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Institute of Public Affairs

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Joint Standing Committee on Electoral Matters
PO Box 6021
Parliament House
CANBERRA ACT 2600

**SUBMISSION TO THE INQUIRY INTO THE REFERENDUM (MACHINERY PROVISIONS) AMENDMENT BILL 2022**

Dear Secretary,

Since 1943 the Institute of Public Affairs has been committed to defending and extending the Australian way of life and mainstream Australian values. Central to the Australian way of life is the right of every Australian to have a say about the major political and cultural issues which affect them.

On 1 December 2022 the Albanese government introduced into the House of Representatives the Referendum (Machinery Provisions) Amendment Bill 2022 ("The Bill"). The purpose of the Bill is to reform the way referendums are conducted in Australia, with particular application to the conduct and regulation of the forthcoming proposed referendum to insert into the Australian Constitution an Indigenous-only Voice to Parliament.

The purpose of this submission is to share with the Joint Standing Committee on Electoral Matters the Institute of Public Affairs' legal analysis of the Bill, as well as other research of the IPA relevant to the Joint Standing Committee's inquiry.

The IPA's legal analysis finds the Bill is further evidence that the debate on the proposal to enshrine in the Australian Constitution an Indigenous-only Voice to Parliament is not balanced and favours the Yes case. Research and analysis of the Bill and other matters by the Institute of Public Affairs finds that:

1. The Bill would mean the federal government can spend taxpayer money unfairly and disproportionately in support of a Yes vote in a referendum.
2. The Bill would mean the federal government can deny voters the ability to hear the No case by repealing the requirement to publish and distribute a referendum pamphlet.
3. The Bill would mean the federal government will use the notion of misinformation to control the public debate.
4. Mainstream Australians reject the notion that it is racist to oppose the creation of the Voice to Parliament.
5. New Zealand's Māori voice to parliament shows Australia's Indigenous-only Voice to Parliament will put race ahead of need.

Constitutional changes represent a fundamental alteration of the institutional and governmental arrangements of the country. The drafters of the Australian Constitution allowed elected politicians to propose constitutional amendments but reserved to the Australian people the right to approve of those proposals, by way of a referendum.

A referendum is more than just the mechanics of submitting a ballot: a referendum is part of a democratic process, whereby competing political claims are allowed to be made and voters are given a fair opportunity to assess each claim and freely come to a decision about which claim they prefer.

In 1999 the federal government held a referendum asking Australian electors whether they would prefer to replace the Queen and Governor-General with a President appointed by the Parliament. The 1999 referendum was proposed and overseen by Prime Minister John Howard, an avowed monarchist who stated he would vote 'no' at the referendum. Rather than operate the levers of power to give preferential treatment to the official 'no' campaign, Prime Minister Howard recognised it was up to the Australian people to decide for themselves their constitutional arrangements. As Howard said in 1995, the debate about the monarchy was 'not a debate about who is the better Australian. There are passionate Australians on both sides of this debate… Our approach is to allow the people of Australia to decide not only the questions and the options but also, fundamentally, the referendum itself.'[1]

The same observations can be made about the debate regarding the Voice to Parliament. The proposal to insert into the Australian Constitution a body to represent and be comprised of Indigenous Australians challenges egalitarian notions of citizenship, and permanently divides Australians by race in the democratic institutions. It is because the consequences for this proposed constitutional change are so significant that it is essential that Australians are allowed to have an equal say and for the federal government to allow a free and fair debate to take place in any potential referendum on this issue.

Given the rarity of attempts to reform the Australian Constitution, it may make sense in some circumstances to update the mechanics of holding a referendum. However, the IPA's analysis finds the Bill goes beyond mere technical changes but represent a critical challenge to the ability of Australians to participate in a free and fair debate about the cultural, legal, and political consequences of the federal government's proposed constitutional changes.

## 1. The Bill would mean the federal government can spend taxpayer money unfairly and disproportionately in support of a Yes vote in a referendum.

