

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

Nyunggai Warren Mundine AO DUniv (Hon. Causa)

16 April 2023

I am Australian citizen since birth. I'm also a member of the Bundjalung first nation of Australia, from my father's side, and the Gumbaynggirr and Yuin first nations of Australia from my mother's side.

I am opposed to the Aboriginal and Torres Strait Islander Voice proposed to be enshrined in a new Chapter IX of the Constitution as outlined in *A Bill for an Act to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice* (the **Bill**).

I oppose this Bill and submit to the Joint Select Committee that the Bill should be withdrawn or, if not withdrawn, that the members of the Australian Parliament should vote against this Bill because:

1. The proposed new Chapter IX of the Constitution does not recognise Australia's first nations.
2. The Voice will not, and cannot, represent Australia's first nations.
3. The Voice will undermine Australia's first nations and threaten the autonomy of traditional owners over their own lands and waters.

The Parliament should reject any Constitutional amendments that will entrench Aboriginal and Torres Strait Islander people as one race of people and who can be spoken for by one uniform Voice to the exclusion of the first nations of this continent.

I would be happy to appear before the committee on 17 April 2023 or in the afternoon sessions on 1 May 2023. I can't appear in person because I'm not able to be in Orange or Canberra on those days, but I can appear via Zoom, Teams or Skype or similar video or phone link.

### 1. Not recognition

The proposed new section 129 of the Constitution begins with the premise that this new Chapter of the Constitution is:

*"In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia..."*

This is not recognition of Australia's first peoples. This is a recognition – and entrenchment – of Aboriginal and Torres Strait Islander people as a race of people, not a recognition of our nations.

The proposed amendments to the Constitution set out in the Bill are based on a false premise that Aboriginal and Torres Strait Islander peoples are one homogenous group of people. It cements the view of Indigenous Australians as one race of people and will enshrine us as a race of people in the Constitution.

We are not one race of people. We are many nations.

"Aboriginal" is a race. Bundjalung is a nation.

A nation of people and a race of people are two entirely different things.

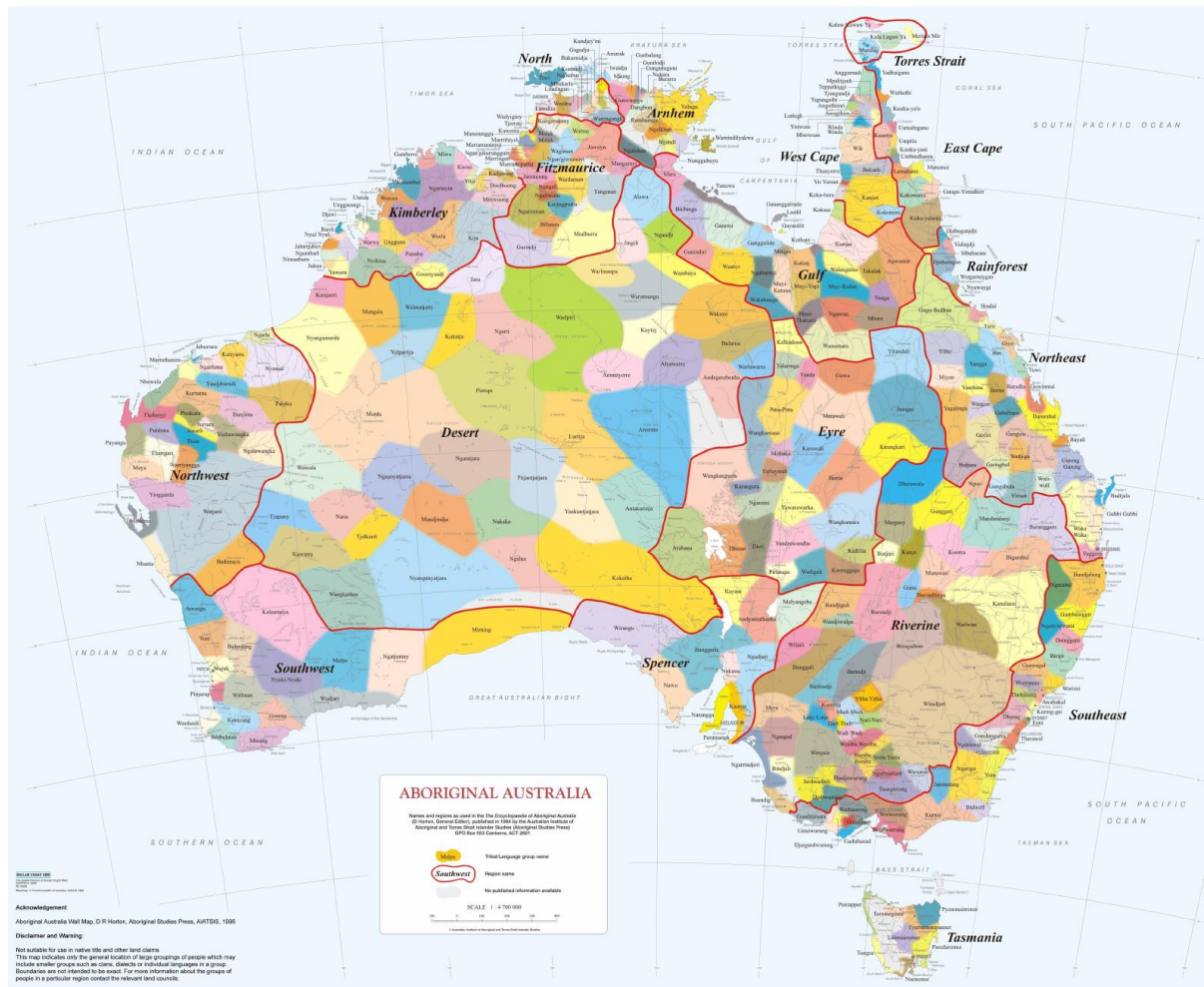
The Oxford Dictionary defines a "nation" as "a large body of people united by common descent, history, culture, or language, inhabiting a particular state or territory". Aboriginal and Torres Strait Islander peoples do not have the same languages or cultures or histories or descent or territorial

