

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN:

WILLIAM ANICHA BAY  
Plaintiff  
and

COMMONWEALTH OF AUSTRALIA  
First Defendant  
and

TOM ROGERS (Australian Electoral Commissioner)  
Second Defendant

AFFIDAVIT

I, Dr William Anicha Bay, of PO Box 860 North Lakes Qld 4509, suspended medical practitioner of Aussie Home Doctor, affirm as follows:

1. On 5<sup>th</sup> September 2023, Justice Jagot directed the Registrar to refuse to issue or file my form 12 (Application for a Constitutional Writ) document without the leave of a Justice first had and obtained by the party seeking to issue or file it.
2. No reasons were provided by the Court for the refusal to issue or file my form.
3. My filed documents contained a matter of immense public interest and importance; that being the contested constitutionality of the upcoming 2023 Referendum of 14 October to change the *Commonwealth Constitution*.
4. The alleged unconstitutionality is based on the failure of FORM B, Schedule 1-Forms of the *Referendum (Machinery Provisions) Act 1984 (Cth)*<sup>1</sup> (the *Referendum Act*) to fulfill the requirements of s 128 of the *Constitution*<sup>2</sup>, namely;
  - a) "...the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.", and;
  - b) "When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes.". Instead, the *Referendum Act* unlawfully mandates only the insertion of the **title of the proposed law** to be submitted on the Referendum Ballot paper<sup>3</sup>.
5. Section 128 does not imply nor specify the **title**<sup>4</sup> of the proposed law to be submitted to electors. To deny the electors full details on the proposed alterations is not what the framers of the *Constitution* intended.<sup>5</sup>

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<sup>1</sup> See Exhibit B1

<sup>2</sup> As marked and exhibited at B2.

<sup>3</sup> By the use of the words, "[Here set out the title of the proposed law]" – see Exhibit B1

<sup>4</sup> See Exhibit B3 and B4 for the title of the proposed law.

<sup>5</sup> As reported at page 987 of Quick and Garran, 'The Annotated Constitution of The Australian Commonwealth' (1901).

6. I have argued that the title does not equate to the substance or spirit of the meaning and requirements of s 128 of the *Constitution* (i.e., the full proposed law to be given to electors for voting on<sup>6</sup>) and is not what the framers of the *Constitution* had in mind when they declared that the Australian people ought to be allowed to decide for themselves this most important of matters.<sup>7</sup>
7. Because of this contested constitutionality, I requested in my Form 12 Application for a Constitutional Writ; relief by way of a writ of mandamus for the Second Defendant, Tom Rogers; to be restrained from printing, issuing, or otherwise distributing the Referendum ballot papers according to law.
8. This relief would only be necessary if the Court found the *Referendum (Machinery Provisions) Act* 1984 (Cth) to be invalid; a declaration for which I am seeking this Court's determination on if leave to file is so granted.
9. In my Form 12 application, I had also requested an urgent interlocutory application whilst this matter was being determined. This would be the next procedural step to be undertaken if leave to file is so granted.
10. For the reason of seeking constitutional clarity on the *Referendum Act*, I have now filed an application for Form 31 - EX PARTE APPLICATION FOR LEAVE TO ISSUE OR FILE.
11. The grounds of this application are:
  - a. **Ground One:** I have standing, there is a justiciable controversy, and I have suffered a personal injury as well.
  - b. **Ground Two:** This is a matter of immense public interest and importance, and urgency.
  - c. **Ground Three:** My matter is neither vexatious, frivolous, nor an abuse of process, and is not outside the jurisdiction of this High Court.
  - d. **Ground Four:** There is still adequate time for this matter to be heard and decided in advance of the 2023 Referendum.
  - e. **Ground Five:** Once the constitutionality of a law is challenged, especially one as constitutionally consequential as this, its authority must be upheld (or at the very least examined) for the Australian people to have confidence in our system of justice, the 2023 Referendum and the *Constitution* itself.
12. The justification for these grounds is given below.
13. **Ground One:** I have standing because Chief Justice Mason in *Boland v Hughes* (1988)<sup>8</sup> said in the very similar case that, "It just strikes me as perhaps a little odd that

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<sup>6</sup> See Exhibit B3 for the full proposed law to alter the *Constitution*.

