The Voice — A Step Forward for Australian Nationhood

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Introduction

1. I thank the Ngara Yura Committee of the Judicial Commission of New South Wales, the New South Wales Bar Association and the New South Wales Law Society for the opportunity to address this Exchanging Ideas Symposium dedicated to the theme of First Nations Justice. In so doing, I acknowledge that I deliver this address from the land of the Gadigal People of the Eora Nation.

2. The focus of this year's Symposium is the Uluru Statement from the Heart and the proposed referendum to amend the *Australian Constitution* to provide for the creation of a Aboriginal and Torres Strait Islander Voice to the Parliament and the Executive. This presentation focusses upon the historical context, the rise of recognition, the concept of sovereignty, the Makarrata and The Voice.

The First History — The First Peoples

3. There is an immense back story to the current debate about the proposal for the creation of a constitutional Voice. It begins with the First History of human occupation of Australia. As I said when I was sworn in as Chief Justice in 2008:

> The history of Australia's indigenous peoples dwarfs, in its temporal sweep, the history that gave rise to the *Constitution* under which this Court was created. Our awareness and recognition of that history is becoming, if it has not already become, part of our national identity.

4. Estimates of the duration of human occupation of the Australian continent vary. According to the Australian Museum website, molecular clock estimates, genetic studies and archaeological data suggest that the initial occupation of Australia by modern humans occurred between 48,000 and 50,000 years ago. Other evidence, some of which has been contested and some of which is inconclusive, has suggested a longer

*I gratefully acknowledge the co-authorship of the last section of this paper —– 'The Voice – High return, low risk' with Professor Geoffrey Lindell, Emeritus Professor of Law at the University of Adelaide.

period of occupation going back 65,000 years. The uncontroversial fact is that Aboriginal occupation of the Australian continent dates back over tens of thousands of years before the arrival of British colonisers in the late 18th century. While the history of the Torres Strait Islanders is more recent, archaeological research indicates evidence of settlement dating back over 7,000 years.[1]

5. Lying across the innumerable physical traces of ancient occupation is the contemporary living presence of long-standing references to Australian landscapes in traditional Aboriginal languages and the intricate lacework of what we inadequately call 'the Dreaming'.

6. The Dreaming could not be fixed in time. It was, according to WEH Stanner, 'everywhen'.[2] A senior cultural bearer for the Kaurna People around Adelaide, Karl Telfer wrote of it thus:

> We are the oldest and the strongest people, we're here all of the time, we're constant through the Dreaming which is happening now, there's no such thing as the Dreamtime.[3]

7. Through the stories of the Dreaming right across the continent we learn of a creation process involving ancestral beings, the description of the landscape by reference to that process and the relationship between peoples and between peoples and country. Those stories expressed in oral traditions, ceremonies and art, provide us with glimpses of the power and vibrancy of traditional relationships between First Nations Peoples and their country and their authority over country.

The Second History — the *Constitution*

8. The second history, the colonising history of Australia, began with the taking possession of the eastern part of the continent by James Cook in 1770. That very large part of the continent was named New South Wales. By the closing decades of the 19th

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1 D Wright and G Jacobsen, 'Further radiocarbon dates from Dabangay, a mid-to late Holocene settlement site in western Torres Strait (2013) 76 *Australian Archaeology* 79.

2 WEH Stanner, 'The Dreaming (1953)' in WEH Stanner, *White Man Got No Dreaming: Essays 1938-1973* (1979, ANU Press).

3 www.creativespirits.info/aboriginalculture/spirituality/what-is-the-dreamtime-or-the-dreaming

century there were six Australian colonies, all of which had constitutions supported by Imperial Statutes and conferring representative self-government.

9. The *Australian Constitution* was drafted by representatives of the colonies meeting over the last decade of the 19th century. It was approved by popular referenda and enacted by the United Kingdom Parliament as s 9 of the *Commonwealth of Australia Constitution Act 1900*. It was a product and part of the Second History of Australia. It was driven in part by a notion of the Australian people as a 'race' reflected in Henry Parkes' statement at the Australian Federation Conference on 10 February 1890 when he said, to a standing ovation, that '[t]he crimson thread of kinship runs through us all'.[4]

10. Bob Birrell in his *Federation: The secret story*[5] observed that at the turn of the 19th century Australians used the term 'people' or 'race' interchangeably. But talk about race and talk about people was not talk about First Peoples. To the extent that they were recognised in the *Constitution* when it came into force in 1901, it was by exclusion.

