolute version of what that means; in our system, it is for the court to interpret that. If a court felt that the legislation did not properly reflect section 44, we would still be in the same dilemma.

Ultimately, if there was consensus of that legislative approach and there was no individual within the community who wanted to challenge it, that would be fine. But that is unlikely to be the case in the situation where someone who loses an election sees that as an opportunity to challenge the person who has been successful.

CHAIR—I suppose it could be argued that, if the parliament was to pass such a law—and assume that it was passed unanimously by the parliament because I do not think this is a matter which has party political differences; we are all in the same boat, so to speak—that might have some persuasive influence on the High Court. But ultimately, if the High Court wanted to maintain the current constitutional understanding, that—

Ms Rubenstein—That is right. Ultimately, because our constitution provides for any change to the constitution to be by referendum, the fact that parliament—although it is not only parliament—essentially is the one that has decided how to interpret it is still not reflective of our constitutional processes if the court felt that it was an inappropriate expression of those provisions.

CHAIR—Do you know what other countries allow dual citizens to stand as members of parliament or the equivalent institution?

Ms Rubenstein—I am afraid I do not have that information. I was in Israel recently and I do know that their legislation has the provision of a requirement for citizenship as a member of parliament, and in certain circumstances citizenship of other countries can disqualify. I would have to go and have a look and give you some more information in relation to that, which I could easily do.

CHAIR—There are also some countries that provide for election to their national parliament or assembly of—

Ms Rubenstein—Of permanent residents or non-citizens?

CHAIR—Of people who live diaspora, away from their country.

Ms Rubenstein—Yes, that is right.

CHAIR—Is Israel one of those countries?

Ms Rubenstein—No. You have to be an Israeli citizen in order to be a member of parliament. So you cannot be, for instance, an Australian citizen who permanently resides in Israel and then become a member of parliament.

Mr KELVIN THOMSON—But is it possible to hold dual citizenship in Israel?

Ms Rubenstein—Yes, it is possible to hold dual citizenship in Israel.

Mr KELVIN THOMSON—And, in that event, you would be eligible to stand?

Ms Rubenstein—Yes, except that there is a provision which disqualifies certain people. It revolved around the extremist Meir Kahane. He was a citizen of the US. They constructed a clause in order to deny him membership of parliament without his having to give up US citizenship; it was done as a means of getting rid of him from parliament at the time. That is my understanding of the motivation behind that

particular change. I can get accurate information for the committee, if it wishes.

CHAIR—I do not know whether this is possible, and I am not asking you to do a major research task for us, but if there is readily available a list of those countries it might be helpful to us.

Ms Rubenstein—Yes.

CHAIR—Going back to the current situation with Sykes v. Cleary, what is your understanding of 'reasonable steps'?

Ms Rubenstein—According to Sykes v. Cleary, it depends on the country to which the person's other citizenship belongs. It then is a matter of looking at their laws to do with renunciation and assessing whether the person has done what is reasonably necessary according to the laws of the other country. If the other country does not provide, for instance, any avenue of renouncing former citizenship then, because it could be interpreted as unreasonable to deprive a person of the right to renounce their citizenship, that person therefore would not be disqualified if they had done whatever they could possibly do to evidence to the country that they were no longer seeing themselves as a citizen of that country. But it is not enough just to make a statement of allegiance to Australia, as was clearly made in that case.

CHAIR—It seems to me that that imposes what I would characterise as an inverse burden: that is, if a country has set out steps which you must go through, you have to go methodically through all those steps, but if you are dealing with a country that says nothing about it probably all you need do is write a letter to the ambassador and say, 'I am renouncing my citizenship of your country.'

Ms Rubenstein—Yes, I think that is a fair statement.

CHAIR—That seems to be—if I can say this from a lay point of view—a somewhat curious result.

Ms Rubenstein—And, if we are concerned about notions of equality before the law, it does impose, in a practical sense, very different responsibilities and burdens on people who are dual citizens in Australia.

Mr KELVIN THOMSON—What do you say, though, to the argument that dual citizenship does create dual loyalties and potential for conflicts of interest, which are things we are concerned about in political life? For example, if a person has Australian citizenship and also American citizenship, or Australian citizenship and also Turkish citizenship, just for argument's sake, there are many issues that come up where conflicts of interest would be a matter of concern to the community. With the American example of US bases on Australian soil or US warships visiting foreign ports, people might expect that a parliamentarian had their first and, indeed, only loyalty to Australia. Then there is the Turkish example, with Cyprus or Macedonia or whatever else is occurring. So you have issues of trade, immigration, foreign aid and foreign policy. What about that issue of conflict of interest?

Ms Rubenstein—I think the underlying assumption there is that the status of citizenship is what imbues the person with the commitment to the country. I think that is what needs to be challenged, because there would be many members of parliament who are not citizens of other countries but who, for some

reason, have a connection to another country, and they may be influenced in their decision making processes by their connection, even though it is not a formal citizenship. Yet we do not do anything formally to ask those people to make a statement—apart from, of course, probing into individuals in any regular political campaign in order to work out what they are going to be doing for their representatives when they are elected.

I would say that the normal political processes should be exactly the same, regardless of that formal status of citizenship, because the formal status of citizenship often is meaningless in relation to the person's identification and commitment. If a person has stated their formal identification and commitment to Australia and is prepared to be a member of parliament, then in the course of regular parliamentary processes any concerns could be dealt with.

Mr KELVIN THOMSON—You also mentioned that, if the South Australian delegate back in the 19th century had been listened to, we might not be here discussing this. But, given that he was not listened to and that the constitution expressly is set out the way it is, is it reasonable to say that the High Court's interpretation is valid and that the only way of changing this is via referendum?

Ms Rubenstein—I think the most certain way of changing it is via referendum. The answer in response to Mr Andrews's question about whether legislation might be an effective way is that, ultimately, you still will need the court's approval of that legislative framework. So a more certain way of dealing with it is by constitutional change.

A much more fundamental way of dealing with it, as I have suggested, is to revert back to Glynn's proposal, which is to give the parliament the responsibility for deciding who should be disqualified. That, I think, takes into account notions of democracy being a living notion rather than a staid notion; that our view of who are the proper representatives of our society will differ according to different communities and stages of political understanding.

CHAIR—Should the oath or affirmation that members take upon being elected to parliament be sufficient indication of their loyalty, if we allow dual citizenship and take your suggestion that being a citizen is the qualification for membership? It strikes me that the suggestion that you could remove a member of parliament by removing their citizenship has the potential for great political heat and potential upheaval. I am not sure whether you would want that degree of uncertainty in the system.

It seems to me that there ought to be some degree of certainty about whether you can be a member of parliament or not. I cannot think of a situation at the present time, but it seems to me that it is not beyond the bounds of imagination to envisage a situation where the circumstances of the notion were such that, where for political reasons there was an advantage of removing someone from parliament because of whatever views they were espousing, to be able to remove that person as a citizen would open up consequences for which we may not be thanked.

Ms Rubenstein—I think, as long as you are certain or clear in your Citizenship Act about the grounds upon which someone could have their citizenship removed—and that clearly would be within notions at present to do with treason or if you were to include some statement as to the person being a citizen of a

country with which Australia was at war—then it would be a breach of that act to take away someone's citizenship in any way other than according to the act. The courts could review that by virtue of judicial review, if parliament attempted to organise for someone's citizenship to be taken away in any way other than according to law.

CHAIR—I suppose what I am getting at is: short of treason, are there any valid grounds for removing someone's citizenship?

Ms Rubenstein—The only example I really can give is if Australia is at war with the country with which the person holds citizenship and as a result may have duties in connection with fighting in one of the armies. I am really linking it to that situation.

