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The Rejection of the Voice for Aboriginal People in Australia – A Postmortem of Causes of Failure

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Abstract

On 14 October 2023, the Australian electorate rejected by an overwhelming majority a proposal for a constitutionally guaranteed advisory body, to be called the Aboriginal and Torres Strait Islander Voice. This was the fourth attempt in Australia to create an advisory voice for Aboriginal people, but the first time it was attempted via a constitutional amendment involving a public vote. The rejection is continuing to reverberate through Australian society. To many Aboriginal people this was not only a rejection of a technical proposal, but a rejection of their aspirations of self-determination. This article reflects on some of the root causes why in the view of the author, the referendum failed. The article is critical of the lack of information about the composition and functions of the proposed Voice as well as the inconsistencies between various reports and public documents. These contributed to public scepticism and rejection of the proposal.

Keywords : Advisory Body; Australia; Indigenous Rights; Referendum; Self-Determination; The Voice

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I. INTRODUCTION

On 14 October 2023, the Australian electorate rejected by an overwhelming majority a proposal for a constitutionally guaranteed advisory body, to be called the Aboriginal and Torres Strait Islander Voice (the Voice).[1] The proposed amendment would have obligated Parliament to enact legislation to create the Voice and to legislate about its composition, powers, functions, and related aspects. A two-stage process was proposed: first, an amendment to the Constitution for the Voice to be mandated; and second, legislation to be enacted in which the detail of the Voice was contained. From the outset this process presented a challenge since it meant that the public had to vote on a constitutional proposal and amendment of which the detail was not known.

The current process leading to the referendum started in 2017 and culminated in an extensive and deeply divisive public campaign at the end of 2023.[2] The proposed amendment to the Constitution rested on three principles, namely *recognition* of Aboriginal people[3] as the first people of Australia; mandating the creating an *advisory body* by which Aboriginal people could make 'representations' to the national parliament and executive government; and *enshrining* the principle of an advisory Voice into the Constitution.

The proposed amendment read as follows:

> **Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples**
>
> **129 Aboriginal and Torres Strait Islander Voice**
>
> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

[1] For an analysis of voting, see Stephan Baum, "Unravelling the Referendum: An Analysis of the 2023 Australian Voice to Parliament Referendum Outcomes across Capital Cities," *Research Square* (preprint), 2024, https://doi.org/10.21203/rs.3.rs-4069107/v1.

[2] Selecting a date when the process by which Aboriginal people sought greater self-determination started is a challenge because Aboriginal demands to be heard and consulted go back to the settlement of the country. For purposes of this article, 2017 is chosen simply because that is the year when the Aboriginal delegates started their deliberations at Uluru, where the *Uluru Statement from the Heart* was adopted.

[3] It must be noted that the reference to "Aboriginal people" does not imply that they are a single Indigenous group with one cultural and language identity. Aboriginal and Torres Strait Islander peoples comprise around 150 language groups, with many communities having a close connection to areas where their ancestors resided and called "country." Around 4% of the total population (984,000) identify as Aboriginal. Australian Bureau of Statistics, "Census 2021" (Canberra, 2021), https://www.abs.gov.au/census.

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.

The question put to the electorate by way of the referendum was whether they supported the amendment to the Constitution. For the Constitution to be amended a double majority, being a majority of the states (4 out of 6 states) as well as a majority of the total popular vote, is required.[4] The final vote was 60% No against 40% Yes.[5] The amendment was defeated in each of the 6 states. The result was 'shocking but not a surprise.'[6]

The process leading to the referendum commenced in 2017 when a group of Aboriginal leaders met at the spiritual centre of Australia, Uluru, to discuss their demands for constitutional recognition. The statement adopted by them, referred to as the Uluru Statement from the Heart, envisaged an amendment to the Constitution in the format that was put to the referendum.

The rejection of the constitutional amendment raises many questions for Australia as far as reconciliation, indigenous rights, self-determination, consultation, and the closing of the socio-economic gap between Aboriginal and non-aboriginal persons are concerned.[7] The scale of the rejection of the proposal sent reverberations through Australian society since there is no alternative plan for national consultation with Aboriginal people. One must note, however, the consultation with Aboriginal people at a *local level* in Australia through native

[4] It is noted that since the enactment of the Constitution in 1901, there had been 46 proposals at 18 occasions to amend the Constitution, of which only 8 had been successful.
[5] Australian Electoral Commission, "National Results," 2023, https://tallyroom.aec.gov.au/ReferendumNationalResults-29581.htm.
[6] Mike Berry, "The Voice Referendum," *Journal of Australian Political Economy* 92 (2024): 247.
[7] Charles and Hamilton view the outcome as a crisis in democracy and the referendum having been "hijacked" by lies and mining interests. Katharine C. Charles and Laura Hamilton, "The Voice and Australia's Democracy Crisis," *Meanjin* 83 (2024): 200–209.

title processes, is advanced, extensive, and sophisticated.[8] I have suggested in the aftermath of the referendum that for future self-determination initiatives, native title should be used as a springboard for broader consultation and cooperation.[9] More than half of the Australian landmass is covered by native title and the empowerment this brings could be harnessed for regional and national consultation. As far as *national* consultation is concerned all leaders have however now been sent back to the drawing board. The state of South Australia has become the first federal state to enact by legislation a First Nations Voice to state parliament with the objective to 'give First Nations people a voice that will be heard by the Parliament of South Australia, the Government of South Australia and other persons and bodies.'[10] The first election for the state-voice took place on 16 March 2024, with a low voter turnout of around 10 percent.[11] The South Australia state-voice is an advisory, consultation, and advocating body.[12] Other states are also considering various forms of advisory, and truth and reconciliation processes.

The experiences of Australia with the design of a national consultative body for indigenous people are not unique to that country. Internationally advisory bodies for indigenous people have had a challenging pathway. For example, in South Africa the Khoisan Act has been declared as unconstitutional;[13] in the Nordic countries the Sámi Declaration remains in draft; in Finland there are ongoing attempt to clarify the powers and functions of the Sámi Parliament vis-

[8] Richard Bartlett, *Native Title in Australia*, 4th ed. (Chatswood, NSW: LexisNexis Butterworths, 2020); Bertus de Villiers, "Using Control over Access to Land to Achieve Self-Government (of Some Sort): Reflecting on the Experiences of Aboriginal People with the Right to Negotiate in Australia," in *Navigating the Unknown: Essays on Selected Case Studies about the Rights of Minorities*, edited by Bertus de Villiers, 104–37 (Leiden: Brill, 2022).

[9] Bertus de Villiers, "Life after the Failed Voice: Options for Aboriginal Self-Determination and Consultation in Australia," *International Journal on Minority and Group Rights* (2024): 1–32.

[10] *First Nations Voice Act 2023* (No. 9 of 2023) (South Australia Voice).

[11] The low voter turnout is likely to cause other states that had considered similar advisory state bodies to reflect on the merit and timing of any new advisory institutional arrangements. "SA First Nations Voice Election Results Show Low Turnout, but Candidate Urges 'Give Us a Chance,'" *ABC News*, March 29, 2024, https://www.abc.net.au/news/2024-03-29/sa-voice-to-parliament-voter-turnout/103649148.

[12] Attorney-General's Department (South Australia), "Local First Nations Voices," 2023, https://www.agd.sa.gov.au/first-nations-voice/local-first-nations-voices.

[13] *Mogale and Others v. Speaker of the National Assembly and Others* [2023] ZACC 14; Bertus de Villiers, "Speaking, but Does Anyone Listen? The Path of Progress and Frustration with Indigenous Advisory Bodies of the Sámi, Aboriginal People, and the Khoisan," in *Indigenous Rights in the Modern Era: Regaining What Has Been Lost*, edited by Bertus de Villiers, 131–200 (Leiden: Brill, 2023).

à-vis national policies that affect the Sámi; in the Americas there are ongoing experimenting with advice-giving indigenous bodies; and in Chile constitutional referenda in 2022 and in 2023 to recognise the rights of indigenous people were defeated.

The decision to put the Voice to a referendum was inherently risky since constitutional amendment requirements in Australia are not often met. Placing such a potentially divisive question before the population without bipartisan support opened the risk of a zero-sum outcome with an unpredictable electorate.[14] The detail (or lack thereof) of the proposed Voice was inevitable going to be the focus of the campaign, for example: is the Voice to be elected or appointed; what would be its purposes and objectives; what would be the term of office; how would urban versus rural Aboriginal interests be accommodated; would it make decisions by consensus or by majority; how would minority interests within the Voice be accommodated; what procedures would be followed before a representation is made; what would be the legal status of representations; on what subject matters could representations be made; could legislation or executive actions be challenged in court on the basis that representations had not been invited, or a representation had not been given adequate weight, or inadequate time had been given for representatives in the Voice to consult with their communities?[15] Although efforts were made to politically respond to these questions, the fact remained that the actual detail would in due course be provided only *after* the referendum, and this uncertainty left the electorate perturbed.[16]

Ultimately government decided *against* providing statutory detail prior to the referendum in answer to the questions put above.[17] Prime Minster Albanese

[14] Bertus de Villiers, "Seven Questions before the Voice Can Be Heard: Learning from the Past," *Brief*, August 2022, 8–11.