lands. There may be similarities and commonalities but that does not make us one nation of people. There are similarities and commonalities amongst the different nations of the continents of Asia, Europe and Africa too, but they are all different nations.

This is acknowledged by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) who says on its website:

*“Aboriginal and Torres Strait Islander Australia is made up of many different and distinct groups, each with their own culture, customs, language and laws. They are the world’s oldest surviving culture; cultures that continue to be expressed in dynamic and contemporary ways.”*

AIATSIS has published a map of representing the many first languages of the Australian continent:<sup>1</sup>



Each of the different coloured areas on the AIATSIS Indigenous language map represents a distinct group of people united by common descent, history, culture, and language, inhabiting a particular state or territory – a nation of people. Language is one of the principal ways of identifying a nation of people because in order to share a culture and territory people must be able to communicate with each other.

Australia’s first nations have been formally acknowledged through the High Court’s decisions recognising native title and through the *Native Title Act 1993 (Cth)*.

<sup>1</sup> <https://aiatsis.gov.au/explore/map-indigenous-australia>

When this Bill refers to “Aboriginal and Torres Strait Islander peoples” it is referring to us as a race of people. I do not see my first nations – the Bundjalung, Gumbaynggirr and Yuin nations – mentioned in the text of this proposed new Chapter IX.

The proposed amendments and the proposed Voice outlined in this Bill are also premised on an assumption that one body can speak for all Aboriginal and Torres Strait Islander people with one voice. There is no contemplation that members of this Voice could have differing viewpoints, that there could be a disagreement between its members or that multiple, conflicting representations could be put forward by its members.

The Constitution says that the houses of Parliament make decisions by majority vote and therefore expressly acknowledges that not all members of Parliament will agree. Other bodies mentioned in the Constitution, such as the Executive Council and the High Court, are concepts rooted in hundreds of years of precedent and longstanding principles of the common law and Westminster system which guide us as to how those bodies make decisions when not everyone on those bodies agrees.

