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Special Issue on the Aboriginal and Torres Strait Islander Voice

Guest Editor: Harry Hobbs

Comment

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WHY A FIRST NATIONS VOICE WILL NOT EXTINGUISH INDIGENOUS SOVEREIGNTY

Dylan Lino*

INTRODUCTION

If the opinion polls are to be believed, large majorities of both progressive voters and Aboriginal and Torres Strait Islander voters support enshrining a First Nations Voice in the *Australian Constitution*.[1] But among the Voice's progressive critics, and especially First Nations critics, one of their persistent concerns has been that constitutionally enshrining the Voice could extinguish Indigenous sovereignty. These are important and valid concerns, and Aboriginal and Torres Strait Islander people should have clear responses to them prior to the referendum. They are concerns which I seek to assuage in this comment. While the question of whether the Voice would extinguish Indigenous sovereignty has been addressed by legal scholars through brief commentary in the media, this comment is the first to give the question in-depth scholarly consideration.[2]

I begin by outlining the concerns expressed by some First Nations people that constitutional enshrinement of the Voice would extinguish Indigenous sovereignty. Next, I argue that the Voice cannot extinguish Indigenous sovereignty under either Australian law or international law because, according to each of those legal systems, Indigenous sovereignty does not exist in the first place. In other words, when it comes to the formal recognition of Indigenous sovereignty under Australian and international law, the problem is with the law as it currently exists, not with changes to the law produced by constitutional enshrinement of the Voice. The denial of Indigenous sovereignty is an injustice, the blame for which should be sheeted home to existing Australian and international law rather than to the effects of the Voice. I go on to show that, regardless of what Australian or international law says, Indigenous sovereignty exists as both a lived reality under Indigenous law and as a political claim against the settler state.

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[1] See, eg, Anthony Galloway, "Yes Vote for the Voice is Leading in Every State and Territory: Poll", *The Sydney Morning Herald*, 30 April 2023 <https://www.smh.com.au/politics/federal/yes-vote-for-the-voice-is-leading-in-every-state-and-territory-poll-20230429-p5d482.html>; Essential Research, *The Essential Report: 18 April 2023* (18 April 2023) <https://essentialreport.com.au/reports/18-april-2023> (see section on "Support for Voice to Parliament (by Voting Intention)"); David Crowe, "'Not Going to Chuck the Towel In': Voice Champion Pat Anderson Undaunted by Criticism at Invasion Day Rallies", *The Sydney Morning Herald*, 27 January 2023 <https://www.smh.com.au/politics/federal/not-going-to-chuck-the-towel-in-voice-champion-pat-anderson-undaunted-by-criticism-at-invasion-day-rallies-20230126-p5cfqm.html>; Reconciliation Australia, *Australian Reconciliation Barometer 2022 Full Report* (September 2022) 25.

[2] See Hannah McGlade, "Voice Will Empower Us, Not Undermine Sovereignty", *National Indigenous Times*, 16 January 2023 <https://nit.com.au/16-01-2023/4736/voice-will-empower-us-not-undermine-sovereignty>; Paul Karp, "Why a Voice to Parliament Won't Affect First Nations Sovereignty as Lidia Thorpe Fears", *The Guardian*, 26 January 2023 <https://www.theguardian.com/australia-news/2023/jan/26/will-indigenous-voice-to-parliament-impact-first-nations-sovereignty-explainer>; Jack Latimore, "What's Indigenous Sovereignty and Can a Voice Extinguish It?", *The Sydney Morning Herald*, 9 February 2023 <https://www.smh.com.au/national/what-s-indigenous-sovereignty-and-can-a-voice-extinguish-it-20230113-p5ccdk.html>; George Williams, "Voice Has Nothing to Do with Issue of Sovereignty", *The Australian*, 9 February 2023 <https://www.theaustralian.com.au/commentary/voice-has-nothing-to-do-with-issue-ofsovereignty/news-story/a4b8767a70d1ac87b49de853bb5f1059>; Referendum Working Group, *Communique* (2 February 2023) <https://voice.gov.au/news/communique-referendum-working-group-february-2023>. For more scholarly – albeit still brief – discussions of similar issues not specifically focused on the Voice, see Megan Davis, "Constitutional Recognition Does Not Foreclose on Aboriginal Sovereignty" (2012) 8(1) *Indigenous Law Bulletin* 12, 13–14; George Williams, "Does Constitutional Recognition Negate Aboriginal Sovereignty?" (2012) 8(3) *Indigenous Law Bulletin* 10, 11; Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (2012) 212; Bret Walker, cited in Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (25 June 2015) 72.

Concerns about the Voice's Effect on Indigenous Sovereignty

One widespread concern among critics of the Voice, especially those from the progressive side of politics, is that constitutional enshrinement of the Voice will extinguish Indigenous sovereignty. Many of those raising concerns over the Voice's effect on Indigenous sovereignty have been First Nations people themselves.[3] The most prominent figure to express these concerns has been Lidia Thorpe, a DjabWurrung Gunnai Gunditjmara activist and Senator. As one of seven delegates who walked out of the *2017 National Constitutional Convention* which produced the *Uluru Statement from the Heart* and its demand for a First Nations Voice, Thorpe declared her opposition to constitutional recognition "because it serves to disempower, and takes away our voice … We need to protect and preserve our sovereignty".[4] As a Senator, first for the Greens and subsequently as an independent, Thorpe has continued to raise concerns about the effect of a Voice enshrined in the *Constitution* on Indigenous sovereignty. On several occasions, Thorpe has questioned Ministers and other government officials in Parliament about whether the Voice would extinguish Indigenous sovereignty.[5]

For those worried that the Voice could extinguish Indigenous sovereignty, the source of their concern appears to be that the Voice would be enshrined in the *Australian Constitution*. Indeed, concerns about the extinguishment of Indigenous sovereignty have been raised against constitutional recognition of First Nations peoples generally, not only recognition through a constitutionally enshrined Voice. Back in 2012, First Nations concerns over sovereignty prompted the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples to devote an entire chapter of its final report to the matter.[6] As Wiradjuri elder and activist Jenny Munro stated after walking out of the *Uluru Constitutional Convention* in 2017, "how does our sovereignty remain intact when we go into the white man's constitution?" Thorpe raised a similar concern in August 2022: "[i]n entering the colonial project, their constitution, we need to be 100 percent satisfied that we're not ceding our sovereign rights by going into the colonisers [sic] 'sovereign' rule book."[7]

There appear to be two analytically distinct but overlapping concerns here. The first concern seems to be about the power of Australian law: since the *Constitution* is the central expression and instrument of the settler state's sovereignty, explicit recognition of First Nations people within the *Constitution* through a Voice could result in Indigenous sovereignty being extinguished. The second concern appears to be about the actions of First Nations peoples: by approving of constitutional enshrinement of the Voice, First Nations people themselves could be ceding their sovereignty under international law.[8] This concern was expressly articulated in an early 2023 media release for the Sovereign Union, written by Euahlayi elder and activist Ghillar Michael Anderson: "[i]f First Nations agree to a Voice, which is only advisory, with no power of veto and for which the colonial parliament legislates its structure and composition, international law sees this as acquiescence and a relinquishment of First Nations sovereignty, which has never been ceded."[9]

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[3] See, eg, Caitlin Fitzsimmons and Jack Latimore, "First Nation Has Its Voice", *The Sydney Morning Herald*, 21 January 2023, 21.

[4] Claudianna Blanco, "'We Won't Sell Out Our Mob': Delegates Walk Out of Constitutional Recognition Forum in Protest", *NITV*, 25 May 2017 <https://www.sbs.com.au/nitv/article/we-wont-sell-out-our-mob-delegates-walk-out-of-constitutional-recognition-forum-in-protest/v42y9atu4>.

[5] See, eg, Commonwealth, *Parliamentary Debates*, Senate, 1 August 2022, 282 (Lidia Thorpe); Evidence to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 7 November 2022, 28–30 (Lidia Thorpe).

[6] Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, n 2, Ch 9.

[7] Paul Gregoire, "Voice to Parliament May Threaten First Nations Sovereignty, Warns Thorpe", *Sydney Criminal Lawyers* (10 August 2022) <https://www.sydneycriminallawyers.com.au/blog/voice-to-parliament-may-threaten-first-nations-sovereignty-warns-thorpe>.

[8] According to international law, one state can acquire sovereignty over territory occupied by another state or group of people where the latter voluntarily cedes their sovereignty (through, for instance, a treaty). See further Ian Brownlie, *Principles of Public International Law* (OUP, 7th ed, 2008) Ch 7.

[9] Sovereign Union, "Acquiescence to the Voice Threatens First Nations Continuing Sovereignty" (Media Release, 2023) <https://nationalunitygovernment.org/content/acquiescence-voice-threatens-first-nations-continuing-sovereignty-0>. McGlade has rejected the argument that Indigenous approval of constitutional enshrinement of a First Nations Voice would amount to cession of sovereignty under international law: see McGlade, n 2.

The underlying premise of these concerns is that Indigenous sovereignty currently exists and is already recognised within an extant legal system. However, that premise does not hold under either Australian or international law. At least for these two legal systems, the key reason why the Voice will not extinguish Indigenous sovereignty is that both Australian law and international law already deny its existence. The Voice cannot extinguish something that, according to Australian and international law, does not exist in the first place. By contrast, Indigenous sovereignty continues to exist under Indigenous law and as a political claim made against the Australian state – and it does so regardless of what Australian and international law says.

Australian Law Already Denies Indigenous Sovereignty

The formal denial of Indigenous sovereignty is a longstanding doctrine of Anglo-Australian common law. To be sure, some judicial decisions in the early decades of British colonisation occasionally showed a degree of solicitude for Indigenous autonomy, particularly over violence committed by Aboriginal people against one another.[10] However, this limited recognition of Indigenous autonomy – never judicially described as "sovereignty" – was denied by the courts in other cases during the same period.[11] By the mid-19th century, colonial courts had quite firmly recognised an all-encompassing and exclusive settler territorial sovereignty.[12] When the Judicial Committee of the Privy Council was first asked to determine the manner in which British authorities had acquired sovereignty over New South Wales in the 1889 case of *Cooper v Stuart*,[13] it affirmed the colonial courts' earlier denials of Indigenous sovereignty. The Judicial Committee infamously declared that the colony had been "a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions".[14]

Since the 1970s, when First Nations people began to demand recognition through the Australian courts of their laws and sovereignty, the courts have continued to deny Indigenous sovereignty recognition under Australian law. In the 1979 case of *Coe v Commonwealth*,[15] in which Wiradjuri activist Paul Coe sought judicial recognition of Aboriginal sovereignty, Gibbs CJ (with whom Aickin J agreed) dismissed the claim:

> The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.[16]

A similar conclusion was reached by Jacobs J, who held that it was impermissible for the High Court to entertain "a claim based on a sovereignty adverse to the Crown".[17]

This position was not modified by the High Court's 1992 decision in *Mabo v Queensland (No 2)* (*Mabo*).[18] *Mabo* gave judicial recognition to the existence of Indigenous laws and held that those laws were capable of furnishing Aboriginal and Torres Strait Islander peoples with ongoing rights to their traditional lands

[10] See Bruce Kercher, "Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales" (1998) 4(13) *Indigenous Law Bulletin* 7; Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen and Unwin, 1995) 10–11; Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1836* (Harvard University Press, 2010) 168–169; SD Lendrum, "The 'Coorong Massacre': Martial Law and the Aborigines at First Settlement" (1977) 6(1) *Adelaide Law Review* 26, 26–27.

[11] Ford, n 10, Ch 7; Kercher, *An Unruly Child*, n 10, 9–10.

[12] Ford, n 10, Ch 8; Kercher, *An Unruly Child*, n 10, 11, 15.

[13] *Cooper v Stuart* (1889) 14 App Cas 286.

[14] *Cooper v Stuart* (1889) 14 App Cas 286, [11].

[15] *Coe v Commonwealth* (1979) 53 ALJR 403.

[16] *Coe v Commonwealth* (1979) 53 ALJR 403, 408.

[17] *Coe v Commonwealth* (1979) 53 ALJR 403, 410.

[18] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

and waters under the common law. However, the High Court has been at pains to point out that *Mabo* did not involve the recognition of Indigenous sovereignty. As Mason CJ held a year after *Mabo* in *Coe v Commonwealth*,[19] "*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia", since its recognition of native title was premised on "the paramount sovereignty of the Crown".[20] In the 2002 case of *Members of the Yorta Yorta Aboriginal Community v Victoria*,[21] Gleeson CJ, Gummow and Hayne JJ held that "the assertion of sovereignty by the British Crown necessarily entailed … that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty."[22] In all of these cases, the High Court has held that the sovereignty of the Crown is both unquestionable in domestic courts and exclusive, thereby ruling out the existence of Indigenous sovereignty.

It is worth noting that, in the 2020 decision of *Love v Commonwealth* (*Love*),[23] the three judges in the minority claimed that the majority judges had effectively recognised Indigenous sovereignty or come close to it. According to the majority, Aboriginal and Torres Strait Islander people could not be considered "aliens" within the scope of the Commonwealth Parliament's legislative power over aliens (s 51(xix)), and therefore were not amenable to detention and deportation under the *Migration Act 1958* (Cth). Significantly, under the majority ruling, determinations of who is Aboriginal and/or Torres Strait Islander – and therefore who is incapable of being an alien – depend in part on a person's recognition by "the elders or other persons enjoying traditional authority" within a given First Nation.[24] For the minority judges, the decision handed the power to determine alienage under Australian law to Aboriginal and Torres Strait Islander peoples, in effect recognising their sovereignty or something approximating it.[25]

But none of the majority judges in *Love* believed that the effect of their decision was to have overturned the courts' longstanding denial of Indigenous sovereignty. Indeed, Gordon J's reasoning articulated a new basis for denying Indigenous sovereignty. She held that one reason why Aboriginal and Torres Strait Islander people could not be considered aliens was that, since Federation, Aboriginal and Torres Strait Islander people had formed part of "the people of Australia", as that phrase is used in the *Constitution*.[26] But according to Gordon J, "the people of Australia" exercise a singular form of popular sovereignty, one that underpins the *Constitution*.[27] For Gordon J, it followed that "[r]ecognition of Indigenous peoples as a part of the 'people of Australia' is directly contrary to accepting any notion of Indigenous sovereignty persisting after the assertion of sovereignty by the British Crown".[28]

Even if some future Australian court took the unlikely step of accepting that *Love* recognised Indigenous sovereignty, this would demonstrate that First Nations recognition in the *Constitution* does not inevitably lead to the extinguishment of Indigenous sovereignty under Australian law. On the contrary, it would demonstrate that the *Australian Constitution*, far from being a mechanism for the extinguishment of Indigenous sovereignty under Australian law, can actually be a vehicle for its recognition.

International Law Already Denies Indigenous Sovereignty

The denial of Indigenous sovereignty is central to international law. As Antony Anghie has shown, the very idea of sovereignty in international law emerged from the efforts of European powers to assert

[19] *Coe v Commonwealth* (1993) 68 ALJR 110.

[20] *Coe v Commonwealth* (1993) 68 ALJR 110, 115.

[21] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58.

[22] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 443–444; [2002] HCA 58.

[23] *Love v Commonwealth* (2020) 270 CLR 152; [2020] HCA 3.

[24] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 70 (Brennan J), endorsed in *Love v Commonwealth* (2020) 270 CLR 152, 192 (Bell J), 253 (Nettle J), 261, 281–283 (Gordon J), 317 (Edelman J); [2020] HCA 3.

[25] *Love v Commonwealth* (2020) 270 CLR 152, 176–177, 179 (Kiefel CJ), 208, 211 (Gageler J), 226–228 (Keane J); [2020] HCA 3.

[26] *Love v Commonwealth* (2020) 270 CLR 152, 278–279; [2020] HCA 3.

[27] *Love v Commonwealth* (2020) 270 CLR 152, 277–278; [2020] HCA 3.

[28] *Love v Commonwealth* (2020) 270 CLR 152, 278–279; [2020] HCA 3.

their authority over Indigenous peoples outside Europe and reject Indigenous peoples' own claims to authority.[29] If the history of international law has occasionally witnessed instances where Indigenous sovereignty was arguably recognised – sometimes, for instance, through treaties negotiated by European powers and Indigenous peoples – the dominant position has been one of rejection.[30] Under contemporary international law, sovereignty is denied to Indigenous peoples on the basis that it is the exclusive preserve of states, indeed that statehood and sovereignty are more or less the same thing. As James Anaya has written, Indigenous sovereignty is "strongly resisted by contemporary international norms of state sovereignty that have survived robustly from historical doctrine and by existing political configurations that favor the sovereignty of already widely recognised states to the exclusion of any competing sovereignty".[31]

While the international legal entitlement to statehood – and thus to sovereignty – was expanded considerably in the mid-20th century through the independence struggles of colonised peoples around the world, this entitlement was not extended to Indigenous peoples. As states began to reformulate the rules about which groups of people were entitled to independent statehood, the situation of Indigenous peoples – as minority populations within existing settler states – was distinguished from the situation of non-European peoples who constituted majority populations within the colonies of empires. Whereas the latter were recognised as possessing a right of self-determination – essentially sovereign statehood – Indigenous peoples were denied the right of self-determination so as to preserve the territorial integrity of settler states.[32]

Even as international law has subsequently evolved to recognise Indigenous peoples' right of self-determination, it has continued to strongly reject Indigenous peoples' entitlement to sovereign statehood. This position is made plain in the *2007 United Nations Declaration on the Rights of Indigenous Peoples*. The *Declaration* remains the most fulsome international elaboration of Indigenous rights, even going beyond the extant international law in certain respects.[33] Significantly, the *Declaration* recognises that Indigenous peoples possess the right of self-determination and associated rights to self-government through their own political institutions in their internal affairs.[34] However, the *Declaration* makes clear that, unlike formerly colonised peoples for whom the right of self-determination has meant sovereign statehood, Indigenous peoples are not entitled to sovereignty realised through independent states. As Art 46(1) of the *Declaration* stipulates:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

In other words, the *Declaration* expressly denies that Indigenous peoples have the right to establish their own sovereign states by seceding from the "sovereign and independent States" in which they reside. As Tanganekald Meintangk Boandik legal scholar has written, the *Declaration* is not "effective in protecting and affirming the sovereignty of Aboriginal peoples".[35] The self-government exercisable by Indigenous peoples, according to the *Declaration*, must operate within the confines of the states that have colonised them. It does not amount to sovereignty as international law conventionally understands it.[36]

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[29] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005) especially Ch 1.

[30] S James Anaya, *Indigenous Peoples in International Law* (OUP, 2nd ed, 2004) Ch 1.

[31] Anaya, n 30, 6–7. See also Patrick Macklem, *The Sovereignty of Human Rights* (OUP, 2015) Ch 6.

[32] Anaya, n 30, 53–54; Siegfried Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples" (2008) 41(4) *Vanderbilt Journal of Transnational Law* 1141, 1149–1152.

[33] International Law Association, Committee on the Rights of Indigenous Peoples, *Final Report* (2012) 29–30.

[34] *United Nations Declaration on the Rights of Indigenous Peoples* (2007) Arts 3–5, 18–20.

[35] Irene Watson, "The Future Is Our Past: We Once Were Sovereign and We Still Are" (2018) 8(3) *Indigenous Law Bulletin* 12, 14.

[36] Patrick Macklem has made a similar point: Macklem, n 31, 154–156. It is possible to argue that the *Declaration* recognises a form of Indigenous sovereignty that is not the same as independent statehood, and that it thereby reconfigures what sovereignty means

Indigenous Sovereignty Exists Regardless of Australian and International Law

Throughout the generations of denial of Indigenous sovereignty under both Australian and international law, Indigenous sovereignty has continued to exist, for one simple reason: the existence of Indigenous sovereignty does not depend on what Australian law or international law says. There are two senses in which Indigenous sovereignty can be said to exist, even in the face of its rejection under Australian and international law. The first is as a lived reality under Indigenous law. The second is as a political claim articulated against the Australian state.

For many First Nations people, their sovereignty continues to exist as *an everyday practice under their own legal and philosophical systems*, regardless of whether it is recognised or rejected under Australian or international law. As Goenpul scholar Aileen Moreton-Robinson has explained, for Goenpul people and other Aboriginal people, "sovereignty is derived from the ancient era of creation which provides the precedents for what is believed to have occurred in the beginning in the original form of social living created by creator beings".[37] Aboriginal sovereignty comes from the fact that Aboriginal people today are "the embodied representations of our creator beings".[38] Notwithstanding the settler state's "sovereign claims to exclusive possession of our lands", says Moreton-Robinson, "every day our sovereignties exist and are operating despite these claims".[39]

A similar conclusion has been drawn by Watson:

> Our sovereignty and right to self-determination have never been surrendered or lost; they cannot be extinguished. Our sovereign laws were birthed by the creative processes of the natural world and given to us to care for country and to pass on its teachings. The Australian state cannot extinguish them.[40]

Watson has also explained how, despite the non-recognition of Indigenous sovereignty under international law, "[w]e are as we have been since time immemorial", which is "sovereign and independent peoples".[41] If international law was to recognise Indigenous sovereignty, Watson says that this would simply be "a reaffirmation of who we have always been".[42] As these scholars clearly explain, Indigenous sovereignty exists under Indigenous law regardless of what is said about it under Australian or international law.

As a lived reality under Indigenous law, Indigenous sovereignty would therefore be able to continue after the constitutional enshrinement of a First Nations Voice, just as it has been able to survive in the face of numerous past encounters between Aboriginal and Torres Strait Islander peoples and the constitutional instruments of the Australian settler state. There are both formal and substantive elements to those many past constitutional encounters. Formally, the constitutional instruments of the Australian state – including the pre-federation colonies and the post-federation Commonwealth, States and Territories – have at times encompassed both explicit textual references to and complete silence about First Nations peoples. While most colonial constitutional documents were silent about Aboriginal and Torres Strait Islander peoples, there were express references to Aboriginal people in the Letters Patent establishing South Australia and in Western Australia's original *Constitution Act 1889* (WA).[43] It is well known that the original *Commonwealth Constitution* contained two exclusionary references to Aboriginal people,

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under international law. My argument is that the *Declaration* and international law generally continue to deny that Indigenous peoples possess sovereignty in the dominant sense of independent statehood. See further Wiessner, n 32; Federico Lenzerini, "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples" (2006) 42(1) *Texas International Law Journal* 155.

[37] Aileen Moreton-Robinson, "Incommensurable Sovereignties: Indigenous Ontology Matters" in Brendan Hokowhitu et al (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge, 2020) 257, 262.

[38] Moreton-Robinson, n 37, 264.

[39] Moreton-Robinson, n 37, 259.

[40] Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 161.

[41] Watson, n 40, 145.

[42] Watson, n 40, 145.

[43] *Letters Patent Establishing the Province of South Australia* (19 February 1836) (UK); *Constitution Act 1889* (WA) ss 42, 70.

both of which were removed with the 1967 referendum.[44] Between 2004 and 2016, all of the State constitutions were amended to provide explicit symbolic recognition of First Nations peoples.[45] Aside from what all of these constitutional instruments have formally said (or not said) about Aboriginal and Torres Strait Islander peoples, they have each substantively empowered the institutions of the Australian state to govern Aboriginal and Torres Strait Islander people – frequently with dire consequences for First Nations individuals, families and communities.

Throughout all of these encounters between First Nations and settler constitutional instruments, Indigenous sovereignty has continued to operate as a lived reality for First Nations peoples, even as their capacity to exercise it has been impeded by the institutions of the settler state. For the same reasons, constitutional enshrinement of a First Nations Voice would not extinguish Indigenous sovereignty as an everyday reality under Indigenous law. In fact, according to the *Uluru Statement*, the Voice would enable First Nations "ancient sovereignty" to be more fully exercised within the Australian state.

Alongside the existence of Indigenous sovereignty as part of Aboriginal and Torres Strait Islander peoples' daily lived experience under their own law, Indigenous sovereignty continues to exist as a *political claim* made against the Australian settler state and the international community, even in the face of their refusal to recognise it. First Nations people began to expressly articulate political claims of sovereignty against the Australian state from around the 1970s, as Paul Coe's 1979 High Court litigation demonstrated.[46] Importantly, even after the High Court had denied his claim, Coe continued to assert the existence of Aboriginal sovereignty, most notably in his successful efforts with other activists to re-establish the Aboriginal Tent Embassy and issue a Declaration of Aboriginal Sovereignty in 1992.[47] The continuous presence of the Embassy on the lawns of Old Parliament House since 1992 has been the most persistent and visible assertion by First Nations people of a political claim to sovereignty against the Australian state. Clearly, Aboriginal and Torres Strait Islander peoples can continue to maintain political claims of sovereignty in the face of their ongoing denial by the Australian state and the international community.

The constitutional enshrinement of a Voice would not extinguish Aboriginal and Torres Strait Islander peoples' political claims to Indigenous sovereignty, since the only way these claims can be extinguished is if Aboriginal and Torres Strait Islander peoples stop making them. There is no reason to think that Aboriginal and Torres Strait Islander peoples will stop asserting their political claims to sovereignty once a Voice is established. For progressive critics such as Thorpe, the Voice's perceived shortcomings will almost certainly see them continuing to assert political claims for the recognition of Indigenous sovereignty. As Thorpe said at the 2023 Invasion Day rally in criticising the Voice: "[t]hey want to put the colonial constitution on top of the oldest constitution on the planet … we are sovereign and this is our land. And we deserve better than an advisory body. … We want real power and we won't settle for anything less."[48] For its proponents, the Voice represents a vehicle for having their political claims to sovereignty realised, both because the Voice itself can be understood as an institutionalisation of Indigenous sovereignty and because the Voice is a platform from which to pursue further realisation of Indigenous sovereignty through treaties.[49]

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[44] *Constitution*, ss 51(xxvi), 127.

[45] Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 39–40, 47–48, 54–55.

[46] See further Julie Fenley, "The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979–1981" (2011) 42(3) *Australian Historical Studies* 372; Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2014).

[47] Foley, Schaap and Howell, n 46, 190–193.

[48] Campbell Kwan, "'We Want Real Power': Lidia Thorpe Tells Invasion Day Rally", *Australian Financial Review*, 26 January 2023 <https://www.afr.com/politics/federal/body-image-advocate-taryn-brumfitt-named-australian-of-the-year-20230126-p5cfkf?post=p54j65>.

[49] See, eg, Eddie Synot, "What We Mean When We Say 'Sovereignty Was Never Ceded'", *The Conversation*, 28 November 2022 <https://theconversation.com/what-we-mean-when-we-say-sovereignty-was-never-ceded-195205>; Sana Nakata, "On Voice, and Finding a Place to Start", *Indigenous Constitutional Law* (3 March 2021) <https://www.indigconlaw.org/sana-nakata-on-voice-and-finding-a-place-to-start>. On the Voice as a vehicle for Indigenous sovereignty, see also Gabrielle Appleby, Ron Levy and

Conclusion

While the existence of Indigenous sovereignty does not depend on its recognition under Australian or international law, that does not mean Australian and international law are irrelevant to the practical realisation of Indigenous sovereignty. Both Australian law and international law affect the capacity of Aboriginal and Torres Strait Islander peoples to exercise their sovereignty in practice. For instance, where the exercise of Indigenous sovereignty under Indigenous law conflicts with Australian law (such as in dealing with rights over land), the Australian state's effective monopoly on the use of violence can ensure, however unjustly, that it is Australian law which prevails. In the case of Indigenous sovereignty as a political claim articulated against the Australian state, the capacity for Aboriginal and Torres Strait Islander peoples' to exercise their sovereignty – over and above asserting the claim itself – is largely or entirely dependent on its institutionalisation under Australian or international law.

So, if First Nations peoples are to be able to effectively exercise their sovereignty, the terms of Australian and international law matter. For many Aboriginal and Torres Strait Islander people, enshrining a Voice in the *Constitution* – alongside processes of treaty-making – is a means within Australian law by which their sovereignty can be better expressed and exercised in practice, even if Indigenous sovereignty continues to go formally unrecognised under Australian and international law. According to the *Uluru Statement*, the "substantive constitutional change and structural reform' it proposes – including a constitutionally enshrined First Nations Voice followed by treaty-making – would be a mechanism through which Aboriginal and Torres Strait Islander peoples" "ancient sovereignty can shine through".[50] Other Aboriginal and Torres Strait Islander people believe that, to effectively exercise their sovereignty, different reforms to Australian or international law will be necessary.[51] But for those of us who want formal recognition of Indigenous sovereignty under Australian or international law, we do not need to worry that the Voice will extinguish Indigenous sovereignty. The real problem – the real injustice – is that neither Australian nor international law formally recognises Indigenous sovereignty in the first place.

Helen Whalan, "Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis" (2023) 46(3) *UNSW Law Journal* (forthcoming).

[50] *Uluru Statement from the Heart* (26 May 2017) <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.pdf>.

[51] See, eg, Irene Watson, "There Is No Hope in a Voice to Parliament", *Pearls and Irritations* (29 October 2022) <https://johnmenadue.com/there-is-no-hope-in-a-voice-to-parliament>; Lidia Thorpe, "Only a Treaty Will End the War against First Nations People", *NITV*, 24 January 2023 <https://www.sbs.com.au/nitv/article/lidia-thorpe-treaty-invasion-day-voice-to-parliament/cxe0tkgme>; Michael Mansell, "Depending on Your Reasons, It's Okay to Oppose the Voice", *NITV*, 21 April 2023 <https://www.sbs.com.au/nitv/article/opinion-depending-on-why-its-ok-to-oppose-the-voice/sr20y558k>.

Introducing the Symposium on the Voice to Parliament

Harry Hobbs*

In May 2017, around 250 Aboriginal and Torres Strait Islander people "from all points of the southern sky" gathered on the red dust of Mutitjulu to call for meaningful reform to the Australian state. The *Uluru Statement from the Heart* gives voice to Aboriginal and Torres Strait Islander peoples' longstanding feelings of disempowerment and alienation from the processes of Australian government. It asks Australians to constitutionally enshrine a First Nations Voice and to legislate a Makarrata Commission to supervise a process of truth-telling and agreement-making. It sees this package of structural reform as necessary to remedy the "torment of our powerlessness", and to "empower our people and take *a rightful place* in our own country".[1]

It has taken several years for an Australian government to engage genuinely with the *Uluru Statement*. In July 2022, on the lands of the Yolngu nation, Prime Minister Anthony Albanese outlined his government's "promise to implement the Statement from the Heart at Uluru, in full".[2] As part of that commitment, in March 2023, the Government introduced a bill into the Parliament to entrench an Aboriginal and Torres Strait Islander Voice in the *Australian Constitution*. The amendment proposes to insert a new Ch IX into the *Constitution*. The Chapter would consist of a single s 129:

> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:
>
> (i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
>
> (ii) the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
>
> (iii) the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.[3]

The Bill is currently before a parliamentary committee. It is expected that it will be passed in June, and later this year, Australians will go to the polls in the first referendum since 1999. If it succeeds, the Voice will be the first amendment to the *Constitution* since 1977.

This special issue of the *Public Law Review* examines several issues surrounding the Voice and the referendum. I thank the editors of the journal, Cheryl Saunders, and Janet McLean, for their interest and encouragement in hosting this symposium, the several authors for their contributions, and the referees – both for their considered comments as well as their very prompt reviews.

The last few years has seen considerable academic and popular commentary on the Voice and a putative referendum. This will only increase over the following months. In this introductory piece, I briefly consider three issues relating to the Voice that have not received as much attention as others. I reflect on the role of legal academics in debate on the proposed constitutional amendment, the potential that the referendum may promote greater popular ownership and understanding of our *Constitution*, and the broader consequences of the Federal Opposition's decision to campaign against the referendum. I begin, however, by introducing the articles in this symposium.

Introducing the Symposium

The Prime Minister's address at Garma may have been the first time many Australians had heard of the Voice, but the proposal is not new. In the first piece of the symposium, Sophie Rigney contextualises the

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[1] *Uluru Statement from the Heart*, 26 May 2017 (emphasis in original).

[2] Prime Minister Anthony Albanese, "Address to Garma Festival" (30 July 2022).

[3] *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth) Sch 1.

constitutional amendment, situating it within a decade plus long process of debate over whether and how to recognise Aboriginal and Torres Strait Islander peoples in the *Constitution* – often, as the *Kirribilli Statement* demonstrated – against initial pushback by both major political parties. More recently the wording has been refined by a 21-member Referendum Working Group co-chaired by Minister for Indigenous Australians Linda Burney and Special Envoy for Reconciliation Patrick Dodson. This has not been an easy process. Nevertheless, the Working Group eventually settled on the text in proposed s 129. Rigney considers three issues raised by this wording: the Voice's capacity to make representations, that those representations could be made to both the Parliament and Executive Government, and Parliament's role in designing the Voice.

