

The Referendum Controversy: *Understanding the Meaning of Community Consultation And Its Application to the Indigenous Voice Process*

Dr Ted Christie, 25 August 2023



Disclosure Statement

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Divergent public opinion has ignited conflict and controversy over the referendum to be held later this year and the proposed law: -

"To alter the Constitution to recognize the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice ("the Voice")".

One source of the controversy is an amendment to the Constitution that will enable *the Voice* to make representations to both Parliament and the Executive on matters that directly affect the Indigenous community.

In this regard, the most recent polling by the **Essential Report (08 August 2023)** is relevant, as it identifies a reason why 42% of those polled may vote "No": Because *"It will give indigenous Australians rights and privileges that other Australians don't have?"*

Based on information available in the public domain, **the Voice process** appears to mimic the *community consultation* process in Australia, given *the Voice* will be about consultation and providing advice.

Since the 1970's, *community consultation* has been the primary process relied on by Government to resolve public interest conflicts - for all Australians, regardless of race or ethnicity.

*A statutory duty in law under the Federal Constitution,
for Government to consult
is the proposed pathway
for the Voice process.*

A **statutory duty** in law for *community consultation* is also a pathway adopted by all levels of Government. It enables the public to provide advice and information to Government on their needs and concerns, in order to resolve matters that impact on them.

In terms of the ongoing controversy on the referendum, concerns whether similar rights and privileges apply for both the Voice process and community consultation need to be addressed.

Knowledge of public law is an aid for resolving this concern.

Case Study: Community Consultation

In *Leichhardt Municipal Council v Minister for Planning No. 2* (1994) 78 LGERA 146, the **community consultation provision** of the *Environmental Planning and Assessment Act 1979 (NSW)* was in dispute.

The statutory provision for community consultation prescribed the **legal obligations for community consultation in terms of the bodies that had to be consulted by the Government agency** when preparing an environmental study or a Draft Regional Environmental Plan (**emphasis added**).

The following meaning for '**consultation**' was adopted by the Court: -

"Given its ordinary or common meaning, according to the Oxford Dictionary, consultation involves the taking of counsel, seeking information or advice from another, and taking it into consideration either by deliberation or in conference.

- *There is no imperative that the advice be accepted or that it be taken into account to any particular degree.*
- *The object of consultation is to be apprised or informed of other opinions or positions in regard to a subject before the matter for decision is finally determined".*

On appeal by the Leichhardt Municipal Council [(1995) 87 LGERA 78], the Court of Appeal of New South Wales, in a 2:1 decision, reviewed the legal obligations prescribed by the statute for community consultation.

The Court of Appeal concluded that the Director of the Government agency – the decision-maker - was required to ensure that consultations with the bodies prescribed in the statute had been properly discharged: -

- *"Later events showed that the [Leichhardt Municipal] Council's views had been considered in preparing the draft Regional Environmental Plan.*
- *Later events also showed that Council was unhappy with the result of the [Government agency] Director's consideration of the Council's views.*
- *To my mind, this does not amount to the consultation process not having been completed. It seems to me that it was completed, although not to the satisfaction of the Council. That did not matter, so far as [the statutory duty to consult] was concerned. **The obligation was to consult, not to agree**" (emphasis added).*

The significance of this Case Study is that it facilitates a comparative review of the rights and privileges between the Voice process and community consultation to be made.

Features of Community Consultation

- ***The decision-maker must consider the information and opinions submitted during the community consultation. A statutory duty for consultation does not impose an obligation on the decision-maker to agree with the consultation outcomes - unless such a power is provided for in the statute.***

NOTE: A good example of legislative drafting of obligations for community consultation and the preparation of the Murray-Darling Basin Plan, can be found in the Federal Water Act (2007).

The Act prescribes the bodies that the Government agency must consult with to seek their submissions; this includes members of the public.

The Act further prescribes that the Government agency "must consider any submissions it receives..."; and the Government agency "may alter the Basin Plan as a result of its consideration of those submissions"

(emphasis added).

- [Community consultation process is a decision-making aid](#) for Government to resolve public interest conflicts - not the decision end-point.
- *Community consultation is not the same as mediation: It does not lead to a negotiated agreement.*
- *The community consultation process does not have a power of veto.*
- *Understanding the dispute resolution process when community consultation arises as a statutory duty is essential!*
- *An appeal arising from a statutory duty to consult is through a judicial review. Judicial review is not concerned with the substance or merits of the decision made following consultation - but whether or not it was properly made i.e., within the legal limits of the decision-maker's power as prescribed in the legislation.*
- *A successful judicial review challenge results in a reconsideration of the original decision in accordance with prescribed legislative obligations.*

How Can Public Opinion for the Voice Process be Galvanized?

Clearly, there are a number of options for Government to consider.

One option would be for Government to acknowledge whether similar *rights and privileges* for both consultation, decisions and dispute resolution will apply for *the Voice process* and *community consultation*. For example:-
Will the Voice process be a decision-making aid and not the decision end-point? If consultation under the Voice process arises as a statutory duty, will "a Voice appeal" proceed as a judicial review – rather than a [mediation or independent review](#)? Clarity is needed on these issues.

**The challenge for Government to galvanize public opinion on
 “full and effective participation by Indigenous peoples
 in all matters that concern them”
 would be facilitated if the “rights and privileges,” based on
 the accepted advice/decision-making/dispute resolution framework
 for community consultation,
 were similar to the Voice Process.**