CHAIR—Just as we rounded up Italians during the Second World War, and Germans, as I recall from reading, during the First World War—that sort of situation.

Ms Rubenstein—But that person would also have an opportunity of renouncing their former citizenship as a way of maintaining their Australian citizenship. So they could make the decision, without it being imposed on them, as to whether they would continue to be an Australian citizen in that circumstance.

Mr KELVIN THOMSON—Regarding your qualification of being at war with another country, in this area of globalisation conflicts arise not so much directly but as a result of United Nations activities. Do you see that as being relevant here? We had the United Nations involvement in the Gulf War. In my area, increasingly I see Iraqis at citizenship ceremonies. I might say, given the circumstances of their arrival here, they are hardly likely to be fans of Saddam Hussein. But do you see this situation being carried on through United Nations activities in Bosnia or other parts of the world?

Ms Rubenstein—No, and I think that probably comes down to my sense of dual citizenship being a common occurrence and that it does not necessarily lead to a conflict of interest if you are living in one country but have a connection with another country. The fact that war is less real or relevant in globalisation is even more reason to say that dual citizenship is a reality that we should more readily accept as part of a society and that conflicts will not necessarily arise just because somebody was born in a country or has some connection or commitment to another country as well as to Australia.

In a situation where there is some conflict between the two countries, the assumption should be that, if the person is an Australian citizen, and in this case a member of parliament, they will be acting in Australia's interests. If they do not do so, they can be voted out at the next election.

Dr SOUTHCOTT—You said previously that in Israel dual citizenship is no barrier to getting elected to the parliament.

Ms Rubenstein—Yes, but I will need to check up on the details as to which countries are disqualified on the grounds of dual citizenship. It is not an absolute statement that all dual citizens are entitled to membership of the parliament. But I will need to follow that up.

CHAIR—Ms Rubenstein, thank you very much for your submission and also for coming along this afternoon and discussing it with us. It has been quite useful.

[12.42 p.m.]

LINDELL, Mr Geoffrey John, Reader in Law, Law School of the University of Melbourne, 12 Birrell Court, Kew, Victoria 3101

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these 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.

Thank you very much for sparing some time to discuss this matter with us this afternoon. We have authorised as an exhibit the paper which you prepared, *Explanatory Paper on Constitutional Recommendations: Report of Senate Standing Committee on Constitutional and Legal Affairs on the Constitutional Qualifications of Members of Parliament*, dated February 1983. I see that not a great deal has changed since February 1983 in this regard. Would you like to make some opening remarks?

Mr Lindell—I am here in a private capacity. I obviously have had some experience in this area. Perhaps it is only fair that I should state I was once a legal officer in the Attorney-General's Department, and that certainly gave me my first acquaintance with these sorts of problems, and later when I left the department in my various capacities in relation to the Australian Constitutional Convention, as I think you have mentioned, there was the paper that I prepared. I have retained my interest in that general area.

I regret that over the summer I did not get the opportunity to prepare a written submission. I was aware of the committee's inquiry and would have liked the opportunity to do so, but other things got in the way. So I am grateful for the opportunity to appear and to give evidence today.

I have circulated today a very short document which contains a summary of the main points I will make to the committee. If it meets with the approval of the committee, I will briefly mention those points before elaborating on them.

CHAIR—Yes.

Mr Lindell—My first main point is that I believe action to amend the constitution in this area to give effect to the recommendations made in the many reports and papers that have been prepared in relation to this difficult subject is long overdue. My second main point is that I would favour an amendment to section 44(i) along the lines suggested by the Attorney-General's Department in its submission. My third main point is that I would also do the same in regard to the submission of the Attorney-General's Department for section 44(iv)—that is, the 'office of profit under the crown' disqualification.

My fourth main point is that, so far as the scope for legislative and administrative measures is concerned, given the difficulty of amending our constitution, I would confirm that I, along with the Attorney-General's Department, the Australian Electoral Commission and a number of other people, feel there is very little scope left indeed for resolving or alleviating the problems that exist in this area by the legislative or administrative route. I am in that camp of people who believe that constitutional amendments are still

necessary in this area, unfortunately, given the difficulty that exists with referendums.

I am a bit more cautious than the Attorney-General's Department regarding its possible suggestion of ensuring that candidates who are officers in the Public Service retain a conditional right to reinstatement. I will explain towards the end of my evidence why I think that is a course that involves some risks. Finally, although it is a very minor suggestion indeed—and, in fact, I thought long and hard about whether I should be putting this forward at all—there may still be merit in exploring a further option, which I have called option A. I will come to that option, as I say, towards the end of my evidence.

My first point is a plea for action; it can be described as nothing more than that. I suspect that you would all know of the numerous reports and recommendations that have been made over time: the Constitutional Commission in 1988; the Australian Constitutional Convention in 1985; the Senate standing committee report in 1981; and, according to the Australian Electoral Commission, no less than six parliamentary committee reports which have been prepared. I am sure there may be one or two others. The Bollen report is also one that I recall.

The point I would emphasise here is that the High Court, whatever you think of its performance in Sykes v. Cleary, can only do so much to get around words that are in the constitution. The case of Sykes v. Cleary, to my way of thinking, being someone who was working in this area for some time, only served to confirm and underline the need for action.

The case of Sykes v. Cleary had most unfortunate consequences, in that some of the warnings that had been issued before its occurrence had not been heeded—and I express that with a good deal of diffidence, as I know that Mr Cleary sits behind we. But, obviously, there were warnings issued and perhaps we did not do enough to bring those home.

I am not generally a believer in the idea of the constitution being old and antiquated, not serving its purpose. In other words, I am not generally a believer in the idea that the constitution is really a horse-and-buggy document. I know other people take different views. I do think the High Court has done much to keep it up to date. Even in the area of parliamentary disqualification, for those of us who are looking at this area, I think we could say that the High Court avoided giving section 44(i)—to take as an example—an absolute interpretation, which could have been quite disastrous.

Looking at the words of section 44(i), they were open literally to the interpretation that even someone who had acquired involuntarily a dual nationality would have been caught by section 44(i). If you look at the judgments in Sykes v. Cleary, I think the court went some way to modifying that, reading it down. You have already discussed with the previous witness the notion of taking reasonable steps to relinquish the acquisition of a dual nationality. I guess what I am trying to say is that things could have been a lot worse: you could have had a High Court reading that in a far more literal way.

At the end of the day, I would simply reiterate that there are some problems which even the High Court cannot solve or feels unable to solve, and there will be those occasions when section 128 does require one to go to the people and get the necessary approval. I would, with respect, suggest that this is one clear-cut situation. This is something I would say of not only sections 44(i) and 44(iv) but also the other aspects of

section 44 as well as section 45.

I simply say again that, while there has been some scope for taking administrative and legislative action, I think all of those measures have now probably been already taken and there is still that need for amending the constitution. I would emphasise something that is not always well known, in that these are the sorts of problems that can arise at the state level of government—you can get parliamentary disqualification problems with state constitutions—but there is one very key difference, and that is that state constitutions are, by and large, very flexible documents that can be amended by the enactment of ordinary legislation. That is simply not the case with section 128 and the Commonwealth constitution.

Without having had the time to become aware of every detail of all the submissions that have been received by the committee, I have had the chance to look at some of them. I have concentrated in particular on the submission of the federal Attorney-General's Department and also that of the Australian Electoral Commission, as well as a few others. But, as you will see, I have drawn from them for some of the views that I want to put.

I am not an expert on questions of citizenship. For that, I defer to my colleague Ms Rubenstein. I do not really want to have to dwell too much on the dual allegiance problem, except to say that my original inclination, given what had been decided in Sykes v. Cleary, was to think that perhaps that problem had been resolved by the court; that, to the extent there was unfairness, the High Court had alleviated the problem by saying that all a person had to do was to take reasonable steps to relinquish dual nationality.

