

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

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1. The Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill proposes an alteration of the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. This will be achieved through insertion of a new Chapter IX headed 'Recognition of Aboriginal and Torres Strait Islander Peoples' and a new section 129 headed 'Aboriginal and Torres Strait Islander Voice'. The proposed section 129 consists of an opening explanatory phrase recognising Australia's Indigenous peoples and three subsections that: (i) establish the Voice, (ii) provide that the Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples, and (iii) provide that the Parliament may make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.
2. When the idea of what was then called an 'Indigenous Advisory Council' was first proposed by the Cape York Institute, it was emphasised that the body must be:
 - non-justiciable: it does not transfer power to the courts (but it should not contain an unattractive 'non-justiciable' or 'no legal effect' style clause) and it therefore does not diminish parliamentary sovereignty;
 - efficient: the procedure should not slow down or hold up the machinery of Parliament;
 - not open to abuse: Parliament must keep running if no advice is delivered by the body on a particular law; and
 - certain and clear: it is precise enough to be understood easily by all parties.¹
3. In its *Final Report*, the Referendum Council adopted four principles proposed by the Expert Panel on Constitutional Recognition of Indigenous Australians to guide assessment of proposals for constitutional reform.² These principles are that the proposal must:
 - contribute to a more unified and reconciled nation;

¹ *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Final Report* (2015) para [4.49].

² *Final Report of the Referendum Council* (30 June 2017) p 5.

- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
 - be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
 - be technically and legally sound.
4. In the short time that has been made available for public comment and discussion on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill, it is important that the Parliament ensures that any proposed constitutional amendment meets all eight of these criteria. This submission focuses on two of these eight principles, namely that the proposal must be certain and clear, and that it must be technically and legally sound. The submission offers preliminary analysis of the likely meaning, interpretation and operation of each aspect of the proposed constitutional change. Each aspect is dealt with in the order in which it appears in the Bill.

A. New Chapter in the Constitution

5. It is proposed that a new Chapter IX be inserted into the Constitution. As a distinct chapter, this would give the Indigenous Voice a structural prominence in the Constitution similar to, but distinct from, the other major institutions established by the Constitution, namely the Parliament (Ch I), the Executive Government (Ch II) and the Judicature (Ch III). It would also give the recognition of Australia's Indigenous peoples a structural prominence in the Constitution similar to three other important constitutional topics, namely Finance and Trade (Ch IV), the States (Ch V), and Constitutional Alteration (Ch VIII).
6. The structural features of the Constitution, and especially its division into distinct chapters, have led to several constitutional implications recognised by the High Court. The most important implications concern the separation of powers, representative democracy, and federalism.
7. The establishment of the Parliament, the Executive Government and the Judicature in Chapters I, II and III and the vesting of legislative, executive and judicial power in these institutions has led to the implication that the separation of powers is a fundamental constitutional principle. The High Court has held that, as a matter of general principle, judicial power, together with power incidental to it, cannot be vested in non-judicial bodies and non-judicial powers cannot be vested in judicial bodies.³ It has also implied from Chapter III of the Constitution a limitation upon the ability of State Parliaments to invest State supreme courts with power incompatible with s 71 of the Constitution.⁴ However, it has allowed the Parliament to delegate law-making power to the Executive so long as Parliament maintains ultimate control over it,⁵ and it has recognised that the Constitution requires Government Ministers to hold seats in Parliament within six months of their appointment,⁶ consistently with the practices of parliamentary responsible government.⁷ The

³ *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54, 88-90; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275-8.

⁴ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

⁵ *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

⁶ Australian Constitution, s 64.

⁷ *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 114, 120.

establishment of a system of representative and responsible government by Chapters I and II of the Constitution has been held to imply a constitutionally guaranteed freedom to communicate about political matters.⁸ Similarly, the Constitution's establishment of a federal system has led to the implication that the Commonwealth and the States must continue to function as independent governments.⁹

8. The insertion of a new Chapter IX into the Constitution would create the potential for similar structural implications concerning the Indigenous Voice and recognition of Australia's Indigenous peoples. Unlike the failed Inter-State Commission,¹⁰ the Indigenous Voice would have its own chapter. While distinct from the Parliament, the Executive and the Courts, the Indigenous Voice would be accorded a similar constitutional status. The exact nature of any structural implications that might be derived from the establishment of the Indigenous Voice in its own chapter cannot sensibly be considered apart from the specific language of the proposed section 129. What can be said at this point is that any such structural implications would likely concern the constitutional relationship between the Indigenous Voice and the other institutions established by the Constitution, and especially its capacity to make representations to the Parliament and the Executive Government, as provided for in the proposed section 129. This question of potential implications is therefore considered at more length below, in connection with the specific terms of section 129.

B. Recognition of the First Peoples of Australia

9. The opening words of the proposed section 129, although not part of its operative clauses, are a form of constitutional recognition of Australia's Indigenous peoples as 'the First Peoples of Australia'. The proposed new preamble put to the Australian people for their approval in the constitutional referendum held in 1999 similarly recognised 'Aborigines and Torres Strait Islanders' as 'the nation's first people'.¹¹ The constitutional amendment proposal in 1999 included an additional section which provided that the preamble would be of no legal force and was not to be considered in the interpretation of the Constitution.¹² In the absence of such a provision, it is clear that the opening words of the new section 129 will inform the interpretation of the section itself and its place and operation within the Constitution as a whole.
10. The reference to 'the First Peoples of Australia' is likely to be interpreted in the context of the reference in the preamble to the *Commonwealth of Australia Constitution Act 1900* (UK) to the agreement of 'the people' of the several Australian colonies 'to unite in an indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established'.¹³ Several Justices of the High Court have affirmed that,

⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559–60.

