An Extract from

AN INDIGENOUS VOICE TO PARLIAMENT

Considering a constitutional bridge

CHAPTER SEVEN: The 'YES' Case

CHAPTER EIGHT: The 'NO' Case

FRANK BRENNAN

The Voice Referendum

How can I be better informed about the choice facing me?

To make an informed choice, it is imperative to gather all the relevant information. Jesuit priest, lawyer, and advocate for the rights of Aboriginal and Torres Strait Islander peoples, Frank Brennan SJ, has two chapters in his latest book, *An Indigenous Voice to Parliament – Considering a constitutional bridge*, to aid the voter in making an informed decision to vote *yes* or *no*. These chapters include Indigenous voices, complemented by two retired High Court judges.

This excerpt of chapter seven, The 'Yes' Case and chapter eight, The 'No' Case are drawn directly from the book, with permission from the author and without any additions or alternations. For a more extensive review and understanding of The Voice Referendum, a copy of the book can be obtained via Kindle .

An Indigenous Voice To Parliament

FRANK BRENNAN SJ

CHAPTER SEVEN

The 'Yes' Case

Given that the government has decided not to provide voters with a pamphlet setting out the 'Yes' and 'No' case, I believe it's useful now to attempt to do that. Given that the issue is an Indigenous Voice, it is imperative that the reader hear directly from Indigenous voices. In these next two chapters, Indigenous voices will be complemented by those of two retired High Court judges who have expressed contrary views about the legal certainty and justiciability of Mr Albanese's Garma formula. I will add Tony Abbott's voice to the 'No' case as he raises important questions about governance for the good of all Australians.

With the background provided in this book, I trust that these two chapters will be an aid for the informed voter wanting to make a conscientious decision to vote yes or no. I am at pains to present fairly the thinking of key advocates, most especially the Indigenous advocates.

Three of the key Indigenous leaders at Uluru were Megan Davis, Pat Anderson and Noel Pearson.

Megan Davis is a law professor and an appointed expert with the UN Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples based in Geneva. She brings many years of international experience to her advocacy for the Voice. She was a member of the 2012 Expert Panel and a member of the 2017 Referendum Council. She writes:

> The Voice to Parliament is a common feature in many liberal democracies around the world. It is a simple proposition: that Indigenous peoples should have a say in the laws and policies that affect their lives and communities. The idea is that if you have direct Indigenous input into law and policy making, the quality of advice will be vastly better than contemporary decision making which is primarily done by non-Indigenous people making decisions about communities they have never visited and people they do not know. This is why so many communities are not flourishing. This is why so many Aboriginal and Torres Strait Islander people are struggling. The decisions made about their lives are crafted by people in Canberra or other big cities …
>
> The task ahead now is to agree to the amount of detail that is required for Australians to feel fully informed when voting at the ballot box. The full-blown Voice design can be legislated after a successful referendum — such a deferral of detail is a common constitutional and political strategy around the world …
>
> The Voice to Parliament reform is intended to bring security and certainty to people's lives, that we believe will manifest in better outcomes for

> communities. Being constitutionally enshrined, the Voice will be sustainable and durable well beyond political timetables. It means that Indigenous empowerment and active participation in the democratic life of the nation is not dependent on which political party is in power.
>
> The second reason for constitutional entrenchment is that it is intended to compel government to listen. Currently the government and policy makers are not compelled to hear what First Nations have to say about the laws and policies that affect them. Entrenchment will mean listening to mob is compulsory and allowing Indigenous input into policy will be mandated. This will mean that laws and policies are more likely to be targeted and tailored to community problems and needs - and it will mean laws and policies are less likely to fail.[1]

