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Institute of Public Affairs

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Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

IPA Submission to the Senate Finance and Public Administration References Committee inquiry into the Administration of the referendum into an Aboriginal and Torres Strait Islander Voice

This submission has been prepared to share IPA research and analysis with the Senate Finance and Public Administration References Committee as it conducts its inquiry into the administration of the referendum into an Aboriginal and Torres Strait Islander Voice.

The submission is directed to the following terms of references:

> The administration of the referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution through an Aboriginal and Torres Strait Islander Voice, with particular reference to:
>
> a. Protections against the potential for foreign actors to seek to influence the outcome or public debate on the referendum question;
> b. The detection, mitigation, and obstruction of potential dissemination of misinformation and disinformation, including via social media or technology platforms;
> …
> g. Any other related matters.

IPA research and analysis has found that the federal government has systematically failed to honour the Australian tradition of providing a free and fair debate over proposed constitutional changes. Specifically:

- The federal government has failed to provide any protections against the potential for foreign actors, such as large digital and social media platforms, to influence the public debate on the referendum question.
- The federal government's commitment to combat the vague and subjective notion of misinformation and disinformation threatens to enable the arbitrary censorship of public debate.
- The Australian Electoral Commission's partnership with RMIT ABC Fact Check and AAP Fact Check to engage in so-called "fact checking" raises serious concerns about the agency's commitment to a free and fair debate.

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The debate over constitutional change must be free and fair in order for Australians to move forward as a united country after the vote. But in an environment in which one side is not given an opportunity to be heard or to have their say, Australians can have no confidence that the debate on the Voice referendum will be free and fair and will leave Australians more divided.

Introduction

Constitutional change represents a fundamental alteration of the institutional and governmental arrangements of the country and has the potential to completely reshape the relationship between citizen and the state. The drafters of the Australian Constitution recognised the gravity of this by incorporating section 128 into the Constitution, which allowed politicians to propose constitutional changes but reserved to the Australian people the sole right to approve of those proposals by way of a referendum.

A referendum is about more than just the mechanics of submitting a ballot: a referendum is part of a democratic process, whereby competing political claims are allowed to be made and voters are given a fair opportunity to assess each claim and freely come to a decision about which claim they prefer.

Outlined below is a brief summary of some aspects of how the Australian government has failed to honour the nation's tradition of free and fair referendum debate.

The federal government has failed to provide any protections against the potential for foreign actors, such as large digital and social media platforms, to influence the public debate on the referendum question.

There is a widespread community perception that the large technology companies already moderate online content in a way that unfairly silences right-of-centre opinions. This was most recently brought to light by the reporting on the so-called "Twitter Files", the release of emails sent by the previous management team of social media company Twitter prior to its takeover by Elon Musk. The reporting by independent journalists Matt Taibbi and Bari Weiss confirmed an overwhelming left-wing bias by the employees of Twitter resulting in unfair censorship of conservative viewpoints.

The Institute of Public Affairs has directly experienced this. On no fewer than three occasions we are aware of, content to disseminate research about the Voice has been minimised or restricted by large digital platforms.

- On 14 February 2023, Google refused an attempt by the IPA to promote a video entitled 'IPA research leads debate forcing Federal Government backflip on Voice pamphlet.' The video contained IPA analysis of the federal government's proposed *Referendum (Machinery Provisions) Bill 2022.*

  The cited reason for refusing to allow the IPA to promote its video was that it was an 'Australian election Ad' featuring a political party, candidate, or officeholder. This

was incorrect: the video featured only IPA Research Fellow John Storey.

- In September 2022 the IPA sought to communicate our research on Facebook through a research video entitled 'Race has no place'. The research video featured the comments of senators Jacinta Nampijinpa Price and James McGrath, and leading academic and public intellectual Anthony Dillon, on the Voice.

  On four separate occasions Facebook acted to ensure the visibility of the video was minimised. The IPA had attempted to pay a fee to share the video to more social media users but was rejected on the basis that the video was inconsistent with Facebook's policy regarding "Ads about Social Issues, Elections or Politics policy". Meta, the parent company of Facebook, did not explain how a research video discussing racial equality violated Facebook's policies. And there was no explanation for Facebook's decision to remove the ban, then reapply the ban a short time later.

  Facebook later admitted they made the mistake and admitted they were wrong to have removed the ban on the promotion of the video, though they wrongly maintained that the content of the IPAs video required a 'disclaimer'.