⁹ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Austin v Commonwealth* (2003) 215 CLR 185; *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410.

¹⁰ Australian Constitution, s 101.

¹¹ Constitution Alteration (Preamble) 1999 (Cth), Sch.

¹² Constitution Alteration (Preamble) 1999 (Cth), section 4, inserting a new section 125A into the Constitution.

¹³ *Commonwealth of Australia Constitution Act 1900* (UK), preamble.

following termination of the power of the UK Parliament to legislate for Australia,¹⁴ ultimate sovereignty is now vested in the Australian people.¹⁵ The opening words of section 129 will raise similarly fundamental questions about the constitutional relationship between the First Peoples and the Australian People. At present the Constitution recognises the distinct existence of the people of each State (section 7) but also treats them as integral parts of the people of the Commonwealth (section 24). In similar terms, it is likely that the ‘First Peoples’ referred to in section 129 will be recognised by the courts as a distinct and yet integral part of the ‘Australian People’.¹⁶ While such matters might be considered merely theoretical, as Sir Owen Dixon once observed, such theories are capable of generating rules of law when adopted by a system of law as part of its principles.¹⁷

11. In Canada and the United States, the terms most frequently used are ‘First Nations’¹⁸ and ‘Domestic Dependent Nations’.¹⁹ While the word ‘nation’ may carry a relatively stronger signification than the term ‘people’, the words can also be used interchangeably. The Macquarie Dictionary defines ‘nation’ as ‘a relatively large body of people living in a particular territory and organised under a single, usually independent government’ while it defines ‘people’ as ‘the whole body of persons constituting a community, tribe, race, or nation’.²⁰ Unlike the proposed section 129, the *Uluru Statement from the Heart* uses the terms ‘first sovereign Nations’ and ‘First Nations’. The International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) protect the right to self-determination of all ‘peoples’, while the United Nations Declaration on the Rights of Indigenous Peoples (2007) affirms the right of self-determination of ‘indigenous peoples’.
12. The status and rights of Canada’s First Nations are expressly recognised and protected by sections 25 and 35 of the *Constitution Act 1982* (Can). Section 35(1) states that ‘The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.’ Section 35(2) defines ‘aboriginal peoples of Canada’ to include ‘the Indian, Inuit and Métis peoples of Canada.’ Section 25 provides that the ‘guarantee of certain rights’ in Canadian Charter of Rights and Freedoms ‘shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada ...’.
13. The Supreme Court of Canada has held that the Crown has a special fiduciary relationship with the country’s First Nations,²¹ and that section 35(1) ‘incorporates the government’s responsibility to act in a fiduciary capacity with respect to Aboriginal peoples’ in a manner that imports certain

¹⁴ *Australia Acts 1986* (UK) and (Cth).

¹⁵ Eg, *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171, 180 (Deane J); *McGinty v Western Australia* (1996) 186 CLR 140, 171 (Deane J), 201 (Toohey J), 230 (McHugh J).

¹⁶ See, for example, Gageler J’s brief discussion in *Love v Commonwealth* [2020] HCA 3 at [137] of ‘discrete segment[s] of the people of Australia’.

¹⁷ Owen Dixon, ‘The Statute of Westminster’ (1936) 10 *Australian Law Journal* 96, 96.

¹⁸ Eg, *Taku River lingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388.

¹⁹ *Cherokee Nation v Georgia* (1831) 8 L Ed 25 at 31, 32.

²⁰ *The Macquarie Dictionary of Australian English* (Macquarie Publishers Australia, 2015), sv ‘nation’, ‘people’.

²¹ *Guerin v The Queen* [1984] 2 SCR 335.

limitations or restraints on the exercise of sovereign power.²² The Supreme Court has also held that it is a ‘corollary’ of section 35 that ‘the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.’²³ As the Court explained:

... Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.²⁴

14. The Australian constitutional context is different from Canada’s, and one would not expect any simple one-for-one correspondence between the legal doctrines developed in the two countries. However, their constitutional histories also have several important similarities and where these exist the jurisprudence of the two countries has often run along parallel lines.²⁵ To date, Australian courts have not affirmed the proposition that Australian governments owe fiduciary duties towards Australia’s Indigenous peoples.²⁶ However, there has been discussion of the possibility in High Court and Federal Court decisions.²⁷ The Court’s rejection of a fiduciary duty in *Wik Peoples v Queensland* depended on the specific statutory context.²⁸ As Kirby J explained in *Thorpe v Commonwealth*, ‘The result is that whether a fiduciary duty is owed by the Crown to the indigenous peoples of Australia remains an open question. This Court has simply not determined it. Certainly, it has not determined it adversely to the proposition. On the other hand, there is no holding endorsing such a fiduciary duty ...’.²⁹ The recognition of Australia’s First Peoples in the opening words of section 129 would provide some constitutional support for these lines of reasoning because it would recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia.³⁰

²² *R v Sparrow* [1990] 1 SCR 1075, 1105-1108.

²³ *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, [20].

²⁴ *Ibid* [25].

²⁵ Eg, *McGinty v Western Australia* (1996) 186 CLR 140, 186-187, 203-204, 246-247, 267-268, 287-288.

²⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 60 (Brennan J, with whom Mason CJ and McHugh J agreed), 113 (Deane and Gaudron JJ), 163-170 (Dawson J); *Coe v Commonwealth* (1993) 118 ALR 193, 202 (Mason CJ); *Wik Peoples v Queensland* (1996) 187 CLR 1, 83 (Brennan CJ).

²⁷ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 199-204 (Toohey J); *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, 204-5 (Lehane J). Academic commentary has also advocated for a fiduciary duty based on the honour of the Crown: Kirsty Gover, ‘The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism’ (2016) 38(3) *Sydney Law Review* 339.

²⁸ *Wik Peoples v Queensland* (1996) 187 CLR 1, 255-256 (Kirby J).

²⁹ *Thorpe v Commonwealth (No 3)* (1997) 71 ALJR 767, 776.

³⁰ The principle of the honour of the Crown under Canadian law ‘derives from the Crown’s assertion of sovereignty in the face of prior Aboriginal occupation’: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 SCR 550, [24].

C. An Aboriginal and Torres Strait Islander Voice – subsection 129(i)

15. Subsection 129(i) is couched in mandatory language: there ‘shall be a body, to be called the Aboriginal and Torres Strait Islander Voice’. Similar language is used in section 101 of the Constitution, which states that there ‘shall be an Inter-State Commission’. However, it was not until 1912, that the Inter-State Commission was established by federal legislation. Following a High Court decision in 1915 that the Commission could not be invested with judicial power,³¹ the body lapsed in 1920 and the legislation was repealed in 1950. Legislation re-establishing the Commission with more limited powers was passed by the Parliament in 1975 but not put into effect until 1983. In 1989 legislation, the Commission was again abolished, with some of its functions being transferred to the new Industry Commission.³²
16. The Commission’s checkered history bears out John Quick and Robert Garran’s observation in 1901 that despite the mandatory language of section 101, the existence and operation of the Inter-State Commission would depend on legislation enacted under section 103, and that the Parliament could not be compelled to enact such laws.³³ The existence of the Voice will similarly depend on enabling legislation being enacted by the Parliament pursuant to subsection 129(iii). The legislative power conferred by subsection 129(iii) is ‘subject to’ the Constitution and therefore subject to subsections 129(i) and (ii). The mandatory language of subsection 129(i) suggests that the power conferred by subsection 129(iii) could not be exercised to abolish the Voice once established. Because no litigation was brought challenging the legislation abolishing the Inter-State Commission, the prospects of a similar challenge to any law abolishing the Voice would remain open.
17. Subsection 129(i) contains three other mandatory elements. Firstly, the Voice must be a ‘body’ and therefore not, it seems, an individual office holder. Secondly, it must bear the character of an ‘Aboriginal and Torres Strait Islander’ Voice. Thirdly, the entity is described in the singular: it is one ‘Voice’. Several questions arise as to what these elements would mean in practice.
18. While it is proposed that the Parliament will have power under subsection 129(iii) to make laws with respect to the ‘composition’ of the Voice, subsection 129(i) requires, in effect, that the composition of the body must be sufficiently ‘Indigenous’ so as to bear that character. Under the system of representative democracy established by the Constitution, there is no constitutional or legal requirement that members of Parliament identify with their constituents in this sense. However, the Constitution does impose certain mandatory qualifying and disqualifying requirements for election as a member of the Parliament.³⁴ In *Love v Commonwealth*, a majority of the High Court drew a constitutional distinction between two categories of non-citizen ‘aliens’ for the purposes of section 51(xix) of the Constitution,³⁵ namely those who are Aboriginal

³¹ *New South Wales v Commonwealth (Wheat case)* (1915) 20 CLR 54.

³² Stephen Gageler, ‘Chapter IV: The Interstate Commission and the Regulation of Trade and Commerce under the Australian Constitution’ (2017) *Public Law Review* 205.

³³ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 895-6.

³⁴ Australian Constitution, sections 16, 34, 44.

³⁵ Australian Constitution, section 51(xix) gives the Parliament power to make laws with respect to ‘naturalization and aliens’.

Australians and those who are not.³⁶ In that case, the Court adopted the tripartite test for indigeneity established in the *Mabo* case, namely descent, identification and recognition.³⁷ While there are questions about the sufficiency, necessity and weight of each of these three elements, it is likely that the High Court would adopt the tripartite test, or some adaptation of it, for determining whether a body established by legislation enacted under section 129(iii) was sufficiently Indigenous in character to meet the requirements of section 129(i).

19. Section 129 contains no reference to the manner in which members of the Voice are to be selected or appointed, so it appears to leave it to the Parliament to determine whether its members are to be chosen by direct or indirect election or some other method of selection or appointment. The *Final Report* of the Indigenous Voice Co-Design Process proposed that membership of the National Voice would be structurally linked to Local and Regional Voices, which would in turn be comprised of a broad range of Aboriginal and Torres Strait Islander people, family groups, communities, organisations and other stakeholders.³⁸ Any legislation enacted under subsection 129(iii) providing for the election or appointment of the Voice would need to meet the indigeneity requirement of subsection 129(i).
20. Subsection 129(i) also refers to the ‘Voice’ in the singular. As a ‘body’, it would need to be composed of a plurality of individual members, but by referring to the ‘Voice’ in the singular, subsection 129(i) appears to require that there must be only one such body. This gives rise to two questions, firstly concerning the composition of the body, and secondly concerning the nature of the representations to be made by the body.³⁹ The second question is addressed below. In relation to the first question, the issue is whether it would be open to the Parliament, legislating under subsection 129(iii), to provide for a composite body consisting of, or somehow representative of, a plurality of smaller regional or local bodies. The singularity of the Voice, as described in section 129(i), might be considered to militate against this possibility. However, also to be considered is the design of the House of Representatives, which consists of members who are individually representative of the people of local electorates, and the design of the Senate, which consists of senators who represent the people of their respective States.⁴⁰ Moreover, the Parliament consists of the King and the two distinct houses, and yet the institution of the Parliament is referred to in the singular.⁴¹ By analogy, it appears that it would be open to the Parliament to constitute the Voice as a composite body, provided that it remained a singular entity capable of exercising powers and performing functions as such.