11. Section 51(xxvi) conferred on the Commonwealth Parliament the power to make laws with respect to:

> the people of any race other than the Aboriginal race in any State; for whom it is deemed necessary to make special laws.

And in s 127 it was provided that:

> In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

12. Nothing was said for a very long time in the High Court about First Nations Peoples. The Index to the first 150 volumes of the *Commonwealth Law Reports* covering the period from 1903 to 1982 lists only four cases under the heading 'Aboriginals'. The first of them was an appeal reported in volume 100 and it tells a salutary story of the relationship between the First Peoples and those who came later. The appellant was the famed artist, Albert Namatjira. He had been convicted in a Magistrates Court at Alice Springs of supplying liquor to a person declared by the Administrator of the

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4 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 10 February 1890, 22 (Alfred Deakin citing Sir Henry Parkes).

5 Bob Birrell, *Federation: The secret story* (Duffy & Snellgrove, 2001).

Northern Territory to be a ward under s 14(1) of the Welfare Ordinance. He was sentenced to a term of imprisonment of six months, reduced to three months by the Supreme Court of the Northern Territory. He appealed to the High Court and challenged the validity of the Wardship Declaration as it applied to the person to whom he had supplied liquor. It turned out that that person was one of more than 15,000 First Nations Peoples who had been declared all at the same time to be 'wards'. This was on the basis that they collectively stood in need of such special care or assistance as was provided by the Ordinance. The *en bloc* character of the declaration seemed at odds with the individualised factors which had to be considered before the power to declare a person a 'ward' could be exercised. Nevertheless, five Justices of the High Court, including the Chief Justice, Sir Owen Dixon, held the *en bloc* approach to be valid. That meant the person supplied by Namatjira had been validly declared a 'ward'. The sentence of imprisonment was held to be an appropriate exercise of the discretion of the Supreme Court of the Northern Territory. The case was *Namatjira v Raabe*.[6]

13. The two exclusionary provisions, s 51(xxvi) and s 127, were the subject of the *Constitution Alteration (Aboriginals) 1967*. Section 127 was repealed. Section 51(xxvi) was amended to extend the race power of the Commonwealth by taking out the exclusion relating to Aboriginal people so that the Commonwealth Parliament was empowered simply to make laws for:

> the people of any race for whom it is deemed necessary to make special laws.

It was not the best response to the need to empower the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander Peoples. Instead of expressly referring to them as such it simply dropped them into the bucket of races about any of whom the Commonwealth could make special laws.

14. Constitution alteration can be a long and sometimes fraught process. There is no well settled and orthodox process. The 1967 amendment to s 51(xxvi) was the culmination of a decades' long campaign dating back to 1910. In 1929 the Final Report of the Royal Commission on the Constitution considered, despite representations to the contrary,

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6 (1959) 100 CLR 664.

that the States were better equipped than the Commonwealth to exercise constitutional responsibility in relation to First Nations People.

15. Aboriginal activists in the 1930s continued to lobby for constitutional changes. William Cooper, the Secretary of the Australian Aborigines League said 'we feel it but right that our people should be the responsibility of the federal administration.'[7]

16. Calls for federal powers were renewed after World War II. The power to legislate with respect to 'people of the Aboriginal race' was one of the amendments proposed in the 1944 Constitutional Referendum conducted by the Curtin Government. It was a part of a package of 14 propositions concerned with the extension of Commonwealth power, although only for a period of five years after the end of the war. In the event, the proposal achieved a majority of votes only in South Australia and Western Australia.

17. The Joint Committee on Constitutional Review in 1959 had received representations that the Commonwealth Parliament should have an express power to make laws with respect to Aboriginal people. However, it did not complete its inquiries on all the issues involved and in the end made no recommendations on that question.

18. The 1960s saw an increasing awareness about First Nations' affairs generally and their place under the *Constitution*.[8] It was in that decade that the Bark Petition was presented to Parliament and the Gurindji People walked off Wave Hill Station.

19. 1964 saw the introduction by Arthur Calwell, leader of the Labor opposition of the *Constitution Alteration (Aborigines) Bill 1964* for a referendum to remove the exclusionary provision from s 51(xxvi) and to delete s 127. However, the Bill lapsed when Parliament was dissolved. In 1965, a Bill for a referendum for the removal of s 127 was introduced by Prime Minister Menzies who was, however, not prepared to amend s 51(xxvi) although he was sympathetic to the notion of repealing it altogether.