Under section 11 of the *Referendum (Machinery Provisions) Act 1984* ("the Referendum Act"), the federal government is prohibited from spending money 'in respect of the presentation of the argument in favour of, or the argument against, a proposed law' except in relation to printing a pamphlet outlining the arguments for and against the change. Clause 4 of the Bill will disapply this restriction, thereby giving the federal government the unfettered ability to spend taxpayer money to give further preferential treatment to the Yes campaign.

[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 June 1995, 1620-5 (John Howard, Leader of the Opposition).

This follows a long tradition of the federal government funding the campaign for constitutional change in this area. Between 2012 and 2017 the federal government expended $25.73 million to Recognise, a campaign entity operated by Reconciliation Australia which 'worked to bring conversations about constitutional reform and recognition into the mainstream, and engaged the broader community on why reform is needed.'[2] The substantial government funding to Reconciliation Australia was a significant factor in the permanence of and evolution of the constitutional recognition debate.

More recently, in the October 2020 Commonwealth budget the federal government granted a substantial financial advantage to the Yes campaign. Page 17 of the Budget revealed that deductible gift recipient status would be given to a pro-Voice campaign entity, Australians for Indigenous Constitutional Recognition. [3] This allows Australian individuals, and importantly, corporate Australia, to make significant donations to the Yes campaign which are deductible for tax purposes, in effect forming a subsidy to the Yes campaign. Meanwhile, no such status has been conferred on a comparable entity representing the No campaign.

An additional announcement in the October budget was a commitment of $75.1 million for preparatory work for the Voice referendum.[4] It is telling that the federal government considers it capable of funding the Australian Electoral Commission with $75 million but not the modest amounts needed to publish and distribute a pamphlet (see below).

The federal government has justified the lifting of the funding restriction as being necessary to carry out an education campaign about the Voice to Parliament so that it can 'counter misinformation.'[5] It is unclear what misinformation the federal government is seeking to counter, or why it was not possible to counter the supposed misinformation by way of a pamphlet printed and distributed to every household.

The history of government conduct in relation to the Voice to Parliament debate provides considerable doubt that the federal government now will act with restraint or that the education campaigns will be anything less than government-funded education of the electorate about how they should vote.

## 2. The Bill would mean the federal government can deny voters the ability to hear the No case by repealing the requirement to publish and distribute a referendum pamphlet.

Section 11 of the Referendum Act requires the Australian Electoral Commissioner to produce and distribute to electors a pamphlet featuring a 2,000-word essay for each of the Yes and No cases in a referendum. This has been an important and indispensable feature of Australian political tradition dating back to 1912 and acts to safeguard the right of all electors to read the arguments for and against a proposed constitutional change. Clause 4 of the Bill disapplies

[2] Reconciliation Australia, 'Recognise campaign successful in raising awareness' (Media release, 29 June 2018) <https://www reconciliation.org.au/recognise-campaign-successful-in-raising-awareness/>.
[3] Commonwealth Budget October 25, 2022 Budget Paper No. 2 page 17.
[4] Commonwealth Budget October 25, 2022 Budget Paper No. 2 page 107.
[5] Attorney-General's Department, 'Next steps towards Voice Referendum' (Media release, 1 December 2022) <https://ministers.ag.gov.au/media-centre/next-steps-towards-voice-referendum-01-12-2022>.

section 11 of the Referendum Act, in effect cancelling this important tradition in respect of any referendum on the Voice to Parliament.

The government claims that its reason for cancelling the referendum pamphlet is because it is outmoded in the 'digital age'. The government claims 'There is no longer any need for taxpayers to pay for a pamphlet to be sent to every household.'[6] However, the terms of this proposed Bill suggests this is not the true motivation behind this decision. The Bill and the public statements of members of the government suggest that this is a continuation of the campaign to skew the debate in favour of the Yes campaign.

