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Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum

THE CURRENT POSITION – AN OVERVIEW

Since Federation Aboriginal affairs are dealt with at local, state and commonwealth level presumably with some level of co-ordination between them. Various efforts over the years have been made by government to improve the position of Aboriginal & Torres Strait Islander (ATI) people including by the Hawke government establishing the Aboriginal and Torres Strait Islander Commission (ATSIC) and its subsequent demise.¹ ATSIC, a body elected by ATI people, was tasked with ensuring ATI participation in policy formulation & implementation, promoting ATI self-management & self-sufficiency, further ATI economic, social & cultural development and co-ordination of the 3 levels of government in regards to policy that effects ATI people. Our Constitution self-evidently provided the Commonwealth with legislative power to establish ATSIC and to bestow upon that body sufficient power and authority to carry out its role. ATSIC was beset with problems and consequently the Howard government took the view that ATI interests were better prosecuted by subsuming or mainstreaming those tasks into government departments.

Over time, and consistent with the tide of events and history in this area, the High Court of Australia has developed indigenous rights under a line of authorities each of which enhanced the rights of ATI people. Significant among them was *Mabo*² and moving to more recent developments such as *Love*.³ The country is in many areas, moving towards a reconciliation with ATI people. This measure to amend our Constitution is another step along that path.

It is now proposed instituting in our Constitution something that appears to me to authorize Parliament to establish something that resembles ATSIC in terms of its representative character and its role. Part of the thinking behind the measure is to ensure the Voice has a constitutional mandate rather than simply being legislative in origin. The view in some quarters is the new body would then not be easily susceptible abolition at the whim of government as happened to ATSIC. In a general sense the proposed amendment is said by government to reflect principles as set forth in The Uluru Statement from the Heart (USFH). If the measure is adopted it will have immense symbolic significance.

CHANGING OUR CONSTITUTION – AN OUTLINE

¹ A Pratt & S Bennett, The end of ATSIC and the future of administration of Indigenous Affairs, *Current Issues Brief no. 4 2004 -05*, Parliamentary Library Publication (Cth) contains an excellent, review of matters related to ATSIC which was established to try to improve the conduct of indigenous affairs, however taking account of the date of publication it should be noted that the landscape has changed significantly since publication.

² *Mabo v Queensland (No 2)* (1992) 175 CLR 1

³ *Love v Commonwealth of Australia ; Thoms v Commonwealth of Australia* [2020] HCA 3 (11 February 2020)

We have a written constitution. It is an Act of the UK Parliament. When it came into effect on 1 January 1901 our country, the Commonwealth of Australia came into existence. The Constitution also formulated the structure of the Federation allocating powers and roles as between the new Commonwealth and the States as well as setting out separations of powers between the legislature, executive and judiciary⁴ The constitution contains a provision in it, section 128, which sets out the procedure to be adopted in order to affect change. Section 128 exists to ensure that the constitution is not changed the whim of the government for politically expedient purposes and to underline the gravity of a proposed change by requiring a proposed change to be approved by the people. Only by a majority of qualified voters in a majority of States approving a proposed amendment can the text of Constitution be changed. Section 128 does not impose a heavy burden on the government to implement change to the Constitution if the proposed change is supported by the people. However previous efforts to change the Constitution had often failed to garner sufficient popular support and therefore the proposal is rejected. Of 44 questions put to the people in a referendum, 6 have been approved. That is seen by most commentators as evidence of s128 being a very high bar to jump. I suggest that says more about the lack of substance in the failed proposal rather than saying anything about difficulties posed by section 128.⁵ It might also suggest a well founded significant level of distrust in the community of politicians from whom all proposals must derive. The orthodox view is that unless the major political parties support a measure it will certainly fail. At this stage it is unclear whether the Opposition will support it. In any event I think that for reasons including those discussed below, the proposal is one that lends itself to an effective campaign against its adoption.