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7 William Cooper, Hon Secretary (Australian Aborigines League) to the Rt Hon the Minister for the Interior Mr Patterson, 31 October 1938 quoted in B Attwood and A Marcus, *The 1967 Referendum or When Aborigines Didn't Get the Vote* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander /Studies, 1997*)* 8.

8 J Summers, 'The Parliament of the Commonwealth of Australia and Indigenous Peoples 1901-1967' in G Lindell and R Bennett (eds) *Parliament: The Vision in Hind Sight* (Sydney, Federation Press, 2001) 149.

20. WC Wentworth proposed another Bill to repeal s 51(xxvi) in 1966 and to confer power on the Commonwealth Parliament to make laws 'for the advancement of the Aboriginal natives of the Commonwealth of Australia.' He also wanted to introduce a new s 127A which would prohibit any law, State or Commonwealth, which subjected any person born or naturalised in Australia to discrimination on the ground of race. Although both the Menzies and Wentworth Bills passed both Houses of Parliament neither went to a referendum.

21. In 1967 Prime Minister Harold Holt introduced the *Constitutional Alteration (Aborigines) 1967* Bill. It proposed the removal of the words 'other than the Aboriginal race in any State' from s 51(xxvi) and the deletion of s 127. The then Leader of the Opposition, Gough Whitlam, supported the Bill and referred to the need for positive Commonwealth initiatives to redress the many disadvantages suffered by Aboriginal people.[9] The Bill passed both Houses of Parliament without opposition. In the referendum that followed, the proposal was passed by 90.8% of those voting which represented the biggest majority for any referendum proposal ever held in Australia. To the extent that there was evidence of public attitudes to be derived from public opinion polls at the time, it indicated that most voters thought that constitutional change would result in a better deal for Aboriginal people.[10]

22. Professor George Williams observed that 'the referendum left unfinished business' because 'it did not add any text to the Constitution recognising Aboriginal people and their history' and 'failed to deal with clauses that allow discrimination on the basis of race'.[11]

23. And for Noel Pearson while the 1967 referendum reversed exclusion:

> It left us with a Constitution that now makes no mention at all of this nation's indigenous history and heritage and 'still contains racially discriminatory provisions'.[12]

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9 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1967, 229 (Gough Whitlam).

10 Summers, above n 8, 208.

11 George Williams, 'Time to Fix a Stain in the Constitution', Sydney Morning Herald, 18 July 2014, 18 cited by Dylan Lino, *Constitutional Recognition* (The Federation Press, 2018) 130.

12 Noel Pearson, 'Next Step is for the Nation to Leave Race Behind, The Australian, Sydney, 25 May 2013 19 cited by Dylan Lino, *Constitutional Recognition* (The Federation Press, 2018) 130.

24. Dylan Lino, in his excellent book, *Constitutional Recognition*,[13] argued that the 1967 amendments were important, but fundamentally inadequate. He saw them as a half-way stop on an inevitable road towards final constitutional recognition of indigenous peoples. He said:

> The 1967 amendments were limited by the historical horizons of politics and identity that attended their emergence, and they have been subject to an uncertain future in which their implementation could and did go in different directions.

25. Lino argued that as a result of what he called the shift in constitutional culture, it became wholly unfeasible, after the referendum, for the Commonwealth to remain inactive in First Nations' affairs or to exercise its new found power in ways that disrespected First Nations citizenship. It is perhaps relevant to consideration of the proposed amendment to create a Voice to the Parliament that, as with the amendment to s 51(xxvi) it does not impose a constitutional legal obligation on the Parliament to do anything. What will drive the Parliament to action is the powerful democratic mandate of an affirmative answer to the referendum question. It is now appropriate to say something about the concept of recognition.

The Rise of Recognition

26. The ordinary meaning of 'recognition' includes 'acknowledgement of the existence or legality or validity of …'. It can also mean 'treating as worthy of consideration …' An early judicial statement of the non-recognition of Australia's First Peoples was made by the Supreme Court of New South Wales in 1833. The Court described the Indigenous inhabitants of the colony as 'wandering tribes … living without certain habitation and without laws [who] were never in the situation of a conquered people.'[14] That was an explicit rejection of 'recognition' of Indigenous societies as law bearers or indeed as societies at all. It was a judicial blindness which persisted. In 1889, in the advice of the Privy Council in *Cooper v Stuart*,[15] Lord Watson said:

> There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the

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13 Lino, *Constitutional Recognition* (The Federation Press, 2018).
14 *McDonald v Levy* 1 Legge 39, 45.
15 (1889) 14 App Cas 286.

