THE HON IAN CALLINAN AC

20 April 2023

Committee Secretary
Joint Select Committee on the Aboriginal Torres
Strait Islander Voice Referendum
POX Box 6201
CANBERRA ACT 2600

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Dear Sir/ Madam,

I enclosed a Submission, including an attachment forming part of it, relating to the Inquiry being conducted by the Joint Select Committee. I have no objection to the publication of it.

I do not wish to appear before the Joint Selection Committee.

Kind regards,

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JOINT SELECT COMMITTEE ON THE ABORIGINAL AND TORRES STRAIT ISLANDER VOICE REFERENDUM

SUBMISSION

I.D.F. Callinan AC

A. REPRESENTATIONS, REPRESENTATION, AND IMPLICATIONS

1. There are two aspects of the proposed Voice which need to be understood at the outset.
2. Proponents say that all that the Voice demands is that Indigenous Australians have the right to make representations [only] to both the executive government and the parliament. But yet there would hardly be a lawyer, or any interested member of the community who did not believe and expect that *every* representation had at least to be given consideration. In other words, already, one implication is universally being read into language which says nothing in terms of what is to happen when a representation is made. There is a real possibility that courts will in future read into a new s 129 further implications.
3. The second incongruity, largely overlooked so far, is that the proposed Voice makes no provision at all, unlike the Constitution itself, for the composition of the Voice as a Constitutional personality. The parliament, the House of Representatives and the Senate, must be "directly chosen by the people",[1] but yet there is to be no Constitutional insistence that the members of the Voice will be directly chosen by the Indigenous People. So far, there is not even a proposal for a franchise of the kind to be adopted for the election of a South Australia State Voice. All of the indications are that the Voice will be made up of a hand-picked Canberra cadre. In short, it is probable that the representations will not be made by a truly representative body.

B. CONSTITUTIONAL INTERPRETATION

4. The Explanatory Memorandum for the Bill has been much discussed. Lawyers have spoken of the Bill and the Explanatory Memorandum as if they were a guide to the construction of the proposed s 129 of the Constitution. Neither the Explanatory Memorandum nor the Bill for the referendum is any more a guide to the construction of the Constitution than the result of the referendum itself. As the majority said in the *Work Choices* case, the Constitutional text must be treated as the *one* instrument of

[1] *Australian Constitution* ss 7 and 24.

federal government.[2] In that case, the history[3] of four failed referendums and the debates of lawyers and legislators about them were held to be irrelevant by the majority.[4] The High Court in *Work Choices* in substance negated the results of those four referendums.

5.

a. There were several exchanges during the hearing of the Select Committee on Friday, the 14th of April 2023, in which reference was made to mandatory discretionary or mandatory considerations.[5] With respect, in my opinion, it is now and has been since 1998 the law that there is no distinction between mandatory requirements and other requirements:

> In our opinion, the Court of Appeal of New South Wales was correct in Tasker v Fullwood in criticising the continued use of the "elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".[6]

b. It is doubtful whether in the case of Constitutional interpretation, as opposed to statutory interpretation, there was ever a requirement to identify a condition or a consideration as a mandatory discretionary one or otherwise. The better

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[2] *New South Wales v Commonwealth* (2006) 229 CLR 1, 101 [134] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[3] *New South Wales v Commonwealth* (2006) 229 CLR 1, 285-301 [709]-[735] (Callinan J).
[4] *New South Wales v Commonwealth* (2006) 229 CLR 1, 99-101 [125]-[135] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[5] Evidence to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Canberra, 14 April 2023, 39, 40, 52.
[6] *Project Blue Sky and Ors v Australian Broadcasting Authority* (1998) 194 CLR 334, 390-391 [93].

view is that the Constitutional validity of an enactment in its terms, or its operation has to be determined as the majority said in *Work Choices* "according to the Constitutional *text*".[7]

C. UNCERTAINTY

6. Sub-section 129(2) would empower the Voice to make representations … on matters relating to Aboriginal and Torres Strait Islander Peoples. What does "relating to" mean? There was discussion in the hearings to date about "core" matters.[8] The proposed subsection does not make any reference to "core" matters. The words "in relation to" are words of the broadest possible import. Again, in the end, the High Court will decide what matters relate to Aboriginal and Torres Strait Islander Peoples. It should be carefully noted that the proposed amendment is unqualified; it does not say core matters, or matters wholly, predominately, substantially, partially, exclusively, essentially, basically, largely, entirely, currently, broadly, especially, or even beneficially related to Aboriginal and Torres Strait Islander People. Everything is at large. The High Court has never gone as far as the Supreme Court of the United States in holding that a matter fell within the *penumbras* of a Constitutional right or power.[9] A penumbra is "the partially shaded outer region of the shadow cast by an opaque object; a peripheral or indeterminate area or group",[10] a region in which implications are found.