If the reason for denying the Australian public the benefit of the referendum pamphlet was that it was antiquated, then it could be expected that the government would:

1. Abolish the provision completely. Instead, the provisions in the Referendum Act requiring the government to provide a referendum pamphlet to voters is only temporarily suspended until polling day for the next general election (clause 4(b) of the Bill); or
2. Propose another method for informing the public in a similarly neutral way using digital technology, such as an essay that could be published electronically. No such alternate proposal will be entertained.

Even if the means of disseminating the referendum pamphlet could be said to be outmoded, such a politically neutral, officially sanctioned document still plays an important part in setting the tone of the debate. By showing respect to each side of the debate, the pamphlet helps ensure that there is an open and fair exchange of ideas in which no side is demonised. Because a constitutional change to include a Voice to Parliament involves matters of race, the debate is likely to be emotionally charged and prone to emotive attacks. For example, several proponents of the Voice have already attempted to demonise its opponents. For example, ALP Senator and Special Envoy for Reconciliation and Implementation of the Uluru Statement from the Heart has said that the government will not fund the referendum pamphlet because 'the government is not interested in supporting any racist campaigns'.[7] This rhetoric indicated that at least among some prominent advocates for the Voice to Parliament it is not considered possible to mount any argument against their proposal that could be published in a mere 2,000 words essay that would not support racism.

Abolishing the requirement to publish and distribute a booklet to electors on the spurious grounds cited by the federal government overturns an important and indispensable Australian political tradition, critical to freedom and democracy, which has ensured arguments in respect to both sides of the debate can be heard. The federal government must commit to ensuring this tradition is upheld and to publish and distribute a pamphlet in the case of any future referendum.

[6] Ibid.
[7] Paige Taylor, 'Dodson urges Dutton to decide if Opposition supporting voice referendum,' *The Australian*, 25 November 2022 <https://www.theaustralian.com.au/nation/dodson-urges-dutton-to-decide-if-opposition-supporting-voice-referendum/news-story/49e24972758f25648e7434f5555276c2>.

## 3. The Bill would mean the federal government will use the notion of 'misinformation' to control the public debate

The federal government has made the claim that the Bill will allow for measures to counter misinformation. In a joint media release issued on 1 December 2022, under the names of Minister for Trade and Tourism Don Farrell, Minister for Indigenous Australians Linda Burney, Attorney-General Mark Dreyfus, and Senator Pat Dodson, the ministers claim the federal government is 'committed to providing public information and education about referendum processes and constitutional change.' As part of this commitment, the ministers propose to 'temporarily lift a funding restriction in the [*Referendum (Machinery Provisions) Act 1984*], to enable funding of educational initiatives to counter misinformation.'[8]

No detail has been provided by the federal government on what kind of content or opinion would count as misinformation. As the Australian Communications and Media Authority has acknowledged, misinformation and disinformation are 'relatively novel and dynamic phenomena' with 'no established consensus on the definition of either term.'[9] The ambiguity of the scope of the terms nonetheless enables overreach and censorship. Institute of Public Affairs research has highlighted that in making freedom of expression dependent on claims of accuracy, it necessarily makes the government responsible for making decisions about which opinions are true or false.

> The suggestion that government officials could be employed as reliable arbiters of truth is idealistic but unrealistic. More realistic is that the "official" truth would be determined not by reference to its accuracy, but according to whether it is politically uncomfortable or unacceptable for certain opinions to be expressed.[10]

The federal government's proposal to counter misinformation carries sinister overtones of an intention to control how the public debate is conducted, and what participants in the public debate are allowed to say. The federal government must commit to allowing for a free and fair debate and abandon pre-emptive threats of censorship based on the vague notion of misinformation.