[15] Bertus de Villiers, "An Advisory Body for Aboriginal Peoples in Australia: The Detail May Be Fatal to the Deal," *Brief*, March 2018, 7–11.

[16] The most comprehensive advice given to Parliament in answer to some of these questions was authored by the Solicitor-General.^1 But, as argued below, this advice did not address all the questions raised above and was also open to disagreement. The advice was what it says—*advice*—and open to disputation. One could hardly expect a doubting public to be enthused about an opinion given by a senior lawyer. See Stephen Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," advice to Parliament, April 19, 2023.

[17] As explained below, the references during the referendum campaign to the Calma Langton report and the subsequent Design Principles for the Voice carried little weight since those materials were not contained in legislation and would not, when the Constitution were interpreted in future, bear any weight.

was often quoted during the referendum campaign when asked about the detail of the Voice, that the 'answer is out there'.[18] The debate will continue about the merit of that answer of the Prime Minister and the decision not to give greater legal clarity about the design of the Voice prior to the referendum.[19] Previous Prime Minister Keating, a strong supporter of the Voice during the campaign, acknowledged after the referendum that it was the 'wrong fight' and it had perhaps 'ruined' the atmosphere for a national treaty.[20]

The run-up to the referendum highlighted two major risks identified by the opposing sides to the Voice-debate: on the one side, the concern was that the proposed power to make representations of the Voice would be so weak that the Voice would become another 'toy telephone' which would have little practical effect since sovereign powers will remain in favour of government and the executive.[21] On the other side, the concern was that the consultation obligations arising from the Voice would give rise to increased litigation, delay the legislative and executive processes, and racialize socio-economic policies.

There is plethora of reasons on offer to explain why the Voice-amendment had failed. I seek to contribute to the discussion by engaging in 3 potential reasons for the failure, namely: (a) the absence of detail prior to the referendum about the composition, powers, and functions of the Voice; (b) the concern about possible involvement of the Voice in general policies and legislation rather than for it to be directed to those matters that solely or principally affect Aboriginal

[18] On 23 September 2023, shortly before the referendum, the Prime Minister defended the lack of detail about the Voice by saying: 'The *detail* is *there* and of course, the Parliament will determine the composition and procedures of the Voice. See A. Albanese, "Albo Hits Back on Claim That Voice to Parliament," *News.com.au*, September 18, 2023.

[19] I acknowledge that there had been many attempts by academics, activists, and influencers to answer questions about the Voice in the leadup to the referendum, but it is the contention of this article that those responses would not have carried much weight in future parliaments and courts, and hence they were simply personal opinions. My proposition is that the lack of statutory detail was fatal to the initiative, regardless of efforts by experts such as Davis and Williams to remedy the information vacuum. See Megan Davis and George Williams, *Everything You Need to Know about the Voice* (Sydney: UNSW Press, 2023). Highly respected barrister McCusker QC described the lack of detail about the Voice and the potential abuse that may arise from litigation arising from representations made by the Voice as a 'power grab disguised in sheep's clothing'. See Malcolm McCusker, "'A Bad Idea for Australia': McCusker Blasts the Voice at Its Core," *6PR*, October 6, 2023.

[20] Lenore Taylor, "Paul Keating Says Voice Referendum Was 'Wrong Fight' and Has 'Ruined the Game' for a Treaty," *The Guardian*, October 27, 2023, https://www.theguardian.com/australia-news/2023/oct/27/paul-keating-says-voice-referendum-was-wrong-fight-and-has-ruined-the-game-for-a-treaty.

[21] Bertus de Villiers, "The Recognition Conundrum: Is an Advisory Body for Aboriginal People Progress to Rectify Past Injustices or Just Another 'Toy Telephone'?" *Journal on Ethnopolitics and Minority Issues in Europe* 17 (2018): 24–28.

communities, their land, culture and traditions; and (c) the risk of increased litigation if parliament or the executive fail to seek or to heed to representations made by the Voice.

Before progressing to the substance of my arguments, a brief background is provided about the path travelled by the Voice-amendment; the Australian experience with previous Aboriginal advisory bodies; and a brief overview of indicia that have crystallised from international law about consultation with indigenous people.

II. PATH OF THE VOICE – FROM ULURU TO REFERENDUM (2017-2023)

The discussion in Australia about the recognition of Aboriginal people in an appropriate way has been ongoing for a long time.[22] A previous proposal by then Prime Minister John Howard[23] to 'recognise' Aboriginal people in the preamble of the Constitution was rejected by Aboriginal people as being merely symbolic, with too little practical and legal effect.[24]

The debate about recognition took a major leap forward when on 26 May 2017 delegates from Aboriginal communities across Australia met under the auspices of the Referendum Council at Uluru in the centre of Australia to issue a statement entitled *Uluru Statement from the Heart.*[25] The Referendum Council made its recommendations after consultation with Aboriginal people.[26] The

[22] The Referendum Council was appointed on 7 December 2015 by then Prime Minster Turnbull and then Leader of the Opposition Shorten. At the time of the referendum the Labour Party had been elected to government and the Prime Minister, Anthony Albanese, committed to a referendum within his first term of office. The leader of the main opposition Liberal Party, Peter Dutton, opposed the constitutional amendment. Dutton was in favour of an amendment to recognise Aboriginal people, but he was against an amendment of the Constitution to create the Voice.

[23] John Howard, "The Right Time: Constitutional Recognition for Indigenous Australians," speech delivered at the Sydney Institute, Sydney, October 11, 2007, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FL41P6%22;src1=sm1.

[24] Some state parliaments in Australia have taken steps to acknowledge Aboriginal people; for example, in 2015, the Constitution of the State of Western Australia was amended to recognize Aboriginal people in the preamble.^1 Some states and territories, such as South Australia and the ACT, have also commenced discussions to enact a state-based Voice for Aboriginal people. See *Constitution Act 1889* (Western Australia), preamble.

[25] "Uluru Statement from the Heart," Uluru: Referendum Council, 2017, https://ulurustatement.org/the-statement/view-the-statement/.

[26] Referendum Council, "Final Report of the Referendum Council," Commonwealth of Australia, June 30, 2017, 44–138, https://www.referendumcouncil.org.au/final-report.

Referendum Council opted for a constitutionally entrenched Voice to be given to Aboriginal people as a practical result of recognition of them being the original owners of Australia. The Referendum Council recommended that the creation of the Voice be mandated by the Constitution (hence requiring a referendum), with the detail to be legislated by Parliament. The basic outline proposed by the Referendum Council for the Voice was as follows: The Voice would be elected and not appointed; the detail of the Voice, its powers and its functioning would be set out in legislation to be enacted by the federal Parliament; the Voice would have advisory powers, not a veto or any legislative powers; and the exact scope of advices to be given were to be finalised in legislation.

The National Indigenous Australians Agency (NIAA), was subsequently tasked by the federal government to investigate, consult, report, and make recommendations on a Voice to give effect to the Uluru Statement of the Heart. The NIAA undertook further public consultation and released its final report for a proposed Voice in July 2021 (also referred to as the Calma Langton report).[27] The report recommended that the Voice would comprise national, regional and local bodies across 35 regions that represent Aboriginal people; that in the design of the Voice the local needs of Aboriginal communities to determine how they would elect or nominate representatives would be considered rather than a single model of election or nomination imposed for all Aboriginal communities; the Voice would provide non-binding advices and recommendations to state and federal governments on matters that directly impact on Aboriginal people in regard to their social, spiritual and economic wellbeing; delegates from the regional bodies were to form a national Voice that would comprise 24 persons; and the Voice would not have legislative, executive or administrative functions.

These recommendations by the Calma Langton report were noted and welcomed by government. Notably however is that government did not formally accept or endorse the recommendations; the recommendations were not reduced

[27] Marcia Langton and Tom Calma, "Indigenous Voice Co-Design Process Final Report to the Australian Government," Canberra: Indigenous Voice, July 2021, https://voice.niaa.gov.au/sites/default/files/2021-12/indigenous-voice-co-design-process-final-report_1.pdf.

to a government White Paper for public comment; the recommendations were not submitted to a constitutional convention for deliberation; and the recommendations were not reflected in a bill or legislation. The detailed recommendations of the Calma Langton Report therefore remained non-binding options and recommendations with the status of a discussion paper rather than a legal or policy instrument.