But this “Voice” has no precedent or comparator from which any principles can be derived, and it is not spelled out in the proposed new Chapter IX. This Bill does not even contemplate that members of this Voice could ever have a different opinion, as if this race of people for whom the Voice will speak must have a uniform view on all matters.

No other group of Australians will have an unelected body enshrined in the Constitution that can purport to speak on their behalf to the entirety of Parliament and the Executive with a presumed uniform opinion. It is proposed that only one race of people – Aboriginal and Torres Strait Islander people - be treated in this way.

In the 1967 Referendum, the Australian people voted overwhelmingly to remove parts of the Constitution that expressly excluded Aboriginal people based on their race. Those amendments gave Aboriginal and Torres Strait Islander people equal treatment under the Constitution. The effect of the 1967 Referendum was to end the racial segregation laws of the Australian states and to open up for Aboriginal and Torres Strait Islander people the same opportunities and freedoms as other Australians and full participation in all aspects of Australian society and the economy.

This Bill is reinstating racial segregation into the Constitution. This Bill is reinstating race-based treatment of Aboriginal and Torres Strait Islander people. It is a step backwards.

The proposed amendments to the Constitution set out in this Bill do not recognise Australia’s first nations and only recognise Australia’s first peoples by reference to our race.

## **2. Not representative**

The proposed new section 129(ii) of the Constitution states that:

*“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 peoples”*

Just as Aboriginal and Torres Strait Islanders are not one people, we do not – and cannot - speak with one voice.

We are many nations, and we speak with many voices.

This Voice will not – and cannot – speak for Aboriginal and Torres Strait Islander peoples. This is not our culture.

A fundamental principle of the cultures of all Australia’s first nations is that only countrymen and women can speak for country. Bundjalung people speak for Bundjalung country. Gumbaynggirr

people speak for Gumbaynggirr country. Yuin people speak for Yuin country. I can't speak for someone else's country.

I used to live in Dubbo, but I am not Wiradjuri. Likewise, now I live in Sydney, but I am not Dharug. Since I am not Wiradjuri or Dharug, every Aboriginal Australian knows that I cannot speak for those countries. My common ground with Wiradjuri and Dharug people is race. Not descent. Not language. And not country.

Even in statements supposedly supporting the direction of the Uluru Statement this is abundantly clear, if members of this Parliament care to listen and pay attention to what is being said.

For example, Yolngu people speak with one the strongest voices of any group of Australians to this Parliament and its governments. The Yolngu have established the Yolngu Nations Assembly which is recognised by Yolngu people and can speak for Yolngu country within Yolngu culture. In 2015, then Co-Convenor of Yolngu National Assembly, Matthew Dhulumburrk Gaykamarŋu, said:

*"We want a treaty because right now we get directives just from the government side for housing, education, skills training. This is one-sided talk that never ends in things that work. Government needs to listen to Yolngu thinking for Yolngu problems. A treaty is good because we need a foundational agreement for the Australian government and the Yolngu government, before anything else happens."*

Listen to what is being said here: "Yolngu thinking for Yolngu problems." A treaty between the Australian government and the "Yolngu government". Not an "Aboriginal Voice" or a treaty with "Aboriginal peoples". If the Voice makes a representation to Parliament that doesn't have the support of Yolngu people, then I do not believe they will accept it and I don't believe that they will acknowledge it has authority to speak for them.

On 23 August 2022, Torres Strait Islander representatives signed *The Masig Statement - Malungu Yangu Wakay (Voice from the Deep)* which called for self-determination and other rights in relation to internal and local affairs. Torres Strait Island Regional Council Mayor, Phillemon Mosby said:

*"The Masig Statement is a mandate from the people for the leaders of our region to stand together in unity. We see that voice to parliament and constitutional change will give our voice a unique place in this country."*

Again, observe carefully what he is saying. Support for a Voice so that it will provide a place for "our voice", i.e., a Torres Strait Islander voice. The Masig Statement was a call for Torres Strait Islander people to have autonomy over Torres Strait Islander country.