## 4. Mainstream Australians reject the divisive misinformation that opposing the voice is inherently racist

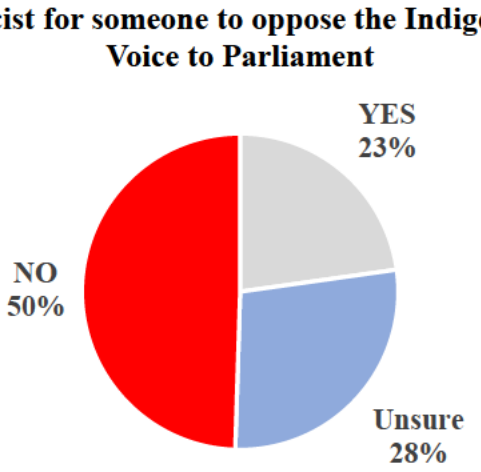
A key justification for the reforms in the Bill is the elitist assertion that being opposed to the proposed Voice to Parliament can only be explained by racism.

Senator Pat Dodson (ALP, Western Australia) explained the motivation for the federal government to remove the requirement to publish and distribute a pamphlet to every household explaining the yes and no cases on the basis that 'The government is not interested in supporting any racist campaigns, which will have an impact on the question of the pamphlet.'

[8] Above n 5.
[9] Australian Communications and Media Authority, *A Report to the Government on the Adequacy of Digital Platforms' Disinformation and News Quality Measures* (June 2021) p 7.
[10] Morgan Begg, 'Federal government must abandon plan for internet censorship' (Research note, 12 May 2022) 3-4.

The belief that it is not possible to oppose the federal government's proposal for constitutional change can only be explained by racism is not accepted by mainstream Australians. According to research commissioned by the Institute of Public Affairs, less than a quarter of Australians actually believe it is racist to oppose the Voice to Parliament:

***Figure 1: IPA research on community sentiment regarding the Voice to Parliament***




Source: IPA, 'Australians do not believe it is racist to oppose the Voice to Parliament' (2022). Note: Poll of 1,000 Australians was carried out by Dynata between 28 November and 2 December 2022

The Australian Constitution belongs to all Australians, and many of those Australians have concerns about the potential legal and cultural consequences that could result from changes to their constitution. The federal government must commit to treating Australians who express these concerns with respect and to allow their voices to be heard.

## 5. New Zealand's Māori voice to parliament shows Australia's Indigenous-only Voice to Parliament will put race ahead of need.

Having a free and fair debate about the Voice is especially important because the potential legal, political, and cultural consequences of changing the Australian Constitution in this way are so significant.

Recent legal research by the Institute of Public Affairs has highlighted how New Zealand's Māori voice to parliament, combined with Australia's history of judicial activism, provides a clear and compelling precedent for the argument that the Voice to Parliament will have damaging and dangerous unintended consequences to Australia's political institutions.

The legal research analysed the consequences in New Zealand of the establishment of an ostensibly advisory body, the Waitangi Tribunal, which had the initial purpose of investigating grievances brought forward by Māori's in relation to New Zealand's quasi-constitutional Treaty of Waitangi, and to make recommendations to the New Zealand government on how to redress those grievances. Based on the New Zealand experience, where the Waitangi Tribunal

has undergone extraordinary expansion of scope and influence since its creation, the IPA finds that Australia's Voice to Parliament:

- will become a vehicle for allocating critical social and economic resources, such as health, education, and job opportunities on the basis of race, not need;
- will not be merely advisory but will wield a veto over important parliamentary debate and government decisions;
- will be impossible to repeal, defund or effectively reform if it proves ineffective or is acting contrary to what was intended; and
- will permanently divide the country along the lines of race and will amplify divisive racial politics.

A recent case arising from New Zealand's Waitangi Tribunal highlights how their voice to parliament produces governmental outcomes based on race, rather than need. During the response to the covid-19 pandemic, the New Zealand government had sought to prioritise the rollout of vaccines to those aged over 65, the cohort most at risk from the virus. The Waitangi Tribunal conducted an inquiry into this and found that the government's failure to make various accommodations for Māoris in the rollout was a breach of Treaty of Waitangi principles. [11] As Māoris as a group are statistically younger than the average New Zealander, rolling out the vaccine according to age would have a disproportionate effect on Māori's. Consequently, the New Zealand government was obliged to provide redress of this grievance and government policy was changed to prioritise Māoris.[12] The likelihood of comparable outcomes arising in Australia is a matter that deserves to be debated, but is at risk of being silenced by the provisions of the Bill.