As the referendum approached and criticism for the lack of detail about the Voice became intense, the First Nations Working Group adopted 'Design Principles' for the Voice. Those Design Principles also fell far short of the detail contained in the Calma Langton Report. The Design Principles did not satisfy critics of the lack of detail and did not do justice to the voluminous Calma Langton report and detail developed by the Co-Design process.[28]

On 19 June 2023, Parliament passed the Constitution Alteration Bill, which contained the proposed amendment and the referendum question.[29]

III. EXPERIENCES WITH PREVIOUS ABORIGINAL ADVISORY BODIES

The debates leading to the referendum took place against the background that Australia has since the 1970s had 3 legislated federal Aboriginal advisory bodies. Although each of those had been abolished, the reasons for their failure and ways to mitigate those risk being repeated by the Voice, were arguably not given adequate attention during the referendum debates.[30] The principal lesson sought to be drawn by the government from the previous experiences was that the Voice had to be constitutionally enshrined to prevent it from being abolished.[31] This was a poor reflection on, and an inadequate response to the

[28] First Nations Referendum Working Group, "Design Principles of the Aboriginal and Torres Strait Islander Voice," 2023, https://voice.gov.au/sites/default/files/2023-06/design-principles-aboriginal-torres-strait-islander-voice.pdf.

[29] *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth), https://www.legislation.gov.au/Details/C2023B00060/Html/Text.

[30] Taflaga suggests that the previous advisory bodies were abolished "at the whims of government," but the reality is more nuanced since, as is shown below, those bodies also became dysfunctional and ineffective due to internal disagreements. See Maria Taflaga, "Australia: Political Developments and Data in 2023: Unfinished Business: Failed Referendums and Ongoing Inflation," *European Journal of Political Research* (2024): 2.

[31] Reconciliation Australia, "Voice to Parliament," 2023, https://www.reconciliation.org.au/reconciliation/support-a-voice-to-parliament/.

reasons for failure of the previous advisory experiences. One would have expected that a detailed analysis would take place of those previous experiences with the view to identify pitfalls to be averted. The principal lesson the yes-campaign sought to draw was that entrenchment should occur, but the argument failed to acknowledge that constitutional entrenchment by itself would not address the reasons for previous failures. A constitutionally entrenched advisory body that malfunctions, or that becomes unyielding, or that loses credibility, or that gives rise to extensive litigation, or that may suffer low participation as happened with ATSIC, may become a substantial hurdle to indigenous consultation and reconciliation – even the more if it is entrenched in the Constitution and can only be removed by way of another referendum.

Following is a brief overview of those previous advisory bodies:[32]

1.1 National Aboriginal Consultative Committee

The National Aboriginal Consultative Committee (NACC) (1973-1977) was an advisory body comprised of 41 elected Aboriginal people. The NACC's principal function was to advise government on policies that affected Aboriginal people. There was no list of topics that had to be referred to the NACC for advice, and there was no legal obligation on government to seek advice or to consult.[33] Several issues contributed to the failure of the NACC, for example: the demand of the NACC to be at law an effective self-government for Aboriginal people and the rejection by government thereof; disagreement about the weight to be attached to advice of the NACC – be it advisory or binding; reluctance on the part of government to explain why NACC advice had not been accepted; internal disagreement between Aboriginal representatives of the NACC about priorities to be pursued; and confusing objectives of the NACC. The NACC was abolished after 4 years.[34]

[32] Bertus de Villiers, "Dithering between Consultation and Consensus: Whereto with Advisory Bodies for Indigenous Peoples?" *Journal on Ethnopolitics and Minority Issues in Europe* 22 (2023): 32–63, https://doi.org/10.53779/HBKA3992.

[33] NACC, "The 1970s: The National Aboriginal Consultative Committee (NACC) 1973–1977," Koori History Website, accessed April 23, 2021, http://www.kooriweb.org/foley/images/history/1970s/nacc74/naccdx.html.

[34] De Villiers, "Speaking, but Does Anyone Listen?"

1.2 National Aboriginal Conference

The second advisory body for Aboriginal people commenced in 1977 (and ended in 1985) with the National Aboriginal Conference (NAC). The NAC was an indirectly elected, national body. The NAC comprised 36 members with regional branches. The NAC had no other self-governing, supervisory, or administrative powers.[35] Similar to the NACC, there was no legal obligation on parliament, the government, or government departments to refer policies or bills to the NAC for comment, or for advice of the NAC to be considered in good faith, or for government officials to meet with the NAC. There was also ongoing disagreement *within* the NAC where its focus should lie – on local issues affecting traditional land and culture of Aboriginal people, or should it also focus on national issues such as a treaty and advocacy on wider socio-economic policy issues.[36] The NAC-government relationship soon ended in stalemate, with some saying the NACC had exceeded its mandate; others saying NAC had become a talk shop with no effective powers; and others complaining the NACC had the wrong focus. Amid these disputes, to rural Aboriginal people the importance of local land rights (also known as native title) in their traditional lands became more important than city-based agendas. The NAC was abolished after 8 years.

1.3 Aboriginal and Torres Strait Islander Commission

The third attempt to create an advisory body for Aboriginal people commenced in 1990 (and ended in 2005) with the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC).[37] ATSIC had an advisory function, but added thereto were also administrative functions to identify spending priorities, to manage some Aboriginal community programmes, and to allocate funds to Aboriginal communities.[38] ATSIC was elected with a regional and a national profile,

[35] AIATSIS, "NAC—Establishment, Role and Functions," Canberra: AIATSIS, 1983, https://aiatsis.gov.au/collections/collections-online/digitised-collections/treaty/national-aboriginal-conference.

[36] Bertus de Villiers, "An Ancient People Struggling to Find a Modern Voice: Experiences of Australia's Indigenous People with Advisory Bodies," *International Journal on Minority and Group Rights* 26 (2019): 1–21.

[37] *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

[38] Kingsley Palmer, *ATSIC: Origins and Issues for the Future. A Critical Review of Public Domain Research and Other Materials* (Canberra: AIATSIS, 2004).

and it had an autonomous budget with substantial staff.[39] A failure or refusal of government to consult with ATSIC, or a rejection of an advice received from ATSIC was not reviewable or otherwise justiciable.[40] The reasons for the demise of ATSIC were varied, but essentially it experienced resistance from government; it struggled to generate legitimacy amongst Aboriginal people which is evident in low voter turnout in elections; there was confusion of powers and functions *within* ATSIC and *between* ATSIC and the government; and there were concerns about corruption and maladministration within ATSIC.[41] ATSIC was abolished after 15 years in 2005. [42]

These previous experiences of Aboriginal advisory bodies raised many questions about the lack of detail that accompanied the proposed Voice. The failure of government to identify the reasons for previous failures of advisory bodies and address those shortcomings by way of the design-elements of the Voice, fuelled concerns by sceptics that the Voice may become an unworkable entrenched body.

In light of the topic of this article, five concerns arose from the previous Aboriginal advisory bodies in general, and ATSIC in particular, namely: (a) the elected nature of ATSIC gave rise to expectations of effective power-sharing and self-government, but those hopes could not be met by its mere advisory and limited administrative powers; (b) the self-administration powers of ATSIC were complicated by overlapping functions with government departments and blurred responsibilities; (c) ATSIC had no reasonable expectation that its advices to government would be sought or accepted, or at least be considered in good

[39] Will Sanders, "ATSIC's Achievements and Strengths: Implications for Institutional Reform," Sydney: Centre for Aboriginal Economic Policy Research, 2004, http://caepr.anu.edu.au/sites/default/files/Publications/topical/SandersATSICAchievement.pdf.

[40] Sanders, "ATSIC's Achievements and Strengths."

[41] Palmer, *ATSIC: Origins and Issues for the Future*.

[42] Angela Pratt and Scott Bennett, "The End of ATSIC and the Future Administration of Indigenous Affairs," Canberra: Parliament of Australia, 2004, https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/FXED6/upload_binary/fxed68.pdf;fileType=application%2Fpdf.

faith;[43] (d) Aboriginal representatives in ATSIC could not agree on a shared vision for Aboriginal self-determination; and (e) the credibility of ATSIC in Aboriginal communities was low, which in turn impacted on its legitimacy and credibility – internally and externally.

IV. OBSERVATIONS FROM INTERNATIONAL LAW ABOUT INDIGENOUS CONSULTATION

It is only recently that international law has being giving specific attention to the collective rights of indigenous people. The notion of collective rights of indigenous people, has since the 1970s been increasingly acknowledged in international law and in regional instruments.[44] The essential concept that has become associated with collective rights of indigenous people is the right to 'self-determination' based on their pre-settlement sovereignty.[45] Whilst it is accepted that self-determination also applies to the rights of individuals, the term is often used in international and public law in the context of indigenous peoples collectively exercising their cultural and customary rights.[46] However, self-determination is not a term of art, and hence its content and application may vary from state to state.[47] As a general proposition the right to self-determination is often associated with arrangements for self-government, self-administration,

[43] Ironically, as pointed out below, the Solicitor-General in his legal advice to Parliament stressed that there would not be an obligation on Parliament to consider representations made by the Voice.^1 This left unanswered the question of why the same frustration that caused the demise of ATSIC would not also cause the demise of the Voice. One of the principal concerns of those on the left of the campaign was precisely that representations could be ignored and hence rendered the Voice ineffectual. It seemed as if the government tried to steer away from giving a definitive answer, but this eroded trust rather than giving comfort. See Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 18(b).