THE HIGH COURT

If the measure is adopted following a successful (from the viewpoint of the government) the High Court will have a key role to play regarding how the measure impacts events. Central to the practical meaning of the Constitution is the way in which its text and context have been interpreted by the Courts since Federation. Over time the High Court has developed vast and complex jurisprudence on the meaning of the Constitution some of which are quite remarkable. Some provisions of the Constitution have been interpreted very narrowly while others quite broadly to such an extent as to invite a conclusion that the meaning found by the Court bears little resemblance to the text or the context of the Constitution itself.⁶ This feature of our Constitution leads to people describing it as a living Constitution. That notion sits uneasily with section 128 at several levels. The composition of the High Court has recently changed with Jagot J having been appointed to that Court by the government and in a few months the government will appoint another judge to replace the retiring Chief Justice. Where the composition of the High Court changes the jurisprudence of the Court can

⁴ *The Annotated Constitution of the Commonwealth of Australia, Quick & Garran*, John Quick and Robert Randolph Garran, Revised Edition, Lexisnexis Butterworths Australia, 2015. This book provides an excellent historical analysis of the ideas and discussions that led to the provisions in the Constitution which assists any understanding of what each provision was intended to mean when it came into effect.

⁵ *Inquiry into constitutional reform and referendums*, House of Representatives Standing Committee on Social Policy and Legal Affairs, AGPS December 2021 Canberra. This interesting and informative report canvasses issues related to changing the Constitution.

⁶ Blackshield, T, Williams, G, & Fitzgerald BF,; *Australian Constitutional Law Commentary and Materials*, The Federation Press 1996, Sydney for many illustrations of that point. Also refer to *Palmer v Western Australia*, HCA 5 (24 February 2021) for discussions of s92 and the technique deployed by the Court to further read down s92. S92 uses words 'shall be absolutely free'. Those words have been read down to mean only law calculated to have a protectionist intention or effect is unconstitutional. Palmer seems to indicate laws with overtly protectionist intention and effect are not unconstitutional measured against section 92.

change. Jagot J is a Labor appointment replacing a Labor appointment (Kean J). The next appointment will replace a Coalition appointment. Many of the legal issues I have mentioned will be determined by the High Court in the proposal is adopted and the outcome is difficult to predict. If the measure is approved and if the Parliament passes legislation as authorised by the measure, then the High Court will probably be asked to resolve some or all of the issues canvassed herein depending on what, if any legislation is passed by Parliament.

One interesting aspect worth noting is that the measure appears to relate only to the Commonwealth government. Many issues of concern to ATI people are, in the main, State and Territory government measures. For instance incarceration in prison usually arises out of being convicted of a State or Territory offence under the relevant criminal law. Housing policy, planning and environment laws are not Commonwealth law. The Voice has role at state or Territory level and has no power to make representation at that level. However if the Commonwealth passes legislation drafted with intent to cover State and Territory activities, and if the High Court upholds that law, then under section 109 of the Constitution the Voice would indeed apply to those levels of government. That is something that will become clearer when the proposed legislation to establish the voice is made public.

THE PROPOSED CONSTITUTIONAL AMENDMENT

The following words proposed to be added to the text of our Constitution have been circulated by government. My discussion mainly relates to what those words might mean if adopted.

- 1 **There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice**
- 2 **The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander people.**
- 3 **The parliament shall, subject to this Constitution, have power to make laws with respect to matters relation to the Aboriginal and Torres Strait Islander Voice including its composition, functions, powers and procedures⁷.**

