CHAPTER EIGHT
The 'No' Case

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

> Prime Minister, we don't need another 'hand out' as you have described the 'Uluru Statement' to be. No, we Indigenous Australians have not come to agreement on this statement – as also what you have claimed. It would be far more dignifying if we were recognised and respected as individuals in our own right who are not simply defined by our racial heritage but by the content of our character.
>
> I am an empowered Warlpiri/Celtic Australian woman who did not, and has never needed, a paternalistic government to bestow my own empowerment upon me. We've proven for decades now that we do not need a Chief

1 Senate, *Hansard*, 27 July 2022 p, 120, also available at https://www.jacintaprice.com/maiden-speech

> Protector of Aborigines. I have got here along with 10 other Indigenous voices, including my colleague Senator for South Australia Kerryn Liddle, within this 47th parliament of Australia like every other parliamentarian: through hard work and sheer determination.
>
> However, now you want to ask the Australian people to disregard our elected voices and vote yes to apply a constitutionally enshrined advisory body without any detail of what that might in fact entail! Perhaps a word of advice – since that is what you're seeking: Listen to everyone and not just those who support your virtue-signalling agenda but also to those you contradict.[2]

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

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

2 Ibid, pp. 120-121.

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

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

My gravest concern is that recognising culture in the Constitution has the potential to accentuate the us-vs-

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

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

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

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

All my adult life there have been Aboriginal and Torres Strait Islander voices in Canberra. The Federal Council for the Advancement of Aborigines and Torres Strait Islanders

3 Anthony Dillon 'Recognition may mean never closing the gap', in Gary Johns, *Recognise What?* Connor Court, 2014, pp. 60-61.

(FCAATSI), the National Aboriginal Consultative Council (NACC), National Aboriginal Council (NAC), the Aboriginal Development Commission (ADC), the Aboriginal and Torres Strait Islander Commission (ATSIC), the National Congress of Australia's First Peoples, the Reconciliation Council, the National Indigenous Council, the Prime Minister's Indigenous Advisory Council, the Coalition of the Peaks, the Torres Strait Regional Authority, and the Torres Strait Regional Council, Northern Land Council, Central Land Council, the National Native Title Council and numerous other Land Councils and Peak Industry Bodies in Health, Education, Law, Justice, Children, etc.

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

I would argue the loudest voices are from individual Aboriginal and Torres Strait Islander people who communicate all the different viewpoints within our communities. And, yes, there is not one Aboriginal and Torres Strait Islander viewpoint. There are many – just like for the rest of Australia. If the vast array of councils, committees, coalitions and conferences over half a century haven't delivered the outcomes Indigenous people want to

see, what makes anyone think a 'Voice to Parliament' will be any different simply because the power to create it sits in the Constitution?

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

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

Writing in *The Australian*, Mundine says:

This new government must embrace a new mindset when considering how best to empower Aboriginal people to be all that they can be. However, with its focus on the *Uluru Statement from the Heart*, it is questionable as to whether such a mindset will be adopted. The principal focus of the statement, the Indigenous Voice to Parliament, seems to be a repackaging of the same old dogma that has defined (and failed) Aboriginal affairs for too many years; namely,

4 Nyunggai Warren Mundine, 'Push for a Voice to Parliament is a bureaucratic power grab to give Indigenous Australians rights they already have', Centre for Independent Studies, 9 August 2022, available at https://www.cis.org.au/commentary/opinion/push-for-a-voice-to-parliament-is-a-bureaucratic-power-grab-to-give-indigenous-australians-rights-they-already-have/

that only Aboriginal people are qualified to speak about Aboriginal issues.

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

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

This belief that Aboriginal people are a different species requiring 'culturally appropriate' solutions has kept an Aboriginal industry thriving and allowed politicians, academics and consultants to build successful careers for themselves while people on the ground languish. Just look at how much attention this new government gives to the

> Uluru statement – considerably more than what is being given to the dysfunction in remote communities.[5]

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

> Recognising Indigenous people in the Constitution is well worth doing, but only if it's done in ways that don't damage our system of government and don't compromise our national unity. Done well, recognition would complete our Constitution rather than change it. Done badly, recognition would entrench race-based separatism and make the business of government even harder than it currently is.'
>
> In my judgment, there are four massive issues with this concept of Indigenous recognition by way of a voice. First, it's a race-based body comprising only Indigenous people. Unless the government is to nominate or the parliament is to select the members of the Voice, there would presumably have to be a race-based electoral roll determining who could stand for election and who could vote for the

