The Discordant Voice

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The responsibility which our Constitution places on voters – the responsibility for approving or rejecting a constitutional amendment – is a grave and onerous one, for this simple reason: once approved, a constitutional amendment exists, potentially, for as long as our nation continues in existence. True, it is theoretically possible for a constitutional amendment to be repealed by a later amendment. In the US, where constitutional amendments require approval only by the federal and state legislatures, this has happened just once, with the "prohibition amendment" adopted in 1919 and rescinded in 1933. In Australia, it has never happened, nor even been tried.

As all lawyers (and most sentient citizens) understand, passing a constitutional amendment in Australia requires a "double majority": a majority of electors nationwide, and a majority in a majority of the states (i.e., four out of the six). This partly explains why, out of 54 proposals submitted to the electorate, only eight have passed. Those eight were, without exception, "no brainers", enjoying both bipartisan political endorsement and widespread community support. Most have been concerned with "machinery provisions" which had given rise to practical problems not foreseen at the time of federation, such as provisions regulating the timing of Senate elections, the power of the Federal Government to assume State debts, the scope of the Federal Parliament's power to provide social welfare, the filling of casual vacancies in the Senate, the rights of territory residents to vote in referenda, and the fixing of retirement ages for Federal judges. The only successful amendment which might be called policy-driven was the 1967 amendment to give the Federal Parliament legislative powers in respect of Indigenous Australians, and to ensure that they were subsequently included in population counts for constitutional purposes.

Aside from amendments concerned with such "machinery provisions", the two most well-known failed amendments were the 1951 anti-communist proposal and the 1999 republic proposal. Other unsuccessful policy-driven amendments sought to extend Federal powers in respect of trade, commerce, industrial relations and suppression of monopolies (1911, 1913, 1919, 1926, 1937, 1944 and 1946) and in respect of local government (1974 and 1988). Yet even amendments which were marketed as enhancing democratic rights and freedoms failed in 1974 and again in 1988.

One feature which is common to all previous referenda, both successful and unsuccessful, is that the amendments were proposed specifically because the desired outcomes could not be achieved without a constitutional amendment. Wiseacres may contend that this is not true of the 1916 and 1917 conscription referenda – both of which failed – since the Federal Parliament could have legislated for military conscription under the defence power without any need for a referendum. But the votes in 1916 and 1917 were plebiscites rather than

referenda in the strict sense: no constitutional amendments were sought, and the electorate was merely asked to approve Parliament's exercise of its undoubted power to introduce conscription. Likewise, a century later, a postal plebiscite was conducted with respect to Parliament's exercise of its undoubted power to legislate for same-sex marriage.

The "Voice" referendum is, however, an entirely different kettle of fish. Nobody seriously doubts that such a "Voice" could be legislated by the Federal Parliament without any constitutional amendment. But the *Uluru Statement from the Heart* called for "*the establishment of a First Nations Voice*" to be "*enshrined in the Constitution*". This is not about amending the Constitution to give Parliament a power which it would otherwise lack. It is the diametric opposite. It is about amending the Constitution to take away, from future Parliaments, a power which they would otherwise possess: the power to repeal or rework mistakes and misadventures committed by their predecessors.

"Entrenchment" has long been an ambition by a certain class of politicians on both sides of the political divide. In Queensland, we have seen it with attempts – based on the "manner and form" provisions of an otherwise obscure British enactment, the *Colonial Laws Validity Act* 1865 (Imp.), re-enacted by section 6 of the *Australia Act* 1986 (Imp.) – both to entrench the uniquely unicameral nature of our State Parliament (*Constitution Act Amendment Act* 1934 (Q.)), and to maintain the current monarchical structure of the State Constitution (*Constitution Act Amendment Act* 1977 (Q.)). Whether and to what extent these attempts are legally effective is too complex a topic for present consideration, so the attention of readers is drawn to two excellent articles: Gerard Carney, *An Overview of Manner and Form in Australia*, (1989) 5 QUT Law Review 69; and Anne Twomey, *Keeping the Queen in Queensland: how effective is the entrenchment of the Queen and Governor in the Queensland Constitution?*, (2009) 28 UQ Law Journal 81.

A more venerable (or primitive) form of entrenchment was apparent at the recent coronation of King Charles III. His Majesty was required to take three oaths, as prescribed by the *Coronation Oath Act* 1688 (Imp.), one of them being:

> *… to the utmost of [His] power [to] Maintaine the Laws of God[,] the true Profession of the Gospell[,] and the Protestant Reformed Religion Established by Law … [and to] Preserve unto the Bishops and Clergy of this Realme and to the Churches committed to their Charge all such Rights and Priviledges as by Law doe or shall appertaine unto them or any of them*.

The idea was that, if the monarch cannot assent to legislation which contradicts these promises, the existing state of the law must continue indefinitely. This has worked for some 345 years, and it will probably continue to work despite the new King's preference to be seen as a "defender of faiths" rather than a "Defender of The [Established] Faith".