[44] James Anaya, "The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples," *Canadian Yearbook of International Law* 49 (2011): 117–76; United Nations, "Indigenous Peoples and the United Nations Human Rights System" (New York: United Nations, 2013); UN Special Rapporteur on the Rights of Indigenous Peoples, "Special Rapporteur on the Rights of Indigenous Peoples," 2007, https://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx.

[45] Ranjan Shrinkhal, "'Indigenous Sovereignty' and Right to Self-Determination in International Law: A Critical Appraisal," *AlterNative: An International Journal of Indigenous Peoples* 17, no. 1 (2021): 71–82, https://doi.org/10.1177/1177180121994681.

[46] Gudmundur Alfredsson, "The Rights to Self-Determination in International Law," in *Minority Self-Government in Europe and the Middle East*, edited by Olgun Akbulut and Elçin Aktoprak, 3–31 (Leiden: Brill, 2019).

[47] Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge: Cambridge University Press, 2020).

autonomy, land rights, consultation rights over policies that impact the indigenous community, and advisory bodies, albeit not limited to those.[48]

The two most relevant instruments in international law that share as primary objective the protection of indigenous rights, are the International Labour Organisation Convention 169 Concerning Indigenous and Tribal Peoples (ILO 169),[49] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[50] ILO 169 is the only legally binding international treaty on indigenous peoples, whilst UNDRIP is a non-legally binding declaration of the UN General Assembly. ILO 169 has only been ratified by a few nations (23 – of which Australia is not one), whilst UNDRIP has principally political and policy impact, but has much wider endorsement (including by Australia). UNDRIP has been described as a 'guiding instrument' to assist signatory parties in better recognising indigenous people's rights.[51] There are ongoing efforts in Australia to ensure its laws and policies are consistent with UNDRIP.[52]

ILO 169 does not use the phrase self-determination, but it recognises the rights of indigenous people to exercise control over their traditional lands and cultural institutions, which, in effect, is a form of self-determination. Article 4(1) of ILO 169 relates to the collective right of indigenous people to institutions that are designed specifically to accommodate their unique identities. The Preamble of UNDRIP and article 19 of UNDRIP encapsulate the objective that is sought to be achieved:

> 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.

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48 Alexandra Tomaselli, "The Right to Political Participation of Indigenous Peoples: A Holistic Approach," *International Journal on Minority and Group Rights* 24 (2017): 390–427.

49 International Labour Organization, *Indigenous and Tribal Peoples Convention*, C169, 1989, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314.

50 United Nations, "United Nations Declaration on the Rights of Indigenous Peoples," 2007, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

51 United Nations, *Indigenous Peoples and the United Nations Human Rights System* (New York: United Nations, 2013), 4.

52 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (Canberra: Parliament of Australia, 2023).

The way how states design institutions for indigenous people to comply with UNDRIP, falls within the discretion of states.[53] Indigenous people have the right to be consulted and to be involved in decisions and policies about the use of their traditional lands and natural resources on those lands, as well as the protection of those resources, and their general development.[54]

In practical terms, one of the most important procedural rights accorded to indigenous people in UNDRIP is the right to free, prior and informed consent (FPIC) about matters that impact on their unique identity, culture, traditions, language, customs, and traditional lands.[55] It is particularly when their traditional lands are affected, that informed consent of indigenous people ought to be sought, albeit that seeking consensus does not imply a veto is granted to an indigenous community.[56] Practical effect and useful guidance was given in the South American Kichwa-case about the meaning of FPIC.[57] In another South American case, the Poma Poma-case, it was declared that 'effective' participation in decision-making is an essential element to consultation.[58] In both of these cases consultation related to specific projects on indigenous lands and not to a general advisory role about socio-economic policies. In the South African Baleni case the right of a veto of an indigenous community over a project was upheld, but that was pursuant to the terms of the applicable statute and not because of standards imposed by UNDRIP.[59] The right to self-determination is difficult, if not impossible, to enforce in domestic settings unless additional legislative or policy interventions occur within states.[60]

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53 Victoria Tauli-Corpuz, *Autonomy Report of the Special Rapporteur on the Rights of Indigenous Peoples* (New York: United Nations, 2019), paras. 36–66, https://www.undocs.org/A/74/149.

54 International Labour Organization, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), art. 15.

55 International Labour Organization, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), art. 6; United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, art. 19.

56 International Labour Organization, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), arts. 15.2, 17.2.

57 *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012). In this case, the court ruled that the following consultation standards must be met: prior to the decision being made; in good faith with the objective of reaching an agreement; with information provided about the proposed project being adequate and accessible; that the project and consultation are based on social and environmental impact assessments; and that the advice expressed by the community must be informed.

58 *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (March 24, 2009).

59 *Baleni v. Minister of Mineral Resources*, 2019 (2) SA 453 (GP).

60 Claire Charters and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009).

As a basic principle, consultation with indigenous people is not mandated for general socio-economic, public policies or legislation that also affect the rest of the population.[61] The obligation to consult related to issues that specifically effect the traditional lands of indigenous people particularly in the event of large-scale projects[62] and policy areas that primarily relate to indigenous people. Furthermore, the justiciability of the right to FPIC is, unless otherwise stated in domestic law, directed at the adequacy of *processes* of consultation rather than as a substantive veto or a review about the merit of the policy or legislative measure.[63]

V. THREE CONTRIBUTORY REASONS FOR THE FAILURE OF THE VOICE-REFERENDUM

The reasons why the Voice referendum failed remain the subject of ongoing discourse in Australia.[64] In this part the focus is on 3 contributing reasons for the failure of the Voice-referendum, namely: (a) the absence of statutory detail about the composition, powers, and functions of the Voice; (b) the concern that the Voice would make representations about general policies and legislation that affect Aboriginal people as part of the general population (for example social areas such as poverty, youth crime, housing, employment, health), rather in respect of those matters that solely or principally affect Aboriginal communities; and (c) the concern of increased litigation if parliament or the executive fail to seek or to heed to representations made by the Voice.

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[61] Bertus de Villiers, "Right to Be Consulted, but the Frustration of Being Ignored: The Ongoing Efforts in International Law to Give Practical Meaning to Free, Prior, and Informed Consent," in *Indigenous Rights in the Modern Era: Regaining What Has Been Lost*, edited by Bertus de Villiers (Leiden: Brill, 2023) , 68–130.

[62] *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (November 28, 2007).

[63] See, for example, in Australia, the *Tipakalippa* case, *Santos NA Barossa Pty Ltd v. Tipakalippa* [2022] FCAFC 193, and the *Cooper* case, *Cooper v. National Offshore Petroleum Safety and Environmental Management Authority (No. 2)* [2023] FCA 1158. In the *Tipakalippa* case, the Federal Court of Australia commented as follows about the purpose of consultation: "Consultation … gives the titleholder an opportunity to receive information that it might not otherwise have received from others affected by its proposed activity." *Santos NA Barossa Pty Ltd v. Tipakalippa* [2022] FCAFC 193, para. 89.

[64] Simon Cowan, "Things to Learn from the Voice to Parliament Referendum," *Canberra Times*, October 21, 2023; Katie Wellauer, Claire Williams, and Bridget Brennan, "Why the Voice Failed," *ABC News*, October 16, 2023, https://www.abc.net.au/news/2023-10-16/why-the-voice-failed/102978962; Naaman Zhou, "The Failure of Australia's Attempt to Create an Indigenous Voice to Parliament," *The New Yorker*, October 19, 2023; Adam Wesselinoff, "Review: How the Voice Referendum's Defeat 'Unsettled' Australia," *The Catholic Weekly*, July 1, 2024, https://catholicweekly.com.au/voice-referendum-failure/.

In the process from 2017-2023 leading to the referendum there were principally five steps by which the details about the possible institutional design, functions and powers of the Voice were ventilated, namely the Uluru Statement of the Heart (26 May 2017); the Joint Select Committee Report (2018); the Final Report of the Indigenous Voice Co-Design Process (September 2022); the Design Principles of the First Nations Working Group (23 March 2023); and finally the text of the proposed Constitutional Amendment (2023). In this part I reflect on each of those steps to explain the 3 design reasons for failure as identified above.