LET'S NOW EXAMINE THE DRAFT PROPOSAL

Point 1. The adoption of this measure in a referendum does not, in and of itself, create the new body. Using the expression 'there shall be' means it is something that shall be created at some unspecified time in the future, however it authorizes Parliament to create that body. It's interesting to note that under the Constitution Section 101 uses the same words 'there shall be an Inter-State Commission...' in order to empower Parliament to establish an Inter-state Commission. The use of the word 'shall' carries with it an obligation or compulsion to establish that body. However as we know, that body having existed briefly under the Hawke government does not exist at the moment. If the analogy applies to the new body and the proposal is endorsed by the Australian people, Parliament must pass legislation to bring the body into existence. It could also opt not to do that. Of course if the body is created by Parliament then arguably Parliament can abolish the body in the same way ATSIC and the Interstate Commission were abolished. It could also pass further legislation amending the Voice. The USFH calls for the voice to be enshrined in the Constitution.⁸ The proposed form of words at point 1, for the reasons I have alluded to, does not conform with USFH in that respect. Quite the contrary. It merely empowers Parliament to create the Voice if it chooses to do

⁷ These words are set forth in the Bill currently before Parliament

⁸ Uluru Statement From the Heart, 2017 states "We call for the establishment of a First Nations Voice enshrined in the Constitution"

so⁹. Why don't the words expressly recognize and acknowledge the status of ATI as the original inhabitants of Australia or require those comprising the Voice be elected and to be members of the ATI community? That defect should be remedied.

Turning to point 2, self evidently presently any person or entity is presently entitled to make representations to Parliament or the Executive government on any issue or matter with no requirement on either body to respond. The various ATI bodies have effectively engaged in such activities for many years. At first glance we might ask what would this measure add to the current position regarding ATI people in terms of lobbying and making representations? The existing position will continue regardless of the fate of the measure and any subsequent legislation. Rational thought suggests that whatever is the outcome should the referendum pass the s 128 electoral test, it should most probably enhance the current position of ATI people. Against that background we see that point 2 has been drafted in very broad terms. The legislation establishing the role of the Voice could be broad ranging and remain within the scope of the express constitutional mandate. In that light, it is clear that all parliamentary measures and executive decisions are potentially subject to the Voice. The expression 'on matters' clearly includes all commonwealth laws and executive decisions because any law or decision is relevantly a 'matter'. Most often legislation and Executive decisions are of general application to all members of the community and therefore apply to ATI people. Next we need to look at what are the implications of use of the word 'representation'? The High Court has looked at the meaning of 'representation' in a line of cases giving rise to an implied freedom of political communication.¹⁰ The heart of the reasoning rests on the notion that representative government depends on freedom of political discussion. Underpinning that is the idea that information allows people to make rational judgements, particularly when voting at an election. This framework of analysis seems to me to be readily applicable to the notion of 'representations' envisioned in this part of the proposed measure because underlying the proposal is the concept of enhancing ATI peoples political influence and involvement. What might the practical effect of that? If Parliament enacts a law which limits matters to which the Voice might make representations or to narrowly define what a representation is or who is to be consulted by the Voice could that law be struck down by an activist High Court on grounds that it is inconsistent terms the Constitution? If the underlying Constitutional intention of the measure is to enable ATI to have input on decisions, in my view it follows that to assess whether or not it wishes make a representation all decisions and proposed legislation and regulations would need to be submitted to the Voice. That body would then need sufficient time and resources to evaluate it and seek input from its ATI constituents so it could decide whether or not to make representations. Obviously if there is no requirement to put measures to the Voice before implementing them, then to Voice would appear to have a limited role involving commenting on measures that have already been implemented or decisions already made and generally lobbying government. This is nothing more than the situation as it now exists. That view of the intention of the measure is difficult to reconcile with the principles propounded USFH and is therefore in that respect probably untenable. Of course it is impossible for all proposed measures to be put before the Voice without crippling the operations of the Commonwealth

⁹ I would suggest that the 'race' and 'external affairs' powers enable Parliament to establish the Voice and legislate each matter set forth in the proposed amendment without the Constitutional amendment being adopted.