These three issues centre on a single underlying theme: power.[4] Indeed, much of the debate that has arisen about the Voice is focused on its legal power and how it might be circumscribed. Conservative critics have sought to limit the role of the Voice in certain areas. On their account, the constitutional wording should not permit the Voice to speak to the Executive, lest the High Court uncover an implication that statutory authorities and public servants must consult – and perhaps even adopt – any representations made.[5] Similarly, they are concerned that the Voice should only be able to speak on matters that directly affect Indigenous Australians.[6] The concerns here are that Aboriginal and Torres Strait Islander peoples may be granted an outsized say in the development and design of law and policy in Australia.[7] Left-wing criticism also focuses on power – or rather, the apparent absence of it. Independent Senator Lidia Thorpe and others have pointed to the Voice's advisory function as evidence it will not support the larger goal of protecting and empowering Indigenous sovereignty.[8] Their concern is that if the Voice cannot compel Australian institutions to listen and act, history suggests Australian institutions will do neither.

The question of power, either too much or not enough, is a central tension in debate on the Voice. Is there a way to reframe this question to encourage more productive discussion? Sana Nakata and Daniel Bray believe so. Nakata and Bray urge us to see the Voice as a form of political rather than legal power. On this account, the Voice can serve as "connective tissue" linking diverse, pre-existing, autonomous communities and representative collectivities with institutions of the Australian State. In doing so, the Voice will "attract and focus" Indigenous representation in a manner comprehensible to Australian governance, bringing with it the potential for real change. Laurel Fox and Graeme Orr agree, inviting us to understand the Voice as an institution to channel and construct Indigenous politics. Drawing lessons from previous national Indigenous representative bodies, Orr and Fox offer several suggestions for institutional design.[9] Heidi Norman also sees the Voice's power as one of political "influence" rather than legal obligation. Norman examines how a constitutionally entrenched Aboriginal and Torres Strait Islander Voice could advance a national response to climate change.[10] This is the promise of the *Uluru Statement from the Heart*.

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[4] This is not surprising. Constitutional recognition is an ongoing struggle to achieve "a more just basic distribution of public power" within Australia: Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 88; Harry Hobbs, *Indigenous Aspirations for Structural Reform in Australia* (Hart, 2021).

[5] See, eg, Graham Connolly, Submission No 27 to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum*, 13 April 2023, 3.

[6] See, eg, Louise Clegg, Submission No 41 to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum*, 14 April 2023, 8–9.

[7] Chris Merritt, Rule of Law Institute of Australia, Submission No 36 to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum*, 12 April 2023.

[8] Eli Green, "'We Want Better': Senator Lidia Thorpe's Demand on the Voice to Parliament", *News.com.au*, 30 January 2023 <https://www.news.com.au/national/breaking-news/we-want-better-senator-lidia-thorpes-demand-on-the-voice-to-parliament/news-story/40b63a840e051644fda78e2bec123eb5>. For a considered take on this issue, see Amy McQuire, "Voting on 'The Voice': Will It Fight Racist Violence", *Presence*, 5 January 2023 <https://amymcquire.substack.com/p/voting-on-the-voice-will-it-fight>.

[9] See further, Hobbs, n 4, 195–231.

[10] See also Narelle Bedford, Tony McAvoy and Lindsey Stevenson-Graf, "First Nations Peoples, Climate Change, Human Rights and Legal Rights" (2021) 40(3) *University of Queensland Law Journal* 371.

The *Uluru Statement* is a historic declaration of Aboriginal and Torres Strait Islander peoples' aspirations for structural reform in Australia. In this, it forms part of a global landscape of Indigenous peoples' sophisticated articulations for constitutional transformation.[11] In their contribution, Claire Charters and Amelia Kendall outline recent developments in Aotearoa New Zealand. In doing so, they reflect on the ground-breaking work of the National Iwi Chairs Forum's Independent Constitutional Working Group, which held over 252 hui around the country between 2012 and 2015, and resulted in the He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa.[12] However, as Charters and Kendall note, promising initial developments have been overtaken by party political considerations. Their conclusion that incremental change fails to deliver adequate solutions should galvanise supporters of the Voice and reiterate the significance of constitutional amendment.

So too should Narelle Bedford's contribution. Bedford tackles a speculative but challenging question: what happens if the referendum does not succeed? Her public law analysis presents sobering reading. Not only would the Constitution continue to ignore First Nations peoples, but the administrative failures that contributed to events like the destruction of Juukan Gorge would not be remedied.[13] As Bedford explains, a "sustained and damaging absence of expert cultural advice in government decision-making" would persist.[14] Nevertheless, fear of failure should not govern our decision-making. Among many other concerns, it would break faith with the very many Aboriginal and Torres Strait Islander peoples who have worked so long and so hard to get to this point. As Marcia Langton explained on the day the wording of the constitutional amendment and question was announced: "We're here to draw a line in the sand and say this has to change."[15]

The Role of Legal Academics

The *Uluru Statement from the Heart* is an invitation to non-Indigenous Australians to "walk with" Aboriginal and Torres Strait Islander peoples "in a movement of the Australian people for a better future".[16] But it is more than an invitation. The Statement challenges all Australians to think seriously about how this country and its institutions engage with Aboriginal and Torres Strait Islander peoples. As a public lawyer, I am interested in the role legal academics play in debate on constitutional reform.[17] Legal academics can inform and educate Australians. We can explain what a referendum is and how it works, we can situate the proposed constitutional amendment in its context and consider what legal effect it might have. We can offer informed opinion on technical and mechanical refinements of the text. In whatever capacity we engage, however, it is important that we remain true to our profession and faithful to our expertise. As Tarunabh Khaitan has recently noted, "a scholar's engagement … must be, well, scholarly".[18]

Legal academics have played a prominent role in the debate thus far. At the time of writing, a parliamentary committee is inquiring into the form of words recommended by the Referendum Working Group.[19] This

[11] See also Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (Routledge, 2016).

[12] He Whakaaro Here Whakaumu Mō Aotearoa, *The Report of Matike Mai Aotearoa: The Independent Working Group on Constitutional Transformation* (January 2016).

[13] Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (October 2021).

[14] Narelle Bedford, "The Aftermath: What if the Voice Referendum Does Not Succeed?" (2023) 34(2) PLR 156.

[15] Lorena Allam, "'I'm Here to Change the Country': Albanese Launches and Uncompromising Indigenous Voice Plan", *Guardian Australia*, 23 March 2023 <https://www.theguardian.com/australia-news/2023/mar/23/anthony-albanese-launches-indigenous-voice-to-parliament-referendum-question>.

[16] *Uluru Statement from the Heart*, n 1.

[17] For a discussion of movement lawyering and Indigenous law reform see Lilian Burgess, Giulia Marrama and Suvradip Maitra, "Movement Lawyering: An Old Ethos and New Theory for First Nations' Sovereignty" (2022) 96 ALJ 510.

[18] Tarunabh Khaitan, "On Scholactivism in Constitutional Studies: Skeptical Thoughts" (2022) 20(2) *International Journal of Constitutional Law* 547, 549; Liora Lazarus, "Constitutional Scholars as Constitutional Actors" (2020) 48(4) *Federal Law Review* 483.

[19] Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Parliament of Australia, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (2023).

form of words has been developed and refined over many years and has been stress-tested in conversation and consultation with academics and legal practitioners across the country.[20] More formal processes have also been established. In October 2022, for example, the government appointed a Constitutional Expert Group to provide advice to the Referendum Working Group on the wording of the amendment. In delivering clear and frank advice, the Expert Group reflected on the need for accurate information to be provided to support Australians make their decision. In its initial tranche of advice provided in December 2022, the Group concluded by noting the importance of responding to "plainly incorrect assertions in a manner that is simple, direct and factual".[21] This is a call for informed and accurate public engagement built on relevant legal expertise. It is a call to counter inaccurate and misleading statements.

Public lawyers and legal academics are well suited to perform this responsibility. We also have an obligation to do so. Noel Pearson has warned that over the coming months public debate will hit "extreme lows".[22] Already concerns have been raised that prominent political figures have engaged in commentary that may "reinforce racist stereotypes and inflict harm",[23] while some politicians, journalists and media commentators appear content to mischaracterise the proposed amendment in order to inflame anxiety and alarm within the Australian population.[24] We know that negative and incendiary statements have a deleterious effect on many Aboriginal and Torres Strait Islander peoples' health and wellbeing.[25] A national poll on the status and place of Indigenous Australians will focus and intensify this harm. Indeed, studies on the 2017 Australian Marriage Law Postal Survey found that increased exposure to negative and homophobic messages was related to increased levels of depression and anxiety among LGBTIQ Australians.[26]

This is not to say that there is no room for disagreement among public lawyers on the merits of the Voice or of the proposed constitutional amendment. It is to say that disagreement should be scholarly – it should be based on accurate information, clear reasoning and be motivated by the desire to illuminate rather than obfuscate. In practice, this means that when engaging in public commentary we must be conscious of our obligations. For example, given the Voice is an advisory body and will not be able to introduce bills into Parliament or vote on legislation, there is no basis for the suggestion that the Voice will turn into "a de facto third legislative body".[27] Statements like these are plainly incorrect. They are political statements made in the guise of legal argument.[28] They may confuse and misinform Australians.

[20] Gabrielle Appleby, Sean Brennan and Megan Davis, "A First Nations Voice and the Exercise of Constitutional Drafting" (2023) 34(1) PLR 3.

[21] Constitutional Expert Group: Aboriginal and Torres Strait Islander Voice, *Communique for the Referendum Working Group – December 2022: Attachment – Advice from the Constitutional Expert Group* (13 December 2022) <https://voice.niaa.gov.au/news/communique-referendum-working-group-december-2022>.

[22] ABC Radio National, "'A Judas Betrayal': Noel Pearson Criticises Liberal Opposition to Voice", *RN Breakfast*, 6 April 2023 <https://www.abc.net.au/radionational/programs/breakfast/noel-pearson-liberals-no-voice-great-betrayal/102194758>.

[23] Sarah Collard, Josh Butler and Lorena Allam, "Indigenous Voice: No Campaign Event Reinforced 'Racist Stereotypes', Watchdog Says", *Guardian Australia*, 5 April 2023 <https://www.theguardian.com/australia-news/2023/apr/05/indigenous-voice-no-campaign-event-reinforced-racist-stereotypes-watchdog-says>.

[24] See, eg, Janet Albrechtsen, "Indigenous Voice to Parliament Will Create Co-government and Cause Policy Chaos", *The Australian*, 8 April 2023 <https://www.theaustralian.com.au/inquirer/indigenous-voice-to-parliament-will-create-cogovernment-and-cause-policy-chaos/news-story/c9bba90e726a77514fd463a561fc69ea>.

[25] Naomi Priest et al, "Racism as a Determinant of Social and Emotional Wellbeing for Aboriginal Australian Youth" (2011) 194(10) *Medical Journal of Australia* 546.

[26] Stefano Verrelli et al, "Minority Stress, Social Support, and the Mental Health of Lesbian, Gay, and Bisexual Australians during the Australian Marriage Law Postal Survey" (2019) 54(4) *Australian Psychologist* 336.

[27] James Allan, "This Is a Terrible Way to Change Australia's Constitution", *Australian Financial Review*, 29 January 2023 <https://www.afr.com/politics/federal/this-is-a-terrible-way-to-change-australia-s-constitution-20230129-p5cg9j>.

[28] On misleading political claims articulated in legal discourse, see, Harry Hobbs, "The New Right and Aboriginal Rights in the High Court of Australia" (2023) 51(1) *Federal Law Review* 129.

Constitutional Literacy

Misleading comments are more likely to find fertile soil in circumstances where Australians have little awareness of key features of and concepts underlying the Constitution. This is a longstanding issue. Surveys in the early 1990s found "notoriously low levels of public knowledge" about the Constitution and our system of government.[29] The situation does not appear to have improved. A 2021 parliamentary inquiry lamented the "apparent low levels of understanding of the Constitution".[30] A similar pattern exists on the proposed amendment. While polling indicates a majority of Australians support putting an Aboriginal and Torres Strait Islander Voice in the *Constitution*,[31] surveys also suggest that many Australians do not know much about the Voice.[32]

The government has acknowledged a community education campaign must precede the referendum. In September 2022, it established a 60-member Referendum Engagement Group comprised of a cross-section of experienced First Nations leaders representing communities and organisations across Australia to consider how to build community understanding, awareness, and support for the referendum. In March 2023, the Parliament passed amendments to the *Referendum (Machinery Provisions) Act 1984* (Cth) to allow the Commonwealth to fund an impartial educational campaign "to promote voter's understanding of referendums and the referendum proposal".[33] It is not yet clear how this campaign will be run, but lessons from previous education programs can be considered. For instance, between 1991 and 2000 the Constitutional Centenary Foundation developed methods to inform Australians about their *Constitution* and systems of government. In their 2000 report they reflected on a decade of experience. They found that:

- Information must be comprehensive and targeted to audience, current issues, and contemporary themes.
- Information must be interesting and accessible in design and content.
- Information must be accurate and impartial.
- Information must reach and involve as wide a range of different people as possible.
- People must be able to be actively involved if they wish.[34]

The Australian Electoral Commission (AEC) is doing its part. It has launched its own education campaign to inform voters about the Constitution and the role of a referendum. It includes videos, graphics, fact sheets and an online Disinformation Register that responds to "prominent pieces of disinformation" regarding the referendum,[35] such as suggestions that voters need to enrol separately to vote in a referendum, and that the process will be "rigged" in some manner. This is positive. Unfortunately, the official pamphlet is unlikely to meet the same standard. In advance of the referendum, the AEC will mail a pamphlet containing arguments for and against the Voice, authorised by parliamentarians, to each household.[36] A proposal to require an independent panel assess the veracity of these arguments was not

[29] Constitutional Centenary Foundation, *Report on a Decade of Experience* (2000) 5.

[30] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Constitutional Reform and Referendums* (December 2021) 23 [2.72].

[31] Francis Markham and Will Sanders, "Support for Constitutionally Enshrined First Nations Voice to Parliament: Evidence from Opinion Research since 2017" (Centre for Aboriginal Economic Policy Research, Working Paper No 138, 2020) 20. For more recent data see Simon Benson and Sarah Ison, "Indigenous Voice Earns Support of Quiet Majority: Newspoll", *The Australian*, 6 February 2023 <https://www.theaustralian.com.au/nation/politics/indigenous-voice-earns-support-of-quiet-majority-newspoll/news-story/112730f98673caf6b106ac3b52da70a2>.

[32] See, eg, David Crowe, "Support for Voice Slips as Voters Await More Detail", *The Sydney Morning Herald*, 24 January 2023 <https://www.smh.com.au/politics/federal/support-for-voice-slips-as-voters-await-more-detail-20230123-p5cenw.html>.

[33] Explanatory Memorandum, *Referendum (Machinery Provisions) Amendment Bill 2022* (Cth) 3; *Referendum (Machinery Provisions) Amendment Act 2023* (Cth) Sch 3A.

[34] Constitutional Centenary Foundation, n 29.

[35] Australian Electoral Commission, *Disinformation Register – Referendum Process* <https://www.aec.gov.au/media/disinformation-register-ref.htm>.

[36] *Referendum (Machinery Provisions) Act 1984* (Cth) s 11.

adopted.[37] It is likely that, as in previous referendums, these arguments will contain "exaggerated or misleading claims that seem designed to confuse or frighten voters".[38] This only puts more pressure on the government run information campaign, as well as legal academics writing for popular media.

In the meantime, proponents of the Voice have launched their own public education and awareness campaigns. Replicating the *Uluru Statement from the Heart*'s origins in community deliberations, supporters are consciously building their programs from the ground up. For example, the Victorian Women's Trust "Together Yes" campaign is centred on "kitchen table" conversations. Supporters are encouraged to host their own event with 10 friends, using resources provided by the organisation, From the Heart, "with hopes participants will in turn convince 10 more people to take part".[39] This model appears to borrow from the community-run and coordinated "Treaty Circles" that formed part of the early stages of the Victorian treaty process.[40] Several law schools have also entered the field. The Castan Centre for Human Rights Law at Monash University has launched a legal clinic for students to educate and inform Australians about the *Constitution*, the Voice, and the referendum process.[41]

The referendum necessarily centres attention on our *Constitution*. Informed public education campaigns supported by accurate public commentary should promote awareness and understanding of the instrument and our system of government. It may also encourage Australians to get involved in legal and political debate on other potential areas of constitutional reform. In my own teaching, I find students express considerable surprise over several parts of our Constitution, and of what our *Constitution* does not contain. I encourage them to appreciate the historical context that led to the introduction of these sections or dismissal of other proposals and to discuss their thoughts with family and friends. The Voice debate not only indicates that there is need for greater civics education; it presents a good opportunity for government to invest in community education and constitutional literacy programs now and into the future. If successful, one of the underappreciated consequences of the Voice may be a more informed public.

The Voice as a Political Contest

The *Uluru Statement* is addressed to the Australian people. This is deliberate. Aboriginal and Torres Strait Islander peoples did not want to see their aspirations for structural reform derailed by politicians "paralysed by … party politics".[42] It is the Australian people who have the authority to "unlock" the potential for genuine reconciliation in this country.[43] In the immediate years following the delivery of the *Uluru Statement*, however, party politics prevented progress. The Coalition government remained implacably opposed to constitutional amendment and to holding a referendum. While the 2022 federal election provided the opportunity for a reset, Opposition Leader Peter Dutton's confirmation that the federal Liberal party will join the National party in opposing the referendum,[44] reveals politics will remain at the heart of the struggle.

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[37] *Referendum (Machinery Provisions) Amendment Bill 2022* (Cth), Amendment Sheet 1816 (Proposed by Independent Senator David Pocock).

[38] Paul Kildea, "Yes or No?: The Government's Proposed Changes to Australia's Referendum Laws", *Australian Public Law* (3 February 2023) <https://www.auspublaw.org/blog/2023/2/yes-or-no-the-governments-proposed-changes-to-australias-referendum-laws>.

[39] Josh Butler, "Indigenous Voice to Parliament: Groups to Launch Grassroots Referendum Campaigns", *Guardian Australia*, 4 January 2023 <https://www.theguardian.com/australia-news/2023/jan/04/indigenous-voice-to-parliament-groups-to-launch-grassroots-referendum-campaigns>.

[40] Aboriginal Treaty Interim Working Group, *Treaty Circle Facilitators Handbook: Building a Pathway to Treaty* (2017) 27.

[41] Monash University Castan Centre for Human Rights Law, *Voice to Parliament Clinic* <https://www.monash.edu/law/research/centres/castancentre/for-students/castan-centre-human-rights-clinic/voice-to-parliament-clinic>.

[42] Megan Davis, "The Long Road to Uluru – Walking Together: Truth Before Justice" (2018) 60 *Griffith Review: First Things First* 13, 15.

[43] Davis, n 42, 45.

[44] AAP, "Peter Dutton Digs in Behind No Campaign for Indigenous Voice to Parliament", *SBS News*, 8 April 2023 <https://www.sbs.com.au/news/article/peter-dutton-digs-in-behind-no-campaign-for-indigenous-voice-to-parliament/62izdsthm>.

This is not the place to speculate on the political consequences of the federal Opposition's decision. It is clear, however, that the decision to oppose will have at least two impacts on the Voice referendum. First, it will negatively affect the chance of the referendum succeeding. The most significant study of Australian referendums has concluded that bipartisan support "has proven essential to referendum success".[45] Proponents of the Voice and the Albanese government have therefore worked hard in a bid to secure support across party lines. The decision to oppose means bipartisanship will not be forthcoming.

Some have suggested that bipartisanship may not be as significant as it once was. Paul Kildea has argued that lessons from referendum history "are a bit stale", given that the last successful referendum was held in 1977 and the last time the country voted on a proposal was in 1999.[46] Further complicating easy analysis is the position of the State and Territory Liberal and National parties. Tasmanian Liberal Premier Jeremy Rockliff has declared he will "vigorously" campaign for the Yes vote.[47] Others have not yet made their position clear.

The more significant consequence is deeper. The decision to formally oppose the referendum will have the unfortunate effect of turning – at least in the minds of many Australians – Aboriginal and Torres Strait Islander peoples' simple request to be seen in the *Constitution* and heard in the processes of governance, into a proxy war between the Prime Minister and Peter Dutton. Supporters of the Voice may gain succour from polls that suggest Australians prefer Albanese to Dutton,[48] but the *Uluru Statement from the Heart* deserves so much more than to be seen through the prism of ordinary political contest.

The Voice is a sophisticated and considered proposal that seeks to ensure Aboriginal and Torres Strait Islander peoples can participate "in the democratic life of the state",[49] and does so in a manner consistent with our constitutional system.[50] In providing an opportunity for Indigenous peoples to have their voices heard in the design and delivery of law and policy that affects them, the Voice will contribute to better outcomes. At the same time, as Robert French, the former Chief Justice of the High Court of Australia notes, the Voice is "a once in a lifetime opportunity for Australia to fill a gaping hole in our *Constitution*",[51] the fact that it says nothing about the peoples – who are still here today – and whose ancestors have cared for this continent for more than 60,000 years. The referendum then, is an opportunity for Australians to accept the invitation offered in the *Uluru Statement from the Heart* and "walk with" Aboriginal and Torres Strait Islander peoples, to build a better Australia.[52]

[45] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 244.

[46] Paul Kildea, "NAIDOC Week 2021: 1967 to 2021: What Will a Successful Referendum Look Like in 2021/2022?", *Indigenous Constitutional Law Blog* (7 July 2021) <https://www.indigconlaw.org/home/naidoc-week-2021-1967-to-2021-what-will-a-successful-referendum-look-like-in-2021/2022>.

[47] Lydia Lynch and Matthew Denholm, "Liberal Leaders Refuse to Join Dutton's 'No' Campaign on Voice", *The Australian*, 6 April 2023 <https://www.theaustralian.com.au/nation/politics/liberal-leaders-refuse-to-join-duttons-no-campaign-on-voice/news-story/65982231d1ba4e4049ab9da3be2f64cc>.

[48] David Crowe, "Albanese Still Well Ahead of Dutton as Preferred Prime Minister: Resolve Poll", *The Sydney Morning Herald*, 24 January 2023 <https://www.smh.com.au/politics/federal/albanese-still-well-ahead-of-dutton-as-preferred-prime-minister-resolve-poll-20230124-p5ceyd.html>.

[49] Megan Davis, "Correspondence: Moment of Truth" (2018) 70 *Quarterly Essay* 147, 158.

[50] Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart, 2020).

[51] Robert French, "The Voice – A Step Forward for Australian Nationhood" (Paper presented at the Exchanging Ideas Symposium, Sydney, 4 February 2023) 15.

[52] *Uluru Statement from the Heart*, n 1.

The Proposal for the Voice to Parliament: Placing the Referendum Proposal in Context

Sophie Rigney*

This article examines the proposed amendment to the Australian Constitution to provide for an Aboriginal and Torres Strait Islander Voice to Parliament and the executive government. This article provides a summary of the history that has given rise to this proposed constitutional change, and examines the drafting history of the proposed amendment. The article particularly examines three issues related to the proposed amendment: the use of the word "may" in the proposed amendment; the Voice speaking to both Parliament and executive government; and the ability of the Parliament to determine the design of the Voice. The article explains where the proposal has come from, why it appears in the form it does, and outlines some of the strengths and challenges of the proposal.

In late 2023, Australians will go to a referendum on enshrining an Indigenous Voice to Parliament in the Australian C*onstitution*. The proposal of a Voice to Parliament – a body that will make representations to the Australian Parliament and government on matters relating to Aboriginal and Torres Strait Islander peoples – has emerged after more than a decade of political and legal discussion about how to "recognise" Indigenous peoples in the Australian *Constitution*. Over this time, there have been five formal government processes,[1] that have ultimately produced a legislated framework, an Act of Recognition,[2] and 10 reports.[3]

In this article, I provide a brief outline of the history that has given rise to this proposed constitutional change. I then outline the proposed amendment to the *Constitution* (which was released in March 2023) and the drafting history of the proposal. I particularly examine three issues: the use of the word "may" in the proposed amendment; the Voice speaking to both Parliament and executive government; and the ability of the Parliament to determine the design of the Voice. My aim in this article is to explain where the proposal has come from, and why it appears in the form it does, as well as offering some views on the strengths and challenges of the proposal.

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[1] Expert Panel on Constitutional Recognition of Indigenous Australians (2012); Aboriginal and Torres Strait Islander Act of Recognition Review Panel (2014); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2015); Referendum Council (2016); Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (2018); Indigenous Voice Co-design Process Interim Report to the Australian Government (2020).

[2] *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).

[3] Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel (2012); Aboriginal and Torres Strait Islander Act of Recognition Review Panel, Parliament of Australia, *Final Report* (2014); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (2014); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015); Referendum Council, *Interim Report of the Referendum Council* (2016); Referendum Council, *Final Report of the Referendum Council* (2017); Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (2018); Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2018); Indigenous Voice Co-design Process Interim Report to the Australian Government (2020); Indigenous Voice Co-design Process Final Report to the Australian Government (2021).

A Short History of Constitutional Recognition and the Voice to Parliament

Australia's First Nations peoples are recognised as the world's longest continuing culture, with a connection to the land that has existed "according to the reckoning of (Indigenous) culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years".[4] Nonetheless, when the British settled or invaded this land, they eventually relied on the doctrine of terra nullius to acquire the territory. When Australia's *Constitution* was drafted, Indigenous peoples were not consulted or involved, despite significant activism of Indigenous peoples for greater self-determination and representation in colonial governance.[5] Ultimately, the *Constitution* as drafted in 1901 made two references to Aboriginal people: in s 127 (which stated "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted") and s 51(xxvi) (which permitted the federal government to make laws for "the people of any race, *other than the aboriginal race in any State*, for whom it is necessary to make special laws"). In a referendum held in 1967, s 127 was repealed entirely, and s 51(xxvi) was amended to delete the words in italics above. As a result, Indigenous peoples were not explicitly mentioned in the *Constitution* at all.

More recently, this absence has been recognised as problematic, both symbolically and practically. The lack of any reference to Indigenous peoples in the document that regulates the relationship between the state and the citizenry has been seen as "unfinished business". Indigenous peoples have called for greater participation in government processes that affect them, to improve those processes and their outcomes. As an example, in 1995, the Aboriginal and Torres Strait Islander Commission (ATSIC) argued for "major institutional and structural change, including Constitutional reform and recognition".[6] This was understood as more than symbolic recognition: "A fundamental component in the recognition of Australia's Indigenous peoples is to provide structures which will guarantee the inclusion of indigenous peoples in Governmental processes."[7]

Since 1999, some movement was made towards "recognising" Indigenous peoples in the *Constitution*, but much of this focused on symbolic change like recognition in the *Constitution*'s preamble or other minor changes that would not afford Indigenous peoples any substantive ability to exercise their rights of political participation. In 2015, however, several Indigenous leaders met with the then-Prime Minister and then-Leader of the Opposition to discuss the way "constitutional recognition" was being undertaken. They issued the "Kirribilli Statement" which made clear that "any reform must involve substantive changes to the Australian Constitution … A minimalist approach … does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples".[8] This marked a decisive change in the "constitutional recognition" movement, from symbolism to substantive change. Such a move is in line with greater appreciation by the state – particularly since the passage of the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007 (and Australia's endorsement in 2009) – of the rights to political participation that attach as collective rights particularly to Indigenous peoples (as opposed to the rights exercisable by particular Indigenous individuals).[9] These rights to political participation are crucial to the exercise of Indigenous rights to self-determination.[10]

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[4] Uluru Statement from the Heart (2017).

[5] See Megan Davis and George Williams, *Everything You Need to Know about the Uluru Statement from the Heart* (UNSW Press, 2021).

[6] Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995) [1.29].

[7] Aboriginal and Torres Strait Islander Commission, n 6, [4.22].

[8] Statement presented by Aboriginal and Torres Strait Islander attendees at a meeting held with the Prime Minister and Opposition Leader on Constitutional Recognition, 6 July 2015.

[9] See particularly UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (2 October 2007) Arts 18, 19 (*UNDRIP*). See also Gabrielle Appleby et al, "Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into application of the UNDRIP in Australia" (2022).

[10] UNDRIP, n 9, Art 3; Appleby et al, n 9.

In response to the Kirribilli Statement, the Referendum Council was established to "lead the process for national consultations and community engagement about constitutional recognition".[11] The Council was to report on outcomes of these consultations and "options for a referendum proposal, steps for finalising a proposal, and possible timing for a referendum" as well as "constitutional issues".[12] The Council established the process for 12 "Regional Dialogues" held across Australia in 2016–2017, and a National Constitutional Convention held near Uluru on 23–26 May 2017. Around 1,200 Indigenous people were involved in this process of dialogues, making this an "unprecedented" process that represented "the most proportionately significant consultation process that has ever been undertaken with First Peoples" in Australia.[13] Participants in the Regional Dialogues were chosen in order to represent those who had "cultural authority", and therefore 60% of the invitations were sent to traditional owners and elders, 20% to local Indigenous organisations, and 20% to individuals including Stolen Generations members, youth and grandmothers.[14] In terms of structure and content, the dialogues were designed to ensure deliberative decision-making and active participation.[15] It has been noted that the Regional Dialogue design was "an exercise of First Nations' right to determine their own political status, and an example of political participation … and an exercise of Free, Prior and Informed Consent".[16]

The Regional Dialogues ranked the Voice to Parliament as a key reform priority.[17] Prior to the National Convention at Uluru, the Referendum Council established a set of Guiding Principles against which to assess possible reforms.[18] At the National Convention, delegates ultimately endorsed the proposal for the Voice to Parliament. The "Uluru Statement from the Heart" called for this Voice to Parliament and a Makarrata Commission to oversee an agreement-making and truth-telling process. This is often described as "Voice, Treaty, Truth": a sequenced series of law reform objectives, with the Voice to Parliament considered to be the priority because of a "recognition that public institutions, politicians and political parties rarely listen to what Indigenous peoples say about their lives and aspirations".[19] Establishing the Voice as a constitutionally-entrenched body would permit treaty and truth-telling to occur with the support of such a structure.

The Voice to Parliament was envisaged as a body that would represent First Nations views on policies and laws that affect them, to the Parliament and government. The Constitutional amendment would be a substantive change – echoing the position articulated at Kirribilli – rather than a minimalist recognition. The Voice would be:

> a structural reform. It is a change to the structure of Australia's public institutions and would redistribute public power via the Constitution … [it] will create an institutional relationship between governments and First Nations that will compel the state to listen to Aboriginal and Torres Strait Islander Peoples in policy- and decision-making.[20]

[11] Referendum Council (2017), n 3, 46.

[12] Referendum Council (2017), n 3, 46.

[13] Referendum Council (2017), n 3, 46.

[14] See Referendum Council (2017), n 3, 8; Davis and Williams, n 5, 133, Public Lawyers, *The Imperative of Constitutional Enshrinement: Submission to the Voice Secretariat* (20 January 2021) 2.

[15] Megan Davis, "The Long Road to Uluru" (2018) 60 *Griffith Review* 13, 41–45. See also Referendum Council (2017), n 3, 10.

[16] See also Appleby et al, n 9.

[17] Referendum Council (2017), n 3, 29.

[18] Referendum Council (2017), n 3, 22.

[19] Davis and Williams, n 5, 151.

[20] Davis and Williams, n 5, 151–152. See also Dani Larkin and Sophie Rigney, "State and Territory Legislative Vulnerabilities and Why an Indigenous Voice Must Be Constitutionally Enshrined" (2021) 46(3) *Alternative Law Journal* 205; Gabrielle Appleby and Eddie Synot, "A First Nations Voice: Institutionalising Political Listening" (2020) 48(4) *Federal Law Review* 529. See also the Attorney-General's Second Reading Speech: "This bill is about … listening … it is up to the parliament and the executive to listen", and the final words of that speech, "It is time to listen" (Attorney-General Mark Dreyfus, *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Second Reading Speech* (30 March 2023)).

Following the National Convention at Uluru, the Referendum Council endorsed the Voice and recommended that a referendum be held.[21] It considered the reform to be modest and substantive; reasonable; unifying; and capable of attracting the necessary support for a successful referendum.[22] Nonetheless, the proposal was rejected by the then Prime Minister,[23] and instead, the government established a Joint Select Parliamentary Committee (chaired by Patrick Dodson and Julian Leeser). This committee ultimately recommended that the government "initiate a process of co-design [of the Voice] with Aboriginal and Torres Strait Islander peoples"[24] and that the government "consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice".[25]

In 2019, a process of "co-design" for an "Indigenous voice to government" and voices "at the local, regional and national levels" was announced.[26] This process, chaired by Tom Calma and Marcia Langton, consisted of two stages. First, three groups (consisting of individuals picked by the government) worked to develop "models to improve local and regional decision-making and a national voice".[27] The second stage involved "consultation" on the proposed models and suggestions in the Interim Report.[28] The terms of reference for this process excluded the issue of constitutional status of the Voice,[29] but nonetheless 90% of public submissions to the consultation process supported a referendum on a First Nations Voice to Parliament.[30] The final report was publicly released in December 2021.[31]

In the lead-up to the 2022 Federal election, the Liberal-National Coalition ruled out a referendum on the Voice if they were re-elected,[32] while the Australian Labor party promised to hold a referendum to enshrine the Voice to Parliament as well as to progress the Treaty and Truth aspects of the Uluru Statement.[33] The Labor Party was elected on 21 May 2022, and reiterated the new government's support for the Uluru Statement and for a referendum.[34] The referendum is anticipated for late 2023.[35] It has taken eight years since the Kirribilli Statement, nearly 30 years since ATSIC's call for substantive constitutional change, and around 100 years since the Indigenous activism of the 1920s–1930s for greater rights to political participation.[36]

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[21] Referendum Council (2017), n 3, 2.