5.1 Design Features of the Voice

The debate leading to the Voice was characterised by demands for more information about the design and powers of the Voice, and counterarguments that Parliament would provide in due course the detail once the constitutional amendment that mandated the creation of the Voice by Parliament, had been approved.[65] Added thereto, the Voice constitutional amendment was not preceded by the legislative processes of a White Paper; a draft bill; or a constitutional convention. The explanations by those who supported the Voice that detail would be forthcoming *after* the referendum, could not cure public scepticism and concern at the lack of constitutional and statutory detail *prior* to the vote.[66] In the run-up to the referendum the following materials sought to provide clarity about the composition, powers, and functions of the Voice, but none of those were legally enshrined:

The *Uluru Statement* (2017) laid claim to ongoing sovereignty of Aboriginal people that was never ceded at the time of settlement and called for a constitutional amendment that would provide for an advisory Voice to be included into the Constitution. Added thereto a 'Makarrata Commission', which

[65] A leading Voice campaigner, Marcus Stewart, commented in the aftermath: "The general Australian community couldn't comprehend what exactly it was." Wellauer, Williams, and Brennan, "Why the Voice Failed."

[66] Olivia Hogan comments that the media should also carry some responsibility for having "created a minefield of information" that made it very difficult to gauge public opinion. Added thereto, the campaign centred too much on symbolism rather than "practical change." See Olivia Hogan, "Why the Voice Failed: The Australian Establishment Has Been Too Focused on Symbolic Gestures Rather than Practical Change," *The Critic*, February 2, 2024.

is perhaps comparable to the South African truth and reconciliation commission, was proposed.[67] The Makarrata Commission were to have a dual function – that of truth-telling about the history of Australia as well as negotiation a form of treaty between Aboriginal people and the government.[68] The Uluru Statement was welcomed by government but referred for further deliberations, including to a Joint Select Committee of Parliament.

The *Joint Select Committee of Parliament on Constitutional Recognition* (2018) invited public inputs and proposals to give effect to the Uluru Statement.[69] The Joint Select Committee in 2018 made several general recommendations about the design, powers and functions of the Voice, for example: the members should be chosen by Aboriginal people rather than being appointed by government; the different practices of local and regional Aboriginal communities should be accommodated in the design of the Voice; the Voice should be organised at local, state and national levels; it should make representations but not have administrative powers; and advices of the Voice should be sought and given at the earliest opportunity. The Joint Committee recommended further consultation to work out greater detail about the design of the Voice as part of a publicly 'co-design' process.

The *Final Report of the Indigenous Voice Co-Design Process* (2021) went to great length to consider the different options for the Voice.[70] The Report (also referred to by the name of the chairpersons of the process as the Calma Langton report) endorsed the idea of local and state voices in addition to the national Voice.[71] The Calma Langton report recommended a national body of 24

[67] "Uluru Statement from the Heart," Uluru: Referendum Council, 2017, https://ulurustatement.org/the-statement/view-the-statement/.

[68] Jill J. Fleay and Barry Judd, "The Uluru Statement: A First Nations Perspective of the Implications for Social Reconstructive Race Relations in Australia," *International Journal of Critical Indigenous Studies* 12, no. 1 (2019): 6.

[69] Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (Canberra: Parliament of Australia, 2018), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Final_Report.

[70] Marcia Langton and Tom Calma, *Indigenous Voice Co-Design Process: Final Report to the Australian Government* (Canberra: Indigenous Voice, July 2021), https://voice.niaa.gov.au/sites/default/files/2021-12/indigenous-voice-co-design-process-final-report_1.pdf.

[71] Langton and Calma, *Indigenous Voice Co-Design Process*, 10. The referendum proposal only dealt with the national Voice, leaving it unclear how the states would be expected to legislate for local voices.

members; to be 'chosen' to represent Aboriginal people in the respective states,[72] regions and territories; with powers to give 'advice' (note the Voice proposal used the word 'representation' rather than advice) to government and parliament; in regard to matters that affect Aboriginal people. Emphasis was placed that advice would be given to both the executive government and parliament to ensure Aboriginal interests were addressed at all stages of the legislative and policy process. Importantly, the scope of powers would be limited to 'advise on matters of *national significance* to Aboriginal and Torres Strait Islander peoples relating to their social, spiritual and economic wellbeing.' (emphasis added since the qualification 'national significance' was not included in the proposed constitutional amendment for the Voice)[73] Guidance was also given about when advice could be made or should be sought (these thresholds when advice would be given or sought were excluded from the proposed Voice amendment). The Calma Langton report summarised the consultation obligation on the federal government as follows:

> The Australian Parliament and Government would be 'obliged' to ask the National Voice for advice on a defined and limited number of proposed laws and policies that *overwhelmingly* affect Aboriginal and Torres Strait Islander peoples. There would also be an 'expectation' to consult the National Voice, based on a set of principles, on a wider group of policies and laws that *significantly* affect Aboriginal and Torres Strait Islander peoples.[74]

The Calma Langton report envisaged that 'consultation standards' would be set out in legislation so it is clear when there is an 'obligation' to consult; when there is an 'expectation' to consult; and when consultation 'may' be sought regarding any other policy or legislative measure. The standard of consultation should

[72] Langton and Calma, *Indigenous Voice Co-Design Process*, 111. It was envisaged that a "gender balance must be structurally guaranteed" within the Voice, but with no clarity how the objective would be achieved or whether gender balance was reflective of Aboriginal law and custom.

[73] Langton and Calma, *Indigenous Voice Co-Design Process*, 11.

[74] Langton and Calma, *Indigenous Voice Co-Design Process*, 11, 160. The Final Report referred to the following examples to which an obligation to consult would apply: amendments to the *Native Title Act* (1993); "major amendments affecting Indigenous Business Australia"; changes affecting the "Community Development Program"; amendments to the national Aboriginal heritage protection legislation; and amendments to the *Aboriginal Corporations Act*. These thresholds were not formally accepted by the government and hence carried no status or assurance during the referendum campaign.

be of 'good faith' and partnership.[75] Importantly, the Calma Langton report recommended that 'compliance of the Australian Parliament and Government with these elements *could not be challenged* in a court.' (emphasis added since this recommended qualification was not included into the proposed constitutional amendment for the Voice)[76] Thereby the risk of legal challenges to legislation or policies was sought to be removed.

It was furthermore emphasised that a recommendation of the Voice did not constitute a veto over any legislation or policy measure. The Final Report emphasised that the Voice was not intended to be a 'third chamber' of Parliament.[77] The term of office of members of the Voice would be 4 years.[78] It was envisaged that there would be some form of interaction between the national Voice and regional voices to ensure inputs and feedback in both directions.[79]

The *Design Principles of the First Nations Working Group* (2023) sought to identify general principles for the design, functions and powers of the Voice, but without providing the same level as detail as recommended by the Calma Langton report.[80] The following design principles are of relevance to this article: the Voice is to make 'representations' on 'matters relating to' Aboriginal people; Parliament and the executive should seek representations 'early in the development of proposed laws and policies'; members of the Voice will be 'selected' by Aboriginal communities; the way in which representatives are 'chosen' will

[75] Langton and Calma, *Indigenous Voice Co-Design Process*, 158. The Final Report stated as follows: "Consultation standards and transparency mechanisms must be flexible enough to address the full range of possible circumstances, particularly concerning timing. In some cases, consultation with the National Voice may be built in from the early stages. In other cases, legislative changes may be time-sensitive, and a smaller amount of time might be provided for consultation with the National Voice."

[76] Langton and Calma, *Indigenous Voice Co-Design Process*, 109, 160. This was an important point of principle that did not find its way into the proposed constitutional amendment. Had the proposed constitutional amendment contained a clause to the effect that legislation or policies could not be legally challenged on the basis that they did not comply with consultation standards, the outcome of the referendum may have been different.

[77] Langton and Calma, *Indigenous Voice Co-Design Process*, 166. The Final Report observed that concerns about the Voice constituting an additional chamber to Parliament were "unjustified" and "mistaken."

[78] Langton and Calma, *Indigenous Voice Co-Design Process*, 132.

[79] Langton and Calma, *Indigenous Voice Co-Design Process*, 145.

[80] First Nations Referendum Working Group, "Design Principles of the Aboriginal and Torres Strait Islander Voice," 2023, https://voice.gov.au/sites/default/files/2023-06/design-principles-aboriginal-torres-strait-islander-voice.pdf.

depend on the 'wishes of local communities'; members would be 'chosen' from each of the states and territories; there would be 'gender balance' at national level; and the Voice would not have a veto power.

Finally, the following draft *constitutional amendment* (2023) was put to the public in the referendum:

> **129 Aboriginal and Torres Strait Islander Voice**
>
> *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.

5.2 Concerns about the Design Features of the Voice

The design of the Voice, as put to the referendum, had suffered several critical design deficiencies, gaps, vagueness, and inconsistencies. These ultimately contributed to the rejection of the proposal since the 'no' campaign focused on the weaknesses of design, whilst the 'yes' campaign could not satisfactorily answer questions of substance about the design and relied on a positive 'vibe'[81] to get the question approved.[82] It was, on reflection, not unreasonable for the public to

[81] Michelle Evans and Michelle Grattan, "The Voice to Parliament and the Silent Majority," *Australian Quarterly* 95, no. 1 (2024): 4–11.