<sup>7</sup> Ibid, In the original s 128 clause presented to the Sydney Convention of 1891 the Committee removed the wording, "Conventions to be elected by," in order that the question should be submitted to the electors." This highlights the importance of the electors being fully debriefed aware and sovereign in the exercise of constitutional amendment. Indeed, the counter argument was put that the constitutional amendments were too complicated to be put to the electors, but this was not upheld in committee. "Mr Deakin pointed out that the Conventions could only say yes or no, and the electors ought to be allowed to yes or no themselves..." i.e., full electoral informed consent was the spirit of this section.

<sup>8</sup> 83 ALR 673

an elector and a citizen lacks standing to raise the validity of a constitutional amendment.” He further said, “if there is a defect in the procedure and that defect is essential to the validity of constitutional amendment, I do not see how a statute can give it immunity from challenge...”.

14. Therefore, I have standing because I am a qualified elector and am required by s 45 of the *Referendum (Machinery Provisions) Act* to vote in this Referendum.
15. I also have a ““special interest” over and above that enjoyed by the public”<sup>9</sup> as I am an ‘announced candidate’ for the 2024 Queensland State Election and campaigning on the 2023 Referendum. I thus have the requisite standing in this matter for the case to proceed.
16. **Ground Two:** Chief Justice Mason in *Boland v Hughes*<sup>10</sup> said that there is, “the notion of constitutional amendment based on the ascertainment or true reflection of the will of the people”. Thus, this matter has significant public importance because the lack of descriptive wording of the proposed law is contrary to the public’s interest in being fully informed of the changes to *Constitution* and expressing our will.
17. Section 128 is the most important section of the *Constitution* as it holds the power to change the *Constitution* itself. Section 128 is the social compact upon which the power of the Australian people and its governance rests; therefore, its application must be interpreted strictly and correctly, and there can be no doubt attended to its legality.
18. Furthermore, proponents of both sides of the Referendum have an interest in ensuring the result of the Referendum is seen as a legitimate outcome and not subject to unnecessary litigation, and most importantly; that a Referendum need not be held again.
19. It is vital that this matter be heard before the Court as soon as practicable to minimise disruption to an efficient and timely holding of the 2023 Referendum. It is also expedient to hear this matter *before* the Referendum to not cause undue costs to the defendants, or to tie this Court up in litigation *after* the event, or to cause the public to have to pay for another Referendum because of a disputed return. If this matter is heard within a few days, it is anticipated there will be minimal disruption to the mechanics of the Referendum, especially since the writ for the Referendum has yet to be issued.
20. **Ground Three:** My matter is neither vexatious, frivolous, nor an abuse of process, and is not outside the jurisdiction of this High Court.
21. My application is not vexatious because there are solid grounds for this matter and a real controversy on the face of the *Referendum Act* mandating a title and not a description of or the full proposed law to be included on the ballot. I argue that the wording in s 128, “...the vote shall be taken in such manner as the Parliament

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<sup>9</sup> *Australian Institute of Marine & Power Engineers v Secretary, Department of Transport* [1986] FCA 636; 13 FCR 124, Justice Gummow at [22].

<sup>10</sup> 83 ALR 673

prescribes.”, means that the Parliament has the power to legislate the manner only **after** the proposed law has been submitted to the electors. The submission of the full proposed law is a prerequisite of the Parliament exercising its powers under the *Referendum Act* and as such make FORM B – Schedule 1 ultra vires to s 128 of the *Constitution*.

