

Constitutional Expert Group – Meeting 2

Annotated agenda

Date: Monday 14 November 2022

Time: 2:30pm – 5:30pm

Location: Commonwealth Parliament Offices, Melbourne

Co-chairs: Hon Mark Dreyfus KC MP and Senator Patrick Dodson

Attendees: Professor Greg Craven AO, Professor Megan Davis, Kenneth Hayne AC KC, Noel Pearson, Professor Cheryl Saunders AO, Professor Anne Twomey AO, Scientia Professor George Williams AO, Professor Asmi Wood

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Discussion of other issues30 minutes (4:50pm-5:20pm)

The impact of enshrining the Voice on First Nations Peoples' sovereignty

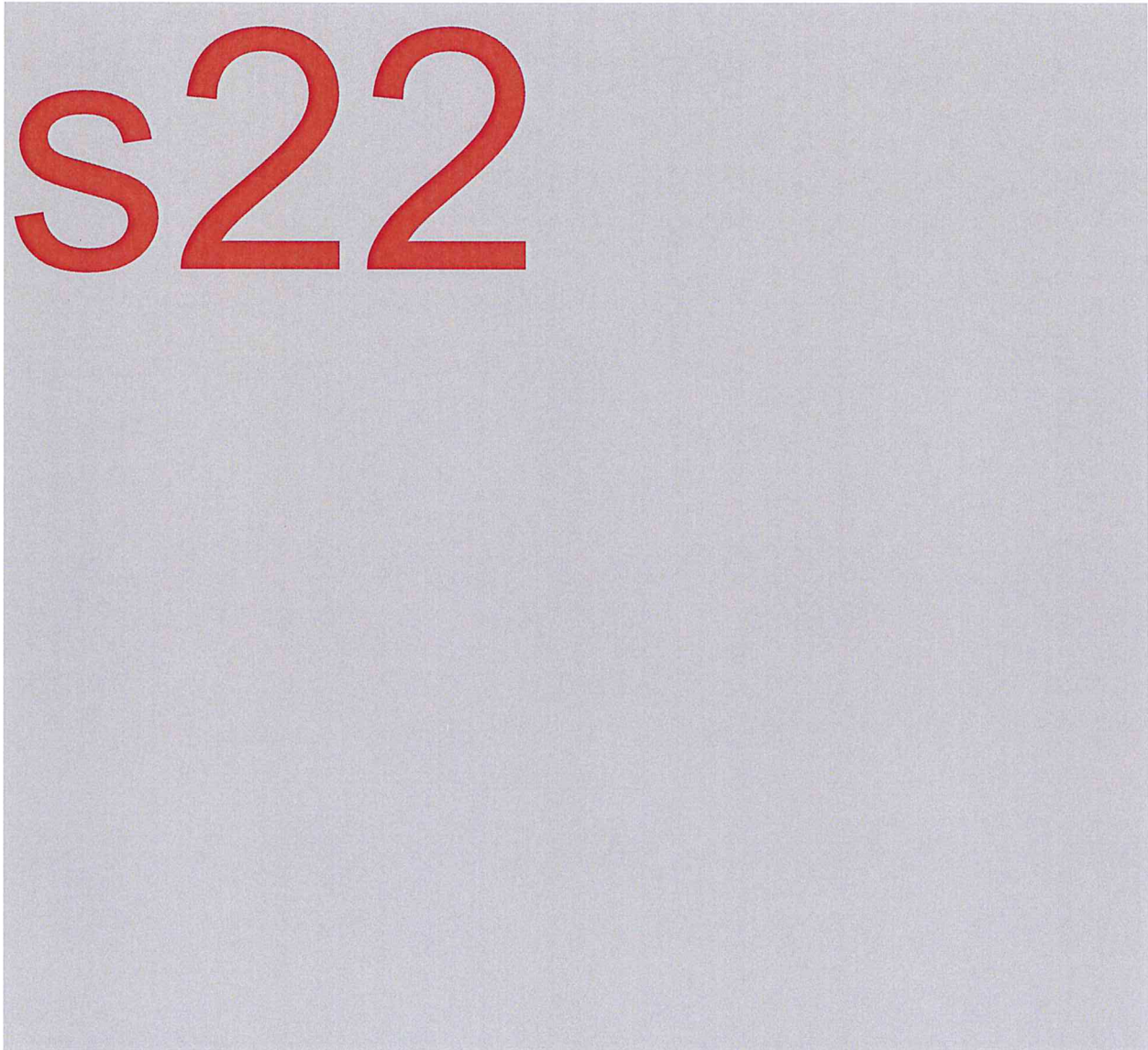
- As some of you may be aware, Senator Thorpe raised questions during Senate Estimates questioning of the Attorney-General's Department about whether enshrining a Voice in the Constitution would amount to First Nations Peoples ceding their sovereignty.
- This has been the subject of extensive consideration, particularly in the context of the proposed 2013 referendum on constitutional recognition of Aboriginal and Torres Strait Islander Peoples.
- It is an issue that the Working Group may wish to refer to the Expert Group for further advice at its next meeting on Wednesday, 16 November 2022.