- On 30 September 2022, the IPA published a research video, 'Is big tech seeking to influence the referendum?', which analysed the recent actions of the big tech companies in restricting the use of their platforms to those who were critical of the Voice. That video was rejected for promotion on the same day. To date, Facebook has not lifted this prohibition.

Other organisations critical of the Voice have experience similar censorship. Needless to say there are no such reported cases of pro-Voice opinions being silenced. The very idea, it seems, is unfathomable.

The Institute of Public Affairs has recommended that the federal government ensure large digital platforms are restrained from taking actions like this by amending the *Broadcasting Services Act 1992* to prevent online censorship during the Voice referendum debate. Currently, Schedule 2, Part 2, Section 3 of the *Broadcasting Services Act 1992* requires broadcasters to offer political parties the opportunity to broadcast election material during an election.

The IPA recommended that this provision be temporarily extended for the period of the referendum to: apply during a referendum campaign; expand the definition of broadcasters to apply to digital platforms; apply the requirement to give opportunity to broadcast referendum material to all referendum participants (presently the law applies to political parties, but this would be inappropriate during a referendum because political parties are not seeking election); and should clarify that digital platforms censoring referendum material is unlawful.

Rather than respond to the concerns about fairness in the online debate, the government has indicated it would adopt the opposite position. This was highlighted in remarks by the federal government's eSafety Commissioner Julie Inman Grant on 28 March 2023, when she declared social media companies were 'on notice' during the referendum debate. In particular, the Commissioner asserted social media companies must monitor their platforms for

'keywords that might be used to silence voices', for mis- and disinformation', and commented on their obligations to minimise 'online hate'.

> We need to make sure that we're minimising online hate. And again, my entreaty to everyone in Australia is, when you see online hate happening, report it to the platform and report it to eSafety. We have the powers to take it down. We're working with law enforcement in across Australia.

The eSafety Commissioner likely does not possess the powers to 'take down' something the government regards as 'online hate'. The *Online Safety Act 2021* which defines the eSafety Commissioner's powers does not refer to 'online hate' or 'hate speech'.[1]

Underlying the eSafety Commissioner's comments is a more general commitment by the government to minimise what it regards as 'online hate'. The eSafety Commissioner herself does not possess direct powers to censor the internet, but it forms an essential part of the governmental infrastructure which gives the executive, and in particular the communications minister, the legitimacy to pressure the digital platforms to self-censor the content the government would like to see minimised. Around the same time as the eSafety Commissioner's press conference, *The Guardian* reported that the Minister of Communications Michelle Rowland would in early April 2023:

> meet the eSafety Advisory Committee, including members of the digital industry and government, which will discuss the role of digital platforms in protecting and supporting Indigenous Australians during the referendum.
>
> The group is engaging with Twitter, Microsoft, Google, TikTok and others around the referendum. Inman Grant said the committee was seeking information from tech giants about their policies on the vote, and would provide 'guidance about what more we expect them to do.

As of writing, there has been no reporting on the outcome of this meeting.

It is highly concerning that agencies of the federal government are teaming up large and influential companies that in effect own and control the modern digital town square. The current federal government is clearly a strong proponent of an indigenous Voice. Further, the eSafety Commissioner and other government agencies such as the Australian Electoral Commission, are official agencies of the Commonwealth government. Thus, the exercise of any powers to limit online content, in the context of a political debate in respect to which the government has made its views clear, could readily be perceived to be state-sanctioned censorship of its opponents rather than the genuine restriction of harmful online abuse, misinformation or disinformation.

[1] John Storey, *Letter to the eSafety Commissioner* (Institute of Public Affairs, 6 April 2023) 2.

The federal government's commitment to combat the vague and subjective notion of misinformation and disinformation threatens to enable the arbitrary censorship of public debate

In a media release issued on 1 December 2022 the federal government proposed making legislative changes to the *Referendum (Machinery Provisions) Act 1984* to remove, for the purposes of the forthcoming referendum, the funding restrictions contained in that Act. One of the stated reasons for this change was to "to enable funding of educational initiatives to counter misinformation."