> British dominions. The Colony of New South Wales belongs to the later class.[16]

27. In *Milirrpum v Nabalco Pty Ltd*,[17] in 1971 the Supreme Court of the Northern Territory held that the traditional rights and interests of the Yolngu People of East Arnhem Land were 'not able to be recognised' by the common law. That is to say the common law would not give them legal effect and protection. Blackburn J, the trial judge, found that the evidence before him showed a 'subtle and elaborate system highly adapted to the country in which the people led their lives', a system which he characterised as a government of laws and not of men.[18] Despite that finding he concluded that there were no rights arising under traditional laws and customs of a kind that could attract recognition at common law. It was not judicial blindness that drove him to that conclusion. It was the Privy Council's decision in *Cooper v Stuart* stating the law applicable to the Australian colonies and the judicial labelling of those colonies as 'settled' rather than 'conquered' — fossilising wrong history into a binding proposition of law.

28. The *Milirrpum* decision led to the establishment by the Commonwealth Government of the Woodward Royal Commission. The Commission proposed a system of inquiry and recommendation by an Aboriginal Land Commissioner upon which the grant of statutory land rights could be made to traditional owners in the Northern Territory. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) set up a system broadly in accordance with Woodward's recommendations. Land rights statutes subsequently passed in New South Wales, Queensland and South Australia followed the same general mechanism of administrative recognition leading to a grant effected by legislation or by a legislative protest.

29. The Northern Territory legislation generated a significant amount of litigation between applicants and the Northern Territory Government and other parties. Thirteen cases arising under that Act went to the High Court before its 1992 decision in *Mabo*.[19] They involved exposure of the Court to concepts of traditional ownership to the extent that those concepts were reflected in the Act itself. The High Court which decided *Mabo*

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16 Ibid 291.
17 (1971) 17 FLR 141.
18 Ibid 267.
19 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

was a different High Court to that which existed at the time of the *Milirrpum* decision. It had had the opportunity for the development of an understanding of traditional ownership of land and waters.

30. The High Court in *Mabo (No 2)* held that the common law could recognise the native title of Aboriginal and Torres Strait Islander people under their traditional law and custom.[20] Importantly, the common law recognition of native title does not affect traditional laws and customs, nor the relationships with land to which they give rise.

31. The concept of 'recognition' is embedded in the *Native Title Act 1993* (Cth). One of its principal objects is 'to provide for the recognition and protection of native title'.[21] The Full Court of the Federal Court of which I was a member in 2005, expanded upon the concept of recognition in *Northern Territory v Alyawarr*.[22] The Court said:

> It derives from the human act by which one people recognises and thereby respects another. By the process, which it names, aspects of an indigenous society's relationship to land and waters are translated into a set of rights and interests existing under non-indigenous laws. The choice of the term 'recognition' links it to the normative framework established by the common law and by the Act itself as evidenced in the Preamble. Recognition is not a process which has any transforming effect upon traditional laws and customs or the rights and interests to which, in their own terms, they give rise.

32. If constitutional recognition is framed as a statement of acknowledgment of the Aboriginal and Torres Strait Islander people as the first peoples of Australia, it can do so in a way that recognises their authority over the land and waters according to traditional law and customs. Such a recognition would not involve any compromise of the sovereignty of the Crown for the purpose of the non-Indigenous legal system. Nor does it involve any ceding of sovereignty by First Nations Peoples. That requires a consideration of what is meant by sovereignty in this context.

Sovereignty

33. In *Mabo* the concept of 'recognition' of native title by the common law was closely linked to notions of Crown sovereignty in the sense of sovereignty over the land acquired by the British Crown at the time of annexation. This was partly because an

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20 Ibid 60 and 61 (Brennan J); 81, 82, 86-7 (Deane and Gaudron JJ); 187 (Toohey J).
21 *Native Title Act 1993* (Cth) s 3(a).
22 (2005) 145 FCR 442.

argument was advanced that the acquisition of sovereignty by the Crown itself had extinguished pre-existing native title for the purposes of recognition by the common law. The Court rejected that proposition. Sovereignty used in this sense referred to legal authority to deal with the land. It did not involve acquisition of ownership.

34. The sovereignty debated in *Mabo*, asserted by the British Crown over the Australian colonies, carried with it the authority, under the non-Indigenous legal system, to govern and deal with the land and waters of the colonies. Importantly it had nothing to say and no legal impact on the responsibility and authority which Indigenous people had under their own legal systems in relation to their traditional land and waters. In that sense it had nothing to say about the asserted sovereignty of First Nations People under their traditional legal systems.