³⁶ *Love v Commonwealth* (2020) 270 CLR 152.

³⁷ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.

³⁸ Indigenous Voice Co-design Process, *Final Report to the Australian Government* (Australian Government, July 2021) 18, 23.

³⁹ This second question is addressed below.

⁴⁰ Australian Constitution, sections 7 and 24.

⁴¹ Australian Constitution, section 1.

D. A Right to make Representations – subsection 129(ii)

21. Like subsection 129(i), subsection 129(ii) would operate independently of subsection 129(iii) in the sense that, although the Parliament would be given power to make laws with respect to the ‘functions’ and ‘powers’ of the Voice, subsection 129(ii) would mandate that these must include the capacity to ‘make representations to the Parliament and the Executive Government’, provided that such representations are ‘on matters relating to Aboriginal and Torres Strait Islander peoples’.
22. The Macquarie Dictionary relevantly defines ‘representation’ as ‘speech or action on behalf of a person, body, business house, district, or the like by an agent, deputy, or representative’. It is noted that when used in the plural (ie, ‘representations’), it often means ‘a description or statement, as of things true or alleged’, or ‘a statement of facts, reasons, etc., made in appealing or protesting’. The Macquarie Dictionary also notes that representations are made by ‘delegates having a voice in legislation or government’.⁴²
23. There is no indication in subsection 129(ii) as to whether representations must be in writing or may be delivered orally. The Macquarie Dictionary definitions do not limit the term to written representations. The primary means by which elected members of the Parliament represent their constituents is through engaging in oral debate on the floor of the Parliament, consistent with the derivation of the word ‘parliament’ from the French ‘parlement’ (a deliberative council or assembly at which debate, discussion, conversation and negotiation occurs) and ‘parler’ (to speak or talk).⁴³ The primary signification of the word ‘voice’ refers to ‘sounds naturally uttered by a single person in speech or vocal utterance’.⁴⁴ It therefore appears that subsection 129(ii) contemplates representations made either orally or in writing.
24. This gives rise to the question whether the Parliament, exercising its legislative power under subsection 129(iii), could require that representations must only be made in writing. Despite the broad language used in subsection 129(iii) to define the Parliament’s powers, there is reason to doubt whether it could do this. It is true that, read in isolation, the conferral of legislative power ‘with respect to matters relating to the Aboriginal and Torres Strait Islander Voice’ would include the manner, mode or means by which the Voice may make representations. However, subsection 129(iii) must be read subject to subsection 129(ii), which places no limits on the form in which representations may be made. As a specifically Indigenous Voice, it could be argued that it would be inappropriate to interpret the power in subsection 129(iii) to enable the Parliament to restrict the freedom of Indigenous peoples to deliver their representations in the manner they consider most fitting or appropriate, having regard to their own particular customs and traditions and manner of communication. While the legislative power conferred by subsection 129(iii) is not limited to the ‘composition, functions, powers and procedures’ of the Voice, none of these particular terms is apt to include regulation of the form in which, or the or means by which, representations are made. While there is a general principle that when construing the language of the Constitution the courts should always lean to the broader interpretation,⁴⁵ a wide interpretation of the legislative

⁴² *The Macquarie Dictionary of Australian English* (Macquarie Publishers Australia, 2015), sv ‘representation’.

⁴³ *Oxford English Dictionary* (Oxford University Press, 2000), sv ‘parliament’.

⁴⁴ *The Macquarie Dictionary of Australian English* (Macquarie Publishers Australia, 2015), sv ‘voice’.

⁴⁵ *Jumbunna Coal Mine, No Liability v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 367–8.

power would enable the Parliament to narrow the scope of the right, enshrined in subsection 129(ii), to make representations, by mandating that they must be made in some particular form. It would be open to a court to consider that it is this right that should be accorded a liberal and generous interpretation, not the power of the Parliament to control its expression.⁴⁶

25. A right to make representations is not, of itself and according to its natural meaning, a right to be consulted or a right to give advice that must be considered, accommodated or followed. However, it is well established that when interpreting the Constitution, the courts are not limited to discerning the ‘expressed’ meaning of the words used but must also discern their ‘necessarily implied’ meaning.⁴⁷ Thus, it has been held that the constitutional requirement that the members of Parliament are to be ‘directly chosen by the people’ (sections 7 and 24) necessarily implies that the electors must be able to exercise a ‘true’, ‘free’, ‘informed’ and ‘effective’ choice when voting in elections, and that this requires they have an ‘opportunity to gain an appreciation of the available alternatives’.⁴⁸ In addition, the provisions of the Constitution establishing a system of parliamentary responsible government (sections 6, 49, 62, 64, 83) require that voters must not be prevented from having ‘access to information’ relevant to the conduct and performance of ministers, public servants, statutory authorities and public utilities, just as the requirement that the Constitution can only be amended following popular approval at a referendum (section 128) requires that electors must not be prevented from having ‘access to information that might be relevant to the vote they cast in a referendum to amend the Constitution’.⁴⁹
26. This line of cases raises the question whether the constitutional right of the Indigenous Voice to make representations to the Parliament and the Executive Government would give rise to similar implications. The implied freedom of political communication is not an individual right but rather operates as a limitation on the exercise of legislative and executive power in a manner that would unjustifiably restrict the freedom to receive and disseminate information relevant to making electoral choices.⁵⁰ At a minimum, it seems clear that a similar negative implication would apply to the Voice. Such an implication would prevent the enactment of laws or the exercise of executive powers in a manner that would unjustifiably restrict the capacity of the Voice to make ‘true’, ‘free’, ‘effective’ and ‘informed’ representations. The more difficult question is whether a more far-reaching implication would arise, namely that the Voice must be provided with everything reasonably necessary to enable it to make representations having these sorts of qualities. This would conceivably include the provision of all relevant information available to the Executive Government concerning a matter that relates to Indigenous peoples, as well as the provision of sufficient resources and expertise to analyse and evaluate that information and formulate an appropriate set of representations on the matter.