[Invite members for any initial views on whether enshrining the Voice would impact on claims of sovereignty]

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Legal implications arising from the use of "First Nations Voice" or "First Peoples Voice" as the name of the body

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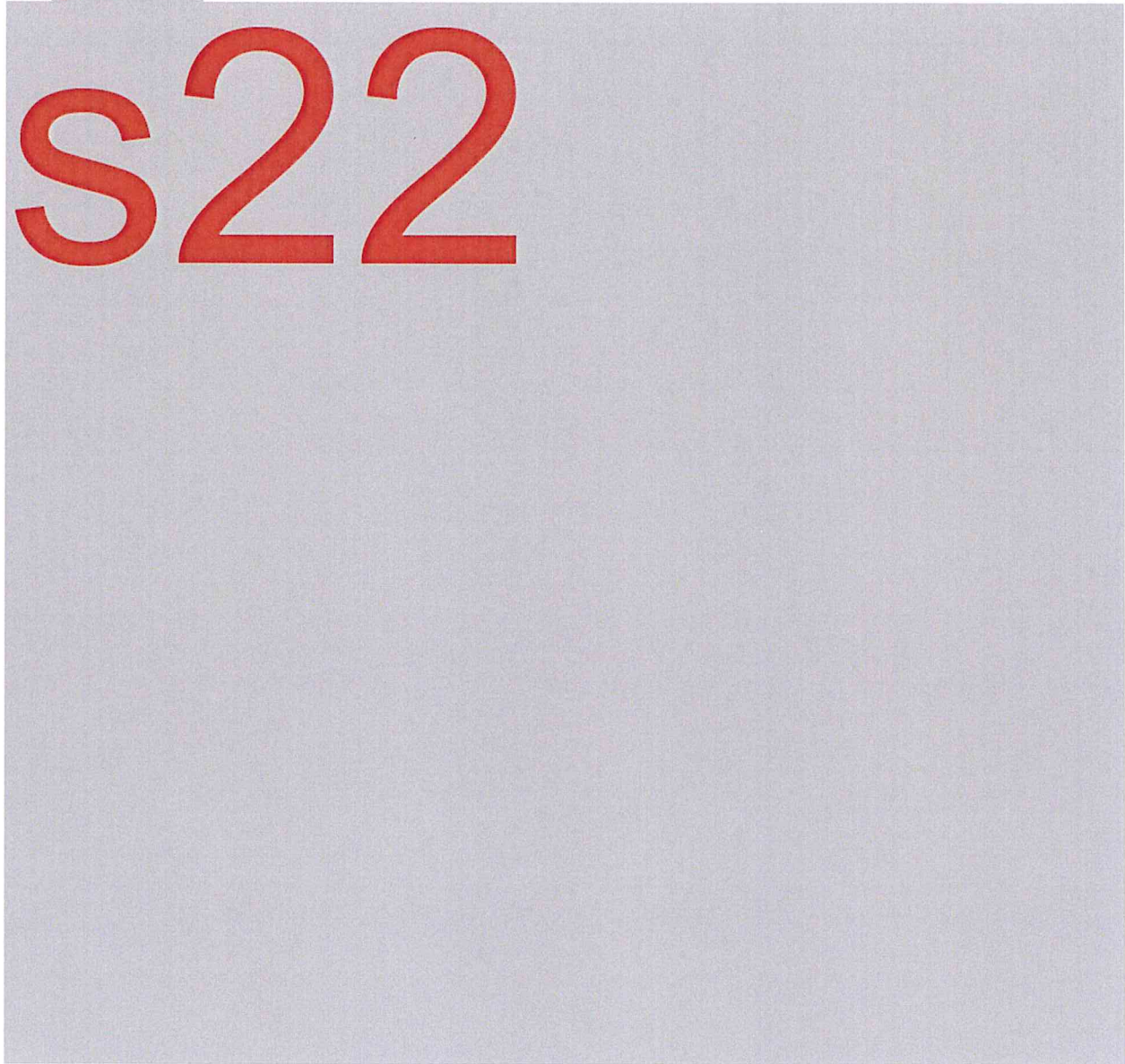
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In particular, the term 'nations' may potentially give rise to constitutional implications, for example concerning the connection between nations and sovereignty. s22