[22] Referendum Council (2017), n 3, 38–39.

[23] Malcolm Turnbull, *Response to Referendum Council's Report on Constitutional Recognition* (26 October 2017).

[24] Joint Select Committee on Constitutional Recognition (2018), n 3, [2.314].

[25] Joint Select Committee on Constitutional Recognition (2018), n 3, [3.152].

[26] National Indigenous Australians Agency, *Indigenous Voice* <https://www.indigenous.gov.au/topics/indigenous-voice>; National Indigenous Australians Agency, *Co-Chairs Announced for Indigenous Voice Co-Design Process* (5 November 2019) <https://www.indigenous.gov.au/news-and-media/stories/co-chairs-announced-indigenous-voice-co-design-process≥.

[27] See National Indigenous Australians Agency, "Indigenous Voice Co-Design" (Fact Sheet).

[28] Indigenous Voice Co-design Process Interim Report (2020), n 3.

[29] National Indigenous Australians Agency, *Terms of Reference: National Co-Design Group* (13 March 2020) 19(d).

[30] Gabrielle Appleby, Emma Buxton-Namisnyk and Dani Larkin, *Indigenous Voice Co-Design Process: An Expert Analysis of the NIAA Public Consultations* (Indigenous Law Centre, UNSW, 29 June 2021).

[31] Indigenous Voice Co-design Process Final Report (2021), n 3.

[32] Natassia Chrysanthos and Angus Thompson, "'Why Would I?': Morrison Rules Out Referendum on Indigenous Voice If Re-elected", *The Sydney Morning Herald*, 2 May 2022 <https://www.smh.com.au/politics/federal/why-would-i-morrison-rules-out-referendum-on-indigenous-voice-if-re-elected-20220502-p5ahue.html>.

[33] Australian Labor Party, *Labor's Commitment to First Nations Peoples* (18 May 2022) <https://www.parlinfo.aph.gov.au/parlInfo/download/library/partypol/8638543/upload_binary/8638543.pdf;fileType=application%2Fpdf#search=%22library/partypol/8638543%22>.

[34] National Indigenous Australians Agency, *Australian Government Commits to the Uluru Statement* (22 May 2022) <https://www.voice.niaa.gov.au/news/australian-government-commits-uluru-statement>.

[35] Anthony Galloway, "Voice Referendum as 'Early as August', Burney Reveals", *The Sydney Morning Herald*, 1 January 2023 <https://www.smh.com.au/politics/federal/voice-referendum-as-early-as-august-burney-reveals-20221229-p5c9br.html>.

[36] Including work of the Australian Aboriginal Progressive Association, William Cooper's petition to the King, and the "Day of Mourning" in 1938.

THE PROPOSED AMENDMENT

An initial draft of the proposed amendment was released in July 2022, and a consultation process followed (as outlined below). Following this, the wording of the proposed amendment was released on 23 March 2023. It reads:

> **Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples**
>
> **s. 129 Aboriginal and Torres Strait Islander Voice**
>
> 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 The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
> 3 The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

History of Drafting the Proposal

This proposal closely reflects others that have been suggested since the 2015 Kirribilli Statement and the Regional Dialogues and National Constitutional Convention. In 2015 Professor Anne Twomey suggested a new s 60A for the *Constitution*.[37] The Twomey proposal was then used as an "example" of a possible amendment at the Regional Dialogues and the Constitutional Convention.[38] Subsequently, the Indigenous Law Centre (ILC) at the University of New South Wales used the Twomey proposal as "a logical point from which to commence the ILC's consideration of constitutional drafting".[39] The ILC advanced a different proposal, which "developed Twomey's drafting but was founded in and drew directly from the aspirations expressed during the Dialogues and at the Uluru Convention", where members of the ILC had been in attendance.[40] This proposal was submitted to the 2018 Joint Select Committee on Constitutional Recognition.[41] The proposal read:

> Chapter 9 First Nations
>
> Section 129 The First Nations Voice
>
> (1) There shall be a First Nations Voice.
> (2) The First Nations Voice shall present its views to Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander peoples.
> (3) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the First Nations Voice.

The Joint Select Committee received 18 different models of proposed constitutional amendments, nine of which addressed solely a national Voice.[42] Many shared common features. Of the nine proposals which

[37] Anne Twomey, "Putting Words to the Tune of Indigenous Constitutional Recognition", *The Conversation*, 20 May 2015 <https://www.theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>. See also Anne Twomey, "An Indigenous Advisory Body: Addressing Concerns about Justiciability and Parliamentary Sovereignty" (2015) 8(19) *Indigenous Law Bulletin* 6; Shireen Morris, "'The Torment of Our Powerlessness': Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs" (2018) 41(3) *UNSW Law Journal* 629. On the different options for reform, see Shireen Morris, *A First Nations Voice in the Constitution* (Hart, 2020) 265–303.

[38] Gabrielle Appleby, Sean Brennan and Megan Davis, "Constitutional Enshrinement of a First Nations Voice: Issues Paper 1: The Constitutional Amendment" (2022) 8.

[39] Appleby, Brennan and Davis, n 38, 8.

[40] Gabrielle Appleby, Sean Brennan and Megan Davis, "A First Nations Voice and the Exercise of Constitutional Drafting" PLR (forthcoming, 2023 March edition).

[41] Patricia Anderson et al, Submission No 479 to Parliament of Australia, *Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples* (3 November 2018).

[42] Joint Select Committee on Constitutional Recognition (2018), n 3, [3.31], [3.38]–[3.46].

addressed a national Voice, the Albanese March 2023 proposal most closely reflects the ILC proposal.[43] The Committee expressed some concern about the number of draft proposals, and thus suggested the "co-design" process as the next step. However, as the terms of reference for the co-design process precluded examination of the constitutional status of the Voice, no draft Constitutional amendments were examined.

Following the change of government, on 30 July 2022 in a speech at the Garma Festival, Prime Minister Anthony Albanese released a draft Constitutional amendment and referendum question.[44] However, the Prime Minister also indicated that this proposal was not final and could be changed after greater consultation. To undertake such consultation, the government established three advisory groups. The "First Nations Referendum Working Group" was tasked with advising the government on "how best to ensure a successful Referendum", particularly focusing on the timing of the referendum, "refining the proposed constitutional amendment and question" and "the information on the Voice necessary for a successful referendum".[45]

In addition, there was a "First Nations Referendum Engagement Group", which was tasked with providing advice "about building community understanding, awareness and support for the referendum".[46] Finally, the government established a Constitutional Expert Group to provide the Referendum Working Group "with legal support on constitutional matters relating to the referendum" including advice on the draft referendum question and constitutional amendments.[47]

Ultimately, the proposed amendment was the result of consultations between the government and these advisory groups. One consequence of releasing an initial draft nine months before settling the proposal, was that there was a great deal of political and media speculation on the content of the proposal. The March 2023 draft has been able to address some of those issues.

The March 2023 proposal was substantively very similar to the first draft released at Garma but had some additions which clarified many of the issues that had been left unresolved. First, the placement of the amendment in the *Constitution* was made clear, with a Chapter heading indicating the location of the new section. Second, both the Chapter title and a preliminary sentence were included, emphasising the importance of recognition in the *Constitution* of Aboriginal and Torres Strait Islander peoples as the "First Peoples" of Australia. Third, in subs (2) the words "of the Commonwealth" were included to clarify that it was the federal parliament and government being referenced, as was always envisaged. Finally, subs (3) was altered. Initially it read that the Parliament would have the power to make laws "with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice" but this was ultimately altered to "with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures". This alteration appears to be a response to some questions around the Voice's ability to speak to executive government and the role of Parliament in determining the legal effect of this, as will be discussed in more detail below. At the same time as releasing the draft proposal, a set of eight design principles was also released, which will guide the design of the Voice after a successful referendum.

Issues in the Draft Proposal

The wording of the current draft raises three particular issues. These are (1) the wording that the Voice "may" make representations; (2) that those representations are to be to "parliament and the executive government"; and (3) the role of Parliament in designing the Voice. As a preliminary point, in any future instance where the High Court is required to interpret an inserted s 129, it is likely that they will interpret

[43] Joint Select Committee on Constitutional Recognition (2018), n 3, [3.38]–[3.46].

[44] Prime Minister, Address to Garma Festival (30 July 2022) <https://www.pm.gov.au/media/address-garma-festival>.

[45] Aboriginal and Torres Strait Islander Voice, *Who Is Involved* <https://www.voice.niaa.gov.au/who-involved#:~:text=The%20Referendum%20Working%20Group%2C%20co,Reference%20on%20the%20Resources%20page>.

[46] Aboriginal and Torres Strait Islander Voice, n 45.

[47] Aboriginal and Torres Strait Islander Voice, n 45.

the provision in line with the intention of the amenders, undertaking a textual approach.[48] This intention may be gleaned from materials including the Second Reading Speech, broader parliamentary debates, the yes/no pamphlets, and the advice of the Solicitor-General.[49]

"May Make Representations"

Although the March 2023 draft largely reflects the proposal drafted by the ILC, there is one major difference: the ILC proposal used the words "The First Nations Voice **shall** present its views" while the March 2023 draft is "The Aboriginal and Torres Strait Islander Voice **may** make representations". An initial concern is that the proposal is weaker than the proposal drafted by the ILC, softening the Voice's capacity to make representations and of the Parliament and government to seek such representations. "May" leaves open the possibility that the Voice will not be called upon to make representations. The possibility theoretically exists that the constitutional enshrinement of the Voice would be effectively toothless: it would exist but would have no real function.

However, the subsection should be read in conjunction with subs (1), that there "**shall** be a body". In this way, the existence of the body itself is constitutionally enshrined, even if it chooses not to make representations in particular circumstances. Indeed, Gabrielle Appleby, Sean Brennan and Megan Davis have noted that the wording of "may" might have been intended "to counter any idea that the Voice must present its views on every single matter relating to Aboriginal and Torres Strait Islander peoples".[50] Indeed, this is reflected in the Attorney-General's *Second Reading Speech*, where it was noted that:

> The Voice will not be required to make a representation on every law, policy or program. The Voice will determine when to make representations by managing its own priorities and allocating its resources in accordance with the priorities of First Nations peoples.[51]

This has been further clarified since the release of the Solicitor-General's advice on the proposed amendment. The advice notes that the proposed section does not require the Parliament to consult with the Voice before legislating.[52] The text of the section "imposes no obligations of any kind upon the Voice, the Parliament or the Executive Government" and "no such requirements can be implied" because of the "deliberate textual choice to empower the Voice to make 'representations' rather than to 'consult' and with the ordinary operation of representative government".[53] Moreover, the proposal would not "impose any enforceable obligation upon the Parliament to consider representations from the Voice, let alone to follow such representations", as Courts tend to take the view that "these are matters for the Parliament itself to regulate".[54] In the Solicitor-General's view, then, representative government will be "unaffected" by the Voice, and the "influence of the Voice's representations to the Parliament will be a matter to be determined by political considerations, rather than legal considerations".[55]

Nonetheless, it has been questioned whether the wording leaves uncertainty about "whether the Parliament can remove the function" in subs (2).[56] Given that Parliament retains legislative power with relation to the Voice (under subs (3) and considered in more detail below), the possibility might theoretically exist for a future government to neuter the functionality of the Voice, by limiting its ability

[48] See *Wong v Commonwealth* (2009) 236 CLR 573; [2009] HCA 3. On the approach to interpreting amended provisions (like the amended s 51(xxvi) after the 1967 referendum), see *Kartinyeri v Commonwealth* (1998) 195 CLR 337; [1998] HCA 22.

[49] See *Wong v Commonwealth* (2009) 236 CLR 573; [2009] HCA 3; see *Kartinyeri v Commonwealth* (1998) 195 CLR 337; [1998] HCA 22.

[50] Gabrielle Appleby, Sean Brennan and Megan Davis, *Constitutional Enshrinement of a First Nations Voice Issues Paper for Public Discussion: Issues Paper 3: Finalisation of the Voice Design* (Indigenous Law Centre, UNSW, 2022).

[51] Dreyfus, n 20.

[52] Solicitor-General, *In the Matter of the Proposed Section 129 of the Constitution* (19 April 2023) [18 (a)].

[53] Solicitor-General, n 52, [18 (a)].

[54] Solicitor-General, n 52, [18 (b)].

[55] Solicitor-General, n 52, [18 (c)].

[56] Appleby, Brennan and Davis, n 38, 14.

to make representations – all while still technically adhering to the Constitutional requirement that a Voice exist. We can imagine that this would be an ideal cover for hostile governments, to give lip service to the existence of the Voice while effectively demolishing its purpose. However, the Solicitor-General's Advice further sheds light on this, arguing that:

> [T]he Parliament could not validly pass a law that would contradict the express words of proposed s 129(ii), such as by providing that the Voice may not make representations on some "matters relating to Aboriginal or Torres Strait Islander peoples". Nor could it validly prohibit the Voice from making representations either to the Parliament or the Executive Government. While laws of both those kinds would undoubtedly be laws "with respect to matters relating to the … Voice", they would purport to take away from the Voice a function that proposed s 129(ii) of the Constitution would have conferred upon it. Proposed s 129(iii) being "subject to this Constitution", such laws would be invalid.[57]

It therefore appears that the wording "may make representations", read in the context of the proposal as a whole, permits the Voice the flexibility of choosing when to make representations while also providing the Constitutional guarantee that the ability to make these representations is protected.

"To the Parliament and Executive Government"

The second issue is the ability of the Voice to speak to both Parliament and the Executive government (including the federal cabinet and the public service). In this way, the Voice should be able to advise both the institution that makes the law, and the institution that implements the law. This is particularly important so that the advice is not ignored by one arm or the other, with no recourse. For example, if the Voice only advised Government, we can imagine that the government of the day could ignore the advice with little push-back from the opposition or other parties. The ability of the Voice to speak to Parliament "would enable Indigenous voices to be heard by all, not solely the government", and would thereby "ensure Indigenous people were no longer trapped within a web of bureaucracy and government priorities".[58] On the other hand, if the Voice only advised Parliament, it may not be able to provide comment on administrative and bureaucratic decisions made by the government, including under delegated legislation. Ensuring that the Voice can advise both these arms of government both increases its scope, and the probability of it being heard. It is also in line with Australia's system of responsible government and the correct relationship between the executive and the legislature.

Nonetheless, there has been some contention over the inclusion of "executive government" in the proposed amendment. In particular, some have claimed that this makes the proposal more likely to be subject to court challenge, and a concern that the High Court might interpret subs (2) such that representations by the Voice would need to be considered by public servants prior to making a valid decision – delaying decision-making and leading to litigation. In response, the Attorney-General had suggested that the initial subs (3) be amended, to clarify that Parliament had authority to determined "the legal effect" of the Voice's representations.[59] However, this proposal was not taken up by the referendum advisory groups consulting to the government. Instead, subs (3) now makes clear that the Parliament shall have the power to make laws "with respect to matters relating to [the Voice], including its composition, functions, powers and procedures". Rewording subs (3) to include the words "relating to" and "including" provides Parliament a wide remit of powers regarding the Voice, and would allow Parliament the power to determine the cases in which representations of the Voice must be considered prior to decisions being taken.[60] As was made clear by the Attorney-General, "It will be a matter for

[57] Solicitor-General, n 52, [30].

[58] Eddie Synot, "Ken Wyatt's Proposed 'Voice to Government' Marks Another Failure to Hear Indigenous Voices", *The Conversation*, 30 October 2019 <https://www.theconversation.com/ken-wyatts-proposed-voice-to-government-marks-another-failure-to-hear-indigenous-voices-126103>.

[59] See Paul Sakkal and James Massola, "The Seven Extra Words that Could Broker a Compromise Deal and Win the Referendum", *The Age*, 13 March 2023 <https://www.smh.com.au/politics/federal/the-seven-extra-words-that-could-broker-a-compromise-deal-and-win-the-referendum-20230312-p5crct.html>.

[60] These words ensure that Parliament "may enact any law that has more than an insubstantial, tenuous or distant connection either to the Voice itself or to any subject relating to the Voice": Solicitor-General, n 52, [25].

the parliament to determine whether the executive government is under any obligation in relation to representations made by the Voice",[61] and that the Voice:

> will not have to wait for the parliament or the executive to seek its views before it can provide them. But nor will the constitutional amendment oblige the parliament or the executive government to consult the Voice before taking action.[62]

As such, any concern that the Voice would need to make representations to the executive government in all matters (otherwise risking a court challenge) is addressed, with Parliament having authority over such matters.[63]

The Role of Parliament in Designing the Voice

Under subs (3), Parliament will have the power to legislate the design of the Voice. The changes to subs (3), made between the Garma draft and the March 2023 draft, broaden, clarify, and strengthen Parliament's powers with regards to the design of the Voice. This is appropriate, as Parliament is supreme. It is also essentially what was anticipated by the Referendum Council.[64] The decisions on the structure and design of the Voice would be left until after the referendum, consistent with the constitutional amendment technique of a "decision to defer",[65] a technique which has been referred to as being in line with constitutional change "best practice".[66] In relation to the Voice, this approach has been described by former High Court Judge Murray Gleeson as a "constitutionally entrenched but legislatively controlled" structure.[67]

Such an approach is familiar in the Australian context: for example, the High Court of Australia was established by s 71 of the *Constitution*, but the detail was determined by Parliament in legislation two years later.[68] In the case of the Voice, there are (at least) four rationales for this deferral: first, as noted, this fits with Australia's system of representative government, where the Parliament has supreme legislative power and is responsible to the electorate; second, this approach works to separate the higher-order principle question from the technical question, to allow the Australian voters to directly vote on the existence of the Voice in the Constitution; third, this attempts to separate that principle question from the technical details issues in political debate, so that the debate does not become mired in a question about "models"; and finally – arguably most crucially – this approach then will permit a design process after the successful referendum, in which First Nations peoples may be able to determine a model that is appropriate, for ultimate submission to parliamentary legislative processes.

Indeed, as Appleby, Brennan and Davis write, providing a "full, detailed model of the Voice" before the referendum could "mislead voters and impair the constitutional function of the referendum: that is, voters may think they are voting on the detail of the model, and not the constitutional provision which is pitched at a much higher level of generality and principle".[69] They argue that this may lead to future governments being reluctant to change a model which had the support of the electors, undermining the flexibility of the design and its ability to respond to changed circumstances. Instead, they argue that questions of "how and when" to finalise the Voice design "should be resolved by reference to three principles: respect for the Australian people as voters in the referendum, assurance to First Nations that the design of the Voice

[61] Dreyfus, n 20.

[62] Dreyfus, n 20.

[63] See also Solicitor-General, n 52, [22]–[40].

[64] Referendum Council (2017), n 3, 2.

[65] See Rosalind Dixon and Tom Ginsburg, "Deciding Not to Decide: Deferral in Constitutional Design" (2011) 9(3–4) *International Journal of Constitutional Law* 636; Rosalind Dixon, "Constitutional Design Deferred" in David Landau and Hanna Lerner (eds), *Elgar Handbook on Comparative Constitution Making* (Edward Elgar, 2019).

[66] The Joint Select Committee on Constitutional Recognition Interim Report, n 3, Section 3: Design Principles.

[67] Murray Gleeson, "Recognition in Keeping with the Constitution: A Worthwhile Project" (Uphold and Recognise, 2019). See also Public Lawyers, n 14; Referendum Council (2017), n 3, 2.

[68] *Judiciary Act 1903* (Cth). See Anderson et al, n 41, 11.

[69] Appleby, Brennan and Davis, n 50, 6.

will not be imposed on them by the Parliament without their input, and flexibility in the future design of the Voice".[70] The Australian public "should be asked first to vote Yes or No on a simply stated question of constitutional principle, fully informed about the primary function of the Voice and the design process and principles which will follow. If they vote Yes, the Parliament, who are the representatives of the Australian people, should then move to legislate the details of the Voice, according to that process and those principles".[71] I agree with the approach put forward by Appleby, Brennan and Davis, particularly its conceptualisation of the different roles of electors, Indigenous peoples, and the Parliament in relation to the Voice; and the distinction between the existence of the Voice and its detailed design.

However, in the lead-up to the referendum, there has been some contention about the design of the Voice. For example, Opposition Leader Peter Dutton wrote to the Prime Minister with 15 "questions" about the design, role, and functions of the Voice.[72] Many of these questions have existing answers, because even though the exact model is yet to be determined, the potential model of the Voice has been the subject of several processes and reports. The eight design principles which were released alongside the proposed amendment to guide the ultimate design of the Voice allow the design to be flexible and open to future change, but to have some certainty around how design is linked to function. Given the importance of Indigenous political participation to both the rationale and operation of the Voice, it is fundamental that there is a further process for First Nations peoples to guide the Voice design in line with these principles.

Conclusions

At the time of writing, the proposed amendment to the *Constitution* had been introduced to Parliament, and was under consideration by a parliamentary committee. The proposed amendment has significant strengths: it ensures that the Voice would appropriately speak to both Parliament and executive government, and it ensures Parliament is responsible for designing the Voice. In turn, this provides flexibility to future governments to adapt the Voice as needed, protects parliamentary supremacy, and is grounded in the correct conceptualisation of the role of Parliament in designing the Voice (rather than having a model prior to the referendum). The wording of "may" in subs (1) raises some questions but is defensible, particularly considering the desire to clarify the role of the Voice vis-à-vis the Parliament and executive, and the Constitutional protections of the ability of the Voice to make representations. Any referendum in Australia faces a daunting prospect for success, due to the requirement of a double majority – an overall majority, and a majority in a majority of states.[73] The idea of a Voice currently retains a significant amount of popular support,[74] but the wording of the amendment will come under scrutiny. Clear communication around why the proposal has been drafted in this manner and what this change will enable will enhance the likelihood of public support for constitutional change.[75]

[70] Appleby, Brennan and Davis, n 50, 4.

[71] Appleby, Brennan and Davis, n 50, 6.

[72] Peter Dutton, *Letter to the Prime Minister* (7 January 2023) <https://twitter.com/PeterDutton_MP/status/1611919809880666112?lang=en>.

[73] *Constitution* s 128.

[74] Simon Benson, "Five States Raise Voice to Back Recognition: Newspoll", *The Australian*, 5 April 2023 <https://www.theaustralian.com.au/nation/five-states-raise-voice-to-back-indigenous-recognition-newspoll/news-story/027f9c23aaa6aa4bd0e61965eab65688>.

[75] See, eg, George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010), where they point out that "sound and sensible proposals" are one of the "pillars" of successful referenda.

On Representation and the Politics of Aboriginal and Torres Strait Islander Voice

Sana Nakata and Daniel Bray*

This article analyses the proposed Aboriginal and Torres Strait Islander Voice to Parliament through the lens of democratic theory and the concept of representation. We outline two conceptions of representation, the dyadic and constitutive perspectives, and argue that the constitutive perspective better illuminates the democratic value and political power of an institutionalised Voice to Parliament. From a constitutive perspective, the political power of Indigenous representation is grounded in existing fields of representation that both precede and exceed the Australian State. On this perspective, the political power of the Voice lies not only in the ability to directly affect political decisions, but also in the way that authoritative representative claims can shape public attitudes, values and decision-making by setting agendas, attracting the views of affected communities and shaping the terms of debate. We argue that the Voice to Parliament expands and empowers existing fields of Indigenous representation by acting as "connective tissue" between Indigenous peoples and state institutions that cannot be politically severed. Its representative power emanates not just from its legal authorisation but also from its political function as a new communicative lever with the potential to transform the national public and political discourse.

INTRODUCTION

Since its inception in the Final Report of the Referendum Council[1] in 2017, the proposal for an Aboriginal and Torres Strait Islander Voice to Parliament has largely been addressed in terms of its constitutional authorisation and legal function. Debates have focused on the constitutional text that authorises specific rights for a group; the legal mechanisms by which this group representation is constituted, institutionalised, and connected to Parliament and the Executive; and the legal status of the representations emanating from the Voice in the policy- and law-making process. These issues need to be finalised within legal frameworks, but they are also matters that attend very explicitly to political power. To highlight these matters, this article examines the Voice proposal through the lens of democratic politics and the concept of representation. In this case, democratic politics is taken to involve the representative processes and practices through which diverse peoples and their political institutions are empowered to discuss, contest and decide the course of their common life together, thereby constituting themselves as a political community despite deep divisions and disagreements. That is, we are concerned with the *political* authorisation and *representative* function of the Voice as *a constitutionally derived political power operating in a democratic polity.*

Since Prime Minister Anthony Albanese recommitted to a referendum on a constitutionally enshrined Voice at the 2022 Garma Festival, much of the public debate has shifted towards these more political matters. While these debates might appear in the media as party or personality driven, we contend that the various political positions reflect different understandings of what constitutes a democratic political community, the function of representation in democracies, and the effectiveness of representation as a

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[1] Referendum Council, *Final Report of the Referendum Council* (30 June 2017).

form of political power. From this angle, three key questions are raised about the Voice proposal: (1) In what ways do forms of Indigenous representation constitute political power?; (2) What value will the representative functions of an Aboriginal and Torres Strait Islander Voice have in the context of ongoing colonisation?; and (3) To what extent might a Voice yield transformative effects upon either Indigenous groups or the colonial government?

In this article, we briefly answer these questions by first introducing theories of democratic representation; second, by examining the existing politics of Indigenous representation; and finally, by offering a brief analysis of the representative principles in the Indigenous Voice Co-design Model. In our analysis of this model, we demonstrate its careful attention to key principles of democratic representation and the politics of Indigenous representation, but also argue that it conceives of the representative function of the Voice in institutional rather than political terms. Specifically, we answer the three questions above with the following arguments:

(1) Representation constitutes forms of *political power* through its institutionalisation and wider contestation in a democratic system.
(2) Indigenous representation has always shaped relationships within and across nations and communities prior to the colonial encounter (where it is simply *representation*). These practices coexist with Indigenous representations made in critical engagement with the state (where it becomes *Indigenous representation*) and should be understood as forms of political power because they inform, shape and transform public attitudes, values and decisions. The Voice will expand upon this broad representative landscape and build new connective tissue between it and political institutions.
(3) Understood in constitutive terms, the representative power of the proposed Voice will contribute to the ongoing potential of Aboriginal peoples and Torres Strait Islanders to shape the future politics of this continent. From the vantage point of democracy, this potential will be realised to the extent that it injects Indigenous knowledge into policy making and acts as an attractor for wider Indigenous representations that shape and contest Australian politics.

On Representation

The concept of political representation has a long history in Western political theory stretching back to early modern thinking about representative government. In the work of Thomas Hobbes, an "epoch-making" connection was established between representation and sovereignty by theorising how a multitude of individuals in a state of nature are made present in the person of the sovereign through a social contract of authorisation.[2] More recently, Hannah Pitkin argues that modern representation involves a paradoxical dualism of presence and absence: making something present *in some sense* which nevertheless is not present literally or in fact.[3] For Pitkin, political representation involves making present the people who are physically absent in political institutions through "independent action in the interest of the governed".[4] In contemporary political theory, however, representation tends to be framed in more explicitly democratic terms relating to principles of popular sovereignty and electoral legitimacy, citizenship rights, the accountability of state institutions, and the wider deliberation and contestation in a pluralist civil society. Not surprisingly, there are a variety of contested views on what precisely makes representation *democratic*. Here, we will focus on two broad approaches that can help to frame how we think about the Voice proposal.

The first is the "dyadic perspective" in which political representation is viewed as a relationship of substitution between citizens and their representatives established through an authorising contract that delegates certain powers. In this perspective, representation is a necessary and second-best alternative to direct participation and decision-making, which is the most democratic method for enacting the will of the people. But given the scale and complexity of contemporary social life, authorised representatives

[2] Quentin Skinner, "Hobbes on Representation" (2005) 31(2) *European Journal of Political Theory* 155, 177.

[3] Hannah Pitkin, *The Concept of Representation* (University of California Press, 1967).

[4] Pitkin, n 3, 221.

must stand in the place of the represented people and translate the interests and opinions, desires and problems of their constituents into deliberative and decision-making institutions. Consequently, normative debates about political representation centre on the proper nature of the dyadic relationship and the proper composition of legislative institutions to accurately reflect the identities and interests of citizens. On the former issue, the classic debate is about whether a representative should be mandated with instructions from constituents (delegate) or should be independent and free to take decisions on their behalf (trustee). On the composition issue, debates centre on to what extent individual representatives and political institutions should share key attributes of the people they represent. In these debates, many have argued for "descriptive representation":[5] only members of a group can speak for that group; and political institutions should mirror the society they represent, not least to ensure that the experiences of social groups historically marginalised because of their race, religion or gender, for example, are included in democratic processes.[6] In this approach, good representation is therefore a question of accurately substituting an originary people with an authorised representative body and ensuring that representatives abide by the terms of the delegative (usually electoral) contract.

The second is the "constitutive perspective" in which practices of political representation are viewed as constituting a broader system of democratic politics involving multiple sites of deliberation and contestation in and around political institutions. Instead of narrowing political representation to dyadic electoral relationships, this perspective views political representation as a systemic process mediated by actors and institutions that represent society – including the state, political parties, unions, NGOs and media – encouraging the broad development of extra-institutional forms of political participation and contestation. In this view, representation is not a necessary substitute for direct action, but a system with democratic value in its own right. For Nadia Urbinati, the broader constellation of activities that create, sustain and contest political representation signal that "democracy is actively in place".[7] Indeed, "[t]he multiple sources of information and the varied forms of communication and influence that citizens activate through media, social movements and political parties set the tone of representation in a democratic society by *making the social political.* They are constitutive components of representation, not accessories."[8] From this perspective, political institutions are empowered to make representations and thereby constitute the interests and identity of a political community for specific purposes without replacing or silencing the other representations circulating around them. These broader processes of deliberation and contestation expand representative politics beyond moments of debate and decision in formal institutions and serve to judge and hold to account the representations made within them. In this sense, the political power of representation exceeds institutional politics and its actors. In democracies, the representative powers of citizens in civil society are not extinguished or replaced by formal representative institutions.

Adopting this constitutive perspective, it becomes possible to understand the Voice as a form of *political* rather than legal power. Instead of focusing on debates about the legal relationship in the Voice-State dyad – for example, the power to compel or veto government action, or the legal scope and remit of the Voice – this perspective locates political power and its democratic value in representation itself. In so doing, it demands that we pay attention to the variety of ways in which representative claims are made, contested and validated in contemporary political life. Attending to these broader representative processes and how they inform, shape and challenge political decisions, enables us to identify the people and communities who are and, importantly, *are not* informing those decisions. That is, it becomes possible to account for political power not only in the exercise of specific decisions but in the broader *representative system* that shapes decision-making. By attracting and channelling Indigenous representation, the Voice proposal

[5] Jane Mansbridge, "Should Blacks Represent Blacks and Women Represent Women? A Contingent 'Yes'" (1999) 61(3) *The Journal of Politics* 628.

[6] Anne Phillips, "Dealing with Difference: A Politics of Ideas, or a Politics of Presence?" in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 141.

[7] Nadia Urbinati, "Continuity and Rupture: The Power of Judgment in Democratic Representation" (2005) 12(2) *Constellations* 194, 199.

[8] Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press, 2006) 24.

seeks to effect change in the pursuit of systemic justice without necessarily being able to point to the direct and immediate outcomes it will achieve. While this relationship between the broad representative field and institutional decision-making is indirect, the constitutive perspective highlights their consequential relationship and locates democratic value in the connections and interactions between them. From this perspective, the history of Australian Indigenous policy has been defined by the tenuous and often fractured relationship between the Indigenous representative landscape and government decisions. Governments have too easily been able to tune out Indigenous representations of their interests, or only tune into those it already agrees with. The Voice proposal can be understood as a remedy to this.

In the next section, we explain that Indigenous political representation should be understood as both preceding and exceeding engagement with the Australian State, as well as critically engaging and negotiating with it. We argue that the Voice proposes an institutional expansion of the representative field, rather than a device to supplant or diminish the existing representative practices of Indigenous communities.