Noel Pearson, the principal architect of the Voice, was a member of the Gillard Government's 2012 Expert Panel, a member of the Turnbull Government's 2017 Referendum Council and a member of the Morrison Government's 2020 Senior Advisory Group. He delivered the 2022 Boyer Lectures, the first of which was largely dedicated to the Voice. In that lecture entitled *Who We Were, Who We Are, And Who We Can Be*, he outlined Anthony Albanese's Garma announcement and conceded: 'We know the nation's leader must be joined by all his counterparties in the federal parliament, and in the parliaments of the states, and communities across the country – but our hearts are hopeful.'[2] He went on to describe:

> … a bridge to join all Australians in common cause, to work together in partnership to make a new settlement that celebrates the rightful place of Indigenous heritage in Australia's national identity. A constitutional bridge to create an ongoing dialogue between the First Peoples and Australian governments and parliaments, to close the gap between Indigenous and non-Indigenous Australians.

He made these observations culminating in a thought experiment which he put to listeners if they were to witness Aboriginal elders convening on the bank of the Hawkesbury River where the Queensland boat the Lucinda was docked, with the key founding fathers on board drafting the Australian Constitution:

> Constitutional recognition will endure but the legislative details can be changed by the parliament if and when it chooses to do so.
>
> Of all the claims I will make in these lectures this is the boldest and one of which I am most convicted: racism will diminish in this country when we succeed with recognition. It will not have the same purchase on us: neither on the majority party that has defaulted to it over two centuries, nor the minority that lives it, fears it and who too often succumb to the very fear itself.

The Australian Constitution moved from negative exclusion to neutral silence. But the 1967 referendum was not positive recognition.

Australia doesn't make sense without recognition. Until the First Peoples are afforded our rightful place, we are a nation missing its most vital heart.

A 'Yes' vote in the Voice referendum will guarantee that Indigenous peoples will always have a say in laws and policies made about us. It will afford our people our rightful place in the constitutional compact. This constitutional partnership will empower us to work together towards better policies and practical outcomes for Indigenous communities.

Constitutional recognition of Indigenous Australians is not a project of identity politics, it is Australia's longest standing and unresolved project for justice, unity and inclusion.

If these representations included the constitutional recognition of Aboriginal and Torres Strait Islander peoples through a Voice to the Parliament and Executive Government in order to create a dialogue between the old and new Australians in respect of the country's heritage and its future – what would those on board the Lucinda respond with the benefit of our hindsight today? I ask each of us: what would our response be if we were on board the Lucinda?

Pat Anderson, the long-time Chair of the Lowitja Institute where she has led research and advocacy on Aboriginal health issues, was Co-Chair of the 2017 Referendum Council and the respected elder who led the Uluru Dialogues. She writes:

Since the advent of colonisation, the absence of an effective process for conducting dialogues between the broader community and First Nations people has been a festering sore at the heart of Australian society.

The *Uluru Statement from the Heart* advocates for a process of dialogue to set us on a path towards a new way of living together. The statement was agreed to in 2017 by a convention of more than 250 First Nations people after an inclusive and rigorous process of regional dialogues. It proposes a First Nations Voice to Parliament to guide a passage both to a new 'coming together' and to the clear articulation of the long-suppressed truth.

Establishing the Voice will lead to immediate, important outcomes. It will set the scene for addressing the centuries of injustice. It will create an effective process to address the intergenerational disadvantage many communities suffer. It will help overcome the historical exclusion of First Nations people from public forums. And crucially, it will offer an important symbolic gesture of acknowledgement and recognition that the days of *vox nullius* (voicelessness), the primary intention and consequence of terra nullius, are at last over.

