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STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

(Roundtable)

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 1 May 2008

Members: Mr Dreyfus *(Chair)*, Mr Slipper *(Deputy Chair)*, Mr Andrews, Mr Butler, Mr Georgiou, Mr Melham, Mrs Mirabella, Ms Neal, Mr Neumann and Mr Perrett

Members in attendance: Mr Andrews, Mr Butler, Mr Dreyfus, Mr Georgiou, Mr Melham, Mrs Mirabella, Ms Neal, Mr Neumann, Mr Perrett and Mr Slipper

WITNESSES

BEHRENDT, Professor Larissa Yasmin, Private capacity.......... 1

BLACK, Mr Peter, Private capacity.......... 1

BLACKSHIELD, Professor Anthony Roland, Private capacity.......... 1

CHARLESWORTH, Professor Hilary, Private capacity.......... 1

CRAVEN, Professor Greg, Vice-Chancellor, Australian Catholic University.......... 1

FLINT, Professor David, Private capacity.......... 1

LAVARCH, Professor the Hon. Michael Hugh, Private capacity.......... 1

O'DONOGHUE, Dr Lowitja, Private capacity.......... 1

RUBENSTEIN, Professor Kim, Private capacity.......... 1

SAUNDERS, Professor Cheryl Anne, Private capacity.......... 1

THOMAS, Ms Khatija, Private capacity.......... 1

TWOMEY, Dr Anne, Private capacity.......... 1

WILLIAMS, Professor George, Private capacity.......... 1

ZINES, Professor Leslie, Private capacity.......... 1

Committee met at 9.14 am

BEHRENDT, Professor Larissa Yasmin, Private capacity

BLACK, Mr Peter, Private capacity

BLACKSHIELD, Professor Anthony Roland, Private capacity

CHARLESWORTH, Professor Hilary, Private capacity

CRAVEN, Professor Greg, Vice-Chancellor, Australian Catholic University

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SAUNDERS, Professor Cheryl Anne, Private capacity

THOMAS, Ms Khatija, Private capacity

TWOMEY, Dr Anne, Private capacity

WILLIAMS, Professor George, Private capacity

ZINES, Professor Leslie, Private capacity

CHAIR (Mr Dreyfus)—Welcome, everyone. I declare open this House of Representatives Standing Committee on Legal and Constitutional Affairs roundtable discussion on reforming the Constitution. We are being webcast. I commence proceedings today by welcoming our participants, a distinguished group of experts who have accepted the invitation to come together with the committee in this roundtable discussion on key issues of constitutional reform in Australia. Our purpose today is not to arrive at what you could call the definitive last word but rather to explore each topic, identifying key issues and whether reform is thought to be necessary and feasible. In the short term, the committee sees this seminar as really groundwork for possible future inquiries and broadening of public debate. Do any of you have any comments on the capacity in which you appear today?

Prof. Charlesworth—I am from the ANU.

Prof. Behrendt—I am Professor of Law at the University of Technology, Sydney.

Prof. Rubenstein—I am Director of the Centre for International and Public Law at the ANU.

Mr Black—I am from QUT.

Prof. Saunders—I am from Melbourne Law School.

Prof. Lavarch—I am from QUT.

Prof. Zines—I am from the ANU.

Prof. Twomey—I am from the University of Sydney.

Prof. Williams—I am from the University of New South Wales.

Prof. Blackshield—I am retired, from Macquarie University, Sydney.

Ms Thomas—I am a solicitor from the Women's Legal Service in Adelaide.

Dr O'Donoghue—I am retired.

CHAIR—Thank you very much. Professor David Flint is on his way. We are starting a little bit late, because I think a few people had some difficulty in getting here this morning. Just by way of introductory comments—and I will keep it short, because we are already running a little bit behind time—I think it is fair to say that we have heard a lot recently about the need for constitutional reform. It has been a persistent theme in public debate, and it came up a lot at the recent 2020 summit. Some of the participants today, indeed, were here at that summit. It came up at the 2020 summit not just in the governance stream but in other streams as well, including the group that was considering health issues and the group that was considering economic issues. In the governance stream, of course, there were direct proposals put forward for a preamble to the Constitution. There were suggestions of a need for a national cooperation commission, as well as very extensive discussion about federal-state relations and the protection of human rights.

It is my hope that today's roundtable can progress some of those public debates, progress some of the discussions that occurred at the 2020 summit and reinvigorate debate about the Constitution. The proceedings are open to the public because the committee wants to maximise public involvement in this process and indeed in its processes. The recent summit process has showed us that people do want to be involved in discussions about government and discussions about the Constitution.

For the benefit of the people present and for those watching or listening to these proceedings from their office, school or home, because these proceedings are streamed, I should explain that the day will consist of five separate sessions. There will be three sessions in the morning: first, a discussion about altering the Constitution—that is, methods for altering the Constitution; second, a discussion on four-year fixed terms and qualifications of members; and after a break we will then move to the third session, which is on federal-state relations. After lunch we will move to sessions 4 and 5. Session 4 deals with the recognition of Indigenous peoples and a new preamble. We will break for afternoon tea, and at about 3.15 we will commence the fifth and final topic, which is on citizenship and human rights.

As the chair of the committee, I am going to chair the roundtable throughout the day. We are proposing that each of these topics is going to be introduced by one of the participants, who will give a five-minute outline on the topic. The purpose of this was not to ask any particular person or any participant for a definitive speech on the subject. It is very much intended to simply open the topic for discussion. Everyone here has a set of focus questions. Again, these are not intended to be the definitive set of questions, but are rather an aid. They are not intended to limit the discussions. The committee opted for the roundtable format, partly as an attempt to get away from the more formal hearing process that parliamentary committees customarily use when there is evidence and formal questioning and formal answers from people appearing one by one before a committee as witnesses. We hope that this format today is going to enable a frank exchange of views.

On that note, I welcome everyone here today. I am sure our discussions are going to be congenial and informative. I do need to apologise on behalf of Peter Hanks QC, from Melbourne, who is unfortunately ill. Personally, I regret he has not been able to be here because he is someone who has made a large contribution to consideration of constitutional issues in the past and, indeed, continues to do so now that he has long since ceased to be an academic and is now a practising barrister. As I have said, the committee is not asking anyone here to give evidence under oath, but I should state that the hearings are part of the proceedings of parliament and warrant the same respect as the proceedings of the House itself. They are intended to be less formal, but I would ask all to bear in mind that the proceedings are being recorded by Hansard and broadcast on the parliamentary channel and I therefore have to make the practical request that everyone switch their mobile phones to silent, if they have not already done so. Again, I thank all of the participants for their time and effort in coming here today. We are only running a little bit late. I will ask Professor George Williams to lead off the first session, which deals with alteration of the Constitution.

Prof. Williams—Thank you. Given this is the beginning of a longer discussion, I thought I should start with some basic facts about constitutional change in Australia and then make some comments about the process of change. The facts are that the Constitution has sought to be amended 44 times, with those proposals being put to the Australian people, since 1901. Of those 44 proposals, only eight, or 18 per cent, have been passed by the people by the double majority requirement—both a national majority of voters and a majority, or four out of six, Australian states. However, the record demonstrates that the rate of change has slowed over time, not increased, and no referendum has succeeded in Australia since 1977, despite a number of proposals being put since that time. In fact, 1977 to 2008, a period of 31 years, is the longest period of no constitutional change in Australia's history. The next longest period, from 1946 to 1967, was 21 years. So we are going through the longest drought in our history when it comes to constitutional change. Not only that, if you look at the rate at which referendums are being put, they also have slowed. This is likely to be the first decade in Australian history where no referendum has been put to the Australian people. There is no decade at any other point in our history which has lacked at least one referendum proposal, and unless the government puts a referendum next year, which seems highly unlikely, we will have had the drought of no referendum proposals at all for this current decade.

It is also important to reflect upon the record of the ALP in government in getting referendums through, given the current Rudd government. The ALP has put 25 referendum proposals to the Australian people since Federation. Of those 25, only one has succeeded—a rate of four per cent.

Indeed, the ALP's single success was in 1946, so it has been 62 years since any ALP proposal has been adopted by the Australian people.

I start with those facts not to suggest that it is 'mission impossible' when it comes to changing the Australian Constitution but that, in dealing with these issues, we need to be utterly realistic about the barriers to success and also about the possibilities of success. For me, it is not a matter of saying, 'These things cannot be achieved.' My take is that Australian governments of both persuasions—because, indeed, the conservative side of politics equally has a very poor record of securing change—demonstrates a conspicuous—

Mr GEORGIOU—Can you give us a ratio?

Prof. Williams—The conservative parties, or, I should say, the non-Labor parties, have got seven of their eight proposals up, and eight of 19 have been passed by the Australian people.

Mr GEORGIOU—So there is poor and poorer?

Prof. Williams—That is right, but the conservative parties have obviously got the lion's share of the proposals that have got through. My view is that the failure represents not an insurmountable barrier but, indeed, a conspicuous failure to learn the lessons of the past and, indeed, what we see in referendums are the same mistakes being repeated again and again when proposals are put to the Australian people. The failure to learn from the mistakes of the past is the key lesson that we can address here in this first session.

If you look at the academic literature and, indeed, the work of people like Cheryl Saunders through the Constitutional Centenary Foundation and many others, clearly there needs to be three things in order to secure the best possible chances of success in altering the Constitution. They are the following. Firstly, there needs to be bipartisanship. Bipartisanship, we need to recognise, is by itself no guarantee of success but, nonetheless, no referendum has been passed without it. Secondly, there needs to be adequate popular education so that Australians feel confident that they understand the issues and can make a considered choice. And, thirdly, there needs to be a level of popular ownership of a proposal. Most significantly, if we look to the 1967 referendum which deleted discriminatory references to Aboriginal people from the Constitution, it secured a 90 per cent vote—I think that was primarily because it had all three of those elements: a strong popular campaign, a good level of education about the issues, and strong bipartisanship. It demonstrates not only that referendums can be passed but also that they can be passed at a very high level if those elements are present.

In looking at the things we might change in altering the Constitution and how we might go forward from here, I think there are two choices. The first option is that we could look at changing section 128 itself to perhaps make it easier to get referendums through, to change the double majority requirement. I do not support change of that kind. I think it is unlikely to succeed on its own. Also I think it mistakes the root problem, which is a failure to deal adequately with the process we have rather than a problem with the referendum mechanism itself.

The second option, of design change, is to look at the referendum machinery legislation, an act of this parliament, which I think is in need of alteration and should be looked at again. That is

where we can focus most productively, because through legislative change it is possible to change the mechanics of the referendum process, to update them for a contemporary Australia, and to fix a number of long-standing problems in how we go through constitutional reform.

I will finish with four concrete proposals that I am interested in, looking at the machinery legislation that might form the basis for a discussion, amongst other matters. Firstly, I think it is long overdue for this committee, or the Senate Legal and Constitutional Affairs Committee, to undertake a focused inquiry into the referendum machinery legislation. It should be looked at in the absence of any particular constitutional proposal. It should be looked at simply from the point of view of whether the machinery legislation fosters proper education, appropriate bipartisanship and also popular ownership of proposals. I think it is a long time since that occurred and it ought to occur now, some years before we actually have any referendum proposal that will muddy the waters with yes or no cases on the merits or otherwise of what is being put forward.

Secondly, I think that the machinery legislation needs an injection of imagination when it comes to different mechanisms for educating Australians about the issues. The fact that we have the lengthy yes and no case booklets that no-one reads is indeed a major symptom of the problems of constitutional change. I remember that when the republic referendum was put I asked my class of about 150 constitutional law students which of them had read the 71-page booklet. Not one of those students indicated that they had read the booklet from back to front. If you cannot get students who are studying the topic interested in reading the information, what hope is there that other electors will actually read it? It is a failed education process; it clearly needs reform. I would even like to look at other issues, like competitions for drafting preambles or other ways of capturing the imagination to get people involved.

Thirdly, I think the machinery legislation needs to start from the premise that no proposal should be put unless there has been a strong grassroots process leading to a referendum. It has focused so much upon the vote itself without actually letting people have a level of consultation and involvement in the design of the proposal that I think it is not suited to bottom-up proposals as opposed to simply top-down imposing of models and ideas that Australians have consistently voted no to. So I would like to see that looked at.

Finally, I think it would be worth while asking: should the machinery legislation include a regular 10-year convention of some kind, every half-generation, that provides a popular means of putting issues on the table so that we know there is a regular feature of our public life that engages with questions of constitutional reform—not something that must necessarily lead to outcomes but, if you like, part of our civic life that involves a regularity in dealing with these issues that means that people see it as an ongoing, continuous process, not just a matter of a referendum being put up every few years that they tend to vote no to. I will leave my remarks there.

CHAIR—Thanks very much. There are quite a few ideas thrown up there straightaway.

Mr SLIPPER—Professor, there is a concern about summits like the 2020 summit that they are feelgood things—make people participate in a talkfest and ultimately not a lot emerges. With respect to the 2020 summit, obviously we will know sometime down the track if anything substantial emerges. Don't you think your 10-year half-generational discussion could well be

seen as just an expensive opportunity for people to express their views on matters which will never be accepted by the Australian people?

Prof. Williams—No, I do not, because I think it comes down to the design of a convention. But I think the convention should clearly have a popular voice. I am not suggesting something like a 2020 summit. Indeed, I am suggesting a proper convention along the lines of what Australia did so successfully in the 1890s, which did lead to the drafting of our Constitution and provided a vehicle for many different views to be expressed and provided momentum for reform. If you talk about cost, I think the cost of inaction is far higher in this area. We have not fixed our federal system for decades, despite a lot of long-running problems. I think one of the reasons for that is there is just not a moment when these issues get raised in our public life in a way that gives them serious and sustained attention.

Mr SLIPPER—But in the 1890s the convention was not elected. My understanding is that it represented the then colonial governments. Other options of course are available. Would you suggest there should be some sort of election of delegates nationally or should they be nominated by states or should various interest groups have the opportunity of sending people? What ideas or thoughts might you have on how such a 10-yearly convention could be constituted?

Prof. Williams—This is one of the reasons I started by saying that I think this committee should look at all of these issues and look in detail at this. My view is that, yes, we should look at electing at least some of those delegates. In fact, the second of the conventions in the 1890s—the 1897-98 convention—was a wholly elected convention. So there is a good precedent for that. I think if you want to get a sense of popular ownership it is essential that people have a sense they can participate in the choosing of delegates to a convention in a meaningful way. I am not sure it should be wholly elected, but I would suggest that there should be something that should build up through a long process the membership of the convention and that the convention, instead of running over just a couple of weeks, as did the failed 1998 convention on the republic, should continue over a longer period of time and educate Australians and give them a sense of involvement.

Mr SLIPPER—It seems like a very costly exercise.

Prof. Williams—I accept it would cost a significant amount of money, but again I would say the cost of inaction is higher in this area. The work of the Business Council of Australia has identified, just in the federalism area, an annual cost of some $9 billion. That cost suggests we need a regular process that works.

Dr Twomey—I would like to add to what George was talking about, just to give you a practical example of where this actually happens. In the United States, at the state level as opposed to the national level, all states except for Delaware have a constitution that must be amended by referendum. So they have similar problems to here—you need the people's involvement in order to achieve constitutional reform. In quite a number of states, about 20 or 30, they have a constitutional requirement that every certain period of time—be it 10 or 15 years; all the numbers are different—there be a constitutional convention or a referendum to decide whether there is a constitutional convention.

It comes back to the philosophy of those who brought into being the initial American Constitution that every generation has ownership of the constitution and has the right to change the constitution to meet their own desires, their own interests and their own way of life. So there is a very strong feeling in the United States, particularly at a state level—it does not really work at the national level—that there should be this regularity in reconsidering the constitution. It does play an important role from the public education and public involvement point of view, because, in the lead-up to the vote on whether to have a constitutional convention or the lead-up to the holding of the convention, with all the issues and public affairs that come forth people say, ‘We can actually be involved in that because that can be put to an elected convention that we can have greater involvement in.’ You see a lot greater discourse in public affairs in the States in the lead-up to the regular reform period. Again, they often have directly elected conventions and there are different ways of doing it. For anybody who wants to look at this further, I have written an article looking at the comparative issues of the United States constitutional conventions and conventions in other countries. I have compared them to the sorts of issues that would arise if we did a similar thing there, and I can refer people to that article if it helps.

Prof. Zines—I just want to remind everyone that there was a fairly long period—I think it was through the seventies and the eighties—where there was regular review of the Constitution by the Australian Constitutional Convention. It was not popularly elected but consisted of members of state and federal parliaments and local government. So it was not a question of just having a two-week look and forgetting about it; it was an ongoing thing. It was put an end to by Attorney-General Bowen in 1985 when he set up the Constitutional Commission, which issued a report in 1998.

Mr GEORGIOU—If we are talking about models, what is wrong with the seventh? I think Whitlam initiated it and it was continued under Fraser and went to the Court government. A mixture of governments was involved. We spoke about bipartisanship. One of the issues that were important, in my recollection, was that it had to be bipartisan, not just at federal level; there had to be an acceptance by the various state governments in particular. The fourth referendum went down because there was a significant difference with Queensland in particular. Rather than going to an elected situation and going back to the 1890s, do people have an evaluation of the effectiveness, efficacy or appropriateness of more recent models?

Prof. Saunders—I was hoping to intervene on another point but I will speak first on the point that Mr Georgiou has just raised. There is quite a lot of literature analysing the constitutional conventions of the seventies and eighties, and if the committee would be interested in it I am happy to point you in that direction. One of the strengths of that organisation was that each of the delegations had to comprise government and opposition. Some of them worked better than others in involving both sides of politics but it was not a very important dimension. One of the weaknesses of that exercise was that the Commonwealth never adequately committed itself to the outcomes of convention recommendations, and one of the consequences of that was that the Commonwealth itself did not take many of the convention deliberations seriously enough. So, if we were to go down that path again, we should think very carefully about what we can learn from that exercise.

I will just come back to George’s opening remarks, many of which I absolutely agree with, and add to them in a couple of ways. George identified three issues that he thinks are important for assisting the referendum process to work more effectively than it has. I will just add another

one to those and that is the question of the substance of the proposals that you put. It is important to put proposals that people think are useful and are a real addition to our constitutional arrangements. If you look at the three proposals that got up in 1977, each of them were dealing with a real problem that you could persuade people needed to be tackled. I think that the contrary to that are proposals that are seen as being put forward to deal with the government's short-term political agenda. That develops a level of suspicion in the voting population which is not helpful when it comes to referenda.

Secondly, I absolutely agree with George's point about an overhaul of the referendum machinery legislation. I think it is very important. If we are seeking imagination about how you help people to understand proposals and to be properly involved, the New Zealand experience with plebiscites and referenda is very, very interesting. They were very creative. They reviewed the effectiveness of their arrangements and there is a lot to be learnt from them. George's point about the booklet is right. Even if his students had read it, they would not have been assisted. The booklets are very, very difficult to understand and indeed very often the yes and no cases contradict each other. So you have to ask yourself, 'What is the purpose of those booklets?'

Finally, if we are learning from past experience, can I ask the committee to also turn its attention to the experience of—I cannot remember what the committee was called, although I was a member of it—the expert committee or whatever it was that was formed in association with the republic referendum process. That committee was not effective for assisting with the development of easily understood materials as it turned out. But it was a very important first step along the process of really worrying about how we help people to understand the proposals on which they are to be asked to vote. I think that it would be useful for the committee to revisit that part of the 1999 experience looking at questions such as the composition of that committee, the role that it played and the way in which it interacted with the whole question of popular involvement.

Prof. Zines—I think the yes and no cases have sometimes been an absolute disgrace. If you look back into the past, particularly the no but also the yes cases have often just been pretty scurrilous political tracts. That has often been the case where perhaps only a minority of people in the parliament are opposed to it. There have also been other occasions in which the public could not possibly get a clear, objective view as to what the issues were about. That is because it is left to those persons in the House who are opposed or in favour of it to draft them. I see great difficulties in suggesting there should be some sort of objective tribunal because the issues can be highly political.

I wanted to also reaffirm Mr Georgiou's point about getting the states involved, because although bipartisanship at the federal level is essential, it is not sufficient. There have been I think five cases where there has been bipartisan support which have failed, usually because of state opposition. In recent times the two most obvious ones would have been the 1977 proposals for simultaneous dissolution, which got 62 per cent of the population but only three states because in the other states they were very much opposed, and the other was the nexus proposal, which was put to the people with the Aboriginal proposals.

Mr Black—I basically agree with the comments that have been made so far. I think what it basically boils down to is that when this process becomes politicised, be that through various political parties at a federal or state level opposing referenda or the yes and no cases getting

bogged down and becoming incomprehensible, the electorate can smell it when a referendum proposal is political and they do not like it. I think that, as a practical matter, is the key to getting a referendum up.

CHAIR—Professor Rubenstein?

Prof. Rubenstein—I would be interested in pursuing the concept of the first area of change that George raised, which is section 128. In the pre-2020 summit that the Jewish community had with the members of the committees, one of the issues that came up in our governance stream was changing the process of change. There was quite a lot of support from the group in terms of that idea, seeing that as problematic. I see Professor Saunders shaking her head, and George raised that as an area that he was not enthusiastic about. However, I would be interesting in developing that discussion a little more. George, do you have the actual numbers of those referenda that had been passed by a majority of people but not by a majority of states?

Prof. Williams—I do. Five would have been enacted or passed, if we did not have the double-majority requirement. That is a significant number. But it is also interesting that one of those was a referendum to remove the double-majority requirement, which only got three out of six states. So it failed on that. It demonstrates the difficulties in doing that. Of course, it fails in part because smaller states identify, as with Leslie's examples, with the fact that they do not want to lose their influence through having that. It is a really difficult thing to get through, unless you can convince smaller states to give up their power—and why would they?

Prof. Rubenstein—Yes. I do not know whether any members of the committee have any responses to that.

CHAIR—Professor Flint?

Prof. Flint—I just want to say that this country would not have federated had the colonial parliaments not promised to put the decisions of the convention to the people. If we were coming to a revision of the Constitution, parliament—if it wanted to do that—would have to agree rather than to let it come back to the parliament and have parliament do nothing. That obviously is a condition. The second thing that I think ensured Federation was that essentially the conventions—except for Western Australia—were all elected after that date. That ensured that the people had a say in and an ownership of the convention.

I think the yes/no case must be contradictory. I think that is the whole point of it. I do not think the 1998 convention was a failure. It was a single-purpose convention, although it was probably a bit short. It came up with what was nearly a majority view, although it was not a majority view, and the Prime Minister put it to the people. I think it did succeed in that what was wanted from that convention was a republic and that was put to the people. So I think that convention was a great success.

If we want to review our Federation, I think we have a serious problem in relation to the states, particularly with the way in which the states raise their money. In fact, they do not raise their money; they come here almost as mendicants to the Commonwealth, and that is not an effective way to run a federation. I think the way to solve that is probably through a convention partially elected and partially ex officio.

The threshold which Quick and Garran set, I think, is quite reasonable. They said that the Constitution is not to be set in aspic, there is to be debate and, if the people agree, that will be passed. They set the threshold as being the people agreeing that it is desirable, irresistible and inevitable. I think that is quite a reasonable standard—desirable, irresistible and inevitable.

It is good if there is no disagreement in the parliament. Sometimes you get changes to the Constitution that are unwise. I think the one on the retiring ages of judges was an unwise provision. It should have given the parliament the power to determine the retirement age because we are just in the process of losing a very good judge, Mr Justice Kirby. We lost Callinan and we are going to lose Gleeson. It is far too young probably for judges to be required to retire. Their retirement age should be at about 75 or 80, but that should be for parliament to decide. It should not be set in concrete so that you can never change it.

CHAIR—Thank you. Professor Craven, do you have a comment on this?

Prof. Craven—Just generally, one of the most important things with referenda is to accept reality. They are really hard. It is always going to be hard. It is always going to be difficult. There is no magic answer to these sorts of things. So you work within that, and there is no point in trying to decide an easy way around the referendum process. The small state issue and the majority of states is a classic example. If you want a real suicide run on a referendum, you try to take away the double-majority requirement. That should queer the pitch for the next 10 referenda in the small states. I have resigned as a Western Australian, but that is a reality.

I think that means it is probably right that we should be looking at the process of machinery. I think George is correct there. We have section 128. How do you make it work? We have learned a little bit about conventions from 1998, which in a sense was the first big set piece quasi half-elected convention for a long time. It is true that the second set of conventions in 1897-98 were elected. There is no doubt about that, and that is why they worked, with the exception of Western Australia.

I think it would be hard to have a serious convention now without an elected element. I suspect the world has moved on from the convention of the seventies and the eighties, which I thought was very good. I think you really have to think through how you do that. I think there were five of us around this table in 1998. I am not sure that any of us would contemplate—certainly, I would not—a fully elected convention. I think you need a balance, for all sorts of complex reasons, or you might be able to do other things. However, simply to have a full-run one would be hard.

From 1998, I think we learned certain things about conventions that work and do not work, although probably they are bipartisan things that are not seriously in dispute. One was that, if you were really going to look at something at a constitutional convention, you would have a clearly thought out discussion program of epic proportions before you began. You would not just launch a convention into the ether and have it talking about anything, republic or non-republic. You would really try to work out the lead time.

The second thing is that it would have to go for a long time. One of the defining characteristics of 1998 was a two-week sprint towards a republic, with the result that, in those last two or three days, things were happening so quickly that I do not think anybody knew what

was going on. I think that compromised it in all sorts of ways. I think we need to have learned from that.

All of these things come directly from 1898; it is not rocket science and it is not new. The third thing is that, once you come up with your model on anything, you would adjourn for a significant period of time. That would enable what you have come up with to go to the people to be debated. Then it would come back with thoughts and improvement, you would debate it again and your improved referendum machinery would come back. Yes, this is partly to do with the republic, but it is to do with anything serious. That, I would suggest, would be hopefully bipartisan lessons from that experience.

CHAIR—Thank you. Professor Blackshield, do you have any comment on this?

Prof. Blackshield—I want to bring up the point that we have touched on about the single-issue referendum versus the package. When we have had a single-issue referendum, it has partly been because of the idea that, if you focus on the single issue, you can have an uninterrupted debate on that issue, and partly because of the feeling that, if you have multiple issues and one of them is unpopular, it is going to drag all the others down too. However, I do not think the record shows that. If you consider certain cases—like 1946, where one out of the whole package got up; 1977, where some got up and some did not; or even 1988, when they all failed but by very different majorities—I think the electorate does discriminate. In addition, it is obviously much more cost-effective to put several proposals at once. This issue needs to be debated back and forth. My view is that it is better and more reasonable to put up not too many but, say, four proposals at a time.

Apart from that, I generally endorse what other people have said, particularly about the yes and no cases. Professor Zines made the point that the no case is often disgraceful. However, in my view, the yes case is often equally disgraceful; it is written by some soap advertising agency and it totally fails to convey the point of the referendum. Ideally, it would be nice to take that process entirely out of the hands of the politicians and give it to some objective body to draft the yes and no cases. But, if that is impossible, then at least—

CHAIR—There is a truth.

Prof. Blackshield—we could control the way the typeface in the no case is manipulated to horrify people. In a referendum that has been through both houses of parliament in the ordinary way, you could take the second reading speech and the reply from the opposition and simply reprint them in an intelligible format. Politicians, of course, would be free to enter the public debate and add whatever else they wanted to, but at least the document itself would be more objective. Even if you cannot substitute objective statements for the political statements, you might be able to add one. The other thing is that the booklet contains the full text of the proposed alteration, but for many people that is going to be unintelligible. I suppose it has to be in there, but it needs to be more clearly explained.

The only other point I want to comment on is public ownership of proposals. One of the difficulties with section 128 is that usually the proposal has come up in the form of a bill passed by both houses of parliament. Occasionally it can be passed by only one house of parliament, but it emanates from the politicians, and even if there is bipartisanship it is bipartisanship among

politicians. There is no public ownership. This is why one proposal that has been debated from time to time is the citizens' initiative proposal—a petition from a certain percentage of the electorate putting up a suggestion. People are divided on the merits of that. I think it is a good idea. The objections to it are, first of all, the apprehension that the people will come up with stupid proposals, as they do seem to do in California. I do not believe that the rest of the world is like California. I think we can trust our electorate better than that. The other objection is that adding the citizens' initiative would involve changing section 128, and that is very hard. But George's proposal, or some variation of the convention proposal, would allow for proposals coming up from the electorate. It would not involve changing section 128. If we are worried about trusting the people to come up with sensible proposals, there would still be that filtering process of what came out of the conventions. So that might be a good answer to the whole citizens' initiative idea.

Dr O'Donoghue—As an old campaigner, I want to just say something about the 1967 referendum, because it was a real people's movement of committed Australians, Aboriginal and Torres Strait Islander people and non-Aboriginal people, who worked for many years towards the referendum. I am not sure that Australia is quite with us these days in relation to our issues and so on, but I think we have to get right back to the popular ownership that was mentioned by George, and we have to get out there and do the work amongst the people. That was a campaign that was a real people's movement. Unless we have that kind of movement, I think generally people do not understand difficult issues like changing the Constitution.