[82] Note, for example, the response of Wood to criticism of the Voice: "To the apathetic electors in the 'no' camp, do not let your self-centred leaders use you, then blame you as red-necks or racists and generally treat you as fools; fight their mantra: if you don't know, don't just vote no, but find out! It is pretty straightforward! These are some of the issues we wish non-Indigenous people would raise." The name-calling and labelling of persons who raised concerns about the Voice as racists did not contribute to an atmosphere of support and reasoned debate for the proposal. Contrast the 2023 referendum culture with the 1967 referendum culture and the unity it had engendered towards the status of Aboriginal people. Also note Berry, who comments that "racism [for rejecting the Voice] is not the full story. There was also genuine confusion about why the Voice was needed, a situation readily reinforced by those opposed to the amendment on a rag-tag range of grounds, reflecting material and ideological commitments. See Andrew Wood, "Critique of 'Voice versus Rights,'" *UNSW Law Journal Forum* 5 (2023): 17. Murray Goot and Tim Rowse, "The Debate over the Constitutional Recognition of Indigenous Australians: National Unity and Memories of the 1967 Referendum," *Australian Journal of Politics and History* 70 (2024): 97–119. Berry, "The Voice Referendum," 243.

have asked critical questions about the composition, powers, and functions of a body that would in future become an integral part of the legislative and policy processes at all levels of Australia. The risk of calling a referendum whereby ordinary people had to be convinced of the merit of the proposal, was exacerbated by the lack of detail to respond to reasonable questions about design.

A critical feature of the referendum campaign was that in the absence of detailed information in the text of the amendment about the design, powers and functions of the Voice, proponents of the Voice cited supplementary reports, scientific works, opinions of retired judges and academics, and policy statements, to purportedly supplement the lack of detail in the legal text. For example, although the Solicitor General sought to give the assurance that a representation provided to Parliament would be non-binding,[83] critics disagreed and pointed out that non-parliamentary advices, materials and opinions would carry little, if any, weight when in future, representations of the Voice become the subject of litigation.[84] There were concerns that the Voice might become a forum whereby *any* government policy or legislation in future could be challenged on basis that it affects Aboriginal people generally or some Aboriginal community specifically, and that consultation with them had not been adequate, timely, or proper. Ironically, the assurance sought to be given by, for example the Solicitor-General that failure by parliament of the executive 'to consider representations' by the Voice '*would not have justiciable consequences*'[85] raised the concern within the Yes campaign and the left of the No campaign that the Voice was set up to become another toy telephone.[86] The lack of detail and the assurance sought

[83] Stephen Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," advice to Parliament, April 19, 2023, para. 38. Some experts cautioned that regardless of legal advice, there may be "unintended legal consequences" from the wording. See Evans and Grattan, "The Voice to Parliament and the Silent Majority," 7.

[84] This refusal by the designers of the Voice was ironic because the Calma Langton report specifically recommended as follows: "The standards set out above would be non-justiciable, meaning alignment with the standards could not be challenged in court and could not affect the legal validity of laws or policies." It remained unexplained during the referendum why the assurances and detail contained in the Calma Langton Report were not particularised by way of legislation. Langton and Calma, *Indigenous Voice Co-Design Process*, 160 (emphasis added).

[85] Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 39.

[86] The ambiguity was also reflected in public statements by Prime Minister Albanese, where on the one hand he made the Voice out to be "simply an opportunity to be heard," whilst on the other hand he suggested it would be a "very powerful instrument. See Evans and Grattan, "The Voice to Parliament and the Silent Majority," 7.

to be given by the Solicitor-General thus became a double-edged sword where the no vote on the right and left side felt their concerns had been vindicated.

Due to the limitation in space, I restrict my analysis to three design aspects of the Voice where these shortcomings were present, namely its composition; its powers and functions; and the justiciability of its representations.

But before attending to those design-issues, I briefly refer to the principles of statutory interpretation in Australia since those rules determine the relevance and weight, if any, that could have been placed by future courts on materials, opinions, and publications released as part of the referendum that were not part of the legal text of the amendment. It is my proposition that the details of the Voice ought to have been enacted in legislation *prior* to the referendum to enable the electorate to make an informed decision about the text of the amendment.[87]

When analysing the Voice amendment, it is essential to distinguish between the *text* of the proposed constitutional amendment – which would be the highest legally enforceable text - and other *non-legal* material such as scientific reports, policies, public statements – that do not have the force of law. If the Voice-proposal had been approved, the text of the amendment would have been the supreme text given force by courts, with possible limited reference to parliamentary statements and debates, but with no or little weight to voluminous extra-legal materials and scientific opinions expressed during the referendum campaign in support of the Voice.[88] Australian courts rely in interpretation on 'common

[87] If the Voice had been enacted by legislation prior to the referendum, the vote would only have affected its constitutional status, not its existence. With the rejection of the constitutional amendment by such an overwhelming majority, the probability of a national statutory Voice has for all practical purposes disappeared and is likely to be removed from the political agenda for a substantial time.

[88] The Solicitor-General gave the following assurance about the material to be considered if in future a question arises about the obligation on Parliament and the executive to consider representations of the Voice: "The High Court has given weight to equivalent explanatory materials when interpreting previous constitutional amendments. Accordingly, the Court can be expected to have regard to the statements just quoted from the Explanatory Memorandum and Second Reading Speech if it is ever called upon to decide whether proposed s 129(ii) impliedly prevents the Parliament from making laws specifying the legal effect of representations made by the Voice to the Executive Government. It would be a distinctly unsound approach to the interpretation of the constitutional text to attribute to the proposed amendment an implied meaning that is not only unsupported by its text, but that is irreconcilable with the evident intention of the drafters as reflected in explanatory materials brought into existence before the Australian people voted on the proposed constitutional amendment." Whilst this is correct, it must also be noted that firstly, if the text of the legal instrument is clear, then there is no need to cite parliamentary debates, and secondly, the ultimate judgment about consideration to be given to representations of the Voice belongs to a future High Court, and its discretion would not be bound by opinions expressed in 2023. See Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 38.

sense' by referring to the *text* of the statute, the *context* of the statute, and the *purpose* of the statute.[89] Whilst courts may, when the meaning of words in the legal instrument are not clear, rely on other parliamentary materials such as the second reading speech, to assist with interpretation, it is unlikely that a court would venture to non-parliamentary materials such as scientific papers, reports, and public statements to assist with a particular statutory interpretation.[90] In essence, the proper approach to statutory construction begins with a consideration of the text itself;[91] secondary materials cannot be substituted for the text of legislation;[92] and a statutory provision is to be construed consistently with the language and purpose of all of provisions of the statute.[93]

In the case of the Voice, references by Prime Minister Albanese that the answer to questions about the composition, powers and functions of the Voice 'is out there', often referred to the Calma Langton report and the Design Principles as purportedly containing the answers sought by the public, but it must be noted that the Calma Langton report had not been formally accepted by government; the report had no policy status as a government or Labour Party policy; the report was not definitive on a number of issues and offered a range of options rather than firm recommendations; the report was subject to further public deliberation in order to finalise the detail; and the report had not been reduced to a government White Paper or a legislative bill. Similarly, the Design Principles had no legal status.

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[89] John Middleton, "Statutory Interpretation: Mostly Common Sense?" *Melbourne University Law Review* 40, no. 2 (2017): 626–656. In Australia, the basic principle to identify legislative intent is to consider "the ordinary and grammatical meaning of the words of the provision having regard to their context and legislative purpose." If the ordinary meaning of text is clear, there is no need to cite parliamentary readings, much less materials produced in the course of a referendum campaign. See *Australian Education Union v. Department of Education and Children's Services* (2012) 248 CLR 1.

[90] Note, for example, the federal *Acts Interpretation Act 1901*, which provides that extrinsic material may be used when the ordinary meaning of a word in the statutes gives rise to a meaning that is "ambiguous or obscure" or an interpretation that is "absurd or is unreasonable." Extrinsic material in this context refers to parliamentary debates such as the second reading speech, not to scientific papers, political speeches, or expert reports and opinions produced in the course of the referendum campaign. 1 *Acts Interpretation Act 1901* (Cth), s. 15AB(1)(b).

[91] *Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27.

[92] *K-Generation Pty Ltd v. Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501.

[93] *Project Blue Sky Inc v. Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355.

5.3 Concerns about the Composition of the Voice

The composition of the Voice was left in its entirety for legislation yet to be enacted by Parliament *after* the referendum. Although the Calma Langton Report made recommendations about the composition of the Voice, those recommendations were not formally accepted by government nor reduced to any legislative instrument. The assumption of the Calma Langton Report was furthermore that state based voices would also be established, but no detail existed about the constitutional requirements, implications, or functions of such regional bodies. Whilst on the one hand the lack of detail allowed for post-referendum flexibility, on the other hand those opposing the proposal exploited the lack of detail about composition for being vague and uncertain.