I share some of the concerns people have about a conflict of interest arising from dual nationality. In saying that, I should perhaps mention that a very long time ago I entered this country as a young boy of seven and I did have dual nationality—and I suspect that probably, if I had stood for parliament, I would have run into some of those problems that we have seen.

Notwithstanding that being my original inclination, and given the worries that some people do have about dual allegiance posing conflict of interest, with some hesitation, I have really come around to the point of view that, given what has happened in relation to Australia—and possibly I was mainly persuaded by looking at what the Attorney-General's Department had said as well as Sir Maurice Byers QC—I would support a change to section 44(i) along the lines recommended by the Attorney-General's Department. By that, what you would have would be the deletion of the present disqualification—and that has been recommended by quite a number of committees now—and the substitution of a new disqualification, and that is that a member would be disqualified if that member did not retain Australian citizenship. Australian citizenship, it is assumed, would be a qualification for election. The moment that you ceased to be an Australian citizen, under this proposal, you would cease to be qualified to sit in the parliament.

I do agree with the Attorney-General's Department that, as a matter of technical law, if you want to ensure that continued retention of Australian citizenship is a requirement to be able to sit in the parliament, you will need an express provision to that effect. I can see arguments being constructed that perhaps an express provision is not necessary. But at the end of the day, if that is what you really want, you will need to spell it out. I would support the department's view that, on balance, you need an express provision to bring that situation about.

I think we are quite well aware of the requirement of being an Australian citizen in order to stand. But a close reading of sections 44 and 45 does not indicate that if you lose your citizenship you become disqualified under 44 and 45, as things stand.

In saying that I support the option put forward by the department, I am very much aware of the fact that ordinary legislation could still make the acquisition and retention of Australian citizenship conditional upon someone not having a separate nationality. The big difference under this kind of proposal, however, is that, if you were going to make that a general requirement for acquiring or retaining Australian citizenship, that would be something that would apply across the board for all purposes of citizenship law, not just for standing for election and continuing to be a member of parliament. That would be the big difference.

But, if the country really were concerned about the double allegiance problem, it could still go back to the situation which I understand did prevail at one point—and that is that, in order to become naturalised, as I did, you would have to renounce any other allegiance. Also, you could make it a continuing requirement of Australian citizenship that you do not acquire dual nationality.

But I do stress that, under that route, the main difference is that that would apply for citizenship generally, not just the problem of election and qualification of members of parliament. I think it was reading Mr Byers' submission that drove this point home to me: that perhaps in this day and age that is the more appropriate way of looking at the kind of disqualification you need in section 44(i).

CHAIR—Perhaps we could break your address there and ask questions about 44(i) before you go on to 44(iv). As I understand it, you are proposing, similar to that which is being suggested by Ms Rubenstein and the Attorney-General's Department, that the underlying principle we should espouse is that membership of the parliament of the Commonwealth should be no different to the rights and obligations that a citizen has generally in the country—

Mr Lindell—Any other democratic rights, yes.

CHAIR—And that the two are intricately linked—

Mr Lindell—Yes.

CHAIR—And that that is the principle.

Mr Lindell—I think that is my view. I have come to it in more of an intellectual way than an emotional way because, as I have said, my inclination was the other way to begin with.

Dr SOUTHCOTT—You have said that, rather than constitutional change, a possibility would be to change the requirements for Australian citizenship so that to become an Australian citizen they must go through all steps to renounce foreign citizenship.

Mr Lindell—Under the scheme that I would be thinking of, that would certainly be the way it would operate. But you still need to amend section 44(i), as it stands; you do not get out of that. What I am

contemplating is a scheme under which you delete the present requirement and replace it with the requirement that you continue to be an Australian citizen. For that, you need an amendment to section 44. But, after you have that amendment, it would depend on ordinary legislation as to what you had to do or had not to do to continue to be an Australian citizen.

Dr SOUTHCOTT—Is it possible that, if you do change the Citizenship Act and someone can only become an Australian citizen after fully renouncing any other citizenship they have, anyone who becomes an Australian citizen from then on would automatically meet the requirements of 44(i)?

Mr Lindell—As I understood it, the recommendation would be that you would have to be an Australian citizen to be elected in the first place, and section 44(i) would ensure that you would cease to be an Australian member if you lost your citizenship for one reason or another. Perhaps I should warn you that, if you did change the ordinary law on citizenship with the effect that I have talked of—that is, going back to the using of dual nationality as a restriction on continuing to be an Australian citizen—you might revisit some of the problems you have now when dealing with people in the disqualification area. But that would be as a result of changes to the general law of citizenship.

CHAIR—I think the practical reality, though, is that estimates are that something like three or four million Australians hold dual allegiance—let me call it that—or dual citizenship. In most cases the reality is that it is unlikely that that sort of change will be approved.

Mr Lindell—I acknowledge that point.

CHAIR—I know this is drafting on the run—and that is always a dangerous exercise—but in section 44 you envisage words to the effect of 'a person who (i) fails to retain Australian citizenship'?

Mr Lindell—Yes, something along those lines.

Dr SOUTHCOTT—If you deleted section 44(i) and replaced it with a requirement that they must retain Australian citizenship to be a member of parliament, why do you need to change the Australian Citizenship Act?

Mr Lindell—No, you do not necessarily have to do that at all. All I was saying was that it still leaves the parliament with the freedom to alter as it wishes, if it does wish, the requirements of Australian citizenship; it is not fettered in that way.

Dr SOUTHCOTT—What is your interpretation of the second part of section 44(i); that is, someone who is 'entitled to the rights or privileges of a subject or a citizen of a foreign power'?

Mr Lindell—I do not think I have really thought about that to any great extent that would make my opinion any greater than anyone else's. I think I will decline to give that interpretation, if you do not mind. It is a while since I looked at that in some detail.

CHAIR—That completes our questions on that section.

Mr Lindell—The next point is also one that has created all sorts of difficulties: office of profit under the Crown. I think it is as well just to mention, very briefly and without burdening the committee too much, the purpose behind this age old disqualification which has been around for quite some time and goes back to our British constitutional heritage. In my explanatory paper to the Australian Constitution Convention, I think I borrowed from the Western Australian report that had looked at the purposes of that disqualification. I think what was said there is still valid today.

Without quoting it word for word, I might just briefly advert to the main points. Firstly, the reason of it being there is to ensure the need to control or influence the executive over parliament. You need to ensure that the executive does not have the ability by patronage, as it were, to influence members of parliament—an influence which would otherwise exist if an undue proportion of the members of parliament were going to be office holders. You are concerned with the ability of the parliament to hold the executive to account and, accordingly, you need to make sure that enough members of parliament are free from the influence of the crown.

The second main reason that is generally given for the office of profit disqualification is the incompatibility of certain officers with the membership of the parliament itself. By that I mean that, if you hold an office of profit under the crown, it becomes incompatible to be a member of parliament as well, in the first place, because of the physical impossibility of fulfilling both the duties of the office and the duties of a member of parliament. There would be the concern that you were not giving enough time and effort to the duties, for example, that you would owe to your constituents. So that is one thing. When we talk about the incompatibility of certain officers with the membership of parliament, we would be concerned with the physical impossibility of fulfilling both duties—a conflict of duties.

But there is also the additional concern that relates to the need to prevent certain officers, whether they be judges or senior public servants, being held by persons who as members of parliament will themselves be engaged in matters of political controversy. You do not want judges participating in matters of that kind and, although perhaps this is not as true as it once was, neither should you have had, I suppose, in the old Westminster tradition, senior public servants doing the same thing—although there are signs of change to some extent in that area.