Prof. Twomey—I just want to add something on the yes/no case. In New South Wales, for example, the yes/no case is not written by members of parliament, so there are other ways of doing it. My understanding, certainly from previous referenda in New South Wales, is that it has been the bureaucrats who wrote it. Also—and I would have to go back and check—I think it is not so much a matter of yes/no but a matter of information to the public as to why we are proposing to make this change, what the position is now and what the effects of the change are, so it is more like an education piece to explain to the people what is happening. Interestingly, also, if you look at the statistics for referendum success in New South Wales, they are hugely higher than in the Commonwealth. I did not bring the statistics with me, but from recollection it is somewhere around 80 or 90 per cent.

CHAIR—What would be your speculation as to why that is so?

Prof. Twomey—I do not know whether there is necessarily a connection between them. There are other reasons for that. One would be that many Commonwealth referenda are focused on giving greater powers to the Commonwealth government and the Commonwealth parliament, so there is that whole Commonwealth-state thing. That does not arise in a state referendum; that is not what state referenda are about. In state referenda it tends to be issues such as in New South Wales, where there were referenda on things like independence for the judiciary, changing the Legislative Council so that they were directly elected and all those sorts of things, and they were successful, because you did not have that sort of intergovernmental dispute aspect. You had no flak from a different government, because you only had one government involved. You had no issue of aggrandising powers. That was wiped out. So the issues were more confined.

But there may also be—and this is something that I think should be studied—a relationship with the fact that you do not have the same antagonistic yes/no propaganda going to the people

in a state referendum that you do in a Commonwealth referendum. There may be a small relationship with the fact that the yes/no cases are written relatively objectively with a view to education rather than in the way we see the Commonwealth ones. I never got to do one myself because we did not have a referendum when I was working in the New South Wales Cabinet Office, but I have read the files from the previous ones. The material was written by bureaucrats, but then it was sent off to be checked by constitutional lawyers. I think they had Professor Lane and various other people who were independent academics out there to check and review the yes/no case before it got sent out so that it was not seen to be partisan; it was seen to be educational. I think that is an approach that might be successful at the Commonwealth level.

Prof. Lavarch—I will just pick up a point, not directly, that Professor Blackshield raised. I am not a great fan of citizens initiated referenda. However, I think the point is that, in terms of any prospect of success, both bipartisanship and popular engagement and endorsement are two sides of the one coin. There were some interesting ideas which flowed a couple of weekends ago out of the 2020 summit. One from the governance group, which I was involved with, dealt with the idea of the Commonwealth engaging seriously in this concept of collaborative democracy. The idea that relying on yes and no booklets and things like that will actually do anything in the way of engaging the public is just fanciful.

However, what we do now have which was not present even when the republican referendum was put, given that the developments have been so dramatic in the last decade, are a whole range of social networking opportunities and a technology platform, which do give a very real chance of at least giving the broader population a chance of engagement with these issues. It is broader than a question of changing the Constitution, but it would be a prime example if you are going to achieve both goals: an engaged population in the process of their governance and a population that gains ownership of a particular proposal to change the referendum, and it is not seen as something being pushed upon people by politicians. That has been inevitably a death knell for these proposals over the years, and that case is so easy to make. Even if it is without much foundation, it is such an easy case to make.

There are great opportunities here. While I accept that it is all terribly difficult and history makes one look at these things with a certain amount of scepticism, the technology, the platforms and the models that are now in various parts of the world for collaborative democracy I think are an interesting way forward, and that might be something which the committee in its broader deliberations could give some thought to.

Mr Black—I just wanted to agree with the comment made that the opportunity presented by the internet to connect, particularly with younger generations, to get the yes and no cases across, is really where the issue has to be. The yes/no booklet will be useful for—how can I put this delicately?—old people—

CHAIR—That is not very delicate! Older people.

Mr Black—Older people; thank you. But the digital natives are people who spend more of their recreation time each week surfing the net than they do watching television, let alone any other recreational activity. They have grown up in this environment. The ability to make the case through YouTube or Facebook applications, or through a range of other online tools, should be an important part of any education and public ownership process.

Prof. Behrendt—I want to quickly give my support to the idea of the 10-year convention, especially in a form where it might be a mix of elected representation and appointments. In picking up Professor O'Donoghue's observations about the 1967 referendum, I think it is important to remember that it was a 20-year process of engaging the public imagination and building those bridges, and I think, in that sense, every 10 years is actually quite a timely period in which to somehow monitor, consolidate and refine support for some of these key issues that are engaging the public in debate in the way that other people around the table have been discussing. It helps to reinvigorate that connection—particularly, I think it is worth stressing, with members of the community and particularly, from our experiences, those in the Aboriginal community, who often feel very isolated from the political process. Through some of these new media techniques, especially, we could find ways to re-engage people in this public debate. I do not think we could overestimate just how much of a refocus that could give us on the Constitution but also how it could generally make the community feel engaged with the political process as a whole, even if the result of the convention were not actually any constitutional change. Perhaps when the committee is looking at experiences of engaging broad sectors of the community around issues, through things like deliberative polling, that might be a good way for you to have a look at how those sorts of really informed, intensive debates with broad sectors of the community can spark the imagination about the way they can engage with public life.

CHAIR—Thank you. I know that Sophie Mirabella has been waiting patiently.

Mrs MIRABELLA—Thank you, Chair. Professor Williams, in much of what you said there is an assumption that, because the people reject a constitutional proposal, they do not understand it. And much of your presentation was focused on the need to better foster education. But would you accept that some people actually reject the proposal because they do understand it and perhaps they understand it too well?

Prof. Williams—Clearly, it is a mixture of things. I think that in many if not most cases, people have enough understanding of a proposal to know either that they do not like it because it has been generated in a way that they distrust, or they do not like the particular proposal because it may be giving more power to the Commonwealth, and they have showed historically that they tend to vote no to that type of idea, for state or other types of reasons. So there is a general level of understanding. But I think, more broadly, we do have a very serious problem in Australia with a lack of understanding and engagement with basic political and governmental processes. There have been surveys that showed, for example, that around half of Australians do not even know we have a written constitution. That is a major impediment to constitutional change. A recent survey by the Roy Morgan polling company asked Australians, 'Do we have a national charter or a bill of rights?' and 61 per cent said yes, despite the fact that we do not. I think that is again a problem. So I do not want to suggest that it is just ignorance here, but I think that is part of the issue. And, indeed, part of the goal—whether or not we get constitutional change up—and part of the process should be about improving the knowledge and engagement of Australians, because that itself is a worthy goal.

Mrs MIRABELLA—But there is also embedded in those statistics the possibility that perhaps it is not a priority or an issue—whether or not we, as the political elite, or you, as the academic elite, have different points of view and can talk about these things ad nauseam. Perhaps it is not a priority for the public, and that is an issue that we have to perhaps accept or deal with in a particular way.

Prof. Williams—I think again it is a mixed answer. On some areas, undoubtedly, there will be people in this room who feel passionately about things that, clearly, are not a priority for Australians. But, on the other hand, if you look at federalism, that is an area that has assumed the status of a national priority. Australians clearly care enough about the quality of their schools and their hospitals, of government provision, and they recognise now that often poor quality is linked to deep structural problems relating to federal financing and federal-state relations. I think there is a really deep interest in and concern about those matters. Often what needs to occur is a linking, if you like, of daily concerns to the structural problems that caused them. That is a matter of education and engagement, and my experience in Victoria and elsewhere, from being involved in grassroots public processes, is that Australians are passionately interested in how they are governed; they just do not have an opening that lets them be involved. And I think that the key is to give them an opening and give them a fair, genuine opening in the way—

Mrs MIRABELLA—Perhaps through citizens initiated referenda. That is an opening to get them more involved.

Prof. Williams—Yes, possibly. I think that is something that should be looked at more. To the extent that we do look at changing section 128, the only area I would look at is how we broaden the scope for initiating proposals. That is the area that should be looked at. But even if we do not do that, I am open to the idea of petitions working more effectively or people having a direct voice through elections to conventions. Unless we do that, we need to be realistic that if people are not given a say then the prospects of success are low.

Mrs MIRABELLA—You referred to statistics leading to a drought of constitutional referenda. What objective analysis says there is an ideal number of constitutional referenda? Farmers know what a drought is in an agricultural sense, but in a political-legal sense how do we know what the ideal number is? What is the formula? Is there an ideal number?

Prof. Blackshield—No rain for nine years, maybe?

Prof. Williams—There is clearly no ideal number. I have simply set the fact that we have not changed the Constitution for 31 years against the fact that we have a broken federal system of government. And the fact that we have had zero change in the face of deep-seated changes that do require constitutional reform to fix them indicates that the wrong number is zero and a better number would be enough change that fixes what I recognise are bipartisan problems. Indeed, the report by this committee a year or so ago that, in a bipartisan sense, recommended that there needed to be constitutional reform to fix the cross-vesting problem in our Constitution is an obvious one—a mechanical change, in the New South Wales sense, that should be fixed. I do not have a number in mind. I simply think that our failure to engage or to pass reforms where they are clearly needed illustrates that as a nation we have dealt poorly with this issue.

Mrs MIRABELLA—I accept that, but there are also great differences of opinion as to what is clearly needed. I have a quick question for Anne Twomey. You mentioned the US and the regular requirement for constitutional conventions at the state level. Has there been any analysis of the impact of these and whether they have resulted in better government?

Dr Twomey—It being America, there is analysis on everything, as you can imagine. No doubt there are three million articles looking at these sorts of things. The answer to this is always

mixed and it is always terribly, terribly hard to judge. How do you judge whether government is better or not? Frequently constitutional conventions or referenda fail, and there has been a lot of analysis in the United States—and in other places as well, like Switzerland—where you have constitutional conventions and referenda and looking at the relationship between the two. How much public involvement do you need? How do you structure your referenda? Do you hold it at the time of an election or another time? All of those sorts of things are discussed, and it may well be that, as you say, the proposal that comes out for change is a bad one and the people recognise it as bad and vote against it. In a way that is a success. So some failures of referendum might be good things. I do not know how you judge whether it gives you better government or not, but at least it is saying that the people get a say in their constitution—because it is their constitution. It does not have to be the constitution of the people of the 1890s. Each generation should at least have a chance to say whether that is the constitution that they want or whether they want to change it. They should have the opportunity to do both. And if they say, 'No, we don't want to change it because we like it the way it is,' that is their choice too. But it should be a generational thing; the people should not be frozen out of the system.

Mr ANDREWS—My question is to anyone who has the answer. Is there any empirical data about the use of or effectiveness of the yes/no cases? I suspect a lot of people never read them, and I equally suspect that most people are informed by other means as to their response, whether it is the media, their mates at work or discussion around the family table or wherever. I suspect not many people read the yes/no case. Is there any data about that?

CHAIR—I have a lot of shaking of heads. I might ask a follow-up question to that. George, in his introductory comments, spoke about the possibility of changing the present act of the federal parliament that deals with how we conduct referenda. He spoke with some criticism of the pamphlet device that is written in the act that was put there in 1912. Does anyone else among the participants have a comment about how we might change to some means of putting referenda or explaining referenda that moves away from the 1912 pamphlet model?

Prof. Blackshield—One other thing that is in the machinery legislation is a set of fairly strict limits on the amount of money that the government can expend on promoting the referendum proposal. It might very well be that there are good reasons why there should be such limits, but I think that is something that should be looked at again.

Prof. Flint—Unlike most of my colleagues, I think that the yes/no case should be written by those who are responsible for it—that is, the members of parliament. They are the ones we rely on in elections to put out their agendas and so on. I think it is perfectly proper and appropriate to have them write the yes/no case, rather than have some other body do it who would purport to be objective but who would have the same prejudices as members of parliament. I am very happy with the yes/no case as it is. You do see the result of that if, for example, there is no no case, as there was in relation to the compulsory retirement of judges. I think that was a bad provision, but it got in because there was not a no case and people could not be guided on that. So I think it is best to do that.

When it comes to CIR, the big disadvantage of CIR in the United States is that it ties up the budget. Imagine if the Rudd government came in and they found that they were forced to spend about 30 per cent of the budget on particular things because of CIR. I do not think CIR is really the answer. Perhaps the answer, if we want that sort of thing, is a recall election. That is much

better. It also gets over some of the problems that you get. For example, in 1975 we had a very bitter experience in this country—that is, the delay of supply. I do not think it was a good idea. I did not think so at the time and I still think it was a mistake on the part of the Liberal Party to do that. They should have just waited, but they brought that on and it led to a very bitter occasion in this country. It would have been better if they had had to put their efforts into getting petitions for a recall election. It would have been much more satisfactory way of dealing with it and would not have left the bitterness. It was a very bitter period in 1975 and it should not be repeated.

Prof. Saunders—I think the fate of the yes/no case depends on what you want to do. If you want to give both sides of the argument a fair chance to state their position then that is what the yes/no case does. If you want to actually help the people of Australia to understand what they are voting for, give them a sense of ownership, let them make a genuine decision of their own, then you need other techniques. The yes/no case cannot help with that. Maybe you want to keep the yes/no case for the first purpose but then develop a quite sophisticated range of techniques for helping people understand what the proposal is, if they have not already been helped by some earlier involvement in developing the proposal in the first place. I do not think it is rocket science. It is complicated, but I absolutely agree with Peter that there is a range of ways that people can be engaged in these issues and it has got to be done on every occasion.

Prof. Zines—I just want to get a couple things on the record. Firstly, if section 128 were changed to provide for only half the states, I think it would have only a temporary effect because it is likely that the Northern Territory will achieve statehood and then we will be back where we are now requiring four states. Secondly, I point out that the Constitutional Commission recommended that there be a state initiative for constitutional change requiring three states to pass exactly the same constitutional alteration bill, three states to have a majority of the people. There was the minority view—namely, that of Sir Rupert Hamer and me—for citizens initiative on strong conditions which I will not go into.

Mr PERRETT—I just have a comment. I should say that I am framing this from the proposition that I see changing the Constitution as being very simple—a majority of the states; 50 per cent of the people plus one. I have always approached that as a very simple proposition to put to the people. That is what I am framing it from.

I am going from what Professor Williams said at the start and that idea of people informed by the no case and therefore vote no or they are ignorant of both cases and vote no. I do not expect an answer to that because I then want to go to Dr Twomey in terms of the US states that have had the referendum especially in the last three, four or five years with the Facebook or MySpace generation. Is there any data to show that more people did come out to vote? I assume that their referenda do not involve compulsory voting. Is there any data on greater percentages of people voting in the last five years?

Dr Twomey—I do not have the answer to that.

Mr PERRETT—In Switzerland or the US or do we not have that sort of data?

Dr Twomey—Maybe it is the age of the academics who write the papers in the journals. To be honest I have read a fair bit about what has been going on in the United States and I have seen

nothing on that. It may well be that all the articles on it are online not in the journals. That is a possibility.

Mr PERRETT—Mr Black, do you want to answer that representing the younger generation?

Mr Black—This current election cycle in the US is really the first main cycle that we have seen where there has been widespread engagement with this technology. So I would imagine that we would begin to see some evidence come out over the next few years.

Mr PERRETT—I noticed that Obama's campaign and the campaign of the previous Democrat guy, Howard Dean—who went out in a scream—were very much about engaging people that had not been engaged in the election process before. Sorry, that was just by way of commentary.

CHAIR—I am going to ask Daryl Melham to make a final comment and then we are going to go to the next session.

Mr MELHAM—Can I just put on the table one referendum question that has not been mentioned—that is, the 1999 question on the preamble which was put at the same time as the republic. I think that that reinforces some of the things that have been said here. The republic referendum was hotly debated. The republic got 46 per cent of the vote. The preamble got 39 per cent yet it had bipartisan support. I opposed it in my caucus, much to the chagrin of some people, but the only person who spoke against it publicly in the parliament was Peter Andren who drafted the no case. Only a couple of people spoke against it publicly in the referendum, yet it got only 39 per cent of the vote. People smelt a rat because of lack of process, lack of consultation and lack of ownership. Two questions were put at the same time. It was not debated widely in the public at the time, apart from an interview I did on ABC, an *Australian* article and a grassroots campaign saying, 'We can do better than this.' I think that is worth putting into the mix in terms of what sort of process there should be. It looked benign. It looked as though it had bipartisan support and that everyone would accept it, but it got seven per cent less than the republic vote.

CHAIR—Regretfully, I am going to have to cut off the debate at this point—but I am going to have to do this with every session. I am sure we could keep talking about any single one of these topics probably for the rest of the day, but I am going to move to the next session which is to deal with the topic of four-year fixed terms and the qualifications of members—which were thrown into this single session. I am going to ask Professor Michael Lavarch to introduce this topic.

Prof. Lavarch—I think that the conversation will be relatively seamless because, if we are concerned about propositions which have a starting point tendency to be seen as favouring politicians and not necessarily the broader community, then maybe these first two are ones which would be candidates for that sort of opposition to be run. Firstly, I will deal with the issue of the term of the parliament. This has been a very constant issue raised right through Australia's federal history. Indeed, I think it was the Western Australian delegation at the conventions who did favour a four-year term but by that stage each of the states other than Western Australia had adopted three-year terms. Initially, there were five-year terms in the colonial parliaments, reflecting the position in Great Britain.

So the Constitution was framed firstly in terms of section 28, requiring three-year terms for the House of Representatives—it is possible for the term of the House to go a little bit longer than three years, as was the life of the last parliament, because the expiry is tied to the first sitting of the new parliament—and section seven, which goes to the makeup of the Senate and that senators are to serve a six-year term. From a relatively early stage the issue as to whether the length of that term was too short and whether Australia would be better served by longer terms came into play. It featured in 1927 in one of the first comprehensive stocktakes of where Australia's constitutional arrangements were at. At that stage the recommendation was that four-year terms should be introduced. There have been a range of other reviews, including a number by organs of this parliament, I think most recently by the Joint Standing Committee on Electoral Matters in about 2005. Sophie might have been chairing at that stage. In its standard review of the conduct of the previous election it put together a chapter which looked at the issue of the term of the parliament and made a case for at least the exploration of a number of different options for extending the term.

Essentially the arguments are pretty well rehearsed. They go to the quality of the decision-making cycle and whether a longer term, given the reality of the way in which governments and parliaments operate, means that there will be an extra year before you move quite into the full-blown electoral cycle, which tends to influence everything. It does not stop, obviously, the operation of the government or the parliament, but it tends to be an overriding consideration. There have, of course, been many cases made by business and others desirous of a longer term. All of the states have four-year terms, bar Queensland, which of course is in a slightly different position—it has a unicameral parliament—and has remained at three years. All of the other states have moved to a four-year term at various points over the last decades. So that original commonality of the terms of the federal House of Representatives and the state lower houses has now been lost. If we were to have commonality we would have the period of four years.

There are of course a whole range of points on the continuum where people have thought about these issues. One is a fixed term of three years, which, it is argued, would at least extend the life of the parliament. At the moment I think there is a broad history of about 2½ years as the standard life of the parliament. There is an argument that you could achieve that without a referendum in terms of the Electoral Act and the commitment of the parliament and the government to adopt such an outcome consistent with the terms of section 28. Another position is to make it a four-year term which is not fixed. That would be exactly the same circumstances as now—there would be no particular obligation on the government of the day, of the prime minister, not to decide to go earlier than the four years at any time in the cycle. But one would assume you would be likely to get a longer parliament and into the final fourth year before an election was called. Then there is the proposition of a fixed four-year term. The majority of Australians at a state level—not necessarily the majority of states—now operate in their state elections under a fixed term model.

Essentially the real issue with this, if you either accept or do not accept the arguments in favour of the term, is really what you do with the Senate. That is where the thing has proven to be difficult. It is sanguine to note that, of all the constitutional referendums that have been put in our history, the lowest vote was the proposition in 1988 of a four-year term with a four-year term in the Senate. So we need to be conscious of the previous debate about the difficulties of things. It is an interesting point to observe.

In terms of what you can do with the Senate, the world is your oyster. You can certainly leave it as it is at a six-year term, but you will have elections out of cycle—and more elections not less because of that. You can extend the term of the Senate to eight years but keep the same pattern. That means you will have the same sort of electoral cycle. But how desirable it is it for members of the Senate to be given an eight-year term? It probably depends on whether you are a senator as to what your view might be on that proposition. Maybe there is a broader view as to whether it is desirable for someone who slips through on some complicated flow of preferences but with a fairly small percentage of the vote to find themselves in the happy situation of securing an eight-year term. It is difficult. The case that was set out by the joint select committee in its report on either the eight-year model or the Senate going to two terms of the House of Representatives is a good one—so the current situation being preserved but without there being an actual specified year term for the Senate. They are all matters worth considering, and no doubt we will debate them.

Quickly turning to section 44, which is the provision dealing with qualifications of members, this in some senses sat a bit dormant for a fair part of Australia's national federal history but in more recent decades has come into play—most particularly in a couple of cases. I suppose Sykes v Cleary is the landmark case. This brought into play section 44(i), which is the provision which deals with the allegiance of a member of parliament and the prohibition from a member having any allegiance to a foreign power or being a citizen of a foreign power. What became clear from that decision of the High Court is that Australia is a country of immigrants with a large proportion of our population potentially holding citizenship of another country. Notwithstanding taking out Australian citizenship, it became clear in that case by the way the High Court took section 44(i) that such citizens could find themselves unable to be chosen as a member of parliament. The High Court then spoke about additional steps or reasonable steps needing to be taken in order to disavow, if you like, any allegiance of the former country. How that sits in with the citizenship law of the former country makes it all a bit complicated.

The other provisions in section 44 which are a bit interesting are those dealing with the question: how wide a net is cast by the concept of the holding of an 'office of profit under the Crown'? Certainly in Phil Cleary's case it captured him as a teacher who had been on leave without pay for some considerable time—years, I think—at the time of his election in the Wills by-election. It might cause grief if you are in the Army Reserve or the Air Force Reserve. It certainly is quite wide.

The other provision which deals with pecuniary interest, in terms of contracts with the public service, was canvassed by Chief Justice Barwick sitting as the Court of Disputed Returns as a single judge in Webster's case in the 1970s. And while that one has not come into play too much in recent years, again, the scope of this provision and how wide a net it casts has led to a number of proposals for reform.

I will end by saying that, while I think they are all good measures to debate, they are issues on which, in terms of our earlier discussion, an awful lot of community engagement and popular ownership would be needed because it would be very easy to portray these as simply benefiting politicians and not necessarily benefiting the broader community terribly much.

CHAIR—Thank you very much for that introduction, Professor Lavarch. I now throw open the topic for comment.

Mr SLIPPER—I do think it is probably a mistake for the committee to put down four-year fixed terms, because it should have been four-year terms, fixed or otherwise, in the sense that there are some people who would support one proposition and not the other.

Prof. Lavarch—There is quite a continuum. I think the former Prime Minister's position was that he favoured a four-year term, it not being fixed but possibly with the creation of a minimum of three years and then with the fourth year being open to the government of the day to pick its moment as to where it might go. At that stage, there was some indication from the Labor opposition that that may not be the third position but it could live with that. But getting a consensus between the major parties on this one is, as our earlier discussion indicates, an obvious starting point and one where a committee could seek to achieve such a position.

Mr MELHAM—What do you do with defectors, or rats in the ranks, if you extend the Senate term to eight years, given that we say that if there are casual vacancies states have got to appoint someone of the same political persuasion? Does that need to be brought into the mix if you are going to lengthen the terms of senators?

Prof. Lavarch—If someone is a rat, they are there for the eight years.

Mr MELHAM—That is what I am saying to you; that is the point. If you lose your endorsement, does that trigger a casual vacancy? I am just throwing that in because we had the casual vacancies referendum.

Prof. Lavarch—I would hate to try to draft that!

Mr MELHAM—That is why I raise it now.

Mr GEORGIOU—You could let Robert Ray loose on it!

Prof. Lavarch—That is obviously one of the issues about the length of an eight-year term.

Mr PERRETT—Could someone tell me the other three countries that have three-year terms?

Prof. Lavarch—The other three countries? I do not know.

Mrs MIRABELLA—I would like to clarify something. I was on the JSCEM committee when it looked at this issue, and I was a subsequent chair, and the committee report was not unanimous. I actually did provide supplementary remarks outlining my objection to four-year fixed terms. So it was not quite unanimous in my opinion. I do not think we have seen, at the state level, the extension of a four-year term, fixed or otherwise, improve policy or the quality of government. But, anyway, that is for discussion in another place. I just wanted to put that on the record.

Prof. Williams—I have two problems about this particular area. The first is a classic example of an area heading for defeat unless it is handled by a very different process. It is hard to think of a better example of something people would love to vote 'No' to than the idea that politicians, through their own self-interest, correct or otherwise, have drafted a proposal to give them an extra year in office. That is very easy to defeat. I think also you just have to look at the early

discussion emerging amongst the committee. The lack of bipartisanship that is already obvious on the issue of fixed four-year terms again is one of the issues that I think will head it to defeat.

I think this is a good proposal. I think it is clearly something that should be taken forward, but personally I only think it should be taken forward if the debate is constructed in such a way that, if it goes to a referendum, the parliament is seen to be responding to popular demand to fix a problem. It needs to be started through a process where people can genuinely see that people do want it and politicians may or may not want it but they are responding to that type of demand. That is the only way I think that it should be put. The reason it is important to focus on this is that it is of course Labor Party policy to hold a referendum on this issue, and media reports have indicated that the government has allocated $27 million for a referendum on this issue in 2010-11. That deeply worries me, because I think this will simply add to the list of the failed referendums that have been put, for the sorts of reasons that I have suggested.

If the debate is opened up genuinely, I think we should go beyond the sorts of issues we are looking at as well. I would like to see the states themselves engaging through their populations on this issue. I am attracted to the idea that we should have fixed terms and we should also have, if you like, a coordination of elections. I do not want the state and federal elections to be held on the one day, but perhaps people might be interested in the idea of a two-year cycle, where every two years all of the states have their elections on the same day, and in the following two years we hold the federal election, and, if you like, we have rolling elections on that type of basis. I am not sure whether people would like it or not, but I think the debate should be opened up to coordinating state elections on the same day.

They are the sorts of things that I think with a broader debate we may or may not get some agreement on, but I think that is the sort of different type of thinking that should go beyond the fairly narrow parameters of the debate that is running around the federal parliament at the moment.

Mr BUTLER—I am glad you raised that, George, because what seems absent from this debate is the question of alignment of state and federal elections. Without raising something that is going to condemn this idea to an even worse loss, I think it should be on the table. I wonder why you do not think that state elections and federal elections should be on the same day. It seems to me that, if I am a national company operating across Australia, there is not a jurisdiction in which I am going to be operating that is not in some sort of an election period in any given year. Without expressing a view one way or the other, I ask: if we are going to have a debate about fixed or non-fixed four-year terms at a federal level and spend a whole lot of money on a referendum, why shouldn’t we have a debate about whether or not we should be discussing with the states the question of alignment? So I am glad you have raised that, but I wonder why you reject out of hand—I am sure it is not out of hand; I am sure you have given this a great deal of thought—the idea of having a single election day every four years that deals with all the major spheres of government.

Prof. Williams—It is certainly not out of hand. I am open enough to the idea of it that, if people wanted it, I think that should be put. I do firmly believe that indeed the popular ownership should drive the proposal in that way, but my personal view is that at this stage I do not think it is the best option, because there is too much possibility of mixing up the issues between the federal and state tiers in a way that would impact upon people’s understanding, I

suppose, of the issues. I think our federal system itself is so messy in these areas as well that perhaps we would get the issues working off each other in a way that might defeat informed choice. But, as I say, it is not a strongly held view—but I do believe that the alignment question should be a central part of the debate.

Mr GEORGIOU—There is not enough advertising time!

Prof. Williams—We need more TV stations!

Mr NEUMANN—Following on from what Professor Lavarch said about Queensland, we do have the experience in Queensland where we know that every four years local government elections take place in March. Even Queenslanders are used to the idea of a fixed four-year period of time. What is the experience in the other states in terms of local government? It seems to me that if they are used to voting every four years when it comes to state government and local government then why wouldn't they be used to the idea of changing to four years federally?

CHAIR—Victoria has opted for a model of local government elections every three years for all local councils pretty much simultaneously with going to four-year terms for the state government.

Prof. Saunders—I am a bit of a maverick on this. I would prefer fixed three-year terms. I think that there is a lot to be said for fixed terms. Of course, you have got to make provision for the possibility—pretty remote in Australian circumstances at the moment, but not impossible—that you lose a vote of confidence in the lower house, but otherwise the view that the head of government, whoever it may be, can pick and choose a time for an election to suit his or her political advantage seems to me to be really rather odd in this day and age. So I would go for fixed terms, but I would go for three-year fixed terms.

That is for two reasons. One, it does overcome the various problems with the Senate. In fact, it would enable you to get simultaneous elections for the House and the Senate and therefore reduce or maybe even eliminate the lag. I am also a bit sceptical about whether the Australian people would go for eight-year terms for senators. They might not go for four-year terms either, but they might think that eight years is beyond the pale. But I also think that, in a country that has relatively few checks and balances in its system of government, three-year terms are something that people may prefer to stick with in any event. That would be my preference, but I know that it is outside the mainstream at the moment.

On the question of alignment, you can see the argument for that, and I am absolutely happy about opening up the debate so that we talk about it, but in the end I suspect it may have too many downsides. Let me just mention one, apart from the ones that others have mentioned already, and that is that it will preclude further experimentation in the timing of elections. One of the ways in which this debate about whether we should have fixed terms or partly fixed terms has come about is by the various states experimenting with their electoral cycles. If that had not happened, we probably would not even be thinking about partly fixed terms of the kind that Michael spoke about. Therefore this would be just another way of drying up the capacity for us to experiment with things in this country, which personally I am not in favour of—but let us by all means talk about it.