> It is, of course, unlikely that all First Nations people will speak with one voice – indeed, that would be undesirable. However, creation of a secure channel of communication will open up new ways for all members of the Australian community to negotiate their differences and discover novel solutions to our common challenges.
>
> First Nations people will therefore not be the only ones to gain from the Voice. A vibrant, living platform for vigorous dialogue that addresses fundamental political issues will also benefit the wider society. It will help revive the ailing public sphere in Australia, restoring trust in institutions that have been degraded and depleted as a result of a deeply established focus on personal ambition, vested interests and loss of shared ethical vision.[3]

Linda Burney is a cabinet minister in the Albanese Government and the Minister for Indigenous Australians. She was previously a minister in the New South Wales Government and a member of the Council for Aboriginal Reconciliation. She is committed to grassroots community education about the Voice in preparation for the 2023 referendum. She spoke about the Voice at the 25th anniversary dinner for Australians for Native Title and Reconciliation (ANTAR). She said:

> The Voice means consulting with Aboriginal and Torres Strait Islander people about the matters that affect us. The Voice means delivering better practical outcomes. Practical outcomes in health, education and housing.
>
> The Voice is not to be a third chamber, nor will it have veto powers. As the Prime Minister has said, the Voice will be 'an unflinching source of advice and accountability. A body with the perspective and the power and the platform to tell the government and the parliament the truth about what is working and what is not.' The Voice will be consulted on matters directly affecting Aboriginal and Torres Strait Islander people – like Indigenous health, education and family violence.[4]
>
> She identified common principles for the Voice as a body that:
>
> • provides independent advice to the Parliament and Government
> •is chosen by First Nations people based on the wishes of local communities
> • is representative of Aboriginal and Torres Strait Islander communities
> • is empowering, community led, inclusive, respectful, culturally informed, gender balanced, and includes young people
> • is accountable and transparent and
> • works alongside existing organisations and traditional structures.

She was insistent that the Voice would not have a program delivery function and would not have a veto power.

She concluded:

> For decades, Governments and bureaucrats in Canberra have thought they knew the solutions for our communities, better than the people actually living in our communities. We simply can't accept more of the same. More of the same poor outcomes. More of the same gaps in life expectancy. More of the same wasted opportunities. We can't accept that any longer. That is why the Voice to Parliament is needed. Because the Voice to Parliament will mean that governments of all persuasions will need to consult and listen to Aboriginal and Torres Strait Islander people on the issues that affect them.
>
> And an Aboriginal and Torres Strait Islander Voice to Parliament will make Australia a better place for everyone. I think most Australians want to see First Nations people thrive and prosper like so many people that have come to these shores to make a home and raise a family.

Senator **Patrick Dodson** has been Director of the Central and Kimberley Land Councils. He served as a Commissioner in the Royal Commission into Aboriginal Deaths in Custody. He was the inaugural Chair of the Council for Aboriginal Reconciliation and Co-Chair of the 2012 Expert Panel for Constitutional Recognition of Indigenous Australians. He is now the Albanese Government's Special Envoy for Reconciliation and Implementation of the Uluru Statement. Addressing the Senate on 7 September 2022, he said:

> As envisaged in the *Uluru Statement from the Heart*, the Voice to Parliament is a modest and generous invitation to the nation. Out of the torment of our powerlessness, it weaves a simple and hopeful suggestion for a way forward. It proposes a First Nations representative body to advise the parliament on the laws and policies that will impact upon their lives, and it proposes that this body, the Voice, be enshrined in the Constitution to ensure it has a place of recognition, responsibility and contribution into the future.
>
> A Voice means that First Nations people, the people who know what works, will advise the parliament in a focused and consistent manner about laws that impact their lives. It is about shaping better policies and strategies that make a practical difference. It is about getting it right for the first time. It is about giving a constant voice to the people who don't have one. It is not the end of the road. It is not the only thing we need to do. But it is the next significant nation-building step in our journey towards reconciliation.[5]

He addressed the Senate again on 23 November 2022:

> What First Nations people have asked for is a very simple thing: a say in how the parliament makes laws about their wellbeing and their lives. It will give Aboriginal and Torres Strait Islander peoples a say on the issues that affect them – after 250 years, not a bad idea – by allowing communities to have a say on their destinies, and that will improve their lives and their circumstances. The