¹⁰Blackshield, & Ors *op cit* note 6, chapter 21. The implied freedom limits the power of all levels of government in law making, but is being wound back in cases since more activist years of the Court some decades ago using devices such as proportionality analysis. Interestingly Seward J posited the question whether or not the implied freedom really exists in *LibertyWorks Australia, Commonwealth of Australia* [2021] HCA 18 at para 249.

government. Interesting questions that will arise in the High Court of Australia for determination include whether failure to submit legislation or executive decisions to the Voice can invalidate that measure. Although the Voice is not compelled to make representations it would probably have to seek input from all ATJ people, noting that ATJ people are not a uniform group who agree on all matters. What are the legal consequences if an ATJ group or individual is not consulted? How does the Voice determine who must be consulted? Does the tripartite test of Aboriginality apply to these issues including those who should be consulted?¹¹ What will be the decision making principles adopted by the Voice to determine whether or not to make a representation in respect of the proposed measure? The legislation passed in Parliament might deal with these issues, however there is no doubt in my mind disputes will arise and difficult questions will be determined by the Courts.

Looking next at point 3, firstly what do the words 'subject to this Constitution' mean? That is the language adopted in section 51 in relation to the heads of power set forth therein. Is that language intended to be language of limitation? Is there an inference to be drawn that there are no substantive new legislative or executive powers granted by the proposed amendment nor are there any new substantive rights reposed in ATJ people. It is difficult to see it in that way when looking at the extremely expansive view the Court takes of powers such as the external affairs power over time and the unpredictable nature of High Court decisions. The High Court will, no doubt, determine that interesting question in due course if the measure is successful at the referendum.

Secondly, Parliament will have powers to make laws with respect to the composition of the Voice. As mentioned previously that would appear to be starkly contrary to the USFH which also talks about ATJ people having power over their destiny and dealing with their torment of powerlessness. There are no restraints or limitations in the draft amendment as to whom Parliament appoints. There is a strong inference if we look at the 3 point generally that the membership must comprise ATJ people chosen by them as was the case with ATSIC, however if the government appointed non ATJ members to the Voice that is in compliance with the amendment because the members are at the discretion of the Parliament.

Thirdly Parliament will have power to bestow on the Voice, functions, powers and procedures. What does that mean? Obviously at a general level it entails bestowing on the Voice powers & functions necessary for the body to make representations. It would include staffing, administrative matters such as budgeting and such matters. It is interesting to consider whether Parliament has been given the authority to repose in the body powers and functions that do not give it the broadest possible ability to make representations. I suspect the High Court will be invited to consider that issue. If the central purpose of the body is to make representations to government it is difficult to see how that can be done without current, accurate and comprehensive information as alluded to above in the discussion of point 2 of the proposal. The Voice would need power to call for, use and retain information regarding matters that relate to decisions and measures in respect of which it may make representations. Without comprehensive information how can it make reasoned representations or decide not to act at all? I think Parliament would have to confer on the Voice extensive information gathering powers including coercive powers that apply to the private sector and to other levels of government. Clearly the amendment would equip Parliament with that power however it is worth noting that as things now stand the Constitution contains the 'Race Power'¹² and the 'External Affairs Power'¹³ both of which underpin the expansive power of the Commonwealth Parliament to make

¹¹ Keifel CJ, *op cit* no 3, paragraph 23

¹² Constitution of Australia Act 1900 (Imp) s 9, Section 51 (xxvi)

¹³ *Id*, Section 51 (xxix)

special laws regarding, *inter alia*, ATI people. It will be interesting to see what, if any, obligations Parliament imposes on the Voice to seek input from ATI people as to what representations should be made or not made by it on a particular issue.

POSSIBLE PRACTICAL EFFECTS?