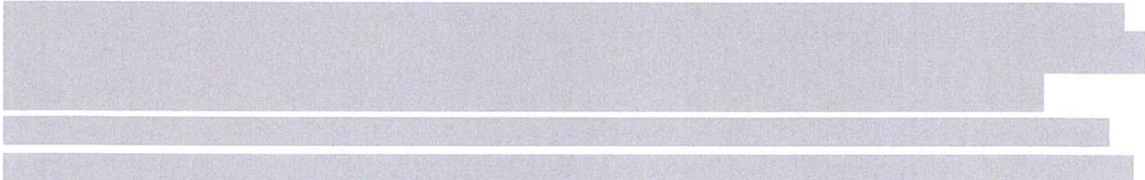
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A use of this term First Nations, which is now widely used in the media s22 is a disingenuous use of the term because Indigenous people have not been granted full Constitutional recognition as 'nations' with the rights and obligations of states, i.e. full recognition of their international legal personhood. The grant of full nation status to Indigenous communities, while excellent in principal, is unlikely to get the Voice the double majority. The majority of voters are unlikely to accept this full meaning of 'nations' at present and could be used as an argument against the Voice by those

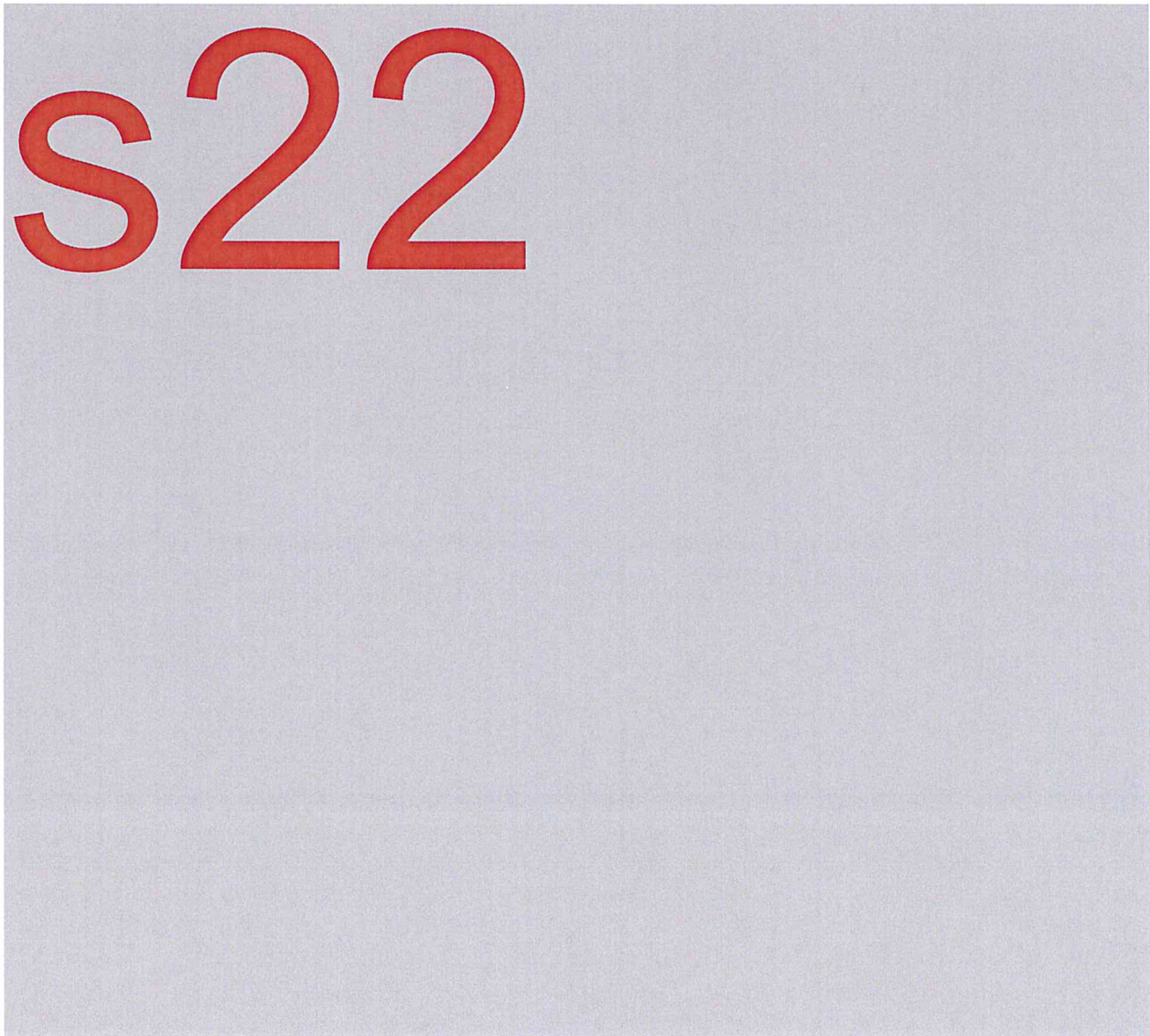
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who wish Indigenous rights to be 'disappeared' as was the intention of the framers of the Constitution.

On the other hand, the use of the term 'nations' for Indigenous communities in the Westphalian sense arguably agrees with the original notion of the Founders that 'aboriginal natives' were 'separate, non-English, and a separate body politic', not to be considered part of the settler-state body politic, a notion that was confirmed by the HCA in Love v Cth.

In terms of domestic Australian law, the use of the term 'First Nations' as a heading in Constitution/the Grundnorm of the settler state, must also mean that Parliament intends to clarify the common law on the status of Aboriginal countries as held by the High Court in Coe No 2.

There are also arguably issues related to / of the reversal of the onus of proof issue in the NTA93 and Mabo No 2. The recognition of Indigenous peoples as full Nations must have some implication on the sovereignty of those peoples to their lands and waters (thus arguably correcting /reversing the HCA's findings in the Seas and Submerged Lands Case, including on issues such as sovereignty).