On the Politics of Indigenous Representation

Indigenous laws of this continent precede those of the Commonwealth of Australia. This need not be any more controversial than stating that the establishment of the states preceded federation in 1901. We start with this incontrovertible claim as a basis for describing how "Indigenous" representation can be understood both as preceding and exceeding the colonial encounter. We place "Indigenous" in quote marks here to delineate the modes of political representation as they existed before they were conceptualised and named as "Indigenous" (or "Aboriginal" or "Torres Strait Islander") through European encounters. In their engagements within their own forms of community, and between neighbouring communities and nations, a political landscape of representation should be understood to have always existed.[9]

For example, in Northern Australia, accounts of pre-colonial Macassan trade and exchange stretching from the Kimberley coast to north-east Arnhem land, remind us that Aboriginal peoples have been engaged in international relations for hundreds of years prior to European contact.[10] Archaeologists and historians, particularly informed by Yolngu and Macassan peoples' knowledge, have been able to describe rich and expansive forms of intercultural exchange.[11] This has included some accounts of political diplomacy and negotiations between the two nations. Denise Russell describes places in which Aboriginal peoples asserted "a right to exclude" Macassan fishers, and makes a case for the existence of negotiated agreements between Aboriginal and Macassan people.[12] Ian McIntosh has further argued that the "current Yolngu vision of intercultural diplomacy is based on former negotiated partnerships, which could be considered treaties".[13] This is just one well documented example of pre-colonial relationships in which Indigenous peoples have represented themselves, their laws and protocols, in their negotiation and navigation of a political life with others.

A further example of legal and political practices that precede and exceed[14] the existence of the Australian State is provided by the concept of *Kaldowinyeri* of the ruwe of the Tanganekald and Meintangk people. Legal scholar Irene Watson describes Kaldowinyeri as a time when "song, stories and law were birthed,

[9] Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015); Christine Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2010).

[10] Lyndon Ormond-Parker, "Aboriginal Trade with Macassan Seafarers" (2020) 55(3) *Agora* 3, 3.

[11] Ormond-Parker, n 10, 3; Marshall Clark and Sally May, *Macassan History and Heritage: Journeys, Encounters and Influences* (ANU Press, 2013); Denise Russell, "Aboriginal-Makassan Interactions in the Eighteenth and Nineteenth Centuries in Northern Australia and Contemporary Sea Rights Claims" (2004) 1 *Australian Aboriginal Studies* 3.

[12] Russell, n 11, 15.

[13] Clark and May, n 11, 217, citing Ian McIntosh, "A Treaty with the Macassans? Burrumarra and the Dholtji Ideal" (2006) 7(2) *The Asia Pacific Journal of Anthropology* 153.

[14] To the extent that traditional laws and customs remain in practice, even forms augmented by the colonial experience.

as were the ancestors – out of the land".[15] She describes Kaldowinyeri as being animated in part by the question, "'what will you do now?', where the 'doing' is to reposition our 'lawful being' … [as a] way of knowing the world from within a space that is occupied and dominated by the colonisers' legal history with its foundation of terra nullius".[16] There is law, Watson tells us, that precedes colonisation and informs her Peoples about how to encounter the arrival of another legal history. When that other legal history asserted itself on this Country, that first law did not cease to inform and shape Indigenous social and political life.

In considering how the Voice proposal expands upon (rather than creates anew) fields of Indigenous representation, we can also point to numerous direct and critical political engagements between Aboriginal people, Torres Strait Islanders, and the state. Frequently cited are documents that directly assert Aboriginal sovereignty and call for the respect of rights (both as they exist in traditional law and in the Western tradition). These include the 1963 Yirrkala Bark petitions demanding recognition of Yolngu rights, the 1988 Barunga Statement calling for the recognition of Indigenous rights,[17] and the 1998 Kalkaringi Statement objecting to Northern Territory statehood being pursued prior to good faith negotiations between the Territory government and Aboriginal peoples of the area.[18] These, and many others, express forms of Aboriginal sovereignty and seek to realise the return of rights to Aboriginal peoples that have always been theirs. These documents, and the conversations, negotiations and commentary that have circulated around them since they were publicised, are important examples of Indigenous political representation.

In the area now known as the Torres Straits, furthermore, Martin Nakata describes how prior to colonisation, Islanders "lived in politically autonomous but inter-connected communities" with trade and kinship connections north into Papua New Guinea and south to Cape York, as well as having a record of trading with voyagers passing through the Strait.[19] Like the documents above, the Islander history since colonisation is one of deliberate, strategic and critical engagement with the state as a means to acquire respect for already existing rights, laws and customs. As early as 1899, local Island councils were in place, helping to create the conditions for the 1937 First Islanders Councillors Conference, which would prove effective in negotiating for the removal of government restrictions on Islanders' lives both in the laws of the time[20] and in the decades that followed. By 1967, when the Commonwealth entered into the governing of Islanders' affairs, most restrictions on Islanders' lives had been removed as a result of the strategic political engagements between the Island Councils and the state. Torres Strait Islanders also worked to inform the terms of the 1978 Torres Strait Treaty between Australia and Papua New Guinea, attempting to clarify the management of maritime borders and relationships across communities that had been impacted by the imposition of a colonial border. Islanders today must navigate this international treaty on a daily basis, despite not being a formal party to it. More recently, in 1997, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs delivered "a report on greater autonomy for Torres Strait Islanders" which acknowledged that "Torres Strait Islanders could take responsibility for their own affairs", and that greater autonomy can be understood as "returning a right".[21] The report recommended the redesign of the Torres Strait Regional Assembly so that it could

[15] Watson, n 9, 11.

[16] Watson, n 9, 11.

[17] The Barunga Statement also included the call for "a national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs": Australian Institute for Aboriginal and Torres Strait Islander Studies, *The Barunga Statement* <https://www.aiatsis.gov.au/sites/default/files/2020-09/thebarungastatement.pdf>.

[18] Agreements, Treaties and Negotiated Settlements Project, *Kalkaringi Statement* (1 January 1998) <https://www.database.atns.net.au/agreement.asp?EntityID=1071&SubjectMatter=24>.

[19] Martin Nakata, "Treaty and the Self-determination Agendas of Torres Strait Islanders: A Common Struggle" in ATSIC and AIATSIS (eds), *Treaty: Let's Get It Right!* (Australian Institute of Aboriginal and Torres Strait Islander Studies Press, 2003) 182, 187.

[20] See *Torres Strait Islander Act 1939* (Qld).

[21] Nakata, n 19, 184.

lead to self-government under Territory status.[22] While this did not eventuate,[23] the Torres Straits have arguably come as close as anywhere on the continent to achieving self-government.

Aboriginal people and Torres Strait Islanders have also represented themselves at the global level through their participation in the United Nations system, most notably through the Working Group on Indigenous Populations and later the UN Permanent Forum on Indigenous Issues. Both these forums would drive the development of the UN Declaration on the Rights of Indigenous Peoples over more than two decades. Prior to its abolition, the Aboriginal and Torres Strait Islander Commission (ATSIC) sent delegations to the Working Group but many others, including Indigenous academic observers and the National Aboriginal and Torres Strait Islander Legal Services Secretariat and Torres Strait groups, have been regular participants.[24] This is a further example of how Indigenous peoples represent their political interests beyond the state, and also of how efforts to exceed the state can be part of a strategy to effect critical change within it.

Other examples of Indigenous representations that critically engage the state emerge from within government processes. Notable among these are the Royal Commission Into Aboriginal Deaths in Custody (1991),[25] the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997),[26] the work of the 2000 ATSIC National Treaty Think Tank,[27] and the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (2017).[28] In these examples, the representative field is not restricted to the formal records of these processes, the reports themselves, the evidence and testimony collected, or the recommendations and subsequent government responses, but also include the public responses they mobilise, including the organisation of rallies and protests. From this perspective, the Indigenous representative field includes both the institutional records and public discourse surrounding land rights litigation, and more recently Indigenous-led climate change litigation. The constitutive perspective draws our attention to this constellation of activities and helps to widen our understanding of the political power and effect of Indigenous representative claim-making.

Yet, beyond these examples, the broader Indigenous representative field is perhaps most visible in the sustained political protests against commemorating the arrival of the First Fleet, particularly since the 1938 Day of Mourning. These protests have transformed the discourse of "Australia Day" as an unquestioned moment of national unity into that of "Invasion Day" (or "Survival Day"). These shifts in discourse (concerning representation of European arrival) demonstrate how representative acts can shape public discourse, and in turn transform public attitudes and values. While such transformations can rightly be criticised for being more symbolic than substantive, they can have important consequences in political decision-making. In Victoria, some local councils have ceased calling 26 January "Australia Day" or changed the way they engage with the public on this day. These shifts also have compounding effects as protests become lightning rods for highlighting other sites of urgent action and thereby constitute and mobilise social movements on issues such as policing practices, sacred sites, land rights, calls for treaty, and the respect for sovereignty.

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[22] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Torres Strait Islanders: A New Deal* (1997).

[23] The Torres Strait Regional Authority operates under Commonwealth Ministerial authority, and the *Aboriginal and Torres Strait Islander Act 2005* (Cth).

[24] Megan Davis, "International Human Rights Law and the Domestic Treaty Process" in ATSIC and AIATSIS (eds), *Treaty: Let's Get It Right!* (Australian Institute of Aboriginal and Torres Strait Islander Studies Press, 2003) 148.

[25] Elliot Johnston, *Royal Commission into Aboriginal Deaths in Custody National Report* (1991).

[26] Ronald Wilson, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997).

[27] ATSIC and AIATSIS (eds), *Treaty: Let's Get It Right!* (Australian Institute of Aboriginal and Torres Strait Islander Studies Press, 2003).

[28] Margaret White and Michael Gooda, *Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of the Children in the Northern Territory* (2017).

We have provided these diverse examples to emphasise that the field of Indigenous political representation is vast, dynamic, active and impactful. This representative landscape is grounded in the practices of existing political sovereigns that precede and exceed the colonial state, while also critically engaging with the state today. A constitutive perspective on representation illuminates this activity as having political power and democratic value in itself. We contend that this has two important implications for how the Voice proposal is being debated: (1) that the absence of a legal power for the Voice to compel or veto government action does not empty it of political power; and (2) that while the Voice will create a new institution of political representation, its most valuable democratic innovation will be to act as connective tissue between the broader field of representation that we have described and the political institutions of the colonial state. Understood as "connective tissue", the Voice will both attract and focus existing Indigenous representation and establish a constitutionally protected channel of Indigenous representation to the Australian system of government. In contrast, ATSIC (1990–2005), although composed of elected representatives, can be identified as a limited form of Indigenous representation. It was limited due to its dual purpose, in which its representative function existed alongside administrative responsibilities for monitoring, developing and implementing policies that fell within its ever-changing remit (due in part to its existence as a statutory rather than constitutional authority). This mixed function, combined with weak legitimacy arising from low voter turnout, resulted in ATSIC functioning less as a connective tissue between community and government and more as an Indigenous surrogate for executive decision-making that took place beyond its reach.

In all, we argue here that the proposed Voice is likely to affirm and strengthen Indigenous political representation as it already exists, and as it has always existed. We argue its strengthening effect arises from the transformative potential of acting as a lightning rod within this broader representative field, irrespective of which interests come to be formally represented in the membership model of the Voice at a given point in time.

Indigenous Representation and the Voice Co-Design Model

We have argued that the constitutive perspective is what best enables us to see the existing field of Indigenous representative claim-making, and to locate within that field the power of political representation to effect changes in public attitudes, values and decisions. This constitutive perspective is particularly valuable in understanding the democratic potential of the Voice because the debate has largely focused on institutional questions (taking a largely dyadic perspective). In this final section, we address the key aspects of the Voice Co-Design Final Report ("Final Report") and identify two key opposing arguments to the Voice: concerns that the proposal goes too far in limiting the authority of the Parliament, and concerns that it does not go far enough. We argue that the Final Report and the opposition to the Voice proposal are grounded in an institutional perspective that takes a narrow view of what political representation can and cannot affect. While the Final Report focuses on the institutional mechanism for injecting Indigenous knowledge into policy making, it also leaves open wider possibilities for generating, attracting and focusing the Indigenous representations to shape and contest Australian politics.

The Final Report reflects centuries long efforts by Aboriginal and Torres Strait Islander peoples to realise their aspirations within the limited legal space that the Commonwealth is able and willing to provide. The Final Report responds to strict terms of reference,[29] which in part explains its strong emphasis on institutional issues and the dyadic relationship between existing Indigenous community bodies at the local and regional level, and the Parliament and government. The Final Report proposes a National Voice body of up to 24 members. These 24 members are to be composed of two representatives from each state and territory and the Torres Strait, a third remote representative from New South Wales, Queensland, Western Australia, South Australia and the Northern Territory, and a representative for mainland Torres Strait Islanders, as well as the option to appoint two further representatives on the basis of expert skill.[30]

[29] Sana Nakata, "On Voice, and Finding a Place to Start", *AusPubLaw* (3 March 2021) <https://www.auspublaw.org/blog/2021/03/on-voice-and-finding-a-place-to-start>.

[30] Marcia Langton and Tom Calma, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (National Indigenous Australians Agency, 2021) 18.

This National Voice is to be connected to Local and Regional Voices, intended to build upon existing arrangements and be community-led, community designed, and community-run.[31] A key example of its institutional focus lies in its innovatively broad approach to descriptive representation, committing not only to geographic representation but also to gender, youth and disability representation, while also ensuring that the Voice is a "workable size".[32] Here, the emphasis on geographic representation at the state and territory level, rather than on the larger number of language groups/nations, likely reflects this challenge of workability. Yet, the commitment to gender balance by requiring two representatives from each state and territory to be of different genders, and the requirement of a Co-Chair model to have two different genders in its leadership, demonstrate a willingness to expand membership to enable greater representation. The establishment of two permanent advisories to the Voice, one each for Youth and Disability, also demonstrate how the pressure to achieve "workability" need not diminish valuable forms of descriptive representation. Despite these descriptive requirements, a 24-member Voice cannot hope to capture the diverse interests and perspectives of all Aboriginal and Torres Strait Islander peoples. However, our analysis here emphasises that the representative field goes beyond its institutional form: the existence of an institutionalised Voice does not just yield representative claims from within its members but also activates a wider public discourse. As it stands, the Final Report remains a proposal only and it will be for the Parliament to determine the structure of the Voice after a successful referendum.

As a result, it is at this level of institutional design that calls for more detail have focused. Questions of how many representatives, how they are selected, and who they can be reasonably understood to represent, have primarily emerged from conservative opposition who tend not to be otherwise persuaded of the need for a distinct form of representation for the country's First Peoples. Conservative opposition has also focused upon the scope of consultation and legal power of the Voice to compel or veto government action. These concerns take an institutional perspective on representation: they are focused upon (1) dyadic relations between the represented and the representative, interpreting any independence as a weakness; and (2) dyadic relations between the Voice and the Parliament vis-à-vis decision-making, interpreting any direct power of the Voice as a threat to the Parliament's supreme authority.

Another set of criticisms of the Voice proposal has emerged from within the Indigenous community who express concerns about its lack of "real" power, question its representativity, and claim it places Indigenous sovereignty at greater risk than Treaty.[33] While the third criticism involves much more than questions of representation, and noting that concerns about sovereignty can be alleviated on a number of grounds, we return to the argument that Indigenous engagements with the state are practices of ongoing sovereignty, not evidence of its cession or subjugation. Focusing on representation, these criticisms identify "real" power as only existing in the moment of political decision, and therefore the inability of the Voice to formally mandate Parliament or government means it has no power. This institutional perspective relies on the assumption that the value of representation lies in its operation as a necessary but poor substitute for direct action. While the Co-Design group proposes transparency mechanisms that include Voice statements on Bills, the tabling of its advice, and a new Joint Standing Committee tasked with the permanent and ongoing role of engaging with the Voice,[34] this is interpreted by some as more of the same ineffectual bureaucracy. Afterall, the numerous reports arising from Inquiries and Commissions are similar government-sanctioned processes that produced high quality evidence, advice and recommendations that Parliaments and governments can ignore if they wish. These are legitimate and understandable criticisms, borne out of centuries of systemic injustice. However, as we have argued above, these criticisms also take a narrow perspective on representative power that does not recognise those processes as part of a broader representative field that have shaped public attitudes, values *and decisions*. A constitutive perspective regards political power as more dynamic and indirect than the moment of institutional decision.

[31] Langton and Calma, n 30, 10.

[32] Langton and Calma, n 30, 116.

[33] Jake Evans, "Senator Lidia Thorpe Quits Greens over Divisions on Voice to Parliament", *ABC News*, 6 February 2023 <https://www.abc.net.au/news/2023-02-06/lidia-thorpe-to-quit-greens-over-voice-disagreement/101935534>.

[34] Langton and Calma, n 30, 168.

Our argument here is that a constitutive perspective allows us to see how the Voice proposal sits within a wider representative landscape and raises important arguments for improving democratic politics; while exclusively fixating on dyadic relationships underpins key criticisms of the Voice and focuses the debate on the "detail" of constitutional powers and institutional scope. In each of these criticisms, we observe that the Voice is being thought of as a "transmission belt" that assumes a direct and linear path from a represented people to the moment of decision. This is a perspective that fails to consider the constitutive effects of the Voice. In addition to changing the way Indigenous policy is made, the Voice also holds the potential to create and publicise new expressions of problems, change political agendas at multiple levels, and even contribute to building new coalitions, political identities and imaginaries of justice. In making this observation, we do not wish to romanticise Indigenous representation or the Voice proposal as a silver bullet or ideal model. Nor do we need to regard the value of Indigenous representation as limited to the task of improving Australian democracy (though it may well do that). Rather, the value of connecting the existing Indigenous representative field to political decision-making is to address the key failure in Indigenous governance: the lack of meaningful and constitutionally protected input of Indigenous people into the government decisions that affect them. By creating this new point of connection between the representative field and state decision-making, we maintain that a Voice is not a substitute for Indigenous self-determination nor a substantive justice outcome in and of itself. Rather, it has value as a communicative lever with potential to shape and transform the public and political discourse. It is not all of what achieving justice for Aboriginal people and Torres Strait Islanders demands, but it is a necessary and effective contribution to it.

Conclusion

The lack of political power that has shaped the colonial conditions of Aboriginal peoples and Torres Strait Islanders has not been due to the absence of their voices from the political landscape but the lack of connective tissue between those voices and governments. The traditional mechanism of representation, the ballot box, does not work well for Indigenous people in overturning systemic injustice. In responding to this deficiency, the Voice proposal expands and attracts existing Indigenous representations and creates a constitutionally protected form of political power for connecting them to the Commonwealth. On a constitutive view, it is often a slow and indirect path from representation to political decision, but it is important to remind ourselves that in a democracy these decisions are shaped by a dynamic field of representative claim-making.

Through formal mechanisms of government, Committees, independent legal action, social media campaigns, strikes, and protest, Aboriginal peoples and Torres Strait Islanders have consistently sustained their political demands for justice, and urgently called for action that improves the conditions of their everyday lives. Over and over again, Aboriginal peoples and Torres Strait Islanders have provided highly expert and evidence-based advice to government authorities, inquiries and Commissions. The representative landscape of these processes, as described above, have included the testimonies of trauma given by those removed from their families and communities as children, those who continue to encounter discriminatory child protection services, those who grieve for family who have died in custody, and those who stand at the shores of rising sea levels and witness the bones of their ancestors wash away. Through these processes – formal and informal, government sanctioned and not – hundreds upon hundreds of recommendations and solutions have been presented to governments. All of this representative work has taken place in addition to the tireless and expert labour of individuals within their communities who succeed most often in spite of governments rather than because of them. Any failure of these efforts to have more concrete and positive transformative effects has not been for the lack of Indigenous political representation, but because of the lack of a direct, sustained and protected connection between Indigenous representation and the Commonwealth Parliament and Executive. By constitutionalising this connection, the Voice does not subsume Indigenous people within the settler colonial state or supplant or diminish the existing representative field, but rather expands and empowers it.

The Voice as Politics

Laurel Fox and Graeme Orr*

The 2023 referendum to embed an Aboriginal and Torres Strait Islander Voice in the Constitution animates questions about the potential of such an institution as an agent for the further development of a national Indigenous politics. This article explores those questions, within their theoretical and historical context. This context includes the nature of political representation given Indigenous diversity and the history of formal, national Indigenous representative bodies in Australia. A representative Voice would at a minimum be a centring conduit; necessarily so given its purpose of speaking into the behemoth that is government at the Commonwealth level. Lessons from the past illuminate challenges for the future design of any Voice, a sensitive issue given tensions between localism and centralism, and between the demotic and existing Indigenous structures. Ultimately, to be transformative within Indigenous and mainstream discourse, the Voice must be sufficiently public, representative and accountable: in short sufficiently political.

Debate about a First Nations or Aboriginal and Torres Strait Islander "Voice" in Australia has focused either on the politics around the proposal, particularly its reception by the various parliamentary parties. Or it has focused on its need, in terms of potential impact. That is, on its value as symbolic constitutional "recognition" and, more significantly, as a potential driver of policy outcomes. Such change-agency is captured in the preposition "to", in the shorthand "Voice to Parliament". It would be a Voice "to" better inform the national government and legislature about matters affecting Indigenous peoples.[1]

But there is another impact that warrants deeper consideration, beyond either its reception by mainstream politics or its fit with the Commonwealth polity. What of the Voice as something constructive of Indigenous politics? That is, what of the Voice as an agent for the further development of a national Indigenous politics? These questions animate this essay.

The essay begins with reflections on both the nature of politics generally, and specifically within the interplay between a behemoth Commonwealth and a multi-faceted set of Indigenous peoples and interests. We then describe the enduring idea of a "national representative body" and describe the history of the three such bodies from the past half-century. In conclusion, we draw lessons about the nature of the "politics" that such a body may construct, depending on its composition and role.

What Is Politics?

The concept of "politics" is so protean that one can open almost any encyclopaedia of political science and political theory and yet find no entry for it. This could be because the subject is so all-consuming that it defies delineation. But that will not do: if we truly believed "everything is political" then politics would be a meaningless meta-cipher and there would be no life outside it or nourishing it.

For our purposes, we can posit an irreducible descriptive core to politics. Politics everywhere is about governing society: power to maintain social order, to encourage flourishing communities and to coordinate interests and values. To Crick, "politics … is the activity by which differing interests … are conciliated by giving them a share of power in proportion to their importance to the welfare and the

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[1] Already we have invoked three terms to describe the original inhabitants of this continent and their descendants. In what follows we will use "Indigenous", the most common contemporary adjective. "First Nations Voice" is also common among proponents, given the international rhetorical heft of "First Nations". The Commonwealth is employing the older term "Aboriginal and Torres Strait Islander" in the formal constitutional wording, as it is both Australian English and explicitly distinguishes the people of the Torres Strait.

survival of the whole community [whilst] ensuring reasonable stability and order".[2] Study of government in Australia has historically had an institutional focus, although understanding governance also requires understanding power relations distributed more widely.[3]

Then, within places that aspire to be democratic, there is an ideal within politics: it is about representation. Politics cannot just be a dictatorial or oligarchical division of public goods across competing sub-interests. While defining "representation" is hardly less difficult than defining "politics" (indeed it generates paradoxes)[4] representation has an irreducibly Janus-like duality. It involves voice, in the sense of *speaking into*: presenting interests or values to be heeded by the wider society and the institutions that coordinate governance. It also involves voice in the sense of *speaking out of*: self-construction through expression, remembering that values and interests are not hard-wired but are sharpened in a recursive process that itself shapes identities.

The ongoing (and as we shall see shortly, historical) push for a national Indigenous representative body intersects with these core elements of politics in several key ways. First, it would be a formal institution, not merely one civil society lobby among others. Obviously it would be a categorical error to conflate institutional politics with all politics; what we mean to do is highlight the significance of a representative body as a centring conduit and shaper of that politics. Relatedly, a primary purpose of such a body is to feed into improved governance within the wider national system. It is not one voice in a cacophony of attenuated voices.

Second, its internal form will be contested, because the nature of political representation is contestable. Should representatives be directly elected or drawn from existing hierarchies and sectors? Should they act as delegates of their "constituencies" or as trustees? Should the body they form be regionalised and bottom-up, or have an integrated, "One Mob" focus? Some who carry an existing voice would prefer to maintain that voice in a more pure or undiluted form: to remain a big fish in a small pond rather than to expand the pond.

Indigenous Voice within National Politics and the Limits of Party Politics

Since Aristotle, the focus of political studies has been on organised states and their public institutions, especially those dealing with conflicting interests and values.[5] In this sense, "politics" is not an obvious feature of singular or small tribal societies,[6] even though features of the political (like negotiated solutions to conflict or solving co-ordination problems) are clearly integral to such societies. Instead it is bound up with two things: organised institutions, and power relations among disparate forces and sub-groups.

Positive arrangements to address or ameliorate the vexed issue of Indigenous relationships with, and within, colonising states like Australia, draw on one of three options. (We are dealing here with political options, not juridical ones, such as a court supervised bill of rights). The three are not mutually exclusive; they could be nested, like the rings of an onion.

At the outer ring is self-determination in a strong sense, via the carving out of an Indigenous- majority province with broad governance powers (eg Nunavut in Canada).[7] At the inside are legislative or parliamentary arrangements, bolstered by reserved seats (such as the Māori electorates in Aotearoa/New Zealand). Even leaving aside mainstream fears of separatism, the Indigenous statehood option runs up

[2] Bernard Crick, *In Defence of Politics* (Bloomsbury Academic, 5th ed, 2013) 7.

[3] Nicholas Barry et al, "Introduction" in Peter Chen et al (eds), *Australian Politics and Policy* (Sydney University Press, 2021) 5–6.

[4] Hannah Pitkin, *The Concept of Representation* (University of California Press, 1972)

[5] To Aristotle, politics is not just inevitable (humanity's gregariousness making us all *zoon politikon*) but the highest form of social partnership, prior to other units, even the individual and the family: *Politics* (H Rackham trans, Harvard University Press, 1932) Book 1.1.

[6] Crick, n 2, 3–4.

[7] Michael Mansell surveys each of these in *Treaty and Statehood: Aboriginal Self-determination* (Federation Press, 2016). As his subtitle suggests he argues for a distinct state (Chs 9–11).

against the fact of the plethora of First Nations across the Australian continent and their dispersal and interweaving since 1788.

On the other hand, parliamentarianism alone – even today, with a numerical high-water mark of Indigenous MPs in the Commonwealth Parliament[8] – is limited, if not assimilative. This is due to the shackles of the Australian party system. Indigenous perspectives may be welcome in most parties, yet remain subservient to party discipline and majoritarian electoral pressures. Numerous parties have, on occasion, formed with a dedicated focus on Indigenous issues and candidates.[9] Such parties seem doomed to be short-lived or idiosyncratic: their limited lifespans reflect the embedded and stable nature of the majoritarian party system in Australia.

The third type of arrangement is negotiation, from a position of recognition and respect. The most obvious form of such an arrangement is a treaty (with exemplars all over the world but, most obviously in our region, in *Te Tiriti o Watangi*). Victoria is the first Australian jurisdiction to begin to make headway on the process of treaty negotiations. But treaties are a long haul whose outcomes are not guaranteed.[10] The Voice proposal fits broadly into this theme of negotiation – as it is predicated on a direct voice at the table, albeit a consultative voice only. But it contrasts with treaty in a couple of key respects.

First, Voice is not a substantive outcome, the way certain treaty provisions (like reparations) would be. Rather it is an institution.[11] Second, it is not exclusive of treaty. Some activists, 35 fallow years on from Prime Minister Hawke's promise of a treaty process, want a treaty first.[12] However in the framing of the *Uluru Statement*, Voice is a necessary precursor to treaty negotiations. Therein lies one insight underpinning the present essay. The Voice is not just an institution speaking "outwards" to wider Australian governance. It would construct a new channel for Indigenous politics, a new channel for the development of national positions and consensuses.

This verb – not just noun – understanding of the Voice proposal is important, and not just to the lexical ordering of Voice-Treaty-Truth in the *Uluru Statement*. That is significant enough, since fair treaty negotiations are unlikely to occur at a national level if Indigenous voices are purely localised, given their plethora and dispersal by colonisation. But there is another note to the pitch of the Voice proposal as politically constitutive. It is the potential – and pitfalls – of an ongoing (re)construction of Indigenous politics.

To use terms like "development" of national Indigenous politics is not to imply current "immaturity". For millennia, First Nations that traded, neighboured or passed through each other's lands built up norms of interaction, via the politics of diplomacy, reciprocity and conflict resolution. Indigenous bodies in specific areas of health, welfare or land management are used to the dynamics of interacting with government departments, as well as coalescing and jostling with each other. Family moieties interweave and vie with each other for influence within a social politics.

But beyond, say, commentary featured on National Indigenous Television (NITV) or agenda-setting by the *Koori Mail* – the nationwide Indigenous newspaper now in its fourth decade – there is a dearth of national institutions to channel Indigenous politics.[13] As we will see shortly, there has been over half a

[8] Eleven of 226 from July 2022 (eight Senators, three MHRs). Source: Parliamentary Education Office. Compare Peter Kurti and Nyunggai Mundine (eds), *Beyond Belief: Rethinking the Voice to Parliament* (Connor Court Publishing, 2022), whose blurb cites this parliamentary progress as one reason to oppose the Voice.

[9] Dean Jaensch and David Mathieson, *A Plague on Both Your Houses: Minor Parties in Australia* (Allen & Unwin, 1998) document seven such parties, between the 1960s and 1990s alone. A new one, the Indigenous-Aboriginal Party of Australia, was registered in 2021.

[10] For current progress, see Harry Hobbs, "Treaty-making Gathers Pace", *Inside Story*, 17 March 2023.

[11] Of course a treaty could incorporate such an institution –for example, 18 First Nations treaties in Canada contain some self-government processes. But it would hardly be the only work of a treaty.

[12] For example, Treaty Before Voice <https://www.treatybeforevoice.com/>.

[13] The *Koori Mail's* motto is "The Voice of Indigenous Australia … Published since 1991". The term Koori however reflects its production roots in eastern Australia. NITV is a wing of the larger SBS broadcaster, itself subject to a public charter of independence and impartiality in reporting.

century of experiments with a national, Indigenous representative body. One key lesson to be taken from this history is not so much the failure, or the current absence, of such bodies, but the *enduring nature* of the idea. In a sense it is an inevitable idea, given the overweening power of the Commonwealth. A Commonwealth that grew inexorably over the first half of last century and which then, in the wake of the 1967 referendum, swallowed the lion's share of power over "indigenous affairs" from State parliaments and bureaucracies.[14] It is thus no coincidence that national representative bodies were first institutionalised in the early 1970s. The other key lesson of this history is that the Voice proposal is no Goldilocks solution. Indeed uncertainty over the composition of a Voice body reflect inevitable tensions within Indigenous politics.

National Indigenous Representative Bodies in Australia

The story of government-sponsored and enabled Indigenous representative bodies in Australia is both chequered and salutary. Chequered in that, over the last half-century, three such bodies have come and gone. Yet salutary in that the revival of such bodies reflects the enduring appeal and importance of the very concept of a "national" and "representative" body.

Understood this way, the Voice, if enacted, will be the fourth such body, after the National Aboriginal Consultative Committee (NACC), the National Aboriginal Conference (NAC) and Aboriginal and Torres Strait Islander Commission (ATSIC). Different in composition and profile and, if entrenched by referendum, not subject to dissolution by Executive whim or parliamentary fiat. But still part of a lineage speaking to the importance of a formal conduit for Indigenous voices, to address the behemoth that is the Commonwealth of Australia. In this section we highlight some key features of these earlier bodies, to tease out the nature or type of politics they instantiated.

NACC (1973–1977)

The NACC was established by ministerial action in 1973. It comprised 41 directly elected representatives, nominally empowered to advise the Commonwealth Executive through the Minister for Aboriginal Affairs. Its enabling document was a brief Cabinet resolution, whose key points were: "the committee should be advisory only; it should not at this time be established by statute… two or three meetings of the Committee per annum might be adequate; the duties of delegates should be prescribed by the Committee and approved by the Minister".[15] (Despite this last clause, the contours and operations of the Committee were not further defined.) The general role of members was to consult within their constituencies and represent their interests at national meetings of the body. The intention of government was to create a "consultative council" with which it could confer on Indigenous policy.[16]

The key feature of the NACC was its representative structure. Whereas the Department of Aboriginal Affairs (1972–1990) was staffed by public servants, and three non-Indigenous appointees made up the Council for Aboriginal Affairs (1967–1976),[17] the NACC comprised popularly elected representatives from specially created Indigenous electorates across Australia.[18] Enrolment, voting and candidature were voluntary, and restricted to Aboriginal and Torres Strait Islander adults.[19]

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[14] Emblematic of that was the *Aboriginal Affairs (Arrangements with States) Act 1973* (Cth) for the transfer of State-based public servants.