In order to be consistent with the USFH and stated intention of the government and the amendment if it is approved and to ensure the Voice can make an informed decision as to whether or not to make a representation, all proposed legislation and executive action would need to require following steps to be taken before proceeding to implementation:

- A) A proposed law or executive decision is presented to the Voice and it would decide whether or not to make a representation on the proposal
- B) The Voice, having received the proposal, first seeks information from sources determined by it to inform its decision as to whether or not to make a representation
- C) The Voice, having received such input as required, presents the proposed law or decision and the information received to its ATI constituents
- D) The ATI constituents, after reviewing the material, provide input to the Voice to help inform its decision whether or not to make a representation
- E) The Voice, in light of the information to hand and feedback received decides whether or not to make representations to Parliament or the Executive
- F) If the Voice decides to make a representation, it makes the representation
- G) We might assume the representation is then evaluated by Parliament or the Executive before the decision is made

MY CONCLUSION

- The proposal fails to comply with the expectations of the USFH because it does not compel the Voice to be elected by ATI people. It should be rejected for that reason.
- The proposal fails to comply with the expectations of the USFH because passage of the amendment does not establish the Voice, rather Parliament creates the Voice and provides for its terms of operation. It should be rejected for that reason.
- The measure institutes into our Constitution special rights for members of a particular race and is therefore fundamentally a racist measure. It should be rejected for that reason.
- The measure reposes in Parliament significant new power and it has the potential to destabilise our structures and systems of government. It should be rejected for that reason.
- The measure if implemented consistently with its stated intention may make the operation of the Commonwealth government very difficult or impossible. It should be rejected for that reason.
- The Commonwealth currently has power to legislate the Voice into existence and provide it with powers the amendment refers to. It should be rejected for that reason.
- ATI people currently have the capacity to lobby Parliament and try to influence government decisions. It should be rejected for that reason.

At this stage the government has failed to provide a copy of the legislation it expects to pass in Parliament should the measure be adopted which would create the new body and what and how it operates. Nor has it provided any details as to how the Voice will operate. I hope they rectify that shortcoming as a matter of priority. Until those details are publicised we cannot really formulate a well based opinion on the measure, except to make the various comments I have made in relation to proposed form of words.

Many issues of concern to ATI people are a product of State or Territory law. Unless the legislation is drafted so as to apply to State and Territory law and that is then upheld in the High Court, issues such a proposed laws related to Criminal sentencing will not hear the Voice.

In previous referenda the government was required to ensure a viable 'No' campaign is given the same funding and support as is the case with the 'Yes' campaign. It has been announced that in this case the previous arrangements won't apply. Quite the contrary, the government will fund 'an information campaign'. It seems to me that decision is evidence that the government is not confident in the outcome of the proposal under the previous arrangements and the elimination of the 'No' case will assist. Much will depend on the position of the Opposition parties and independents, not to mention the big media outlets. I think the form of words is open to all sorts of criticisms some of which I have touched on. I also think the Government appears secretive and highly partisan when confronted with questions on what this whole thing amounts to.

Whatever is the case regarding the structure of the Voice established by Parliament should the measure succeed, the ATI representatives appointed to the Voice will, I predict, have significant political authority and present a political threat to any government that does not accept any representations made by it. If the measure is adopted it will radically change the political landscape providing ATI people (or those purporting to represent them) with enormous moral authority to influence the politics and policy of the day.

It seems to me the better way to proceed would be for the government to try to enact a symbolic recognition of ATI people in the Constitution. That is what various advocates have called for many years. The prospects for success would be far greater were that the case for reasons that include most of the issues I have raised would not exist (if it were well drafted). A symbolic change would be far more likely to attract the support of the Opposition. Part of a symbolic change could include repealing section 25 and also section 51 (xxvi).

If I am correct in suggesting the Commonwealth already has the power to set up a Voice, then that strengthens the argument for an amendment that is limited to symbolism. Ironically it seems to me that if this measure is approved at the Referendum it might be seen as hugely divisive because there will those who say it creates in our Constitution special substantive rights that apply only to one sector of our community determined by their race. However if the measure fails it may be seen by some as another setback for race relations and yet another kick in the guts for indigenous Australians.

I hope the committee finds my comments of some interest.

Stuart McRae.