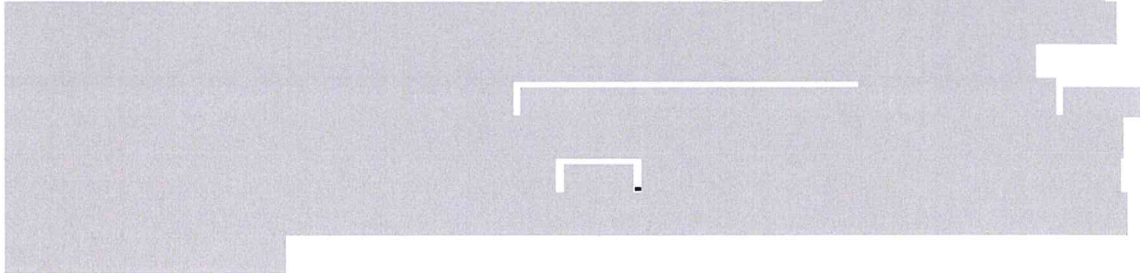


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The Uluru Statement calls for constitutional recognition of the status and sovereignty of First nations through a constitutionally enshrined First Nations Voice. Therefore, constitutional enshrinement of the Voice is itself recognition. s22



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What would be the legal implications of amendments made by the Indigenous Law Centre?

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'First Nations' – As discussed in the last meeting, I think that the use of the term 'First Nations' is highly problematic on two grounds. First, from a political point of view, it will be a gift to those who seek to argue that the amendment will divide Australia by race, as they will then argue that it goes so far as to acknowledge different nations. The use of the term 'nation' outside of its ordinary context of a 'nation state' will cause confusion and aid the 'No' case.

Second, there is a genuine legal issue that might arise from the use of this terminology, concerning the implications that the High Court might draw from it. If the term 'First Nations' were used in the Constitution, it is not inconceivable that in the future, First Nations advocates would argue that a particular Commonwealth law, that they oppose, is invalid because it is inconsistent with their status as a nation, which includes inherent sovereignty as a nation and a right to self-determination. The argument would proceed that a constitutional implication is derived from the term 'nation', informed by the reference to sovereignty in the Uluru Statement of the Heart, which (it would be claimed) forms part of the extrinsic materials that explain the constitutional amendment. The constitutional amendment, it would be argued, would override the previous High Court jurisprudence that does not recognise Indigenous sovereignty. The final step of the argument would be that the constitutional implication arising from the term 'nation' operates as a limit on Commonwealth legislative and executive power to act in ways inconsistent with First Nation status. Would the High Court accept such an argument? Perhaps – no one can say for sure. But it is a genuine legal argument that could seriously damage any prospect of success for the referendum.

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Referendum Working Group

Enshrining an Aboriginal and Torres Strait Islander Voice
in the Constitution

Summary of second tranche of advice

Constitutional Expert Group

The Constitutional Expert Group (Expert Group) considered additional questions referred from the Referendum Working Group relating to the draft constitutional amendment put forward by the Prime Minister at Garma on 30 July 2022 to enshrine an Aboriginal and Torres Strait Islander Voice (Voice) in the Constitution.

1. An introductory sentence to the provision could be included without giving rise to any legal concerns

The Expert Group considered the following example of possible introductory language to the draft provision from the Prime Minister's speech at Garma on 30 July 2022:

In recognition of Aboriginal and Torres Strait Islander Peoples as the First Peoples of Australia:

(1) *There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.*

(2) ...

All members of the Expert Group agreed that introductory language of this kind would be appropriate in providing a succinct explanation for the enactment of the provision and clearly link the provision to constitutional recognition.

2. The names 'Aboriginal and Torres Strait Islander Voice' and 'First Peoples Voice' are preferable to the name 'First Nations Voice'

Members of the Expert Group acknowledged that 'First Nations Voice' was chosen for the name of the Voice in the Uluru Statement from the Heart.

However, while not unanimous, there was general consensus that the name 'Aboriginal and Torres Strait Islander Voice' or 'First Peoples Voice' would be preferable to 'First Nations Voice', including for legal clarity.

3. Parliament would have the power to establish, and create relationships between, the Voice and sub-national bodies including regional Voices

The draft provision, along with existing heads of power, provide sufficient authority for the Parliament to make laws to implement a range of models for the Voice. These could include laws to establish sub-national Voices. Any connections with State and Territory Parliaments, Governments or Voices should be carefully formulated with the cooperation of the relevant State or Territory.

4. Other matters

All members of the Expert Group agreed that the draft provision would not affect the sovereignty of any group or body.