[15] LR Hiatt, Maurice Luther and Lowitja (Lois) O'Donoghue, *Inquiry into the Role of the National Aboriginal Consultative Committee* (Report of the Committee of Inquiry, 4 November 1976) 14–15 (*NACC Report*).

[16] Gough Whitlam, "Aboriginals and Society" (Press Statement No 74, Statement by the Prime Minister, 6 April 1973) 2.

[17] The CAA comprised HC Coombs (a senior economic adviser to government), WEH Stanner (a senior scholar and anthropologist) and Barrie G Dexter (a former diplomat and the first Secretary of the Department). See Sally Weaver, "Australian Aboriginal Policy: Aboriginal Pressure Groups or Government Advisory Bodies?" (1983) 54 *Oceania* 1, 7.

[18] Whitlam, n 16, 2.

[19] The definition of Aboriginal and Torres Strait Islanders by then was "a person of Aboriginal or Islander descent who identified as an Aboriginal or Islander and is accepted as such by the community with which he is associated". See the *NACC Report*, n 15, 13–16.

Governments and NACC members and proponents diverged over whether it should act only in a behind-the-scenes advisory capacity. Or whether its role should extend to executive decisions and encompass public advocacy (independent of and, where necessary, oppositional to government). In the governmental view, Indigenous people could "organise themselves to provide a political pressure group, but not within the context of the very organisation established by Government to provide it with advice".[20] The NACC was to be a committee, within the established traditions of executive government. Some have argued that establishing the NACC was a way to contain Indigenous voice at a time when it was radicalising.[21] Nonetheless, the NACC pursued a greater role and acted with initiative. Members engaged in confrontation with the government to be recognised as an "independent political organisation",[22] and the NACC concerned itself with controversial national issues.[23]

In response, the Minister queried his ability to pay members' salaries if they adopted "different functions from those described in the Cabinet minute [becoming] not a body to consult with me, but a directive body".[24] Given this ongoing conflict over roles, the NACC was abolished by ministerial decision in 1977. Despite striving to expand its roles, the NACC inherently remained a limited government construct, not able to do "politics" in the sprawling and public sense.

NAC (1977–1985)

The NAC was established ministerially in 1977 to replace the NACC. It operated alongside the Department and a new Council for Aboriginal Development (CAD, 1977–1980). Prescriptive enabling documents were issued in the form of a *NAC Charter*, incorporated into Hansard.[25] It, too, was constructed on an elective basis. Its 35 representatives were to "draw together and express Aboriginal opinion on the basis of views put forward and considered at local and State levels".[26] The Minister could consult it *if the Minister wished* (as opposed to consultation as of right or via a prescribed administrative process).[27]

As with the NACC, enrolment, voting and candidature was restricted to Indigenous adults residing in specially created electorates.[28] Voters directly elected representatives to the national body, and those members also comprised State and Territory branches. Those branches selected delegates to a more frequently meeting NAC Executive. In contrast, the CAD comprised 10 members: five chosen by government and five nominated from within the NAC Executive.

Although the NAC had advisory capacity, the CAD was expressly established as "the formal advisory body to the Minister for Aboriginal Affairs".[29] This duality reflected a decision by government to separate the "representative" role (albeit that the Minister could consult the NAC), from giving "formal advice" to government.[30] This reflected its establishment by a conservative government which wanted to conserve a "conventional emphasis on cabinet control and ministerial responsibility for policies".[31] Reflecting

[20] Ian Viner, "Submission No 39 for Cabinet in Decision No 292 of Cabinet: National Aboriginal Consultative Committee" (25 February 1976–2 March 1976) 3.

[21] Stuart Bradfield, "Separatism or Status-Quo?: Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC" (2006) 52 *Australian Journal of Politics and History* 80, 82, 84.

[22] Weaver, n 17, 3.

[23] Including for example, police brutality and prisoner rights, and land rights: *NACC Report*, n 15, 20–21.

[24] Colin Tatz, *Race Politics in Australia: Aborigines, Politics and Law* (University of New England, 1979) 43.

[25] Minister for Aboriginal Affairs, Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 1977, 2106–2108 ("NAC Charter", "CAD Explanatory Note", "CAD Ministerial Statement").

[26] CAD Ministerial Statement, n 25.

[27] Sally Weaver, "Australian Aboriginal Policy: Aboriginal Pressure Groups or Government Advisory Bodies: Part II" (1983) 54 *Oceania* 85, 93.

[28] NAC Charter, n 25, cll 14, 21.

[29] CAD Explanatory Note, n 25, 2107.

[30] Weaver, n 27, 88–89.

[31] Compare the reformist Whitlam government that installed the NACC: Weaver, n 17, 10–12.

on governmental design choices made in 1976–1977, the main author of the NACC Report (which contained the recommendations for the NAC design) used the words: "before letting the tiger loose, the Minister carefully removed all its teeth".[32]

Again, despite its elective basis, the NAC, like the NACC, was not intended to occupy some wider, public advocacy role. Its members were not meant to assume a free-ranging, expressive function,[33] as opposed to being akin to a "hired consultant".[34] Nonetheless, the NAC was free to lobby its views unofficially,[35] and in its lifetime acted in a manner akin to the NACC. For instance, it adopted some public and confrontational positions, most evident in appealing for land rights and a *Makarrata.*[36]

ATSIC (1989–2005)

ATSIC effectively fused aspects of a department and a representative body. Established as a statutory authority under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), it assumed Executive, advisory and representative capacities. This omnibus design was to be a form of self-determination, ensuring "Aboriginal and Islander people are properly involved at all levels of the decision-making process in order that the right decisions are taken about their lives".[37] It thus operated as a peak representative body, while also directly exercising on-the-ground administrative functions involving a significant budget.

The Act established elected Regional Councils across Australia and a national Commission with a chairperson and CEO. The Commission was a policy-making entity (alongside the Minister), while Regional Councils advocated parochial interests and took charge of regional policy implementation and service delivery.[38] Australia was divided into 60 regions, with direct elections for Regional Councillors. As with its predecessors, enrolment, voting and candidature were voluntary and restricted to Aboriginal and Torres Strait Islander adults. The regions were grouped into 17 zones, and councillors in each zone voted for a delegate to sit on the national Commission. The Minister was empowered to appoint three additional Commissioners, including the chairperson, as well as the CEO (who alone did not have to be of Indigenous descent).

While the NACC and NAC could advise the Commonwealth Executive on policy matters, they sat outside of it. ATSIC, in contrast, enjoyed not only a ministerial advisory role but service delivery roles alongside the wider ecosystem of governmental agencies. It was thus "both an extension of the institutions of Australian political democracy, with all its bureaucratic apparatus, *and* an exercise of Indigenous self-determination".[39]

Ultimately, ATSIC's dual roles created internal conflict: elected Councillors and Commissioners were accountable to their constituents, but the regional councils and the Commission were legally accountable to the Minister and Parliament. This led many to query whether ATSIC was a voice accountable only to Indigenous people, an adviser to government, or a deliverer of government services accountable to the Parliament and Auditor-General.[40] Despite this, ATSIC established itself as an effective advocate, within key national and public debates, often in conflict with government positions.[41]

[32] LR Hiatt, "A New Aboriginal National Organization" (1990) 60 Oceania 235, 237.

[33] Weaver, n 27, 95.

[34] *NACC Report*, n 15, 102; Weaver, n 27, 93.

[35] Weaver, n 27, 93.

[36] Scott Bennett, *Aborigines and Political Power* (Allen & Unwin, 1989) 179.

[37] Minister for Aboriginal Affairs, Commonwealth, *Parliamentary Debates*, House of Representatives, 10 December 1987, 3152.

[38] Will Sanders, John Taylor and Kate Ross, "Participation and Representation in ATSIC Elections: A 10 Year Perspective" (2000) 35 *Australian Journal of Political Science* 493, 493–494.

[39] Geoffrey Stokes, "Australian Democracy and Indigenous Self-determination, 1901–2001" in Geoffrey Brennan and Francis G Castles (eds), *Australia Reshaped: 200 Years of Institutional Transformation* (CUP, 2002) 181, 211 (emphasis in original).

[40] Michael Mansell, "The Political Vulnerability of the Unrepresented" in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena Publications Association, 2007) 73, 83.

[41] Jane Robbins, "The Howard Government and Indigenous Rights: An Imposed National Unity?" (2007) 42 *Australian Journal of Political Science* 315, 323.

Lessons: Design, Deferral, Dissent

One clear lesson from the bodies just described, is that over-reliance on an elective principle risks erasing fundamental Indigenous modes of governance, rooted in connection to country. The NACC and NAC structures exemplified this problem.[42] ATSIC's Regional Councils were designed to alleviate it. However this solution generated a new interplay, between Regional Councillors and their constituents, and the Commission itself. While there have always been contests between parochial and national perspectives for Indigenous peoples facing governmental structures, ATSIC institutionalised and demarcated this.

ATSIC's structure attempted to balance the "politics of diversity" involving regional interests and national ones.[43] In turn, as Regional Councils had different and at times competing responsibilities to the national Commission, an intra-ATSIC politics arose and fed back into intra-Indigenous group politics. Such jostling was not wholly organic, as the Regional Councils and Zones did not map neatly onto pre-existing communities or traditional boundaries. This structure, and the mix of roles, also generated an "in-house" ATSIC politics – enmeshed with the wider bureaucracy of government – that was not present in the NAC or NACC models.

A second lesson revolves around role. The NACC and NAC/CAD models were explicitly designed to nestle within a co-operative and behind-the-scenes approach to advising the responsible Minister. While rooted in Westminster concepts of accountability within centralised governance, this was also meant to neuter the bodies as publicly political entities. Genuine representation, by necessity, involves such a public dimension, as it requires a two-way interplay between the representatives and those people (or bodies, or interests) they represent.

The 2023 Voice referendum will take place prior to the settlement of any specific model for the Voice itself. The proposal is hardly a vacuum, however. Two aspects are clear. The body will be advisory only, unlike ATSIC. And it will give advice to both the Commonwealth Executive and Parliament.

Proponents of the Voice have opted to defer any attempt to definitively resolve the design of the body, until after the referendum. In part this reflects the politics of direct democracy itself. A detailed model will be picked at by those who want no Voice at all, leading to an "if in doubt, kick it out" appeal to the electorate. (A powerful stratagem against change, given compulsory voting.) Deferral of design seeks to keep the principle of a national representative body front and centre, while respecting two protocols.

One is that formally, the power to erect the framework of the Voice lies with a future national Parliament. The other is that substantively, it must involve an intricate balance and compromise within and between Indigenous communities and existing power structures. Even in the process of its own structuring, a Voice will be an exercise in national Indigenous politics, of a boot-strapping kind.

The 2021 Indigenous Voice Co-Design Report (which consulted widely to assay aspirations and models) plumps for a high level of interwovenness. Its framework is based on federalist quotas, guaranteeing two members from all eight jurisdictions plus the Torres Strait, with additional members for "remote" representation from the five geographically largest jurisdictions and for mainland resident Torres Strait peoples. These 24 members would be selected or elected, by processes generated by 35 "Regional Voices" that would be themselves organised to reflect local traditions. "Gender balance would be structurally guaranteed" within the 24-person national Voice.[44]

Obviously, such a devolved model is not a directly elected, national committee or assembly. The idea is a pyramid with a strong base accommodating and drawing on, rather than cutting across, existing local bodies. Its conception of politics is reflected in an insistence that the national Voice be "proactive [as well as] responsive".[45] It is not to be a handmaiden awaiting Cabinet (or parliamentary committee) invitations

[42] Lowitja (Lois) O'Donoghue, *An Aboriginal and Islander Consultative Organisation: Report of Consultations* (Australian Government Publishing Service, 1986) 27.

[43] Diane Smith, "From Cultural Diversity to Regionalism: The Political Culture of Difference in ATSIC" in Patrick Sullivan (ed), *Shooting the Banker* (North Australia Research Unit, Australian National University, 1996) 17, 28.

[44] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 17–18 (*Co-Design Report*).

[45] *Co-design Report*, n 44, 19.

to advise on already shaped initiatives. Nor is it to play the role of a traditional Ombudsman, responding to "constituents" grievances. It is to have a public role in shaping agendas.

Any design process will not be easy. As we have seen, two related issues are critical. One concerns the axis between localism and centralisation; the other concerns the balance between the demotic and (for want of a better word) the elitist. There is a complex interplay within Indigenous societies: with some communities rooted in country; with complex kinship and family ties; with existing interest groups and agencies; with often urbanised activist movements; and with a university-educated middle class.

Tension within these forces and groups is often portrayed almost geographically, as if the very concept of *an* Indigenous politics risked effacement of the unique voices of a multiplicity of countries. But, as Larkin notes, the politics of diversity also informs the aspiration of a *newly* constitutive, representative politics: there is a fear that any new "Local and Regional Voices [may] revert to pre-existing structures and organisations … Delegates at the Regional Dialogues were very clear that they felt these organisations did not represent them politically, and the danger of this model is they will be reverted to: further silencing voices who have told us they are not being heard".[46]

At the time of writing (April 2023) South Australia has legislated a First Nations Voice to advise that State's Executive and Parliament. Its composition is interesting, especially in considering how the final design morphed away from what was initially proposed. The initial Bill envisaged a single, 13-person body, headed by the appointed Commissioner for Aboriginal Engagement. Five members would have been directly elected, by plurality vote, from five electorates spanning the State. Seven would be appointed Indigenous people, with two places reserved for representatives of the Councils of the main desert peoples (the Maralinga Tjarutja, and the Aṉangu Pitjantjatjara Yankunytjatjara).[47]

The finalised First Nations Voice for South Australia is considerably more layered, reflecting key ideas from the national Co-Design Process report. It combines a dual-tier composition with requirements for gender diversity, as well as specialist advisory committees alongside the Voice itself. The first tier consists of Local Voices, likely based on six regions. They are to be elected by Indigenous people, but with gender quotas.[48] (Curiously these elections are to coincide with the quadrennial parliamentary election: which may ensure high turnout but risks admixing partisan politics with Indigenous politics.)

Each Local Voice will then send its joint presiding officers to the State-wide First Nations Voice, which is to meet up to six times a year, to act as a conduit between the Local Voices and the Parliament and Executive.[49] To augment its indirectly elected nature, the State-wide Voice must also establish independent committees to advise *it*: one of Elders, one of Youth, one for the Stolen Generations and one made up of Native Title representative body delegates.[50] Finally that Voice will also report to the legislature annually, including via a kind of "State of the Indigenous Union" address to a joint sitting of both houses.[51]

Representative Politics: Public, Contested, Relational

Public rhetoric has framed the Voice proposal, in an elliptical shorthand, as a "Voice to Parliament". The wording of proposed s 129 of the *Constitution* offers a "Voice [that] may make representations to the Parliament and the Executive Government of the Commonwealth".[52] In a practical sense, the lexical order might be "Government and Parliament". (Since the budget and reach of the Executive means that its policies and programs are the lifeblood of practical governance. And since, in a Westminster system

[46] *Co-design Report*, n 44, 45, quoting submission by Dani Larkin.

[47] *Aboriginal Representative Body Bill 2021* (SA).

[48] *First Nations Voice Act 2023* (SA) Pts 2–3. On gender see Sch 1 s 4.

[49] *First Nations Voice Act 2023* (SA) ss 28–29.

[50] *First Nations Voice Act 2023* (SA) ss 30–33.

[51] *First Nations Voice Act 2023* (SA) s 38.

[52] *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023* (Cth).

like Australia's, no bill is likely to be enacted without government support and the great majority begin as Cabinet submissions.[53])

Yet, as we noted at the outset, the "Voice to Parliament" label frames things in a way that is not just symbolically important, Parliament being the ultimate democratic institution. Parliament is also the ultimate public, political institution: its debates and inquiries are streamed and recorded verbatim, its papers collected and published. While the Executive consults, it works under a cloak of Cabinet and other secrecy that freedom of information laws only partly unveil. A Voice "to Parliament" necessarily involves publicity of the advice, if not a model of a Voice as an assembly deliberating in public.

Legislation could of course confine advice to the Executive to a discreet (and discrete) approach of tendering recommendations via the Minister. Such a "behind-the-scenes only" approach would not be consistent with the Voice's avowedly representative aims. Indeed it would run counter to the Indigenous aspirations that were on display when the NAC and NACC chafed against limits on their role as a conduit for an array of social and economic concerns. In short, the impact of the Voice as an element of public law will not be measured solely by whether government heeds its advice. The Voice itself will shape the *politics* of reaching that advice: the accountability and responsibility, of those voices that make up the Voice, to Indigenous peoples and groups.

Australia the settler-state has tended to act unilaterally to define what these bodies are *and can develop to become.* This hierarchical rather than relational approach underscores their cyclical abolition. It also helps explain contemporary political party disjuncture about the very desirability, let alone role, of the Voice. In contrast, more genuine intercultural dialogue and accommodation could alleviate the kind of intractable and symptomatic legitimacy crisis settler-states otherwise find themselves in.[54]

Rather than leading irresistibly to disunity or division within a nation, "surviving cultural multiplicity constitutes the secure place of anchorage" for Indigenous/non-Indigenous polities within a state.[55] Along the way, institutional political reform through the Voice proposal may also shift "mainstream" politics, most obviously in its inter-relationship with Indigenous voices and concerns. The Voice proposal thus offers potential for a "shift in mentality" within politics and governance more broadly.[56]

Much of this essay may seem theoretical and historical. But such reflections will be critical in the ultimate challenge of designing a Voice. It must be sufficiently public, and sufficiently representative and accountable: in short, sufficiently *political*. These insights do not determine how large it should be, let alone how it might be elected or selected, or tiered between a national body and new or existing local and regional organisations. Compromises on such matters were evident in the shifts in design of the South Australian model, outlined above. Such choices will determine the nature of the political space that the Voice constructs.

To outsiders, especially those who pay little heed to the practice of politics, the meta-politics and jostling over such design questions may suggest that Indigenous politics in Australia is especially riven with complex fissures, some organic, some the result of colonialism. There are tensions between interests rooted in "country", and a more dispersed, often urbane, "One Mob" politics. While distinctive to Indigenous politics, such tensions are hardly unfamiliar in wider society.

There is no simple balance of forces and structures in mainstream Australian politics and governance either. It involves three-tiers, with hundreds of local governments, eight regional legislatures, and the multi-branched Commonwealth government. Within all that there are a plethora of agencies and interest groups, both formal and informal, based in government, corporate and civil society. Familial and communal rivalries are also present in Whitefella politics.

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[53] "Early engagement" with the Executive is thus crucial, even in relation to legislation: *Co-design Report*, n 44, 11.

[54] Gabrielle Appleby, Ron Levy and Helen Whalan, "Voice Versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis" (2023) 46 *UNSWLJ* (forthcoming).

[55] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP, 1995) 204–205.

[56] Appleby, Levy and Whalan n 55, 3, 14; Dani Larkin and Kate Galloway, "Uluru Statement from the Heart: Australian Public Law Pluralism" (2018) 30 *Bond Law Review* 335.

Ultimately, the Voice presents a political challenge for non-Indigenous Australia. If it comes into being, to listen to it, obviously. (If not, it will come to be seen as window-dressing, however much it serves to channel a national Indigenous politics.) But also, in both the referendum on its adoption, and its future structure and workings, there is a challenge to the nation to adopt a mature outlook, and not frame division and dissent as somehow an unseemly pathology of Blackfella politics. Public contestation is an *essential* element of *all* representative politics.

The Voice as a Strategy for Advancing Aboriginal and Torres Strait Islander Rights and Interests on Climate Change Mitigation and Adaptation

Heidi Norman*

A new and meaningful relationship between Indigenous peoples and political institutions, as the Voice intends, is needed to address climate change adaptation and mitigation. Indigenous peoples in Australia, and globally, are already experiencing the impact of climate change. With rights and interests recognised over their land, this land estate is increasingly vital to addressing the immediate term net-zero targets and longer-term reduction of carbon in the atmosphere along with advancing Indigenous knowledges in new economies and rights to country.

This contribution highlights the critical need for a new and meaningful relationship between Indigenous peoples and political institutions to address the greatest challenge of our time: climate change. I detail the public policy context that has given rise to the consensus position to work towards a Voice enshrined in the Constitution (followed by treaty and truth telling) and, with reference to the impact of climate change on Indigenous peoples and government commitment to invest in climate change responses, how the Voice will be vital to ensure Indigenous rights and interests are realised, with wide reaching benefit for all.

Since 2010, successive national Australian governments have committed to some form of process to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. Indigenous peoples' sustaining argument is that because ancient pre-colonial law and governance have not been adequately recognised, the Indigenous polity has neither a clear nor a just relationship to Australian political institutions.[1] Consensus to pursue a constitutionally guaranteed mechanism for Indigenous participation and consultation in the political process has emerged slowly. The 2017 Uluru Statement from the Heart was the culmination of regional and national conferences and called for Voice, Treaty and Truth, as a sequence of reforms, that advance towards a just settlement with First Peoples.[2] The Voice proposal eschews a rights framework in favour of providing "the impetus for a profound paradigmatic shift between Indigenous peoples and the state"[3] focused on securing the "power of influence" in the policy process to advance Indigenous rights.[4] But this "power of influence" is more than improved policy and programs and service, it is anticipated the Voice will shape a new and meaningful relationship between Indigenous Peoples and political institutions.

History of the Relationship between Indigenous Peoples and Political Institutions

The agreed position to pursue a constitutionally guaranteed mechanism for Indigenous participation and consultation (or voice) in the political process has immediate genesis in the last 25 years of policy chaos,

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[1] Marcia Langton, "Dominion or Dishonour: A Treaty between Our Nations?" (2001) 4(1) *Postcolonial Studies* 13.

[2] *Uluru Statement from the Heart* (26 May 2017).

[3] Noel Pearson, "There Is No Such Thing as Minimal Recognition – There Is Only Recognition" in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 174.

[4] ABC Radio National, Nick Baker and Damien Carrick, "Former High Court Justice Kenneth Hayne Backs Voice to Parliament Details"', *The Law Report*, 29 March 2023.

inefficiency and lack of progress achieving better outcomes for Indigenous people. The 1970s marked a new relationship between Indigenous peoples and Australian political institutions: the Commonwealth government recognised the right to Indigenous community led self-determination and land rights and established the first Indigenous representative and advisory body to government. The election of the Howard government in 1996, however, began a wind back of the central elements of earlier progressive reforms.

Aboriginal and Torres Strait Islander representative bodies advised government and formed the architecture of self-determination. The National Aboriginal Consultative Committee (1973–1977), National Aboriginal Conference (1977–1985) and the Aboriginal and Torres Strait Islander Commission (ATSIC) (1989–2005) all held some mandate from their respective communities that elected them. With the establishment of ATSIC as a statutory authority, something more substantial commenced. Political scientist, Will Sanders writes enthusiastically about what ATSIC achieved: an emerging Indigenous "order of Government", recognition of "peoples" as distinct from "populations", and financial support for the Indigenous community-controlled sector were defining features that characterised self-determination.[5]

ATSIC had a permanent staff of public servants, and a deep network that scaffolded regional, zone and national councillors, making it a representative body within Australian political institutions and beyond through participation in international forums autonomous of the Australian government. ATSIC funded research to support policy reforms and make interventions in policy discussion, established policy frameworks and standards, and was a vital source of advice to government on a range of policy. The Commission also funded Indigenous services and community-controlled organisations, and held assets.

Simple and swift abolition of ATSIC in 2004–2005 marked the beginning of chaos in Indigenous affairs policy and programs. But the Commission's axing had already been foreshadowed. On coming to office in 1996, the incoming federal government announced an audit of ATSIC. Their suspicion heralded a new level of hostility to Indigenous rights. In 1997, in one of the early decisions of the new federal government, the Commonwealth authorised the building of a bridge in a small and isolated region of South Australia connecting the mainland to Hindmarsh Island against the wishes of a group of Ngarrindjeri women seeking to protect this place of significance to women and children.[6] The Howard Government made it abundantly clear that a small and isolated group of women – and indeed, Indigenous people – would not stand in the way of progress and the majority interests.

The dynamics that contributed to an apparent reluctance among Aboriginal and Torres Strait Islander peoples to defend ATSIC and its elected representatives offers salient lessons. Media reportage of Indigenous political aspirations reveals limited comprehension of Indigenous perspectives and an overriding ideological agenda from certain media corporations.[7] Even mainstream media reportage on ATSIC was overwhelmingly hostile. The relentless negative characterisation of elected Indigenous representatives, appeared to closely align with the Commonwealth government's reform ambitions and interests of capital. Characterisation of ATSIC in national political discourse as a "failed" "experiment in separate representation"[8] became so entrenched it continues to be repeated today without evidence of its failings.

The impact of the loss of a representative body was recognised immediately. Aboriginal and Torres Strait Islander Social Justice Commissioner Bill Jonas identified in his 2004 Annual Report the necessity for "ensuring meaningful participation of Indigenous peoples in government processes".[9] His successor, Tom

[5] Will Sanders, "Missing ATSIC: Australia's Need for a Strong Representative Body" in Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano Jiménez (eds), *The Neoliberal State, Recognition and Indigenous Rights: New Paternalism to New Imaginings* (ANU Press, 2018) 113, 114.

[6] Margaret Simons, *The Meeting of the Waters: The Hindmarsh Island Affair* (Hodder Headline, 2003).

[7] Archie Thomas, Andrew Jakubowicz and Heidi Norman, *Does the Media Fail Aboriginal Political Aspirations? 45 Years of News Media Reporting of Key Political Moments* (Aboriginal Studies Press, 2020).

[8] Sanders, n 5, 117.

[9] William Jonas and Darren Dick, "Ensuring Meaningful Participation of Indigenous Peoples in Government Processes: The Implications of the Decline of ATSIC" (2004) 23(2) *Dialogue* 4, 13.

Calma, also raised concerns over "the absence of principled engagement with Indigenous peoples".[10] In the almost 20 years that have followed, the administration of Aboriginal policy and programs has been chaotic and dysfunctional. Competitive contractualism, mainstreaming, normalisation and neo-paternalism have wrought havoc on what has remained of an Indigenous order of government. It has also failed to address chronic disadvantage for many Indigenous Australians.

The call for a Voice speaks to three points. First, it emerges in the context of the material conditions and everyday lived consequences of poor government decisions in Indigenous policy. Second, it recognises that Indigenous policies and programs will be much improved by meaningfully engaging the people with knowledge and expertise, "on the ground" and in local conditions and contexts. Third, representation addresses the relationship of Indigenous peoples in the national political discourse. The Voice offers this promise as it will be a constitutionally enshrined representative body empowered to make representations to the Executive Government and the Parliament on laws and policies that relate to First Nations people. One of the issues the Voice will likely talk about is climate change.

Climate Change

One of the most critical issues facing the world today is climate change. The 2021 State of the Environment Report highlights that Indigenous peoples are on the front line in terms of climate change impacts and mitigation and that they are manifest across Australia, present in all landscapes, seascapes, and ecosystems.[11] These impacts are already being felt. Over the last few years, significant drought (2019), bushfires (2020) and floods (2022), and rising temperatures have affected Barkandji, Bundjalung, Gomeroi, and Yuin Aboriginal communities, along with many others.[12] Climate change presents new risks of dispossession experienced as food and water insecurity, damaged landscapes and cultural heritage, and an inability to remain on country.

Indigenous people are guardians of local and traditional knowledge systems and have long contested the extractive and exploitative impact of colonialism on land and water and asserted that the climate crisis must be addressed through restituted Indigenous relationships to land and country. Therefore, the agenda for Indigenous land justice addresses historical dynamics of colonialism *and* climate change.

First Nations people are pursuing a range of actions to force action by government to protect their country and people from climate change. In central Queensland, the Wangan and Jagalingou traditional owners set a precedent by exposing the inherent bias of the Australian native title system towards colonial extraction.[13] In the Torres Strait, Islanders are on the frontline of the climate crisis: King tides, erosion, inundation and coral bleaching are threatening the lives and cultures of Torres Strait Islander people.[14] Urgent action is needed to ensure they can remain on their island homes. In 2022, a group of claimants, known as the #TorresStrait8, successfully brought a human rights complaint against the Australian Government to the United Nations Human Rights Committee over the Government's inaction on climate change.

In a ground-breaking decision, the Human Rights Committee found the Australian Government's failure to adopt measures to protect Torres Islanders against the adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family

[10] Tom Calma, *Social Justice Report 2006* (Human Rights and Equal Opportunity Commission, 2007) 107.

[11] Terri Janke et al, "Indigenous" in *Australia: State of the Environment 2021* (Department of Climate Change, Energy, the Environment and Water, 2021) <https://soe.dcceew.gov.au/indigenous/introduction>.

[12] Heidi Norman, *Friday Essay: Death on the Darling, Colonialism's Final Encounter with the Barkandji* (5 April 2019) The Conversation <https://theconversation.com/friday-essay-death-on-the-darling-colonialisms-final-encounter-with-the-barkandji-114275>; Bhiamie Williamson, *Like Many Disasters in Australia, Aboriginal People Are Over-Represented and Under-Resourced in the NSW Floods* (4 March 2022) The Conversation <https://theconversation.com/like-many-disasters-in-australia-aboriginal-people-are-over-represented-and-under-resourced-in-the-nsw-floods-178420>.

[13] Kristen Lyons, Morgan Brigg and John Quiggin, *Unfinished Business: Adani, the State and the Indigenous Rights Struggle of the Wangan and Jagalingou Traditional Owners Council* (2017).

[14] Daniel Billy v Australia (Torres Strait Islander Petition), *Communication under the Optional Protocol to the International Covenant on Civil and Political Rights* (13 May 2019).

and home.[15] The Torres Strait Islanders successfully argued that changes in weather patterns have direct harmful consequences on their livelihood, their culture and traditional way of life. This complaint was the first legal action brought by people of low-lying islands vulnerable to climate damage against a nation state and creates a pathway for action by individuals where national governments have failed to protect people most vulnerable to the impacts of climate change on the enjoyment of their human rights.[16] The decision puts further pressure on the Australian Government to act on climate change to ensure the safe existence of the people of the Torres Strait Islands. In making representations on these issues, the Voice could strengthen the Torres Strait Islanders position; as they explain, they seek to ensure "their voices are heard and their lived experience influences policy and decision makers".[17]

In the country where the author is connected, the plains and forest lands of north-western New South Wales (NSW), Gomeroi people have been on the frontline of climate action. In 2022, Gomeroi people argued before the National Native Title Tribunal that our ability to exercise Native Title rights and interests would be impacted as a result of the greenhouse gas emissions of a mining project on country. The Narrabri Gas Project has backing from all relevant governments in Australia but was overwhelmingly opposed by Gomeroi people at our 2022 Native Title claimant group meeting. The President of the Tribunal, John Dowsett, ruled in favour of Santos:

> The Gomeroi applicant submitted that the … Narrabri Gas Project would result in grave and irreversible consequences for the Gomeroi People's culture, lands and waters and would contribute to climate change. The Tribunal does not doubt that the Gomeroi applicant's concerns are genuine. However, the Tribunal concluded that the Gomeroi applicant had failed to justify its assertions that the proposed grants would have such effect.[18]

The Tribunal concluded that the proposed grants "would provide a public benefit, significantly outweighing the Gomeroi applicant's concerns, particularly having regard to the limited and imprecise evidence provided in connection with such concerns".[19] Justice Dowsett did not accept evidence about the impacts of the project on Gomeroi People, including the impacts on native title rights and interests, cultural heritage and the greenhouse gas contribution of the project to climate change. Nevertheless, we should expect more legal action and political organising defending country from the impacts of climate change and growing clarity on the role of government to give due consideration of the rights and interests of Indigenous peoples.

Government Action at last

After decades of inaction, the 2022 federal election returned a Parliament that overwhelming accepts that climate change is occurring because of human action and rapid energy transition is required to avert the worst effects of a changing climate. The Indigenous land estate is increasingly vital in developing renewable energy projects and decarbonisation. However, the rapid acceleration of the energy transition represents significant challenges and opportunities for Indigenous peoples and their land estate. Whereas other economic activity that has taken place on Indigenous lands have not generated the anticipated benefit, including wealth for Indigenous land holders, the energy revolution should deliver benefit for Indigenous peoples. At this critical juncture in Indigenous futures on our land, there is a vital need for Indigenous representation and perspective in Government policy and program that affect our communities.

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[15] Human Rights Committee, *Views Adopted By the Committee under Article 5(4) of the Optional Protocol, concerning communication No 3624/2019*, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2019).

[16] Kristen Lyons, *Australia Violated the Rights of Torres Strait Islanders By Failing to Act on Climate Change, the UN Says. Here's What That Means* (26 September 2022) The Conversation <https://theconversation.com/australia-violated-the-rights-of-torres-strait-islanders-by-failing-to-act-on-climate-change-the-un-says-heres-what-that-means-191329>.

[17] Our Islands Our Home, *About* <https://ourislandsourhome.com.au/about-the-campaign/>.