Misinformation is an inherently vague concept. As the Australian Communications and Media Authority has acknowledged, misinformation and disinformation are 'relatively novel and dynamic phenomena' with 'no established consensus on the definition of either term.'[2] The ambiguity of the term enables overreach and censorship of debate by giving public authorities the power to make decisions about which opinions are true or false:

> The suggestion that government officials could be employed as reliable arbiters of truth is idealistic but unrealistic. More realistic is that the 'official' truth would be determined not by reference to its accuracy, but according to whether it is politically uncomfortable or unacceptable for certain opinions to be expressed.[3]

Defining concepts like misinformation and disinformation is inherently subjective. Is a mere error of fact misinformation, or does it require an intention to deceive? Or is it only misinformation if it is "harmful", and who assesses something as harmful and by what measure? How is an error "proven" particularly in the case of contested policies and ideas in the spheres of law, economics or politics?

An example will suffice to illustrate the point. [4] On 27 February 2023 Monash University published an article "Voice to Parliament: Debunking 10 myths and misconceptions". "Myth 7" was the "[The Voice] will divide the nation". How was this "myth" debunked? By the assertion: "The Voice to Parliament will unite the nation, because it will be a big step towards reconciliation." So a political opinion ("the Voice will divide us") was elevated to the level of a "myth" to be debunked by the simple assertion of an alternative political opinion ("the Voice will unite us"). If Monash University were tasked with identifying, for the government, misinformation presumably the claim that "the Voice will divide us" would qualify. In reality, the issue of whether the Voice will divide, or unite, Australian's is one of, if not the, central political question at stake, to be decided by voters at the referendum.

The regulation of misinformation and disinformation allows a person's subjective viewpoint to be elevated to the status of arbiter of truth. This should never be allowed, but is most concerning because almost all such arbiters have a strong bias to left-of-centre politics, both amongst the large social media platforms and the so-called "fact checking" organisations.

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[2] Ibid.
[3] Ibid.
[4] Katie O'Bryan and Paula Gerber, 'Voice to Parliament: Debunking 10 Myths and Misconceptions' (27 February 2023) <https://lens.monash.edu/@politics-society/2023/02/27/1385518/voice-to-parliament-debunking-10-myths-and-misconceptions?utm_campaign=ENEWS_ERD&utm_source=NEWS&utm_medium=email&utm_content=news_myth_cta&subdivision=PER>.

The Australian Electoral Commission's partnership with RMIT ABC Fact Check and AAP Fact Check to engage in so-called "fact checking" raises serious concerns about the agency's commitment to a free and fair debate.

The Australian Electoral Commission has announced that it will team up with the "third party" fact checking organisations AAP Fact Check, RMIT FactLab and RMIT ABC Fact Check.[5] As alluded to above in respect to misinformation and disinformation, "fact checking" is inherently subjective. In reality, in many cases it is simply a way to denounce an opposing political viewpoint as not simply wrong, but dangerous, in order to silence that viewpoint.

The use of "fact checkers" has been denounced by influential American writer and journalist Michael Shellenberger, who labels it "The Censorship Industrial Complex." In his testimony to the United States Congress, Shellenberger said:

> Who are the censors? They are a familiar type. Overly confident in their ability to discern truth from falsity, good intention from bad intention… These organisations and others are also running their own influence operations, often under the guise of 'fact-checking'. The intellectual leaders of the censorship complex have convinced journalists and social media executives that accurate information is disinformation, that valid hypotheses are conspiracy theories, and that greater self-censorship results in more accurate reporting.

In Australia, a review of the "fact check" and "debunking" articles by these self-appointed arbiters of truth reveal a clear left-wing bias. The cases chosen by AAP Fact Check, RMIT FactLab and RMIT ABC Fact Check to be "fact checked are almost exclusively right-of-centre viewpoints or opinions by right-of-centre politicians or commentators. It is almost impossible to find examples where a left-of-centre politician, commentator, or viewpoint has been "fact checked" or "debunked". One must either assume the bias of the authors of such articles, or that left-of-centre politicians and commentators are uniquely endowed with the gift of factual accuracy on all matters, while those on the right remain within the realm of mere mortals prone to error.

As well as the ideological bias of the fact-checkers, the "facts" being "checked" are inappropriate topics on which to declare truth or falsehood. Contested political or legal claims cannot be proven or disproven. In the realm of legal claims, contested legal positions could only be proven or disproven by the courts, in Australia ultimately only by the High Court of Australia. Yet the tactic normally adopted by fact checkers is to simply quote a contrary "expert" opinion and therefore declare the original claim or assertion to be untrue, debunked or a myth. This can then be used to denounce the opposing viewpoint, label it as misinformation, and use the semi-official imprimatur that the fact-checking organisations

[5] Sam Buckingham-Jones and Mark Di Stefano, 'AEC eyes tie-up with fact checkers for Voice referendum,' *The Australian Financial Review*, 19 March 2023 <https://www.afr.com/companies/media-and-marketing/aec-eyes-tie-up-with-fact-checkers-for-voice-referendum-20230317-p5ct0r>.