> government's role is to ensure that the bricks and mortar of a referendum are sound and that we give the Australian people the best chance of making a clear and considered decision on a voice to parliament. We are consulting with First Nations leaders and constitutional experts to lay the groundwork for a referendum.
>
> Let me share one part of the work to date, a set of principles for the Voice that have been agreed by the working group. It will be a body that provides independent advice to the parliament and the government. It will be chosen by Aboriginal and Torres Strait Islander peoples based on the wishes of their local communities. It will be representatives of those communities. It will be gender balanced and include youth. It will be accountable and transparent, and it will work alongside existing organisations and traditional structures. The Voice will not have a program delivery function. Nor will it have a veto over the parliament or the executive government.[6]

While many voters will be supportive of a Voice to Parliament providing Indigenous perspectives on any proposed special laws – specifically applicable to Indigenous Australians, their land rights and cultural heritage – some will be cautious about a Voice that can make representations not only to Parliament but also to executive government and in relation to any matters of concern to Indigenous Australians. Questions have been asked whether such an expanded Voice would risk litigation in the courts and needless clogging of the daily working of Government.

Retired High Court Judge **Kenneth Hayne** is chairing the Albanese Government's Constitutional Expert Group on the Voice. He was on the High Court when the judges made it clear that the Executive Government could not completely exclude the judges from reviewing decisions by Commonwealth public servants in relation to the asylum claims of non-citizens. Presumably he would have a fair sense of how the High Court would deal with a constitutional entity (the Voice) having a constitutional entitlement to make representations to public servants about all manner of things. If public servants were to treat such representations as junk mail in their in-boxes, presumably the High Court would intervene.

Hayne sought to address fears about ongoing litigation in relation to a Voice having a constitutional entitlement to make representations to Executive Government on any matters which the Voice members thought relevant to Indigenous Australians.

He wrote:

> If the voice makes a representation to the executive, I suppose someone may say that the executive did not consider what was said. Again, finding a plaintiff with standing to make that submission may be difficult. But get past that hurdle; if that person could show the executive had ignored what was said, the resulting decision could be undone only if the decision-maker was bound to have regard to what was said. And whether a decision-maker would be bound to take it into account would be a matter

for debate. Assume, however, that the decision-maker were bound to consider what was said, isn't that the very point of the Voice — to give First Peoples a Voice in matters relating to First Peoples? And the most that could happen is that the decision-maker would be told to remake the decision. And in remaking the decision, what the Voice said would be one matter to take into account. It would not dictate the outcome. So I do not see future litigation derailing operation of the Voice.[7]

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1 Megan Davis, 'A First Nations Voice to Parliament: Our plea to be heard', ABC Opinion, 27 May 2022, available at https://www.abc-net.au/ religion/megan-davis-voice-to-parliament-ourplea-to-be-heard/ 1 1300474

2 Noel Pearson, Boyer Lecture 1: 'Who We Were, Who We Are, and Who We Can Be',31 October 2022, available at https:// capeyorkpartnership.org.au/noel-pearson-boyerlecture-one/

3 Pat Anderson et al, 'Why a First Nations Voice should come before Treaty', The Conversation, 22 October 2022, available at https:// theconversation.com/why-a-first-nations-voiceshould-come-before-treaty- 192 3 88

4 Linda Burney, 'Australians for Native Title and Reconciliation (ANTAR) 25th Anniversary Dinner',12 October2022 available at https:// ministers.pmc.gov.au/burney/ 2022/australiansnative-title-and-reconciliation-antar-25thanniversary-dinner

5 Senate, Hansard, 7 September 2022, p. 86.

6 Senate, Hansard, 23 November 2022, p. 38.

7 Kenneth Hayne, 'Fear of the voice lost in the lack of legal argument', The Australian, 28 November 2022, available athttps://www.theaustralian-com.au/commentary/fear-of-the-voice-lostin-the-lack-of-legal argument/news-story/9696d03a566d3d946a74b7035175a9e4