[18] *Santos NSW Pty Ltd v Gomeroi People* [2022] NNTTA 74 (Determination Summary).

[19] *Santos NSW Pty Ltd v Gomeroi People* [2022] NNTTA 74 (Determination Summary).

The new federal Government's response outlined in their "Powering Australia Plan" commits to significantly boosting renewable energy and in turn creating new jobs, cheaper energy supply and reducing emissions.[20] Powering Australia commitments include ratifying the Paris Agreement and enshrining targets in the *Climate Change Act 2022* (Cth). These targets include a Nationally Determined Contribution of 43% emissions reduction by 2030 and a net zero target by 2050. The plan also includes enhanced contribution, participation and leadership in regional and international climate change forums. This covers funding ($42.6 million over four years as part of the 2022–2023 Budget) to extend capacity of the Climate Change Authority to provide independent climate change advice to government and funding ($7.1million over two years in the 2022–2023 Budget) to develop a plan for the Australian Public Service to reach zero emissions by 2030. It includes a suite of initiatives, including developing a carbon credits scheme, a $1.9 billion "Powering the Regions Fund" to support clean energy industries and jobs and decarbonisation of existing industries, more than $100 million to build workforce capability and $15 billion to establish the National Reconstruction Fund to diversify Australian industry and drive sustainable economic growth.

Aboriginal Land, Climate Change and Voice

The Aboriginal land estate is critical in the response to climate change. Over the last 50 years there has commenced a land titling revolution.[21] Indigenous peoples have recognised land interests over more than half the continent, nearly four million square kilometres, with more under claim. Indeed, in the recent refresh of the predominant overarching public policy tool, known as "Closing the Gap", restitution of land and water to Aboriginal community control is a measured objective.[22] The land estate has been recovered through common law recognition of native title, and a suite of state and federal legislation. While it is difficult to clearly delineate, one estimate suggests that Indigenous peoples hold exclusive possession native title and fee simple to around 26% of Australia's landmass. When non-exclusive native title is included, that number rises to 54% of the country.[23] It covers National parks, conservation areas, and vast expanses of the continent.

The land estate will inevitably prove highly significant in climate change mitigation. Many areas under Aboriginal title hold high biodiversity and regeneration value, as evident in the declaration of 81 Indigenous Protected Areas, comprising half of Australia's conservation estate.[24] But the significance of Indigenous land holding is more than just the measure of square kilometres, with land in urban areas and some in coastal zones and sea. These lands are governed by Traditional Owner groups and Aboriginal Land Councils and afford, in many cases, authority and status in political decision-making and cultural responsibility, care and protection. Often, they operate separately to service organisations yet overlap significantly with interests in resource management and culture and heritage protection. They are increasingly operating as "nations", with a land and economic base, and seeking to advance recognition through treaty and agreement-making processes. A constitutional Voice will further support their aspirations.

Government and industry are recognising the centrality of the role of the Indigenous land estate and Indigenous knowledges in responding to climate change. In November 2022, South Australian Minister for Energy and Mining, Tom Koutsantonis spoke with Traditional Owners in Port Augusta. The Minister foregrounded Aboriginal-owned land, knowledge and interests as integral to the government's commitment to energy system transformation, explaining: "we can't transform without you, we can't

[20] Australian Government, Department of Climate Change, Energy the Environment and Water, *Powering Australia* <https://www.energy.gov.au/government-priorities/australias-energy-strategies-and-frameworks/powering-australia>.

[21] Sue Jackson, "Land Rights: A Postcolonial Revolution in Land Title" in Sue Jackson, Libby Porter and Louise Johnson (eds), *Planning in Indigenous Australia: From Imperial Foundations to Postcolonial Futures* (Routledge, 2017) 155.

[22] *National Agreement on Closing the Gap* (2020) Outcome 15.

[23] Josh Nicholas et al, "Who Owns Australia?", *The Guardian*, 17 May 2021 <https://www.theguardian.com/australia-news/ng-interactive/2021/may/17/who-owns-australia>.

[24] National Indigenous Australians Agency, *Indigenous Protected Areas* (2022) <https://www.niaa.gov.au/sites/default/files/ipa-nat-map-april22.pdf>.

decarbonise without you, we can't disturb your land without you." He announced his government was "coming to the oldest civilisation in the world for help, to lead us on the journey".[25] In New South Wales, the government's Electricity Infrastructure Roadmap to transition the NSW economy to net zero within two decades includes some consideration of Aboriginal community interests. At the Commonwealth level, the federal government announced in February 2023 the development of a First Nations Clean Energy Strategy and has initiated a First Nations Clean Energy and Emissions Reduction advisory group.

Indigenous landholders are interested in clean energy and decarbonisation projects as social and business enterprises.[26] However, they experience barriers in capacity, knowledge, expertise, and capital to engage in the transformation that is already underway, and which will intensify over the coming decades. In New South Wales, an area that is the focus of the author's research, there are significant opportunities for Aboriginal land holders to be engaged in the new energy economy that ensures Indigenous values, cultural heritage and community advancement are built into the structural economic change. Clearer and stronger recognition of Indigenous peoples could spark major reform for the renewable energy sector. Yet, research reveals that Aboriginal land holder interests are consistently marginal in policy development, at best an afterthought. Policy reforms are often not achieved until the last minute and only when raised by ally parliamentarians following lobbying from Aboriginal Land Councils. Multiple examples emerge of missed opportunities to consult with Aboriginal stakeholders. Other groups, such as farmers and producers have direct lines of communication and political interests vested in the political system. They are also unconfined by the discourse of "minority interests" and are enabled by the ideology of progress.

The rapidly escalating government interest in responding to climate change and the belated inclusion of Indigenous interests in climate change mitigation and adaptation is significant. Consideration of Aboriginal land, interests, and opportunities can only be enhanced through consultation with Aboriginal communities. The Voice will ensure the perspectives of Indigenous peoples across the country will be represented as policy and programs develop. Keeping in mind the range of tenure arrangements and diversity of the restituted Indigenous land estate, the input of local information, knowledge and aspirations will be the key. The following sections address six examples where input of Indigenous interests and voice can make a significant contribution.

Renewable Energy Transition

The energy transition currently underway will transform land-use patterns across many parts of regional Australia. While the risk of exclusion for Indigenous peoples is significant, opportunities that will come with meaningful participation are enormous.

A recent study of the NSW Renewable Energy Zone pilot site found there was limited Indigenous land holder engagement in clean energy. While a First Nations reference group was convened and First Nation Guidelines prepared detailing how renewable energy operators should consult with communities, there was limited support in the way of resourcing and expertise to enhance Aboriginal political leadership. The inclusion of Indigenous perspectives, while welcome, was belated in the policy process and did not give sufficient weight to Indigenous interests. For example, the First Nations guidelines prioritised jobs and Indigenous business procurement, while Local Aboriginal Land Councils prioritised energy security and activation of their land estate in renewable energy projects, economic development, and enhancing the resilience of communities in the face of climate change.

Clean energy projects are more likely to provide lasting benefits to Indigenous communities as "mid-sized" renewable energy projects built on Indigenous-owned land.[27] Other decentralised energy models, such

[25] Minister Tom Koutsantonis was speaking with Traditional Owners in Port Augusta on 8 November 2022. Notes from his address were shared with the author by an attending policy officer with the First Nations Clean Energy Network.

[26] Heidi Norman, Chris Briggs and Therese Apolonio, "Advancing Aboriginal Interests in the New South Wales Renewable Energy Transition" (CAEPR Discussion Paper, 2023).

[27] Heidi Norman and Chris Briggs, *How Can Aboriginal Communities Be Part of the NSW Renewable Energy Transition?* (5 May 2022) The Conversation <https://theconversation.com/how-can-aboriginal-communities-be-part-of-the-nsw-renewable-energy-transition-181171>.

as renewable energy micro-grids, could also deliver energy security for remote communities, enabling economic opportunities and the development of social services. Successful decarbonisation ventures (eg, savanna burning in Northern Australia, Indigenous ranger groups, native agriculture, endangered species regeneration, carbon abatement, biodiversity stewardship, and community-owned renewables) could be accelerated more widely to provide secure and profit-generating ventures for communities. The Voice could make representations on these issues early in the policy cycle, bringing "on the ground" and research informed perspectives that convey the aspirations of Indigenous land holders.

Aboriginal Land and Net Zero Emissions Targets

The NSW 2020 Net Zero Plan sets out how the NSW government will cut emissions by 70% in 2035 and reach net zero emissions by 2050.[28] The plan commits to the creation of a "Primary Industries Productivity and Abatement Program"; one of its key priorities will be to "[connect] landholders, including Aboriginal landholders, to carbon markets".[29] Many other governments across Australia are also embarking on policy reform in relation to carbon abatement, as reflected in the announced review of the Emissions Reduction Fund. These efforts have largely marginalised Indigenous land holders in favour of more dominant political interests and oriented to agricultural and pastoral production landscapes.

Caring for Country

Approaches to care that reflect Aboriginal worlds can be seen in the discourse "caring for country" and in the delivery of culturally affirming health services. "Caring for Country" refers to Indigenous peoples' approaches to land and water management and relational connection to place, based "in the laws, customs and ways of life that Indigenous people have inherited from their ancestors and ancestral beings".[30] It encompasses approaches to land and sea management and is increasingly documented as generative of social-political, cultural, economic, and physical and emotional wellbeing of Indigenous people.[31] The literature reveals that caring for country is increasingly measured as maintaining cultural life, identity, autonomy, and health.[32]

Across the tropical savanna, Indigenous ranger groups are already contributing to Australia's emission-reduction goals. In New South Wales, land returned to Aboriginal community control is small, with more awaiting return – some claims have been unresolved since the 1980s. Yet even this small and fragmented estate is significant in the context of stemming the worst effects of climate change. Indigenous presence in the urban areas of greater Sydney is high: in at least two local government areas Aboriginal land holdings are second in size only to those of government. In New South Wales where the Indigenous population is significant and where colonisation most sustained, as much as 80% of these urban lands are zoned "conservation", meaning that for many Aboriginal land holders the ability to develop their land and generate much needed collective wealth is limited. Yet in the context of urban land clearing and development, Aboriginal land often forms the critical "green corridors" that provide habitat for animals, public space and the vital "lungs" of our cities. More effective representation of Aboriginal aspirations in relation to land, including advancing climate change mitigation and adaptation through the Voice mechanism could lead to improved outcomes for all.

[28] NSW Climate and Energy Action, *Net Zero Plan* <https://www.energy.nsw.gov.au/nsw-plans-and-progress/government-strategies-and-frameworks/reaching-net-zero-emissions/net-zero>.

[29] NSW Department of Planning, Industry and Environment, *Net Zero Plan Stage 1: 2020–2030* (2022) <https://www.energy.nsw.gov.au/sites/default/files/2022-08/net-zero-plan-2020-2030-200057.pdf>.

[30] Jessica Weir, Claire Stacey and Kara Youngetob, *The Benefits of Caring for Country, Literature Review* (Australian Institute for Aboriginal and Torres Strait Islander Studies, 2011) 1.

[31] Weir, Stacey and Youngetob, n 30.

[32] Weir, Stacey and Youngetob, n 30, 3.

Indigenous Climate Change Strategy

The February 2023 meeting of the Energy and Climate Change Ministerial Council (ECMC) focused discussion on national energy, climate change and adaptation priorities. National, state and local governments were represented at the meeting where Ministers agreed on five strategic priorities for 2023. This included energy transformation to meet net zero emission targets, reduced emissions, investing in adaptation and resilience to climate change and "[e]mpowering and comprehensively engaging with Australia's regions and remote communities, including First Nations, on the pathway to decarbonization and Australia becoming a renewable energy superpower".[33] While the ECMC met and committed to empowering Indigenous people, First Nations representation was not evident. The Voice is critical in ensuring both early and sustained involvement in policy, to help create opportunities for First Nations people.

First Nations Clean Energy Strategy

The Australian Government has committed $5.5 million to support the co-design of a "First Nations Clean Energy Strategy".[34] The strategy is a key priority under the Commonwealth's National Energy Transformation Partnership and is intended to ensure First Nations people have a say in energy policies and programs in the transition to net zero and identify priority reforms and areas for future investment. The Department of Climate Change, Energy, the Environment and Water, the National Indigenous Australians Agency and in collaboration with the First Nations Clean Energy Network (FNCEN) are leading Aboriginal community forums to develop this work.

On climate change and the now urgent attention to net zero, the Voice could make a difference. There are some impressive industry and community voices already doing significant work, such as the Indigenous Carbon Industry Network (ICIN) for carbon and FNCEN for renewables. These networks have emerged in the absence of a national representative body. Through careful negotiation, the Voice will be able to support and complement these specialist groups by advocating for Indigenous land holders and helping them to survive on country, to develop strategies to ameliorate the worst impacts of climate change and to contribute to achieving net zero. Representations to the executive government and the Parliament early in the policy development process can help ensure our rights and interests are elevated.

Resourcing and Supporting Indigenous Land Holders

Indigenous land holders want to address climate change in ways that support their ambitions to generate prosperity and rebuild nations and economies that align with Indigenous values, including land regeneration and connecting with country.[35] For Indigenous land holders to participate and lead climate change mitigation and adaptation they need independent and informed research, policy advocacy, evaluation tools, technical expertise, and capital. There is a critical need for research for and with Indigenous communities supporting their engagement in climate change mitigation and adaptation work. Support for Aboriginal land holders interested in clean energy and decarbonisation enterprises must enable access to the rapidly emerging opportunities. What is needed is best practice models for Indigenous peoples, drawing on domestic and international experience, that can inform Aboriginal land holder projects and agreement-making. Climate change and land management research also needs to be translated for use and application by Indigenous land holders to assess Aboriginal land suitability for climate adaptation and mitigation projects, to access economic opportunities, and contribute to national and international energy transition and decarbonisation targets.

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[33] Australian Government Department of Climate Change, Energy, the Environment and Water, *Energy and Climate Change Ministerial Council* (Meeting Communique, 24 February 2023) <https://www.energy.gov.au/government-priorities/energy-and-climate-change-ministerial-council/meetings-and-communiques>.

[34] Australian Government Department of Climate Change, Energy, the Environment and Water, *First Nations Clean Energy Strategy* <https://www.energy.gov.au/government-priorities/energy-and-climate-change-ministerial-council/priorities/national-energy-transformation-partnership/first-nations-clean-energy-strategy>.

[35] Heidi Norman et al, "Booming Contributions By First Nations to Address Australia's Environmental Crisis Must Be Recognised" (Arena, 3 August 2022) <https://arena.org.au/first-nations-environmental-work/>.

CONCLUSION

The transition to clean energy and decarbonising our atmosphere will accelerate over the coming years. The Indigenous land and sea estate and its people as managers and custodians will be key players. The value of this estate, and the work involved to regenerate landscapes and provide vital habitats is a necessary part of any transition plan. In order to ensure this transition does not replicate established patterns of colonial dispossession and absence of informed consent, Indigenous representation early in the policy process is necessary to ensure adequate protections and opportunities are realised. This critical work will be assisted by a constitutionally enshrined Voice to government and Parliament.

Representation of Indigenous interests and aspirations in relation to their land estate will be a key function of the Voice. Limited benefits have been secured for Indigenous land holders from the mining boom; the energy revolution must be more equitable and provide real opportunities for Indigenous peoples. Our very survival on country depends on vastly improved government leadership supporting and enabling Indigenous aspirations. This has the greatest likelihood of success through Indigenous representation early in the policy development process.

Ko wai tātou? Reflecting on Constitutional Transformation in Aotearoa New Zealand

Claire Charters and Amelia Kendall*

This article traces the constitutional development in Aotearoa New Zealand from the Indigenous first law of tikanga Māori to our current arrangements and towards our future aspirations. Notably in 2016, He Whakaaro Here Whakaumu Mō Aotearoa: the report of Matike Mai Aotearoa envisioned indigenous constitutional transformation to reconceptualise current constitutional arrangements. Post-2016, constitutional transformation has been limited by Crown politics, with recent initiatives failing to enact true partnership between state and tāngata Māori. As Indigenous peoples around the globe grapple with how to effectively initiate and conduct constitutional discussions within colonial state systems, the Indigenous experience of tāngata Māori in Aotearoa New Zealand will hopefully provide some insights that may positively contribute to meaningful constitutional change.

INTRODUCTION

In te reo Māori, the native language of the Indigenous peoples of Aotearoa New Zealand, the importance of establishing and understanding relationships between the surrounding environment and people is paramount. Ko wai koe is commonly translated as who are you? Literally, it means which waters are you from? The question illustrates the inherent and fundamental understanding that we derive from our waters, our connections to the land and our ancestry. This bond between us and our environment continues despite colonisation or the government of the day.

Nonetheless, like colonised Indigenous peoples globally, over the past 200 years tāngata Māori have largely had taken from us our economic, social and political sovereignty over our own whenua, both illegally and illegitimately. Tangibly, our lands have been taken – only about 6% of the total land area in Aotearoa New Zealand remains as Māori freehold land.[1] Contrary to what was orthodox understanding for over a century, te Tiriti o Waitangi guarantees our ongoing sovereignty, or tino rangatiratanga, with the Crown acquiring our permission to regulate settlers.

Today, we sit at the bottom of all socio-economic ladders in life expectancy, poverty, health, education, safe housing and incarceration. We face structural inequality in that the colonial system is not ours yet is imposed upon us. Our self-determination is denied. Our ways of living and our laws are not respected or recognised by the state.

For these reasons, Māori –iwi, hapū and whānau[2] – have called for constitutional transformation from the beginning of the Crown's assertion of sovereignty over our territories. Our resistance is shown over again through the establishment of religious and tribal movements such as Kingitanga and Kotahitanga, rangatahi youth led protest groups such as Ngā Tamatoa in the 1970s and 1980s, and peaceful protests against the alienation of Māori land seen in the 1975 Land March to Parliament or 1978 Bastion

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[1] Controller and Auditor-General, *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee* (18 March 2004) 25.

[2] Māori social groupings. Iwi or "tribes" consist of hapū "subtribes" that can trace descent from a common ancestor which are in turn encompassing of "family" or whānau groupings. Suggested translations of Māori terms are taken from Hirini Moko Mead, *Tikanga Māori: Living By Māori Values* (Huia (NZ) Ltd, 2013) 309.

Point occupation by Auckland-based iwi Ngāti Whātua Ōrākei.[3] Māori have consistently asserted tino rangatiratanga over our land and have never wavered.

Although there have been attempts to provide a forum to hear Māori claims on breaches of te Tiriti o Waitangi through the Waitangi Tribunal, its recommendations are, generally, non-binding (although there are limited exceptions relating to Crown forest or memoralised lands).[4] Similarly, contemporary Tiriti settlement processes provide limited financial and cultural redress and do not engage with our claims to tino rangatiratanga. It is in this context that the national tribal nations leaders' forum (or National Iwi Chairs Forum) commissioned a report on constitutional transformation in 2010, titled *He Whakaaro Here Whakaumu Mō Aotearoa*: the report of Matike Mai Aotearoa, released in 2016.[5] It summarises the hopes and aspirations of Māori to realise tino rangatiratanga as guaranteed in te Tiriti of Waitangi.[6]

This article traces the constitutional development in Aotearoa New Zealand from the Indigenous first law of tikanga Māori to our current arrangements and towards our future aspirations, placing the Matike Mai report in its political context. While we are yet to achieve any meaningful constitutional change, we hope that our efforts in Aotearoa New Zealand might provide some insights for our Indigenous brothers and sisters around the globe. We especially hope that it might positively contribute to meaningful constitutional change in Australia.

Constitutional Development in Aotearoa New Zealand

Although Australia and Aotearoa New Zealand were similarly colonised by Britain the development of the states' constitutional arrangements, and constitutional history and context, differs considerably.

Tikanga Māori

Ancestors of Māori arriving in Aotearoa developed tikanga Māori – the Indigenous first law of the land – by melding culture and laws brought from the Pacific with the new environment.[7] Tikanga Māori was the governing law of Aotearoa and Māori constitutional structures.[8] Under tikanga Māori, authority is not concentrated in one ultimate political authority, but shared among hapū, whānau and eventually iwi and exercised from the ground up.[9] Tikanga Māori can differ across regions, often overlapping and may be place and time-specific to specific whānau, hapū and iwi.[10] In fact it can be described as a "law and a discrete set of values", both codifying political and social expectations, and outlining foundational values in Māori society that is highly sensitive to context.[11]

[3] Kingitanga, the Māori King political institution established in Waikato and Kotahitanga, pan-tribal political movements, intended to unify Maori tribes.

[4] As identified in the *Treaty of Waitangi Act 1975* (NZ). See generally ss 8HA–8HI and ss 8A–8H, 8HJ.

[5] The Independent Working Group on Constitutional Transformation, *The Report of Matike Mai Aotearoa* (2016) (*Matike Mai Report*).

[6] Translated as *self-determination*, Moko Mead, n 2.

[7] Joseph Williams, "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 *Waikato Law Review* 1, 2.

[8] Carwyn Jones, "A Māori Constitutional Tradition" (2014) 12(1) *New Zealand Journal of Public and International Law* 187, 194. For example, "mana" one key concept underlies Māori leadership and evokes "notions of influence, prestige, power, force and vitality".

[9] Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) 48.

[10] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843.

[11] *Matike Mai Report*, n 5, 41.

Crown Assertion of Sovereignty

As settlers increasingly settled in Aotearoa in the 1830s, Māori sought to maintain control over relationships with settlers and traders, and ensure their compliance with tikanga Māori.[12] Constitutional documents He Whakaputanga o te Rangatiratanga o Niu Tīreni in 1835 and te Tiriti o Waitangi in 1840 affirmed and guaranteed Māori tino rangatiratanga, a freedom to exist as a people, a continued right to land, the power to determine their destinies and the promise of autonomy and self-governance.[13] The Crown as a signatory to Te Tiriti o Waitangi gained kāwanatanga or the authority to govern settlers. In breach of te Tiriti, it has since asserted itself as arguably the only legitimate sovereign power with the authority to impose a mono-legal legal system.[14]

The State's Constitutional Structure

Aotearoa New Zealand has no written constitution, rather comprising of individual statutes, judicial decisions, conventions, regulations and exercise of prerogative power. For example, the *Constitution Act 1986* (NZ) sets out governing powers, and the *New Zealand Bill of Rights Act 1990* (NZ), which is expressly subordinate to other legislation, incorporates many civil and political rights into New Zealand laws. A number of conventions reflect fundamental constitutional principles such as the separation of powers and Parliamentary sovereignty.[15]

Essentially, we have a "political" constitution in that political power determines laws unfettered by a written constitution. Under current constitutional arrangements elected political parties have plenary legislative and executive authority under the sovereign British monarchy. Formally the King is head of state, represented by the Governor General in Wellington who acts on the advice of ministers of the Crown. There is no law higher than legislation and Parliament is absolute, and reigns supreme. The Executive, usually consisting of ministers selected from the party or coalition holding the majority or near majority of seats in Parliament, exercises considerable control over Parliament, effectively determining the laws adopted by Parliament.

Contemporary Context: Incremental Change until 2010

Over the last 40 years, incremental constitutional changes have been enacted to respond to Māori claims to rights under te Tiriti o Waitangi, the common law, and international Indigenous human rights instruments (such as the UN Declaration on the Rights of Indigenous Peoples). The Waitangi Tribunal, established in 1975, hears claims that the Crown has breached the principles of the Treaty of Waitangi, as either pre-1992 historical claims (although new historical claims can no longer be filed) or contemporary claims. The Tribunal is also able to direct district specific or thematic inquiries, such as the current inquiry into the impact of colonisation on Māori women.[16] Its reports are well-researched and considered although as noted its recommendations are usually not binding on the Crown.

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[12] Waitangi Tribunal, n 9, 157.

[13] Waitangi Tribunal, n 9, 153 to 407 for further historical context. He Whakaputanga o te Rangatiratanga o Niu Tīreni or Declaration of Independence was an initial assertion of tino rangatiratanga by northern chiefs in a confederation arrangement to allow for collective representation and self-governance. For example, article three of He Whakaputanga o te Rangatiratanga o Niu Tireni 1835 established formal gatherings at Waitangi each year to enact laws. Similarly, te Tiriti o Waitangi signed between the Crown and a significant number of Māori tribal leaders from around the country from a Maori perspective at least, heavily emphasised retention of rangatiratanga. See also Margaret Mutu, "'To Honour the Treaty, We Must First Settle Colonisation' (Moana Jackson 2015): The Long Road from Colonial Devastation to Balance, Peace and Harmony" (2019) 49 *Journal of the Royal Society of New Zealand* 4, 6–7; Waitangi Tribunal, *Whaia Te Mana Motuhake In Pursuit of Mana Motuhake* (Wai 2417, 2015) 25.

[14] Waitangi Tribunal, *Tino Rangatiratanga me te Kawanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry Pre-publication Version* (Wai 1040, 2022) 202–275.

[15] See generally Geoffrey Palmer, "The New Zealand Constitution and the Power of Courts" (2006) 15 *Transnational Law & Contemporary Problems* 551.

[16] Waitangi Tribunal, *Memorandum – Directions of the Chairperson Initiating the Mana Wāhine Kaupapa Inquiry* (Wai 2700, 2018).

Aotearoa New Zealand has had a treaty settlement process since the late 1980s, which provides some cultural and financial redress to iwi groupings accompanied by a Crown apology, although it faces critiques such as that it fails to engage with or address tino rangatiratanga.[17] It is worth noting that recent Treaty settlements have included innovative redress options such as shared management arrangements between Crown and iwi over significant natural landmarks, including granting legal personhood. For example, Te Urewera, an area of native forest, formerly a national park and the ancestral homeland of Ngāi Tūhoe, was recognised as a legal person as a result of the Ngāi Tūhoe iwi treaty settlement. Decision-making powers in relation to this area of forest was assigned to a board comprised of representatives from Ngāi Tūhoe and the Crown.[18]

Increasing Recognition of tikanga Māori

Even now, incorporation of tikanga Māori into the existing monist system is limited, suggesting the Crown is only beginning to grapple with legal pluralism in Aotearoa New Zealand.[19] New Zealand's legal system has been fiercely mono-legal where the incorporation or recognition of tikanga has been poor or for the purposes of assimilation.

The courts initial position can be summarised in the 1877 *Wi Parata v Bishop of Wellington* case where Prendergast J dismissed the Treaty of Waitangi as a "simple nullity" where "primitive barbarians" lacked sovereignty or any form of law.[20] Moving forward to contemporary times, the courts held in *Takamore v Clarke* that tikanga Māori informs and influences the development of New Zealand common law.[21] The recent Supreme Court decision, *Ellis v R*, confirmed and extended this legal proposition.[22]

Incremental Change Does Not Realise Māori Rights: Constitutional Change Is Needed

Incremental change as outlined is simply not enough. Aotearoa New Zealand's Constitution is, at its core, fundamentally at odds with tikanga Māori ways of governance especially in its basis in top-down authority, resulting in inequality.

Aotearoa New Zealand's Constitution is imposed without Māori consent contrary to the rule of law and premised on the Crown's absolute and illimitable sovereign power contrary to te Tiriti's agreement to share authority and iwi Māori retaining our sovereignty and regulation over our own. Piecemeal incorporation of tikanga Māori within the courts and state system fails to meet these requirements of te Tiriti. Essentially, there is no recognition of tino rangatiratanga in the law illustrated by Parliament's unconstrained power to make any law it desires, even if contrary to human rights or Treaty rights. We have seen abuses of this power with Parliament deliberately legislating over the top of judicial decisions that recognise Māori land rights.[23]

It would be difficult to provide remedy through incremental or internal changes to the state constitution and state governance structures. Significant, transformative, structural change is required. This is not a new realisation – Māori have long called for the need to reform and decolonise state systems.[24] As seen

[17] Office of Treaty Settlements, *Ka tika ā muri, ka tika ā mua, Healing the Past, Building a Future* (2021). By deciding on the process, the Crown has ultimate control over the treaty settlement process. See Malcolm Birdling, "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" (2004) 2(2) *New Zealand Journal of Public and International Law 259*.

[18] *Te Urewera Act 2014* (NZ) s 21.

[19] Janet McLean, "The Political, the Historical and the Universal in New Zealand's Unwritten Constitution" (2014) 12 *New Zealand Journal of Public and International Law* 321, 325.

[20] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 77–78.

[21] *Takamore v Clarke* [2013] 2 NZLR 733; [2012] NZSC 116.

[22] *Ellis v The Queen* [2022] 1 NZLR 239; [2022] NZSC 114.

[23] See, eg, *Attorney General v Ngati Apa* [2003] 3 NZLR 641 and the resulting *Foreshore and Seabed Act 2004* (NZ).

[24] Widely documented in publications such as; Te Ohu Whakatika, *Ināia Tonu Nei: Māori Justice Hui* (2019); Tā Mason Durie's presentation at the *Toitu Hauora Māori Leadership Summit 2019* which documented the history and future of Māori involvement

in colonised Indigenous populations around the world, a system that fails to appropriately recognise the laws and rights of the Indigenous population is also one that delivers consistently poorer outcomes – as Māori experience in Aotearoa New Zealand.[25]

MATIKE MAI: INDIGENOUS CONSTITUTIONAL TRANSFORMATION

In 2010 the National Iwi Chairs Forum, which advocates for the collective priorities of iwi, established the Independent Constitutional Working Group. The purpose of the Working Group was to develop a model for an inclusive Constitution for Aotearoa drawing on He Whakaputanga and Te Tiriti o Waitangi in Aotearoa New Zealand.[26]

Between 2012 and 2015, the Working Group held over 252 hui around the country with Māori communities including iwi and hapū to discuss constitutional transformation. The final report titled *He Whakaaro Here Whakaumu Mō Aotearoa* drew on constitutional values such as tikanga, community and belonging that featured in these discussions.[27] Importantly, this Report proposed new forms of governance legitimised by the guarantee of tino rangatiratanga in He Whakaputanga, and Te Tiriti o Waitangi which the Report recognises as the founding documents of Aotearoa and a basis to reconceptualise current constitutional arrangements.[28]

The Report proposes six possible models of constitutional structure. These models redistribute power currently concentrated with the Crown into separate spheres of influence of Māori and the Crown in various arrangements. The spheres represent separate sources of power and authority of Māori and the Crown and suggests how they might interact; however, the Report emphasised these models were merely starting points for discussions on constitutional transformation.[29]

To monitor progress towards the proposed constitutional transformation, the Report sets out a number of short-term goals, to be achieved by 2021. These recommendations were largely focused on continuing this constitutional discussion, primarily led by and engaging with Māori but to expand and initiate dialogue with others in their communities and the Crown, and formalising and furthering discussion through constitutional conventions among Māori, and with the Crown.[30] Ultimately achieving these goals brings Aotearoa New Zealand closer to recognising tino rangatiratanga through constitutional transformation.

CONSTITUTIONAL DEVELOPMENTS POST MATIKE MAI

There have been significant developments post the publication of the Matike Mai Report, evidencing an increasingly articulate, forceful and compelling case for transformation as opposed to incremental steps.

Crown's Response to Constitutional Transformation

Initially the Crown did not respond in any formal capacity to the release of the Matike Mai Report in 2016. As Moana Jackson recounted, the Crown's initial predictable reaction to the Report: "their response was 'it doesn't matter because we're in charge'".[31]

within the health system; or Moana Jackson, *Māori and the Criminal Justice System: He Whaipaanga Hou: A New Perspective* (Department of Justice, 1988), the seminal text on the shortcomings of the criminal justice system, and suggested reform.

[25] For example, tāngata Māori have often over twice as high mortality rates in cardiovascular disease indicators than non-Māori; Ministry of Health, *Wai 2575 Māori Health Trends Report* (2019) 51. Tāngata Māori are over 52% of the prison population; Department of Corrections, *Corrections Volumes Report 2020* (2020) 3.

[26] *Matike Mai Report*, n 5, 7–11.

[27] *Matike Mai Report*, n 5, Appendix Three, 117–121.

[28] *Matike Mai Report*, n 5, 104–112.

[29] For example, "Model Three" outlines a three-sphere arrangement consisting of a "Tino Rangatiratanga" sphere for iwi and hapū, a "Kāwanatanga" sphere for the Crown, and a "Relational" sphere where iwi, hapū and Crown work together. See generally *Matike Mai Report*, n 5, 99–104 of the Report.

[30] *Matike Mai Report*, n 5, 113.

[31] Helen Potter, *Constitutional Transformation and the Matike Mai Project: A Kōrero with Moana Jackson* (Economic and Social Research Aotearoa, 2018).