I suppose you could also add the third point about the importance of maintaining the principle of ministerial responsibility, although that is a principle that has been in decline for some time, the idea being that you do not want to have officers making decisions on matters of public policy and for whom ministers are ultimately responsible to parliament. That is a factor as well.

I do not think those reasons are any less valid today than they were before. What I think is clearly acknowledged by most people—although I do notice that one significant exception is Mr Byers—is that it is the wording that gets us into trouble, it is the wording that causes the difficulty and it is the wording that is in need of change.

I do not want to go through the myriads of difficulties that have arisen in the past. I think they have been adequately summed up by both the Constitutional Commission in its very able reports and also the Attorney-General's Department in its submission. I am speaking of things such as the uncertainty that

surrounded the meaning of the expression 'office of profit under the Crown'—and I am sure that we would all understand that point—and assistant ministers not being sufficiently exempted or not being referred to in express provisions as not coming within the disqualification. These days I think it is still very dangerous to pay parliamentary secretaries and assistant ministers anything that would represent profit without running the risk of disqualification under the relevant provision.

A problem which can sometimes easily be overlooked, although it would not be of so much concern to the members of the lower house, is the problem of the senator-elect—someone who can, in fact, for anything up to 12 months be effectively discouraged from taking on any sort of public employment for fear of running the risk of holding an office of profit and then being disqualified under section 44. Although that issue has never been decided, it is still a risk and it is something that I think works unfairly for persons in that position. There is also the apparent unfairness of public servants having to resign and, therefore, being discouraged from standing for parliament—and I am sure that Mr Cleary will attest to that.

Then there are the anomalous provisions that exist in section 44—the idea that, as far as the constitution itself is concerned, there is no problem about a minister in a state government being a member of the Commonwealth parliament. The present prohibition on that comes from a different direction, not a constitutional one. I think there are some very unclear references to pensions and service in certain kinds of military forces. All of these things, I think, are reasons why these provisions are now regarded as antiquated and do need to be amended.

I agree with the guiding principles that we should be informed by if we do want to change the wording. They have been, I think, adequately stated by the Constitutional Commission and the department—the problem of avoiding double dipping of salaries from various sources and also the question of divided loyalty. So, in seeking greater clarity, we should be guided by those two basic principles.

It is at this point that I come to my third main point, and that is that I would be in favour of amending the office of profit disqualification in the way that is supported in the submission of the Attorney-General's Department. The solution that it has supported is one that does go back now quite some time. It was first put, I think, in the Senate standing committee's report in 1981. It was approved in large measure by the Australian Constitutional Convention in 1985, although there were some drafting points that I did draw to the convention's attention that required some attention; and, of course, they were picked up by the Constitutional Commission as well.

The way that solution works I think is simple enough to understand. In the first place, instead of having 'office of profit under the Crown' as the guiding concept, you would replace that with a detailed and more specific list of offices and employment which would be regarded as inconsistent with the membership of the parliament. So, instead of relying on just that one comprehensive expression, you would have a detailed list of offices that are regarded as inconsistent. Then persons who hold such offices would not be required to resign them in the uncertainty as to whether they were going to be elected; they would just simply cease to hold them if it turned out that they were elected. That would be the key advantage of that particular measure in relation to the problem I mentioned earlier about public servants.

In the case of Mr Cleary, for example, it would have enabled him to have stood and then only lose his

position in the Public Service, such as it was, if he were elected and he would not have had to have resigned. The constitution would then put an end to that employment and, if he were not elected, he could just simply go back to the position that he did enjoy.

So persons who hold such offices or employment would cease to hold them at some point before double dipping and divided loyalties could arise. That obviously would be after the elections, if they were successful, and you started earning whatever parliamentary allowances are payable to members of parliament. As a corollary, you would also ensure that, if any of these forms of employment were acquired after you were elected, it would be at that point that you would cease to be a member.

That is the double mechanism that lies behind what I call the 1981 solution. While it is a solution advocated by the Senate standing committee, going back to 1981, there is a similar provision I think in section 61 of the Victorian constitution which I know is slightly different. But it does pick up this essential idea of not forcing people to resign and merely saying that, if they are elected, they simply lose their former employment.

I do support the warnings of drafting, as good lawyers should, raised by officers in the Attorney-General's Department. As I indicated, I had some warnings myself. One would need to pay attention to those. But I do not regard those drafting warnings as insuperable; I do not think they give rise to problems that would prevent this essential mechanism replacing the present one.

Before I leave that area, I should perhaps say that, although it is not in the summary document that I have given you, I do have some reservations—although I have not thought them out as well as I should have, I suspect—about the alternative solution you may have seen in the submission of the Liberal Party and my good friend and colleague Mr George Williams from the ANU. I think the alternative solution that is being offered here, particularly for this resignation problem—having to resign before one stood for office if one was a public servant—is that you simply remove the word 'chosen' from section 44 of the constitution. The disqualification then would only relate to being incapable of sitting—in the hope that that then means the whole process of election and nomination would not be relevant to the disqualification.

I think, if one were to go down that route, one would probably have to adopt that for all the disqualifications in section 44—but maybe that is not entirely correct. If one is concerned about the potential influence that the Crown can have over people in regard to what they are going to do as members of parliament, one might still have a residue of concern that that could still take place under this proposal during the election campaign. It may be a little fanciful, but you might posit a situation where the Crown would use its position of employment to extract undertakings from a candidate about what they would undertake to do once they had been elected. I do not know that I would put too much importance on that, but it is a point you might want to think about.

Finally, if you do go down that route, the disqualification would no longer operate by reference to the point at which you were chosen; it would operate strictly by reference to the point at which you began to sit in the relevant house. As you may or may not be aware, there are provisions for both houses of the Commonwealth parliament under which both houses can grant permission to members to be absent for any period of over two months in any one session.

If there were some difficulty raised about whether someone had fallen foul of certain disqualifications, it would perhaps be possible that one could see this permission being used by a majority of the parliament to protect a member and simply postpone the time when that member had to sit and then run the risk of the disqualification being attracted. It might also have some effect in postponing the period when you might want to challenge a difficulty that had arisen.

Having said that, I am not absolutely opposed to that suggestion, but I would like to follow up those particular points before accepting them. I still remain of the view that the better way to go would be what I call the 1981 solution that goes right back to the Senate standing committee. That concludes what I have to say about section 44(iv). I will be talking about legislative and administrative measures in a moment.

CHAIR—Just as a matter of curiosity, my recollection from legal history is that there was a stage in the UK parliament—and this is going back some time, obviously—when judges were capable of sitting as members of parliament.

Mr Lindell—I cannot confirm that, but it would not surprise me if that were so.

CHAIR—I am talking about a couple of centuries ago now.

Mr Lindell—Of course, yes, certainly before the Act of Settlement.

CHAIR—That is probably of no great relevance. I take up your last point on two matters. One is the question of a person potentially giving undertakings while still holding an office prior to election. Would that not be addressed though by some other provisions of, say, the criminal law? It seems to me that that is still open at present. This may not be entirely on all fours, but I am thinking of the allegations that have been raised—and I am not on top of them all—against the police minister in Queensland in relation to the by-election that was held there. Not having looked into it beyond glancing at the newspaper reports, it seems to me that that sort of situation, firstly, can arise now and, secondly, can be dealt with by other provisions of the law.

Mr Lindell—I think I would have to acknowledge that. I think there would be scope for perhaps trying to deal with that in an alternative way rather than being concerned with questions of qualifications and disqualifications which have such an impact on the workings of the parliament.