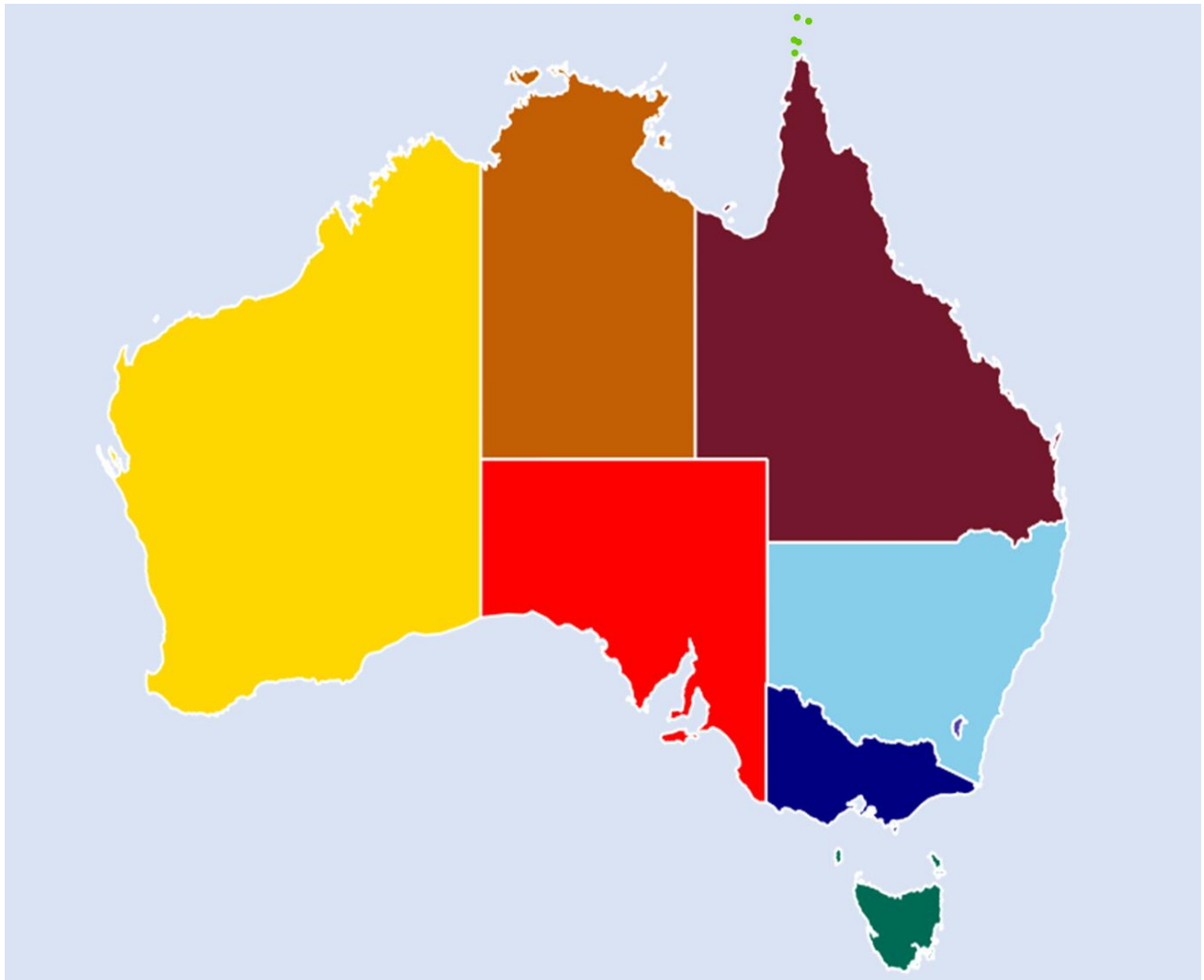
I don't share Mr Mosby's belief that the Voice outlined in this Bill will enable a Torres Strait Islander voice to be heard. But I think he and I share the same view that this Voice cannot speak for Torres Strait Islander country.

The Prime Minister has said that the details of this Voice and how it will operate will be based on the 2021 Indigenous Voice Co-design Process Report to the Australian Government by Tom Calma and Marcia Langton (**Co-Design Report**). The Co-Design Report proposed a National Voice of 24 members, 2 members appointed by the government, 2 members from each state, territory and the Torres Strait, 5 additional representatives from "remote" parts of the NT, WA, Queensland, South Australia and NSW, and 1 representative for Torres Strait Islanders living on the mainland.