The New Zealand Labour Party has been in government since 2017, most recently winning a landslide victory in 2020 and forming the first ever single-party majority government under the Mixed Member Proportional (MMP) voting system introduced in 1993 , with strong representation of Māori Members of Parliament (MPs). [32] Although seemingly having the support and political will to respond to and facilitate constitutional discussions, the Labour Party did not campaign on this point, and have not made any explicit or deliberate moves to initiate constitutional transformation. Perhaps most telling is their leading "major policy commitment" is to celebrate Matariki as a public holiday from 2022.[33]

While there have been promising developments in the form of shared governance structures over water management and the establishment of a Māori Health Authority, as outlined in more detail below, Māori focused policies have been incremental, developed by and within the State-controlled system and are subject to governmental control.

Three Waters Proposal

The government has proposed reform to water services and infrastructure in Aotearoa New Zealand including transferring water management from councils to regional entities. Initially imagined as a way for Māori to exercise greater tino rangatiratanga through equal representation on newly established Regional Representative Groups, this proposal resulted in significant public backlash where some perceived enactment would allow Māori to veto decisions or gain ownership rights over the water. The government has relaunched this initiative assumedly in an effort to clarify its intent.[34]

Māori Health Authority

To combat health discrimination, the Crown has "reset" health services in Aotearoa New Zealand to give effect to the *principles* of Te Tiriti o Waitangi which involves establishing Te Aka Whai Ora, a Māori Health Authority.[35] Effective since June 2022, this independent statutory authority is empowered to create kaupapa Māori services and monitor improvement in hauora Māori although ultimate decision-making power remains with the Minister appointed board.[36]

He Puapua: The Crown's Commitment to "Co-governance"

Aotearoa New Zealand (after an initial rejection) endorsed the United Nations Declaration on the Rights of Indigenous Peoples in 2010, indicating a commitment to recognising Indigenous rights. This is significant as in recent years, initiatives to realise the Declaration have become the central space where the government has indicated engagement in constitutional transformation ideals.

In 2019, the Māori Development Minister invited the UN Expert Mechanism on the Rights of Indigenous Peoples to provide support and key recommendations as to the development and content of a plan that enacts the Declaration such as the consultation, participation and partnership of Māori in each phase of the process.[37] In recognition of the Crown's commitment to the United Nations Declaration on the Rights of Indigenous Peoples (the *Declaration*), the Māori Development Minister also established a working

[32] Dr John Wilson, *The 2020 General Election and Referendums: Results, Analysis and Demographics of the 53rd Parliament* (Parliamentary Service, 2021).

[33] See Labour Party, *Māori Manifesto Labour 2020* (2020).

[34] Department of Internal Affairs, *Transforming the System for Delivering Three Waters Services – Summary of proposals* (2022) 36–37; Department of Internal Affairs, *Three Waters Reform Programme* (2023) <http://www.dia.govt.nz>; Zane Small, "Are Councils Being Stripped of Assets? Will Māori Have Veto? Three Waters Explained", *Newshub*, 1 October 2021; Kieran McAnulty, "Three Waters Reset: McAnulty Explains Why Co-governance Stays", *1News*, 16 April 2023.

[35] *Pae Ora (Healthy Futures) Act 2022* (NZ) s 6.

[36] *Pae Ora (Healthy Futures) Act 2022* (NZ) ss 21, 29, 32. See also Te Aka Whai Ora, *Te Aka Whai Ora Statement of Intent 2022–2026* (2022) 15 which promotes embedding Te Tiriti o Waitangi in the health system and ensuring "iwi, hapu and whanau exercise tino rangatiratanga in their decision-making authority" although unclear how this power may be exercised.

[37] Expert Mechanism on the Rights of Indigenous Peoples, *Country Engagement Mission (8–13 April 2019) New Zealand, Advisory Note* (14 July 2019).

group in 2019 to prepare *He Puapua* – an advisory report on what a national plan of action to enact the Declaration might entail.[38] The Report relies on the assumption that the government will recognise and implement the Declaration.

Although not a direct response to the Matike Mai Report (where Te Tiriti and He Whakaputanga as constitutional documents legitimise transformation), He Puapua explicitly draws on the Report and proposes a similar constitutional structure where both Māori and the Crown exercise and share governance authority.[39]

More specifically, He Puapua imagines a "Vision 2040", which can be achieved through specific outcomes suggested in the Report such as empowering Māori to exercise authority over Māori matters, including jurisdiction over their lands territories and resources, and culture. Other markers of success include strong Māori participation in central and local government, or new governance institutions such as a senate or upper house in Parliament which could ensure legislation is compliant with te Tiriti or the Declaration, and/or significant return of Crown lands and waters to Māori ownership.[40] As the Report emphasised, there is no one way to achieve constitutional transformation.[41]

Public release of He Puapua was highly politicised where opposition accused the Government of advancing a hidden separatist agenda. This rhetoric has previously caused the Labour Party to withdraw from advocating on Māori rights.[42] Leader of the opposition at the time, Judith Collins heavily played on this point, claiming the "divisive" Report outlines a "two systems' treaty view".[43] Perhaps unsurprisingly, to minimise pushback, the Labour Government publicly dismissed some of the recommendations such as establishing a separate Māori senate. Prime Minister Jacinda Ardern noted the Report had "not gone before Cabinet and does not necessarily represent the views of Cabinet".[44]

National Plan of Action: Enacting the Declaration

In 2021, the Crown initiated the development of a national plan of action to realise Aotearoa New Zealand's obligations under the Declaration together with representatives from the National Iwi Chairs Forum and the Human Rights Commission.[45] The initial Cabinet Paper proposing this action specifically advocated for enhancing tāngata Māori self-determination and "ambitious action as opposed to business as usual" to demonstrate commitment to Māori wellbeing and development.[46] Originally slated for public consultation in late 2022, the Crown has now paused this workstream until after the election, largely due to the government reluctance to agree to the proposals put forward in the draft plan.[47]

[38] Claire Charters et al, *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa, New Zealand* (Te Puni Kokiri, 2019).

[39] Charters et al, n 38, iv. Examples of thematic areas include rangatiratanga, participation in kāwanatanga Karauna and culture.

[40] Charters et al, n 38, iv, 45, 58.

[41] Charters et al, n 38, 10.

[42] For example, see Meriana Johnsen, "He Puapua Report Bogged Down in 'Swamp of Politics'", *Radio New Zealand*, 9 May 2021.

[43] Luke Malpass, "Judith Collins Issues Race Relations Warning, Says Labour Planning 'Two Systems by Stealth'", *Stuff Newspaper*, 2 May 2021.

[44] Michael Nelison, "Prime Minister Jacinda Ardern Responds over Māori Self-determination Report He Puapua", *The New Zealand Herald*, 3 May 2021.

[45] Cabinet Office Circular, *United Nations Declaration on the Rights of Indigenous Peoples: Next Steps for a Declaration Plan* (1 June 2021) para 10.

[46] Cabinet Office Circular, *United Nations Declaration on the Rights of Indigenous Peoples: Next Steps for a Declaration Plan* (SWC-21-MIN-0083, 2 June 2021) para 5; Cabinet Office Circular, *New Zealand's Progress on the United Nations Declaration on the Rights of Indigenous Peoples: Development of National Plan* (28 February 2019) 1–4.

[47] Cabinet Office Circular, *United Nations Declaration on the Rights of Indigenous Peoples Plan: Update* (SWC-22-MIN-0053, 6 April 2022) para 9; Jo Moir, "Co-governance Work Set to be Put on Hold", *Newsroom*, 2 December 2022.

Other Constitutional Developments

The Human Rights Commission recently released Maranga Mai, a report reviewing how colonisation and racism has affected Māori, noting how non-Māori settlers created the existing systems in Aotearoa New Zealand "in their image for their benefit to the exclusion of Māori".[48] A key recommendation is for the government to commit to constitutional transformation as articulated in Matike Mai (and other reports such as *He Puapua*) to recognise He Whakaputanga and Te Tiriti o Waitangi as the founding documents of Aotearoa and contributes notable support and legitimacy from a human rights perspective.[49]

Initiatives have also focused on the recommendations outlined in Matike Mai, specifically on continuing the constitutional discussion. This included, a *Matike Mai Constitutional Convention* in February 2021 which provided a chance to both look back on constitutional transformation and ahead at what questions might still need to be addressed, and more recently, the *Constitutional Korero Conference* in November 2022. Hosted by te Puna Rangahau o te Wai Ariki, the Aotearoa Centre for Indigenous Peoples and the Law at Waipapa Taumata Rau (The University of Auckland), global experts on Indigenous peoples and the state and Indigenous constitutions shared legal insight and advice on constitutional transformation.

Perceptions and Reflections: Where Are We at?

The government has demonstrated that affirming rights of Māori under the foundational documents of the country is not their priority. The government and opposition parties continue to misrepresent and politicise expression of tino rangatiratanga during election campaigns despite appeals from Māori.[50]

In our experience, articulating Indigenous priorities and framing constitutional discussions are aided by sourcing Indigenous rights in our own traditional legal system to establish our authority authentically and providing resources, space and capability to effectively and materially engage our whānau Māori. Perhaps importantly, instead of negotiating space within the current system, constitutional transformation may be expedited by rejecting the legitimacy of the current system and returning to these Indigenous legal systems with their own authority, legitimacy and precedent.

Conclusion

This article provides a brief overview of the historical and political context to constitutional transformation in Aotearoa New Zealand. As discussed, incremental change where the Crown validates Indigenous legal systems at its own pace fails to deliver solutions to inequalities that Indigenous people disproportionately face. Matike Mai presented constitutional transformation from an Indigenous perspective and brought these discussions into the consciousness of political parties, and the nation. The Crown's response has been conditional and lacking real engagement. Current forms of "co-governance", inducing backlash from some of the public, has been limited in its scope, failing to enact true partnership.

We have outlined key takeaways of the Indigenous experience in Aotearoa New Zealand in the hope that it may help to inform constitutional discussions in Australia. Constitutional transformation should not be out of our grasp. As Matike Mai reported, a legitimate treaty expectation discussed was the "belief that the many practical and social obstacles to transformation can be overcome and a new constitution established".[51]

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[48] Human Rights Commission, *Maranga Mai! The Dynamics and Impacts of White Supremacy, Racism and Colonisation upon Tangata Whenua in Aotearoa New Zealand* (2022) 21.

[49] Human Rights Commission, n 48, 12. See also Human Rights Commission, *Ki te whaiao, ki te ao Mārama* (2022) which had similar recommendations.

[50] Russell Palmer and Jamie Tahana, "Iwi Leaders Warn Hipkins Not to Bow on Three Waters Co-governance", *Radio New Zealand* (3 February 2023). Both National Party and Act Party have taken strong stances opposing both the Māori Health Authority and Three Waters Reform, creating key policies to walk these back. See, eg, policy document National Party, *Local Water Done Well* (2023); Zane Small, "National's Christopher Luxon Commits to Scrapping Māori Health Authority, but No Need for Referendum on Co-governance", *Newshub*, 29 March 2022. Current leader of the National Party Chris Luxton also explicitly labelled co-governance conversations as "divisive and immature"; Amelia Wade, "Rātana Gets Political: Christopher Luxon Calls Co-governance Conversation 'Divisive, Immature'", *Newshub*, 24 January 2023.

[51] *Matike Mai Report*, n 5, 99.

The Aftermath: What if The Voice Referendum Does Not Succeed?

Narelle Bedford*

The Uluru Statement from the Heart is an invitation to all Australians. However, should the referendum to amend the Australian Constitution to establish an Aboriginal and Torres Strait Islander Voice be unsuccessful, it would have three problematic legal consequences for public law. This is beyond the inevitably deeply personal, national, and international impacts. The first public law consequence is the continuing silence in the Australian Constitution about First Nations people and a loss of Constitutional confidence. The second is the drift away from co-operative federalism. The third is the sustained absence of expert cultural advice in government decision-making. Great change is not without risk. But that risk is not a reason for retreating fearfully and not trying to do something that matters.

INTRODUCTION

The *Uluru Statement from the Heart* is a generous invitation extended by First Nations peoples for constitutional reform.[1] It offers a fair and truthful relationship for the people of Australia based on justice and self-determination. The impending Voice referendum presents a unique opportunity for a distinctive and historic legal impact, promoting national unity and demonstrating our common humanity. It represents a moral choice that First Nations peoples are owed recognition and consultation about matters that affect them. The Voice is premised upon hope and empowerment for First Nations peoples. If successful, it would create the structural reform that is an essential precondition for further steps, including a Makarrata between First Nations peoples and the Australian nation, and truth-telling.

For these reasons, proponents and supporters of the Voice may not wish to contemplate the potential negative consequences if the seemingly unthinkable happens: that is, the referendum on enshrining a First Nations Voice into the *Australian Constitution* is not passed and the chance for large-scale reform is missed. These potential negative consequences should not be ignored. Indeed, they should be factored into the analysis of the referendum process. At the outset, I affirm my commitment to the *Uluru Statement* and make a public declaration that I will be voting yes in the referendum.

It is necessary to state clearly that First Nations peoples have never ceded sovereignty, and there has always been, and will continue to be, even in the event of an unsuccessful referendum, a complex system of First Nations laws and governance.[2] These exist alongside the *Australian Constitution*, and this manifestation of legal pluralism will persist, as can multiple conceptions of sovereignty.[3] Watson has argued forcefully that:

* Assistant Professor, Faculty of Law, Bond University. This article is inspired by, and dedicated to, my mother, Jackie Bedford, a proud Yuin woman from Ulladulla, New South Wales.

Acknowledgement: I acknowledge Kombumerri country on which this article was envisioned and developed. The Kombumerri people are custodians of the land, sea, flora, and fauna, and I admire their wisdom and sharing of knowledges. I recognise all First Nations peoples across the continent now known as Australia, and I accord my profound respect to Elders past and present.

[1] *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).

[2] See generally Peter Kilduff and Asmi Wood, "Determining Sovereignty: Through Law? Or a Political Option?", (2021) 50 *Australian Bar Review* 476.

[3] See generally Gabrielle Appleby, Ron Levy and Helen Whalan, "Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis" (2023) 46(3) *University of New South Wales Law Journal* 1.

> [T]here is true law – law of the land and the sea. We walked and sang the law, becoming beings of law.[4] … We were here first, we are still standing, and the laws of this continent always were, and always will be.[5]

First Nations peoples in Australia have demonstrated enduring strength and tenacity in the face of injustice, trauma, and disappointments. However, should the referendum not receive support from an overall majority of voters and a majority of voters in a majority of states, it would have a profound impact at a personal level for First Nations peoples.

The decline of the invitation to listen to the Voice and "walk with us in a movement of the Australian people for a better future" would be interpreted as a large-scale rejection. It would mean that Australian voters did not take up – or explicitly rejected – the opportunity for "political listening".[6] The *Uluru Statement* was a carefully crafted request derived from 12 months of consultation and design by First Nations peoples based on deliberation through a series of First Nations designed and led dialogues. Rejection would mean that the structural nature of the problem faced by Aboriginal and Torres Strait Islander peoples would remain unresolved.[7]

An unsuccessful referendum would be traumatic for First Nations peoples – not just in Australia but worldwide. The strength of the commonalities between First Nations peoples generally was given substance in the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP).[8] After initial resistance, Australia became a signatory to *UNDRIP* in 2009.[9] In doing so, Australia committed to listening and engaging with Aboriginal and Torres Strait Islander peoples. For example, Art 19 of *UNDRIP* states:

> States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

If the referendum was unsuccessful, it would fly in the face of obligations that Australia has already accepted. But an unsuccessful referendum would reach beyond the personal and impact negatively on our nation. The nation as a whole would suffer the loss. It would expose divisions and perpetuate a belief that fundamental national change is too hard to achieve. This would engender despondency, demonstrate a lack of confidence in our reform processes and make us vulnerable to criticism on the world stage that we do not have the resolve to face up to our history and plan for the future.

Beyond these deeply personal, national, and international impacts, this article speculates that an unsuccessful referendum would have three problematic legal consequences for public law, which go to the heart of Australian democracy and federalism.

THERE WILL BE A CONTINUING SILENCE IN THE AUSTRALIAN CONSTITUTION AND A LOSS OF CONSTITUTIONAL CONFIDENCE

The first public law consequence of an unsuccessful referendum would be the continued silence within the *Australian Constitution* about First Nations peoples. Our *Constitution* is the foundational document of Australia in that it establishes the systems that govern our society. For it to contain no mention of

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[4] Irene Watson, "Aboriginal Recognition: Treaties and Colonial Constitutions, 'We Have Been Here Forever …'" (2018) 30(1) *Bond Law Review* 7, 17. See also Irene Watson, "Aboriginal Laws of the Land: Surviving Fracking, Golf Courses and Drains Among Other Extractive Industries" in Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017).

[5] Watson, "Aboriginal Recognition", n 4, 18.

[6] See generally Gabrielle Appleby and Eddie Synot, "A First Nations Voice: Institutionalising Political Listening" (2020) 48 *Federal Law Review* 529.

[7] Shireen Morris, "The Torment of Our Powerlessness: Addressing Indigenous Constitutional Vulnerability Through the Uluru Statement's Call for a First Nations Voice in Their Affairs" (2018) 41(3) *University of New South Wales Law Journal* 629, 630.

[8] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, UN Doc A/RES/61/295 (2 October 2007).

[9] Megan Davis, "To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On" (2012) 19 *Australian International Law Journal* 17, 18.

First Nations peoples is a gaping omission. Section 25 (dealing with persons of any race disqualified from voting) and s 51(xxvi) (dealing with special laws for people of any race) would persist in the *Constitution*, but they do not specifically refer to First Nations peoples. These arcane and anachronistic provisions would endure as the only, albeit indirect, mention of the existence of First Nations peoples. This can be compared to two examples of countries with written constitutions and an affinity with Australia. The first is the *Canadian Constitution* with its commitment in s 35 that:

> (1) the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.[10]

The second is within the Pacific region, where the *Vanuatu Constitution* has an entire chapter dedicated to the National Council of Chiefs (in addition to those covering the traditional separation of powers – the Parliament, the judiciary, and the Executive). There the National Council of Chiefs has a constitutionally enshrined role to be consulted on any matter related to tradition and custom.[11]

Another potential repercussion of the referendum not succeeding is troubling in a different way. It is possible that the current or a subsequent government, could decide to pivot and attempt to legislate a form of the Voice rather than engage in structural reform via the *Constitution*. Such an action would be in direct conflict with the *Uluru Statement*'s request for a permanent, enduring structural change enshrined in the *Constitution*. It would also recall the bitter experience First Nations peoples had when the government abolished the legislated, and elected, Aboriginal and Torres Strait Islander Commission (ATSIC).[12] The action of an elected government removing a legislated mechanism for First Nations self-determination was extensively analysed at the time, and rightly seen as "silencing Indigenous voices".[13] The scars from that experience remain. Many First Nations peoples would be deeply and rightfully sceptical that a legislated Voice, created in the wake of an unsuccessful referendum, could be an enduring solution rather than something subject to the vagaries of the preferences of the political party in power at any given time in the future. First Nations peoples are unlikely to be supportive, given their bitter familiarity with the repeal of the legislation establishing ATSIC,[14] and its predecessors,[15] and the clarity with which a permanent, constitutionally entrenched role in the democratic decision-making of the nation has been sought.

Another negative scenario which conceivably could come to pass, particularly if the Voice referendum was unsuccessful by a slim margin (in either not obtaining a majority of yes votes overall or succeeding overall but in fewer than four States), is a second referendum.[16] Under these circumstances, the current or future government may respond by reformulating the referendum question to address the concerns which motivated no voters. This could place the government's political capital at risk and run the peril of

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[10] *Constitution Act 1982*. See also Benjamen Franklen Gussen, "A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples" (2017) 40(3) *Melbourne University Law Review* 867, which contains comparisons with Canada, New Zealand, Ecuador, and Bolivia.

[11] *Constitution of the Republic of Vanuatu 1980*, Ch 5, ss 29–32.

[12] William Jonas and Darren Dick, "Ensuring Meaningful Participation of Indigenous Peoples in Government Processes: The Implications of the Decline of ATSIC" (2004) 23 *Dialogue* 4.

[13] Sue Richardson, "The Abolition of ATSIC: Silencing Indigenous Voices?" (2004) 23 *Dialogue* 1.

[14] See generally Joan Cunningham and Juan I Baeza, "An 'Experiment' in Indigenous Social Policy: The Rise and Fall of Australia's Aboriginal and Torres Strait Islander Commission (ATSIC)" (2005) 33(3) *Policy and Politics* 461.

[15] These include the Movement for Aboriginal Advancement; the Federal Council for the Advancement of Aborigines and Torres Strait Islanders; the National Aboriginal Consultative Committee; and the National Aboriginal Conference. See generally Julie Fenley, "The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979-1981" (2011) 42(3) *Australian Historical Studies* 372; Sally Weaver, "Australian Aboriginal Policy: Aboriginal Pressure Groups or Government Advisory Bodies?" (1983) 54(2) *Oceania* 85.

[16] The Australian Electoral Commission has prepared a summary of outcomes for every referendum, detailing both the national vote and recording which states had a majority yes vote: Australian Electoral Commission, *Referendum Dates and Results* <https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm>. Of the 36 unsuccessful referenda, five secured a national majority but not a majority of States, while the other 31 did not secure either a majority of voters or a majority of States.

annoying voters by asking them to vote on the same issue for a second time.[17] Such an approach could see the Voice model watered down, angering proponents of the proposal without necessarily winning over a majority.

An unsuccessful Voice referendum would also have grave consequences for the prospects of reconciliation with First Nations peoples. Noel Pearson addressed the pressing need for true and long-lasting reconciliation in his 2022 Boyer Lectures titled "Who We Were and Who We Can Be".[18] Linda Burney has said the consequences of an unsuccessful referendum would amount to a "major blow" and be "damaging" to the reconciliation cause, while noting it would not be fatal but deeply injurious.[19] Thus, the impact of an unsuccessful referendum would not be contained to constitutional implications but extend to core challenges facing our nation such as reconciliation.

Not only would the *Constitution* remain silent and inadequate on the recognition of, and a Voice for, First Nations peoples, but an unsuccessful referendum would also erode confidence in constitutional reform. The difficulty of achieving a successful referendum, on any topic, would yet again seem insurmountable and there would likely be a significant time delay before another attempt at constitutional change. After all, Australia has had to wait 24 years since the last (unsuccessful) referendum. Likewise, the mantra that constitutional change can only occur in Australia with clear bipartisan support by the major political parties would take deeper root, potentially deterring other attempts to change various aspects of the *Constitution*. This outcome would leave the flaws in the nation's foundational document preserved in aspic; Australia would remain, as Geoffrey Sawer concluded, constitutionally speaking a "frozen continent".[20] This resonates with the conceptualisation of movement in Australia's *Constitution* and the tension with it stagnating.[21] If the public and political parties lose confidence in our ability to change the *Constitution*, it will inevitably extend the period of inertia.

In 1999, a referendum to insert recognition of First Nations peoples into the Preamble of the *Constitution* (and for Australia to become a republic) failed.[22] The Preamble insertion was resoundingly rejected by the Australian voters. In fact, the national vote in favour of the Preamble question, at just under 40%, was the tenth worst result of all the 44 referendum questions which have been placed before Australian voters.[23] All similar suggestions of a constitutional statement, in the Preamble or elsewhere in the *Constitution*, have since been repeatedly rejected by First Nations peoples as empty, symbolic, and performative measures without substance. Any subsequent attempt by an Australian government to attempt preambular reference to First Nations peoples is again likely to be rejected by the very people it is seeking to include.

There Will Be a Drift away from Co-operative Federalism

The second public law outcome of an unsuccessful referendum would be a significant cleavage between the Australian States and Territories on questions of First Nations rights and a drift away from

[17] While Ireland may be an example of a different outcome being achieved on the same constitutional referendum topic (abortion) over time, the nature of the questions posed in 1983 and 2018 was substantially different. See generally Luke Field, "The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date" (2018) 33(4) *Irish Political Studies* 608. Sometimes mischaracterised as referenda, in 1916 and again in 1917, the then Australian Prime Minister, Billy Hughes, conducted two plebiscites on conscription, despite the government having legal authority for conscription. In both plebiscites, the no campaign triumphed narrowly.

[18] Noel Pearson, "Noel Pearson Is Hopeful for Indigenous Recognition through a Voice to Parliament in Boyers Lecture", *ABC News*, 6 November 2022 <https://www.abc.net.au/news/2022-11-06/boyers-2022-noel-pearson-indigenous-recognition-voice-parliament/101607224>.

[19] Linda Burney, "Reconciliation Will Be Damaged if Voice Fails", *The Age* (Melbourne), 20 November 2022.

[20] Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

[21] Jonathan Crowe, *Australian Constitutional Law: Principles in Movement* (OUP, 2022).

[22] See generally Helen Irving, "The Republic Referendum of 6 November 1999" (2000) 35(1) *Australian Journal of Political Science* 111, 111.

[23] Irving, n 12, 111. See also AEC, *AEC 1999 Referendum Reports & Statistics* <https://www.aec.gov.au/elections/referendums/1999_referendum_reports_statistics/summary_preamble.htm>.

co-operative federalism towards competitive federalism. Following any unsuccessful Constitutional referendum, public, academic, and media attention would inevitably focus on which jurisdictions supported the proposal and which did not. In fact, such analysis was conducted even following the successful 1967 referendum question on First Nations peoples, to determine where the "heaviest no vote" was in Australia.[24] Similarly and more recently, the Australian Electoral Commission published a detailed analysis of the voting in the 1999 Preamble referendum, which revealed Queensland as the State with the lowest yes vote (32.81%) and then moved beyond the State level to detail the vote in every federal electoral division.[25]

The exposed distinction between supporters and opponents of the Voice could perhaps call into question the coherence of our federation,[26] and render stark the differences between us. Following the Australian Marriage Law postal survey (also known as the same sex plebiscite) held in 2017, sophisticated analysis was published that matched voting outcomes in each federal electorate with data available from the national census.[27] This data-matching, reflecting what is done now after national and State elections, enabled conclusions to be drawn about the social characteristics which exerted a strong influence on the voting outcome.[28] Those States and Territories, and even electorates, in which a majority of voters did not support the Voice would be plain for all to see. What would it mean for young Aboriginal and Torres Strait Islander men and women, boys and girls, to discover that many of their neighbours voted no?

In the wake of an unsuccessful referendum vote, some States and Territories might pursue, or continue, reforms. This has the worrying potential of resulting in First Nations people in different parts of the country potentially being accorded different rights, causing inconsistency.

Those States and Territories which did pursue reform would become the leading sites for innovation, evidenced through the treaty processes already underway in some jurisdictions.[29] Such a development would echo the contention advanced by Dani Larkin, Harry Hobbs, Dylan Lino, and Amy Maguire that the Australian States, rather than the Commonwealth, have become the main sites for law reform advancing First Nations interests.[30] State and Territory reforms are significant and valuable, but they lack the enduring force of federal constitutional enshrinement and could not help develop a coherent national narrative. Additionally, Megan Davis has argued:

> The uncoordinated pursuit of treaty across the federation creates a quandary for Aboriginal and Torres Strait Islander peoples. There is a real risk of further embedding the current power imbalance that the *Uluru Statement from the Heart* singled out as *the torment of our powerlessness*.[31]

This fracturing of a national approach is exceptionally impactful for First Nations Peoples as Davis has explained. The disadvantages faced by those in slower-paced States and Territories is doubly harsh. The drag of a defeated referendum might even sap energy and aspiration from State and Territory treaty processes. They could merely become a vehicle for service delivery in return for community commitments, extending the recent trend of providing social security payments in return for "mutual obligations". Such a pattern would need to be guarded against.

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[24] "Heaviest No Vote From Country", *The Sydney Morning Herald*, 29 May 1967 <https://aiatsis.gov.au/sites/default/files/catalogue_resources/21470.pdf>.

[25] AEC, n 23.

[26] See generally Stephen McDonald, "Federalism and a First Nations Voice" (2023) 34 PLR (forthcoming).

[27] Ian McAllister and Feodor Snagovsky, "Explaining Voting in the 2017 Australian Same-Sex Marriage Plebiscite" (2018) 53(4) *Australian Journal of Political Science* 409.

[28] See, eg, Adrian Beaumont, "Final 2022 Election Results: Coalition Routed in Cities and in Western Australia – Can They Recover in 2025?", *The Conversation*, 28 June 2022 <https://theconversation.com/final-2022-election-results-coalition-routed-in-cities-and-in-western-australia-can-they-recover-in-2025-184755>.

[29] For example, in Victoria the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) was Australia's inaugural First Nations Treaty law, while South Australia has become the first State to legislate the establishment of a First Nations Voice to Parliament with the *First Nations Voice Act 2023* (SA).

[30] Dani Larkin et al, "Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States" (2022) 41(1) *University of Queensland law Journal* 35.

[31] Megan Davis, "Voice, Treaty, Truth", *The Monthly*, July 2018.

While past failed referendums have not meant the government that proposed it was voted out at the next federal election, a weakening of the unity of purpose in Australia would be damaging for our federation and national narrative. The result would demonstrate that people in different States and Territories approach issues related to First Nations differently, undermining a sense of national cohesion and shared purpose.

THERE WILL CONTINUE TO BE A SUSTAINED ABSENCE OF EXPERT CULTURAL ADVICE IN GOVERNMENT DECISION-MAKING

The third public law outcome of an unsuccessful referendum is the continuation of the sustained absence of structured, expert cultural advice in government decision-making. Thus, there are administrative as well as constitutional law implications, which would flow from an unsuccessful referendum. The need for culturally informed advice to the Executive will not abate if the referendum is unsuccessful. It is the Executive who maintains primary responsibility for the formulation and delivery of programs for First Nations peoples.

One of the goals of administrative law is improved government decision-making. Ideally, best practice decision-making about any particular group in society should only occur after extensive consultation with diverse representatives of that group. This can be articulated as "not about us without us". The Voice provides the means for an enduring arrangement to ensure that First Nations peoples are always included and can provide advice about decisions which affect them. The *Uluru Statement* was signed by over 350 delegates from more than 100 nations, following a regional dialogue process engaging approximately 1,300 First Nations peoples, 60% of whom came from traditional owner groups.[32] To lose the opportunity of this significant consultative mechanism would not obviate the need for consultation. It simply means that an alternative would need to be developed. Inevitably, any alternative would not be as diverse, representative, and so well supported by the communities it would be seeking to embody.

Linda Burney has explained that one of the design aims in the creation of the Voice to advise both the Parliament and the Executive is "to make sure the decisions that we make are better decisions".[33] Thus an unsuccessful referendum will result in a weakened normative impact as the promise of enhanced, tailored, and culturally responsive First Nations decision-making would not be realised.

Other administrative law consequences of an unsuccessful referendum could arise from the common law evolving to oblige consultation by the government with First Nations peoples on decisions and issues affecting them. This duty to consult, and where possible to accommodate First Nations peoples, has been increasingly recognised by the Canadian Supreme Court as an essential part of the requirements of procedural fairness.[34] Procedural fairness compels a government to consult and facilitate the participation of those affected by government decisions.[35] The duty of procedural fairness is context specific and highly nuanced.[36] Considered broadly, it may extend to requiring responsive action or the adaptation of proposed decisions.[37] The Voice was designed as an integral part of institutional machinery to advise the government, and its absence would leave a continuing void in government decision-making processes that would need to be addressed in some way. Alternative mechanisms for consultation with First Nations peoples would be necessary, but concerns would remain as to whether an alternative body or process would be a permanent feature of our Australian public law landscape.

A final administrative law consequence of an unsuccessful referendum would be the lost opportunity for improved accountability of government decisions. As Megan Davis has explained "a Voice …

[32] Davis, n 31.

[33] Burney, n 19.

[34] See *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73 and *R v Sparrow* [1990] 1 SCR 1075.

[35] *Kioa v West* (1985) 159 CLR 550; Justice Alan Robertson, "Natural Justice or Procedural Fairness" (2016) 23(3) AJ Admin L 155, 156.

[36] *Kioa v West* (1985) 159 CLR 550; James Edelman, "Why Do We Have Procedural Fairness?" (2016) 23 AJ Admin L 144, 144.

[37] Andrew Edgar, "Procedural Fairness for Decisions Affecting the Public Generally: A Radical Step towards Public Consultation" (2014) 33(1) *University of Tasmania Law Review* 56.

will not be another layer of bureaucracy", rather a Voice "will hold the bureaucracy to account", it "will reduce waste and make sure policies actually work".[38] Government accountability is a key driver of administrative law and public law more generally. In the area of decisions affecting First Nations peoples, the already existing accountability mechanisms (potentially judicial review, merits review, Ombudsman, and freedom of information) would have been augmented by the creation of the Voice. Should the referendum not succeed this additional forum for accountability will not be realised.