Prof. Craven—I am not sure that this is going to be hugely popular thought, but—

CHAIR—Don't say it then!

Prof. Saunders—No, don't stop him!

Prof. Craven—I have trouble mustering much enthusiasm for this one. I know it is very popular in certain quarters. It is like Abba—it is a thing of the 1970s whose day has come and seems to have gone.

CHAIR—It has come again!

Prof. Saunders—No, Abba is back again!

Prof. Craven—Maybe we can bring it on the road again, but I have absolutely no doubt that it is a certain loser. If you look at the conditions of this, it has got 'loser' branded on its forehead. You can see the bipartisan thing collapsing as one talks. You can see dissent breaking out just in the audience here. I think the problem with it is that there are principled objections to it, which may not be right but they are terribly easy to run. I think of the ones that have come up before. What is the 'No' case to this one? 'Politicians want to go longer between submitting themselves to your judgement. Vote yes or no.' I really do not have much doubt which way that one would come down. Whether it is right or wrong is a different question, but I think that is true.

I think there is another principled objection, which is that if you are into checks and balances in this country you are probably pretty fond of the Senate, and some of the reaction to some of the former administration's proposals around the Senate demonstrated that very clearly. Unless you can come up with some sensible answer to what you do with the Senate in a proposal like this—and I would rather wear eight years than some of the other alternatives, but I cannot say I am hugely enthusiastic about eight years—you have got another massive problem.

In terms of alignment with the states, I would actually oppose that quite strongly because it seems to me that it would be yet another thing downplaying the character of the states as genuine polities within the Australian Constitution. They would just become electoral cabooses tied to the engine of the Commonwealth. You start to get up a series of arguments, none of which may be right but which, put together, are more than enough, I think, to sink it.

The final thing I would say is that I am not sure certainly that fixed four-year terms actually are terrific. I base that only on my experience in Victoria at the end of the eighties and the early nineties that, when governments get into a difficult stage in their electoral cycle, the joys of some of these types of provisions are equivocal. So I would come back to where I began. I think it is a certain loser. Do we want a certain loser at this stage of the referendum cycle? I would have thought probably not.

Prof. Zines—I missed part of Michael Lavarch's presentation, unfortunately. I am not sure whether he dealt with this. It seems to me that there is a problem with the Senate other than the term—that is, if the Prime Minister is to lose the power to have an election whenever he or she wants, can we sensibly leave the opposition and their supporters in the Senate to force an election when they want? Fixed terms are going to require some exceptions. One, obviously, is

going to be if the House of Representatives moves a motion of no confidence. Also, presumably, one would have to exclude a double dissolution during the fixed-term period rather than have an election. But on the question of supply, that could simply be made an exception, in which case, of course, the Senate has the power to push the government to an election; the Prime Minister has no power to choose a date for an election. Alternatively, you could have an American situation where there is a fixed term, the Senate retains power to reject supply but has no reason for doing so to get rid of the government; they cannot get rid of the government because there are fixed terms. You do get a few problems, as you do in America, of a week or two when no public servants are paid, but eventually it goes through. Or, thirdly, you simply take away the power of the Senate to reject supply during, say, the three-year fixed term of a four-year maximum term.

Prof. Behrendt—Professor Craven has made me even more convinced that Professor Saunders is right about the three-year fixed term. I guess it reminds us that we really need to separate those issues about the period and then the issue of whether they are fixed or not. I suspect a debate around a three-year fixed term might raise equally attractive arguments to the electorate about weighting the benefits of certainty to the electorate against the benefits of incumbency for the parliament. But I want to add this particular issue, which might seem like a side issue in looking at the benefits of looking at fixed terms. In the lead-up to the recent election there were some changes to the electoral law which had a rather large impact on the ability of people to enrol to vote once the election had been announced. I think that is another issue of the certainty that can be provided by fixed-term electoral periods. If we have no changes to those election laws, it does give us the benefit of being more prepared in terms of enrolling—particularly sectors like the Indigenous community that is perhaps reluctant to be enrolled and is a fairly young community demographically, around those things. I raise that issue of the impact on electoral enrolment in that debate around fixed terms or otherwise.

Mrs MIRABELLA—Can I make a point on that please, Chair. The chair of the Australian Electoral Commission gave evidence to the Joint Standing Committee on Electoral Matters and he was asked this specific question: did the change in electoral laws impact on the number of people getting onto the roll or updating their details? In fact, it had not, and in some cases it had improved because it went hand in hand—

Mr MELHAM—That was prior to the election, wasn't it?

Mrs MIRABELLA—Sorry?

Mr MELHAM—You have not taken evidence yet.

Mrs MIRABELLA—Yes, that was leading up to the election—

Mr MELHAM—They are still waiting for submissions.

Mrs MIRABELLA—but of the evidence that is available to date, Mr Melham, the chair of the AEC said that because they had conducted such a vigorous campaign it did not seem to be an issue. The numbers were proportionately consistent with previous elections.

CHAIR—And happily, the Joint Standing Committee on Electoral Matters is going to be looking very, very closely indeed at these matters.

Ms NEAL—I completely agree with the views expressed that putting up a fixed term, particularly a longer fixed term, is fraught with danger in terms of being a lightning rod for suspicion of government in general and suspicion of politicians as well. But I have to say I do think there is a negative impact on not proceeding and some great difficulties associated with having an uncertain election term and a three-year term.

I am very aware—having been fairly intimately involved with the process of government and elections for almost 30 years now—that having an uncertain election means that, generally, for the last six months or so there is often a fairly directionless government, very much affected by the day-to-day media stories. And I think that means that many opportunities to govern properly and to take policy directions that are in the interests of the state and the country at large would be preferable. Certainly a lot of the legislative program is cut short. As everyone knows, any bills remaining when an election is called generally go into the ether—some to return and some never to return—so a lot of good work of both the parliament and the executive is lost. I have great concerns that we do not want to waste the effort of a referendum and waste the efforts of people involved in having a failed referendum, but I certainly would like to see it happen if it could. Of course I think we really need the support of the opposition to do it.

What people have not mentioned very much, and what I am interested in, is this: if we do reform the definitions of ‘office of profit’, what directions have people considered that might be an improvement? At the moment it seems to me that there is absolutely no clear direction about what ‘office of profit’ really means and how far it extends. The consequences of an election being overturned are extremely costly, as everyone is aware, including having an area that has no representative for a period of time. What thought has been given to what might be a reform in that area?

CHAIR—Perhaps I will ask the participants that question, but just specifically about ‘office of profit’ which is under section 44(iv) of the Constitution.

Dr Twomey—In terms of ‘office of profit’, if you have a look at the New South Wales constitution, which also has an ‘office of profit’ provision in it, it also has ways of getting around the problem, particularly if it is one of those absurd sort of results—

Ms NEAL—It is quite uncertain still.

Dr Twomey—Certainly the description of ‘office of profit’ has been very difficult and unclear but I think, from recollection—and I have written about this in my book but I cannot remember all the details—that there is actually a provision where the House can vote to excuse very minor problems in relation to ‘office of profit’ to get rid of the really ridiculous aspects of it. So if you had a look at how the New South Wales constitution works you would see that there is a lot more flexibility in the ‘office of profit’ provisions in the New South Wales constitution than in the federal Constitution, and that could be a possibility.

CHAIR—The Victorian constitution likewise has an excuse provision written into it.

Ms NEAL—It would have to be a very brave government to excuse one of its members.

Prof. Saunders—I wonder if one of the answers is not so much fiddling with the definition of ‘office of profit’ as fiddling with the point at which it matters, so that you cannot take your seat if you have an ‘office of profit under the Crown’ or at some later stage, but it doesn’t cut in quite as early in the nominating process, which is the one which is catching people and maybe quite unfairly catching people.

CHAIR—Professor Blackshield, you have been waiting.

Prof. Blackshield—In Sykes and Cleary, the dissenting judge, Justice Deane, differed from the majority on the interpretation of the word ‘chosen’, and his view was that, even if there was a problem, as long as you cleared it up before the declaration of the polls you were okay. I am tempted to say we could introduce that interpretation by legislation, but I do not think we could. It does depend on an interpretation of the word ‘chosen’ in the Constitution, but clearly his solution was a better solution. Even so, the ‘office of profit’ language itself is obsolete, and I assume that ‘office of profit under the Crown’ will not become obsolete but ‘office of profit’ itself. We need to focus on real situations of conflict of interest. The whole of section 44 is a mess. The provisions that have proved to be judicially enforceable are not justified, and the ones that are justified have proved not to be judicially enforceable. Most of it is obsolete. Changing it might, to some extent, raise the same problem as George raised about the fixed terms: that it looks like politicians protecting themselves. But I think it is possible to make a public case that these are outmoded, in some cases 18th century, political problems, and that whatever real problems there are about disqualification need to be thought through again.

Ideally, it seems to me, we should take the disqualification problems out of the Constitution altogether and whatever we do regard as sensible disqualifications should be regulated by act of parliament, precisely because they do become obsolete and need to be looked at again from time to time. Whether you could sell that part of the referendum proposal I do not know. But I think you could sell a more sensible set of disqualification provisions and try to focus on what situations we think might produce a genuine conflict of interest.

Prof. Rubenstein—If I could make a further contribution on section 44(i), this committee—I think under the chairmanship of the Hon. Kevin Andrews—looked at aspects of section 44 in 1997 and did recommend that section 44(i) be repealed and that issues to do with loyalty and conflict of allegiance be dealt with in parliament. That has been made even more poignant since the decision in Sykes and Cleary, of course, because of the amendments to the Australian Citizenship Act in 2002. At the time of Sykes and Cleary, of course, dual citizenship was only in existence for those who had a former citizenship and took up Australian citizenship or had it by virtue of descent, whereas from 2002 anybody who takes up a new citizenship no longer loses their Australian citizenship. So the issue of dual citizenship has grown within this country. As a matter of representative democracy, do we really want to disqualify the significant numbers of people who are dual citizens—and are rightly dual citizens in a cosmopolitan and globalised world? I think that there would be the capacity to make a very strong case to all of the Australian people that the issue of dual citizenship would not necessarily be one that is deserving of disqualification and that there might be ways of dealing with direct conflicts that are not bound in disqualification.

Prof. Williams—Firstly, I agree with the timing point. That is one of the major problems with the provision—it simply cuts in too early—and much of this could be avoided by simply having a provision that ensured that this would not bite until the declaration of the poll or at a later point when people can clear up their affairs. But even then there is simply too much legal uncertainty about section 44. It is not possible to give clear legal advice on key aspects of section 44 with any level of certainty. That is where we are in this provision. It means that in the 'office of profit' provision the position of universities, for example, is very unclear—and I have given legal advice myself there. You can say there that people are probably okay, but people simply are not prepared to take the risk, so they resign their positions. There are a number of other quasi-independent bodies where we simply do not know the answer.

There is also, with the foreign power issue, a high level of uncertainty because, of course, the High Court interpretation means that we have to look at it under the status of the foreign law, not Australian law, in determining the obligation or the citizenship. It means that Australian lawyers have to give legal advice based upon the law of an African country, of Israel or of any country around the world to determine the answer. People are left in enormous uncertainty because they may be entitled to citizenship under a foreign law, going back to their ancestry, which will disqualify them even though they have never taken any positive steps to actually enliven that citizenship, and that is a wholly unsatisfactory situation, I think, for a very large number of Australians. It goes beyond the dual citizenship problem to being a far wider problem of application.

Getting back to the popular process, I am very attracted to section 44 being the subject of popular debate. I think that, as Kim has suggested, it does throw up some very good issues about who should be in the federal parliament. It throws up issues of citizenship and representation. It is exactly the sort of issue, I think, that is well suited to a public debate. I think that is the in, if you like, to actually get this looked at. We have so many good parliamentary committees that have established the problem. If we are serious about fixing it we should be asking people what they see as the appropriate qualities and disqualifications of their representatives in the Australian parliament, including as to issues of citizenship and the like. I think it is a good one for taking forward on that basis and one that actually has some prospects of success if the process is handled appropriately.

Prof. Blackshield—I was going to say that we should start from the proposition that, on principle, anybody should be entitled to be a member of parliament. With that as your base, then you think about what the exceptions to it should be.

Mrs MIRABELLA—On that issue of dual citizenship, Professor Rubenstein, you said that we are disqualifying people who have dual citizenship from running for parliament. We are not. We are actually asking them—and I was in this position, and other members of parliament were as well—to make a choice. Whether we like it or not, there are different standards expected of the legislators in the federal parliament in whether they deal with potential, perceived or imagined conflicts of interest—for example, with regard to financial affairs. Everything has to be seen to be above board because it goes to the very confidence that people have in their members of parliament.

We are not disqualifying people; we are asking them to make a choice. I think there is a very different standard and a different expectation of members of parliament. It does raise very real

questions, does it not, about actual conflict? We deal with issues, whether in regard to the treaties we sign, our foreign policy or other legislation. There are very real areas where conflict can arise that cannot be foreseen simply through some legislative mechanism. It is a very minimum requirement, I would have thought, for anyone who wants to make laws for the nation and the Australian people.

Prof. Rubenstein—This is a good example of how this would be a really interesting discussion to have across the board, because I disagree with you on two levels: one is the formal aspect of renouncing another citizenship and what impact that really has on one's sense of connection to that other country and whether—

Mrs MIRABELLA—From my perspective it has had none.

Prof. Rubenstein—It has had no impact on your sense of connection.

Mrs MIRABELLA—No.

Prof. Rubenstein—Can you give me the example of the other—

Mrs MIRABELLA—The fact that I had to renounce my Greek citizenship, which I never applied for—it is one of those examples where you are automatically given it but you have to write away—meant that there was an inconvenience in that I could not apply for a passport, but I was quite happy to give that up. I, like many others who are first generation Australians, feel totally comfortable with my family heritage, history and connection and, personally, I thought the calling and the responsibility of being a member of parliament was far more significant than formally holding citizenship of another country.

Prof. Rubenstein—That is your situation but there might be other people who have a stronger connection to their other citizenship which may not be at all affected by the formal renunciation of that but they may still have a continuing affection, association and sense of commitment in ways other than the practical consequences that come from holding that citizenship.

Mrs MIRABELLA—But at what point could that commitment perhaps conflict with their commitment to make laws in the interests of Australia, their electorate and Australians?

Prof. Rubenstein—It could very well in any—

Mrs MIRABELLA—That is my problem.

Mr MELHAM—I suppose the argument is that if it is conflicted the electors can take—

Prof. Rubenstein—It into account.

Mr MELHAM—vengeance at the next election because it would be a matter of public record.

Mrs MIRABELLA—That is assuming they know of all the hundreds of pieces of legislation that that member has voted on, which is impossible.

Mr SLIPPER—They have reluctantly got a new passport for themselves and their family.

Prof. Rubenstein—But in some ways it makes more transparent the issue that Mr Melham just made, because if you have renounced your citizenship but still have a continuing connection people do not necessarily have the capacity to know that. But if a register were set up which listed people's other citizenships, and if there were some discussion about a trade issue with the country of which a member of parliament is also a citizen, there would be a way in terms of transparency of making other members of parliament hold that member to account in their decision making process—whether they were making their decision in the best interests of Australia or whether some other allegiance were involved.

Mrs MIRABELLA—There are many decisions that are made that are not recorded and are not formal but, symbolically, it is quite an important step, just as citizenship ceremonies are formally an important, very special step that people take—and they take it extremely seriously, having been to many of them. In the same way, the actual renunciation is a clear signal to a wannabe member of parliament that, 'Hey, you're doing something that clearly demonstrates where your primary allegiance is.'

Prof. Rubenstein—I think a commitment to run for parliament and be a member of parliament shows a significant commitment to the country—

Mrs MIRABELLA—Not necessarily.

Prof. Rubenstein—I think this shows the very lively debate that I would be very happy to continue in a much more public and national way. I do think that in a globalised world we can think much more positively about dual citizenship and not see it as undermining Australia. I will end my contribution by saying that I always make the distinction of people who see citizenship like marriage or parenting: you can have more than one child and have a commitment to each of them without necessarily undermining the other.

CHAIR—I agree with you. I will move the topic back to the other part of section 44 that we discussed, the office of profit, and ask whether participants have a view on the attempts that have been made by, I think, all states at least to deal with the potential disruption to the lives of people who are public servants when they run for public office. I think all states have introduced legislation which, in effect, gives a suspension and the possibility of retaking your position in the public service if you stand for election to the federal parliament and are not elected. Is that sufficient, or do we still need to be looking at doing something to section 44 itself? Does anyone have a comment on that?

Dr Twomey—I do not think constitutionally you could get around it by doing legislation. I think you would find that the High Court would simply say that, if you suspended your right to be in the public service, you still held an office of profit under the Crown, just as Phil Cleary, holding his position on leave without pay from, I think, the state public service, was still deemed to be holding an office of profit under the Crown. Although at the state level that is perfectly legitimate and it works because of the difference between the state and Commonwealth constitutions, at the Commonwealth level I do not think you could legislate to avoid the problem. I think you would need a constitutional amendment.

Ms NEAL—The New South Wales provision actually says that you resign and then you can seek to be reinstated subsequent to the election, so you are not actually just in abeyance, which I think avoids the possibility of you being on suspension. I just wondered whether it was possible, rather than removing section 44 entirely, to put the same rider that applies in section 34:

Until the Parliament otherwise provides …

So, rather than remove it entirely and cause maybe some concern for the community, if you put that rider, it remains there until the parliament legislates and replaces it with some other maybe more current and relevant provision.

Mr GEORGIOU—I am open to discussion, but the position with respect to Commonwealth public servants is quite clear: if they want to stand for parliament, they resign, and they have an automatic right of re-entry. That has been the case for 50 years, and that has never been challenged.

Mr MELHAM—So if you don't resign at the time of your nomination—it's a bit dumb!

Mr GEORGIOU—Well, yes, but we're not legislating for intelligence, Daryl!

Mrs MIRABELLA—That is unkind, Daryl!

Prof. Williams—If that were challenged in the High Court, I think indeed there is an argument that that would be invalid or at the very least that somebody who has a right of reappointment is someone who has a continuing office of profit. I think it is certainly arguable that it does not fix the problem. If it were challenged then I think that, as the Sykes v Cleary case demonstrates, if you have got the potential there for continuing employment and the law actually gives you some right then that may well fall foul of section 44.

Mr MELHAM—That is a long bow, isn't it?

Mr GEORGIOU—Yes.

Prof. Williams—No, I think if you—

Mr MELHAM—You resign and resign for a purpose—

Prof. Williams—If you have got a right of return then that gives you continuing rights, and I think there is a clear argument there that could be put that it does not satisfy section 44.

Mr MELHAM—An argument, but it is—

Mr GEORGIOU—The fact that it has not been put for 50 years is neither here nor there, of course.

Prof. Williams—I think it is a bit like Sykes v Cleary. That was a far wider and more destructive interpretation than anyone anticipated. If you were to follow the logic of that, certainly if I were advising someone I would advise them to be extremely wary of that, because I

think if they followed the logic and approach of Sykes v Cleary there is at least a significant possibility that the High Court would say, 'Continuing legal right to be a public servant is something that does not comply with section 44.'

Mr GEORGIOU—No, Sykes v Cleary is quite different.

Mr SLIPPER—If an act has gone through the parliament which says that you resign but you have the right of reappointment, then effectively you are really saying that it is possible that no-one who is a public servant could be elected to the parliament with certainty, because anyone who resigns apparently has that right of return.

Prof. Williams—That is the destructive nature of section 44. I am not defending it. In fact, I think—

Mr MELHAM—No, your argument is that it is not really a resignation because they have a right of reinstatement.

Prof. Williams—Exactly.

Mr GEORGIOU—But it is his resignation.

Mr MELHAM—I am not defending that—

CHAIR—The level of difficulty we are having in talking about section 44(iv), the office-of-profit provision, is in fact a very good demonstration of—yes, think carefully before you run for parliament—the awkwardness of the present provision, speaking as someone who has been very actively involved for several years in giving advice on whether or not people are qualified to stand for parliament, which has often required looking at the fine detail of the act of parliament that establishes the particular tertiary institution that the candidate is employed by or the fine detail of the particular local government act in a particular state that establishes the local council that the candidate is a member of.

My personal view is that it should not come down to that level of minute examination of a particular statute setting up the public body which employs the candidate to determine whether or not they fall foul of the provisions of section 44(iv) and that, if we are going to have a disqualification-for-office provision, whether it be in the Constitution or in an act of parliament, it ought to be something that people are able to pick up, read and understand. At the moment, we have a provision which not even constitutional lawyers—not even the eminent people in this room—can pick up, read, interpret and understand.

Mr BUTLER—This is not only a problem when it is actually challenged in court. We saw before the last election that a long list of our candidates were speculated about around office-of-profit issues, on the basis of employment that had never been held before to be a problem with section 44, but that does taint the political process. Clarifying this question does not just rely upon those cases that have been run in courts of disputed returns, because we make judgements about whether to run these cases on a whole lot of political grounds, not legal grounds. The problem is that there can be a whole lot of uncertainty introduced in the political process, as was the case before last year's election.

CHAIR—Yes, Mr Butler is right to remind us of the use that was made of the section 44 provisions at the last election.

Prof. Williams—Can I just make one very quick final point—that is, the provision is also totally ineffective in terms of affecting the electoral outcome ultimately of the people. In every case where someone in the House of Representatives has lost their seat, they have subsequently been returned at a by-election. It introduces an element that does not solve a problem; it simply creates further problems.

Mr NEUMANN—As the recipient of much political criticism in the last election and as the spokesperson for the Labor Party on this issue, this is not just an academic exercise for me personally. I took many, many hours off my very busy legal practice in my local community to chair health reference committees in the country areas in Blair and elsewhere and also to serve at very minimal payment compared to what I would have earned standing in front of those judges—about whom I have not got the faith that Professor Flint talks about at 70 years of age—as a litigation lawyer. But I have to say that this was used by my political opponents dramatically against me in the last campaign, causing much vexation and much consternation both in my side of politics and in the local media. I had to ask for the local media to print a retraction saying that I was eligible to run two days before the election. So this is not an academic exercise for candidates. The day before the election, you saw in my local media a number of outlets where I had to insist on editors actually running that story that I was eligible. The next day, I was going to the polls. So this is a very important issue. We really must fix this problem. There has got to be a greater definition of what it really means.

Mr PERRETT—Is there much information about what the founding fathers—

Ms NEAL—And mothers.

Mr PERRETT—No, I am saying ‘fathers’ because there were no women there. Sorry, Belinda. The founding fathers’ intent with this section of the Constitution I assume was to avoid conflicts of interest.

CHAIR—I will let Professor Craven answer the question.

Prof. Craven—There is stacks of stuff, but it is not terribly clear because they are drawing on the English experience and vast numbers of colonial experiences. Just linking this session to the last one, I understand that it is not an academic issue. But I think in this context you really need to remember the brutal reality of referendum politics. Listening to this stuff and thinking about it, I am very happy to reform section 44 if I can. But just imagine the referendum on the acknowledgement of a foreign power. Imagine the ‘No’ case. You could run it in your sleep. And then, while you are having nightmares in your sleep, run the one about, ‘What the government wants to do is amend the Constitution so it can put its paid fat cats in under acknowledgement of money so they will do its bidding.’ You can see the ads rolling forward. So, if you were going to do anything with this, it would have to be on the basis of the mother of all education campaigns, careful consideration and forming of a consensus. It would be very hard.

Prof. Saunders—Although maybe you do it under a broader rubric, the answer to the founding fathers point is that the founding fathers were dealing with the task of making a

constitution where there was no conception of Australian citizenship. Had there been, they would have created the status of Australian citizenship, given them a right to vote and given them a right to stand for parliament—basic, democratic rights. In the absence of that, they fell back on saying, 'What are the little bits of the puzzle that we deal with?' Section 44 is the consequence. I think it would be much more desirable to face the reality that we need a concept of citizenship in the Constitution and deal with it appropriately, and then I think you probably would leave these matters to legislation, and very properly so.

Proceedings suspended from 11.20 am to 11.38 am

CHAIR—I call on Professor Cheryl Saunders to introduce our next topic of discussion, which is federal-state relations—the easy one.

Prof. Saunders—Any federal system, by definition, involves both centralisation and decentralisation. In thinking about our federal system, as with anyone else's, you can take one or other of those perspectives and, whichever perspective you choose to take, you get somewhat different answers. Given the recent tenure of public debate on federalism in this country, I am going to direct my remarks this morning to concerns particularly about the absence of uniformity and harmonisation or the problems of achieving uniformity and harmonisation in areas where national action of some kind is genuinely required, particularly in relation to a national market. In other words, much of what I am going to say is focused on ways in which you achieve the effect of centralisation. But it would equally be possible to focus on concerns about decentralisation in this country. There are many ways in which our attitudes to the federal system waste opportunities for experimentation and innovation, waste opportunities to further deepen our democracy and, in some respects I think, jeopardise our attitudes, not just to federalism but also to parliamentary democracy, as we continually erode the states and their capacities and therefore their levels of performance. So it seems to me that, in time, in order to do what sometimes is referred to as fixing federalism, we will need to focus on both of those dimensions: how well federalism works at the national level but also how well it works to achieve the various goals it is supposed to achieve at the subnational level.

It is clear from much of the debate in Australia in recent years that individual Australians and groups of various kinds—for example, the Business Council—want more laws to be harmonised and want many areas of decision making to be streamlined, and a lot of the studies that have been produced have identified costs associated with what are seen to be inefficiencies, although sometimes they are just the consequences of having a federal system of government.

How we go about dealing with harmonisation and streamlining depends on the area in question and on identifying these areas accurately. I think that to have a study that actually does identify the areas that need harmonisation and streamlining is a first priority in this area. There are lots of generalisations that are thrown around, but they need to be properly probed. It seems to me that there are a number of possible techniques for tackling these various problems, and one of them involves constitutional change, although not all of them do. Let me just quickly run through the four principal mechanisms that occurred to me for dealing with these problems of harmonisation.

The first is more effective use by the Commonwealth of its existing overseas and interstate trade and commerce power. There are all sorts of historical reasons in Australia why the trade

and commerce power did not develop in anything like the way in which it developed in the United States. I am not encouraging the development of a United States style commerce course, but we could do a great deal more with the interstate trade and commerce power than has been done. A number of so-called problems about the national market were raised with some of us who were at the summit, and just to listen to the problems is to invite the answer: 'Well, why don't you just legislate, using the trade and commerce power, and the problem will go away.'

A second technique for dealing with some of the difficulties that have been raised by various groups has been to improve the effectiveness of the mutual recognition scheme. Mutual recognition provides for the reciprocal recognition of standards across state borders. It was a very interesting and innovative scheme when it was put in place. I am constantly told it does not work as well as it should. Well, if things do not work as well as they should, they need to be looked at to make them work better. But the mutual recognition scheme, I think, is another technique that deserves attention. The third technique—and this is the more familiar one—is intergovernmental cooperation. Cooperation comes in a variety of forms. One familiar form is the use of financial support: section 96 grants, incentives—financial incentives of various kinds. A fourth technique is the use of references of power by the states to the Commonwealth, and a fifth technique is cooperative legislative schemes of a variety of kinds.

I want to return to intergovernmental relations briefly in the context of accountability but let me just make two observations about them now. The first is that the reference power sits quite neatly with our system of federal parliamentary government. It can be used in a way that does not create significant accountability problems. So, to the extent that there are problems with the use of the reference power, whether they are problems of law or problems of practice, it would be useful to identify them and try to resolve them. Some of the problems are familiar to you—for example, doubt about whether references can be revoked that apparently deter states from making references. But other problems have emerged in the context of recent references about how the inconsistency provision works in relation to the use of referred powers and about how states can continue to have a say in the way in which their powers are used on an ongoing basis, which we could think about to see whether the power could be streamlined.

The second observation I would make about such schemes at this stage is that Australia has been very ingenious in developing intergovernmental models of decision making, but some of the most ingenious models have also turned out to be very unwieldily to the point of being incomprehensible. If we want to stick with this mode of dealing with problems of harmonisation and uniformity, we need to think quite hard about what sort of framework should be put in the Constitution for such arrangements that will fit them more neatly into our system of government. I have been giving some thought to that myself and I would develop a model that draws upon the mechanism in section 105A of the Constitution for enabling agreements to be entered into that have a range of properties that would overcome some of the problems we have had with the existing schemes.

The fourth mechanism for dealing with problems of harmonisation and uniformity is constitutional amendment to increase Commonwealth powers. We very rarely think about that as a solution these days, for all the reasons that we talked about earlier today, but perhaps we should now start thinking about it more directly. It has always seemed to me that, rather than agonise over these complicated schemes for securing a national corporations law, a referendum to enable the Commonwealth to incorporate companies would have been quite straightforward to

run and it is one that might well have been won. Quite frankly, with all the discussion that went on after the Work Choices decision about whether the Commonwealth could now legislate for universities using the trading corporations power, I would far rather that there was a referendum to give the Commonwealth direct power over universities than for universities to be regulated as trading corporations, which would make Australia look absolutely ridiculous in the eyes of the world.

