CABINET - SUBJECTS FOR CONSIDERATION, 15 FEBRUARY 1993

Not Relevant

2. **ITEMS FOR DISCUSSION**

3.1 Amendment of the Constitution Act 1934. AGD 809/1988

APPROVED

Not Relevant

15/2

MINUTES forming ENCLOSURE to **AGD 809/88**

TO THE PREMIER FOR CABINET

Amendment to the Constitution Act, 1934

1. PROPOSAL

1.1 That Cabinet approve an amendment to the Constitution Act, 1934
(a) to repeal paragraphs (b) and (c) of Section 17 and paragraphs (b), (c) and (d) of Section 31.
and (b) to include a provision so that Members of Parliament must, throughout their term, continue to be Australian citizens. (Special provision will need to be made for Members who may not be Australian citizens but fall within the exception applying to British subjects in Section 29(1)(b)(ii) of the Electoral Act, 1985).

2. BACKGROUND

2.1 Section 17 of the Constitution Act, 1934 provides
"If any Member of the Legislative Council.....
(b) takes any oath or makes any declaration or act of acknowledgment or allegiance to any foreign prince or power;
or (c) does, concurs in or adopts any act whereby he may become a subject or citizen of any foreign State or power
his seat in the Council shall thereby become vacant."

2.2 Section 31 similarly provides for vacation of House of Assembly seats but there is an additional proviso namely:
"(d) becomes entitled to the rights, privileges or immunities of a subject or citizen of any foreign State or power."

2.3 In November 1992, the High Court handed down its decision in Skyes v. Cleary & Ors. The High Court was asked to determine if two candidates, both naturalised Australian citizens, were capable of being elected as Members of the House of Representatives while, by operation of the law of Switzerland and Greece, they remained citizens of Switzerland and Greece respectively.

2.4 Section 44 of the Commonwealth Constitution provides:
"Any person who:-
(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power.....
shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives."

2.5 The High Court interpreted this provision as requiring a candidate who is an Australian citizen and also a citizen of a foreign country by

operation of the law of the foreign country to take reasonable steps to renounce that foreign nationality.

2.6 The South Australian provisions are not drawn in identical terms to Section 44(i). However, the decision in Cleary has resulted in an examination of the effect of Sections 17 and 31 in the South Australian Constitution Act.

3. DISCUSSION

3.1 The South Australian provisions do not apply to candidates but rather to persons who are already Members of the Legislative Council or House of Assembly. A Member's seat becomes vacant only if the person while a Member pledges allegiance to a foreign power or does, concurs in or adopts any act whereby he may become a subject or citizen of any foreign State or power, etc. The Member must take some positive action for the provisions to come into effect.

3.2 Therefore, Sections 17 and 31 of the Constitution Act, 1934 do not prevent a person who holds dual citizenship from becoming a Member of Parliament but once elected a member must not become a citizen of another country.

3.3 However the sections go further than this. It may be that a Member who sought a foreign passport or even travelled on a foreign passport may be in breach of these provisions. The Crown Solicitor has advised Clause 10 [redacted] Clause 10 [redacted] Nevertheless the point is arguable and should be clarified.

3.4 I have reviewed the current provisions in Section 17 and 31, and consider that they are unnecessarily restrictive. I consider that the requirements with respect to citizenship of Members should be consistent with the requirement placed on them as candidates.

3.5 Section 52(1) of the Electoral Act provides that
"A person is not qualified to be a candidate for election as a member of the House of Assembly or the Legislative Council unless he is an elector."

3.6 An 'elector' is defined in Section 4 as
"a person whose name appears on a roll as an elector (not being a person under the age of 18 years who is provisionally enrolled) and includes a person whose name should appear on a roll as an elector but has been, by error, omitted from the roll."

3.7 Section 29(1)(b) provides that, to be entitled to be enrolled on the electoral roll, a person must, be an Australian citizen or a British subject who was within the period of three months commencing on 26 October, 1983, enrolled under the repealed Act or a Commonwealth or Territory electoral roll.

3.8 Therefore, save for the exception applying to some British subjects, the only persons capable of being qualified as candidates for election are Australian citizens.

3.9 Therefore I propose that the new requirement under Section 17 and 31 should be for Members to retain their Australian citizenship throughout their term of office. Special provision will need to be made for Members who may not be Australian citizens but who fall within the exception applying to British subjects referred to above.

3.10 Costs and Staffing
This proposal has no cost or staffing implications.

4. RECOMMENDATIONS

4.1 I RECOMMEND that Cabinet approve the drafting of a Bill to amend the Constitution Act, 1934

Clause 10

[redacted]

4.2 A Brief to Parliamentary Counsel is attached.

C J Sumner
ATTORNEY-GENERAL

3/2/93

BRIEF FOR PARLIAMENTARY COUNSEL

Clause 10

[redacted]

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