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CHAPTER EIGHT

The 'No' Case

Senator Jacinta Price is a Country Liberal Party Senator for the Northern Territory Having been deputy mayor of Alice Springs she is well fan liar with the plight of remote Aboriginal communities. In her first speech to Parliament, she spoke of 'platitudes of motherhood statements from our now Labor Prime Minister who suggests without any evidence Whatsoever that a Voice to Parliament bestowed upon us through the virtuous act of symbolic gesture by this government is what is going to empower us.'[1] She told the Senate:

> Prime Minister, we don't need another 'hand out' as you have described the 'Uluru Statement' to be. No, we Indigenous Australians have not come to agreement on this statement as also what you have claimed. It would be far more dignifying we were recognised and respected as individuals in our own right who are not simply defined by our racial heritage but by content of our character.
>
> I am an empowered Warlpiri/Celtic Australian woman who did not and has never needed, a paternalistic government to bestow my own empowerment upon me. We've proven for decades now that we do not need a Chief Protector of Aborigines. I have got here along with 10 other indigenous voices, including my colleague Senator for South Australia Kerryn Liddle, within this 47th parliament of Australia like every other parliamentarian: through hard work and sheer determination.
>
> However, now you want to ask the Australian people to disregard our elected voices and vote yes to apply constitutionally enshrined advisory body without any detail of what that might in fact entail! Perhaps a word of advice — since that is what you're seeking: Listen to everyone and not just those who support your virtue-signalling agenda but also to those you contradict.[2]

Anthony Dillon is an academic and one-time commentator on Indigenous affairs. He writes regularly in *The Spectator*. He identifies as both Aboriginal and Australian. He believes that 'the current popular ideologies which portray indigenous people merely as victims of history and White Australia (the invasion and racism) should be challenged'. In one of hie earliest pieces opposing constitutional recognition of any sort, he wrote in 2014:

Recognition of culture in the Constitution has the potential to open the gate to different rules for people with Aboriginal ancestry and [it has] become a 'lawyer's picnic'. One very concerning example of different rules the insistence on placing children in need of short-term and long-term care with 'culturally appropriate' carers. Currently for children with Aboriginal ancestry (however

minimal), the Aboriginality of potential carers is given far too much weight. This practice has sometimes ended in tragedy. Some children have suffered, all in the name of 'culture'. A colour-blind culture or way of life, characterised by love is a far more important consideration than a culture that is assumed to be Aboriginal simply because the adult potential carers themselves have some Aboriginal ancestry.

Let us not forget the obvious elephant in the room - who an Aborigine? Currently, anyone with any Aboriginal ancestry is entitled to identify as an Aboriginal Australian. This generous criterion is aligned with the ridiculous mantra, 'You are either Aboriginal or you are not.' Categorising Australians as Aboriginal, or not, by these rules contributes to the emergence of 'Aboriginal experts' who act as gatekeepers and significantly influence the national discussion on Aboriginal affairs. As a consequence of the stridency of these 'expert voices' (some of whom only discover their voices in the later stages of their lives), discussions are monitored and controlled to the point where non-Aboriginal people are constrained in expressing their opinions on matters that affect their fellow Australians. Some are not game to open their mouth because so many of these gatekeepers loudly proclaim that non-Aboriginal people have no right to have or to express an opinion on these matters. This 'us-vs-them' separatism lines the pockets of a few but keeps many Aboriginal people from reaching their full potential.

