

Gilbert & Tobin Constitutional Conference

Commentary on Climate Change Litigation and Voice Presentations

10 February 2022
The Hon Robert French AC

1. My remarks are directed primarily to the proposal for an alteration to the *Constitution* to enshrine a First Nations Voice to make representations to the Parliament and to the Executive on matters relating to Aboriginal and Torres Strait Islander Peoples. They are particularly concerned with questions relating to the possibility of constitutional and judicial review litigation that might be engendered as a result of the proposed amendment. In this respect there is a linkage to be made with the first topic addressed on this panel — Climate Change Litigation and, in particular, the decision of the Full Federal Court in *Minister for Environment v Sharma*.¹ The Respondents in that appeal had sought to establish that the Minister for Environment in making decisions under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) had a personal duty, sounding in tort, to take reasonable care in determining whether to approve the extension of a coal mine to avoid causing personal injury or death to all persons who were less than 18 years of age and ordinarily resident in Australia arising from emissions of carbon dioxide into the earth's atmosphere. The primary judge had found such a duty of care and had concluded that human safety was a distinct implied mandatory consideration in the decision about a controlled action that might endanger human safety to be implied from the subject matter, scope and purpose of the EPBC Act.
2. The decision of the Full Court of the Federal Court addressed, inter alia, the boundaries between matters of so-called 'core' policy decisions by the Executive — lying beyond the scope of the judicial function and decisions which are amenable to judicial review. Allsop CJ said, at [248]:

The fundamental question of legality aside, it is not the function of the Judicial branch to rule upon any lack of adequacy or any lack of wisdom of government policy by reference to the law of torts.

¹ [2022] FCAFC 35.

At [250], referring to climate change policy, the Chief Justice said:

The natural places for the development of such policy and the making of decisions as to the implementation of such policy is the Executive branch of government, and Parliament. Both have the power and the ability to obtain all relevant up-to-date information bearing upon policy. Both arms of government are, in a parliamentary democracy, responsible to the people of the polity.

At [251]:

The authorities to which I have referred make clear that so-called core policy, or at least the making of it, is not, or is unlikely to be, the province of the Judiciary, in its role of quelling private controversies or controversies between individuals and government.

3. The Chief Justice cited the decision of the Court of Appeal of New Zealand in *Smith v Fonterra Co-operative Group Ltd*² in dealing with a posited duty about greenhouse gas emissions saying ‘Courts are ... ill-equipped to address the issues that the claim raises’, which call for ‘a level of institutional expertise, democratic participation and democratic accountability that cannot be achieved through a court process.’³
4. Those general sentiments feed into consideration of the constitutional legal dimension of The Voice proposal in its present form. It is in the area of ‘core policy’ that The Voice might be expected to operate as well as in more specific areas of law, policy and practice.
5. The function of The Voice is set out in paragraph 2. To ‘make representations’ is to make official statements to the Parliament and the Executive. Those words cover submissions or advice about existing or proposed laws and administrative policies and practices. There would be a high democratic obligation to respect such statements and to take them into account. That does not translate into a constitutional legal obligation.
6. The Voice may make representations about ‘matters relating to Aboriginal and Torres Strait Islander Peoples’. The term ‘relating to’ can cover a broad range of matters. Its limits are likely to be defined by common sense and political realities. Laws, policies and practices relating to Aboriginal and Torres Strait Islander education and training, family and social welfare, health, remote community services, community policing,

² [2021] NZCA 552.

³ [2022] FCAFC 35, [255].

Aboriginal art, cultural and heritage protection, traditional ownership of land and waters, are well within that range. The establishment of a truth telling process and of a treaty-making process would also be covered.