35. Authority over land and waters within the First Nations legal framework and within the colonising legal framework are capable of co-existence just as tradition law and custom are capable of co-existence of the kind reflected in native title agreements. Importantly, constitutional recognition and the creation of The Voice does not involve any ceding of traditional authority over land and waters. That proposition is also relevant to the possibility of an agreement between First Nations Peoples and Commonwealth and State Governments whether it be designated by the term 'treaty' or by some other term such as 'Makarrata'.

36. The concept of sovereignty spelt out in the Uluru Statement from the Heart appears to be consistent with this analysis. The Statement described Aboriginal and Torres Strait Islander tribes as 'the first Sovereign Nations of the Australian continent and its adjacent islands…' It went on to say:

> This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

37. In the Uluru Statement from the Heart, Makarrata is described as a culmination of the First Nations' agenda — a Yolngu word meaning the coming together after a struggle. The Uluru Statement seeks a Makarrata Commission to supervise a process of agreement making between governments and First Nations and truth telling about

history. That is a process which has already begun. It does not compromise sovereignty on either side.

38. Against that general background it is time to turn to the proposal for The Voice set out in the Uluru Statement from the Heart.

The Uluru Statement from the Heart

39. The Uluru Statement from the Heart, adopted at the 2017 National Constitutional Convention of First Nations Peoples, including the statement about their sovereignty which has already been set out. The Statement went on to point to the legacy of colonisation for First Nations People:

> Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. **They should be our hope for the future.**
>
> These dimensions of our crisis tell plainly the structural nature of our problem. *This is the torment of our powerlessness*.
>
> We seek constitutional reforms to empower our people and take a *rightful place* in our own country. When we have power over our destiny our children while flourish. They will walk in two worlds and their culture will be a gift to their country.
>
> We call for the establishment of a First Nations Voice enshrined in the Constitution. (emphasis in original)

The Voice – High return, low risk

40. The Voice is a big idea but not a complicated one. It is low risk for a high return. The high return is found in the act of recognition, historical fairness and practical benefit to law-makers, governments, the Australian people and Australia's First Peoples. It rests upon the historical status of Aboriginal and Torres Strait Islanders as Australia's indigenous people. It does not rest upon race. It accords with the United Nations Declaration on the Rights of Indigenous Peoples for which Australia voted in 2009. It is consistent with the International Convention on the Elimination of all Forms of Racial Discrimination. Suggestions that it would contravene that Convention are wrong.

41. The proposed draft amendment to the *Constitution* to establish The Voice provides, as presently framed:

> 1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.
>
> 2. The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander Peoples.
>
> 3. The Parliament shall, subject to this *Constitution*, have power to make laws with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice.

42. Those words set out the basic constitutional elements of what The Voice will be and do. They leave it to the Parliament to make laws on the detail and to change those laws from time to time. Parliament will have a high democratic mandate to make such laws. It will not have a legal, constitutional obligation to do so.

43. The first constitutional element of The Voice is that it will be a 'body'. The relevant ordinary meaning of that word is a group of people who work or act together. The only constitutional requirement in relation to the body is that it be called the Aboriginal and Torres Strait Islander Voice.

44. The function of The Voice is set out in paragraph 2. To 'make representations' is to make official statements to the Parliament and the Executive. Those words cover submissions or advice about existing or proposed laws and administrative policies and practices. There is no constitutional legal obligation for the Parliament or the Executive to accept or be bound by such submissions or advice. There would, however, be a high democratic obligation to respect them and take them into account.

45. The Voice may make representations about 'matters relating to Aboriginal and Torres Strait Islander Peoples'. The term 'relating to' can cover a broad range of matters. Its limits are likely to be defined by common sense and political realities. Laws, policies and practices relating to Aboriginal and Torres Strait Islander education and training, family and social welfare, health, remote community services, community policing, Aboriginal art, cultural and heritage protection, traditional ownership of land and waters, are well within that range.

46. The third paragraph of the amendment confers power on the Parliament to make laws to give effect to The Voice. It does not impose a constitutional legal obligation on Parliament to do so. Nor does the amendment require that the Parliament adopt a particular composition or confer particular functions, powers or procedures on The Voice. That is left to its discretion. Any laws made by the Parliament would necessarily contain elements supporting the leading function of The Voice which is to 'make representations'.