22. Furthermore, I am not seeking to embarrass or unjustifiably bother the Commonwealth nor the Australian Electoral Commissioner. I have a genuine and special interest in the Referendum being held according to law (i.e., s 128 of the *Constitution*) and this is an interest I believe is, or ought to be, shared with all electors in our Commonwealth.
23. My matter is not frivolous because there is no certainty my matter would fail, and indeed there is precedent with the case of *Boland v Hughes* 1988 that might have succeeded if not for timing which would suggest my matter has the requisite merit to proceed. The main impediment (timing) to victory in the Boland case has in my matter, been removed.
24. My matter is not an abuse of the processes of the Court as the similar case of *Boland v Hughes* did not attract that regard. The High Court is the lawful jurisdiction to originate matters like mine which involve a writ of Mandamus being sought against an officer of the Commonwealth<sup>11</sup>. It is also the lawful place to have a hearing on matters involving interpretation of the *Constitution* by virtue of s 76 of the *Constitution* and s 30 (a) of the *Judiciary Act 1903* (Cth). As such, my matter is also firmly within the jurisdiction of the High Court as well.
25. **Ground Four:** There is still time for this Court to decide this issue as the writ for the Referendum has yet to be issued and Parliament is sitting this week and can resolve this issue by a short amendment to the *Referendum Act*.
26. Chief Justice Mason in *Boland v Hughes* said, that, “I have no doubt that had this matter been agitated at an earlier stage and had I come to a conclusion that there was sufficient substance in the principal question sought to be raised by you, there would have been no difficulty in having the matter determined by a Full Court...”.
27. No such impediment exists in this case where much time has been allowed for constructive correction in the public (and private) interest at minimal cost to the defendants.
28. Furthermore, there is sufficient time for Parliament and the AEC Commissioner to make corrections to ensure this Referendum is constitutionally valid as s 9 ss (2) of the *Referendum Act* allows for up to 58 days after the issuance of the writ to take the votes of electors. This means the Referendum could be held as late as November 4<sup>th</sup>, 2023.
29. Finally, s 10 ss (1) of the *Referendum Act* allows for further extensions of time by the Governor-General which may further accommodate issues like this. In other words, there is no time impediment to the Parliament and Mr Rogers getting this

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<sup>11</sup> Per s 75 (v.) of the *Constitution*

matter correct in advance of a lawful Referendum voting day thus likely saving much expense to the Australian public.

30. **Ground Five:** *‘Omnia praesumuntur rite et doctee probetur in contrarium solenniter esse acta’*: it is a presumption at law that all acts are valid until challenged. By this assumption, I humbly request the Court to allow a hearing on this matter so that the validity of the *Referendum Act* can be proven by the Commonwealth. Without this process of legal inquiry, a stain shall forever remain on the legitimacy of the *Constitution* if so altered without due consideration. This will inevitably result in further legal challenges from interested parties that need not occur, and can be prevented now with swift action from your Honours.
31. In summary, I believe that confidence in Australia’s Referendum and the *Constitution* itself would be best served by a hearing on the constitutional legality of the *Referendum Act*, specifically whether a title of (and not the full) proposed law on the ballot paper to alter the *Constitution* by the electors is within the spirit and meaning of s 128 of the *Constitution*.

AFFIRMED by the deponent  
at \_\_\_\_\_ in Queensland.  
on 10<sup>th</sup> September 2023.

Before me:

\_\_\_\_\_

\_\_\_\_\_

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

Affidavit of Dr William Anicha Bay affirmed on 10<sup>th</sup> September 2023.

**INDEX OF EXHIBITS**

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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN:

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Plaintiff

and

COMMONWEALTH OF AUSTRALIA  
First Defendant

and

TOM ROGERS (Australian Electoral Commissioner)  
Second Defendant

EXHIBIT B1

This is the exhibit marked B1 produced and shown to Dr William Anicha Bay at the time of affirming his affidavit this 10<sup>th</sup> September 2023.

FORM B – Schedule 1

Before me

.....  
Justice of the Peace

## Schedule 1—Forms

### FORM A

Commonwealth of Australia

*Writ for a referendum*

To the Electoral Commissioner

I command you to cause a proposed law entitled [*here insert the title of the proposed law*] to be submitted, according to law, in each State and in the Australian Capital Territory and the Northern Territory, to the electors who are qualified to vote at referendums.