My gravest concern is that recognising culture in the Constitution has the potential to accentuate the us-vs-them divide. Even more dangerously, privileging Aboriginal culture with the full force of the law has the potential to spark a 'feeding frenzy' of 'culture vultures' an endless welter of ever more strident demands for special consideration. Perhaps my concerns are unfounded, but I suggest that we need to think through very carefully. We need to ask ourselves: will changing the Constitution put food on the table, get kids into school, adults into jobs, and families living in safe, clean environments?[3]

Warren Mundine is a successful businessman who has had a colourful political history, having been national president of the Labor Party, a member of Tony Abbott's Indigenous Affairs Council and an unsuccessful candidate for the Liberal Party in a federal election. He is Director of the Indigenous Forum at the conservative Centre for Independent Studies. He writes:

> People ask me why I am opposed to the *Uluru Statement* from the *Heart* and an Aboriginal and Torres Strait Islander Voice to Parliament. It is simple question, and I have a simple answer.

The assumption that Aboriginal and Torres Strait Islander don't already have a voice to Parliament, or that Indigenous voices are limited, is ridiculous.

All my adult life there have been Aboriginal and Torres Strait Islander voices in Canberra. The Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI), the National Aboriginal Consultative Council (NACC), National Aboriginal Council (NAC), the Aboriginal Development Commission (ADC), the Aboriginal and Torres Strait Islander Commission (ATSIC), the National Congress of Australia's First Peoples, the Reconciliation Council, the National Indigenous Council, the Prime Minister's Indigenous Advisory Council, the Coalition of the Peaks, the Torres Strait Regional Authority and the Torres Strait Regional Council, Northern Land Council, Central Land Council, the National Native Title Council and numerous other Land Councils and Peak Industry Bodies in Health, Education, Law, Justice, Children etc.

And then we have had advisory committees to Ministers for Education, Health, and more. As well individual Aboriginal and Torres Strait Islander people lobbying, Aboriginal and Torres Strait Islander members of various political and their Aboriginal and Torres Strait policy committees. Not to mention festivals and conferences such as Garma and Barunga, which politicians, corporates and special interest groups attend.

I would argue loudest voices are from individual Aboriginal and Torres Strait Islander people who communicate all the different viewpoints within our communities. And, yes, there is not one Aboriginal and Torres Strait Islander viewpoint. There are many - just like for the rest of Australia. If the vast array of councils, committees, coalitions, and conferences over half a century haven delivered the outcomes Indigenous people want to see, what makes anyone think a 'Voice to Parliament' will be any different simply because the power to create it sits in the Constitution?

I don't understand why it needs to be in the Constitution at all. And I haven't been convinced by any argument on this so far. The Constitution the fundamental law underpinning our nation that all other laws must comply with. If it to be amended or meddled with, then it should be for a bloody good reason — and it should be something that will make us a better and more united nation (as was the case for the 1967 referendum).

The Voice to Parliament will be nothing more than another huge bureaucracy to control Indigenous fives. The same old. same old.[4]

Writing in *The Australian,* Mundine says:

This new government must embrace a new mindset when considering how best to empower Aboriginal people to be all that they can be. However,

with its focus on the *Uluru Statement from the Heart*, it is questionable as to whether such a mindset will be adopted. The principal focus of the statement, the Indigenous Voice to Parliament, seems to be repackaging of the same old dogma that has defined (and failed) Aboriginal affairs for too many years; namely, that only Aboriginal people are qualified to speak about Aboriginal issues.

We offer some ideas here that reflect a new mindset. These ideas will be unpopular with many, but they need to be, otherwise we will see only a repeat what we've seen for the past tew generations where symbolism, quotas, grand statements against racism and talkfests rule. This mindset will pave the way for a focus on jobs, education, housing, modern services and all the other benefits most other Australian take for granted. All this contributes greatly to long rich lives, which, as Australian citizens, is the absolute right of Aboriginal Australians as Australian citizens.

A new mindset must challenge the myth that Aboriginal people are vastly different from other Australians. While there may be some minor differences between Aboriginal Australians and their non-Aboriginal brothers and sisters, they have the same needs and desires: to live in safe and clean environments, to have an education that equips them for the modern world, to have an opportunity to engage service to their local and broader communities, and to have access to basic goods and services such as modern health facilities and fresh food. In far too many communities these basic rights are missing.