Further, without the structural reform of the Voice, Australia's general ad-hoc approach to consultation would continue to be out of step with international law and international practice. This is specifically regarding the *International Convention on the Elimination of Racial Discrimination* (*CERD*),[39] and the need for consultation when implementing "special measures" – such as those implemented with respect to First Nations peoples. The need to consult pursuant to the *Racial Discrimination Act 1975* (Cth) was explicitly rejected by the High Court in *Maloney v The Queen*,[40] on the basis that the requirement was set out in the *CERD* Committee's non-binding recommendations, rather than in the Convention.[41] This interpretation means that Australia's current practice on consultation is out of step with international law and international best practice.[42]

Progress towards the other two aspects of the *Uluru Statement* – Treaty and Truth – could conceivably continue without an embedded structural foundation, but the alternative underpinning foundation to support these initiatives would be weaker. For this reason, I uphold the sequencing in the order proposed as a core first step. Similarly supporting the sequencing laid out in the *Uluru Statement*, was Justice Francois Kunc, writing as editor of the *Australian Law Journal*, who stated:

> Constitutional amendment and then legislation of the Voice can be done much more quickly than the processes around treaty and truth-telling. For example, the work of a Makarrata Commission will take years.[43]

Should the referendum not succeed, yet again, First Nations peoples would be unwillingly placed in the position of ultimately relying on the benevolence of government for the future progress of long-term structural reform. However, the appetite of any future government to undertake even more ambitious reforms, such as a national Treaty, would likely be diminished by the apparent lack of popular support implied by the referendum's lack of success. Additionally, as a nation, Australia could lose some energy and drive for reform in complex matters generally. Federal governments have at times been wary about taking on big reforms, fearing that complex changes that require time to explain and implement will only alienate voters. An unsuccessful Voice referendum would likely reinforce this overly cautious approach, leaving important challenges unaddressed.

The issue of Treaty has featured prominently in the public debate surrounding the Voice referendum. The *Uluru Statement* calls for a Makarrata Commission to be established "to supervise a process of agreement-making between governments and First Nations and truth-telling about our history". While

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[38] Josh Butler, "Final Voice Referendum Wording and Constitutional Amendment 'Very Close'", *The Guardian Australia*, 22 March 2023 <https://www.theguardian.com/australia-news/2023/mar/22/final-voice-referendum-wording-and-constitutional-amendment-very-close>.

[39] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

[40] *Maloney v The Queen* (2013) 252 CLR 168; [2013] HCA 28.

[41] See Simon Rice, "Case Note: Joan Monica Maloney v The Queen [2013] HCA 28" (2013) 8(7) *Indigenous Law Bulletin* 28; Patrick Wall, "Case Note: The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in Maloney v The Queen [2013] HCA 28" (2014) 15(1) *Melbourne Journal of International Law* 228.

[42] Rachel Gear, "Commentary: Alcohol Restrictions and Indigenous Australians: The Social and Policy Implications of Maloney v The Queen" (2014) 21 *James Cook University Law Review* 41, 64; Harry Hobbs, "First Nations, Settler Parliaments, and the Question of Consultation: Reconciling Parliamentary Supremacy and Indigenous Peoples' Right to Self-determination" (2021) 58(2) *Osgoode Hall Law Journal* 337, 359, 362.

[43] Justice Francois Kunc, "As the Debate Continues, Some Observations about The Voice to Parliament" (2023) 97 ALJ 155, 155–156.

the creation of this body could occur independently of the referendum outcome, structural initiatives would still be needed.[44] For example, it would be necessary for a representative body of First Nations peoples to be established so that it could speak with authority in negotiations for a Treaty. Coherence in the institutional landscape would be at risk. As State and Territory treaties develop, it is possible that these treaties might recognise different rights and express obligations differently to other treaties, leading to a confusing and inconsistent overall result.

Likewise, the *Uluru Statement* request for "truth-telling about our history" could occur without constitutional enshrinement of the Voice. The sequencing in the *Uluru Statement* was deliberate, with truth-telling intentionally listed as the last of three reforms. This is because there have been official attempts at truth-telling in the past, such as the Royal Commission into Aboriginal Deaths in Custody,[45] and the *Bringing Them Home* report which concentrated on the Stolen Generations.[46] First Nations peoples want the truth not only to be told, but more importantly, to be acted upon.[47] That there are unimplemented recommendations from both of these reports remains a source of frustration and disappointment, hindering the healing of First Nations peoples.[48]

Perhaps then if the Voice was not created, the better approach might be to focus on truth-telling by First Nations peoples themselves, rather than relying on more government initiated and led processes.[49] Yet another option, would be a First Nations led formal truth and reconciliation commission such as those in South Africa and Canada.[50] Done well, these processes can assist in healing and confronting the truths of past actions and policies. But these forums take time and to be meaningful, all calls for action must be adhered to.

Conclusion

The *Uluru Statement* has been ascribed by Dani Larkin and Kate Galloway with the status of being an "important part" of Australia's public law,[51] moulding into a "central pillar in a truly pluralistic Australian public law".[52] They assert it amounts to "a vital opportunity to integrate Indigenous law into an otherwise settler legal system".[53] But should the referendum not succeed, the Voice could enter the public law lexicon as an example of a failed public law reform. According to Larkin and Galloway:

> As long as Australia maintains institutional structures designed to exclude the voices of Indigenous communities, we remain ill-equipped to support communities to solve the complex problems they face.[54]

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[44] Shireen Morris and Harry Hobbs, "Imagining a Makarrata Commission" (2022) 48(3) *Monash University Law Review* (Advance Online) 1, 6–7.

[45] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991). See also Patrick Dodson, "25 Years on from Royal Commission into Aboriginal Deaths in Custody Recommendations" (2016) 8(23) *Indigenous Law Bulletin* 24; Elena Marchetti, "The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody" (2006) 33(3) *Journal of Law and Society* 451.

[46] RD Wilson, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997).

[47] Gabrielle Appleby and Megan Davis, "The Uluru Statement and the Promises of Truth" (2018) 49(4) *Australian Historical Studies* 501, 502.

[48] Appleby and Davis, n 47, 508.

[49] A contemporary example of truth-telling on an individual level might be the *Dark Emu* book by Bruce Pascoe, which detailed historical practices of First Nations peoples. See Bruce Pascoe, *Dark Emu* (Scribe Publications, 2018).

[50] In South Africa, refer to the seven volumes of the Truth and Reconciliation Commission's Final Report <https://www.justice.gov.za/trc/report/index.htm>. In Canada, refer to the various reports issued by the Truth and Reconciliation Commission <https://nctr.ca/records/reports/#trc-reports>.

[51] Dani Larkin and Kate Galloway, "Uluru Statement from the Heart: Australian Public Law Pluralism" (2018) 30(2) *Bond Law Review* 335.

[52] Larkin and Galloway, n 51, 336.

[53] Larkin and Galloway, n 51, 336.

[54] Larkin and Galloway, n 51, 344.

The failure of the Voice referendum would inevitably have negative ramifications. This article has set out how these negative impacts could unfold in legal terms. However, these should not be considered as a justification for not pursuing the Voice now, but rather should be thoughtfully considered as part of the referendum debate. The Voice referendum is not a binary choice between practical reconciliation with First Nations peoples and structural reform. It is possible, and indeed necessary, to act on simultaneous fronts. Equally, claims that the process is being rushed or that not enough detail is available, do not accord with the public record of First Nations appeals and the long history of expert consideration.[55]

The referendum process itself could have a positive normative benefit by providing civic information and stimulating public debates. This could in turn improve knowledge about Australia's true history and enhance public literacy about our constitutional structures. It must be said that the debate could also see the spread of misinformation, clouding rather than illuminating the issues at hand.

All will not be lost should the referendum not succeed. As explained by Mary Graham, First Nations cultures are founded in relationality, both to other people, the land, sea, animals and plants.[56] This will endure. The next generation of First Nations people who are "wave makers" (as described by Watson) will need to move to the front and drive change.[57] They will build on the work of Elders who have accomplished great things, but who will feel the brunt of a lost referendum. For example, Noel Pearson has publicly stated that he will return to country, "fall silent", and step away from the national scene in the event of an unsuccessful referendum.[58] In a similar vein, Marcia Langton has said she will stop agreeing to deliver Welcomes to Country.[59]

Great change is not without risk. But that is not a reason for retreating fearfully and not trying to do something that matters. If the necessary support is not attained and the referendum is unsuccessful, Australia could lose some of its cohesion, our institutions and processes would require re-examination, and our reputation on the international stage would be tarnished.

Sometimes a nation is given a chance to do something meaningful which will have a lasting impact and help address longstanding and deep wrongs. As a legal academic and a proud Indigenous woman, I hope we do not miss this chance.

[55] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People, *Final Report* (Commonwealth Parliament, 2015); Referendum Council, *Final Report of the Referendum Council* (Commonwealth of Australia, 2017); Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (Commonwealth Parliament, 2018).

[56] Mary Graham, "Aboriginal Notions of Relationality and Positionalism: A Reply to Weber" (2014) 4(1) *Global Discourse* 17.

[57] Watson, "Aboriginal Recognition", n 4, 18.

[58] Noel Pearson, "Noel Pearson Says He Will 'Fall Silent' if Voice Referendum Fails", *ABC*, 20 February 2023 <https://www.abc.net.au/news/2023-02-20/pearson-says-he-will-fall-silent-if-voice-referendum-fails/102000768>.

[59] Marcia Langton, "Vote No and You Won't Get a Welcome to Country Again", *The Weekend Australian Magazine*, 18 April 2023 <https://www.theaustralian.com.au/weekend-australian-magazine/marcia-langtons-fight-to-be-heard-reaches-its-crescendo-with-indigenous-voice-to-parliament/news-story/c49338fbc21b72a9c012d65bc8eafda4>.

Developments

Compiled By Hannah Joyce

FOUNDATIONS OF LEGAL SYSTEMS

Aboriginal Law, Rights and Justice

Election for First Peoples' Assembly of Victoria

The elections for the First Peoples' Assembly of Victoria were held from 13 May to 3 June, and the incoming Members have been announced.

The Assembly hopes in its next term to negotiate a State-wide Treaty to tackle issues such as improving health, education and justice, and to empower Traditional Owner groups in Victoria to start negotiating Treaties in their areas.

See <https://www.firstpeoplesvic.org/news/traditional-owners-chosen-to-negotiate-treaty-in-victoria/>.

Full Federal Court Holds That Native Title Rights and Interests Are Proprietary in Nature

The Full Federal Court (Mortimer CJ, Moshinsky and Banks-Smith JJ) has held that native title rights are proprietary in nature, and constitute "property" for the purposes of s 51(xxxi) of the *Australian Constitution*.

Dr Yunupingu AM, on behalf of the Gumatj Clan or Estate Group of the Yolngu People, brought two applications under s 61 of the *Native Title Act 1993* (Cth). The first was a claimant application, seeking a determination of native title in favour of the Gumatj Clan or Estate Group. The second application sought payment of compensation for the alleged effects on native title of certain executive and legislative acts done after the Northern Territory became a territory of the Commonwealth in 1901, but prior to the coming into force of the *Northern Territory Self-Government Act 1978* (Cth) ([1]). Each of the separate questions was resolved in favour of Yunupingu.

The Commonwealth advanced a number of arguments, notably including that *Tau v Commonwealth*[1] – in which the High Court held that s 122 is not limited or qualified by s 51(xxxi) – had not been overruled by *Wurridjal v Commonwealth*.[2] However, the Court held that native title rights and interests are proprietary in nature, constituting "property" for the purposes of s 51(xxxi) ([444]). The requirement that property be acquired on "just terms" in s 51(xxxi) does apply to laws enacted pursuant to s 122 – that is, laws for the government of a territory.

The Commonwealth has now lodged a special leave application in the High Court to challenge the decision.

See *Yunupingu v Commonwealth* [2023] FCAFC 75.

International Law

High Court Unanimously Recognises and Enforces Investment Arbitration Award

The High Court has unanimously dismissed an appeal from the Full Court of the Federal Court of Australia relating to the interpretation of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (*ICSID Convention*). The Court considered whether and to

[1] *Tau v Commonwealth* (1969) 119 CLR 564.

[2] *Wurridjal v Commonwealth* (2009) 237 CLR 309; [2009] HCA 2.

what extent entry by a foreign State into the *ICSID Convention*, alongside agreement to Arts 53, 54 and 55, constitutes a waiver of foreign State immunity under the *Foreign States Immunities Act 1985* (Cth) (the Act) from Australian court processes regarding recognition and enforcement of arbitral awards.

The respondents commenced arbitral proceedings against Spain under the *ICSID Convention*, and obtained an award of €101 million. They brought proceedings in the Federal Court of Australia to enforce the award under the *International Arbitration Act 1974* (Cth) ([1]–[4]). At first instance, the Court held that Spain's agreement to Arts 53, 54 and 55 of the Act constituted a waiver of its immunity from recognition and enforcement of the award, but not from its execution, ordering that Spain pay the respondents €101 million ([5]). On appeal, the Full Court held that while immunity from recognition had been waived, immunity from court processes of execution had not. The Court made new orders that the award be recognised as binding and for judgment to be entered against Spain for €101 million ([6]).

The High Court dismissed the appeal, holding that – given Spain was the subject of a binding ICSID award – its agreement to Arts 53, 54 and 55 of the *Convention* constituted a waiver of foreign State immunity from the jurisdiction of Australian courts to recognise and enforce that award, but not to execute it. The principle at international law that a waiver of immunity under s 10 of the Act must be "express" does not deny the ordinary and natural role of implications in elucidating the meaning of express words of the treaty ([23]–[26]). The terms "recognition", "enforcement" and "execution" in the *ICSID Convention* are used separately and hold different meanings ([42]–[48]). The High Court concluded that the orders made by lower courts were properly characterised as orders for recognition and enforcement ([8]).

See *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 97 ALJR 276; [2023] HCA 11.

Victorian Supreme Court of Appeal Considers Denial of Natural Justice as Defence to Enforcement of a Foreign Judgment

The Victorian Supreme Court of Appeal (Kyrou, T Forrest and Hargrave JJA) has set aside a judgment which affirmed the enforcement of a Chinese judgment, finding that the applicant had successfully raised denial of natural justice as a defence to an action on a foreign judgment.

The applicant, Yin, is a Chinese national living in Australia. The respondent, Wu, is a Chinese national living in China. In 2018, Wu obtained a judgment against Yin in the People's Court of Zheijiang Province, China. This judgment was obtained on a summary basis without Yin being heard – a public notice directed to Yin was issued in an unknown way, and did not come to Yin's attention ([1]). Wu commenced proceedings against Yin to enforce the Chinese judgment for the Australian dollar equivalent of the Chinese judgment sum, alternatively claiming an amount approximating the Chinese judgment sum on various alternative causes of action. In his defence, Yin pleaded that he was not served with the documents commencing the foreign proceedings producing the Chinese judgment, and was unaware of the existence of the judgment until the Australian proceeding was commenced. Yin submitted that the Chinese judgment should be refused because, inter alia, there was a failure by the Chinese court to accord him natural justice. After a summary judgment was entered in favour of Wu, Yin appealed to the Supreme Court's trial division, which rejected Yin's defence of denial of natural justice.

On appeal, the Court of Appeal found that Yin's evidence raised a prima facie case that he had been denied natural justice in the Chinese proceedings ([91]). The Court found that the earlier judges had erred in placing the onus on Yin to establish that he had not been validly served the relevant documents in relation to the Chinese proceedings ([84]). The Court also noted that, even if the evidence had been sufficient to establish that Yin had been "legally summoned", the evidence as a whole did not establish that the public notice procedure complied with the requirements of natural justice ([84], [95]).

See *Yin v Wu* [2023] VSCA 130.

PARLIAMENT

PARLIAMENTARY COMMITTEES

Voice Senate Committee Releases Report

The Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum has released its Advisory Report on the Constitutional Alternation (Aboriginal and Torres Strait Islander Voice) 2023. The report follows a significant number of submissions as well as public hearings held across Australia.

The Committee recommended that the Bill be passed unamended. The Committee was satisfied that the Bill is fit for purpose and meets the request expressed in the *Uluru Statement from the Heart*, that the ability of the Voice to make representations to executive government is appropriate and should not be amended, and that the Bill is "constitutionally sound".

The report included two dissenting reports, from the Liberal Party and National Party members respectively. The first referred to a potential duty arising on the part of the executive government to consult the Voice and consider its representations and questioned whether that would affect the workability of government. The latter argued that there was an absence of detail on the Voice to Parliament.

See <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000125/toc_pdf/AdvisoryReportontheConstitutionAlteration(AboriginalandTorresStraitIslanderVoice)2023.pdf>.

Constitutional Alteration Bill for an Aboriginal and Torres Strait Islander Voice Passes Both Houses of Parliament

The *Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023* (Cth) has passed both the House of Representatives (121 in favour, 25 against) and the Senate (52 in favour, 19 against). The referendum for an Aboriginal and Torres Strait Islander Voice to Parliament will be held between two and six months from the Bill's passage through the Senate on 19 June.

See <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7019>.

RELATED SCRUTINY BODIES

He Arotake Pōtitanga Motuhake Independent Electoral Review Releases Its Interim Report

The Independent Electoral Review has released its interim report with draft recommendations for a fairer, clearer and more accessible electoral system. The review was established by the Minister of Justice to review Aotearoa New Zealand's election laws.

The report addresses six key themes: making electoral laws fit for the future, improving mixed member proportional voting; a referendum on the parliamentary term; supporting more New Zealanders to vote; fairer rules for political financing and campaigning; and upholding the Treaty of Waitangi. Recommendations include holding a referendum to determine whether parliamentary terms should be longer, lowering the voting age to 16 and giving all prisoners the right to vote, and requiring in the Electoral Act that the Electoral Commission give effect to the Treaty of Waitangi and its principles.

The review's second stage of engagement is taking place from 6 June to 17 July.

See <https://electoralreview.govt.nz/have-your-say/interim-report/>.

EXECUTIVE

CROWN

Coronation of King Charles III

On 6 May 2023, the coronation of King Charles III and his wife Camilla as king and queen of the United Kingdom took place at Westminster Abbey. King Charles III acceded to the throne on 8 September 2022 upon the death of Elizabeth II.

The Coronation Oath was read by the Archbishop of Canterbury, pursuant to s 3 of the *Coronation Oath Act 1688* (UK). In the past, changes have been made to the oath read at the coronation – though without amending the original Act – to reflect constitutional developments. At the coronation of King Charles III, the oath referred collectively to the "other realms and the territories", rather individually naming each Commonwealth Realm. The change is said to reflect external constitutional changes since the last coronation in 1953 – including Pakistan, South Africa and Sri Lanka becoming republics.

See <https://commonslibrary.parliament.uk/changes-to-the-coronation-oath/>.

JUDICIARY

COMPOSITION AND STRUCTURE

Early Retirement of the Honourable Chief Justice Susan Kiefel from the High Court of Australia

The Honourable Chief Justice Susan Kiefel will retire early as Chief Justice of the High Court of Australia, leaving the Court on 5 November 2023. Kiefel CJ was appointed to the High Court as a Justice in 2007 and became Chief Justice in 2017.

The Attorney-General has begun the consultation process to appoint a new Chief Justice.

See <https://www.abc.net.au/news/2023-06-16/susan-kiefel-to-retire-early-chief-justice-high-court/102487420>.

JUDICIAL POWER

High Court Finds ss 78(1) and 79(1)(b) of the Crimes (Appeal and Review) Act 2001 (NSW) Apply by Force of the Judiciary Act 1903 (Cth)

The High Court has allowed an appeal from the Court of Appeal of New South Wales, concerning whether ss 78 and 79 of the *Crimes (Appeal and Review) Act 2001* (NSW) (*CAR Act*) applied to someone convicted of a Commonwealth offence by their own force, or by operation of s 68(1) of the *Judiciary Act 1903* (Cth). The majority held that ss 78(1) and 79(1)(b) of the *CAR Act* – but not s 79(1)(a) – were applied as Commonwealth laws by force of s 68(1) of the *Judiciary Act*. Section 68(1) of the *Judiciary Act* applies certain laws of a State or Territory to a person charged with Commonwealth offences, in respect of whom jurisdiction is conferred on the courts of that State or Territory under s 68(2).

My Huynh was convicted of a Commonwealth offence by the District Court of New South Wales, and applied to the Supreme Court for an inquiry – pursuant to s 78(1) of the *CAR Act* – following an unsuccessful conviction appeal, seeking an order that the case be referred to the Court of Criminal Appeal to be dealt with as an appeal ([1]–[5]). Where there is doubt or question as to their guilt, mitigating circumstances, or the evidence in the case, s 79(1)(a) permits the Chief Justice or an authorised judge of the Supreme Court to call for such an inquiry. Section 79(1)(b) allows the Chief Justice or authorised judge to refer the case to the Court of Criminal appeal to be dealt with as an appeal. The Court of Appeal held, by majority, that ss 78 and 79 of the *CAR Act* did not apply of their own force or by force of s 68(1) of the *Judiciary Act*, finding that the single judge therefore had no jurisdiction to determine the application under s 78(1) ([4]–[5]).

On appeal to the High Court, the Attorney-General – with the support of Mr Huynh – submitted that the Court of Appeal's decision was incorrect. The Court appointed amici curiae to present arguments responding to those of both parties. The Court unanimously held that ss 78 and 79 do not apply by their own force – the conferral of a power on a State court to set aside, on appeal, a conviction or sentence imposed in federal jurisdiction would be beyond the legislative power of the State ([37], Kiefel CJ, Gageler and Gleeson JJ). However, ss 78(1) and 79(1)(b) were applied as Commonwealth laws by force of s 68(1) of the *Judiciary Act*. Sections 78(1) and 79(1)(b) do not concern non-judicial procedure, and could be characterised as with respect to the hearing and determination of an appeal arising out of the trial or conviction of a convicted person. Section 68(1), however, cannot provide authority for the exercise of the independent executive power by a designated officer under s 79(1)(a).

See *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298; [2023] HCA 13.

INDIVIDUAL RIGHTS

NZ Bill of Rights

New Zealand Court of Appeal Finds Police Taking and Retaining Photographs without Lawful Authority Breaches Bill of Rights

The New Zealand Court of Appeal (Cooper J) has found that taking and retaining photos of an individual at a random traffic stop, and later using them for identification purposes, breaches the right to be secure against unreasonable search and seizure.

Mr Tamiefuna was convicted of one count of aggravated robbery and sentenced to a term of four years and 11 months' imprisonment without parole. Police identified Tamiefuna by cross-referencing CCTV footage with close-up photographs taken a few days after the robbery, when the vehicle he was travelling in was the subject of a random stop ([3]–[15]). On appeal, Tamiefuna claimed that the taking and retention of the photographs breached s 21 of the *Bill of Rights Act 1990* (NZ) (*NZBORA*), and claimed that the order to serve his sentence without parole was disproportionately severe, in breach of s 9 of the *NZBORA*.

The Court held that Tamiefuna had a reasonable expectation of privacy in the circumstances ([58]). There is a reasonable expectation that a person's photograph will not be deliberately taken and retained for identification purposes by police without a good law enforcement reason ([56]). The police acted without legal authorisation when they took and retained Tamiefuna's photograph, and this was in breach of s 21 of the *NZBORA*. Given this breach, the photographs were improperly obtained for the purposes of s 30 of the *Evidence Act 2006* (NZ) – however the photographs were nonetheless admissible as evidence against Tamiefuna, as the intrusion to the right was not very serious ([98]–[104]). The Court also found that the order under s 86C(4) of the *Sentencing Act 2002* (NZ) resulted in a disproportionately severe sentence, in breach of s 9 of the *NZBORA*. Had it not been for s 86C(4), the judge would not have imposed a minimum period of imprisonment and Tamiefuna would have been eligible for parole ([113]–[121]).

See *Tamiefuna v R* [2023] NZCA 163.

ECONOMIC AND FINANCIAL FRAMEWORK

Taxation

High Court Holds That Scheme for Payment of Notional GST by Local Government Bodies Does Not Impose a Tax

The High Court has unanimously held that ss 15(aa) and 15(c) of the *Local Government (Financial Assistance) Act 1995* (Cth) (the Act) do not impose a tax for the purposes of s 114 of the *Constitution*. The main issue in the case was whether a scheme for the payment of "notional GST" by local government bodies in New South Wales involved the imposition of a tax on property belonging to a State and was therefore inconsistent with s 114 of the *Constitution*.

Section 15(aa) of the Act makes it a condition of grants of local government financial assistance that States withhold amounts of notional GST payments that "should have, but have not, been paid by local governing bodies" and pay the amounts to the Commonwealth. Section 15(c) of the Act provides that if the relevant federal Minister notifies the Treasurer of a state that it has failed to comply with s 15(aa), the State must repay to the Commonwealth an amount determined by the federal Minister, not more than the amount the State has failed to pay. Hornsby Shire Council lodged with the Commissioner of Taxation an amended Business Activity Statement (BAS) following the sale of a car at an auction, the proceeds of which included an amount of $3,181.82 described as notional GST. The BAS resulted in a liability to pay GST in the sum of $3,146, reflecting the inclusion of notional GST. The Council paid the sum under protest, arguing that the GST liability arising from the inclusion of notional GST in its GST was a tax on property belonging to the State of New South Wales, contrary to s 114 of the *Constitution*.

At the High Court, the dispute concerned whether payment of notional GST was a compulsory exaction enforceable by law – a tax – or an entirely voluntary act. The Council contended that the combined operation of the Act, the *Federal Financial Relations Act 2009* (Cth) and the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) represented a "circuitous device" by which the prohibition in s 114 of the *Constitution* was impermissibly circumvented ([43]). The Court held that the Act did not impose a tax. The inclusion of notional GST in the Council BAS was a voluntary act in accordance with the Intergovernmental Agreement made by the Commonwealth and New South Wales. No federal law compelled the Council to include the notional GST in its BAS ([4]).

See *Hornsby Shire Council v Commonwealth* [2023] HCA 19.

JUDICIAL REVIEW

GROUNDS

High Court Finds Decisions Invalid as They Needed to Be Made by the Minister Personally

A High Court majority (Kiefel CJ, Gageler, Gleeson, Edelman and Jagot JJ) has allowed two appeals from a decision of the Full Court of the Federal Court of Australia. At issue was whether instructions issued to departmental officers by the Minister in 2016 (Ministerial Instructions) in the exercise of the Commonwealth executive power – and purported decisions made by department officers in compliance with them – exceeded the limits of executive power. The majority found that the instructions purported to instruct the officers to make a decision which could only be made by the Minister personally.

The appellants, upon refusal of their visa applications (which was affirmed by an administrative tribunal), requested that the Minister exercise the power under s 351(1) of the *Migration Act 1958* (Cth) (the Act) to substitute a more favourable decision for the tribunal's adverse decision, if the Minister thinks it in the public interest do so. This power, pursuant to s 351(3), may only be exercised by the Minister personally. The Ministerial Instructions directed officers to only refer such requests to the Minister in "unique or exceptional circumstances". Not satisfied that such circumstances applied, the Department finalised the requests without referral. At first instance and on appeal to the Full Court, the appellants unsuccessfully argued that the decisions were unreasonable, and the Full Court refused leave to raise a new ground of unlawfulness. The High Court granted special leave on both grounds ([48], [56]).

Section 351(1) of the Act confers personally on the Minister two distinct decisions, each involving an exercise of the statutory power: a procedural decision to consider or not consider whether to make a substantive decision; and a substantive decision to, in the public interest, substitute or not substitute a more favourable decision ([14], Kiefel CJ, Gageler and Gleeson JJ). The Minister could not delegate either of these decisions to departmental officers. The Ministerial Instructions exceeded the limitations imposed on executive power by s 351(3) of the Act, by requiring departmental officers to evaluate the public interest and make decisions entrusted to the Minister personally ([29]–[32]). As a result, the decisions made pursuant the Ministerial Instructions were unlawful.

See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214; [2023] HCA 10.

High Court Finds Judge Should Have Recused Himself from Full Court Appeal for Reasons of Bias

The High Court has allowed an appeal from a judgment of the Full Court of the Federal Court of Australia dismissing the appellant's appeal from a single-judge decision of the Federal Court. The Federal Court at first instance dismissed the appellant's application for judicial review of the Administrative Appeals Tribunal's decision to affirm a decision not to revoke cancellation of the appellant's visa ([5]–[9]). The visa cancellation was based on the appellant's sentence to a term of imprisonment for conviction of a drug offence. The High Court considered whether a judge sitting as part of the Full Court to hear the appeal should have recused himself by reason of a reasonable apprehension of bias. The judge in question had appeared as Senior Counsel for the Crown – in his former capacity as the Commonwealth Director of Public Prosecution – in opposition to an appeal by the appellant against his drug conviction ([10]).

On the morning of the Full Court hearing of the appeal, the judge's associate informed the parties of the judge's involvement in the conviction appeal. The appellant's counsel made an oral application for the judge to recuse himself, but the judge ultimately declined, giving both oral and written reasons ([11]–[17]).

By majority (Steward and Gleeson JJ dissenting) the High Court held that the judge should have recused himself from the Full Court appeal, finding that his appearance as counsel against the appellant in the conviction appeal gave rise to a reasonable apprehension of bias. The court noted the causal connection between the appellant's conviction and the visa cancellation as reinforcing the reasonableness of the apprehension of bias ([166]). Given the reasonable apprehension of bias on the part of the judge, the Full Court as constituted had no jurisdiction to hear and determine the appeal ([133]).

See *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15.

High Court Quashes Protection Visa Refusal Made Solely on National Security Grounds

The High Court has held by majority (Gordon, Edelman, Steward and Gleeson JJ) that the purported decision of the Minister for Home Affairs to refuse the plaintiff's application for a temporary protection visa under s 64 of the *Migration Act 1948* (Cth) (the Act) was invalid. The Court issued a writ of certiorari to quash the decision and a writ of mandamus compelling the Minister to determine the plaintiff's visa lawfully within 14 days ([53]).

The plaintiff, an Iranian citizen, arrived in Australia by boat in 2013 and was immediately detained under s 189 of the Act. In February 2017, the plaintiff made a valid application for a temporary protection visa. In October 2017, the plaintiff was convicted following a guilty plea to the aggravated offence of people smuggling, in breach of s 233C of the Act. The Minister refused the plaintiff's application in June 2022, as she was not satisfied that the grant of the visa was in the national interest pursuant to cl 290.227 of Sch 2 of the *Migration Regulations 1994* (Cth) given the plaintiff had been convicted of people smuggling. This was the sole basis for the refusal, and all other criteria for the grant of the visa were satisfied.

The plaintiff sought judicial review of the decision. The Court held that the decision was invalid. On proper construction of cl 790.227 – in light of its function and context – the clause did not operate to permit the Minister or their delegate to reconsider under the criteria of "national interest" matters that had already been considered under s 65, and to treat those matters as sufficient to form an opinion of non-satisfaction in relation to national interest ([91]–[99]). The plaintiff's people smuggling conviction bore directly on the consideration of the visa criterion Public Interest Criterion 4001, which the Minister accepted had been satisfied, and the discretionary visa refusal power in s 501, which the Minister decided

not to exercise. The fact alone that the plaintiff was people smuggler could not be treated as sufficient to conclude that the grant of the visa was not in the national interest under cl 790.227 ([104]–[105]). Clause 790.227 was "not intended to be a trump card" for the Minister to refuse the visa under s 65 without needing to consider any other relevant criteria or powers ([106]).

See *ENT19 v Minister for Home Affairs* [2023] HCA 18.

High Court Holds Finds Offending for Which No Conviction Was Recorded Is an Irrelevant Consideration in Visa Cancellation

The High Court has dismissed an appeal from the Full Court of the Federal Court of Australia concerning whether the Minister's refusal to revoke a decision to cancel Mr Thornton's visa gave rise to jurisdictional error because the Minister took into account an irrelevant consideration: Mr Thornton's offending as a child, for which no conviction was recorded. By majority (Gageler, Jagot, Gordon and Edelman JJ), the Court held that the Minister had taken into account an irrelevant consideration, giving rise to jurisdictional error.

Thornton, a citizen of the United Kingdom living in Australia since the age of three, held a Resident Return visa. At 21 years old, Thornton was convicted for offences and sentenced to 24 months' imprisonment, and his visa was subsequently mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) ([5]–[6]). In deciding not to revoke the visa cancellation, the Minister said he was satisfied Thornton represented an unacceptable risk of harm to the Australian community, citing that Thornton had begun "offending as a minor and had a number of offences recorded before reaching adulthood" ([7]). The primary judge dismissed Thornton's application for judicial review. On appeal, the Full Federal Court quashed the Minister's decision on the basis that the Minister had taken into account Thornton's offending contrary to s 184(2) of the *Youth Justice Act 1992* (Qld) and s 85ZR(2)(b) of the *Crimes Act 1914* (Cth) ([8]).

The Court held that, on proper construction, s 184(2) of the *Youth Justice Act* provided that Mr Thornton was taken to never have been convicted of an offence committed when he was a child under a Queensland law. As a consequence, under s 85ZR(2) of the *Crimes Act*, Thornton was to be taken by any Commonwealth authority never to have been convicted of an offence to which s 184(2) of the *Youth Justice Act* applies ([4]).

See *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17.