In the explanatory booklet that accompanied the proposed Voice amendment, more was said about the possible composition of the Voice, for example, that it would represent Aboriginal people from across the country; that 'members of the Voice *will be chosen* by Aboriginal and Torres Strait Islander people in their local area and serve for a fixed period';[94] and the Voice 'will include young people and a *balance* of men and women.'[95] The Referendum Booklet did not provide any information about the size of the Voice; the manner in which representatives would be 'chosen'; how members were to be held accountable by their constituencies; or the way in which 'parity' between men and women or election by young people would be achieved in the Voice; or how minority opinions within the Voice would be accommodated. Most importantly, the Referendum Booklet had no legal status and read like a wish list rather than a constitutional design instrument.

In other supplementary material, such as the Calma Langton report, mention was made that the Voice would comprise 24 members, but with no clarity how those persons would come to office. Although mention was made that the members of the Voice would not be appointed by government, in all other respects there was no certainty about how members would be nominated, elected, or appointed

[94] Australian Electoral Commission, *Your Official Referendum Booklet* (Canberra: Australian Electoral Commission, 2023), 12, https://www.aec.gov.au/referendums/files/pamphlet/referendum-booklet.pdf.
[95] Australian Electoral Commission, *Your Official Referendum Booklet*, 14.

other than to say it would be in accordance with the local Aboriginal laws and customs. Most importantly, it was not clear how those elected to serve in the Voice would overlap with elected Aboriginal members of parliament or with native title holders. It is not unreasonable to conclude that if the Amendment had been approved, it would likely have taken years to work out the detail.

The imbedded deficiency of this approach for the election of representatives of the Voice was that it assumed that amongst Aboriginal groups at regional and local levels there were agreement about how leaders or elders would be appointed to represent multiple Aboriginal communities collectively. But there was and is no such intra-Aboriginal agreement.[96] Furthermore, the assurance sought to be given of 'gender parity' in the composition of the Voice at the national level raised the question how such an objective would be attained, and whether such parity is reflective of Aboriginal law and customs.

Whilst a case was made by the yes-campaign that the legislative detail about the composition of the Voice would follow on the referendum, the absence of detail during the referendum created an atmosphere of scepticism in the public mind.[97] The failure by the proponents of the Voice to address reasonable questions, added to an atmosphere of negativity.

5.4 Concerns about the Powers and Functions of the Voice

The powers and functions of the Voice were not defined by the proposed constitutional amendment. Those details were also left to the settled in due course by Parliament. The amendment merely provided that the Voice shall have the power to make 'make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres

[96] Gabrielle Stonehouse, "The Differing Views from Indigenous Australians across NSW on the Voice to Parliament Referendum," *ABC News*, October 6, 2023, https://www.abc.net.au/news/2023-10-06/nsw-voice-to-parliament-different-indigenous-australian-views/102927776.

[97] These are typical questions that could have been discussed at a constitutional convention, but since the Voice proposal was not referred to a convention, the opportunity was lost. Note, for example, the constitutional convention convened in 1998 to consider the question of a constitutional amendment for Australia to become a republic and the extensive debates that took place in an effort to expand consensus.^1 There was no satisfactory reason given by the government why the proposed Voice amendment had not also been referred to a constitutional convention. George Winterton, "Australia's Constitutional Convention 1998," *Agenda: A Journal of Policy Analysis and Reform* 5, no. 1 (1998): 97–109.

Strait Islander peoples'. Although the Solicitor-General expressed the opinion that the Voice was compatible with the Australian system of representative and responsible government,[98] it was not clear on what subject matters the Voice could make representations. Although the amendment did not seek to confer any legislative, executive or judicial powers to the Voice, the amendment was silent as to the range of topics that would fall within or outside the scope of the Voice.

Two critical issues arise for purposes of this article from this power, namely what is the meaning of 'representations'; and what matters would fall within the scope of policy areas on which representations could be made?

It is notable that the amendment did not define what is meant by 'representation'. It is furthermore noteworthy that the Calma Langton report did not refer to 'representation' but rather to 'advice', whilst the Solicitor-General in its opinion observed there would be no obligation to 'consult' with the Voice.[99] The obvious question arose why the word representation was preferred to previously used words of advice or consult? No clarity or satisfactory explanation was given why the term representation was preferred in the proposed amendment to the term advice in the Uluru Statement and the Calma Langton report. During the referendum debate, including in the Referendum Booklet, the concepts recommendation, representation, and advice were often used interchangeably as if they carry the same meaning.[100] The Design Principles principally used the word 'representation'.[101] This raised the questions: why were different concepts – advice, recommendation, consult, representation - used to describe the outcomes of the Voice deliberations, and did those terms signify different meanings? Or, was it just a case of sloppy drafting?

An issue that caused the extensive debate during the referendum was the scope of the powers of the Voice in general, and more particularly on which topics could the Voice make representations and when would its representation have to be sought by government or parliament. The Calma Langton report recommended

[98] Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 8.
[99] Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 18(a).
[100] Australian Electoral Commission, *Your Official Referendum Booklet.*
[101] First Nations Referendum Working Group, "Design Principles of the Aboriginal and Torres Strait Islander Voice."

two principal categories of consultation, namely when advice *must* be sought and when advice *may* be sought. Those recommendations were for inexplicable reasons not carried into the amendment. The Voice proposal adopted had a much wider scope by stating that the Voice could make a representation 'on matters relating to Aboriginal and Torres Strait Islander peoples'. This could, potentially, involve *any* policy or legislation since no mention was made of Aboriginal people being affected 'directly, disproportionally, or predominantly'. In fact, the Referendum Booklet stressed that the Voice would be a 'vehicle' that would address broader socio-economic issues such as Aboriginal life expectancy, infant mortality, and education.[102] Although the Solicitor-General gave the assurance there would be *no obligation* on parliament or the executive to consult or to consider representations of the Voice,[103] this opinion fuelled concern within the Yes camp as well as on the left side of the No campaign that the Voice would have no effective powers. This broad scope of potential powers seemed to repeat the lack of clarity about functions was displayed in the previous Aboriginal advisory bodies.

There was also concern that the status of popularly elected Aboriginal representatives in the federal Parliament (11 at the time of the referendum) would be undermined by the Voice process, whereby a parallel process to the parliamentary processes may be embarked upon. Added thereto was the concern that some of the issues raised by the yes campaign regarding socio-economic indicia, were not necessarily race based but also had an element of class and social status. For example, high juvenile incarceration, poor health conditions, and backlogs in educational performance have elements of race, but also elements of class, income, education, locality, and socio-economic status.[104] Concerns were therefore expressed that the Voice would cause an administrative *apartheid*-

[102] Australian Electoral Commission, *Your Official Referendum Booklet*, 16.

[103] Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 18(b).

[104] A leading Aboriginal no-campaigner, Jacinta Price, expressed her views about the importance of addressing socio-economic challenges on the basis of root cause rather than race as follows: "My hope is that after October 14, after defeating this voice of division, we can bring accountability to existing structures, and we can get away from assuming city activists speak for all Aboriginals and back to focusing on the real issues—education, employment, economic participation, and safety from violence and sexual assault." See Jarrad Cross, "Jacinta Nampijinpa Price Tells Press Club the Voice Is 'Built on Lies' amid Furore in Canberra," *National Indigenous Times*, September 14, 2023, https://nit.com.au/14-09-2023/7687/jacinta-nampijinpa-price-tells-press-club-the-voice-is-built-on-lies-amid-furore-in-canberra.

approach whereby different policies were developed for different communities based on race, rather than special protection and consultation based on indigenous culture and traditional lands.[105]

The Design Principles sought to place an obligation on Parliament and Executive Government to seek representations from the Voice 'early in the development of proposed laws and policies.'[106] This type of broad and unqualified statement would likely have opened the door for extensive litigation about disputes such as timing to invite a representation; time given to Voice representatives to consult with indigenous communities; the weight given to representations; re-consultation as the policy process evolve; and the position of minority views within the Voice.[107] The Design Principles also did not consider that detail that evolves during the policy or legislative process may give rise to demands for another round of consultation being sought.

In short, the proposed powers and functions of the Voice relied on concepts such as consultation, advice, and representation interchangeably as if to convey the same meaning; it failed to specify when and how representations had to be sought or given; and it failed to address concerns that the policy and legislative processes would become drawn-out and circular due to ongoing representations about the detail of policies and legislation.