This belief that Aboriginal people are a different species requiring 'culturally appropriate' solutions has kept an Aboriginal industry thriving and allowed politicians, academics, and consultants to build successful careers for themselves while people on the ground languish. Just look at how much attention this new government gives to the Uluru statement - considerably more than what is being given to the dysfunction in remote communities.[5]

As prime minister, **Tony Abbott** was an advocate for completing the Constitution, not changing it. He was rightly renowned for his commitment to improving the lives of Aboriginal and Torres Strait Islander peoples on remote communities and committed himself to spending a week each year while prime minister with one of the remote communities. He has spent years in dialogue with Noel Pearson but remains unconvinced about the Voice. He wrote very forthrightly:

> Recognising Indigenous people in the Constitution is well worth doing, but only if it's done in ways that don't damage our system of government and don't compromise our national unity. Done well, recognition would complete our Constitution rather than change It.

Done badly, recognition would entrench race-based separatism and make the business of government even harder than it currently is.'

In my judgment, there are four massive issues with this concept of Indigenous recognition by way of a voice. First, it's a race-based body comprising only Indigenous people. Unless the government is to nominate or the parliament is to select the members of the Voice, there would presumably have to be a race-based electoral roll determining who could stand for election and who could vote for the Voice's members. This would give Indigenous people two votes: first, like everyone else, a vote for the parliament itself: and second, in right that's uniquely theirs, a vote for the Voice. If governments were in the habit of making decisions for Indigenous people without their input, or if the parliament were devoid of Indigenous representation, there might at least be an argument for such a special Indigenous body. As it's happened though, constitutionally entrenching a separate Indigenous voice when there are already 11 individual indigenous voices in the parliament, and when there's arguably 'analysis paralysis' from a surfeit of Indigenous consultation mechanisms already, is a pretty strange way to eliminate racism from our Constitution and from our institutional arrangements.

Second, it would vastly complicate the difficulties of getting legislation passed and anything done. If the Voice chooses to have a view on anything at all that touches Indigenous people, that view would have to be taken very seriously by government; indeed, as the PM has admitted, it would be a veto, in fact, if not in theory.

Third, in the event that an Indigenous person or entity were aggrieved by a government that failed to give the Voice a chance to make representations on any issue, or that then ignored it, there could readily be an application to the High Court to rule that the Constitution had been breached. This is the likely consequence of importing into the Constitution such a vague-yet-portentous concept as a 'Voice' (as opposed to one described as an advisory body or a commission), especially one that's said to be the means of putting an end to centuries of marginalisation. At the very least, the existence of a Voice could import further delay into the finalisation of legislation or decision-making as it's given adequate time to Investigate and come to its conclusions.

Fourth, the whole point of Indigenous recognition is to address a gap in what's otherwise been an admirable Constitution and, in so doing, to help to complete the reconciliation of Indigenous people with modern Australia. There could hardly be a greater setback to reconciliation than a referendum that tails. Yet that the likelihood - at

> least based on the record of previous attempts to change the Constitution - in the absence of substantial bipartisan support. Although the Coalition's Indigenous affairs spokesperson has previously been an in-principle supporter of a Voice, the new Coalition senator tor the Northern Territory the proud 'Celtic Warlpiri Australian' woman Jacinta Price, has expressed deep scepticism about a proposal with so much of the detail thus far omitted, with so much potential for ineffective posturing, and that defines people by racial heritage.
>
> I can understand why many indigenous leaders would want constitutional change to go beyond the symbolic order to produce better outcomes for their own people, and hence the call for their own unique voice to which the parliament should defer. But better outcomes are ultimately the product of better attitudes, and these are more likely to be engendered by a generous acknowledgment of all the elements that have made modern Australia such a special place than by creating yet more elements of government based on Indigenous ancestry.
>
> Based on what we currently know, the Voice is wrong in principle, almost sure to be bad in practice, and unlikely to succeed in any referendum. If it fails, reconciliation is set back. If it succeeds, our country is permanently divided by race. Hence the fundamental question: why further consider something that would leave us worse off whichever way it goes?[6]