I return briefly to questions of accountability and transparency for intergovernmental arrangements. This is not a new problem. It is well understood to be a problem. It is manifested in all sorts of ways—in the conditions attached to grants, in the accessibility of intergovernmental agreements and in the transparency of intergovernmental debates on questions of public policy, which might enable the public to understand and evaluate competing views. It seems to me that tackling this problem is important not just for the accountability of intergovernmental arrangements but also for their effectiveness. If people understood a lot better how these arrangements worked, more pressure might be put on politicians to ensure that they work quicker and more effectively. It seems to me astonishing that for a long time all parliaments, in particular this parliament, have done so little in monitoring intergovernmental activity. There is a new dimension rapidly being added to this problem, with the increasing inclusion of New Zealand in intergovernmental arrangements, which means that these arrangements are now having an international as well as a trans-state dimension.

Let me illustrate this by reference to one aspect of intergovernmental arrangements; namely, the category of intergovernmental agreements. There is an intergovernmental agreement attached to all references of power and to most legislative schemes. Intergovernmental agreements, in addition, are used for a wide range of other purposes. Intergovernmental agreements in this country, in effect, are a form of soft law, as indeed are conditions attached to section 96 grants. There are literally hundreds of such agreements in Australia, just as there are in Canada. Canada recently did a count and came up with 900 or thereabouts—with a great deal of difficulty, I might say, in trying to drag them all together. But, if you look at the PM&C website, which has a little bit for COAG and a little bit for intergovernmental agreements, you will find five, and that has been the case for as long as I can remember—because I take an interest in these things.

We have no practice of scheduling intergovernmental agreements to legislation, even when the agreements are relevant to the operation of the legislation in practice. By contrast, when legislation is affected by treaties, occasionally there is an effort to schedule the treaties to the legislation. I think you can draw a contrast here with parliament’s recent concern about legislative instruments. You have put in place a highly sophisticated scheme for the scrutiny, monitoring and general accountability of legislative instruments in recent years. I think it is highly appropriate that that scheme has been put in place and parliament has moved from reliance on, say, regulation making to reliance on other forms of delegated legislation. But it is quite interesting that there has been such an emphasis put on keeping track of instruments of that kind and no interest attached whatsoever to keeping track of very important intergovernmental instruments.

Let me make one final observation about the constitutional basis for Commonwealth legislation. This is not an issue when Commonwealth power is straightforward, as it is in many areas—intellectual property, bankruptcy, insurance et cetera. There is no problem about the Commonwealth power and, as these things go, the legislation is pretty transparent. The problem

arises when the Commonwealth is trying to be creative and to push the limits of its own power through heads of power that are not well adapted to the purpose. In this case, much Commonwealth legislation requires the person who is potentially affected by it to take a punt on, or at least to do some highly sophisticated analysis to work out, whether they are subject to the Commonwealth law. The use of the corporations power is a case in point. You always legislate by reference to trading and financial corporations, even though we do not actually know what trading and financial corporations are. Furthermore, bodies may dodge in and out of being within the category of 'trading and financial corporations' over time.

I think we have reached a point where only very good constitutional lawyers can hope to understand many Commonwealth acts of parliament. This is good news for those of us who teach constitutional law. I teach it to my students and say, 'I don't care whether you want to be a constitutional lawyer. If you want to be a lawyer you have to have a deep knowledge of constitutional law.' However, it is not good from the standpoint of transparency and accessibility and generally from the standpoint of the rule of law.

I would urge this committee also to think about how it might keep an eye on legislation from this point of view. The complexity of legislation is something that the parliament, it seems to me, should weigh in the balance in determining whether policies should be pursued by the Commonwealth and how they should be pursued. In addition, it would be desirable for the parliament to adopt the least complex ways of achieving its legislative goals. Here again I think that, if there were to be some significant growth in the use of the trade and commerce power over the next little while, it would help with this problem as well.

CHAIR—That was an excellent introduction. Who would like to go first in this difficult area? Does everyone fear to tread? I am going to have to prompt a little. Professor Williams is volunteering.

Prof. Williams—I suppose one thing I take from Cheryl's presentation, which I see as the first and perhaps overriding principle in this area and other areas when it comes to constitutional reform or government reform, is that I think you do not hold a referendum unless it is absolutely essential. Indeed, that means that, in this sort of area, everything should be achieved that can be achieved without going to a referendum and enlivening all of the problems that we have been talking about this morning. We ought to recognise that, in federal-state relations, many of the problems are fixable to a large extent by other means. That includes the financial problems, and we have already seen major reforms through COAG dealing with specific purpose payments, which have been some of the biggest reforms to Federation now for some decades. It is possible, without a referendum, to reallocate powers and responsibilities through accepted constitutional means. That should be looked at again. Of course, the governance arrangements that Cheryl is talking about, which are so important to accountability and transparency, are a matter of legislation and not constitutional reform.

The problem, though, is that some things do require constitutional reform and they may be a narrower subset. However, in this area, it is important to recognise that the problems are structural in nature and do require some constitutional change in the longer term. Indeed, the idea that I put on the table for what I would see as the first thing that any government should tackle in the area generally is to deal with the problem that the High Court has identified, which is the flaw in the Constitution that prohibits certain forms of cooperation between the

Commonwealth and the states. It is a dry, relatively boring constitutional problem, but it fits very neatly into, say, Ann Twomey's list of things that New South Wales governments have been successful in getting through—because there is a problem, it needs to be fixed, and this particular one gets in the way of harmonisation in a number of areas that the Business Council of Australia has identified.

This is an area that simply requires a constitutional amendment, which may pick up Cheryl's other points about picking up a suitable framework for agreements and the like, that simply enables cooperation to be achieved for mutual judicial enforcement and to enable things like a national regulator. No-one gets any more power; it simply fixes a flaw, enabling us to deal with cooperation. It is something that has had bipartisan support for many years. It was adopted by the meeting of the Standing Committee of Attorneys-General some years ago; it was to draft a proposal, which has never happened. It is also something that the Business Council has supported. In fact, I am not aware of any known opponents to the suggestion. It was also the subject of a unanimous recommendation of this committee in December 2006. I put that on the table, because it needs to be fixed. Personally, I would like to see any attempt at constitutional reform at the next instance go for something that is actually achievable, go for a real problem and go for something perhaps minor but important that can break the drought and test out a lot of the mechanisms for change—go through the machinery and things like that—rather than leap into the republic or any other issues that are naturally very divisive.

What is missing in the area though is—we know that we can do many of these things through legislation, although some will need constitutional changes—action. That has been the missing element in federal-state reform for many years. This again is where I come back to the idea of some sort of convention, which came out strongly from the 2020 governance group at the summit. Personally, I would like to see a convention dealing particularly with the problems of federal-state relations in 2009. I think a convention is a way of building in the process and community aspects that we have talked about. It is also a way of giving genuine political momentum to the issue. Once you have held a convention, you have the possibilities of developing bipartisan support, providing a democratic framework for reform and providing expectations that something will happen. If a convention is held, the odds are that we will get reform to fix the Federation that will go beyond putting out the bushfires in health, education and the like, which are critically important, but none of which tend to go to the longer term structural problems that are giving rise to those issues in the first place.

CHAIR—Mr Butler?

Mr BUTLER—I am glad you came back to that, as governments have just sorted out that first part at their intergovernmental ministerial council meetings. There are a couple of problems with that. I think you are probably right: you can muddle through and fix most problems that confront the country just by dint of hard work and eventually getting a consensus. The water process that we have gone through over the last several months is evidence of that.

However, it is a bit fake, really. The Franklin dams issue was fake. If you were to talk to most people out there and say, 'Should the Commonwealth have power over that,' they would reply 'Yes.' But, if you then followed that up by saying, 'Well, should they do so because we happen to be involved in a particular treaty?' they would say, 'Well, no; the Commonwealth should have power over this, because we think national environmental matters should be the province of the

Commonwealth'—not because you happen to work your way through a tortuous debate and into ministerial council meetings or have signed a particular treaty, but because you should be up-front and have a debate with the people about the water problems we face or about particular states going out and opening up brown-coal-fired power stations without talking to the rest of the country. Such things should be the province of the Commonwealth government. I agree that you do not want to put up things in the shorter term that are going to crash and burn and kill the idea of constitutional reform for another decade. However, I think the purpose of this roundtable is to start coming up with some bolder, longer term ideas as well.

The second problem with the proliferation of interministerial council meetings, or whatever they are called, is that they—I do not know what the politically correct term for 'emasculation' is nowadays—have sort of emasculated the role of the Commonwealth. A great example I have experienced of that is with the South Australian Wine Industry Council, which has about two-thirds of the nation's wine industry—by volume much more than by quality. The industry had been lobbying for years to have a standard bottle labelling arrangement in place, because that is what our exports demand. This issue had been to numerous interministerial council meetings of consumer affairs ministers, many of whom have no interest in the wine industry because their states do not have a wine industry to speak of.

However, this was a critically important issue for us. We had been asking the Commonwealth to simply use its head of power under weights and measures to fix this once and for all. For years it had been bogged down: 'Well, no, we have to get the consumer affairs minister of Tasmania'—for Christ's sake—'to agree to this.' This was something that was a critical and strategically important issue for the wine industry. So the other problem with this 'path of least resistance' model of interministerial council meetings is that it just stops the Commonwealth acting decisively, even when there is no debate that they have the power to do so.

Mr GEORGIOU—It may be a bit more complex than that.

Mr BUTLER—I prefer the simplistic analysis.

Mr GEORGIOU—Maybe the Commonwealth does not want to act decisively.

Mr BUTLER—It gives them an excuse not to, because they can blame the Tasmanian consumer affairs minister—with apologies to Tasmania. I am being hypothetical.

CHAIR—Picking up from that, perhaps I can raise for the consideration of participants the fact—I think it was more than clearly put by Professor Saunders in her introductory remarks—that we have a system of government in this country where relations between the states and the Commonwealth are the product of hundreds of quite complex agreements and arrangements for intergovernmental ministerial councils, none of which is reflected in the Commonwealth Constitution. I invite comment by participants on whether or not, in fact, we should be attempting a constitution that reflects, in a readable and comprehensive way, at least an outline of the system of government that we now have in this country, because on any view the present Constitution does not do that.

Mr SLIPPER—But, if we are not going to get a constitutional amendment through, it is better to do what we are now doing. I think that was the point that Professor Williams made.

CHAIR—That is understood. I am inviting comment. However, just to Mr Slipper's point, of course, Australians being practical people, we have devised a whole range of means to get around the fact that the words of the Commonwealth Constitution written in the 1890s are not adequate for present circumstances; we have devised ways around those words. I am raising the question of whether or not we should have a set of words in the Constitution that more accurately reflects what happens.

Dr Twomey—Yes, I think we do need that. The reason is that, although we have been very good at devising ways around it, the High Court has also been very good at devising ways of striking it down. We can see this with the cross-vesting issue, which George was talking about before, with all the states and the Commonwealth agreeing to allow the cross-vesting of jurisdictions so that a case that involves both state jurisdiction and Commonwealth jurisdiction issues can be heard in a Federal Court. That agreement was effectively struck down by the High Court in the Re Wakim case. We see intergovernmental agreements and cooperative legislative schemes that were threatened by the High Court's decision in the Hughes case. In that case, the High Court said that, unless the Commonwealth parliament has a specific legislative head of power to impose duties on Commonwealth officers, you cannot use Commonwealth officers to enforce an intergovernmental scheme. That is another major problem that we have. You have other decisions or at least statements and judgements of the High Court that lead to doubt about the operation of section 51(xxxvii) as a useful means of being able to exchange or send legislative powers from the state to the Commonwealth.

In particular, in one of the High Court judgements, one of the judges said, 'There is nothing in the Constitution requiring cooperative federalism. Cooperative federalism is just a slogan.' The difficulty we have here is that we need to put something in the Constitution that allows for and supports cooperative federalism at the judicial, the legislative and the executive levels so that it deals with the cross-vesting problem, with the Hughes problem and with making section 51(xxxvii) an effective procedure. I think you could sell this to the community by just saying, 'Look, we're putting something in the Constitution to help governments cooperate.' Isn't that what everybody wants: to be able to solve a lot of these problems by governments getting together and cooperating? The fact that, even when you eventually do achieve cooperation, it gets struck down by the High Court because of the absence of something in the Constitution suggests that we need to put something in the Constitution.

I very strongly support a potential constitutional amendment to deal with those issues. As Cheryl said, you could put in a mechanism, similar to section 105A that also sets up a mechanism or allows for intergovernmental agreements and puts it into some form that makes it clear in the Constitution that it is possible to do it— 'Here is the mechanism for doing it. These are now legitimate and the High Court cannot knock them down just because it wants to read the Constitution in a particularly literalistic form.' So, in answer to your question, yes, I think we do need something in the Constitution.

Prof. Craven—Going first to the question that you posed, the idea that you have got to have a Constitution that absolutely literally, beautifully, comprehensively and on a second-by-second basis reflects reality is basically an Australian legal fantasy, to use the right term. All constitutions are going to be a mixture of conventions, practice, language and psychology. There is no avoiding it; you do not want to avoid it. The American Constitution we are all meant to love is the most archaic document you have ever seen. I am very happy to put things in a

constitution and I am very happy to put in general things about intergovernmental agreements. But, for example, the stuff about codifying conventions, George and I disagree on epically. The one bit of the Australian constitutional system—because we actually have a system and not just a constitution—the average person does understand is who gets to be Prime Minister and who the Prime Minister is, and that is the bit that is unwritten. So I do not buy that. I am happy to fiddle but not major change.

On federalism, I worry about the 'fix federalism' rhetoric. The verb can be problematic. When my father talked about 'fixing the dog', it did not mean something nice. I am happy to look at federalism. I am happy to refine federalism and all those sorts of things, but I think we do need to think about whether we like federalism or whether it is a problem. A lot of what is said now says to me 'federalism is a problem', which I do not agree with. It seems to me that federalism is a good system of government. It has two axes. It has a productivity axis, which we all love, and then there is a division of power axis, which I love. I worry that that gets lost in some of these discussions. When I hear about the Commonwealth wanting to act decisively, I am at least as worried by that as I am inspired. That is something that we do have to think about. That is one of the reasons I am quite inclined towards a constitutional convention on federalism, because it seems to me that these debates tend to be fairly brutal. The Commonwealth says one thing, the states say the other and the Commonwealth then announces that it has won, which is pretty much the paradigm in a lot of these things. It would be good to get this discussion into a group of people where there were multifarious points of view and you could talk about both productivity and division of powers.

My own view on referenda on federalism is that I actually suspect you would get a referendum up on the Commonwealth's power to incorporate corporations—and that would be a good thing. I am very dubious that you would get referenda up extending the external affairs power in the ways that we saw on the Franklin Dam. We have to remember that the most common example of a referendum that fails is one giving more power to the Commonwealth. When I go back over the list of these things, quite often I look at it and think, 'Yes, I would have voted no to that anyway.' So I think that the argument for a convention is pretty good—to try to lure a genuine debate into a genuine multifaceted forum that does not just give simplistic answers.

Prof. Saunders—Can I just pick up a number of points. On one of your points about what the Constitution should say about cooperation, I do not really think there is much use in the Constitution providing a framework for COAG, for example. In fact, it would be pretty bizarre, given that the Constitution does not mention the Prime Minister at all to have it mentioning the heads of Australian government. But I do think that whatever we do to the Constitution in relation to intergovernmental relations has to be done in a way that is clear, that we can understand it at least, and that more or less fits into the system of government. This business of dealing with the Wakim and Hughes problems, to the extent that they are problems, can be tackled in a way that just makes the Constitution more incomprehensible and the agreements more complex and difficult to provide an accountability framework for. If we have a provision that says, 'The states may transfer their executive power to the Commonwealth,' that is a classic example of such a mishmash of lines of accountability. But, if, as George says, the actual goal is to enable us constitutionally to set up a national regulator, then fine, let us identify that as a goal, put it in place, put some constitutional mechanism for doing it—whether it is done directly or whether it is done through some sort of intergovernmental legislative process—and deal with the

actual problem rather than just endlessly allowing power to be swapped around between levels of government, with all the consequences that flow.

The same judge who said that there is no principle of cooperation that can tweak the meaning of the Constitution also complained bitterly about intergovernmental cooperative schemes, to the point where he said, 'You would not be able to have schemes like this in a system that had a bill of rights, because people don't know what their rights are when you put such arrangements in place.'

Finally, on the constitutional convention idea, I am not opposed to constitutional conventions on federalism or anything else, but I think it needs to be much more focused. If you have a constitutional convention on federalism you will stand there for a week, two weeks, three weeks or five months, talking about whether to have two levels of government and 40 regions, in the same sort of meaningless way that this debate always develops. If you really want a discussion on federalism, identify what it is that you want to talk about, or at least begin the process by identifying what you think the real problems are, and then put in place a process for producing solutions for dealing with them. Otherwise, it will be a recipe for madness.

Dr O'Donoghue—I wonder whether this session enables a discussion on the three levels of government?

CHAIR—Certainly.

Dr O'Donoghue—I think there needs to be a discussion about whether we are overgoverned in terms of three levels of government. And, if we are, which level goes? This discussion has been had before. But Aboriginal people living in remote, regional and also urban areas have great difficulty, I think, in dealing with the federal government in terms of its bureaucratic nature and it being so far away from where our people live and operate. The two levels, federal and state, are always at loggerheads with each other, particularly about our issues. And local governments are much closer to our people, and our people are very involved in local government, much more involved in local government, and local government is much more involved with our people as well.

I thought I would just throw that in as a possibility for discussion. I know it came up at the time of the republic discussions and so on. When I was Chair of ATSIC, early on, we did in fact get a seat at the table of COAG, after a very long time, and it was a waste of time, actually. It was quite good to be there but we were not really very well acknowledged in terms of what we wanted to say there. So that is my contribution: there should be a discussion about whether we are overgoverned in terms of three levels of government.

Prof. Flint—I think we could overemphasise the benefits of uniformity. There is an argument for diversity. We need only consider the situation of the universities. The country which has the greatest concentration of the best universities in the world certainly does not have the minuscule administration of universities from Washington. Universities in the United States are matters for the states and matters for the private universities which have been established. And I think that there is a good argument for that sort of thing.

There is competition in a federation. We saw that for example in South Australia, when South Australia, many decades ago, advanced a number of social changes. These were seen as radical but they were, in many respects, adopted throughout the Commonwealth after a time. The same with Queensland: Queensland abolished what was really an odious tax which affected the middle classes, particularly the rural middle classes—that is, death duties. And when Queensland acted, eventually the other states saw the advantages. If we had had uniform death duties, death duties at the federal level, we would probably still have death duties. Had it not been for the Queensland government, that would not have disappeared in this country.

Mention has been made of the number of referendums which were rejected by the people because they led to a concentration of power at the centre. Most of those, if you look at them, would no longer be necessary, because the High Court has reinterpreted the Constitution, the most recent example being the Work Choices case. I would strongly commend the dissents of Michael Kirby and Ian Callinan there, because I think they more correctly reflect what was the intention of the founders of the country.

It may well be that one thing that you could consider, if you wished, is the federal government abdicating its power in relation to some of the appointments in the High Court. It might be, for example, that the second appointment—if you had two—would go by rotation to the states. The first states, in my opinion, should be those which do not have a member from their bar on the High Court. You have, for example, the situation where South Australia has never had a member of the High Court, which is extraordinary in a federation.

Mr SLIPPER—Maybe their lawyers are not good enough!

Prof. Flint—Well, I would not say that. We have a situation where the High Court has seen the Constitution from a very centralist point of view since the 1920s. Until the 1920s the High Court did reflect the views of the states, but thereafter, apart from some minor matters, it has tended to—not always, but nearly always—give a solution which favoured Canberra rather than the states.

Prof. Behrendt—I want to underline one point that Professor O’Donoghue made, because we think it is a really important aspect of the tension in state-federal relations that we cannot get around in a constitutional debate. There is no doubt that since the 1967 referendum the unintended consequence of that was that the split between federal and state governments of responsibility for Indigenous affairs has created one of the biggest structural barriers to our ability to effectively deal with some of the pressing needs of the Indigenous issues. We have a lot of debates about which policies are right and which ideologies are right and wrong, but there is that structural problem that exists there—I know those of you who have been in state parliaments will also know this—that actually explains why there is a consistent underfunding of key areas like health, housing, education and employment. So I am very supportive of the idea of having debates that look at how we can more effectively deal with these tensions between the responsibilities of both levels of government. I would urge the committee to, maybe, look at Indigenous affairs because of that consequence of the 1967 referendum and the role the Constitution plays in that structural barrier to our ability to more effectively deal with some of these issues.

Mr SLIPPER—Professor Behrendt, do you think it is possible that the referendum on Indigenous affairs in 1967 might not have passed as easily as it did if the Australian people knew how the High Court was going to interpret that change?

Prof. Behrendt—Without having the ability to look back, I guess that what we can look at is that the people who argued for the yes vote very clearly intended that when the federal government was given the additional power it would use that power benevolently, and certainly that has not been the case. We have seen the High Court having to grapple with that reality, but I do not think we can get away from the fact that there was a genuine belief by the people of Australia that giving that power would mean that the federal government would act in the best interests of Aboriginal people.

CHAIR—Professor Lavarch, do you want to make a comment?

Prof. Lavarch—Yes, just a couple of observations. I do not quite see eye to eye with Professor Flint in terms of High Court appointment methods and issues like that.

Mr SLIPPER—You were involved in some appointments, weren't you?

Prof. Lavarch—I was. They are very good judges too—Justice Gummow and Justice Kirby. They are very fine judges. Firstly—on the point you raised, Mr Chairman, about the divide or space between the reality of the way in which our system of government and the constitutional structures operate and what the document actually says—it would be good to have a document which resembles more closely the actual way in which our system operates. It is quite remarkable, I suppose, that our Constitution does not mention the phrase 'Prime Minister'.

But I do agree with Professor Craven on this point. What is unwritten about the way our system of government operates is as fundamental as what is written, and no document can ever fully capture the reality of the way in which the system operates, nor could it endeavour to capture all the nuances that the system of conventions and understandings and practices allow. It is not that our focus should be on the grand design but that it should be on the practical issues where real improvement can be made. To that end, I think that what Cheryl has said and, in a different way and with a different emphasis, what George has said is pretty right—that maybe there does need to be some improvement in some of the architecture in terms of facilitating the concept of cooperative federalism. I am a supporter of the federal structure, of a federal system of government, and I think that sometimes we can get a little bit preoccupied with individual problems and lose sight of the fact that our system does work pretty well. It is a strong system. We are overwhelmingly well governed, but there are deficiencies and problems which need to be, and can be, improved upon. Certainly some improved architecture around intergovernmental arrangements, agreements and transparency is I think quite valuable and would be a signpost to the way in which we would like our Federation to operate. I think Professor Saunders's suggestions as to how one might go about that are very worth while.

Prof. Williams—I agree that the system works pretty well but I do not think it works well enough. I know you are not disputing that point, but I draw the committee's attention to a very recent report by the OECD which found that the Australian system of government has the highest levels of unnecessary government duplication amongst all OECD nations in terms of the basic amount of taxpayers' money that is being wasted. That is not an attack on the federal

system; it is an attack on the dysfunctional nature of our current federal system. I also believe strongly that we need a workable, effective federal system, but that is not what we have at the moment.

On the question of whether the Constitution should reflect how the government works, I agree with the comments that are being made. We cannot go too far down this path or we will end up with a tax act for a constitution, but clearly we can do far better in setting out the framework in a way that describes in basic detail what we need to know and what citizens need to know about how they are governed. It disturbed me a couple of years ago when I attended a conference of teachers teaching students about civics that the lead speaker led off by saying, ‘Whatever you do, don’t give the students a copy of the Constitution. It’s the best way to confuse them as to how our system of government operates. They will get no idea. Give it to them right at the end of the course because then they will get some sense of how the document works.’ That is a real barrier to understanding, which I think is a problem and does need to be dealt with. It is not a matter of massive reform but it is something that I think is relevant in a sense of engagement and education and the like.

It is also a problem because we have a number of sections now that frankly are misleading the people. They send us in entirely the wrong direction. A good example is section 59, which says that the Queen can still disallow any law within a year of its passage through the federal parliament. If you read our Constitution you would still believe that any law by this parliament could be disallowed by the Queen on her own volition. Of course, none of those things is now correct, based upon convention and based upon ministerial responsibility and the like, but that ought not to have a place in our Constitution today, and I think there is an appropriate case to be made for at least removing the obsolete provisions from it.

Mr MELHAM—That depends on whether we become a republic.

Prof. Williams—You may well deal with it as part of a republic but, quite apart from the republican issue, even if you are a monarchist, you would say—as they do say—‘We’re an independent nation and that provision has no place. We want to keep the relationship but we just don’t see it is appropriate that this obsolete provision is there.’

Mr SLIPPER—I do not think we will ever be a republic.

Prof. Williams—Even if we are never a republic, we should still remove it, I would say, because even monarchists would accept that it no longer accurately states how the system of government works. The final thing is on local government; that really is the missing element in a lot of these debates. I simply make the point that thinking on this issue is somewhat impoverished when the best idea that people consistently come up with is that the Constitution should merely recognise local government, which was the subject of the 1988 referendum and which failed dismally. We need to go far beyond that to look seriously at what the role of local government is. In my view, a mere symbolic recognition achieves very little, and if we had a referendum based around that idea, which is the Rudd government’s policy, it would be largely a waste of time, because it would have no meaningful constitutional consequences while at the same time entrenching something that appears to give little but carte blanche to the High Court to determine the meaning of what such a provision would achieve.

Prof. Charlesworth—It seems to me, listening to other people talk, that in all the sessions we have identified particular problems and talked about the individual problems of solving them. But one idea that came up at the 2020 summit—in fact, I think it was Cheryl Saunders who put it forward as her 100-word idea; it was also endorsed in a number of the other 800 submissions that the government stream received—was thinking about the whole Constitution and adopting a new constitution for the 21st century. I am struck that that has not yet come up here; we have identified a lot of problems and this afternoon we will identify a whole lot more. But I know that straightaway the nay-sayers will say this is impossible and so on, but surely this committee is the one committee we can look to for some coverage on this and to actually think about it. It seems to me that we can solve little things. I agree with Greg; I am an old debating, sparring partner of Greg's and I have noticed that one of the things he does in debates is to straightaway identify a preposterous situation and say that he does not agree with that—and saying that we cannot have a constitution that utterly reflects everything we do surely is correct.

There is going to be a lot of detail of our life that is going to grow and I welcome that—I think that is a really good thing—but I do not think that is what this proposal is actually arguing. I think it is to get the big design of a situation right. Each time I go back to the Constitution—and it has been some years now; I do not pick it up on a regular basis, as an international lawyer—I am appalled by the fact that it is so out of touch with our life. I must say that as a teacher I often go into our local schools and talk about things involving the Constitution. There is a situation that if you let people read it they will be very dismayed that this is the foundational document. I would just put it to this committee that they might take a more radical perspective. Rather than fixing this provision or that provision, what about taking the much bolder step of thinking about a much simpler 21st century Constitution, one that gets the architecture broadly right—perhaps one that leaves, on some issues, such as the particular ones we have identified, more leeway to parliament to sort out some of the technical details.

Prof. Saunders—My idea was not that we have a completely new Constitution from scratch—indeed some of the architecture itself is not so bad. My idea was that the Constitution should be renewed so as to remove its colonial elements—of which section 59 is of course one, but there are others that are more positive and creative like the insertion of citizenship—and also to remove sections that are overtly racist, like section 25 and, arguably, the racist part. So thank you.

Ms NEAL—I have to say that I do not really detect in the community a groundswell of support for the Constitution to map the complexities of the relationship between the states and the federal government. It is obviously the idea that people should be aware of the laws of government that is appealing in theory, but the vast number of people in the community at large are more concerned with simplifying the relationship between the federal government and the states than to map that complexity. They want to know who is providing the services, who is responsible for them, and who is responsible to ensure the quality of them. Most people, in many different ways, are expressing the view that they want it simpler. At the 2020 summit—both here and my local one—the idea of abolishing the states came up a number of times. I do not think that is necessarily the solution, but clearly people are often bewildered and confused about who provides their services and have no idea of where to go to sort them out. A lot of our job as representatives of parliament is to try to show people where to go and how to access the services. I tend to see our resources better spent in simplifying that relationship than in trying to work out how to explain it in the Constitution.

Mr GEORGIOU—I was actually going to make many of the points that have been made, but they have been made much better. Firstly, the Constitution is not something that reflects the reality of social and political life. Secondly, I notice that this is called a roundtable seminar, but I look at the table and it works quite well.

Mr SLIPPER—It is rectangular.

Mr GEORGIOU—Yes. Thirdly, can I just alert people to the fact that, if you try to play around with the Constitution to make some sort of intellectually nice picture and a clear picture, you start to get into huge problems because all the issues that have been regarded as settled are actually not settled. You open them up for argument and a lot of the things are going to become contested when they are not contested now. The final point I would like to make is that I think that the task of constitutional reform is to see where there is agreement on movement forward across the board that is being blocked by the Constitution. It is not about having an elegant or new constitutional document. It is about saying, 'We agree that we want to go somewhere and the barrier to us going somewhere is that Constitution.' Then we can bring people along. Thank you for your indulgence, Chairman.

CHAIR—It is a pleasure. Professor Craven, you wanted to say something, I think.