On any view, there is a distinct tinge of hubris, if not arrogance, to the notion that one generation of lawmakers are possessed of such deep and profound wisdom as to be competent to dictate to their successors, in perpetuity, how their legislative powers must be

exercised. It is notable that the push to entrench legislative policies tends to arise only at times of intensely divided political passions, when those presently in the ascendency look to curtail their opponents' freedom to pursue a different agenda, even at a distant future time when that agenda may have the unequivocal support of an electoral mandate. So it was in England following the Civil War, the execution of a king, Cromwell's protectorate, and the restoration of the monarchy; so it was in Queensland, under the Depression-era Forgan Smith Government of 1934, and under the Bjelke-Petersen Government of 1977.

Entrenchment is generally a bad idea, even when it occurs with the best possible motives. The US "Bill of Rights" (the First to Tenth Amendments to the US Constitution) is a case in point. Guarantees of "*the right of the people to keep and bear Arms*" (Second Amendment), and "*the right of trial by jury*" in "*suits at common law, where the value in controversy shall exceed twenty dollars*" (Seventh Amendment), may have seemed like good ideas at the time of adoption. But the lack of prescience which these provisions manifest – both as to the impact of ever more lethal firearms technologies, and as to the effects of monetary inflation – are cautionary reminders to anyone who conceives it a good idea to fetter future legislatures and governments in dealing with unforeseen future exigencies.

If it is ever appropriate to amend the Australian Constitution, solely to entrench (or "enshrine") a policy reform, two questions must be addressed: first, is this policy reform one which will continue to be appropriate in all imaginable future circumstances?; and secondly, is the drafting of this policy reform sufficiently flawless to ensure that what is proposed (in good faith) as a positive reform cannot become an instrument producing negative outcomes? Unless both questions can confidently be answered in the affirmative, it is more sensible to leave future parliaments (and future electorates) to deal with circumstances as they arise.

To answer the first question, it is necessary to use one's imagination to contemplate future situations which are very different from those which presently subsist. This is precisely what America's "Founding Fathers" failed to do, by not considering that 1791's muzzle-loading flintlocks might eventually be replaced with automatic or semi-automatic self-loading assault rifles, capable of discharging over 500 rounds per minute over an effective range of 2 kilometres; and by not considering that the "buying power" of $20.00 in 1791 would, over the next 232 years, fall to the then equivalent of less than 67 cents. So here is one (and only one) "what if" that calls for serious consideration regarding the Voice: with Aboriginal and Torres Strait Islander peoples currently representing less than 4% of the total Australian population, and if that percentage continues to decline over time, is there a point at which it would cease to be a good idea that there "*shall*" (rather than "*may*") "*be a body, to be called the Aboriginal and Torres Strait Islander Voice*"?

As to the second question, it suffices to point out that the current drafting of the proposed amendment is seriously deficient. The principal concerns are these:

(1) The opening words of the proposed new section 129 – which precede, and apparently apply to, each of the three operative provisions in the proposed subsections 129(i), (ii) and (iii) – are "*In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia*". According to traditional canons of construction, meaning has to be given to every part of an enactment, and the significance of these words is enhanced as they form part of an entirely new Chapter in the Constitution, entitled "*Chapter IX—Recognition of Aboriginal and Torres Strait Islander Peoples*". Hence, the operative provisions must be interpreted in a way which gives them efficacy as "*recognition*" of one section of the community in their capacity as "*the First Peoples of Australia*". What this means in practice is, I am afraid, anyone's guess.

(2) The proposed Section 129 uses the expression "*Aboriginal and Torres Strait Islander peoples*" as if its meaning were plain and unambiguous. Nothing could be further from the truth. The Australian Law Reform Commission has produced a particularly scholarly chapter on "*Legal definitions of Aboriginality*" as part of its report entitled "*Essentially Yours: The Protection of Human Genetic Information in Australia*": (2003) ALRC Report 96. What this shows is that the preponderance of judicial authority supports legal tests involving considerations of self-identification and community recognition, in addition to purely genealogical enquiries. Unhelpfully, the drafting of the proposed Section has not adopted the (admittedly somewhat outdated) language found elsewhere in the Constitution, raising the perennial question whether a change of language is to be taken as signifying a change in meaning. Use of the word "*peoples*" – not found anywhere else in the Constitution – might imply identification on the basis of racial or ethnic origins, location of dwelling, religious adherence, cultural traditions, or some combination of these features. But identification of such "*peoples*" as "*the First Peoples of Australia*" might imply that genetic testing is both sufficient and necessary to prove descent from inhabitants of Australia prior to European settlement.

(3) Most voters at the forthcoming referendum would expect the Voice to be made up of Indigenous Australians, chosen by Indigenous Australians (presumably by a democratic process). Indeed, in his Second Reading Speech, the Attorney-General said, "*The intention is that its members will be selected by Aboriginal and Torres Strait Islander peoples based on the wishes of local communities*". Yet, whilst that may be "*the intention*", it is not an intention reflected in the language of the proposed Section 129.