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have given themselves to approach the social media platforms to have the offending viewpoints taken down and censored.

For example, RMIT FactLab has claimed to have "fact checked" and proven "false" the notion that the proposed Voice would operate as a "third Chamber of Parliament", and that it would give "special rights to one race of people". The sole "evidence" for such claims are the unchallenged views of legal "experts", often the same experts who have advised the federal government on how to establish the Voice, or who are legal academics at universities which are clearly in favour of the Voice. In other words, they are merely contrary opinions. Readers are free to attribute whatever weight to the views of these "experts" they wish, but absolutely nothing has been "proven" to be "false" by merely quoting contrary opinions.

Further, the very nature of a constitutional question means, by definition, that it can only be resolved by the High Court. The role, functions, powers, and rights of the Voice will be determined by the High Court. So it is impossible for mere legal "experts" to definitively say what the role or powers of the Voice will be. At most they can express their own opinion and the public can weigh up the merits of each viewpoint. But by couching the debate as one of "fact checking" or "debunking", the conclusion of the fact checkers not only suggest the contrary view is wrong, but completely illegitimate and dangerous. It is deplorable that Australia's national broadcaster, the ABC, an organisation funded by taxpayers to provide unbiased news and information to inform the public, participates in such censorious journalistic techniques.

In addition, claims like the Voice will be a "third Chamber" or will give certain Australians "special rights" are not necessarily strictly legal assertions. They can be rhetorical, in that the person expressing the view thinks the Voice will operate that way in practice (regardless of the strict legal powers of the Voice), or they are opposed to the symbolism of preferencing in the constitution a certain group (regardless of any enforceable legal powers). But the fact checkers are usually deaf to such subtleties of tone, simply "debunking" these views purely on their strict legal merits. Such methods have the effect of "tone policing". Rhetorical arguments, satire, and recourse to emotion are all perfectly legitimate methods of political persuasion. There should be no attempt to use pedantic literalism to silence genuine political debate. Especially when the "Yes" case utilises emotive language and unverifiable claims all the time. Typical "Yes" case talking points include that the Voice will "close the gap", is a "modest request", is the "right thing to do", will finally give indigenous Australians a "say over their lives", or opposing the Voice is "racist", or will "jeopardise Australia's international reputation". All these claims are either unsubstantiated, rhetorical, or outright false, yet will never be "fact checked" by the left-leaning self-appointed arbiters of truth at AAP, ABC or RMIT.

Claims such as the Voice will be a "third Chamber" or grants "special rights" have not been disproved, indeed cannot be proven false, and represent legitimate discourse in the political sphere. But based on the proposals being mooted by the AEC, eSafety Commissioner and by the very inclusion of the regulation of misinformation in the terms of reference of this inquiry, the government is contemplating using such an adverse finding by unelected, self-appointed arbiters or truth to silence certain opinions. Such claims do not target any person or group for hate or vitriol. All that is done by such claims is allow an opponent of the referendum question to express their view, which is potentially true, at worst contended, and

none the less reflects the feelings and sentiments of the commentor concerned. But if a fact checking organisation unilaterally takes issue with the tone used and gets some "experts" to express a counter view, then such opinions can be labelled "false", a "myth", or "debunked", and thus categorised as dangerous, misinformation or disinformation. Based on the proposals put forward by the government and its agencies, this would then empower them to approach the foreign owned social media platforms to have such opinions censored.

A more direct violation of the principles of free speech, in which government agencies collude with media and technology companies to silence the legitimate opinions of one side of a political debate, is difficult to imagine.

Far from further limiting the free expression of ideas, particularly right-of-centre ideas, to overcome the clear distortion of this debate so far (unfair funding, unfair regulatory treatment, the limitation of information, and the use of the powers of government agencies to promote the cause of the government of the day), the government should instead be making a wholehearted effort to ensure all viewpoints can be heard.