Prof. Craven—I was just listening to that and I was saying to Michael Lavarch that it is very true that, once you start mucking around with things on which you have some sort of functional consensus and trying write them down explicitly, you can get into very significant problems. The classic example of that was in 1998 at the Constitutional Convention, where the convention flirted with the idea of trying to reduce the principal conventions of responsible government to a codified form. This is a wide argument. I think Michael would back me up on this. It very quickly started to become very difficult because you started to raise questions about the Senate's power to block supply—where would that fit and should it have it? I think there are limitations. For the record, I certainly would not want a new Constitution. I am very happy to renovate the old Constitution. It is a charming Federation edifice. It may well need a new bathroom, but I am not really interested in moving or demolishing it.

Prof. Saunders—And a new kitchen.

Prof. Craven—It needs a new kitchen, but the lounge room is great.

Mr Black—I think, having listened to the discussion there, perhaps there may be two steps to this process. The first step is to identify what are some of these specific concerns that people have, be it section 59 or be it the incorporation of corporations at a Commonwealth level or whatever, which hopefully can be done, I would have thought, relatively easily and with widespread bipartisan agreement. I do not think that would be a big hurdle. There is then that second step, which might be the need to think boldly—to borrow that phrase—which could involve a longer term consideration and debate about exactly what we do want our federal system to be in the 21st century. That is something that we could not even begin to touch on today. If we were serious about doing it, it would require the sort of ongoing, 10- or 20-year process to get popular ownership of it which Dr O'Donoghue spoke about in the earlier session. That might be a debate that we want to start now while we are still fixing the specific things, but we can continue to move forward with that bigger picture in mind.

Mr NEUMANN—As a longstanding member of the rules committee of the Queensland ALP and also a state conference delegate—

Mr MELHAM—Is that a disqualification!

Mr NEUMANN—it has always struck me how our state conferences in the Queensland ALP bear little resemblance to the actual rules.

Mr SLIPPER—It struck us too!

Mr MELHAM—At least we have rules, Peter!

Mr NEUMANN—One of the things that I think people understand is that, if you are running a local P&C or children's kindergarten or sporting club or church group, they know that not every single thing that is written down in their constitution goes on. They know that that forms the basis of constitutionalism, if I can put it like that. I read some of the textbooks of you guys when I was at law school, and I remember Professor Ken Wiltshire saying to me in a government lecture back in about 1980 that he used to worry and be sleepless at night over the problems in federal and state relations. That was the first time that I had actually heard that, and I was at university.

I have just conducted summits in some of the high schools in my electorate, and I must say that, whilst a number of the high schools were very good when it came to creative issues, the arts, rural issues and environmental issues, when it came to the governance section they were completely bewildered. They had absolutely no idea what to do. I just want to ask you generally, to take Professor Lavarch's comments about an engaged population, what you think we can do to get an engaged population. I do not want people to get to 21 years of age—like I was, at the University of Queensland—and then discover that there are big issues in terms of federal-state relations. What can we do to improve that? You are all blank?

Mr Black—As the token young person, I think that the reason for this disengagement stems from disillusion with politicians and the political process, and that is fundamentally the issue. They do not have an interest in politics, in politicians; therefore they do not have an interest in government. I think that is fundamental. I do not think it is a matter of fundamentally changing—I do not think there is anything you can do to necessarily change—the system. I think that, if anything, you have to change the people, and that is how you will get an engagement from young people. That might just be a generational thing, as more and more younger people move into parliament and people see their peers and colleagues there. There might be greater engagement, but to be perfectly honest I am not particularly hopeful.

CHAIR—Professor Williams, are you going to have a go at answering the question?

Prof. Williams—I think the lack of a regular cycle of engagement is part of the problem—that these are issues that Australians understand come up every now and then and we vote no to them, and that sort of puts them to bed. It is so ad hoc and irregular that, without something like a 10-year convention, it is just not part of our political life in the way that it should be. I think also the nature of the processes we have gone through itself alienates people. When we have, for example, fixed four-year terms, the sense is that it is coming from on high, from this parliament

developing ideas. It is not a debate for people to be particularly interested in; it is just their role to knock it down again, because you do not need to be engaged and they are not invited to be engaged. The process does not actually provide a door for them to be involved.

For me, the best example of engagement from both sides of the debate and the best sense of education I have seen in the area was at the republic referendum. It failed in terms of getting the change but was a tremendous success in many ways in terms of actually getting people to draft their own models, to think about the ideas. With preambles, there were preamble quests that the Constitutional Centenary Foundation ran that got nearly 400 entries. I think a regular cycle of engagement based on particular issues about our democracy and citizenship is the way to do it. Indeed, if a large debate started up about the question of dual citizenship and the federal parliament, that is exactly the sort of thing I think people would respond to in schools and elsewhere because it is a real, live issue, it matters, and it is something where, if it is done in the right way, people are actually invited to be listened to, as opposed to being told what the model is and then given a final yes or no vote at the end.

Ms Thomas—I would just like to make a comment about how people engage in understanding the federal split. It is not just, I suppose, how the state and federal split affects Aboriginal people. I think we understand it in its most acute, practical way because it stops us from engaging in accessing services and policies. But for the broader community, for example, in my day-to-day work as a family law practitioner I have to explain to people why it is that they have to bring their de facto law application in one court but all the married people get to have their children's and property matters dealt with in one jurisdiction. When it affects them in a negative way, having to explain to the broader community why that is is very difficult. It does not make sense to them why one group or class of people get treated better than they do. They have to run around more than the married people, and I have to run two files. In that sense there may be a general understanding about state and federal delineation of powers, but in a practical sense, when people do not understand why it is that they are being affected negatively, I think maybe that is more of an incentive for mainstream Australia to get involved in how it really practically affects them. Probably family law and children's issues are a really unifying issue across Australia.

CHAIR—You are suggesting that there is some basis for educating people, because at least that is a common experience.

Ms Thomas—Yes. They do not understand why they are being negatively affected by it.

Prof. Charlesworth—Coming in at the end of George's answer to Mr Neumann, one thing that gives perhaps some suggestions on a way to engage people is the idea of deliberative polls. These were used I think in the context of the referendum, and also there was one involving Indigenous issues, but there was also one here in the ACT involving the question of whether the ACT should adopt a bill of rights. I had not before that really understood what a deliberative poll involved. You probably know about it. It was quite interesting methodology, where you choose a representative sample of a population—and I think that was done through Newspoll—and you bring them together over two days. It is a group of people who have never thought about the particular issue. I think deliberative polls were generated originally in Texas to make decisions about power grids. The idea is that, if you get a representative sample of the population, bring them together, poll them beforehand on their response to the particular question, give them

intensive education involving people from all sides of the debate, debating and giving information, working in small groups, what is found is that after these two intense days of education—self-education often—you come up with very different outcomes. People will vote in a very different way once they have been informed.

I am not suggesting one could do that, because they are actually quite time-consuming and expensive, but there are some lessons from that whole deliberative poll process that I think would be really interesting to involve if we go towards setting up some type of regular discussion about constitutional issues. One of the things is the incredible importance of education and the way that, once people have actually understood the issues, they will go from prejudice—'No, I don't like a bill of rights' or 'I don't want the power grid there'—to quite different sorts of views. The other thing is to have a real opportunity for competing views to be presented. This goes back to some of the things that were said in the first session about the pretty low quality of the yes and no cases for referendum, because in the deliberative polls the organisers make real efforts to get a genuine representation of different positions, put in a very accessible and high-quality way. I just think there are some lessons there that could be learnt in terms of constitutional education.

Prof. Flint—I think the reasons for disengagement are probably two. Firstly, it all works so well. Secondly, we got it very easily. Self-government was given to the colonies. Federation was something we decided ourselves, and the British did not stand in the way of Federation. So we do not have a momentous event like the War of Independence to look back on or the documents. We do not have a declaration of independence that you go back to and read and that is recited in the schools—although I think the preamble to our Constitution Act reads very well. By the way, I think the no case in 1998 was very well written! That said, I agree entirely. Actually, Malcolm Turnbull made this point. He published a diary after the referendum—and he may regret that he actually published it. If you go back to July, before November, he writes in his diary: 'We have Buckley's chance of winning. Nobody is interested.' And that was the issue. There was not strong interest in the issue. Why he did not then abandon the project in that July I do not know, because it would have saved us a lot of money.

I think Ms Neal has really put her finger on the problem—that is, people do not know where to go half the time. It is confusing. Everybody knows where to go if you have a problem with your garbage. You go to your local council. But, when it comes to hospitals, who is in charge of the hospitals? Is it the federal minister? Is it the state minister? Do you go to your state MP or not? It is very confusing. That is the way the situation has developed because of the incursion of federal power into state affairs. We are probably reasonably happy with that, but it is very confusing for the general public.

CHAIR—There is of course a historical explanation for that: the people of this country voted to give power over health to the Commonwealth government by constitutional referendum, and the referendum did not ask for any change in the constitutional power wielded by the states, which is why we now have the situation where both the Commonwealth and the states have power over health—as a result of a constitutional referendum process.

Prof. Flint—Mr Justice Handley has cast doubts on the counting of that referendum!

Mr MELHAM—It's a bit late to challenge!

CHAIR—Professor Behrendt?

Prof. Behrendt—It is just a brief point and probably an obvious one, but I think we need to refocus on civics training in schools and for young people as well. That is where you can really engage people. If we take Ms Thomas's suggestion that you really need to teach it in a way that is going to engage young people and make them feel that the discussions they are having are important because of their future, then that is the way to do it.

I do not really buy this argument that young people are not interested; you only have to look at the way that they organise around an issue like climate change and look at where these new groups like GetUp! are coming from. They are coming from young people. We see this a lot in Indigenous affairs. If we turn up to the meeting on a Sunday afternoon and it is all the older people—the people in the reconciliation groups are all the older people—we sometimes think, 'Where are all the young people?' But you go home and find you have been invited to join 50 groups on Facebook. Perhaps they are just not as visible to us in some ways, but I think it is pretty hard to mount the argument that they are not interested in issues that are important to them. Where they think they can make a difference they are perhaps moving into—and you have made this argument very eloquently—a whole different way of talking about these issues and a whole different way of activism, and that is where I think there is actually a lot of promise for re-engaging younger people with the Constitution.

CHAIR—Thanks. I am conscious of the time, but I will call on Mr Perrett.

Mr PERRETT—Following on from Professor Behrendt's comments—as a former teacher I love any chance to go back into the classroom with kids. Unfortunately, two of the things that have come up a couple of times in terms of the Constitution are their perceived right to bear arms and the right to free speech. So it is a bit depressing that they know more about some other country's constitution than ours.

CHAIR—On that slightly depressing note, we will break for lunch. We will return for the session on recognition of Indigenous peoples and a new preamble.

Proceedings suspended from 12.47 pm to 1.21 pm

CHAIR—I welcome everyone back after lunch and hand over to Professor Charlesworth to introduce the session dealing with the recognition of Indigenous peoples and the new preamble.

Prof. Charlesworth—I am very conscious in introducing this session that we have the benefit of the experienced Indigenous leaders in this room. I propose to speak to the questions which I have outlined and then to hand over to Larissa Behrendt and Dr O'Donoghue. We are also lucky enough to have Khatija Thomas, as a representative of youth, here too.

First of all, one important issue before we start thinking about recognition of Indigenous status and rights in the Constitution is to have some thought about what they might be, what the actual content of those rights might be. Of course, one of the recurring features of this debate in Australia is that there would certainly be some politically who would say, 'There should be no special reference to the Indigenous peoples. They're just like us. Let's just go for a bland uniformity.' But I think that, if we are acknowledging that there is a need, one of the first things

would be recognition of first ownership of Australia. That would be one thing that would come through.

The secretariat has very kindly circulated the United Nations Declaration on the Rights of Indigenous Peoples. Somebody might be able to update me, but I believe the latest news was that Australia is currently considering whether to sign on to this. The Australian government, of course, was one of the four negative votes for it last year when it was adopted by the General Assembly of the United Nations. But I do understand from Larissa—and she might be able to update us—that there is currently a delegation in New York and so Australia might be poised to sign this. I am not exactly sure where we are up to.

I offer this as one example of a statement of possible Indigenous rights. I am not suggesting this necessarily be incorporated in the Constitution; I am simply offering this as a statement of highly negotiated Indigenous rights. This declaration took over 20 years to draft at the United Nations, so it is not something that has just popped up overnight. It is highly negotiated. The really significant point about this declaration is that the chief negotiators on this declaration were Indigenous peoples themselves from all over the world. So I think this declaration does have particular status. It is controversial because countries with significant Indigenous populations voted against it—the United States, Canada, Australia and New Zealand—but it seems to me that, if one reads the terms of the declaration, it is very difficult to see what the objections might have been.

A critical problem that is always pointed out is article 3—recognising the rights of Indigenous people to self-determination. But then I point out that article 4, which was included, limits what self-determination actually means to Indigenous autonomy or self-government in matters relating to internal and local affairs. So in fact the international law meaning of self-determination has been limited in this declaration. I will not go through it but I simply offer this as one statement that I think is very valuable in thinking about what is the content of Indigenous rights.

The next question: does the Constitution currently deal appropriately with Australia's Indigenous peoples? What is striking is that the 1967 referendum actually took out—I think; I could be corrected on this—any reference to the word 'Aborigine'. So there is no current reference to the words 'Aborigine', 'indigeneity', or 'Torres Strait Islanders' anywhere in the Constitution. Of course, it was a good thing those references were taken out, because they were highly discriminatory. The current situation is that there is no reference in our Constitution at all. There are indirect references, as has been pointed out already, to Indigenous people through the word 'race', which appears. As I think Cheryl referred to before, we have some very extraordinary provisions, such as the directly racist section 25. You just have to read the terms of it to see that it is quite an extraordinary provision to have in a constitution. Were a Martian to pick up our Constitution, they would get quite a shocking reflection on current modern Australia. We also have the racist power in section 51(xxvi), and I will come back to that. So we currently have no reference at all in our Constitution to the first Australians. I would certainly argue that that is something that we should definitely include.

If reform is necessary, what forms might it take? I hasten to add that not all of the ideas I have set out are necessarily constitutional. But one that has been raised constantly and that came up in a number of the summit streams a couple of weeks ago is recognition of our first Australians in a

new preamble. Borrowing an idea from George Williams, one way to think about that would be to involve people in that through perhaps a competition for a new preamble, but it seems to me that that would be quite a significant step and perhaps not a controversial one. A second possibility, if we are talking about the Constitution, is amendment of section 51(xxvi). Larissa has already referred to the fact that the major critique of the current wording of 51(xxvi), as the High Court showed in the Hindmarsh Island case, is that the High Court has decided that this power is not required to be used to legislate beneficially for Indigenous peoples, that it can also—

Mr MELHAM—That was left unresolved. Two judges said that. Kirby said one thing, Gaudron said another, and two did not comment on it. It was decided that it was a winding back of a current act of parliament which was permissible. It did not determine the race power.

Prof. Charlesworth—The effect of it was that it was used before for legislation that was non-beneficial.

Mr MELHAM—Professor Zines?

Prof. Zines—It was held by the court that parliament, having granted a benefit, could repeal it—

Mr MELHAM—Wind it back—

Prof. Zines—wholly or in part. In other words, you cannot have one parliament granting a benefit and binding all future parliaments never to repeal it. They did not get to that other question.

Prof. Charlesworth—The issue remains, I think, that the power is there in the Constitution with at least this ambiguity around its application, and I think that it is something that could be resolved through amendment or perhaps removal of that power. This was discussed at some length in the governance stream at the summit.

A third possibility that is sometimes raised is the insertion of a guarantee of equality in the Constitution. This I think will also come up in the next session on protection of rights. That has been raised in some quarters. A final issue is the issue of a treaty agreement compact. This is something that would not necessarily have constitutional status. I just wanted to report a bit on the conversations at the 2020 summit about that, at least in the governance stream. I know there were lively discussions about it in the Indigenous stream too, but I will just say what happened in the governance stream. Sir William Deane was an active participant in this.

One of the ideas that was put up was the general sense that the word ‘treaty’ was problematic and implied that there might be two separate nations and that perhaps a better wording to go for was ‘agreement’ or ‘compact’. Outside the Constitution, one of the things that such a compact could do would be to commit the government to consultation with Indigenous peoples on appropriate constitutional and other forms of legal change—in other words, move to a compact or agreement quickly.

This then implicates the next point, which is on the best forms of consultation with Indigenous Australians to ascertain their views on any changes. Maxine McKew, who was co-chair of the governance stream, spoke about the fact that she felt—and I would be very interested in Professor O'Donoghue's, Professor Behrendt's and Ms Thomas's views on this—that the very rapid and intense consultation on the apology would be a model for consultation. She felt that that had been very effective and very quick and had come up with a consensus. So perhaps it is possible, without too much time and agony, to develop a compact. The issues are relatively clear and, as I say, one part of that is a commitment to consultation on constitutional and legal changes. I offer that as just one idea.

Finally, what can we learn from the experience of other countries when constitutional things arise? I will just mention one country—Canada. It has done some quite interesting things. When the Canadian constitution was patriated in 1982, a provision was created which preserves the existing rights of Canada's First Nations. That provision has been interpreted by Canadian courts. The great difference in Canada to the Australian situation is that there were a series of agreements and treaties in place.

Very recently there has been another interesting development with respect to indigenous peoples in Canada. I think just this week the composition of a truth and reconciliation commission that the Canadian government has sponsored was announced. They have also committed a very significant amount of money to be available for compensation for Canadian First Nations people who were removed from their parents. It seems to me that there are some very interesting things going on in other parts of the world. I throw those ideas open.

Prof. Behrendt—We are explicitly talking about the specific experiences of Aboriginal people under the Constitution. In a way, the experiences of Indigenous people with the Australian legal system since the Constitution was drawn up are not just a result of our community's special relationship with the rest of the country but also reflective of the fact that the Constitution itself was drafted with the intention that it would not specifically protect rights and would leave that decision-making power to the legislature. I always think that, as the most vulnerable, socioeconomically disadvantaged and culturally distinct community within Australia, our experiences are a good story on where some of the overall weaknesses with rights protection are in the Constitution. I just wanted to highlight the fact that there are some special things about the Indigenous story but, in some ways, we are just the example of some of the real flaws that exist in relation to not protecting rights. This is why the issue of continuing to put rights into the Constitution remains high on the list.

To pre-empt the argument that we have enough protections in the common law, I would just say that I think many Indigenous people feel very acutely the fact that the Racial Discrimination Act has only been repealed three times and on all three occasions it was in relation to our community, most recently with the Northern Territory intervention. This is why it continues to be a very pressing issue for us.

I would at least preface these remarks by saying that the assertion that the common law protections are adequate from an Indigenous perspective is often seen as coming from a position of privilege. We feel those things very acutely. I think there is another issue, which Hilary alluded to, in relation to the declaration that poses some interesting questions for people around the table. Although it is a little unclear as to when the government might sign off on the

declaration—and there is a commitment to do that—there has not been any discussion as to the ways in which the rights within that declaration will come into Australian law. I think that that provides us with an opportunity to have a discussion about what that might look like. The committee might want to turn its mind to that as well.

I would also say this in relation to the international experience. Hilary points to section 35 in the Canadian constitution, which gives a very good example of how other countries have decided to give some constitutional protection to indigenous rights. As you can see from the Canadian experience, it did not completely resolve the tensions between how you balance the rights of indigenous people with those of all other Canadians but it certainly set up a framework that has given indigenous people some very important and substantial rights—particularly the duty to consult, which was much desired by Aboriginal people here. Similarly, I think the committee might be interested to look at the experience in New Zealand, particularly around the treaty's protection of Maori languages and the way the courts have interpreted that and the very real protection that is given Maori language and Maori culture. You now see young Maori people fluent in Maori when their parents cannot speak the language. That might be another very interesting example for you to have a look at.

It is my personal view that the history of Aboriginal people under the Constitution continues to highlight the fact that we need to have improved rights protection in the Australian legal system. I think for lots of reasons the most appropriate way to have that is through some kind of charter of rights that keeps in the public domain most of the big discussions about what rights we protect and how we balance them. There are good reasons for that. We can see that in Canada, where it really created a culture of rights. For indigenous people that has been a very important development as well. You can see a real difference in the way indigenous rights are debated in Canada, because all Canadians understand that as a Canadian citizen you have a concept of rights. Again, it does not mean that they have necessarily resolved all of these issues about balancing indigenous rights against, say, the rights to development but their dialogues about these tensions are far more sophisticated. I think it is a continuing frustration, particularly for us as Indigenous people, to always have to start our discussions with why we want to talk about rights in the first place. There is a language and a culture of rights that actually improves the extent to which the community can have these sorts of discussions.

Having said that, it is my personal view that, given the experience of Aboriginal people in Australia with the Racial Discrimination Act, there is a strong argument for looking at a few key important rights that have a special history in Australia and entrenching those into the Constitution. The continuing issue of a right to freedom from discrimination occurs because of that. I think we can move away from an either-or model when we talk about bills of rights between the Constitution and legislative models and be a bit more sophisticated.

Ms Thomas—I work at more of a community level. I have worked in land rights and now I work in family violence related areas of law. Personally, as an Aboriginal person, I would like to talk about the issue of the rights discourse and wanting to actually engage with people about our rights as Aboriginal people but even further than that as Australian citizens.

Something I related to when we were talking about the dual citizenship issue earlier was that, as an Australian Aboriginal person, I never actually identified as or felt Australian until I had an opportunity to work and live overseas in an Australian ex-pat community where I was treated as

an Australian—I was an Australian. I was treated by other people as an Australian, not as an Aboriginal person. When I lived in Cambodia, they did not have any awareness of all those social constructs about the way people treat you as an Aboriginal person. I was treated as a privileged Westerner, which was a really foreign concept to me. I wanted to share with you my personal experiences as an Australian person. Until that time, when other people interacted with me that way, I never even had an idea of my Australian citizenship and the rights that were afforded to me as an Australian citizen living abroad. At the core of this issue for Aboriginal people is how we can be considered by people in Australia and by other Australian people around us as equals—as having equal citizenship rights. I think that starts from the top, in affecting people's attitudes regarding cultural rights and how we are treated as Aboriginal people and Australian citizens here.

Dr O'Donoghue—I insisted that I bring somebody with me, but I was almost left out for Khatija this time. But I said that that was not the way it was to be; that I was really mentoring her on this trip to open up doors and so on for her to be involved more and more, as I am not a lawyer. She has taken it up and wants to be actively involved. Khatija comes from north South Australia. It is quite an achievement for that to happen for one of our young people who has come from Northern Australia.

A lot of this stuff has been around us forever, it seems. We have had discussions on agreements and compacts. I do not know if anybody remembers the makarrata—also an agreement. It seems that this has gone on forever, and nobody takes enough notice of what has been happening. In relation to this particular general assembly, I think I attended every session in Geneva—and that was over 20 years. I am not sure, because none of us have been in Geneva, and there is still a delegation there coming back—

Ms Thomas—New York.

Dr O'Donoghue—Yes, it is New York now—I always talk about Geneva. I in fact moved a resolution for a permanent forum in New York, which we of course now have. It is about two years old now. The delegation is in New York, and I have just heard via the grapevine that Canada are close to ratifying this resolution. We need to get more information back from New York in relation to that particular one.

At the 2020 discussions, which I was at, the word 'treaty' was used in other groups as well as ours. The 't' word is not popular, but we did continue to talk about a treaty—which is an agreement, a compact, or a makarrata. We thought we should get a treaty on the table again, so we did. Patrick Dodson talked regularly about a 'new dialogue' with government. That is the way that he prefers to put it, and I think that is fine. We are trying to find ways whereby that recognition can happen—and the father of reconciliation seems to be able to find some words that appeal to the parliament and so on. They were the words he used.

As to 'truth and reconciliation', I think that is probably more about the stolen generation, though it might be much wider than that. The date is still to be fixed for that in Canada and I guess there will be a delegation that would go there as well.

We still want consideration but we want consideration in the body of the Constitution not the preamble. That is where most of our people would be asking for recognition—not in the

preamble but in the body of the Constitution. As to the Native Title Act, I think you all know that it has been used three times: Hindmarsh, the Northern Territory intervention, and the one before that.

In relation to recognition, there has been recognition elsewhere but the one we have been very interested in is the Sami parliament. We are interested in how that works and how well it works. It has existed now for quite a few years and it works very well. We have gone a bit cool on the New Zealand arrangement of representation in the parliament of a number of Maori people. I think we are more inclined to want our people to join the major parties and contest an election and be there in their own right. There are still people who talk about the Maori situation. But the thing that is very high there is the Treaty of Waitangi. I think that has been by far the biggest step there. It has given them lots of rights and so on which we in Australia miss out on. That is it from me.

Ms Thomas—Where I think we are at, as an Aboriginal community in the native title arena, post the amendments to the Wik 10-point plan, is: whatever the amendments to the Constitution, and even whatever wording could be used in the preamble to recognise Aboriginal people, Aboriginal people's expectations, from native title in the original Mabo decision and the spirit of that, were shattered by the 10-point plan. And what we were given were rights that only existed to the extent that they were not inconsistent with anybody else's; our rights were always second-best to everybody else's in Australia. That is what native title has done for Aboriginal people's position in relation to having a right and a say over their land and their position in Australia. I think that both the preamble and also insertion of recognition for Aboriginal people are going to be part of us, realising that recognition is a really symbolic thing that Aboriginal people were wanting from native title, which they did not get, as well as overarching rights that are not second to anybody else's—rights that exists in their own right.

Dr O'Donoghue—I will say one thing in relation to 'Indigenous', as against 'Aboriginal and Torres Strait Islander' people. I do not know how that has crept in. We are the first people, but every organisation before has always recognised the two peoples of Australia—for example, the Aboriginal and Torres Strait Islander Commission. I raised this at the 2020 summit. A shiver goes up my back every time people talk about 'Indigenous'. Even our people are using it—and Larissa has used it—all the time. I want for there to be a change, to refer to us as Aboriginal and Torres Strait Islander people and not Indigenous. We do have a relationship with the world's indigenous people, at the UN and so on. We have had that for many years and we want to keep it in the international arena. We need more discussion and so on in relation to it. We had a full day before the 2020 summit where we discussed this issue. The majority of Aboriginal people I know really want to be known as Aboriginal people.

During the life of the last parliament is where I think it all happened. Most of our national organisations—this is probably not related to this at all—have lost their logos. There is no red, black and yellow anymore for our national organisations. It has just crept up like a thief in the night. The kangaroo and emu, the coat of arms, are now on every Aboriginal document, whereas organisations had their own logos before. Under the funding arrangements and so on, I think they had to drop their logos, which I am most unhappy about.

CHAIR—I would like to think, Dr O'Donoghue, that bringing back the red, black and yellow might be one of the more simple things we could do and probably will not require constitutional

change. I am wondering at this point if I could focus, and invite other people to focus, on what was after all described as one of the three concrete policy proposals from the governance stream of the 2020 summit, and that was for a preamble in the Constitution to recognise the first peoples' custodianship. I am mindful of what Dr O'Donoghue said about there being calls for something in the body of the Constitution as well as in the preamble. I invite comment from participants about the notion of a preamble, bearing in mind of course that the last time we went to the people about this, in 1999, it involved the rejection of a preamble.

Mr PERRETT—Could I make a comment before the question goes to the academics?

CHAIR—Sure.

Mr PERRETT—It is my belief that, whilst I would support a preamble, that preamble should be written by ATSI people, not by anyone else. That is my idea to throw out there.

Prof. Saunders—I would very interested in the views of the people who have just spoken. There was a bit of confusion in the debate on this in the governance group at 2020 because the original documentation talked about amending the preamble to include reference to Aboriginal and Torres Strait Islander people, whereas, of course, there is not one. There is not one to the Constitution itself—just to pre-empt David. There is one to the Constitution Act. But the Constitution itself just starts with a table of contents. In talking about a preamble to the Constitution, I assume we mean the Constitution itself, rather than the Constitution Act. That then raises the question of what your group, Lowitja, might have said about what else should be in the preamble. Did you envisage that it would be a preamble solely recognising the prior existence of Aboriginal and Torres Strait Islander people et cetera, or would it be a broader preamble, of the kind that George spoke about earlier, attracting the need for wide consultation on a whole range of things and more of the kind that we put to referendum a few years ago?

Dr O'Donoghue—We did not get into that detail.

Prof. Saunders—But it is quite important, I think—

Dr O'Donoghue—Yes, it is.

Prof. Saunders—because it comes back to Mr Perrett's question about consultation as well.

Prof. Williams—Perhaps I should just state the view that I stated at the 2020 summit. I strongly support the idea that there should be recognition in a preamble of Indigenous peoples or Aboriginal and Torres Strait Islander peoples—whichever term is used—and that that should recognise connection to the land and the like and also should, of course, be drafted not through consultation but through a process of direct involvement and leadership on that issue. But I took the point further and said that I do not think it is enough just to have a preamble that deals only with that issue and that it would look more than a little odd, I think, to just deal with that issue. In fact, there is another problem as well, and that is that we do not have any preamble to the Constitution at the moment that includes the broader body of Australians.