Ian Callinan served on the High Court with Kenneth Hayne. He is a well-known constitutional conservative, having been placed on the High Court by John Howard when Tim Fischer at the time of the *Wik* decision was calling for a 'capital C conservative' to be placed on the court. Callinan disagreed with Hayne's assurance that there was nothing to fear from the Voice. In particular, he thought Hayne was underplaying the prospect of litigation that might arise were a Voice to executive government, as well as to parliament, to be placed in the Constitution. He said that 'like senator Jacinta Nampijinpa Price and many other Australians. including many; many lawyers of goodwill, I do not think the Voice is the way'. He wrote cordially and respectfully but very firmly:

> Stretching my imagination only a little, I would foresee a decade or more of constitutional and administrative law litigation arising out of a Voice whether constitutionally entrenched or not. Every state and territory are likely to have an interest in any representations and in the interactions between the Voice and the constitutionally entrenched houses of parliament and executive government.

It is one thing to say the Voice can make representations only, but in the real world of public affairs, as the Prime Minister candidly acknowledged, it would be a brave parliament that failed to give effect to representations of the Voice.

Who knows what a future High Court might do as seeks to juggle the respective rights, obligations, and 'expectations' to which the voice would give rise? I can imagine any number of people and legal personalities in addition to the states who might plausibly argue that they have standing.

Standing is a highly contestable matter. It is an opaque and plastic concept. Whether a person has standing or not is itself a just justifiable question of the kind regularly heard and determined by the courts, expansively so in recent times. One has only to glance at the litigation that environmental concerns have generated as to standing to see that this is so.

I have no doubt that already, courageous, and ingenious legal minds both are conceiving bases upon which to litigate the many legal and cultural implications of the Voice. The Voice, or a member of it, is almost certain to argue in the courts that a member of the executive government, in executing a parliamentary enactment of a representation of the Voice, took into account an irrelevant consideration or failed to take into account a relevant one, or made a decision that no reasonable person could make, shifting (indicators] relied upon in a most every challenge brought to the actions of government.[7]

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1. Senate, Hansard, 27 2022 p, 120, also available at https://www.jacintaprice com/maiden-speech
2. Ibid, pp. 120-121.
3. Anthony Dillon 'Recognition may mean never closing the gap', in Gary Johns, *Recognise What*? Connor Court, pp. 60-61.
4. Nyunggai Warren Mundine, *Push for a Voice to Parliament is a bureaucratic power grab to give Indigenous Australians rights they already have', Centre for Independent Studies, 9 August 2022, available at https://www.cis.org.aufcornmentary/opinionfpugh-for-a-voice-to-parliament-is-a-bureaucratic-power-grab-to-give-indigenous-australians-rights-they-already-have/
5. Nyunggai Warren Mundine, 'New mindset of action must replace grand symbolic gestures', *The Australian*, 20 July 2022, available at https://www.theaustralian.com.au/commentery,'new-mindset-of-action-must-replace-grand-symbolic- gestures/news-story/23c66f4209b1c0bc5760e04c67d443fb
6. Tony Abbott, 'Pass or fail, this referendum will surely leave us worse off ',*The Australian*, 5 November 2022, available at https://www.theaustralian.com.au/inquirer/pass-or-fail-this-referendum-will-surely-leave-us-worse-off/newsstory/761616d76aaa8e5e308ed9ce1d04c8ba
7. Ian Callinan, 'Examining the case for the voice an - argument against', *The Australian*, 17 December 2022, available at https://www. theaustralian.com.au/inquirer/examining-the-case-for-the voice-an-arguement-against/news-story/e30c8f2ffcbae73eaa3921e82bf174a9

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