(4) There seems to be a widespread misconception about the width of the power to "*make representations to … the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples*". Many commentators assume that "*the Executive Government of the Commonwealth*" is synonymous with the Federal Executive Council, or perhaps the Cabinet or the broader Ministry. However, Chapter II of the Constitution – dealing with "*The Executive Government*" – includes the Federal Executive Council (Section 62) and Ministers of State (Section 64), but also civil servants and "*all other officers of the Executive Government of the Commonwealth*" (Section 67), "*the naval and military forces of the*

Commonwealth" (Section 68), and "*departments of the public service*" (Section 69). Actually, the "executive government" comprises every person and agency – whether an individual, a board or committee, a ministry or department of government, a commission, or a body corporate – which is charged with executing or carrying into effect Commonwealth laws and administering the Commonwealth government, including:

- each and every Commonwealth public servant;
- each and every department of the Commonwealth Government;
- the Australian armed forces;
- law-enforcement agencies like the Australian Federal Police (AFP), the Australian Border Force, the Australian Criminal Intelligence Commission (ACIC), and the National Anti-Corruption Commission (NACC);
- statutory and non-statutory bodies like the Australian Taxation Office (ATO), the Australian Securities & Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC), the Australian Broadcasting Corporation (ABC), the Office of the Australian Information Commissioner (OAIC), and the Foreign Investment Review Board (FIRB), to mention just a very few; and
- administrative tribunals which do not form part of the Judiciary, such as the Administrative Appeals Tribunal (AAT) or its successor.

(5) The Attorney-General has stated that "*Nothing in the provision will hinder the ordinary functioning of our democratic system*". That is literally true. However, in order for the proposed Section 129 to be given effect, Parliament must pass legislation, as contemplated by subsection 129(iii). That legislative power is broad, embracing all "*matters relating to the Aboriginal and Torres Strait Islander Voice*", which expressly includes, not only its "*composition*", its "*functions*" and its "*procedures*", but also its "*powers*". Notably:

- The potential "*powers*" are not expressly limited to matters falling within the Commonwealth's legislative mandate under Section 51 of the Constitution.
- Nor are they limited to powers of a kind which have been a traditional feature of Australian politics or government; they could include, for example, a "*power*" to negotiate and enter into a treaty with the Commonwealth, or a "*power*" to declare some form of indigenous sovereignty.
- The exercise of these "*powers*" will not necessarily be subject to any executive or judicial review, save on *ultra vires* grounds. There will be no scope for a review "on the merits"; nor (depending on the terms of the relevant legislation) will the exercise of such "*powers*" be subject to traditional judicial review on grounds such as use of the power for an improper purpose, failure to take into account relevant consideration, unreasonableness or irrationality, error of law, or even actual or apprehended bias.
- The legislative grant of such "*powers*" must be directed to the "*recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia*". It is hard to think of any subject of potential "*powers*" which does not have at least some connection with "*recognition*" of the relevant kind, but it may conceivably be open to challenge a grant of

"*powers*" on the footing that it simply does not go far enough to constitute such "*recognition*".

- Although the Attorney's Second Reading Speech posits that "*The constitutional amendment confers no power on the Voice to prevent, delay or veto decisions of the parliament or the executive government*", such "*powers*" may be conferred by legislation under the proposed subsection 129(iii).
- It is clearly arguable that subsection 129(iii), read together with the opening words of Section 129, mandates a legislative framework in which the "*powers*" conferred on the Voice rise to a level which constitutes genuine – rather than tokenistic – "*recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia*". One can only speculate where that line will be drawn.

It must also be remembered that Section 129, if adopted, will not be subject to Section 15AB of the *Acts Interpretation Act 1901* (Cth.), under which "extrinsic material" is available to aid in the construction of ordinary federal legislation. Section 15AB, as an ordinary enactment of the Australian Parliament and not a constitutional amendment approved by the electorate, cannot and does not bind the High Court in the way that it construes amendments to the Constitution. Accordingly, statements in the Explanatory Memorandum and the Minister's Second Reading Speech for the amendment bill cannot supply any protection if the High Court considers that such statements do not reflect the correct interpretation of the proposed Section 129 according to traditional canons of construction.

Most legislative drafting has effect only temporarily, until the legislation is amended or repealed by the legislature. There are many cases, particularly in the fields of revenue and corporate law, where the initial draft did not achieve the intended aim, resulting in subsequent amendment or in repeal and re-enactment. However, if the proposed Section 129 is approved by the electorate, the opportunities for amendment or repeal and re-enactment, even if the purpose is to overcome an unexpected judicial interpretation and to reinstate the original intention, will be vanishingly remote.

This is what makes the outcome of the forthcoming referendum critical for all Australians.