I would support the idea of specific recognition as part of a more general recognition of Australians, what our aspirations are for the Constitution, where we have come from and where

we are heading—in fact, the sort of thing you see in very powerful language, for example, in the South African constitution or other documents. I think that is, as Cheryl suggested, a very important point of discussion. To put my view on the table as I expressed it there, I think it should be a general preamble, not just a specific one, if only because we may end up with just an odd form of a couple of sentences that does not really work for what it is meant to do. It would be a partial preamble rather than something that is more encompassing. To that extent, I think the then Prime Minister was correct in 1999 in seeking to draft a preamble for everyone. I think that is what needs to occur. The failure of that does not obviate the need to do this. The failure there was in not properly consulting with Indigenous peoples, let alone having them involved in the drafting, but more generally in not having the Australian people involved in the process, such that when we voted on a preamble we did so in the same way as we did on what people saw as the politicians' republic—the politicians' preamble. I think it is a process problem rather than being an objection to the idea of encapsulating aspirations in a document, as other nations tend to do.

Prof. Rubenstein—On that same note, I will bring to the discussion one of the ideas that came from the governance stream in the Jewish 2020 discussions. Associate Professor Mark Baker, who heads up the Centre for the Study of Jewish Civilisation at Monash University, is not a lawyer but was on the governance stream. He chose to be on the governance stream because his belief is that there needs to be a metanarrative that speaks to the people in the Constitution, and he talked about the preamble as being one framework for doing so. He used, actually, the story of Passover—which, of course, is the very reason why there was the special Jewish presummit—as a nice parallel to thinking about this more broadly, because at each Passover families get together to tell the story of the exodus of the Jews from Egypt. As he pointed out, Jews from all different persuasions can connect to that story at many different levels, so there is capacity in a story to speak to different understandings of freedom and various ideas that it encapsulates. So too, he was saying, we as Australians should be able together to come to a metanarrative that speaks to all Australians, starting, of course, with the Aboriginal and Torres Strait Islander story as the starting point to that story. I found that very persuasive in thinking also more broadly about the Constitution speaking to the people, involving the people and being a starting point to then launch into—as we can talk about later—the way that citizenship, and what that means more substantively, is expressed in the content of the Constitution.

CHAIR—Professor Saunders, you are nodding.

Prof. Saunders—I am just agreeing with Professor Rubenstein.

Prof. Behrendt—If I could just follow on from those points, I think that process for the preamble provides us with precisely the opportunity to engage a broad range of Australians with the idea of the Constitution. We were talking in the last session about how we do that. I agree; I think it has an enormous symbolic importance and the ability to be a nation-building exercise in terms of the dialogue that can be had.

From the conversations I have been involved in with members of my community—looking at the work that has been done before I even got involved in this as an issue and really looking at it through the last decade—although it has, I think, been a strong theme about having this important recognition, I have never read that as being an exclusive recognition. I think that it is a conversation that helps us to get many Australians to see this increasing use of Indigenous

culture—with welcomes to countries, symbolic openings of parliament, Aboriginal art et cetera—as part of how we do important symbolic events in Australia as something that should speak for all Australians, precisely in the way that Kim has mentioned. I just think that there is a practical reason for it. We have already spoken about how difficult it is to achieve the momentum and the numbers needed to pass it. Unless we feel that a majority of Australians are invested in this document in a really sincere way, it is not going to be possible. So I think there is a lot of potential with the preamble and I think we should be prepared for it to be a very long but important dialogue.

Prof. Saunders—Can I raise another vexed aspect of this topic. Larissa made me think about it. The last time we voted on the preamble the referendum question would have said that courts cannot take the preamble into account in interpreting the Constitution. There are all sorts of reasons why that was put in. I was very opposed to it at the time, but as I have thought about it more recently I thought that that had to be right with that preamble because the preamble actually had nothing to do with what was in the Constitution.

If we were really to have a preamble that recognised Aboriginal and Torres Strait Islander people, I think you would have to take section 25 out. You would have to do something about the racist provision. You would have to do something to line the preamble up with the body of the Constitution. If the two are lined up adequately, it does not actually matter whether it is taken into account at the margin for the purposes of constitutional interpretation. So having a preamble I think does have some implications for the rest of the Constitution.

On the other hand, if you say, ‘No, no, it is all too dangerous; we cannot do that,’ then you go down the path of adding this bizarre looking clause that says that the courts cannot take into account the preamble in interpreting the Constitution, and then you have devalued the worth of the preamble.

Mr PERRETT—That was precisely the weight of the 1998 convention, as I recall. What better way to do it than to have a preamble and the cleaning-up process in the same referendum.

Prof. Craven—It is really similar to what Cheryl was saying, and drawing back on Con Con. In fact, I think Kevin and Michael were both involved in this debate. You do not want to have a preamble that is out of kilter with the Constitution because it creates all sorts of problems. I would favour recognition of Aboriginal people in the preamble. That was moved at Con Con in I think a better form than what came up at the referendum. You do not want to get into the trap that I think we started to get into of trying to put dispositive things in the preamble because we thought it would be easier to get them in there than have provisions in the Constitution. There were some versions of the preamble that started to become almost a poetic bill of rights. I think that is a problem. I think that would make the preamble deeply divisive. I think you could have just as nasty a referendum over a preamble if you had enough in it as you could have over anything else. My recollection of Con Con is that the debate over the preamble was probably the most divisive and bitter of the entire experience. You certainly would not want to risk Aboriginal or Indigenous recognition by having other stuff in there that dragged it down. So I think you have to be very careful how you put it together.

Generally there is a real concern about preambles—you do not have to agree with it all. If you put enough abstract values in a preamble and you put it in a constitution with the right high

court, that preamble could drive interpretations which I think would be unacceptable and not properly referable. We could argue about this forever, but there is no doubt that there is a significant view out there that that is how preambles could work and that is why that provision, which was undoubtedly inelegant but in my view necessary, was put in. I would counsel caution, particularly if we do want Indigenous recognition in the preamble, which I do.

Dr Twomey—Back to the other substantive provisions of the Constitution. Like Greg, I am a bit queasy about preambles and what they may be used for. I would rather approach constitutional change in terms of the substantive provisions. I do not think you would have any problem with anybody objecting to the removal of section 25. Although I did want to point out, in response to what Hilary said, that if you actually look at the provision it is not intended to be racist per se; it was actually intended to discourage the disqualification of people by virtue of race in the state by reducing the representation of that state in the parliament if they did it. It actually picks up one of the US amendments to the constitution that was intended to encourage voting being allowed for—

Mr GEORGIOU—We need a very long footnote in the Constitution explaining it.

Dr Twomey—Quite so. But the reason for getting rid of it is that it anticipates the fact that people may be disqualified from voting by reason of race. That is a good enough reason for getting rid of it, even though the original purpose of it was to discourage that from happening. I do not think you would have any problems at all getting rid of that, if you had a referendum; no-one would mind.

I think the harder question is what you do with the race provision in section 51. We have heard a lot of discussion about the Kartinyeri case, the Hindmarsh Island Bridge case, and the question of whether the provision should only be used in a way that is beneficial. Obviously on the face of it the provision is racist. It allows racist laws, it allows discriminatory laws and on the face of the Constitution that is a bad thing. The question is how you deal with it. A possible way of doing it is to get rid of it altogether. But if you do get rid of it altogether, do you still want the Commonwealth parliament to have some sort of legislative power to legislate for and in relation to Aboriginal and Torres Strait Island people? So you have to think about that. And if you do want that, can you sensibly constrain that in a way that is beneficial?

My problem with the argument about the 1967 referendum and the suggestion that that power can only be exercised in a way that is beneficial to Aboriginal people is to say, ‘How do you decide what is or is not beneficial?’ There are all sorts of tricky questions—beneficial to whom? Say, for example, you had a law that said that you cannot use traditional methods of spearing as punishment. You could say on the one hand that that is beneficial to people to stop them from being speared. You can say on the other hand that it is not beneficial, that it is disadvantageous to Aboriginal people if it takes away their traditions.

Mr Melham interjecting—

Dr Twomey—I just do not know how you would judge what is and what is not beneficial, if it were constitutionalised. That is the problem: if you constitutionalise it, how do you decide?

A second example could be the native title legislation. You could say that some provisions in the Native Title Act are beneficial to Aboriginal people and some of them are not. So what do you do? Do you take it on a line-by-line, subsection by subsection basis? Do you say that the whole law, as a general totality, has to be beneficial or not? I think you can get into all sorts of terrible difficulties and how they end up being interpreted in the High Court is really very problematic.

So the difficulties of dealing with the race power in section 51 are much greater. I think section 25 is easy to throw out. With section 51 and the race power, you really have to look at whether you want a legislative power that deals specifically with Aboriginal people or whether you think that can be dealt with generally through other powers. And if you do want such a power, can you sensibly in any way constrain it to what is beneficial? I think that is problematic.

Prof. Zines—I agree with what Anne Twomey said on the question of benefit. I think the notion of leaving that to a court to decide rather than parliament itself determining the question is undesirable because, as we know from arguments about the interventions in the Northern Territory or even the Hindmarsh Island Bridge affair, there are disagreements even among Aboriginal people as to whether an action is or is not beneficial. Personally, I would prefer not to have the High Court decide that question.

Apart from the Commonwealth having power with respect to Aboriginal and Torres Strait Islander people, I did not think it is necessary for the parliament to have power over race because of the sheer problems of deciding what a race is and what sorts of laws one would now want to make for them.

The question of beneficial or non-beneficial might to some degree be met by an equality clause, which has been mentioned as the third item here. As for section 25, I agree with what has been said about that and certainly it ought to go, whatever the original motive was.

Mr GEORGIOU—How would you put any meaningful notion of equality into the Constitution without having the judges that you are so concerned about having to interpret it?

Prof. Zines—I am sorry, I did not hear the end of that remark.

Mr GEORGIOU—If you want to put equality into the Constitution, wouldn’t that require a very substantial degree of judicial intervention and interpretation to determine what in God’s name it meant, because I do not know what it means?

Prof. Zines—It would, certainly, but there would be something to go on. Indeed, the Constitutional Commission and the committee in New Zealand, when it was considering a bill of rights, actually recommended against an equality clause on the grounds you mention. When I say ‘equality’ I am using that as a broad, general term. What the Constitutional Commission recommended was freedom from discrimination on a number of grounds, including ethnic origin, race and so forth.

CHAIR—Ms Thomas.

Ms Thomas—What I would like to see within the Constitution in terms of recognition for Aboriginal people is a very broad, encompassing principle of equality and equal rights that recognises Aboriginal people as having unique rights as well as human rights and citizenship rights—a broad principle but one that also recognises our unique position in Australia. And then, as Professor Behrendt said earlier, from that principle, further recognition and the mechanisms of our enjoyment of those rights would then be informed by a bill of rights or however Australia chose to provide domestic recognition of Indigenous people, and that would then be inserted into Australian law. I see our rights as being, to use your example, access to customary law or our rights to engage in our cultural practices and also our traditional laws and restorative justice. Those things would be dealt with on the ground, at the community level, because of our right to practise our culture, our right to self-government and things like that. That is how I would like to see it filter down to Aboriginal people on the ground.

CHAIR—Mrs Mirabella.

Mrs MIRABELLA—I just have a question. With regard to a preamble and removing any reference to it not being able to be referred to by the courts, it would arguably have a similar status to a reform of a substantial part of the Constitution. It would then run into the same problem of passing at a referendum that a referendum question on a more substantive part of the Constitution would have, wouldn't it?

Prof. Lavarch—That provision was in the preamble that went forward at the end of the nineties and got a very poor vote, so that did not help—

Mrs MIRABELLA—No, but surely it would not get a better vote if that clause was not there.

Prof. Saunders—I do not understand the point. There is no provision presently in the Constitution to say that you cannot take the preamble into account, because there is no preamble.

Mrs MIRABELLA—Yes.

Prof. Saunders—So my assumption is that, if we want to amend the Constitution to add a preamble, we have to go down the referendum route—of course: it is an amendment to the Constitution. It is irrelevant whether it is an amendment that bites or not; it is still a part of the Constitution. You have to use section 128.

Mrs MIRABELLA—I am not disputing that. But by not having a clause restricting the use of the preamble by the courts, as you argued, inserting a preamble effectively becomes as difficult to pass as a proposal to amend a substantive part of the Constitution.

Prof. Saunders—I do not quite know why that would be. It is as difficult in procedural terms because you have got to use section 128.

Mrs MIRABELLA—Because people are apprehensive about substantive changes to the Constitution, so if you remove that proviso—

Prof. Saunders—But it is a preamble, and we who are lawyers know what preambles are; they are not substantive provisions of the Constitution. It comes back to Professor Craven's point about drafting.

Mrs MIRABELLA—But that is also arguable, because lawyers have diverse opinions about what can and cannot be taken into account in interpreting certain provisions, a new right or a new law, and I do not think you can say it will never be taken into account.

Prof. Saunders—No. But I think you can certainly say that it is not a substantive provision. It is a provision that may be taken into account at the margin in interpreting ambiguities elsewhere in the Constitution. The concept of ambiguity is admittedly a wide concept, but that is why I made the point that you would need to think about the content of the Constitution as well so that the preamble is sort of a seamless continuum.

Mrs MIRABELLA—In the same way that many seemingly minor provisions in lengthy treaties that we have signed have been relied upon and will be relied upon to create substantive law in Australia, so too could aspects of the preamble.

Prof. Saunders—It depends on what is in the preamble and what is in the rest of the Constitution.

Mrs MIRABELLA—And who is interpreting it.

Prof. Saunders—Well, particularly the first two.

Mr ANDREWS—That was, as I said earlier, the nub of the debate at the Constitutional Convention and, had it not been expressed after much debate as an aspirational preamble, it would not have won the support that it got then. I think that, in a sense, reinforces what Sophie is saying—that is, if it did not get support there, it was not likely to get support from the general public either.

Prof. Blackshield—I was coming in on the equality question and I was going to say that, no, you cannot preclude judicial interpretation, but you can try to control it a bit on some issues. For example, you can have some form of words to make it clear that you do not just mean formal equality or equality before the law; you also mean some kind of real, substantive equality. If you are having an antidiscrimination provision, you have to think about whether or not you want to permit so-called benign discrimination. You can settle that issue one way or the other in the way you draft it.

I also wanted to get on the table, before we finish, something that is probably a bit further down the track than what we are talking about today. Hilary, Professor Charlesworth, drew attention to the tension in the UN declaration between articles 3 and 4 about self-determination, and you can also throw into that tension article 46, which makes it clear that we are not countenancing anything that would impair territorial integrity or political unity. That tension is something we are going to have to face up to sometime. It does raise a constitutional issue and I would be interested in having people's reactions to what we are going to do in the long run about that question. It may be that it will simply boil down to fairly specific agreements on a regional basis with particular communities, but I just do not know.

CHAIR—Does anyone have a comment on that question that has just been raised?

Prof. Behrendt—I was actually going to look at some of those treaty issues just because I did not think we had given them quite enough attention. I was going to refer the committee to the fact that ATSIC did do quite a lot of work behind the scenes when it had the treaty campaign on that pulled together a whole lot of useful documents about models et cetera. I think what was interesting about that—and I think it is recurring now with the debates around representation—is that there seems to be a very clear view that comes out in the research and the discussions that Aboriginal people seem to be very focused on having representation or the ability to provide input into decision making at a regional level. Certainly, the work done around the treaty did highlight the fact that at a national level people were most interested in a treaty framework that would provide for more intensive and detailed treaty making at the regional level in that way, which I think goes to your question there.

I was going to mention another thing that the committee will be keeping an eye on. Perhaps Dr O'Donoghue, who has just been so heavily involved with the consultations around 'sorry', might have some additional reflections on that consultation issue. The discussions around the representative body should also inform the committee to some extent on the processes that can be undertaken and a framework or an interface with which to interact with Indigenous communities in relation to talking about these big issues of preambles and treaties, to ensure that level of engagement. It seems that there are a couple of parallel conversations that will be taking place that might inform the way that you look at including Indigenous people in these issues. I might hand over to Dr O'Donoghue to speak further about that consultation issue because I know she had some ideas about that.

Dr O'Donoghue—Right at this moment I am trying to convince Mick Dodson—when he gets home. The human rights commission went out to tender and the university has won the tender. Mick will be running with the consultations, apparently, in relation to a representative body and other things. There has been lots of consultation done already on that, which I have been involved with. I am just hoping that they are not going to reinvent all of that again, taking into account what Aboriginal people are saying up till now. But that also links into possibly the treaty, as you say, the representative voice, a new dialogue with government and a whole range of things. So it is quite a way to go, although I think this government wants to see some recommendations in relation to a replacement for ATSIC—a representative body. All of our people, of course, are still in New York while these things are being announced. So I cannot advance it any further.

Prof. Behrendt—Could I just add to that. Probably the document that best captured the broad views of Indigenous people that was undertaken by ATSIC is *Recognition, rights and reforms*, which I still think provides the best blueprint of the aspirations of the Indigenous community. I have revisited that in my own work over the last 10 years with the sort of research work we do at the university about people's aspirations for treaties, self-determination or whatever it is that we are looking at. That still seems to be very consistent with the framework of what the aspirations seem to be. I think you might find that a very useful document in terms of the rights and agendas that are in there.

If I could make one final comment, picking up on the issue about sovereignty. The more you dig into unpacking what Indigenous people mean when we use the term 'sovereignty', it

becomes ever more apparent that it is actually an aspiration to find a place within the Australian state. The way in which the term is used as a red rag by people who oppose the dialogue, to shut down debate, I think misconstrues the intentions of Indigenous people. It is actually rare in the research work I have done and in the conversations I have had that the aspiration is actually separatism. It might be, from our side, an unfortunate term in what it means to the rest of Australians, but I am not sure that there is a better word that the community feels comfortable with. It is also important to know that once you start to unpack it and just ask that simple question, 'When you talk about recognising sovereignty, what do you mean?', we find in our research that often the first thing an Indigenous person we are talking to will say is: 'I want the right not to be discriminated against.' So having a look at some of that research that unpacks the aspiration to sovereignty might also assist you in realising that these debates might not be as divisive as they are sometimes painted to be.

Mr SLIPPER—I think the use of the word 'sovereignty' is a mistake, because sovereignty means something, according to its true meaning, that frightens the rest of the community. If you could find another word that would adequately describe the desire not to be discriminated against, I think that people would be much happier to accept it. No-one believes anyone should be discriminated against, regardless of race, but the word 'sovereignty' seems to indicate something quite separate from that.

I was quite taken with what Professor Saunders said with respect to the preamble—that essentially there is no point in having a preamble unless the courts can take that into account and it can be used as a vehicle for interpretation of the Constitution. But there is a catch-22 situation because, if you have that sort of preamble, people will not vote for it. People are frightened of what the High Court decides. They do not really trust lawyers, politicians, judges and so on. So I just think that if we do what you suggest, which would appear to be logical, you will simply be putting another constitutional amendment which would be bound to fail.

Prof. Saunders—That may well be, but you put the emphasis slightly differently to where I put it.

Mr SLIPPER—Not intentionally.

Prof. Saunders—No, I am not suggesting that. I think there is very little point in having a preamble if we do not regard it as being really part of our Constitution. And that means we need to think of the Constitution as a whole, including the preamble and whether it actually reflects what is in the document. That is what preambles do: they lead into documents. If we go out of our way to say, 'And you can't take it into account in those circumstances,' although under our legal system preambles can be taken into account, then we are making a statement that actually this is all just front; it is not part of the document. So I think we need to recognise this as an issue that has to be got over, not so much having a preamble but what we put in the preamble and how we put it in the preamble so that you reduce, minimise, any untoward effects that people might fear such a preamble would have. Some of us will have different fears along those lines. Nevertheless, I think that the problem is regarding it as a document that hangs together.

Mr SLIPPER—I can see exactly what you say, but the problem is that that sort of preamble, in my judgement, would never be accepted by the people in a referendum.

Prof. Saunders—Then we have a problem, and maybe we come back to Hilary's idea that we need a new constitution.

Prof. Behrendt—I might respond to the sovereignty comment. I take your point about that, but you might be interested to know that when we did the research it was not just the right not to be discriminated against that came up. That would often come up first, which in and of itself is interesting, but it would also include what might be termed Indigenous rights—so, culture, health and language—and then what we might think of as empowerment rights, like the right to be involved in policy et cetera.

We asked about that term 'sovereignty' and why they would use the term when it clearly was not sovereignty under international law and there is a whole lot of politics that goes with using the term. People had really moved away from using the term 'self-determination' at the time because when ATSIC was set up they said ATSIC was self-determination. People would say, 'Well, whatever we think of ATSIC, that's not self-determination,' and there was actually an increase in the use of the word 'sovereignty'. I suspect that 'self-determination' now also has its own baggage, especially with this false dichotomy of rights versus practical reconciliation and the use of the term 'self-determination' as almost a derogative term. I think it is easy to say that it is unfortunate that that is the term, but the challenge that we find is, as Aboriginal people have even said in the research, 'I don't know another word that describes what I am trying to say.' We have even had people say, 'There might have been something in my own language but I am not sure what it is.' I think that that dilemma—so you are aware of why we have this tension—is probably just a result of the impoverishment of our own political language.

Mr SLIPPER—The problem is that the use of that word means that it is a concept that the community will not accept.

Prof. Behrendt—Absolutely. I accept that, but I was trying to give you some background as to why we find ourselves in that situation.

Mr SLIPPER—Whereas the very practical measures that you said people aspire to, no reasonable person would dissent from. But once the word 'sovereignty' is used, I think there is a higher level of concern.

Prof. Behrendt—I am sure that is right.

Prof. Rubenstein—I wanted to ask, in the context of representation, whether Professor Behrendt, Dr O'Donoghue and Ms Thomas have heard of John Chesterman's suggestion of another creative way of including Indigenous Australians in decision making and representation without constitutional change. I think—you might be able to correct me, or others around the table might—that it was to set up a special Indigenous executive council so that, just as all legislation needs to be signed off by the Executive Council before it receives assent, you could include a requirement that legislation also be signed off by an Indigenous executive council and, if it chose not to sign off, the parliament would then need to respond to the whole of the parliament to explain why it was not taking into account the views of the Indigenous council. I thought it was quite a creative way of thinking beyond our traditional ways of representation. I wonder if you have any thoughts on that.

Mrs MIRABELLA—Would that be for all legislation?

Prof. Rubinstein—There was a discussion as to whether it would be only for legislation that had any impact on them as Indigenous Australians or whether it would be legislation more broadly. I think that was part of the discussion.

Dr O'Donoghue—Do not call it an advisory council. It has to be active in legislation. We have had too many advisory committees, which our people do not want. We want to be advocates for our people; we do not want to be just giving advice to government.

Ms Thomas—From our experience, it leaves it so wide open to being ignored. It is rubber-stamped and then they do not—

Prof. Rubenstein—It was an Indigenous executive council.

Ms Thomas—They can give a reason why they do not take on what you say.

Dr O'Donoghue—It has to have teeth.

Ms Thomas—Yes. If there are no teeth, if there is a reason, they can present the reason and it may be acceptable or unacceptable to Aboriginal people, but then so what? Nothing else comes of it. That is the experience with other advisory, advocacy and signing-off committees that we have been involved in.

Prof. Behrendt—That is the huge tension. People from the Indigenous community want the ability to have a representative body that is meaningful. If there was one advantage to ATSIC—and we can debate the pros and cons of ATSIC all afternoon, which we will not be doing—it did have appropriations and it gave us a leverage that was unusual. The ability to monitor and direct policy were two functions that ATSIC had. It probably did not do them as well as it could have, mostly because it was side-tracked by the service delivery aspect of its role. I think there is an appreciation now that those roles cannot sit together, but people want the ability to have a meaningful input into that.

Having had ATSIC, whether people liked it or not, and being shocked at how quickly it could be taken away, has made people interested in a model that can be a bit more independent of government. For example, something like the New South Wales Aboriginal Land Council, even though it is a statutory body anyway, has its own independent asset base. Therefore, it has an element of independence from government. That is the other tension that we are seeing—that people now are very reluctant to be too tied up as a government body because they realise how quickly something can be given and taken away again. I think you will see all of those views expressed in the debates that will be coming about representative bodies in this new climate.

CHAIR—Mr Georgiou, you wanted to pursue something.

Mr GEORGIOU—Yes. Do people think that the public at large might think it is incongruous to write an aspirational preface, a preamble, to a document that is over 100 years old? I would really like to know whether people think, 'This is a bit odd.' That might explain part of the reason why they feel uncomfortable. Would they rather go to a straight constitutional

amendment and fix the things and put in whatever it is, then let people vote on whether they want it or not?

Prof. Saunders—It depends on what is in it and what else you might do at the same time. Just say you did it at the same time as you were removing some of the colonial traces from the Constitution and dealing with section 25 and the racist power. You could perfectly cleanly and appropriately make references to all sorts of things about Australian nationhood, independence and the position of Aboriginal and Torres Strait Islander peoples in a preamble. It would look fine. Moreover, there are actually some strengths in this document we have been talking about. One of them is its separation of powers system, its commitment to the rule of law and so on. Again, you would need to think pretty carefully about how you wrote some of that, but it would fit perfectly well with the document as we have it and with our experience of its evolution over the last 100 years. I think it requires a bit of fancy footwork, but I do not think it is necessarily impossible.

Prof. Williams—I agree. I think the key is that a preamble by itself would be hollow unless you deal with the values within the Constitution that would be so inconsistent with or irreconcilable to, for example, nondiscrimination on the basis of race or other sorts of principles within the preamble. The reason I have a problem with something like section 125A that was proposed in 1999 and that would have prevented the interpretation is that all that is doing is providing a shield for the fact that we have a preamble that is at odds with the text of the Constitution. Either option, I think, is a bad option. After listening to the debate, that is why I have come to the view that if you want to tackle the preamble option you follow through on your intentions. You do remove section 25 at the same time. You do fix the racist power by deleting any reference to race in that context, putting in a power to legislate about Indigenous peoples but putting that subject to a non-discrimination on the basis of race clause. I think if you do that you remove the potential for judicial inconsistency or creativity which becomes necessary simply because the values are inconsistent with the substance of the Constitution.

Mr GEORGIOU—I am not as worried about the judiciary as most of you seem to be.

Prof. Williams—I am not. I just think you put the judges in an impossible position when you in fact say, ‘These are the founding intentions as expressed in 2008 in a preamble and here’s the document you’re interpreting, which is so obviously inconsistent with those intentions.’ You have to deal with both at the same time; I think that is critical.

The other issue I will put on the table is that I think there should be something in the Constitution like section 105A which enables the recognition of agreement settlements or other forms of negotiations between Indigenous peoples and local, state and federal governments and, without actually setting out the terms of those, provides a framework by which they can be negotiated and recognised. I think they should be recognised in a similar way to intergovernmental and other agreements. I think that by providing a framework you provide the capacity for a longer term process to actually engage with that and also for leadership at the local level, if that is where it should start.

Prof. Craven—I do not spend every night worrying about the judiciary, but every second night I do! I agree with everything said about preambles. I am not particularly fussy about preambles. I agree that they should correspond with the Constitution; they should correlate

closely. They should not have extraneous stuff in them. There is a tremendous temptation when you are writing a preamble—because you are not constrained by its legal effect in the same way as a substantive revision, as Cheryl rightly says—to get a little bit carried away. You start talking about ‘equality’, ‘due process’, ‘under law’ and all those sorts of things. When I hear things like that, I start to worry. It is not because I am opposed to ‘equality’, ‘due process’ and ‘under law’, but what could vague, compendious terms like that be made to mean? I think that is where the divisive character comes from. This is where these things can provide big targets at referenda.

Mr GEORGIOU—We will get laughed at.

Mr BUTLER—I was going to raise the point that Petro raised but maybe with a slightly different ending. I think it will look like we are retrofitting a model T Ford with a 21st century preamble. If it is going to be a metanarrative, to use Professor Rubenstein’s description, if we are going to try and have something that broadly describes what sort of nation we think we are now and what sort of nation we want to be, it will include concepts that I do not think will fit well with the substance of our Constitution. I do not think that is necessarily a bad thing though because it might highlight a whole range of anomalies in our Constitution and drive a debate that leads to some more substantive consideration of amendments to our Constitution.

For example, it may well be that there is a discussion about including notions beyond the legal in a preamble—and I raise this without really having thought about it much—about sustainability. If, for example, the people discussing a preamble said, ‘We think one of the key issues in our political discourse now is the notion of sustainability. We think that should go in a metanarrative of what sort of country we are going to be’, through the substance of our Constitution they will find precious little by way of heads of power for our national government that deals with that—whether it is about water, energy or any other key driver of questions of sustainability. I think it will look weird and some people will think it is the wrong way around. But I am not convinced that it is the wrong way around because I think a debate over that sort of preamble could be useful for driving a more substantive debate about what is anomalous in our Constitution, as I think there is quite a lot that is anomalous.

Mr ANDREWS—I completely disagree with that. I thought the purpose of the Constitution was to set out the governing arrangements for the country. Had the founding fathers set out their aspirations in 1900 they might well have been quite different to what our aspirations are today. I suspect that, in another 20, 50 or 100 years time, the Australian people will have different aspirations. I think it is best that aspirations and policies are reflected through what parliaments decide from time to time rather than trying to set them in concrete in a document which I would have thought had a much more limited purpose than trying to set out a metanarrative. It is an arrangement for government—that is what our Constitution is. It works reasonably well. I am not saying it should not be changed here and there, but the reality is that it is about how we actually govern ourselves in this country.

Mr PERRETT—I will go back to some points made by Mr Slipper to Professor Behrendt. I have only been a politician for six months, so I am a bit naive when it comes to things like this, but I think the great Australian people can be moved quite a long way over concepts like sovereignty. If I think back to the High Court decision of 3 June 1992 and the progression in a year or so to the people’s understanding of native title law as enacted by the parliament, there was an incredible movement. I think, with the right education process, a preamble really could

be a fantastic thing for the future of the country. Whether it is bolted onto the old Model T or whatever, I really think it would be a fantastic progression.

