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

Inquiry into Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023

I acknowledge and thank the Secretary and Committee for the opportunity to make this submission. I write in support of the proposed amendment to the *Constitution*. I agree with many of the observations and arguments advanced in the pro-Voice submissions that the Committee has already received. I also acknowledge that a group of law scholars and staff at the University of Sydney Law School has already made a submission (Submission 82) on which my name appears.

I do not seek to make long or authoritative comments on the text of the amendment. I simply note that I do not myself identify any drafting defects in the proposed wording of the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* Bill. I will, however, make comments on two matters.

1. The Preambular Statement

The ‘chapeau’ or ‘preambular’ statement that precedes the subsections reads as follows:

‘In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia...’

There was a question raised in some public discussion with respect to the preambular statement to the effect that it may engender some risk of an innominate implied right. It has been said that the statement raises questions about what rights, privileges and obligations could be implied if a person is, or group of persons are, recognised as the ‘First Peoples of Australia.’ I do not see or understand how any implication could be read into the chapeau on its terms. I also do not identify a specific implication that could be raised on a basis that the preambular statement, because it precedes the subsections that follow, attains any independent force. Rather, I can only perceive that the *subsections that follow* the preambular statement could be determinative of the rights—implied or otherwise—that could arise in respect of the preambular statement.

In short, I do not think the preambular statement obtains any independent legal force, tied as it is, both syntactically and conceptually, to the subsections that follow. Given, furthermore, that the preambular statement is avowed to constitute a statement of fact, it would be expected that any potential determination of its legal meaning would perceive that it may have limited or no ‘work to do’ on its own as a matter of law.

Beyond the legal questions relating to the preambular statement, I wish to express my personal acceptance and endorsement of the statement as a syntactic instrument or vehicle through which constitutional recognition of Indigenous and Torres Strait Islander peoples can be achieved. Preambles proposed in previous times have had, I think, the unfortunate effect that, in identifying many other aspects of Australian life as good, they then detracted from the unique and incomparable place that Indigenous and Torres Strait Islander peoples of Australia hold as the first peoples of this land.¹

2. (Not Just) A Monitoring Function

It is uncontroversial to repeat the observation that the purpose of the 1967 referendum was to excise what was a ‘blight on the Constitution.’² It is also uncontroversial to observe that the amendment of s 51(xxvi) and the removal of s 127 were directed towards the *inclusion* of Indigenous and Torres Strait Islander peoples in the governance of Australia. However, as a matter of both principle and historical experience since 1967, removing an enshrined exclusion does not simply result in, or even facilitate, inclusion. As has been observed before, the 1967 referendum left much to be done; indeed, its ‘constitutional ramifications... are still to be worked out.’³ And a review of commentaries of ministers and senators at the time⁴ will reveal that the aspirations of the 1967 referendum were perhaps greater than what has since been achieved.

The proposed wording of the amendment is the missing second step in achieving what the 1967 referendum implied could be achieved in the first place. This is because it provides a facility by which any future laws proposed to be made under s 51(xxvi), rare though they are and may continue to be, could be crafted in co-operation with Indigenous and Torres Strait Islander peoples. More than this, however, the proposed amendment provides a facility by which Indigenous and Torres Strait Islander peoples could, through the Voice, make representations about laws made under other constitutional heads of power when they are, under the proposed s 129(ii), ‘matters relating to Indigenous and Torres Strait Islander peoples.’ This would include, for instance, input being received from Indigenous and Torres Strait Islander peoples about the crafting of policy and law about educational disadvantage for the purposes of the ABSTUDY scheme.

A clear virtue of way in which the proposed amendment is framed is that it will enable input from Indigenous and Torres Strait Islander peoples to be available to the Commonwealth Parliament and Executive on matters on which the government will have a need as a matter of informed policymaking. The Voice, therefore, should be embraced as a vehicle through which improved and much better-informed governance in this country may be achieved on matters relating to Indigenous and Torres Strait Islander peoples.

Yours sincerely



Christopher Rudge

¹ On these preambles, see Mark McKenna, Amelia Simpson and George Williams, ‘With Hope in God, The Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble’ (2001) 24(2) *UNSW Law Journal* 401—419 <<https://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/24-2-17.pdf>>.

² John Williams and John Bradsen, ‘The Perils of Inclusion: The Constitution and the Race Power’ (1997) 19 *Adelaide Law Review* 95.

³ *Ibid.*

⁴ See, eg, Sarah Pritchard, ‘The Race Power in section 51(xxvi) of the Constitution’ (2011) 15(2) *Australian Indigenous Law Journal* 44-57, esp 48–49.