7. The third paragraph of the amendment confers power on the Parliament to make laws to give effect to The Voice. It does not impose a constitutional legal obligation on Parliament to do so. Nor does the amendment require that the Parliament adopt a particular composition or confer particular functions, powers or procedures on The Voice. That is left to its discretion. Any laws made by the Parliament would necessarily contain elements supporting the leading function of The Voice which is to ‘make representations’.
8. Parliament could not make a law which could confer on The Voice a legal right to veto a proposed law. Parliament could not make a law limiting its own law-making powers by legally requiring prior consultation with The Voice. The Voice is not a third chamber. The constitutional amendment would, however, support the adoption by Parliament of internal procedures to provide for The Voice to be heard. The Parliament could also make a law requiring the Executive to have regard to representations by The Voice to the Executive when adopting or changing policies and practices relating to Aboriginal and Torres Strait Islander peoples.
9. The Voice will present First Nations’ views at a national level. The Parliament, in determining its membership and the mode of election, will necessarily want to ensure that representations made by The Voice reflect a distillation of the views of First Peoples across Australia. That is not a constitutional legal obligation. The composition of The Voice is left to the Parliament. It is, again, a powerful democratic expectation given the functions of The Voice. The practical benefit of input from national representatives of First Peoples is that it derives from their lived experience across the country. The input of The Voice may not be the only view of First Peoples. There is certain to be diversity of opinion and even dissent on particular issues. Those opinions and that dissent can also be heard. Indeed, there would be nothing to prevent The Voice from drawing attention to that dissent or diversity, whether it comes from a minority of its own members or beyond. There would be nothing to prevent the submission of different views of those who disagreed with a particular representation made by The Voice.

10. What, if any, part would the courts have to play in the working out of the constitutional and legal role of The Voice? There is little or no scope for constitutional litigation arising from the words of the proposed amendment. The amendment is facilitative and empowering. Parliament cannot legally be compelled to make laws for The Voice. It cannot be compelled to make a particular kind of law. Nor can it be prevented from repealing or amending the laws it makes.
11. There has been an argument floated that the proposed amendment might give rise to a constitutional implication that representations made by The Voice to the Executive Government could be mandatory, relevant considerations in executive decision-making which could be challenged in the courts if consideration had not been given to an applicable representation.
12. This would appear to be a highly improbable scenario for the following reasons:
 - (1) The wording of paragraph 2 of the amendment encompasses representations to the Parliament. They cannot bear an implication that the Parliament is bound to have regard to them as a legal condition of its law-making powers.
 - (2) The range of matters in which representations could be made to the Executive would include many matters of policy of the kind that Allsop CJ in *Sharma* described as ‘core policy’ and on any view outside the purview of the judiciary.
 - (3) An implication of the kind floated would have to carve out of the enormous range of matters upon which representations could be made to the Executive, matters in which an executive officer or body is exercising a statutory or non-statutory power. It would have to attach to those matters consideration of the representation as a condition of the valid exercise of the power. Paragraph 2 simply states what The Voice may do and does so at the highest level of generality. The spectre of litigation based on a significant but narrow cast constitutional implication unstated but lurking within those words, is a shadow which distracts from the substantive debate.
13. There is always the possibility that someone, someday would want to litigate matters relating to The Voice as can anybody who seeks recourse to the courts. That flows from the fact that we are a country governed by the rule of law which provides access

to the courts where it is said that public officials have exceeded their power. That said there is little or no scope to find constitutional, legal obligations in the facilitative and empowering provisions of the amendment.

14. If the Parliament wanted to it could make a law providing that the exercise of defined statutory or non-statutory executive power would be conditioned upon consideration of relevant representations from The Voice. And if Parliament imposed such a requirement, the exercise of the power would be judicially reviewable if it were not complied with. There is, however, no obligation to impose such a condition. That would be a matter for the Parliament.
15. The Voice proposal is a once in a lifetime opportunity for Australia to fill a gaping hole in our *Constitution* — to recognise our first history and the First Peoples who bear it and the painful legacy of its collision with the second history of colonisation. The high return against low risk is that The Voice will provide a practical opportunity for First Peoples to give informed and coherent and reliable advice to the Parliament and the Executive to assist them in law and policy making in one of the most difficult areas of contemporary government. It empowers First Peoples and the Australian people as a whole to acknowledge, address and move forward from the legacy of their colliding histories.