Prof. Saunders—On Mr Andrews's point: it may well be, of course, that you do not want to set out in a preamble your substantive outcomes, and maybe that is where sustainability comes in. Maybe there is another way of talking about things like that.

Mr BUTLER—We should not pretend that, if there is a debate around a preamble, there will not be a whole lot of interest groups trying to get their bit in there.

Prof. Saunders—Sure. Of course that is absolutely right, but you can use a preamble to talk about aspirations for governance. The Constitution deals with governance and your aspirations for the way in which your governance arrangements work is a perfectly appropriate thing to think about. It may be in that context that you could pick up some intergenerational thing—I do not know.

Mr NEUMANN—I always thought that the referendum rejected on 6 November 1999 was a bit of a waste of time, to be honest with you, because the elegance, the beauty, the modernity and even the fashion of the words did not fit well with the turgid legalese and flow of the 19th century type language that was there. I think without any substantive change in the Constitution at all, even if we adopt the more radical revolutionary Charlesworth approach of a new Constitution—as we can either be reformers like Saunders or revolutionaries like Charlesworth—

Prof. Saunders—She was always like that!

Mr NEUMANN—Unless we do that it is simply a waste of time and effort, and every sectional group that we possibly can imagine will do that. I am all in favour of aspirational and non-discriminatory language. I think it is great. But we really have to do something substantive; otherwise we will be just talking amongst ourselves and not engaging with people. It will be just a complete waste of time.

Prof. Zines—An example of one of Mr Andrews's aspirations that no longer fits is in the preamble to the act, which says that the people agree to unite under the crown of the United Kingdom of Great Britain and Ireland—which disappeared in about 1927. But is still hanging about in the preamble.

Prof. Craven—This is interesting in this debate. For a piece of language that is not dispositive and does not have legal effect and all of those sorts of things, it is amazing how the preamble very quickly becomes one of the most emotionally charged, engaged and interesting debates—as you see around here. I think there is a basic psychological difference that turns up like the tip of an iceberg through a preamble. I do not want a metanarrative to the Constitution. If I want a metanarrative in my life, I will go to my psychiatrist. I have no need for it to be placed there.

Prof. Saunders—That is your metanarrative!

Prof. Craven—My own view is that there is a basic difference—and I think this comes through in what Kevin Andrews and a few others are saying—between what you think a preamble is for and to some extent what you think a Constitution is about. Both views can be perfectly valid and all the rest of it, but they are very different, and you really cannot expect different people coming from different perspectives to agree on that. You also do not want to get engaged in these debates in such a way that you maximise your chance of losing not only that debate but any other associated debate that happens to be going on at the same time.

CHAIR—The suggestion that has been made by very many participants about the need for this process to be driven by the people is never better exemplified than in this discussion about the preamble.

Prof. Charlesworth—One point Greg made with which I definitely agree was one he made when we were talking at lunch about the need for engendering excitement amongst schoolkids and so on about the Constitution. I actually think one could see the process of trying to agree on the words of the Constitution as a very interesting civics exercise. So I think there is some value, even if it were not successful, in starting that process. And there would be a range of ways to do it.

I was struck by the very interesting debate in Spain about the competition to update the words of their national anthem. I do not know if other people have followed this. It was won by quite a humble person, a carpenter or somebody. And then there has been a lot of disagreement about whether the words carry the Spanish nation and so on, and some people refuse to sing it. But, whatever the outcome, there were 50,000 entries in the competition to get new words to the old Spanish national anthem, and I think just to have an attempt is a really useful thing.

I think the value of a preamble is that you are not limited by intensely legal language and that you can forge something. I would be confident that this is sort of answering Kevin Andrews's concerns—that one could agree, for example, on respect for our land. There would be a number of things that I do not think would be too contentious that would be likely to last for centuries. So just because it is difficult—I would say that the journey would be as valuable as the destination, in this context.

CHAIR—Thanks, Professor Charlesworth. And because that was a particularly positive contribution, I am going to call this session to a close on that note.

Proceedings suspended from 2.46 pm to 3.21 pm

CHAIR—I ask everyone to take their seats again. We are now going to deal with the last topic in the fifth session of the day—citizenship and human rights. I am going to ask Professor Kim Rubenstein to introduce that topic.

Prof. Rubenstein—Thank you very much, Chair. I am delighted to start the discussion for this session on citizenship and human rights. As we have seen through the course of the day, the topic and subject matter of citizenship and human rights is one that has been expressed and discussed in some ways already, so this gives us an opportunity to fully engage with some really important and quite substantive issues in relation to the Constitution and potential change. As has been mentioned before, the starting point, when we think about citizenship, is that

'Australian citizen' is not a term that you will find in the Australian Constitution. We do see the reference to citizenship of another country, which came up under the context of the discussion of section 44(i) and disqualification from parliament. But while there is no reference to Australian citizenship, and this is something we will come back to in terms of the need for having that, there are of course references to membership of the Australian community throughout the Constitution but in different ways. So the covering clauses and other sections, such as sections 7 and 24, refer to the people of the Commonwealth or the people of the states in relation to choosing senators and members respectively. Section 34 further raises the concept of membership of the community in prescribing that the qualification of being a member of the House of Reps is that the person is the subject of the Queen until parliament otherwise provides, but there is that reference to 'subject of the Queen' in the Constitution. And then, importantly, section 117 is the other section that refers to membership. It says:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Of course at the time of Federation the people in Australia who had full membership had the status of British subject or subject of the Queen. Those who were not British subjects were aliens, and it is that terminology around which our Constitution revolves in terms of membership. It is a point that I think continues to be significant in public policy and the discussion about membership of the Australian community. Its source is very much in the fact that membership is defined in a negative sense, through alienage, rather than through a positive statement of who we are as an Australian people and who the Australian Constitution speaks to in terms of membership of the Australian community. I think that is something that is really deserving of serious attention and change.

I think, though, that we have to be quite careful—and this might come out more clearly when we look at rights—in our definitions if we think of defining citizenship in the Constitution in terms of membership of the Australian community. Perhaps one way of thinking of it is enlarging and perhaps defining 'people of the Commonwealth' to include citizenship—and I will, perhaps, go into that in more detail when we look at rights—because there is a danger in the definitions of citizenship, and certainly legal citizenship, that there is the potential to exclude people who live within the Australian community permanently but who have not become full citizens in a legal sense, who may be treated differently in ways that may not be appropriate according to rights standards. A good example in terms of current public policy, of course, is those individuals who have lived all of their lives in Australia—one case involved someone who was 27 days old when he came to Australia—but have the potential to be removed from Australia by virtue of the fact that they have not taken out formal citizenship. There is a question of whether those are appropriate rights standards that should apply within a constitutional understanding of membership of the community.

Mr SLIPPER—Maybe it is an incentive to take out citizenship.

Prof. Rubenstein—Possibly, and that is perhaps for further discussion—

Mr GEORGIOU—We are not into that anymore.

Prof. Rubenstein—when we get to definitions. I do want to make the point, though, that even though 'British subject' was the status of individuals at the time of Federation there was quite an elaborate discussion about citizenship in the constitutional conventions because John Quick, who was a member of the convention, was very keen to have a power over citizenship in section 51 and also a reference to Australian citizenship in section 117. That attempt was rejected for a range of reasons, which I have written about elsewhere and which were very much influenced by immigration policy at the time. One of the strong themes I think we have seen in Australian public policy in relation to citizenship is the linking of immigration to citizenship, which again is another issue in terms of how we go about defining citizenship in the Constitution.

In the 1999 referendum there was, of course—with a move to a republic and the whole notion of an Australian citizen being an Australian head of state—a realisation that there would be a need to include citizenship in the Constitution. The Constitution Alteration (Establishment of Republic) Bill, which was introduced into parliament in 1999, provided for the removal of the words 'a subject of the Queen' in section 117 of the Constitution and their replacement with the words 'an Australian citizen'. In the list of definitions in the bill, an Australian citizen was defined as:

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

But there was no inclusion at that time of an amendment to section 51 to include an express power over citizenship, although it could be argued that the insertion of such a definition implicitly gave the Commonwealth parliament power to make laws over citizenship. In relation more broadly to section 51 and the fact that there is, of course, an Australian Citizenship Act, the understanding generally is that the Commonwealth gets its power through the 'Naturalization and aliens' head of power and also, more broadly, through an implied nationhood power in relation to being able to define who its members are.

Lastly, before we move on to the human rights aspect of it, the 1988 Constitutional Commission also considered citizenship in its deliberations and recommended that section 51 be altered to encompass nationality, citizenship, naturalisation and aliens—to use the word 'citizenship' in that head of power specifically so as to make it clear that the Commonwealth definitely had the capacity in the area. Also, the rights committee of the commission had proposed an amendment of the Constitution to include a definition of citizenship. It suggested a section which I will read out to you:

All persons who are:

(i) born in Australia;
(ii) natural born or adopted children of an Australian citizen;
(iii) naturalized as Australians

are citizens of Australia and shall not be deprived of citizenship except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.

I think that is quite interesting. That is the recommendation of the rights committee of the 1988 commission. The commission's final report did not actually adopt that in its recommendations.

What is also interesting is that at that time in 1988 amendments had already been made to the Citizenship Act which changed that natural born right to citizenship. Up until 1986, birth in Australia was sufficient under the Citizenship Act to give you citizenship. But after 1986, they changed it so that you needed a permanent resident or Australia citizen parent as well as your birth in the country to entitle you to automatic citizenship. There has been a change in legislation in terms of the right to automatic citizenship. Birth is not sufficient in itself. Yet the recommendation at that time—and it is certainly something that would need to be discussed in defining citizenship—was that we would revisit the categories or the entitlement to automatic citizenship by birth in Australia, which I think would raise very interesting questions linking back to my earlier suggestion that a lot of citizenship discussion is linked to immigration policy, rather than to thinking much more broadly about what we believe citizenship as a concept should mean for all Australians, not just for immigration purposes.

We have already covered or raised for discussion the question of dual citizenship, but I repeat again that as a matter of public policy there has been a strong move in the statutory sense to accepting dual citizenship. My own view, as I expressed earlier, is that that should lead to the repeal of section 44(i) and to looking at ways to enable and enhance representative democracy for all Australians, given the large contingent of dual citizens.

Moving on then within that context to the question of rights within the Constitution, I make the point a little bit more strongly about how we have to be careful in the way we define citizenship or what the consequences of those definitions are for rights. I start off by purely thinking of citizenship rights in my last few minutes. The bottom line is that, given there is no reference to citizenship, there is also no reference to any citizenship rights. If we think about the current framework of the rights we attribute to citizenship, they are rights that come from legislation. So the Electoral Act is the act that gives citizens the rights to vote and of course the duty to vote. It is the Migration Act that gives citizens the right to free entry in and out of the country. But those are legislative rights that can be changed. Indeed, in argument before the High Court recently, the Solicitor-General was making the point that it would be within the power of the Commonwealth to restrict Australian citizens from re-entry into Australia, if the parliament so determined. In other words, there is no protection of that fundamental right that I think most of us would agree citizens have—that is, to live in their country of citizenship.

Mr SLIPPER—It would be a dangerous move for the parliament to enact that.

Prof. Rubenstein—It would be, but it is something that it is constitutionally capable of.

Mr SLIPPER—Maybe you could recommend it to the government.

CHAIR—So he argued that, but it has not been—

Prof. Rubenstein—No it has not, but he was arguing it. The point is that within our constitutional structure there is no protection of rights that we think of as inherent in citizenship. Similarly, it is open to discussion as to how well voting rights are protected in the Constitution. So basic rights that we think of as civic and citizenship rights are not in our constitutional document. If we look at the rights that are in the document—and the point has been made several times—this Constitution was not framed within the context of thinking about the protection of rights by constitutions. But there are in fact references and, in relation to Mr Perrett's earlier

reference to there not being founding mothers, there were in fact founding mothers who were not present at the actual conventions but who influenced the convention debates. Section 41 of the Constitution is a perfect example of the influence of those women who were politically active at the time. They insisted that the representatives from South Australia and Western Australia protect the right to vote that women in South Australia and Western Australia had received by the time of Federation. Their right to vote was protected through section 41 of the Constitution, which says:

> No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

That strong political action by the women of the 1890s ended up leading to the disadvantage of this section when the High Court in ex parte Sipka read down section 41 to say that it no longer had any value after 1902, when women throughout Australia—white women, I should add, because it specifically disenfranchised Indigenous women—were given the vote. The 1902 Commonwealth Electoral Act enfranchised white women and the High Court said that that was part of their understanding of why section 41 no longer had any relevance. There were other federal arguments as part of that as well. It is an example of one of the clear rights statements in the Constitution which has been read down so that there is not a strong reference to voting rights. Sections 7 and 24, of course, enabled the people of the states and Commonwealth to elect their representatives, but again we could have a much clearer statement in the Constitution about the right to vote.

There is a broader question of what other rights in terms of human rights we should think about, and that leads to thinking more broadly beyond civil and political rights to social and economic rights and whether they should be protected. Then there is the more current debate as to whether rights should be protected by the Constitution per se or whether we should be looking at charters or legislative bills of rights. But I am also mindful of Professor Behrendt’s comment earlier that we do not have to be thinking of them as mutually exclusive concepts. We could be thinking of having some core rights in the Constitution as well as a charter, and I think that that is a very positive reminder to us when thinking about these issues.

Finally, in some of the discussion that has taken place through the 2020 conference or in anticipation of it, in thinking about charters of rights and the possibility of having declarations of incompatibility with rights rather than having determinative decisions about rights violation, there has been some discussion as to how that might sit within our current constitutional framework in terms of the separation of powers and the capacity of the High Court to make decisions only on matters before the court that have a direct impact on parties. There is a question about whether we should also consider the High Court’s jurisdiction under section 75(v) and whether it might be desirable to enlarge its jurisdiction to give us the scope to make that change conclusively rather than leaving it open to some concern about the efficacy of it.

CHAIR—Thanks very much, Professor Rubenstein. That was a comprehensive introduction. Who would like to start on either of these topics—the citizenship topic that has been raised or the protection of human rights?

Prof. Zines—I just want to say that the Constitutional Commission deliberately rejected the individual rights committee's recommendation of defining 'citizenship' in the Constitution for the very reason that changes were being made and other changes could be made to citizenship. The commission said that before it could agree to a provision that had been recommended by the committee it would have to indicate very clearly to what extent that would override existing law. It decided that it would be undesirable. Of course, later I think there was an amendment to provide that someone born in Australia of foreign parents could not achieve citizenship until they were 10 years old—is that right? It was something like that.

Prof. Rubenstein—Yes. If you were born in Australia and neither of your parents were permanent residents or citizens—

Prof. Zines—You get citizenship when you are 10.

Prof. Rubenstein—If you continued to reside in Australia for 10 years then you would.

Prof. Zines—It was thought that this was something that would develop over the years, that it should not be entrenched in the Constitution at any one particular time. As for re-entry into Australia, there is no decision suggesting that the Commonwealth could deny entry to an Australian citizen, although that has happened, I think, with that communist journalist.

Prof. Rubenstein—Wilfred Burchett.

Mr SLIPPER—Burchett.

Prof. Zines—Burchett. Indeed, a few years ago I would have been quite firm in saying that, no, there is no power to stop an Australian citizen coming back in because of all these references to the sovereignty of the people that were coming into judgements. Therefore, how could you deny one of the sovereign people the right to come in and exercise his or her constitutional rights? However, the matter is certainly uncertain. I certainly would be opposed to defining citizenship, but I think it would be a good idea to change 'subject of the Queen', wherever it appears, to 'Australian citizen' because it is confusing to people.

I do not know about 7 and 24. To say that members are chosen by the people is a very appealing phrase, and I do not know whether people would want to get rid of it, putting something more legalistic in like 'Australian citizen', particularly as it is the parliament, within limits, which determines who exercises this power of the people. There are limits, as we know, to what parliament can do, as a result of the recent case holding invalid the provision denying the vote to anyone who happens to be in jail, no matter for what reason.

I do not quite understand what Professor Rubenstein is saying in the last point in relation to section 75(v). Are you still referring to orders against Commonwealth officials about when the Commonwealth officials deny rights? Section 75(v) is concerned with ensuring that officers of the Commonwealth do not go beyond their legal and constitutional powers.

Prof. Rubenstein—I meant to refer broadly to section 75, not section 75(v), so that we could add to it. I am so used to just referring to section 75(v).

Prof. Zines—Why would it need to be original jurisdiction? Why can't you have any court dealing with these matters, with the appeal to the High Court if necessary?

Prof. Rubenstein—That would be another way, yes. Thanks for clarifying that.

Prof. Blackshield—In 1983 I was involved in one of the abortive attempts to draft an Australian constitutional bill of rights and we drafted two clauses. One said, 'Every citizen shall be entitled to enter Australia.' Another one said, 'Every person shall be entitled to leave Australia.' We thought that distinction was right, but I also thought it was a very interesting illustration of the basic principle that there are some human rights that should be guaranteed to every human being present in the territory and there are others that it is legitimate to confine to citizens. Part of the trouble in drafting bill of rights legislation is to work out which is which. But it is a necessary distinction.

On the point about how our citizenship law, such as it is, has been the tail wagged by the immigration dog, that is also true of this stuff about what used to be the right of citizenship by birth. What happened in a couple of cases was that the parents of a child born in Australia were being deported. There was an appeal to the human rights commission. The human rights commission said, 'Yes, the child born in Australia is entitled to remain. Therefore it would not be fair to deport the parents.' But it was the human rights commission that suggested that the way to solve this problem was to take away the right of citizenship by birth, and that is what happened.

Prof. Saunders—Just a few quick points. Professor Zines, obviously rightly, says that there are limits to the extent to which you can fiddle with the concept of 'the people' in sections 7 and 24, but the limits are extremely vague and you are really putting a huge weight on the court to make them up from effectively nothing. I would favour a clear statement of the basic democratic rights of Australian citizens in the Constitution and the creation of a constitutional status of Australian citizen. I am actually less fussed about defining the basis of citizenship. I would probably be happy to do that too, but, as long as the status was there and the rights attached to it were there, I think that a great deal would have been accomplished for all sorts of reasons.

On the question of whether you replace 'subject of the Queen' in section 117 with 'Australian citizen', at the time there was a question as to whether it should be just replaced by 'people'. It is not obvious to me that you would want to limit the protection against discrimination for people moving from state to state to 'Australian citizen'. I would be inclined to cast that rather more broadly than the referendum suggested.

Prof. Zines—That would be 'a person resident'.

Prof. Saunders—Yes—sorry.

Prof. Behrendt—I firmly believe that, when we talk about considering whether or not the Constitution works, the test we should apply is how it works for the poor, the marginalised and the culturally distinct and historically disadvantaged. If it does not work for that most vulnerable sector of the community then we have to question how good it is. It is not good enough if constitutions work well for members of the middle class et cetera. If you apply the test of how the framers made decisions about human rights protections in the Constitution, or to not include

them, the story of Indigenous people under the Constitution is one that inevitably leads us to think we can do better.

When I finished law school and went to study in the States, I was very much against a bill of rights. I thought the common-law protections were enough, because I never thought that I would live in an Australia where the Racial Discrimination Act would be repealed. I was appalled to think that I lived in a country that could actually take away that fundamental right from my community. I know that I was appalled by that, even coming from a position of privilege within that community, such that I am not the one to be most likely affected on a personal level. Since then, it has been repealed twice more. I have made this point before.

I think the Kruger case also underlies this issue, a case around the removal of Aboriginal children which I think for all Indigenous people symbolises our treatment under the Constitution and what has been allowed to be done to us legally. I think what is interesting about the Kruger case for all Australians is that, within that case, Aboriginal people did not argue for specific Aboriginal rights to be recognised in their aspiration to seek some recognition of the wrongs that had been done. They argued on the basis of rights that we would consider all Australians would have—due process before the law, equality before the law et cetera. So I think it remains a really powerful reminder of just how much better we can do under the Constitution.

I felt very strongly that I needed to say that, because I think it explains why I feel so strongly about the need to have a charter of rights. Without getting into the details of the pros and cons of that, I have already said that I think there should be a legislative bill of rights with a few rights entrenched in the Constitution. Obviously because of that history and the vulnerability around the Racial Discrimination Act, I do think the right to be free from racial discrimination is one of those rights that should be entrenched. But I would also put up my hand for the right to due process before the law and the right to equality before the law. I think they are two rights that resonate with the Constitution's general embrace of the principle of the rule of law. They sit very nicely with that.

I know there is a strong argument against the entrenchments of rights because of the role the judiciary plays in deciding them, but I think that argument sits very curiously beside the fact that every day our courts make really important decisions about our rights—for example, the rights of a custodial parent against a non-custodial parent. I cannot think of a more important decision about how to balance rights than that, but we trust judges to do that every day and to make decisions in cases between employers and employees and between landlords and tenants. So I do not think it is a big stretch to say to members of the judiciary that we trust them to make decisions about some of these key things.

My final suggestion to the committee is in the consideration of where to place these rights. I think it would be a nice, symbolic gesture if rights were to be included in the Constitution. If we put them in at section 127, which was the provision that formerly said that Aboriginal people could not be included in the census, I think it would be a nice, symbolic act to show how far we have matured as a country to swap section 127 with some provisions about rights.

Prof. Rubenstein—Can I make two follow-up points?

CHAIR—Yes.

Prof. Rubenstein—I think that Professor Behrendt's points are also underlined by thinking about statutory citizenship because, if we look at the citizens' rights to vote and rights of residence, they are two of the rights that were denied to Indigenous Australians. Even though they were formally Australian citizens, they were not entitled to the rights under the Electoral Act until 1962 and they were not entitled to free movement within the country, things that we think of as inherent rights of citizenship in a nation. So again they underscore the point that these are things that we really do need to say are protected constitutionally for all Australians, and that would affirm that equality.

The other point I wanted to make, which picks up on the point about due process and I think also links into Professor Zines's concerns about definitions of citizenship, is that, even if we left it to parliament to define who would be a citizen, I think we would need to have something similar to the statement that no person should be deprived of citizenship except in accordance with a procedure prescribed by law, complying with the principles of fairness and natural justice. There was an important High Court decision in Ame and the Commonwealth, a case where Australian citizens who had been born in Papua were deprived of their Australian citizenship without that due process, which was deemed to be constitutionally possible because of the plenary power over territories under section 122. In that case, the Australian citizens were denied residence in mainland Australia, and that was deemed constitutionally possible. They were deemed second-class citizens by virtue of Papua being an external territory, of course, but it laid open that possibility for governments and parliaments to think of discriminating and creating different classes of citizenship, which I think we should of course not allow.

Prof. Zines—But might there not be occasions where a person should be deprived of citizenship automatically by law—say, when you are serving in the forces of an enemy and fighting Australia or something of that nature?

Prof. Rubenstein—That is a current provision—but, again, that is setting out a clear framework for that to occur.

Prof. Zines—You are not first of all asking him to appear before a tribunal, giving him the right to be heard and doing all that. You are just saying, 'You cease to be an Australian citizen once you do that act,' so there is no natural justice provision.

Prof. Lavarch—I will bet David Hicks—

Mr GEORGIOU—Not quite.

Prof. Rubenstein—I do not think that asking for due process is such a big ask, even in that scenario. I would rather have the baseline of requiring due process than thinking of the circumstances where it might not be necessary.

Mr GEORGIOU—This is fascinating. I was always of the view that the comment that 'citizenship is a privilege, not a right' was a bit of a slogan that we threw around, but now I am almost persuaded that is true. Can somebody just illuminate for me whether it is open to the Australian government, through its parliament, to legislate that native born Australians shall not become citizens unless they pass a test showing that they are full members of the community,

have access to the ethos of the community and they know something about the community in the form of—

Ms NEAL—Cricket?

Mr GEORGIOU—Yes, cricket as well! Is it open to the parliament to legislate for that?

Prof. Rubenstein—Yes, it is.

Mr GEORGIOU—I find that very worrying. That is it from me.

CHAIR—Mr Melham.

Mr MELHAM—Can I just raise the issue of Australian citizens and aliens, and American citizens and aliens. When the USA PATRIOT Act was enacted in America post September 11, American citizens were protected by their constitution for certain treatments, but aliens were not. What concerns me is that, at the moment, there is not a level of protection for aliens in Australia. You could also have that differential treatment of aliens and Australian citizens in relation to criminal law or the operation of a number of laws. Of course, we know the history of internment, where whole races of people were rounded up and locked up or whatever on the basis of race not on the basis of criminality. What can we do to overcome that? As I said, I am concerned about the differential treatment. I do not mind treating Australian citizens the same as aliens, but I have got a problem with differential treatment in terms of the criminal law and other aspects. Or am I just being naive?

Prof. Saunders—No. Of course it is a serious question. In some areas you will differentiate. In voting, it would be accepted that Australian citizens would vote and people who are not Australian citizens normally would not, although even there the ethos is changing a bit and, as we are seeing across Europe, for example, noncitizens are voting in local elections. So you would need to leave it open so that you could add others to the voting pool.

Mr MELHAM—It is a policy question.

Prof. Saunders—But once you start moving into other areas like detention, for example, I think you should look at other sorts of rights to create those safeguards. I do not think we should be put off in considering whether there is a core status of membership in Australia by the fact that people might be discriminated against for other reasons, and we should try to tackle those reasons in some appropriate non-discriminatory fashion, a non-discrimination right.

Prof. Charlesworth—I would argue a bit against the tying of rights and citizenship. I am not denying that there are none there, but it is really a response to what Tony Blackshield was saying. I think there are perhaps one or two rights that one might associate as special to citizenship, but it would worry me if we got it much broader than perhaps the right to enter Australia—I agree with that—and the right to vote. I was just trying to think what else might be in that category, and I could not think of anything else that I would be happy to endorse beyond that. That led me on to make the point that since the 1970s—and this is not necessarily a constitutional issue—we in Australia have been very consistent in accepting international human rights obligations. We were involved in the drafting of the Universal Declaration of Human

Rights, which has its 60th birthday this year, and we became parties—this was bipartisan; it was under both conservative and Labor governments—to human rights treaties in the seventies and eighties. One issue is that human rights as expressed at the international level are not tied to citizenship, generally speaking. It seems to me that one way into this argument—this is an international way of speaking—is to just talk about the simple fulfilment of our international obligations. Australia has never implemented the obligations it undertook in the seventies and in 1980 in the two basic covenants, and it seems to me that, whichever way we go about it, whether constitutionally or through a charter of rights, we have to come back to the basic fact that we have made these international commitments and have never taken them very seriously. We have very imperfect implementation of human rights through HREOC legislation but that is extremely limited. We have done better in particular issues of sex, disability and racial discrimination, but as Larissa has pointed out they are fairly fallible implementations because they are easily overridden. That is to inject a more general point into this.

Prof. Craven—I will probably put the unpopular, contrary view to bills of rights and charters of rights, which I daresay comes as—

Mrs MIRABELLA—Perhaps unpopular in this room but perhaps more popular elsewhere.

Prof. Craven—You never know your luck. It is a somewhat odd debate because I think, particularly on this side of the table, we certainly all know exactly what each other is going to say and could probably give each other's position. I always begin with this one by saying that this is not an argument about whether or not you like rights; everybody in their right mind likes rights and nobody here is a despoiler of rights or an apologist for despoilers of rights. We are talking about what we think are the best means of protecting rights. That is the basic argument there.

I also think that this thing needs to be put into the context of wider political psychology. I do not think the real argument is about whether Kevin Rudd is going to wake up in the morning and suddenly strip the Australian citizenship of every Liberal. That is nonsense; it is not going to happen. If it did, he would have a very short reign as Prime Minister. It will not happen. The real argument is about the things that Larissa is talking about: those breaches of human rights in particular contexts and what the best way is to try to deal with them. I have a fundamental problem with the idea of a constitutional charter or bill of rights. I think it has two basic difficulties. I will not rehearse it at length but it fundamentally offends my notion of democracy, which says that basic policy decisions are going to be made by people who are elected and electorally accountable. That lets out the judges, and I do not buy it.

The democratic deficit argument is the one more commonly put up. The second argument, which I think is less commonly put up, is this: I just do not think the judges are competent to do it. I do not see why I would place confidence for fundamental policy decisions and rights decisions in a group of people awfully like myself and the rest of us who have not been trained in that position and have no particular claims to serve as social arbiters. I particularly do not buy the argument, 'We let the judges do other things and make great big decisions so why don't we let them do this?' There are exceptions, but most of the decisions we let the judges make—Is it reasonable to issue a warrant? Is it reasonable to give bail? Is it reasonable to do that?—are not the same as saying to them, as the Americans or any number of people have done, 'Here is a right-to-life; go with it.' That is why a lot of Americans refer to the Supreme Court as a

'superlegislature'. Those rights are not things to be interpreted; they are topics upon which one can legislate. We could look, for example at due process, which becomes privacy, which becomes a right to abortion. It is not the particular example that matters; it is the logical chain with which it goes.

