
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

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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-our-plea-to-be-heard/11300474>
 - 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-boyer-lecture-one/>

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

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-voice-should-come-before-treaty-192388>

4 Linda Burney, ‘Australians for Native Title and Reconciliation (ANTAR) 25th Anniversary Dinner’, 12 October 2022 available at <https://ministers.pmc.gov.au/burney/2022/australians-native-title-and-reconciliation-antar-25th-anniversary-dinner>

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

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

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

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

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

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