The Institute of Public Affairs' analysis finds that the Bill is a dangerous step towards further denying the right of Australians to engage in a free and fair debate about the Voice, and must be withdrawn entirely. The Institute of Public Affairs would welcome the opportunity to further discuss with the Committee its research on the Bill and the proposed referendum.

Kind regards

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*Enclosed*:

*Report #1:* *The Voice to Parliament: An Analysis of the New Zealand Experience and Australia's History of Judicial Activism*

*Report #2:* *Australians Do Not Believe It Is Racist to Oppose the Voice to Parliament*

[11] Waitangi Tribunal, *Haumaru: The COVID-19 Priority Report* (2021).
[12] Office of the Minister for COVID-19 Response, *The COVID-19 Response After the Peak of Omicron* (2022).

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# THE VOICE TO PARLIAMENT

## AN ANALYSIS OF THE NEW ZEALAND EXPERIENCE AND AUSTRALIA'S HISTORY OF JUDICIAL ACTIVISM

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# Executive Summary

One of the key claims made in favour of changing Australia's Commonwealth Constitution to include an Aboriginal and Torres Strait Islander Voice to Parliament is that it will only be an advisory body. However, the wording of the proposed constitutional change is not clear cut in respect to what the powers of the Voice will be. This constitutional uncertainty makes it likely that the Voice will be more substantive, divisive, and powerful than many proponents claim.

Based on the New Zealand experience of race based constitutional governance, the history of Australian judicial activism, and the way in which the proposed Aboriginal and Torres Strait Islander Voice to Parliament is being designed, IPA's analysis finds that:

1. The Voice will become a vehicle for allocating critical social and economic resources such as health, education, and job opportunities on the basis of race not need;
2. The Voice will not be merely advisory but will wield a veto over important parliamentary debate and government decisions;
3. The Voice will be impossible to repeal, defund or effectively reform if it proves ineffective or is acting contrary to what was intended.

In New Zealand, a body intended to have purely non-binding advisory functions in respect to redressing grievances by Māori people, the Waitangi Tribunal, has become in effect a binding quasi-judicial body. This has been brought about by virtue of an expansive interpretation of the Treaty of Waitangi by New Zealand's courts. Since the seminal decision of the New Zealand Court of Appeal, the 1987 Lands Case, and decades of subsequent judicial activism, Māori activism, and more recently political activism at the highest levels of New Zealand's government, New Zealand's governing institutions have become divided along racial lines. The racial characteristics of each New Zealander influences who gets what say in managing national resources, making laws, and how laws should be applied. New Zealand's current constitutional arrangements are unfair, undemocratic, and politically divisive.

If the Voice to Parliament is implemented in its current proposed form, it too will be susceptible to judicial activism that will greatly broaden its scope. This will grant special privileges to some Australians based on their race, contrary to the rule of law. Further, the way the Voice is being designed will make it especially susceptible to political activism.

Australians should be cautious of introducing into their constitutional system a body whose powers will be legally uncertain and for which there is international precedent suggesting it will be used as a tool for promoting divisive racial politics.

# The Voice to Parliament

On 30 July 2022 in his address to the Garma Festival, Prime Minister Anthony Albanese set out his intentions to present to the Australian people a referendum question as to whether the following words should be added to the Australian Constitution:

> There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice. 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. 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.[1]

Prime Minister Albanese stressed that the Voice would not have any substantive power: 'Not a third chamber, not a rolling veto, not a blank cheque. But a body with the perspective and the power and the platform to tell the government and the parliament the truth about what is working and what is not.' The proposed constitutional change only provides that the Voice may make 'representations' to Parliament.