Critical examples of the federal government denying Australians a free and fair debate on the Voice

Perhaps no example better highlights the intent of the political class to "manage" the referendum debate rather than allow for a free and fair one than the initial form of the *Referendum (Machinery Provisions) Amendment Bill 2022* in December 2022. The Bill was intended to reform the way referendums are conducted in Australia, with particular application to the conduct and regulation of the Voice referendum. The key change of the Bill was to temporarily suspend section 11 of the *Referendum (Machinery Provisions) Act 1984*, which requires the Australian Electoral Commission to produce and distribute to electors a pamphlet featuring a 2,000-word essay for both the supporting and opposing arguments to a referendum question.

The federal government claimed that the referendum pamphlet was outmoded in the 'digital age' though the genuine motivation for attempting to cancel the pamphlet was flagged by ALP Senator and Special Envoy for Reconciliation and Implementation of the Uluru Statement from the Heart Pat Dodson who said the government would not fund the referendum pamphlet because 'the government is not interested in supporting any racist campaigns.'[6] The assertion indicated that in senior levels of the federal government it was not considered possible to mount an argument against their proposed constitutional change that was not fundamentally racist.

Ultimately, the federal government dropped this change in order to pass the remainder of the Bill. But the Bill is a symbol of the broader approach taken by the political class, that the debate over constitutional change should be managed, information restricted, and the public cannot be trusted with certain information that might be put forward by the "No" case.

[6] Paige Taylor, 'Dodson urges Dutton to decide if Opposition supporting voice referendum,' *The Australian*, 25 November 2022.

Funding for pro-voice advocacy

A key claim made by the federal government for refusing to provide equal public funding for the "Yes" and "No" campaigns is that public funding was unnecessary. Linda Burney, the Minister for Indigenous Australians, said in November 2022 that '[the federal government] will not be using public funds to fund a yes or no campaign… We believe those campaigns can raise their own money through private means.'[7]

This claim is contradicted by the history of funding for pro-voice non-government organisations since the Uluru Statement from the Heart was released in 2017. It is not an exaggeration to say that there would likely not be an established and advanced movement to amend the constitution to include an indigenous Voice, without years of publicly funded advocacy. IPA analysis of documents submitted to the Australians Charities and Not-for-profits Commission has found that one national advocacy organisation, Reconciliation Australia Limited and its state partners, has received $30.3 million in funding from state and federal governments between 2017 and 2022. This is in addition to $25 million in direct government funding between 2012 and 2017 to operate 'Recognise', a campaign entity dedicated to convincing the public about why constitutional change was necessary.

In addition to Reconciliation Australia, the Cape York Institute received more than $11 million in 2020, which bolsters its advocacy activities. For instance, in 2020, the Cape York Institute launched 'From the Heart', a campaign for securing a Yes vote at the Voice referendum.

It has been publicly funded bodies, over many years, that have been the driving force behind constitutional recognition. The "Yes" campaign organisations have been well funded for years and ready to start campaigning as soon as the referendum proposal was announced last year. The "No" campaign has had to rely solely on private funds. The funding arrangements by successive federal governments have in reality been grossly uneven for years, undermining the present claim of funding neutrality.

Favourable regulatory treatment for the Yes campaign

In the October 2022 Commonwealth budget, the federal government granted a substantial financial advantage to the "Yes" campaign. Page 17 of Budget Paper No. 2 revealed that deductible gift recipient status would be given to pro-Voice campaign entity, Australians for Indigenous Constitutional Recognition.[8] This allows Australian individuals and, importantly, corporate Australia, to claim a tax deduction when they donate to the "Yes" campaign.

The federal government has indicated that it would be willing to now grant deductible gift recipient status to an organisation aligned against the proposed Voice. As of writing, no such organisation has received this status. The financial advantage of deductible gift recipient status made available to the "Yes" campaign has been accumulating for months, while the "No" case has been permanently disadvantaged and continues to be so.

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[7] James Elton, 'No public money for 'Yes' or 'No' campaigns in Indigenous Voice to Parliament referendum, Burney confirms,' *ABC.net.au*, 29 November 2022 < https://www.abc.net.au/news/2022-11-29/no-public-money-for-yes-or-no-referendum-campaigns-burney-confir/101712992>.

[8] The Honourable Jim Chalmers MP and Senator the Honourable Katy Gallagher, Commonwealth of Australia, *Budget Paper No. 2* (Budget Measures October 2022-23, 25 October 2022).

The Institute of Public Affairs welcomes the opportunity to consult further to discuss our research and analysis in relation to this critical public policy issue.

Regards,

John Storey
Director, Legal Rights Program