⁴⁶ Compare *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 303, noting that ‘[i]t is well established that s. 51(xxxi) operates as a constitutional guarantee and that, for that reason, “acquisition” and “property” as used in that paragraph are to be construed liberally’.

⁴⁷ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 155.

⁴⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

⁴⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

⁵⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

27. A ‘positive’ a right of this kind would go further than the implied freedom of political communication, which only functions as a ‘negative’ prohibition on power. Whether a positive right to information or resources would be implied from the right to make representations would depend, in part, on a comparison of the role played by individual electors in the constitutionally prescribed system of representative and responsible government and the constitutionally enshrined right of the Indigenous Voice to make representations to the Parliament and the Executive Government. The institutional nature and function of the Voice as an integral part of the constitutional system of government, enshrined in its own chapter in the Constitution, would make it analogous to the Courts, which are dependent on funding in order to perform their constitutional functions. While adequate funding of the Courts has not been recognised as a constitutional requirement, Sir Gerard Brennan did once observe that ‘Constitutional convention, if not constitutional doctrine, requires the provision of adequate funds and services for the performance of curial functions.’⁵¹
28. Section 61 of the Constitution states that the executive power of the Commonwealth extends to the ‘execution and maintenance’ of the Constitution. Executive action can and must be undertaken, in exercise of this power, to meet the obligations imposed on the Executive Government by the Constitution itself. Of foremost importance is the need to ensure that the essential institutions of the Commonwealth as established by the Constitution are adequately funded and resourced. The Constitution establishes a Federal Parliament, consisting of the Senate and the House of Representatives. The Constitution refers explicitly to several specific functions of the Governor-General including the summoning, dissolving and proroguing of Parliament, the determination of the time for holding of its sessions and the holding of joint sittings (sections 5, 57), the issue of writs for general elections for the House of Representatives (section 32) and transmission of messages to the Parliament recommending the appropriation of money (section 56). As the High Court pointed out in *Brown v West*, ‘there is no doubt’ that the Executive must facilitate the functioning of Parliament by providing for its necessary funding and administrative support, subject to the appropriation of funds.⁵² By parity of reasoning, section 61 likewise requires the Executive Government to facilitate the exercise of the judicial power of the Commonwealth not only by appointing federal judges (s 72), but also by providing for the payment of judicial salaries, the administration of justice, the functioning of the courts and the execution of their judgments and orders.
29. Also potentially relevant is the principle, particularly applicable to legislative powers, that with the grant of constitutional power there is implied everything necessary to make the grant of power effective.⁵³ There are, in addition, strong policy reasons to support an implication of this nature, given the importance of the Voice in providing a means by which Australia’s Indigenous peoples can have an effective means by which to make representations on matters that relate to them.⁵⁴

⁵¹ Gerard Brennan, ‘The State of the Judicature’ (1998) 72 *Australian Law Journal* 33, 35.

⁵² *Brown v West* (1990) 169 CLR 195, 201 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

⁵³ *D’Emden v Pedder* (1904) 1 CLR 91, 110; *Attorney-General (Vic) v Commonwealth* (1935) 52 CLR 533, 562; *Re Wakim; ex parte McNally* (1999) 198 CLR 511, 579 [122].

⁵⁴ See *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [143].

30. In practical terms, any implied right to the provision of the resources or information needed to make effective representations would have to be calibrated to the capacities of the Parliament and the Executive Government and the inherent differences between the nature and exercise of legislative and executive power and the representation-making function of the Voice. A test of relevance would have to be applied to ensure that the right to the provision of information was limited to matters of sufficient relevance to the specific interests of Australia's Indigenous peoples. Moreover, a failure to provide sufficient information would not, of itself, invalidate an exercise of legislative or executive power.