Although I cannot claim to be an expert, I think there are some countries, like Canada, where the approach that is taken would, in fact, try to shift the focus away from qualification and disqualification. Once you are a Canadian citizen, I think you have the right to be elected—and that is written into the charter of justice—and then you leave problems of conflict of interest to be regulated by the ordinary law. But it would not necessarily have the consequence of disqualifying someone.

CHAIR—Then your last point was the suggestion about deleting ‘chosen’ from the provision. It would seem to me that a potential difficulty there would be that you could have a situation where a person had been elected but chose not to sit for some period of time.

Mr Lindell—Yes.

CHAIR—There is nothing that I can recall that, once you are elected, forces you to sit in parliament.

Mr Lindell—No.

CHAIR—Most people are panting to get there, but the reality is that I do not think there is any provision that says you have to turn up on the day we are all sworn in. If you want to turn up on some later date, you can.

Mr Lindell—The provision that I am aware of is section 38—and I think it is section 20 for the Senate—which indicates that, if you are absent from either house for more than two months in any one session without the permission of those houses, you vacate your seat.

CHAIR—But, even apart from that, you could wait the two months.

Mr Lindell—That is right.

CHAIR—That seems to me to be an undesirable potential situation to leave.

Mr Lindell—Yes. I feel a bit uneasy about that general concept being used as the solution to these problems.

Mr KELVIN THOMSON—Can I ask about local government employees, local government councillors, in connection with this issue of office of profit under the Crown? What is your view about whether that applies to them?

Mr Lindell—The view that I have taken in the past—depending on the degree of control that the Crown can come to exercise under new arrangements for local government—the sorts of controls that I was familiar with in the past would not be enough, in my view, to lead me to conclude that local government bodies are part of the Crown. I think this illustrates one of the difficulties, obviously, of the whole concept: what is the Crown? There are many cases about which bodies are the Crown or agents of the Crown.

But, at the end of the day, when one wades through the very many cases in that area, I think one would be hard put—at least in the case of a local government that does not have an administrator administering its affairs, assuming we do not have that kind of thing on board—to treat local government as coming within section 44(iv) as it stands at the moment. In fact, I have a New South Wales case where President Kirby, as he then was, as president of the court of appeal, for other purposes had to decide that very question and took the view that local government was not part of the Crown.

CHAIR—Was not?

Mr Lindell—That is right.

Mr KELVIN THOMSON—What about the issue of people who have consultancies or private sector

contracts with the Crown? This is, increasingly, the way things are being organised, and it seems to me that this is the area where this issue is likely to come up more often. That seems to be covered more by section 44(v), and we have not been asked to look into it. But, in a sense, it does seem to be very relevant as to how we address these questions or whether there are potential problems down the track.

Mr Lindell—I would agree with you in thinking that the solution to that problem lies not so much in section 44(iv) but in section 44(v). Government contracting, as it is often referred to, is a matter causing a good deal of concern at the moment at the state level here in Victoria.

All I could reiterate is that there is a decision in that particular area involving Senator Webster, as he then was, in which Chief Justice Barwick took a very strict view of the government contract provision and read it down very, very strictly. The view that he took, much to the surprise of the so-called experts like myself at the time, was that the kinds of contracts that were outlawed were executory type contracts that involved things outstanding that still had to be done in the future. So, if Senator Webster's company was only supplying goods on the basis of supplying the goods and then just being paid, there being no great long period of time during which the contract is outstanding, Chief Justice Barwick took the view that section 44(v) was evaded. Of course, that was the decision of only one judge. I think there are some difficulties that some people would have with it. But, on the other hand, it is a decision now that has stood for some time.

But all I can do is to reiterate my earlier point: you are looking at something that I think needs to be looked at under the umbrella of 44(v). I can only say that, while I can see why the Attorney has been concerned to limit your inquiry in the way that he has, my own perspective leads me to think that, if you are taking the trouble to amend particular aspects of section 44, you will be in some difficulty not dealing with the others.

Mr KELVIN THOMSON—I might say too that I think your point about the Victorian situation is well made. It is my understanding that the provisions are that if you are elected you are deemed to forfeit your Public Service position. So there is nothing you have to do in order to bring about that situation. The assumption is made that a person who gets themselves elected to parliament would prefer to forfeit their Public Service position rather than their position in parliament.

Mr Lindell—Yes.

Dr SOUTHCOTT—Do you think that state public servants should be included in the definition of 'office of profit under the Crown'?

Mr Lindell—In other words, it is a matter of interpretation. Do they come—

Dr SOUTHCOTT—They obviously do, don't they?

Mr Lindell—I think the view that most of the constitutional review bodies have taken is that employment at both levels of government should come within the prohibition—and I cannot see any reason why not at the moment.

Dr SOUTHCOTT—What do you think should be the critical date that someone must vacate their office of profit under the Crown?

Mr Lindell—As things stand now?

Dr SOUTHCOTT—Now it is the date of nomination. What do you feel should be the critical date?

Mr Lindell—I come back to the solution we have just heard: one should not require people to give up those positions at all; one should just simply say that, once they are elected, their previous office or employment, if it is still outstanding, ceases from that moment onwards. I said 'once they are elected'. In fact, if one goes into the detail of the solution that I am supporting—and it is clearly stated in the submission of the Attorney-General's Department—you are looking at the date when someone starts to draw their parliamentary allowance. So it is election plus drawing on the allowance: the double dipping principle.

Dr SOUTHCOTT—That is a good solution, because it picks up both the House of Representatives people and the Senate people who have quite a different time period between the declaration of the poll and the drawing of the parliamentary allowance. The House of Representatives people, as I understand it, draw the salary from the date of the election, whereas with the Senate it is from 1 July after the election.

Mr Lindell—I was not aware of that, but I see no reason to doubt that being correct.

CHAIR—It could not be from the declaration of poll because of that problem, because you would still have an overlap in the House.

Mr Lindell—I come now to the fourth main point in the summary. I am now dealing with the point that the Attorney was particularly concerned about: whether there are legislative and administrative ways of avoiding the problems that we have. I think I have indicated fairly clearly my view on that. The High Court could only go so far. I think we have probably exhausted all the measures that can be taken. Some have already been taken, and they are mentioned by the Attorney-General's Department in its submission. So I conclude there is little, if any, scope for any more measures to be taken. You really do have to confront the constitutional route, as difficult as that may be.

I do take leave to express a particular point. It is probably one of the points at which I depart a little from the approach of the Attorney-General's Department. I think they talk about the possibility of creating a conditional right of reinstatement. As I understand the present position, there have been for some time provisions that would enable unsuccessful candidates for election to seek to be reappointed to the Public Service. A lot is done to streamline and facilitate their re-entry, but at the end of the day their re-entry is discretionary—that is to say, when they have resigned their position in order to avoid these problems they have no real assurance that they will ever be reappointed. I have no doubt that it is possible legally for someone to go through that procedure and not be reappointed, and for very good reason.

The problem, as the Attorney-General's Department says in its footnote No. 44, is that the more you make that a right, the more it looks as though you have not relinquished your office of profit. The High Court would see that as a problem, I think. What they have suggested is that, instead of giving you a right to

be reappointed to the same position that you had before, they do—if I can use the word—'flirt' with the idea of having a right to be appointed to what is virtually another position.

The only thing I would say about that is that, as I see it, that may not get you out of the fire. That may run the risk that, having ceased to be the holder of the previous office of profit under the Crown, you might still be seen to have some kind of appointment to an alternative or other office of profit under the Crown. From the point of view of the court's worries with that section, it really would not matter which office you were holding; it is the fact of holding an office of profit. It does not have to be the original one, in my view, in order to fall within the mischief of this kind of disqualification.

CHAIR—In the case of the Public Service, your office is that of a public servant.

Mr Lindell—Yes.