I do not buy, also—and George knows this—the argument that you can get around this with a statutory bill of rights or a charter. It seems to me that fails in at least three ways. First of all: well, I suppose the courts could always more or less make sure, or parliament could always defer to the courts or prevalently defer to the courts—in which case you have the same problem, with a judicially enforceable bill—or parliament could ignore the courts, in which case you have got a real problem with respect to that right and, indeed, with the credibility of the judiciary, or you could do both alternately, in which case you have got both problems alternately, and you have still got the same problem with the competence of the judges. If you do not think the judges are good at this, why would you let them loose? So I think it is really an almost intractable problem. I have had the exact opposite experience to Larissa. I went to Canada in favour and came back from Canada absolutely opposed. So I think the experience goes both ways.

It is very hard to convert people from one side to the other on this. I think it is undoubtedly the most divisive argument in Australian constitutional law. It is interesting to see we have statutory charters—or bills, as I prefer to call them—up in the ACT and in Victoria and comprehensively stymied in Western Australia. I would suggest that, in a sense, the tide of righteousness has turned on this particular point. It is interesting to note that a strong intellectual campaign is starting to be mounted on the other side of this. You have now got former Premier Carr, His Eminence Cardinal Pell, and you have, I think, the Hon. John Hatzistergos in New South Wales putting this.

Mr MELHAM—That has always been their position; their position has not changed.

Prof. Craven—No, but it is interesting to see it being articulated, I think, in anticipation of a push. So with all the goodwill in the world, I really do not see myself changing my mind.

Prof. Blackshield—It is true that once we get onto bills of rights, some of us are going over old ground. I have a fundamental problem with a constitution that does not guarantee rights, especially the rights of minorities, because, for me, a society that does guarantee those rights is an essential part of my concept of democracy. I do not have the difficulty about not trusting judges; I do have difficulty with some of the decisions judges make. But one of the reasons I have always advocated a judicially enforceable bill of rights is that the experience of working in that jurisdiction will improve their performance in other jurisdictions.

I do not accept the argument that the common law is a good enough protection. I do think that the common law is an important protection of human rights. It does not always work; it has weaknesses. But it has considerable strengths. We have a whole variety of instrumentalities for protecting human rights. One of the most effective is the work that individual members of parliament do on behalf of their constituents. This is a very important function. But the proponents, such as I, of a bill of rights are not saying we should have a bill of rights instead of those other things; we are saying there is room for this protection too, as part of the whole panoply of protections of human rights.

I have always thought it should be a constitutional charter. In recent years I have accepted the argument that what you should have is a statutory bill or charter first. The theory is that it would operate for 10 years or so and then you would put it into the Constitution, partly so that the community has experience of how it is working and to see that some of the threatened, horrible consequences do not in fact ensue; and partly so that when judges do make mistakes in interpreting it, the parliament has an opportunity to correct the mistakes before you put it into the Constitution.

The big argument against a statutory bill at the Commonwealth level is that the Commonwealth parliament has to have power to enact it. The most obvious source of power is the external affairs power. The exercise that I was involved in in 1983 was attempting to draft a bill of rights which would implement Australia's obligations under the International Covenant on Civil and Political Rights, but it is not actually a terribly good basis to start from. The advantage of a constitutional charter is that we would not have to model ourselves on some other model like that; we would be free independently to think for ourselves about what rights we really want to protect.

Prof. Flint—We were discussing internment. I seem to remember that internment was practised in the first and second world wars in this country mainly on the basis of being an alien or being a British subject who was suspect for some political purpose. For example, in the early part of the Second World War, being a member of the Communist Party probably would have been sufficient. But in the United States, with a bill of rights, not only were politically suspect people and aliens interned but American citizens of some races were interned on the basis of that race. That was with a bill of rights. You had vast numbers of Japanese in California interned. They were American Japanese—they were not necessarily citizens of Japan—and they were interned on that basis.

Mr PERRETT—And had their land is taken as well.

Prof. Flint—Yes. A lot depends really on the judges who are interpreting a bill of rights. In the very early days of the United States a very stringent sedition law was found to be valid; slavery was upheld in the Dred Scott decision by the Supreme Court of the United States; industrial protection laws were found in the late 19th century to be in breach of the Constitution; and, as I say, there was internment. It is only really in recent years—speaking relatively, say in the last two decades—that the American Supreme Court has moved to a more small 'l' liberal stance in its interpretation. This is the problem with bills of rights: it really depends on who is interpreting the bills of rights.

What I find difficult is that I think it gives the judges a political role which is inappropriate for the judiciary. It is almost at times a corrupting role. You can understand it perhaps more with the United States where that court is only essentially about federal law and federal constitutional matters and does not rule on state matters. But I would prefer to see these matters with the political arm of the state. We have probably worked out better this way. I think in many ways we are a superior democracy to the United States, at least over a long period of time, because of what we have done and not because we needed a bill of rights. I do not think you necessarily need a bill of rights to be a superior country from the point of view of the protection of democratic rights. The UK, for example, is a prime example, at least until recently.

Dr Twomey—The one thing that I think we do need in the Constitution in terms of rights is the right to vote. I think that is a great flaw in the Constitution. If you think about it, that is the most fundamental right that the whole Constitution should hang off—the whole notion of the people, the whole notion of representative government, the notion of responsible government. It all comes back to the will of the people. Indeed, the foundation of the Constitution itself and the source of power to change the Constitution come back to voters in a referendum.

The Constitution is fundamentally flawed on the right to vote. Section 41 of the Constitution, as Kim mentioned, should have protected Aboriginal people in the states—New South Wales, Tasmania, South Australia and Victoria—who had the right to vote in 1902. They should have then continued to have the right to vote since then and the Commonwealth electoral law should not have been able to disenfranchise them because of the way section 41 was intended to operate. But the High Court read it down, so it is ineffective. I think this has become more obvious with the very recent Roach decision by the High Court, which is about prisoners rights to vote. The Constitution itself anticipated in 1901 that the franchise would be on the basis of existing state franchises until the Commonwealth provided otherwise. The existing state franchises were discriminatory on grounds of race, on grounds of sex, on grounds of all sorts of other things as well: if you were in the Navy or in the police force you could not vote in some states; if you were a vagabond or a disreputable person you could not vote. The Constitution recognises or accepts that there can be discrimination of that kind in the right to vote. The High Court was left basically to scratch up some kind of implication from the Constitution that 'in reasonable terms' just does not exist on the basis of its history in order to support a universal franchise. I think we should be up-front about it and put in the universal franchise. If we want to disqualify certain prisoners at a certain level, then that should be a debate that we have. It should be put in there so that that very fundamental right, the right to vote, upon which everything else hangs, is at least placed in the Constitution and protected.

Mrs MIRABELLA—On that point, if you were to successfully insert 'a right to vote' in the Constitution, does that mean that that right belongs to an Australian citizen to do with it what they like? Does that then bring a de facto voluntary voting system or not?

Dr Twomey—As George says, it depends on how you word it. My personal view is that there should be compulsory voting, but compulsory voting should also entail the right to vote informally. You should always—

Mr Melham interjecting—

Prof. Blackshield—It is compulsory—

Dr Twomey—I know. I have had a look at this myself as well, and if you look at the particular terms of it, there is some ambiguity in it, particularly in the High Court decisions about this. Anyway, we will let that go by for the moment. The point is that constitutionally you should have the right to vote, but that right to vote may well and should entail the responsibility to turn up at an electoral polling place or to put in your polling—

Mrs MIRABELLA—But if it does not, or if it is problematic to frame the wording of that provision of the right to vote, leave it as general and as vague as possible because we might end up having very different forms of voting in the future. We have already trialled electronic voting

for blind people in some areas. I am interested to hear from anyone else on this: you leave it broad, but wouldn't it necessarily raise the question?

Prof. Saunders—It depends on how you draft it. Every Australian citizen has a right to vote. This right does not preclude the parliament deciding it must be exercised every time or that they must turn up or however you want it. It is easy enough to hedge it round.

Mr MELHAM—But there are also qualifications. We used to have subdivisions, so if you were in the wrong subdivision, even though you were within the division, your vote was not counted. They are now removed.

Prof. Saunders—A very nice model for this is the South African Constitution. It is very nicely written, it is drafted in beautiful language, but it has the rights clearly expressed and when they know there is a qualification of that kind, that they might want the parliament to have the capacity to deal with, they put that in too. It is fairly straightforward.

Prof. Williams—I just wanted to come in on the point of David Flint, who was talking about the quality of our democracy and how we have a democracy which is the envy of the world, even given that we have the absence of a charter or bill of rights. I disagree with that, and I disagree with it having spent substantial periods of time in places like the US, Canada, New Zealand and the UK. If we look hard at our system we discover there are some very serious flaws in our democracy that do relate quite directly to the absence of human rights protection.

Mrs MIRABELLA—Like?

Prof. Williams—I will give you some specific examples of that. Of course, this is an additional argument to Larissa's point about minorities and others, which I do see as a key argument for a charter of rights. Let me take specific examples relating to free speech, which is the lifeblood of any modern democracy. Here are three examples that you will not find in any other comparable democracy and each of them is unthinkable in any of those democracies, given the proper protection of human rights. These are examples that I have talked about around the world, and I cannot believe that Australia has a system that still allows these. And there are many more that I could provide. The first is the jailing for 10 weeks of Albert Langer in the late 1990s for advocating a valid form of voting. He was jailed for 10 weeks—

Mr GEORGIOU—No, that is not correct. Langer was jailed because he refused to pay his fine.

Prof. Williams—That is correct, but he refused to pay the fine in relation to a conviction that arose because under the Electoral Act, section 329A, he advocated a form of voting which, while valid, he was not permitted to advocate because it was made illegal.

Mr GEORGIOU—If he had payed his fine, he would not have been jailed.

Prof. Saunders—I think the conviction is what is important.

Prof. Williams—Can I put it this way: the Electoral Act made it an offence to advocate a form of voting that was recognised as giving rise to a valid vote when the votes were counted. It

directly made an offence a form of speech which is about advocating a form of voting that the Electoral Act recognised. That is clearly something that would not be permitted under any system with a decent free-speech guarantee.

The second relates to the Pauline Pantsdown song *Backdoor Man*, which has been banned from being played on ABC radio. It was one of the most popularly requested songs on Triple J for a week. Pauline Hanson went to court and was able to get that song banned from being played. It has not been played on the radio since, even though, particularly among young people, it was seen as one of the most effective, if you like, protest songs of its kind. It cannot be played, and you will not find similar examples in other countries.

Mrs MIRABELLA—Are you saying that is a serious infringement?

Prof. Williams—I am.

Mrs MIRABELLA—I want to give my young person's comment on this.

CHAIR—You had better be careful, Professor Williams, because we might ask you to sing it next.

Prof. Williams—My point is that if you believe in freedom of speech—I do not like the song but you ought to believe it is fair enough that people should be able to play it without having it banned and without the potential of criminal sanctions.

Mrs MIRABELLA—You are seriously using this as an example to say we are so much worse than the US and Canada and the rest of them?

Prof. Williams—I would use it as an example that that is the type of song that could not be banned in other countries from being played on the radio.

Mr PERRETT—Was there an injunction, and the court said that Triple J shall never play that song, or was it an injunction for a week—

Prof. Williams—No, it is an ongoing injunction that is still in place.

Mr MELHAM—And what is the basis of the injunction?

Prof. Williams—The basis was defamation law without any countervailing free-speech protection. Defamation when put up against a free-speech guarantee operates quite differently in places like the United States. For example, it is held that the defamation law must give people the right to criticise politicians or to have songs or other forms of political protest.

Mrs MIRABELLA—You can do that here.

Prof. Williams—You can't do that here. That is the point.

Mrs MIRABELLA—You can criticise politicians.

Prof. Williams—You can. The third example relates to the ASIO laws and the anti-terror laws. That example relates to the fact that not only under the ASIO laws can nonsuspects be detained for up to a week but there is a provision that says that anyone who talks about operational information can be jailed for a period of up to five years for discussing those matters, including where the law itself may have been breached in terms of the way the detention has operated. That is an example which goes to the heart of the accountability of government and again that is an example you won't find in any of the comparable anti-terror laws in other countries. It is a direct infringement of people's ability to—

Mr MELHAM—But that was not about accountability. There were protections there in relation to the process. That was to make sure that the information was not released, and that is in terms of a security situation.

Prof. Williams—If it was limited to that, I would not have a problem with it. The problem is—and this is something that, for example, the Right to Know Coalition of the media organisations is looking at—that it is far broader than anything that can be justified on a national security ground, and you cannot report information in good faith in the public interest in the media even if it is to report that the government itself has not complied with its guidelines or done so in a way that may breach the law.

Mr MELHAM—You know as well that that is based on the other provisions in relation to other legislation. The National Crime Authority has hearings for which it is a penalty if you reveal the nature of those hearings.

Prof. Williams—That is fine to that extent, but it is far broader than that. That is the issue.

CHAIR—Just before anyone answers, I have to interrupt us for a moment. Dr Twomey and Professor Flint have to leave to catch a plane. I am interrupting for a moment just to thank them both very much for their participation here today, which has been very helpful.

Prof. Flint—Thank you, Chair. It is certainly not because we are offended about Pauline Pantsdown!

CHAIR—Mr Andrews also has to leave.

Mr MELHAM—It is really a question, isn't it, Professor Williams, of competing rights, and then it is a policy decision as to what prevails over another right? You cannot have unfettered free speech.

Prof. Williams—Absolutely not.

Mr MELHAM—you are certainly not arguing that?

Prof. Williams—No. What I am arguing is that we have got the balance wrong as compared to other nations. One of the best sources of this is the Right to Know Coalition's report of the major media organisations put out last year, which found that, for example, in federal laws there are over 500 provisions which require secrecy, often in circumstances where that is not justified and in circumstances where there are no checks and balances and no recourse because, unlike in

other countries, there is not an adequate free speech guarantee to, if you like, tip it more in favour of more openness and free speech within the system.

Mr PERRETT—Professor Williams, I suggest you go back to your kitbag if those are your three best examples. I can stack them up against so many infringements of free speech in the US, where they supposedly do have protection. You go and have a look at the rights of labour to protest around a presidential motorcade. There are some incredible infringements of free speech in the US, where there is allegedly a protection. But I do like those three comments. I think I will be phoning Triple J and asking for Pauline Pantsdown!

Prof. Williams—Good on you!

Prof. Charlesworth—There has just been a lot of discussion and focus on the judiciary in relation to bills or charters of rights, but I would like to mention a little of the experience here in the ACT, where we have one of the two Australian charters of rights—we have the Human Rights Act here. In fact, the greatest effect has not been in our courts at all. There have been remarkably few cases brought by disgruntled people wanting to talk about their human rights. In fact, some lawyers would be quite critical of our Supreme Court for being very slow to address these arguments. The real effect has actually been on the bureaucracy in the ACT, because under the Human Rights Act it is required that the protected human rights, which are essentially those in the Covenant on Civil and Political Rights, be considered in the development of any policy and in the development of legislation. So there have been very lively debates within the bureaucracy about whether particular policy proposals are actually consistent with human rights. In fact, I think it has had quite a positive effect in that it has made the executive arm of government really scrutinise its plans. Some of the wilder rushes of blood that occasionally come to the head of elected governments about a quick, knee-jerk response to a particular problem have had to go through a human rights filter. They have tended to be, I think, very positive developments. So I think that by focusing just on whether this will rev up an already bad judiciary—it has been a shock today; there has been so much badmouthing of our noble judiciary, but—

Mrs MIRABELLA—No, just accepting that they are human and susceptible to all the failings of the rest of us.

Prof. Charlesworth—I do understand that, but I think that is putting too much emphasis on, if you like, the safety net—the last recourse under human rights charters—and not enough on the very positive effects they can have in requiring executives and legislatures to think twice before they enact something that is inconsistent with human rights. I venture to say that were there such protections at the federal level we would not have had some of the more extreme forms of law that we have seen, particularly in relation to antiterrorism. So I would just like to move the focus away from courts and back onto the other arms of government.

Mr SLIPPER—Some would say they were not extreme.

Prof. Charlesworth—Of course, there is a very real argument. But what I think that they show is that some of the amendments to the Criminal Code did not have the benefit of a human rights analysis. You may come out with pretty tough provisions, but I think what we can see is that there would be various provisions one can point to—and George has pointed to some

already—where I think they were done very much with a single lens, and that is security. I would say that that is too narrow a lens and that what you have got to do is to have a more balanced lens. So I would suggest that you might have got, perhaps, provisions that were not so different, but they would have had the benefit of human rights scrutiny and I think they would have been better and more acceptable.

Mr GEORGIOU—I have to agree with my colleague. They are not at all extreme compared with the way that they started.

CHAIR—Before I come to Professor Lavarch, I can corroborate what Professor Charlesworth has said about the ACT level in relation to the experience in Victoria, which has been that there has not been a rush of litigation following the introduction of the Charter of Rights and Responsibilities. It has had a major impact on the way in which the bureaucracy goes about its business. The few attempts that have been made to litigate provisions of the charter, particularly with a view to altering the way in which the criminal law works in Victoria, have been unsuccessful.

Prof. Lavarch—I am going to make the same sorts of points, largely. I am a supporter of a statutory charter of rights and I do that with a realistic view, I think, of what courts can and cannot do. I accept that courts are not law reform bodies of themselves. They deal with individual cases that come before them and they are not equipped with research arms or those sorts of policy support mechanisms that government has. One needs to understand that. But the model which applies in the ACT and then is further refined in Victoria—and this is another good example of some of the strengths of federalism, I have got to say, in terms of developments in different jurisdictions over time—is based on the so-called dialogue model between the various arms of government in which the courts can have a useful role to play. Just as other elements of our institutions had evolved over time, I see this as part of a maturing and an evolution.

Go back a few decades and you would find that people were having similar sorts of debates about the merits of judicial review of administrative decisions and the scope of that jurisdiction. Do we now look back seriously and think that on the whole that has been a bad development? Has that improved the way in which public administration has occurred in Australia? I suspect very much that it has. The reliance simply on the institutions that are embodied in this document, the Constitution as it was at that time, has changed. We have had parliamentary ombudsmen. We have had the creation of the Human Rights and Equal Opportunity Commission. We have had extensions such as a greater role of the courts in oversighting administrative decisions. This is a further evolution along that road. We have had the benefit of looking at systems operating in other countries and the pros and cons of constitutional entrenched rights as opposed to statutory charters, and I think that what we saw in Victoria was an excellent assessment of what is good and strong in terms of what we have seen other jurisdictions adapt and improve, and I hope to think that we might see other Australian states pick that up.

I greatly respect Professor Craven's views, which he always puts well. They are very well-rehearsed views and, as he said, we could all argue each other's positions on this thing. But there always seems to me an incredible inconsistency in these arguments where we think that judges are able to effectively do work in terms of the common law and the various traditions which have been built into the common law in interpretation and enforcement of various rights. We are happy for them to do a whole range of fundamental critical decisions, but suddenly we think that

they will go berserk or be poorly equipped or will not be able to possibly handle an extension to this jurisdiction. If you are genuinely of that belief you should be then going back the other way in terms of things that should be stripped out, and maybe some people believe that that should be the case. But if you get the right balance, where judges can play a role but the parliament is properly far more focused on the protection of rights, which occurs in both the ACT and Victorian systems and which is an extension of what occurred first in Queensland following a post-Fitzgerald inquiry change in terms of the incorporation of fundamental legislative principles and the role of parliament and a parliamentary committee to report on legislation there, this is all about our institutions evolving, and I think that we are at the stage where Australia should very seriously look at a statutory charter of rights, and I strongly endorse it.

Mr GEORGIOU—Can I take the argument from another perspective; it is about judges. Sometimes the concern about judges has been pursued by excluding them from processes of review. The certain consequence of doing that is that we get abuse in our bureaucratic systems. They become unaccountable. People get very badly damaged. At the end of the day, we are left with a huge mess on our laps that we have to clean because we have governments being degraded by a lack of external oversight. That would be my argument for judges being included rather than for politicians closing them out.

Prof. Behrendt—I was going to add to the points that Professor Charlesworth was making about the impact of the ACT legislation. To give an example that I found to be very enlightening about that impact, when I had the privilege of sitting on the committee with Hilary when we did the community consultations, I can guarantee you that nobody came to us and said, ‘We really want a bill of rights because of our concerns about transportation legislation.’ But I was very interested when the act came into force that there was a major review done of simple things like transportation legislation. The more you get into it, even a simple piece of legislation like that can have huge impacts on people. It is about how you give people licences and the circumstances in which you take their licences away—therefore affecting their livelihood—and what sorts of due process do you have in place when you want to make decisions like that. There are a whole range of issues around privacy that are raised because of where, in relation to public transport, we have cameras et cetera in the ACT. I was amazed that a simple piece of legislation like the transportation legislation could have such a large interaction of basic human rights. It provided a very good example of the very important role that a charter of rights can play. It can also give many of us comfort that middle-level bureaucrats go through the process when they draft legislation of thinking how to make it compliant with simple things like due process before the law.

Prof. Saunders—I am very glad that Hilary and Larissa have raised the points that they have, because until they did this debate was boiling down to a typical Australian debate on bills of rights which on the one hand had people saying, ‘We think that there needs to be protection of rights, whether it is in legislation or in the Constitution,’ and on the other hand had people saying, ‘We can’t have that because look what power it will give to judges.’ That does not solve the problem. If you think that the system is perfect, then there is no problem to solve. But if you think that it is not—and we have had plenty of evidence, most obviously from Larissa’s earlier remarks, around the room today that there is some greater need to focus attention on rights on this country—then the question is: how are you going to do it if you are not going to use what is in fact the traditional mechanism for sorting out questions of law?

One answer to that—and Greg will leap in and assassinate me in just a moment, but that is all right—is that you have some sort of parliamentary charter of rights. Sure. I just am very sceptical about that working, for all sorts of reasons. Firstly, you have to internally set your own standards. As we see even from some of the Senate committees that purport to look at rights, the standards that are set are not terribly convincing. In the absence of some process by which you can identify these benchmarks that are going to be used as a measurement, I do not think that is going to work. Greg can speak for himself, but I think that it will be eaten away by the political pressures of the moment.

If you think that there is a problem, if you think that we need some mechanism to focus attention on the rights of minorities or on the rights of Australians when they are put under pressure in particular circumstances, then I do not see how you can do without going to the courts and allowing them to play the role of check and balance in the system that is, quite frankly, part of the common law system.

Prof. Craven—Can I respond?

CHAIR—Your right of reply, Professor Craven.

Prof. Craven—I will not resort of physical violence of any sort.

Prof. Saunders—Not here, anyway!

Prof. Craven—One thing I would say is that this idea that we are overemphasising the courts in this is unrealistic. If you have a statutory bill of rights and you have judicial review, I think it is reasonable that people are going to focus quite strongly on the courts. There is nothing you can do about that. Whenever I hear that nothing has gone wrong in the ACT and nothing has gone wrong in Victoria, my response is: 'Yet'. We have not had enough time to see how that goes. It is interesting, partly because of the expectations some of the proponents of this have built up: 'We've got terrible human rights; absolutely awful. We're going to fix it with this—but it won't do anything.' There is a certain implausibility in that.

I do sometimes react when I hear about how the executive has suddenly turned into a sort of 'Buddhist contemplation society'. If we do not need the judiciary, why have we got it in this? If we can have the really good effects without judicial involvement then why have we gone the extra step? I am interested in a parliamentary charter—and Michael Tate pushes this perhaps a little more than I do. It is an interesting alternative.

One of the things that does interest me about it—just to turn back to what Cheryl said—is that I can see the problems with it. I have worked for a parliamentary committee and I have worked for a government, so I understand what happens. It fascinates me that some attorneys-general in the states—who are not necessarily the most co-operative beasts when it comes to collaborative engagement with their enemies—are very happy about a bill like this and very nervous of a parliamentary charter. They would not contemplate a scrutiny of acts committee armed with a set of materials like this but they are very calm about the idea of a statutory bill of rights. I rather wonder what that says. Cheryl says this is the way we traditionally deal with issues of law. But I do not think something like a guarantee of equality or due process or whatever is a question of law in the same way that a dog licence is; they are characteristically different.

The difficulty here—and I have forgotten who said it—is that so many of these things are not about human rights in the sense of ‘I have a human right and you’re an animal and therefore my right wins because you are trying to oppress me’. We went through some of those complex examples you have. There are two perfectly viable human rights in conflict, and they are both genuine, so how do you decide between those two things? If every conflict of rights was simply about right and non-right—and I think some of the ones that Larissa has come up with are closest to that—I would be less worried about the courts. But in that complex accommodation of right to right, that is where I come back to my difficulties with the judiciary; I do not think they are ideally suited to it.

CHAIR—Professor Williams, in your response to what has been said could you also deal with the process that was followed in Victoria—which is similar but perhaps a little more complex than what happened in the ACT—as to how the legislative charter was brought to public attention and debated.

Prof. Williams—Thank you for that invitation. I felt that we probably should get back to the process as it relates to the first session, but I will not resist the temptation to respond quickly to a couple of things that Greg has said. Firstly, he suggested these are not questions of law. But they are already questions of law in many places in Australia. It is not a matter of whether they are part of the law; it is about the inadequacy of their legal protection. You will find many of these things reflected in the common law already. Indeed, the counter argument tends to be that they are already well protected in the common law so we do not need to take it further. For me it is about how you entrench it and how you properly protect it. I accept that some things ought not to be susceptible to legal determination, but that is at the outer edge of what we are talking about. The core can certainly be dealt with adequately.

I also accept Greg’s point that it is early days in the ACT and Victoria and it is hard to extrapolate good experience from them given that it has only been a couple of years. So let us look to the United Kingdom and New Zealand, which both have statutory implements—since 1990 in New Zealand and since 1998 in the UK. To take the UK example, the independent statistics and the government statistics show that the increase in litigation in the UK over the last decade is less than one-half of one per cent. It is not even statistically significant. The system does not set up new rights in a way that actually gives rise to significant litigation. It is not giving rise to damages; there have been only two cases in the UK in the last 10 years. The incentives are just not there. There is no reason to expect that there will be any explosion of litigation in Australia. There has not been so far and, based on the overseas experience, you certainly would not expect it.

To end on the process: this forum is not a place to solve these issues. There are legitimate and strong differences of opinion. I strongly support the idea, which we talked about earlier in the day, that the way to move on with these issues is to open up a larger debate. Australians should have a say on this question. If they see a problem, as Cheryl has put it, then it is up to people to come up with solutions, and people need to have a say as to whether they see those solutions as being appropriate and workable. I think that is why the way to move this debate forward is to open up a larger national process. The process in Victoria was successful because it included people from both sides of politics on the committee, including the former Liberal attorney-general Haddon Storey. I think any national process on this issue run by the Rudd government should also include people from the conservative side of politics. The success of the Victorian

and ACT processes was that they adopted a lot of the things we talked about earlier in the day—new technologies, for example—to give a say to people who often do not have a say in these processes.

If it turns out that there is strong support for change then I think it should go ahead. If it turns out that the support is not there then my strong view is it should not go ahead. But I think that is the right way forward to actually determine the answer to this type of question. This is a basic question about democracy, and it should be a fair, open and genuine process that involves both sides of politics. Only after that has reached some resolution will we be in a position to move beyond what can be a sterile, academic debate without a popular voice as part of it.

Prof. Zines—I am often amazed at Professor Craven, but I am rather amazed at the suggestion that he is suspicious of courts in dealing with conflicts of interest. It seems to me they deal with conflicts of interest all the time in developing the common law: in interpreting statutes in relation to common law rights; and in the Constitution continuously, in relation to matters contained in section 92 or section 116, freedom of religion and so forth. So I do not really know what he is about, but I have to go now—I am sorry, Mr Dreyfus!

CHAIR—Quickly!

Prof. Craven—I said they are not very good at doing it. It is incompetence, rather than unwillingness.

Prof. Zines—They have been at it for about 800 years. I see no reason at all for it.

CHAIR—I thank you very much, Professor Zines, for your contribution—not least the last one. I am going to wrap it up now and ask the deputy chair of this committee, Peter Slipper, to make some closing remarks.

Mr SLIPPER—I think today's proceedings have been particularly interesting. We approach the topic from a range of points of view. Some of us believe that the Constitution ought to be changed. Some of us believe that the Constitution ought to be changed more easily. Some of us, presumably, would also not like to see substantial change to the Constitution at all. On behalf of the committee I would like to thank our participants for giving their time. They are all distinguished in their own way. We know of what they have written, and what they have said and they have all come along today to enunciate their points of view in a very free, flowing, open and honest way. The committee would like to thank you for coming to Canberra. They say that Canberra is a city of 300,000 people surrounded by reality—the rest of the country. It is good that you have come to Canberra and assisted the committee in its deliberations, which will result in a report being made to the parliament.

This roundtable—or this rectangular series of tables, forming a rectangle—has been a successful format. We have tried not to limit the participation but to have a number of eminent people here, going for quality rather than quantity. A range of subjects have been covered, including the fundamental question of how each generation might have an opportunity to change the Constitution; the eligibility and disqualifications for parliamentary office; the old federal-state situation; recognition of Indigenous peoples; citizenship, and the broader topic of how and whether rights and responsibilities of individual Australians might be expressed.

We have a diversity of views, but that is healthy in a democracy. The committee has much to think about. The fact that we were able to achieve a full attendance of all committee members is a tribute to the quality of our speakers and also acknowledges the importance of the subject discussed. On behalf of the committee I would like to thank you for your participation and hand back to the chair for a formal motion to be moved.

Resolved (on motion by **Mr Slipper**):

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

Committee adjourned at 4.44 pm