D. THE OPINION OF THE SOLICITOR-GENERAL

7. There has been political discussion about the non-disclosure of the opinion of the Solicitor-General of the Commonwealth on the proposed Voice. The opinion of the Solicitor-General on any Constitutional topic is worth having but it is not the Solicitor-General who has the say here, it is the Court. Equally, the public might be interested in what the opinion of the Solicitor-General was of the likelihood of success of the Commonwealth in the case of *Love v Commonwealth*.[11] I doubt whether many lawyers or the Solicitor-General, who unsuccessfully argued the case for the Commonwealth,

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[7] *New South Wales v Commonwealth* (2006) 229 CLR 1, 101 [134].
[8] Evidence to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Canberra, 14 April 2023, 43, 44, 52.
[9] Griswold v Connecticut, 381 U.S. 479 (1965), 841-486.
[10] 'Penumbra' *Oxford English Dictionary* (Webpage) www.oed.com/view/Entry/140382?redictedFrom=penumbra#eid; see also 'penumbra' *Macquarie Dictionary* (Webpage) www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=penumbra.
[11] *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 153.

gave an opinion predicting the outcome there. The case is a classic case study in uncertainty of outcome in Constitutional legal affairs. The High Court divided four-three. In no way in disparagement of the majority, it may be observed that the minority were Kiefel CJ, a Supreme, Federal and High Court Judge of more than 25-years' experience, Keane J, a former Solicitor-General of Queensland, Court of Appeal Judge, Chief Justice of the Federal Court and Justice of the High Court for some years, and Gageler J, a former Solicitor-General of the Commonwealth.

E. ANYONE'S GUESS?

8. Section 51(xix) of the Constitution empowers the Commonwealth to make laws … with respect to naturalisation and aliens. Notwithstanding the clarity of the words there, the majority of the High Court in *Love* decided that "Aboriginal Australians [wherever born] were not within the reach of the aliens powers in s 51(xix)". In reaching their conclusion, the majority applied a tripartite test earlier formulated by Deane J in the *Tasmanian Dams* case[12] and adopted in *Mabo (No. 2)*[13] in aid of their construction of the Constitution notwithstanding that *Mabo* was not a Constitutional case but a common law case about occupation, use and ownership of land. It should also be pointed out that Deane J stated that test, without citation or other reference, as the "conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal Community as an Aboriginal".[14]

F. CLOG ON GOVERNMENT AND BUSINESS

9. Concerns that the Voice as propounded would delay and disrupt government and business activity cannot be brushed aside. It would be an unwise businessperson or a naïve politician who would not be soliciting in advance of any project or programme the views of the Voice. And when the Voice speaks, who is to receive its words? Will there not need to be established a recipient of representations by the Voice, a new bureaucracy in a new building in Canberra? And what about representations to the Executive? Will they go to the head of the executive government in Australia, the

[12] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[13] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.
[14] *Commonwealth v Tasmania* (1983) 158 CLR 1, 274 (Deane J).

Governor-General, or a department of the Governor-General, established by a Minister of State for the Commonwealth? And how will representations be *processed*? At the very least, there are bound to be multiple inter-departmental committees poring over, and debating among themselves how they should advise the government to act, and the parliament to begin the processing of an enactment.

10. There is a possibility also of interference with state government and intra-state business activity. Take for example a project, say a fully compliant solar-panel-powered factory on freehold land making wind turbines for sale and consumption entirely within a state and therefore hitherto not a matter for Commonwealth intervention. But say the factory is near land of cultural significance to Indigenous People and that the Voice makes a representation that the size, shape and general nature of the factory are offensive to that culture and that the Commonwealth, either at an Executive or Parliamentary Level should take steps to veto the project. Even if it were to be decided by the High Court that a combination of sections 51(xxvi), (xxxix), 109 and 129 did not confer a legal right to of veto over or involvement by the Commonwealth in the project, there would likely still be delays and additional cost to the project while the Commonwealth, the Voice and the State argued about it.
11. The conversation between lawyers has focussed on the High Court but it should not be overlooked that the Federal Court also has an important role to play. The Federal Court is the court that decides the vast majority of federal administrative law cases. Because of the inevitable increase in bureaucracy as a result of the Voice and the large and diverse number of First Peoples, there is bound to be an increase in administrative decision making and complaints about it, all giving rise to further delays in Administrative Appeals Tribunals, and the like, and Federal Court proceedings.
12. A further matter is the role that the Federal Court has in deciding disputed questions of fact. There will be disputes about facts, that is to say, disputes between members of the Voice, the First Peoples themselves, and others who may be affected by the operation of the Voice. For more than 30 years now, the High Court has outsourced fact-finding, even in matters in which it has original jurisdiction, to other courts, especially the Federal Court. The facts necessary for the resolution of *Mabo (No. 2)* were found after a long and involved hearing in the Supreme Court of Queensland (Moynihan J).
13. It was said in favour of the proposed Voice to the Joint Select Committee that the Voice "will not waste its social or political capital by exploring the outer range of its scope of

representation".[15] It is a brave claim to have the measure of Social and Political Capital at any time. It is in the nature of most people and almost all political organisations to probe and expand the outer range of its scope.

F. IMPLIED FREEDOM OF POLITICAL COMMUNICATION

14. It would be imprudent to underestimate the capacity of any future High Court for ingenuity or originality. It was not until 1992, when the High Court some 90-years-old, that it was able to discover in the text and structure of the Constitution something that never had been discerned before, an *implied* freedom of political communication.[16]
15. Attached to this submission and forming part of it is the article written for the Australian newspaper and published on the 16th December 2022.

G. CONCLUSION

16. It is an irony that so many of the proponents of the Voice, well-intentioned and highly-regarded as they are, should be echoing the language so often and infamously used by the late Sir Johannes Bjelke-Petersen to reporters seeking information about government, "*don't you worry about that*".

20 April 2023

[redacted]

I.D.F. Callinan AC

[15] Evidence to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Canberra, 14 April 2023, 48.
[16] Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.