CHAIR—Not of a grade A in whatever department.

Mr Lindell—That would add force to the point that I am really making, anyway. But I am really hammering home the point that I do see some risk that, while you might no longer be seen to be holding the original office of profit, you might still be seen to have some kind of office of profit because of this general right of reinstatement. So I think you probably are on safer ground if you retain the discretion not to appoint someone, despite the difficulties they are in and as hard as that might be for that individual.

Perhaps I will run the risk of being a little risky myself, having said that you should be cautious. I now come up with my option A—and I am sure you will all be glad to know that this is the last thing I want to talk about. With the sort of option that I was thinking of, I had in mind building on the existing nomination period. As I explain in option A, I would be suggesting that you make the nominations that are received in the existing period only conditional or provisional. So, when they are first received in the time that is required now, they are treated as not a final nomination but only provisional—preliminary, if you like. They would only become final and effective if candidates failed to withdraw the nomination during a further period. I think it would necessarily have to be a very small period, but not exceeding a week would be the kind of period that I had in mind.

The purpose of giving you that extra period is that the extra period would not allow for further nominations at all. It would just simply allow those people who were nominated originally to, as it were, be given the opportunity to reconsider their position, with the help of as much educational material as possible and other material that perhaps the Australian Electoral Office could assist in preparing, to enable them to determine whether they are running the risk of disqualification.

If we are looking at the present position, we now have quite a bit of history about the problems that these sections are causing. I know that people are given material already; maybe there is some scope for expanding it. I do notice that in a number of the submissions, a lot is being said about doing as much as possible to warn people of the danger they run.

All I am trying to say is that, during that extended period, you would give the candidate who has been nominated in this preliminary way the opportunity to take stock, to look at that material and, ultimately, to see whether they think they need further legal advice. I do not think the Australian Electoral Commission would wish to see itself as giving that advice, for very good reasons. So, ultimately, I am not suggesting that the commission should be the one giving that advice. All it can do is warn people of some of the dangers they run.

Having implicitly criticised the Attorney-General's Department, I will be met with the point that there are comments in Sykes v. Cleary which seem to make it clear that that word 'chosen' begins with a nomination period; therefore, am I not running a risk as well? The only reply that I would give to that is to say that, under my scheme, the nomination itself is not effective until the end of that cooling off period. It is then that I think the chosen period would begin to run, not at the point at which someone had lodged a preliminary nomination or had one lodged for them.

I would be hopeful that the High Court would be sympathetic to that, even if it is only a very minor suggestion indeed for trying to tackle the difficult practical problems that arise in this area. I do not see that the mischief they were concerned about would be violated by the scheme that I am propounding. At the end of the day, I do realise that it may be such a minor suggestion that perhaps it is not worth pursuing with the element of risk that is involved. But, on reflection, my own view would be that, while this would need to be looked at—you might want to get advice about it—there is a reasonable prospect that such an option might work.

CHAIR—I see the value of what you are proposing. I imagine there might be an objection to that from the political parties, unless there were a provision which could allow them to substitute another candidate. You could go through this process and find out that Dr Southcott or Mr Thomson within the week would be disqualified, and that gives us an option to withdraw the nomination or not to make it final. But, if I were Mr Robb or Mr Gray, I would be wanting to substitute someone else for my party's nomination. So I see some objections on practical grounds.

Mr Lindell—I see, yes. I must confess, I had not thought of that. I had not given any attention to that. It is possible, of course, that you might still be able to have a further nomination period to deal with that problem. But it may be that that does create the difficulty you think of, and it may not be worth while pursuing the option that I have mentioned.

Mr KELVIN THOMSON—I would have to agree that I think there could be chaos within the nomination period. Where a person is nominated and then dies, for example, that causes chaos in the particular by-election. There is a subsequent by-election.

CHAIR—Or nominate someone who has been disendorsed by their party.

Mr KELVIN THOMSON—That has happened. If a person is given this cooling off period, it seems to me that they may still proceed with their nomination and still get into trouble. I do not know about Phil's particular circumstance, but with some of the examples that have been around, other candidates seem to me to have pursued their nomination with their eyes open and simply did not expect that the matter would be

judged in the way it was—in Jackie Kelly's case, Senator Ferris's case, and so on. I am not sure of how many situations this would make a difference in. The other thing is that, as I read it, it would still mean that teachers, police officers, and so on, would have to resign in order to contest an election.

Mr Lindell—Yes.

Mr KELVIN THOMSON—I think that is a problem. Irrespective of the chaos and controversy that the section has caused, I think there is some intrinsic unfairness in that: that the resignation should occur once you have been elected, not that people have to resign their jobs in order to contest.

Mr Lindell—I certainly do not disagree for one moment with that. But I think you have to realise that, at the moment, that unfairness can only be solved in one way: with an amendment to the words of the constitution. As to the extent to which we would be influencing people, I for one would not want to be seen to be saying that even people who are apprised of risks will take account of them and act in a cautious way. All one can do is perhaps try to reduce the chaos that does arise. You might deter some people from taking a course which is fraught with difficulty.

Dr SOUTHCOTT—The Australian Electoral Commission, when they spoke to us, said that they give a bit of information about what constitutes 'office of profit' and 'allegiance under the Crown'. I know that certainly the Liberal Party sends pages and pages of legal advice around to all the candidates; I imagine that the ALP does the same thing. But still there seem to be—

Mr Lindell—They still run the risk?

Dr SOUTHCOTT—No. There still seem to be cases coming up. If you look at the Sykes v. Cleary case, the incredible thing was not only that Mr Cleary was found to be ineligible but also that the Labor and Liberal candidates were found to be ineligible. If we do not address this section, we could be seeing a situation where we have a potential challenge after almost every federal election.

Mr Lindell—I would agree with all of that. But, once again, it underlines the need for constitutional action. Failing that, remember that what I was trying to do was to address the Attorney's plea to find something that did not involve the problems of 128. I think, in the light of Sykes v. Cleary—and it is very poor comfort to all the people who suffered in that case—the general political community is much better apprised of these problems and the risks that they are running. We have now had not only Sykes v. Cleary but also a couple of other disqualifications around, and I would be hopeful that people would be paying more attention to that during that cooling off period that I was talking about.

CHAIR—Mr Lindell, thank you very much for coming along today and discussing these matters with us. It has been quite useful.

Resolved (on motion by Mr Kelvin Thomson):

That the document 'G J Lindell: Summary of Main Points' be accepted as an exhibit and received as evidence in this inquiry.

[1.38 p.m.]

CLEARY, Mr Philip, 21 Hoffman Street, West Brunswick, Victoria 3058

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings of this committee 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.

Thank you for coming along today, Philip. I said in some opening remarks, when you were not present, that we would be taking evidence from you and that you have the singular distinction of being the first member of federal parliament to lose his seat, following a challenge under section 44(iv) of the constitution. We are interested in what you might have to say about the matter.

Mr Cleary—Thank you very much, Kevin. I am appearing today in a private capacity. I will make a few introductory comments—I have a couple of pages of notes—and then perhaps talk about a couple of the issues. The questions have been canvassed, I am sure, to the nth degree. Geoffrey spoke about most of the issues that I would raise in the legal context of 44(iv).

It is well documented that I was a teacher on leave without pay when I nominated for the seat of Wills in March 1992 and that I was subsequently ruled ineligible under section 44(iv) of the constitution. What is not well documented is the position taken by Mr Justice William Deane in his dissenting judgment.

Mr Justice Deane, as members of the committee know, ruled that the question of eligibility in relation to 'office of profit' should be applied at the time of the declaration of the poll. Although Mr Justice Deane ruled, I suspect reluctantly, that I did hold an office of profit, he found that, as I had resigned prior to the declaration, I was not ineligible to sit in the parliament. It follows that, if the High Court had been made up of judges of the same disposition as Mr Justice Deane, there would have been no need to examine section 44(iv) of the constitution; in other words, we probably would not be sitting here today.