5.5 Concerns about the Justiciability of Representations of the Voice

The topic that perhaps gave rise to most debate during the referendum campaign, was the possibility of litigation that may arise from Voice

[105] Warren Mundine, a leading Aboriginal no-campaigner, criticised the race-based premise of the Voice as follows: "This is based on a false premise that Indigenous Australians are one homogenous group, and will constitutionally enshrine us as a single race of people, ignoring our unique first nations. It's a step backwards." See Nyunggai Warren Mundine, "The Voice, as Proposed, Is Flawed and Insulting to First Nations," *Sydney Morning Herald*, April 19, 2023, https://www.smh.com.au/national/the-voice-as-proposed-is-flawed-and-insulting-to-first-nations-20230418-p5d193.html.

[106] First Nations Referendum Working Group, "Design Principles of the Aboriginal and Torres Strait Islander Voice."

[107] Note, however, the opinion expressed by the Solicitor-General that there was no obligation on Parliament or the executive to consult with the Voice. While I respect this opinion, it is ultimately the High Court that would determine the law, and other dissenting opinions would then become theoretical. I would suggest that in light of international jurisprudence where greater attention is given to consultation with Indigenous people and the obligations arising from UNDRIP, it is not untenable to suggest that a future High Court could have placed obligations on government and Parliament to seek representation from the Voice. In my view, the assurance sought to be given by the Solicitor-General is open to dispute. See Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 18(a).

representations, or due to the failure to seek or to invite a representation. The Solicitor-General expressed the opinion that there was no obligation on the executive or parliament to 'consider' or 'follow' representations made by the Voice since 'courts are adverse to enforcing procedural requirements relating to the internal deliberations of Parliament…'[108] This opinion did not and cannot be construed to have ruled out any possible future decision by the High Court to require from parliament or the executive a different standard of conduct than had been anticipated by the Solicitor-General.[109]

On the one hand, the yes-campaign sought to give assurance that the representations would not be non-binding; would not constitute a veto; would respect the sovereignty of parliament; and would not constitute a third chamber of parliament. On the other hand, the no-campaign empathized that whatever weight is given to representations of the Voice would depend on the discretion of a future High Court; that the potential justiciability of representations of the Voice might politicise the appointment of judges; that no assurances given by any expert during the referendum campaign would bind a future High Court; and that under the veil of continued Aboriginal sovereignty the High Court could over time expand the scope of powers of the Voice.[110] To address this concern, the Liberal Party proposed an inclusion into the text of the amendment to the effect that parliament would control the applicability of judicial review and thus parliament would be able by way of legislation to restrict the justiciability of

[108] Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 18(b). Solicitor-General Donaghue, para. 18(b).

[109] Note, for example, how the Constitutional Court in South Africa has ordered Parliament to re-negotiate and re-write legislation aimed at granting consultation rights to the Khoisan Indigenous people since the original public consultation had not been adequate.^1 While I accept that the judgment in South Africa was pursuant to a different constitutional regime, there is an increasing trend internationally for courts to require good faith or free, prior, and informed consent from governments in their dealings with Indigenous people.^2 Although I am not critical of this trend, it does undermine the assurance sought to be given by the Solicitor-General that the relationship between the Voice and the executive and Parliament would not in future give rise to potential litigation. See *Mogale and Others v. Speaker of the National Assembly and Others* [2023] ZACC 14. G.N. Barrie, "The 'Right' to Free, Prior and Informed Consent: Evolving Customary International Law," in *Courts and Diversity: Twenty Years of the Constitutional Court of Indonesia*, edited by Bertus de Villiers, Syarifuddin Isra, and Paulus Budi Faiz, 195–227 (Leiden: Brill, 2024).

[110] Note, for example, the proposition that the Voice would lead to the "structural political empowerment" of Aboriginal people, whose "sovereignty was never ceded or extinguished." Gabrielle Appleby, Scott Brennman, and Megan Davis, "A First Nations Voice and the Exercise of Constitutional Drafting," *Public Law Review* 34, no. 1 (2023): 4.

Voice representations. This proposal was not inconsistent with the Calma Langton recommendations, but it was rejected by government during the parliamentary process leading to the referendum.[111]

There was an obvious contradiction between the text of the proposed amendment and the public assurances sought to be given that the Voice representations would not give rise to litigation.[112] Whilst the materials leading up to the referendum made repeated statements that the representations, consultation and advice of the Voice would not be a veto and would not lead to challenges of the validity of legislation and policies, the proposed amendment to the Constitution contained no such guarantee or limitation. This fuelled concerns that the Voice could become an instrument by which practically any legislation or policy measure that remotely affects Aboriginal people, could be subject to challenge for lack of timely invitation for a representation; lack of giving proper weight to a representation; and lack of adequate time or resources to enable representatives of the Voice to consult with their respective communities prior to making a representation.

VI. CONCLUSION: WHERE DOES THE REJECTION OF THE VOICE LEAVE ABORIGINAL CONSULTATION IN AUSTRALIA?

The Australian referendum campaign concerning the Voice is arguably a good example of what should *not* be done to enact an advisory body for indigenous people. Public surveys indicated overwhelming support for the principle of an Aboriginal advisory body, but the specifics of the proposal and the failure of government to engage the public about reasonable questions left the electorate negative and the proposal was rejected by an overwhelming majority.

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[111] Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Canberra: Parliament of Australia, May 2023), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Aboriginal_and_Torres_Strait_Islander_Voice_Referendum/VoiceReferendum/Report.

[112] Note, for example, the statement that the litigation arising from representations made by the Voice should provide a basis for "intergenerational generosity" by the courts. This type of vagueness increased public scepticism, rather than addressing concerns about increased litigation. See Appleby, Brennman, and Davis, "A First Nations Voice and the Exercise of Constitutional Drafting," 6.

The following propositions drawn from the Voice-process can be made regarding the three topics the subject of this article, namely design; powers and functions; and justiciability:

The rejection of the Voice was a rejection of a particular model of consultation, not a rejection of consultation as such with Aboriginal people, nor a negation of the importance of listening to Aboriginal people, or a refusal to address Aboriginal socio-economic disadvantage.

The case made for the inclusion of a mandate to create the Voice into the Constitution by way of a referendum rather than to create a statutory Voice, was not convincing. The principal argument in favour of a constitutional amendment was that entrenchment would prevent abolishment of the Voice, but that exacerbated concerns because of a lack of detail about the Voice and the difficulty to amend the Constitution again should the Voice have to be removed for whatever reason.

The calling of a referendum to approve a constitutional amendment that mandated the creation of an indigenous advisory body by Parliament was a high-stake risk based on a zero-sum approach whereby there is either total success or total failure. Recent international experiences with referenda such as those of Chile and Brexit highlight the risk of putting such complex issues to a popular vote. As Evans and Grattan observe: 'Zero-sum ultimatums don't tend to go well in times of economic uncertainty as the case of Brexit in the United Kingdom shows.'[113]

A statutory Voice would have been easier to establish; there seemed to have been bipartisan support in Parliament for such an advisory body; it would have been flexible and easy to amend; and it could in due course have given advice about some form of constitutional recognition.

Indigenous advisory bodies are inevitably dependent on public goodwill and bipartisan support. The greater the risk of adversarial relationships and litigation, the more likely an advisory body would fail, or would lose public goodwill.

[113] Evans and Grattan, "The Voice to Parliament and the Silent Majority," 9.

The design of the Voice left too many questions unanswered. The reference to supplementary material and opinions of experts as if those carried legal weight to address concerns with the design, did not address the weakness of the legal text that was put to the vote.

The ostensible wide powers of the Voice created the risk that it could become a forum whereby *any* government policy or legislation could be challenged by specialist interest groups under the veil that it affects Aboriginal people in general, or a specific Aboriginal community.

The potential justiciability of representations of the Voice read with its wide powers and functions, was in many respects the death knell for the initiative. Notably, a future High Court would be guided principally by the text of the Constitution as supreme law, and not by legal, political, or scientific assurances given at the time of the referendum campaign.

The outcome of the referendum reflects, at least in part, concern about the judiciary using and perhaps abusing its powers to direct social policies in a manner of its suiting rather than for Parliament and the executive to determine the course of social-economic reform and reconciliation.

Finally, do indigenous advisory bodies have a place in Australia? The answer to the question is an unequivocal yes, but much depends on its purpose, objectives, design, powers and functions, and justiciability of advice of such an indigenous advisory body.

My concern with a referendum was made known well before the calling of it. I have consistently supported an advisory body for Aboriginal people but argued for it to be put in a legislative rather than a constitutional framework. My concerns expressed in August 2022 were as follows:

> There is a risk, as in the case of the republican-debate, that something that seems obvious and ready for public approval, fails because the detail put people off. The problem is that, since the mechanism for recognition is proposed to be the Constitution, including the Voice in the Constitution would require every Aussie voter to be convinced not only of the merit of the Voice in general, but also the detail of it. That does not bode well, because

> so many people can develop a gripe about so many issues. Strange bedfellows can find themselves voting 'no', but for different reasons....Australia cannot afford a 4th failed experiment with Aboriginal consultation.[114]

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[114] De Villiers, "Seven Questions before the Voice Can Be Heard," 9–11.

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