47. Parliament could not make a law which could confer on The Voice a legal right to veto a proposed law. Parliament could not make a law limiting its own law-making powers by legally requiring prior consultation with The Voice. The Voice is not a third chamber. The constitutional amendment would, however, support the adoption by Parliament of internal procedures to provide for The Voice to be heard. The Parliament could also make a law requiring the Executive to have regard to representations by The Voice to the Executive when adopting or changing policies and practices relating to Aboriginal and Torres Strait Islander peoples.

48. The Voice will present First Nations' views at a national level. The Parliament, in determining its membership and the mode of election, will necessarily want to ensure that representations made by The Voice reflect a distillation of the views of First Peoples across Australia. That is not a constitutional legal obligation. The composition of The Voice is left to the Parliament. It is, again, a powerful democratic expectation given the functions of The Voice. The practical benefit of input from national representatives of First Peoples is that it derives from their lived experience across the country. The input of The Voice may not be the only view of First Peoples. There is certain to be diversity of opinion and even dissent on particular issues. Those opinions and that dissent can also be heard. Indeed, there would be nothing to prevent The Voice from drawing attention to that dissent or diversity, whether it comes from a minority of its own members or beyond. There would be nothing to prevent the submission of different views of those who disagreed with a particular representation made by The Voice.

49. What, if any, part would the courts have to play in the working out of the constitutional and legal role of The Voice? There is little or no scope for constitutional litigation arising from the words of the proposed amendment. The amendment is facilitative and

empowering. Parliament cannot legally be compelled to make laws for The Voice. It cannot be compelled to make a particular kind of law. Nor can it be prevented from repealing or amending the laws it makes.

50. This leads to two important questions. The first is — why not leave The Voice out of the *Constitution* altogether and just make a law using the races power to create The Voice? The first answer is that The Voice is not about race. It is about our First Peoples as the indigenous people of Australia. The second answer is that by providing for The Voice in the *Constitution*, the Australian people perform an act of recognition and acknowledgement of First Peoples as the bearers of the first history of our continent. That is a history which stretches across tens of millennia. The third answer is that the constitutional provision creates a democratic mandate for the Parliament to create and continue The Voice as a significant institution in our representative democracy. It would be a democratic mandate because it is approved by a majority of electors in a majority of States as required by s 128 of the *Constitution*.

51. The second question is why not spell out the detail of The Voice now, beyond what is set out in the proposed amendment? The most that government can sensibly do is to indicate in broad terms the model it favours and which it would submit to the Parliament after a successful referendum. In the end it will be a matter for the Parliament, the elected representatives of all Australian people, to decide. The Co-design Model, proposed in the report by Professor Marcia Langton and Professor Tom Calma, sets out likely elements of a body with representatives drawn from across Australia. It explains how that model would work. But even if the government were to commit to a detailed model now, its commitment would not have any constitutional legal effect. Careful planning must go into the nuts and bolts of The Voice to be established by the Parliament in order to give it the best chance of working and, through its workings, benefiting Australian society as a whole.

52. There are numerous examples of powers conferred on the Parliament by the *Constitution*, as adopted in 1901 when the way in which those powers would be exercised was left to the Parliament. The 1967 referendum gave power to the Commonwealth Parliament to make laws for Aboriginal and Torres Strait Islander people. The government of the day was not required to spell out how it would exercise them.

53. As to litigation, there is always the possibility that someone, someday will want to litigate matters relating to The Voice as can anybody who seeks recourse to the courts. That flows from the fact that Australia is governed by the rule of law which provides access to the courts where it is said that public officials have exceeded their power. That said, there is little or no scope for any court to find constitutional legal obligations in the facilitative and empowering provisions of the amendment. And if Parliament made a law which created unintended opportunities for challenges to executive government action, the law could be adjusted. There are many examples of that. A law providing that the Executive was required to take into account representations from The Voice as a condition of the exercise of executive power would, in all probability, be justiciable. For if Parliament imposed such a requirement, the Executive must be held to account if it does not comply with it. But in providing for representations to be made to the Executive, the law does not have to impose such a requirement. That is a matter for the Parliament.

54. The Voice proposal is a once in a lifetime opportunity for Australia to fill a gaping hole in our *Constitution* — to recognise our first history and the First Peoples who bear it and the painful legacy of its collision with the second history of colonisation. The high return against low risk is that The Voice will provide a practical opportunity for First Peoples to give informed and coherent and reliable advice to the Parliament and the Executive to assist them in law and policy making in one of the most difficult areas of contemporary government. It empowers First Peoples and the Australian people as a whole to acknowledge, address and move forward from the legacy of their colliding histories.