The analogy, I suppose, is with Tim Fischer's desire to see what he describes as more conservative judges on the High Court, in the wake of the Mabo and Wik decisions. Tim Fischer is saying that rulings by judges are political. I could not agree with him more. It is as true of judgments in the criminal justice system as it is of judgments in the High Court. My view is that the judgment in Sykes v. Cleary was a political one.

David Philips, senior lecturer in the history department of the University of Melbourne, in a letter to the *Age* on 2 December 1992, wrote:

It—

that is the Act of Settlement 1701 upon which section 44(iv) is based—

was aimed against "placemen" of men who received salaries or payments from the Crown or executive, and could therefore be controlled by them ... If the High Court chooses to interpret this clause in the Constitution so literally as to

disqualify Cleary, how do they get around the fact that the Prime Minister and Ministers of every incumbent government which faces election, are all drawing government salaries and hence occupying 'offices of profit under the Crown' - as indeed are all salaried Mps.

Philips' argument was that the office of profit provision was designed to protect members not controlled by the government or opposition parties. He obviously believed that the High Court's ruling that I held an office of profit was contrary to the spirit of the constitution. People keep talking about literal interpretations of the constitution, but what does a 'literal interpretation' actually mean? If we are talking semantically, what do we mean by 'literal'? 'Literal' does not mean that a particular definition is correct.

Although Senator Peter Walsh took a divergent position on my eligibility, he, like Philips, read politics into the decision making process of the High Court. As to the eligibility of Senator Webster, whose family business had been selling telegraph poles to the Postmaster-General in 1974 and who appeared before the High Court under the pecuniary interests section of the constitution, Walsh had this to say in his valedictory speech of 1993—I can just imagine him saying this too, I think I might have spotted it on the TV, and I was very happy when he said it:

I do not believe now, and I did not believe then, that Webster had acted improperly but he was unambiguously disqualified by the Constitution's black letter law, as Phil Cleary was nearly 20 years later.

Justice Barwick's judgment was so shonky and so redolent of political prejudice that one Liberal senator said at the time that it had almost destroyed his faith in justice. Another said that if Webster was not caught by section 44(v), nobody could be.

He did not envisage the Independent member for Wills, Phil Cleary, being before the High Court. I think Geoffrey has alluded to this issue too, and I think he was suggesting that he was very surprised that Justice Barwick ruled in the way he did, as was everyone in the legal profession. We have to ask questions about that, I suppose, privately.

Notwithstanding the politics of section 44(iv), an issue which caused me some concern was the High Court's reluctance to address the issue of the real status of public servants who resigned their office of profit to run for parliament. It is generally understood that, when public servants resign for the purpose of contesting an election, they are guaranteed under convention their right to resume their position should they not be elected. In other words, it is not a real resignation. In his judgment Mr Justice Deane said:

There is surely much to be said for the view that a procedure such as the taking of leave without pay or other emoluments followed by resignation when it is apparent that the person concerned will ultimately be elected is a preferable one to the rather devious procedure of an ostensible termination of appointment in the context of a persisting relationship and entitlement to resume the appointment if unsuccessful at the poll . . .

Mr Justice Deane was very, very strong about this issue. What was really surprising about the transcript from the High Court decision was that I do not think the other judges actually even touched on the question of what the real resignation by a teacher or a public servant amounted to—in other words, the fact that it was not a real resignation. I know that Geoffrey has made some points about just how strict the convention is in relation to resuming your position, but I think it is generally so that teachers and public servants do get their

positions back. I do not know what my position is at the present time under the Kennett government. I might have to ask a few questions.

On page 2 of his submission to this committee, Gerard Carney, Associate Professor of Law, Bond University, expresses his explicit support for what Justice Deane describes above as a devious practice. Justice Deane went on to say that:

. . . the extent, if at all, to which the holding of an office of profit under the Crown should preclude a citizen from being nominated or participating as a candidate in the electoral process is a matter for the Parliament.

I presume, therefore, that Justice Deane would support any move which attempts to deny the High Court the right to rule on a person's eligibility to sit in the parliament. Of course, the High Court could rule on what an office of profit actually is. But Deane and others are implying that the right to actually determine whether a person can sit in the parliament should be taken from the High Court. There are all sorts of groups who want to do that with the High Court. My intentions would be quite different from those who want to extinguish Mabo or the Wik judgment of course.

None of this, of course, resolves the question of what constitutes an office of profit. There has been no resolution of the debate as to the relationship between local government and the Crown—and, again, Geoffrey has alluded to and spoken of that issue, which I think is a very serious one. For example—and I am sure that Mr Thomson knows this and he might be able to tell me whether the member still occupies this position—a member of the Labor Party sat in the federal parliament last term whilst occupying the position of mayor in a New South Wales municipality. I do not know whether the person still occupies that position. I understood that he was a mayor during his time in the parliament.

There is a pressing need for reform of sections 44(i) and 44(iv) of the constitution. At the time I considered the decisions against Liberal candidate John Delacretaz and the Labor candidate Bill Kardamitsis to be unfair and discriminatory. It is also worth noting that at the time of the disqualification of Delacretaz and Kardamitsis there were at least 20 members of parliament who could have been challenged under section 44(i) of the constitution.

The member for Kalgoorlie virtually said as much. If you go back to the *Hansard*, you will see a question asked by Peter Costello of a government minister in relation to this question of office of profit. And I think Graeme Campbell virtually stood in the parliament and said that he did not care less when others were running around the corridors looking for legal opinion. Dr Theophanous would be another member, I suppose, who would have been a trifle concerned. But those members held their seats.

As to section 44(iv), given the interpretation of Sykes v. Cleary, there is a desperate need for amendment. Approximately two million people were forced into second-class status in the electoral process by the High Court's ruling that public servants should resign their position to run for parliament. Private school teachers receiving funding from the Commonwealth faced no such encumbrance, nor of course did millionaires or the placemen as defined by David Philips. Gerard Carney in his submission expressed the view that:

. . . the opportunity for candidates to abuse their public office position after nomination and before their election did exist.

And:

. . . the avoidance of controversy during the election campaign serves to enhance the reputation of members and preserve respect for the Parliament. For these reasons the decision in *Sykes v. Cleary* is correct.

With all respect, this is a fairly sensationalist and ahistorical view of the real meaning and the origins of section 44(iv). The idea that a schoolteacher has a position capable of being abused for political purposes between the date of nomination and the election is laughable and only confirms how little that particular ruling on section 44(iv) has to do with the original intentions of the Act of Settlement 1701. As for the proposition that we should base our rulings on a desire to reduce controversy, if we wanted to do that we would probably close down the parliament, wouldn't we.

The amendment to section 44(iv) of the constitution as proposed by the Attorney-General's Department addresses most of the issues which concern me. However, the question of what will qualify as a public sector position will remain unresolved—and we are, I suppose, caught in the midst of those kinds of debates in Victoria and the question of local government. That is about all I have to say.

CHAIR—Thank you very much, Philip. Can I just go back, for the record, to what you were aware of prior to nominating and everything that led to the High Court case. What information had you been provided with? Had you made any inquiries? Did the subject cross your mind?

Mr Cleary—It was a very chaotic moment in my life, naturally. It just happened out of the blue: a resignation, a campaign under way spontaneously. I am a teacher on leave without pay and have been for four years. On the nomination form there is a clause, 'Do you hold an office of profit?' We stopped for a minute and someone said, 'No, it couldn't be an office of profit because you don't have the position at this point in time, having been on leave for such a period of time.' We just made a quick check around, and people seemed to think that it was not a problem. I think, to use the vernacular, it was probably along the lines of, 'Look, that clause was put in the constitution to stop the king bankrolling the parliament; it doesn't really pertain to you.' So that is generally how we perceived it at the time.