E. Representations to the Parliament and to the Executive Government – subsection 129(ii)

31. The proposed section 129(ii) refers to 'representations to the Parliament and the Executive Government of the Commonwealth'. Chapter I of the Constitution is headed 'The Parliament'. Section 1 states that the Parliament 'shall consist of the Queen, a Senate, and a House of Representatives'. Sections 7 and 24 state that the Senate and the House of Representatives are respectively composed of senators and members directly chosen by the people. Chapter II of the Constitution is headed 'Executive Government'. While the term is not defined as such, it evidently embraces the offices and institutions expressly addressed in that chapter, including the King, the Governor-General, the Federal Executive Council, Ministers of State, government departments and civil servants.⁵⁵ Section 61 also states that the executive power of the Commonwealth 'extends to the execution and maintenance of ... the laws of the Commonwealth'. Under numerous laws of the Commonwealth statutory powers are conferred upon Ministers, civil servants and officers of various statutory agencies, boards, corporations and other entities.
32. A question arises as to whether the capacity of the Voice to make representations to the Parliament and the Executive Government is a right to make representations to them as entire institutions, or is also a right to make representations to individual members of the two institutions, such as individual members of Parliament and individual civil servants. A second question arises as to whether such representations may also be made to agencies, boards and other entities established by statute to perform governmental or public functions.
33. In relation to the first question, the *Co-Design Report* suggests that representations could include communications on several levels. Representations to Parliament could include 'providing formal, tabled advice and giving evidence to parliamentary committees' and representations to the Government could include 'engaging with ministers and officials, including those responsible for mainstream policies and programs'.⁵⁶ Within the parameters of subsection 129(ii), the Parliament would have power under subsection 129(iii) to make laws regulating and facilitating the making of representations. Would it be able to make laws requiring, for example, all representations to Parliament must be tabled in Parliament or all representations to the Executive Government must be tendered in writing to the responsible Minister? Or does subsection 129(iii) entail the right to make representations more generally to individual officials and members of Parliament?

⁵⁵ Australian Constitution, sections 61, 62, 64, 67. See *Williams v Commonwealth* (2012) 248 CLR 156, 350[512].

⁵⁶ Indigenous Voice Co-design Process, *Final Report to the Australian Government* (Australian Government, July 2021) 148.

34. The Constitutional text itself refers to the Parliament and the Executive Government each in the singular, implying that although consisting of component parts and many members, they each form an integral whole. As Selway explained, the model of executive government extant at the time the Constitution was enacted involved ‘a centralised, hierarchical administration staffed by salaried public servants and answerable to a corporate and political Cabinet’ ultimately responsible to a democratically elected Parliament.⁵⁷ To adjust to this new arrangement, the courts conceptualised the Crown as a ‘corporation aggregate’ comprising the whole government.⁵⁸ If the right enshrined in subsection 129(ii) is a right to make representations only to the Executive Government as a whole, conceived in this aggregative and hierarchical sense, then it would be arguable that the right could be cabined by legislation requiring it only to be tendered to the Cabinet or to the responsible Minister. However, if it is a right of the Voice to direct its representations to particular government officials responsible for the development or implementation of particular policies, then it would be arguable that the Parliament could not legislate under subsection 129(iii) to prevent such representations being made at those intermediate or lower levels of the bureaucracy.
35. There is no High Court authority of which we are aware that provides a clear answer to the second question, whether a right to make representations to the ‘Executive Government of the Commonwealth’ would include a right to make representations to agencies, boards or corporations established by Commonwealth law to undertake public functions. There is High Court authority to suggest that at least some Commonwealth statutory agencies, boards or corporations are so identified with the Commonwealth, or with a Department of the Commonwealth Government, that they enjoy the immunities of ‘the Crown in right of the Commonwealth’.⁵⁹ There is also authority to suggest that such bodies or corporations will fall within the description of ‘the Commonwealth’ for the purposes of section 75(iii) of the Constitution if they are established as a means by the Commonwealth can ‘operate in a particular field’, that is, ‘through a corporation created for [that] purpose’ – as distinct from a corporation that is established to function ‘independently of the Commonwealth’ and therefore ‘otherwise than as a Commonwealth instrument’.⁶⁰ Where the former intention exists, it has been said that such corporations are established to function as ‘agencies or emanations of the Commonwealth’, or that they ‘form[] part of or represent[] the Commonwealth’.⁶¹ These cases did not specifically concern the meaning of the words ‘Executive Government of the Commonwealth’ as used in the Constitution.⁶² However, they do offer a set of

⁵⁷ Bradley Selway, ‘Of Kings and Officers: The Judicial Development of Public Law’ (2005) 33 *Federal Law Review* 1, 26.

⁵⁸ Ibid 32-33, citing *Town Investments Ltd v Department of Environment* [1978] AC 359.

⁵⁹ *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 447-448 (Dawson, Toohey and Gaudron JJ, with whom Brennan CJ generally agreed); but see 459 (McHugh J), 466-472 (Gummow J). However, see also *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 291, noting that the Constitution does not identify the polities that are the component parts of the federal system as ‘the Crown in right of ...’, but rather refers to ‘the Commonwealth’ and ‘the States’.

⁶⁰ *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334, 338.

⁶¹ *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 363, 367, cited in *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334, 337. However, it has also been suggested that a statutory authority that falls within the description of section 75(iii) may not necessarily fall within the description of ‘the Crown in right of the Commonwealth’: *Maguire v Simpson* (1977) 139 CLR 362, 406.

⁶² A distinction has been drawn between ‘the Commonwealth’ and ‘the executive branch of its government’ (ie, ‘the Executive Government’): *Williams v Commonwealth* (2012) 248 CLR 156, 184 [21]. The ‘Crown in right of the

criteria that may be used to determine whether a statutory body would be identified with the Executive Government for the purposes of the proposed section 129.⁶³ The right of the Voice to make representations to the Executive Government could therefore include, in principle, a right to make representations to statutory entities that are sufficiently identified with the Executive Government.