The Co-Design Report rejected direct election of members of this Voice and instead said that members of the "Local & Regional Voices" (community organisations) within each state and territory would "collectively determine" Voice members for their respective jurisdictions. This means the Voice's members will not represent or be chosen by first nations. They will be selected from within newly created and artificial regions that bear no resemblance to the first nations but rather will be

grouped on a state and territory basis – in other words, based on the way European colonists divided up Australia.

This proposed new Chapter IX of the Constitution will mean that the new map of Indigenous Australia will look more like this with first nations groups effectively erased off the map:



*Wikimedia Commons*

This Voice and its 24 members (even if elected directly) will not – and cannot – represent the hundreds of first nations of the Australian continent. It cannot speak for country since it will not represent one.

I do not believe any Aboriginal or Torres Strait Islander Australians will regard the Voice as being able to speak for them or their countries.

Traditional owners should be their own voice for their own nation and country. They don't need some new national Voice to speak for them.

### **3. Undermining first nations**

I believe the Voice will empower people to speak for country who don't have authority to do so.

The Voice will be enshrined in the constitution. The rights of traditional owners on their own countries will not. The Voice will therefore have structural primacy over organisations representing traditional owners.

In the 1970s and 1980s governments around Australia passed land rights legislation, starting with the Federal Liberal Government's passing of the *Land Rights Act 1976* (Cth).

In 1992, the High Court recognised that the Meriam people were 'entitled as against the whole world to possession, occupation, use and enjoyment of (most of) the lands of the Murray Islands'. In doing so, the High Court rejected the idea that the lands of the Australian continent were *terra nullius* or 'land belonging to no-one' when European colonisation occurred from 1788.

The High Court incorporated the legal doctrine of native title into Australian law and recognised the fact that the peoples who had lived on this continent for many thousands of years had rights to their lands according to their own laws and customs and therefore had settled law governing occupation and use of those lands.

In response to this decision, the Australian Government passed the *Native Title Act 1993* (Cth).

Through the native title process, traditional owners of particular lands and waters enter into agreements mostly with state and territory governments. Once an agreement has been reached, it can be brought before the Native Title Tribunal and registered through the Federal Court. Native title is centred around Australia's first nations. Anyone who wants to do business on lands or waters where native title exists needs to talk to the traditional owners. Only countrymen and women can speak for country consistent with the fundamental principle common to the cultures of all Australia's first nations.

Traditional owners - like all human beings - don't always agree on everything. Within traditional owner groups there will be differences of opinion and there are governance structures and closely supervised rules for how traditional owners make decisions. When a traditional owner group makes a decision there will invariably be some people who don't agree.

We have seen before attempts to undermine traditional owners and their ability to make decisions about their own country. We've seen groups with different agendas enlist minority dissenters in public relations campaigns. We've seen traditional owner groups held to a unanimous approval threshold that no other group of people in this country is held to. It will be much easier to undermine the autonomy of traditional owners, particularly to say 'Yes', by enlisting a constitutionally enshrined Voice who will have a right to make representations to the Executive against the wishes of traditional owners about their own countries.

Prescribed bodies corporate (who represent native title claimant groups) and land councils (who represent holders of land rights) will be just some of many local community organisations who somehow have to collectively nominate members to this Voice which, with its constitutional enshrined status, will have primacy. Their voices for their own countries will be diluted and drowned out.