Just to go a step further, why I did ultimately resign—and I know that it is mentioned in one of the submissions that that must have suggested or implied that I knew I was contravening the constitution—was in fact because we received a phone call from someone saying that there may be a challenge. In that case we thought we had better resign, and we did—and, of course, that was prior to the declaration of the poll.

But, just to make one other point, as has been pointed out, both the Liberal and Labor candidates were ruled ineligible. Who would have thought that? Surely they were advised by their parties. It is easy in retrospect, but I was the first.

Dr SOUTHCOTT—Why do you think Sykes did the challenge? He was not the runner-up. Was he hoping to knock out every one above him? Was that the strategy behind it?

Mr Cleary—To get into the corridors of Ian Sykes's head would be a tricky old business and we have come up with some strange conclusions. I think he was from a group that for a long time had been challenging the parliament over the constitution. I think his offsider was a bloke called George Turner from Sydney who was continually faxing the parliament with claims that the parliament was acting unconstitutionally. Ian Sykes and a group of people saw an opportunity to challenge me. There were personal elements to it, I suppose—unhappy candidates, unsuccessful candidates.

Dr SOUTHCOTT—How did he support his challenge in the High Court? Did he pay for that himself?

Mr Cleary—I do not know. I think it was covered by the Electoral Commission, the federal government or something. I am not sure how it all operated. I know he dropped the summons on my doorstep one night as I was putting the rubbish out.

CHAIR—Suggestions have been made by the Attorney-General's Department which, in effect, were supported by Mr Lindell today. I take it, but just to be clear, that you support those provisions.

Mr Cleary—I do. I think that is the clearest way to resolve this problem. There will still be—and Geoffrey has addressed that too—problems about the definitions and about what is a public sector worker. That could still end up being challenged in the High Court, couldn't it. But this is a clear way of addressing the problem—the clearest way. I think you have addressed some of the anomalies in other suggestions. With all respect, Geoffrey made a suggestion and you immediately saw some possible problems in it. In a way, that is a bit like what these clauses are like. It is often unforeseen.

Mr KELVIN THOMSON—We are trying to come up with ways of resolving these problems—I think we are pretty much agreed that there are problems all right—short of constitutional amendment, because everyone understands how tricky it is getting constitutional amendment and probably how reluctant governments are to run referenda. But each time we come at this point there are problems. It appears—and this is certainly the way that Mr Lindell has suggested it—that the only way to resolve this thing satisfactorily is head on with the constitutional change. But it is legitimate for him and all of us to canvass ways of dealing with these problems, short of the constitutional change.

Mr Cleary—I thought Geoffrey's solution sounded reasonable, except that the person still had to resign. But the other issue sounded quite reasonable and plausible—and then, Kevin, you found a little hole in it.

CHAIR—I think it is plausible, but it may create other difficulties. That is the problem.

Mr Cleary—And also it could still be taken to the court and someone could then argue about the day of nomination. That question will not be resolved, if you have a preliminary period. Which is the real date of nomination: is it the preliminary or what you call the final?

CHAIR—I am reminded, Mr Lindell, with reference to plausible argument—and this is not meant to be in relation to your argument—that I was appearing in an appeal before Mr Justice Woodward, as he then

was, in the Federal Court once. After I had finished my presentation, he said to me, 'Mr Andrews, that is a very plausible argument but it's wrong.'

Mr KELVIN THOMSON—Can I ask about the Electoral Commission. You mentioned that you came to the box, 'Do you hold an office of profit?' Do you think there is a role for the Electoral Commission in terms of the advice that it provides to candidates about the qualification for office issue?

Mr Cleary—I think so, Kelvin. It could be a very simple set of instructions, couldn't it, based on what they know. It can't be final, of course, because the courts can only be the final arbiter.

But in my case, if someone had said, 'Look, we have an opinion that, even if you are on leave without pay, it is in your interests to resign,' what did I have to lose? I would have resigned leave without pay to go back on leave without pay if I were unsuccessful. It was a trifling; it was a signature on a piece of paper.

So, yes, I think there is a role there. Just how you would organise it, whether there are problems a la the Electoral Commission and what advice they are allowed to give, I am not sure, I am not an expert on that. But, theoretically, yes, I think it would be a good idea.

Dr SOUTHCOTT—The problem is that 'office of profit' is hardly an everyday sort of expression which just rolls off the tongue in conversation.

Mr Cleary—Yes, that is right, you do not think about it. But the Kelly case was an interesting one. I would have thought that the Liberal Party would have advised her that there was trouble, given that I was the precedent. There was a ruling, and it was fairly clear. There was one dissenting judge.

Mr KELVIN THOMSON—There was the prospect that the High Court would take a very broad view of these issues, not the narrow view that was identified in Webster that Barwick had taken. I share your scepticism about the basis of that, and I think you are entitled to say about the High Court that they cannot both be right—the decision in Webster and the decision in your case. But, against that background, it is surprising that candidates do not get advice about all the potential areas of office of profit; perhaps some do.

Mr Cleary—Hence, the proposal as laid out is a good one because it circumvents that problem, given that there is a trigger mechanism to end a particular relationship with the Crown. So I would support that.

CHAIR—I know that Mr Lindell wants to make a comment. So, for the purposes of *Hansard* and the technicalities, I am proposing to recall you so that is in order.

LINDELL, Mr Geoffrey John, Reader in Law, Law School of the University of Melbourne, 12 Birrell Court, Kew, Victoria 3101

Mr Lindell—I did not want to contradict Phil's statement at all. I think I recollect that in Kelly's case she thought that action had been taken to place her on the reserve and it had not been taken. So, in a way, she may have done everything she could have done, and it may have been outside her control, and the fault may have been with someone who did not carry through the necessary administrative steps. So in a sense it highlights this problem.

Mr Cleary—I just wonder whether that was the case. The action she took may have been enough, but was it because it was done after the nomination that she ended up in trouble? At the time of nomination she had a particular position which she vacated afterwards.

Mr Lindell—It was my understanding that she had attempted to do everything before nomination and that she later found out that somebody had not done the right thing and transferred her across to the reserve. I am not saying that that is the correct version, but I just have some recollection that that may have been one explanation for what happened.

Mr KELVIN THOMSON—Phil, you did make reference to what happened to Bill Kardamitsis and John Delacretaz. Have you developed a view based on what the court said and so on about that issue of dual citizenship and how we should deal with that?

Mr Cleary—Kim made the point, and I agree with her, that I do not think that removing dual citizenship dissipates the commitment of a person to another body. Just because you take away the citizenship from a particular nationality does not mean they don't have some kind of affection or allegiance that may be in contradiction with their supposed connection with the nation state in which they live. The removal of the other citizenship or the use of that argument is based on the premise that the loyalty only stems from having the citizenship, which it does not have to have. There can be an allegiance without the citizenship.

I think, Kelvin, you are in a territory where we see and experience that diversity every day. We understand that being Greek or Turkish or the like and having a passport or a citizenship does not reduce your allegiance to the community in which you live, to the family, the school, the locality and the nation state. I think it is a falsehood to suggest that removing the citizenship will make one a better citizen or that having it is an impediment to better citizenship.

CHAIR—Philip, thank you very much for coming along today and for the discussion about the issue. We appreciate it. I thank all for their attendance today and thank *Hansard* as well.

Resolved (on motion by **Dr Southcott**):

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

Committee adjourned at 2.03 p.m.