F. Potential Implications

36. The Explanatory Memorandum accompanying the Bill contains several unequivocal statements about the meaning and effect of the proposed constitutional amendment. Similar statements were made in the Attorney-General's Second Reading Speech. It is stated that the constitutional amendment 'confers no power on the Voice to prevent, delay or veto decisions of the Parliament or the Executive Government' and 'would not oblige the Parliament or the Executive Government to consult the Voice prior to enacting, amending or repealing any law, making a decision, or taking any other action' (page 5). It is also stated (at pages 11-12) that:

14. Subsection 129(ii) would not require the Parliament or the Executive Government to wait for the Voice to make a representation on a matter before taking action. Nor would s 129(ii) require the Parliament or the Executive Government to seek or invite representations from the Voice or consult it before enacting any law, taking any action or making any decision. Subsection 129(ii) would also not require the Parliament or the Executive Government to furnish the Voice with information about a decision, policy, or law (either proposed or in force) at any time.

15. Finally, s 129(ii) would not oblige the Parliament or the Executive Government to follow a representation of the Voice. While the constitutional nature of the body, and its expertise in matters relating to Aboriginal and Torres Strait Islander peoples would give weight to the representations of the Voice, those representations would be advisory in nature.

...

18. Section 129 does not impose any obligations on the Parliament in relation to representations made by the Voice.

...

21. It is a matter for the Parliament to determine, in the exercise of its power under s 129(iii), whether the Executive Government is under any obligation in relation to representations made by the Voice.

37. These statements are carefully worded. They are not, in their terms, expressions of intent; rather, they are statements about the legal meaning and effect of the proposed amendments. It would be open to a court to consider the Explanatory Memorandum and Second Reading Speech when

Commonwealth' has long been identified, however, with 'the Government of the Commonwealth': *Cain v Doyle* (1946) 72 CLR 409, 431.

⁶³ It has been observed that statutory definitions of the Crown, where they exist, 'invariably include ministers and statutory authorities subject to ministerial direction': Bradley Selway, 'Of Kings and Officers: The Judicial Development of Public Law' (2005) 33 *Federal Law Review* 1, 33-34.

interpreting section 129. However, materials of this kind are not consulted to substitute the subjective intentions of those who drafted, enacted and approved of the constitutional amendment for the meaning of the words actually used. Rather, they are consulted to help identify the contemporary meaning of the language used, the subject matter to which that language was directed and the nature and objectives of the movement from which the decision to recognise Australia's Indigenous peoples ultimately emerged.⁶⁴ Such materials will not be determinative of the interpretation of section 129, but they may help resolve any lack of clear meaning,⁶⁵ and may also support a conclusion arrived at through consideration of the constitutional text, including its expressed and necessarily implied meaning.⁶⁶

38. A distinction has been drawn between the 'unexpressed assumptions' upon which the framers proceeded when drafting the Constitution and the necessary implications that arise from the text and structure of the Constitution.⁶⁷ Thus, even though the framers of the Constitution deliberately chose not to seek to protect 'personal liberty by constitutional restrictions upon the exercise of governmental power',⁶⁸ this did not prevent a majority of the High Court from concluding that the Constitution contains an implied freedom of political communication.⁶⁹ Despite the reservations that some have expressed about the matter,⁷⁰ the existence of constitutional implications does not depend on the subjective intentions of the lawyers who frame, the parliamentarians who enact or the people approve of amendments to the Constitution. Likewise, it has been said that it is 'not permissible to constrict the effect of the words' of the Constitution 'by reference to the intentions or understandings' of those who drafted the document.⁷¹
39. Principles of administrative law require executive decision-makers to consider all relevant matters they are bound to take into account when exercising a power.⁷² A party with sufficient standing may initiate proceedings in the courts seeking judicial review of the administrative action in question.⁷³ In such circumstances, a court may set aside an administrative decision which has failed

⁶⁴ *Cole v Whitfield* (1988) 165 CLR 360, 385. See the cautionary observations of Kirby J in *Wong v Commonwealth* (2009) 236 CLR 573, [93]-[102] and *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [132].

⁶⁵ *Wong v Commonwealth* (2009) 236 CLR 573, [23], [52], [172].

⁶⁶ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [29]-[31], [91]-[94].

⁶⁷ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 135.

⁶⁸ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 182.

⁶⁹ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁷⁰ Including one of the present writers: Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18(2) *University of Queensland Law Journal* 249.

⁷¹ *New South Wales v Commonwealth* (1990) 169 CLR 482, 511, cited in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 165.

⁷² *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-42.

⁷³ In *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, the High Court upheld the standing of an Indigenous people to commence an action restraining a potential contravention of section 21 of the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic), which prohibited wilful or negligent defacing, damaging or otherwise interfering with an archaeological relic pertaining to the past occupation by the Aboriginal people of any part of Australia, or carrying out an act likely to endanger such a relic.

to give adequate weight to a relevant factor of importance, or has given excessive weight to a relevant factor of little importance. In such cases, the courts do not substitute their own decisions for those of the executive agency or decision-maker, but rather ensure that executive powers are exercised within the constraints of the law. In the ordinary case, the obligation to take such matters into account depends on the construction of the statute that confers the decision-making power and may arise by implication from the subject-matter, scope and purpose of the statute.⁷⁴ While the matter is not without doubt, it would be open to the Court to consider that an amendment to the Constitution conferring on the Indigenous Voice the constitutional function of making representations to the Executive Government on matters relating to Indigenous peoples would be interpreted to imply that executive officers must consider all such relevant representations when exercising reviewable executive or statutory powers.⁷⁵ An aggrieved party with sufficient standing would then be able to initiate proceedings in the courts seeking judicial review. If it was shown that appropriate consideration was not given to the relevant representation, the courts would have the jurisdiction to set aside the exercise of power and order the decision-maker to exercise the power in accordance with the law.