This point was made in submissions to the Co-Design Report. In its submission to the Co-Design Report<sup>2</sup>, the La Perouse Aboriginal Community Alliance expressed concern about the cultural authority of the advice given through the local and regional "voices". Its submission recommended that any Regional Voice boundaries be aligned with first nations because:

*"...in order for a treaty to be truly an agreement between government and First Nations, they can only be negotiated by members of that Nation who have the right to speak for their Nation's country. Opting to create Regional Voice boundaries which conflict with the traditional boundaries of First Nations would only add to the already complicated overlapping of Native Title, Land Rights and government systems. We understand that, in regional and remote areas, the Traditional Owner groups and Aboriginal service providers often have*

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<sup>2</sup> [59df8c44896ed-La Perouse Aboriginal Community Alliance - sbm17b7ed976ba6349a48768\\_Cleaned.pdf](https://www.niaa.gov.au/59df8c44896ed-La-Perouse-Aboriginal-Community-Alliance-sbm17b7ed976ba6349a48768-Cleaned.pdf) (niaa.gov.au)



*common membership bases. However, due to the high number of Aboriginal people living in urban areas, it is important that these boundaries are clearly set to encourage harmony between Aboriginal groups who can then focus energy and resources towards the advancement of Aboriginal people.”*

The Ngaanyatjarra Council (Aboriginal Corporation) based in central Western Australia is the the principal governance organisation in the Ngaanyatjarra Lands of around 2,000 Ngaanyatjarra, Pintupi, and Pitjantjatjara traditional owners living in 12 member communities across Western Australia, South Australia and Northern Territory. In its submission<sup>3</sup> it made the following observations:

*“Policies driven across state borders, let alone three states, are too complex and tend to be ineffective. It is difficult to deal with a State, and the Federal Government - dealing with four governments is even more difficult. Combining our organisation’s perspective/views/voice with those of the other groups would, in practice, silence the voice of Ngaanyatjarra people, the very community we, as a council, represent.”*

*“To ensure the Ngaanyatjarra people have a representative voice to governments, our voice needs to be undiluted, in other words, direct.”*

*“The Council is the voice for Ngaanyatjarra Lands. It has been for 40 years and is widely accepted as so doing. In this time, we have worked with multiple Australian federal governments under a series of 10 prime ministers. However, our experience in dealing with governments is that no one is listening - we are not heard. The proposal to create 25 to 35 artificial Indigenous groups, including across state borders, would further exacerbate this problem.”*

*“There is a real risk that distilling voices from 500 Indigenous clans into a collection of regional groups would effectively nullify authentic Indigenous voices rendering them meaningless, allowing governments to claim that they have ‘consulted’ Indigenous people.”*

Yet we know from the final Co-Design Report that the Regional Voice boundaries will not align with first nations groups and will primarily align to the colonial structures of state and territory borders.

The Final Report of the parliamentary inquiry into the Juukan Gorge destruction, stated that Free, Prior and Informed Consent (FPIC) is a core principle of UN Declaration on the Rights of Indigenous People (UNDRIP) and that “Stakeholders throughout this inquiry have pointed to it as a crucial principle that must be enshrined within Australian Aboriginal cultural heritage legislation and related practices.”

Yet the Co-Design Report rejected UNDRIP as a framework for triggering the Voice’s consultation requirements stating that this would “create a complex system requiring specialist legal and expert advice on every proposed law, creating Whole of Government processes with the potential to slow down the legislative development process and passage through Parliament”. I have no doubt that is true. But this shows why this Voice is so flawed. Through the native title and land rights systems, major projects do go through a detailed consultation process with traditional owners who have the benefit of specialist legal and expert advice in seeking their consent. But the Voice, which will not incorporate FPIC in its design, will have primacy as the representative body for matters concerning Aboriginal and Torres Strait Islander people because of its enshrinement in the constitution which traditional owner rights do not have.

I therefore believe that this Voice in the proposed new Chapter IX of the Constitution set out in the Bill will undermine Australia’s first nations and threaten the autonomy of traditional owners over their own lands and waters.

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<sup>3</sup> [2e54669918dcd-Ngaanyatjarra Council Group - sbm17b7c25b8751c9112473b\\_cleaned.pdf \(niaa.gov.au\)](#)

#### 4. Additional Comments

This is the only opportunity for the Australian people to present their views to Parliament on the Voice. I therefore take this opportunity to place on the public record my concerns about claims that first nations people are overwhelmingly demanding a constitutionally enshrined national Voice as outlined in the Bill.

At the first public hearing of this Joint Committee, I heard one witness say that the proposed Bill results from “the most proportionately significant consultation process that has ever been undertaken with First Peoples.”

The evidence does not support this.