5 Nyunggai Warren Mundine, 'New mindset of action must replace grand symbolic gestures', *The Australian*, 20 July 2022, available at https://www.theaustralian.com.au/commentary/new-mindset-of-action-must-replace-grand-symbolic-gestures/news-story/23c66f4209b1c0bc5760e04c67d443fb

Voice's members. This would give Indigenous people two votes: first, like everyone else, a vote for the parliament itself; and second, in a right that's uniquely theirs, a vote for the Voice. If governments were in the habit of making decisions for Indigenous people without their input, or if the parliament were devoid of Indigenous representation, there might at least be an argument for such a special Indigenous body. As it's happened though, constitutionally entrenching a separate Indigenous voice when there are already 11 individual Indigenous voices in the parliament, and when there's arguably 'analysis paralysis' from a surfeit of Indigenous consultation mechanisms already, is a pretty strange way to eliminate racism from our Constitution and from our institutional arrangements.

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

Third, in the event that an Indigenous person or entity were aggrieved by a government that failed to give the Voice a chance to make representations on any issue, or that then ignored it, there could readily be an application to the High Court to rule that the Constitution had been breached. This is the likely consequence of importing into the Constitution such a vague-yet-portentous concept as a 'Voice' (as opposed to one described as an advisory body or a commission), especially one that's said to be the means

of putting an end to centuries of marginalisation. At the very least, the existence of a Voice could import further delay into the finalisation of legislation or decision-making as it's given adequate time to investigate and come to its conclusions.

Fourth, the whole point of Indigenous recognition is to address a gap in what's otherwise been an admirable Constitution and, in so doing, to help to complete the reconciliation of Indigenous people with modern Australia. There could hardly be a greater setback to reconciliation than a referendum that fails. Yet that is the likelihood – at least based on the record of previous attempts to change the Constitution – in the absence of substantial bipartisan support. Although the Coalition's Indigenous affairs spokesperson has previously been an in-principle supporter of a Voice, the new Coalition senator for the Northern Territory, the proud 'Celtic Warlpiri Australian' woman Jacinta Price, has expressed deep scepticism about a proposal with so much of the detail thus far omitted, with so much potential for ineffective posturing, and that defines people by racial heritage.

I can understand why many Indigenous leaders would want constitutional change to go beyond the symbolic in order to produce better outcomes for their own people, and hence the call for their own unique voice to which the parliament should defer. But better outcomes are ultimately the product of better attitudes, and these are more likely to be engendered by a generous acknowledgment of all the elements that have made modern Australia such a special

place than by creating yet more elements of government based on Indigenous ancestry.

Based on what we currently know, the Voice is wrong in principle, almost sure to be bad in practice, and unlikely to succeed in any referendum. If it fails, reconciliation is set back. If it succeeds, our country is permanently divided by race. Hence the fundamental question: why further consider something that would leave us worse off whichever way it goes?[6]

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

Stretching my imagination only a little, I would foresee a decade or more of constitutional and administrative law litigation arising out of a Voice whether constitutionally

6 Tony Abbott, 'Pass or fail, this referendum will surely leave us worse off', *The Australian*, 5 November 2022, available at https://www.theaustralian.com.au/inquirer/pass-or-fail-this-referendum-will-surely-leave-us-worse-off/news-story/761616d76aaa8e5e308ed9ce1d04c8ba

entrenched or not. Every state and territory are likely to have an interest in any representations and in the interactions between the Voice and the constitutionally entrenched houses of parliament and executive government.

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

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

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

I have no doubt that already, courageous and ingenious legal minds both are conceiving bases upon which to litigate the many legal and cultural implications of the Voice. The Voice, or a member of it, is almost certain to argue in the courts that a member of the executive government, in executing a parliamentary enactment of a representation of the Voice, took into account an irrelevant consideration, or

failed to take into account a relevant one, or made a decision that no reasonable person could make, shifting [indicators] relied upon in almost every challenge brought to the actions of government.[7]

7 Ian Callinan, 'Examining the case for the voice – an argument against', *The Australian*, 17 December 2022, available at https://www.theaustralian.com.au/inquirer/examining-the-case-for-the-voice-an-argument-against/news-story/e30c8f2ffcbae73eaa3921e82bf174a9