40. If the recognition of Australia's First Peoples in the proposed new chapter of the Constitution were to invigorate the proposition, accepted in Canada and New Zealand, that the Crown owes fiduciary-like obligations to Indigenous peoples or must always act with honour in its dealings with them, then the implications could be deeper and more wide-ranging.⁷⁶ As noted, in Canada these principles have given rise to the requirement that the Crown must consult with First Nations and accord them reasonable accommodations in its policy making. In the Canadian jurisprudence, these requirements operate not at the level of administrative law, but by virtue of what has been called 'an overarching constitutional imperative'.⁷⁷

Powers of the Parliament – subsection 129(iii)

41. The powers proposed to be conferred on the Parliament by subsection 129(iii) are expressed in wide terms. Somewhat awkwardly, they are defined as the power to make laws 'with respect to matters relating to' the Voice. Similar words are used in section 52 of the Constitution, which provides that the Parliament has exclusive power to make laws 'with respect to: ... (ii) matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth'. This sort of language extends the scope of the power beyond that which is merely 'with respect to' a subject matter, to that which is 'with respect to' a subject matter that 'relates to' a subject matter (ie, two degrees of separation,

⁷⁴ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-40.

⁷⁵ While a similar implication would not arise in relation to representations to the Parliament, this would not necessarily prevent such an implication arising in relation to representations to the Executive Government, noting the inherent differences between the two institutions in terms of their composition, powers and functions.

⁷⁶ The proposition that the implied freedom of political communication gave rise to a 'constitutional defence' in cases of alleged defamation split the High Court in *Theophanous v Commonwealth* (2006) 225 CLR 101, with a narrow majority upholding its existence. A less radical position was adopted by the Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, which held that the common law of defamation and qualified privilege should be developed to properly reflect the requirements of the Constitution in relation to freedom of political communication.

⁷⁷ *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)* [2005] 2 CNLR 212; [2004] BCTC 506 [17].

instead of only one). Thus, it has been suggested with respect to section 51(ii) that such ‘matters’ might include the ‘functions’ of such departments, such as the provision of housing for defence personnel by the Department of Defence, ‘property’ used by such departments, and ‘obligations’ incurred by such departments – meaning that there is power to make laws with respect those functions, property and obligations, provided they in turn relate to such a department.⁷⁸ Quick and Garran proposed that such matters would include ‘all matters relating to the organisation, equipment, working and management of the department, the appointment, classification, and dismissal of officers, and all the general body of law relating to its conduct and administration’ as well as ‘all machinery, procedure, and regulation, without which a public department would be impotent’.⁷⁹ Accordingly, under the proposed subsection 129(iii) Parliament will be given power to make laws not only with respect to the ‘composition, functions, powers and procedures’ of the Voice, but also with respect to many other such ‘matters’ relating to the Voice generally. The only limitation on the scope of these words is that the power is conferred ‘subject to’ the Constitution and therefore, as noted above, subject to subsections 129(i) and (ii), as well as any other relevant requirements of the Constitution.

42. The High Court has maintained that the ultimate responsibility to ensure that the Commonwealth and the States remain within the limits of their respective powers is placed in the federal judicature.⁸⁰ Any attempted exercise of legislative power under subsection 129(iii) will therefore be subject, in all matters in which there is a contest, to a judicial assessment of whether the law is constitutionally valid. Constitutional limitations on legislative power will arise from the expressed or necessarily implied meaning of any aspect of the Constitution, including the mandatory words of subsections 129(i) and (ii).⁸¹ The High Court has also maintained that it is for the Court to determine the existence of those facts, known as ‘constitutional facts’, on which the jurisdiction of the Parliament may be predicated in any particular case, notwithstanding any attempt by the Parliament to determine the existence of such facts.⁸² If legislation provided that the Voice were to be limited to making representations exclusively on matters specifically or directly relevant to Aboriginal and Torres Strait Islander peoples, and listed what those specific matters were to be, it would remain a matter for the Court to determine whether this unconstitutionally restricted the right of the Voice to make ‘representations ... on matters relating to Aboriginal and Torres Strait Islander peoples’. Similar questions could arise if there were some other attempt by Parliament to prevent the Voice from making representations to particular statutory agencies or office holders, or even particular Ministers or Departments. Further, if a Minister, head of department or other Commonwealth officer was authorised by statute to determine, with unlimited discretion, how a representation was to be handled or administered, this too might be subjected to judicial review on

⁷⁸ *Defence Housing Authority, Ex parte; Re Residential Tenancies Tribunal & Henderson & Anor* S75/1996 [1996] HCATrans 491 (3 December 1996), per R J Ellicott QC and K Mason QC.

⁷⁹ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901), 660.

⁸⁰ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 268; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 514.

⁸¹ Ie, ‘there shall be a body’, ‘Aboriginal and Torres Strait Islander Voice’, ‘may make representations to the Parliament and the Executive Government of the Commonwealth’, and ‘matters relating to Aboriginal and Torres Strait Islander peoples.’

⁸² *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

the ground that it was inconsistent with subsection 129(ii). And if in any of these scenarios, the legislation descended to determining that the Voice may not make representations on particular matters, factually described, the legislation could be found to be ineffective because it purported to determine constitutional facts relevant to determining the topics on which the Voice has the constitutional right to make representations. While it is not being suggested that any or all of these scenarios might eventuate, they illustrate the ways in which subsection 129(i) and (ii) may place restrictions on the capacity of the Parliament to legislate under subsection 129(iii).