The Uluru Statement was adopted at a gathering of just 250 delegates at a Yulara Resort over four days. During the convention, some delegates walked out with a spokeswoman saying “It’s not a dialogue, it’s a one-way conversation. Every time we try and raise an issue our voices are silenced”.

Delegates were selected from a series of ‘Dialogues’ that had been held in over the previous 6 months. According to the Referendum Council:

- There were 12 ‘Dialogues’ in Torres Strait, Brisbane, Adelaide, Ross River, Cairns, Melbourne, Sydney, Perth, Darwin, Dubbo, Broome and Hobart plus an ACT Information Day. The Yulara convention itself was the 14th session.

Over half of the 13 sessions before the Yulara convention were held in capital cities. Yet, nationally, according to the 2021 census only 37% of Aboriginal and Torres Strait Islander people live in capital cities (in the Northern Territory is only 24%). Over half the Dialogues were held in locations where most Aboriginal and Torres Strait Islander people do not live.

- Attendance to the Dialogues was by invitation only which the Referendum Council says, “ensured each Dialogue was deliberative and reached consensus on the relevant issues”.

I interpret this to mean dissenting views were not encouraged but intentionally avoided.

- Meetings were capped at 100 participants with 60% of places were reserved for First Nations/traditional owner groups, 20% for community organisations and 20% for key individuals. The Referendum Council also says it “worked in partnership with a host organisation at each location, to ensure the local community was appropriately represented in the process”.

No other information is provided including whether the attendees making up the 40% of community organisations and key individuals had to be Aboriginal or Torres Strait Islander or the identity of these “host organisations” who were the arbiters of local representation or what constituted “appropriate representation” at all.

Even if every attendee was an Aboriginal or Torres Strait Islander person that makes for 1300 people out of over half a million Aboriginal and Torres Strait Islander Australians aged 15 years or over, or only 0.25%.

Prior to the convention, the Referendum Council released a discussion paper and invited responses of which it has published 700 on its website. These responses could be submitted by anyone, whether Aboriginal or Torres Strait Islander or not. Most responded to a pre-set of questions. Of a random sample I reviewed, I saw a number that opposed a Voice.

I have also heard it said that the consultation process for the Co-Design Report indicated great demand for this constitutional amendment by Indigenous Australians but, again, a look at the detail of this does not support that claim. That consultation process informed people of the Voice as a given and did not invite or create an opportunity to suggest alternatives. The Co-Design group “interacted” with over 9,000 people over 4 months but only actually met with 5,400 people and the Co-Design



Report doesn't say how many of these people were Aboriginal or Torres Strait Islander. Even if all were, that's only around 1% of Aboriginal and Torres Strait Islander Australians aged 15 years or over.

The Co-Design Report does say that around 90% of individual submissions to the co-design group and 80% of surveys came from non-Indigenous Australians amongst which support for the Voice was especially strong.

I do not agree that the consultation process has been significant or supports the view that Aboriginal and Torres Strait Islander people overwhelmingly want this Voice.

## **Conclusion**

The proposed amendments to the Constitution and the Voice do not recognise first nations people.

This Bill recognises and entrenches Aboriginal and Torres Strait Islander people as a race of people. It does not recognise our first nations.

The Voice will empower people to speak for country who don't have authority to do so. It will effectively erase first nations off the map.

No other group of Australians will have a constitutionally enshrined, unelected body that can purport to speak on their behalf to the entirety of the Commonwealth with a presumed uniform opinion. This Bill singles out only one race of people – Aboriginal and Torres Strait Islander people - be treated in this way.

This Bill seeks to reinstates racial segregation into the Constitution and race-based treatment of Aboriginal and Torres Strait Islander people. It will, in effect, reverse the 1967 Referendum.

Traditional owners should be their own voice for their own nation and country. A national Voice cannot speak for country.

I submit that the Bill be withdrawn or, if not withdrawn, that the members of the Australian Parliament should vote against this Bill and reject any Constitutional amendments that will entrench Aboriginal and Torres Strait Islander people as one race of people and who can be spoken for and represented by one uniform Voice, ignoring and erasing the first nations of this continent in the process.