I appoint the following dates:

1. For the close of the Rolls: the     day of     20 .
2. For taking the votes of the electors: the     day of     20 .
3. For the return of the writ: the     day of     20 .

[*Here insert Governor-General's title and the date*]

Governor-General

By His Excellency's command

### FORM B

Commonwealth of Australia

BALLOT PAPER

[*Here insert name of State or Territory*]

Referendum on proposed Constitution alteration

#### **DIRECTIONS TO VOTER**

WRITE "YES" or "NO" in the space provided opposite the question set out below.

[*Here set out the title of the proposed law*]

DO YOU APPROVE THIS PROPOSED ALTERATION?

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN:

WILLIAM ANICHA BAY  
Plaintiff

and

COMMONWEALTH OF AUSTRALIA  
First Defendant

and

TOM ROGERS (Australian Electoral Commissioner)  
Second Defendant

EXHIBIT B2

This is the exhibit marked B2 produced and shown to Dr William Anicha Bay at the time of affirming his affidavit this 10<sup>th</sup> September 2023.

Section 128 of the *Constitution*

Before me

.....  
Justice of the Peace

- *Commonwealth Constitution s 128*

128. Mode of altering the Constitution.

This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, "Territory" means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

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First Defendant

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EXHIBIT B3

This is the exhibit marked B3 produced and shown to Dr William Anicha Bay at the time of affirming his affidavit this 10<sup>th</sup> September 2023.

The Proposed Law

Before me

.....  
Justice of the Peace

2022-2023

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

*As passed by both Houses*

**Constitution Alteration (Aboriginal and  
Torres Strait Islander Voice) 2023**

**No. , 2023**

**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**

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1 **A Bill for an Act to alter the Constitution to**  
2 **recognise the First Peoples of Australia by**  
3 **establishing an Aboriginal and Torres Strait**  
4 **Islander Voice**

5 The Parliament of Australia, with the approval of the  
6 electors, as required by the Constitution, enacts:

7 **1 Short title**

8 This Act is the *Constitution Alteration (Aboriginal and Torres*  
9 *Strait Islander Voice) 2023*.



1 **Schedule 1—Alteration of the Constitution**  
2

3 **1 Table of contents**

4 After:

5 Chapter VIII Alteration of the Constitution

6 insert:

7 Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples

8 **2 After Chapter VIII**

9 Insert:

10 **Chapter IX—Recognition of Aboriginal and**  
11 **Torres Strait Islander Peoples**

12 **129 Aboriginal and Torres Strait Islander Voice**

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

- 15 (i) there shall be a body, to be called the Aboriginal and Torres  
16 Strait Islander Voice;
- 17 (ii) the Aboriginal and Torres Strait Islander Voice may make  
18 representations to the Parliament and the Executive  
19 Government of the Commonwealth on matters relating to  
20 Aboriginal and Torres Strait Islander peoples;
- 21 (iii) the Parliament shall, subject to this Constitution, have power  
22 to make laws with respect to matters relating to the  
23 Aboriginal and Torres Strait Islander Voice, including its  
24 composition, functions, powers and procedures.  
25

(48/23)

IN THE HIGH COURT OF AUSTRALIA  
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BETWEEN:

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Plaintiff

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EXHIBIT B4

This is the exhibit marked B4 produced and shown to Dr William Anicha Bay at the time of affirming his affidavit this 10<sup>th</sup> September 2023.

The title of the proposed law

Before me

.....  
Justice of the Peace

# The case for voting

# No

The case for voting **No**  
starts on **page 11**  
and is then presented  
on alternate pages.

## A proposed law:

To alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.

Who wrote this?

The content of this argument (which can be viewed at [aec.gov.au/referendums/pamphlet.htm](http://aec.gov.au/referendums/pamphlet.htm)) was authorised by a majority of those members of Parliament who voted against the proposed law and desired to forward such a case. This text has been published without amendment by the Electoral Commissioner.

Your official Yes/No referendum pamphlet | The case for voting No