Many proponents of the Voice also highlight the limited nature of the proposed change. The Referendum Council, a body set up to advise on options for constitutional recognition of Indigenous Australians, has stated that: 'The proposed Voice would not interfere with parliamentary supremacy, it would not be justiciable, and the details of its structure and functions would be established by Parliament through legislation that could be altered by Parliament.'[2] The subsequent Indigenous Voice co-design process also emphasised that the Voice would not have a veto and would be non-justiciable, 'meaning that there could not be a court challenge and no law could be invalidated.'[3]

These sentiments may lull some Australian voters into thinking that the proposed Constitutional changes are harmless, merely a nice gesture to be made to Aboriginal and Torres Strait Islander people in recognition of past wrongs.

However, it is certainly possible, even based on the innocuous sounding wording of the proposed changes, that the Voice will evolve into something far different than what was intended. Based on the New Zealand experience of race based constitutional development, and the current degree of Australian political and judicial activism, this is in fact highly likely, perhaps inevitable.

1 Anthony Albanese, 'Address to Garma Festival' (Speech delivered at the 2022 Garma Festival, East Arnhem Land, 31 July 2022) <*https://www.pm.gov.au/media/address-garma-festival*>.

2 Commonwealth of Australia, *Final Report of the Referendum Council*, 30 June 2017, p 38 ("Referendum Council Final Report").

3 Commonwealth of Australia, *Indigenous Voice Co-design Process Final Report to the Australian Government* July 2021, p 18 ("Co-design Final Report").

# The New Zealand Experience

Unlike in Australia, which never reached any settlements with or entered into any treaties with Indigenous Australians, in 1840 the British Crown entered into a treaty with the New Zealand Māori people in the form of the Treaty of Waitangi ("the Treaty"). Excluding the wordy preamble and signing clauses, the terms of the Treaty were simple, constituting a mere three clauses as follows:

> *Article the first [Article 1]*
>
> *The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.*
>
> *Article the second [Article 2]*
>
> *Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.*
>
> *Article the third [Article 3]*
>
> *In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.*
>
> *(signed) William Hobson, Lieutenant-Governor.*

In summary, Article 1 involved the Māori people ceding sovereignty over their territories to the British Crown, Article 2 allowed Māori people the right to retain possession and use of their land, and Article 3 extended to all Māori people in New Zealand the protection of the Crown and the rights and privileges of British subjects. Upon such innocuous wording, the constitutional arrangements of New Zealand have evolved to the point where racial politics permeates all levels of New Zealand's governing institutions.

What role the Treaty plays in modern New Zealand constitutional law came before the New Zealand Court of Appeal (the highest New Zealand court) in 1987. Often referred to as the 'New Zealand *Mabo*', the decision of *New Zealand Māori Council v*

*Attorney-General*[4] ('the Lands Case') involved plans by the New Zealand government to transfer land to state-owned enterprises. There were fears by some Māori people that this would place the land beyond the reach of claims that were then being made in respect to some of that land.

In finding in favour of the Māori claimants, the Court laid out a set of principles said to arise by virtue of the Treaty which imposed on the New Zealand government various obligations. These 'Treaty principles' included that the New Zealand government has a duty to act reasonably and in good faith towards Māori people, that the government must take active measures to protect Māori interests, that the government was in partnership with the Māori people, and the government must only make decisions impacting Māori people on an informed basis. Needless to say, no such obligations are explicitly set out in the Treaty. However, these principles were said to be needed to give effect to its 'spirit'. In the words of President of the Court, Justice Cooke, due to the discrepancies in Māori and English language there were 'differences between the texts and shades of meaning. What matters is the spirit.'[5] What the spirit of an agreement is necessarily involves reviewing the surrounding historical circumstances and context. But given the agreement was reached 147 years before, and its authors long dead, establishing what the correct historical circumstances were was likely to be contentious, and determining how the spirit of the Treaty should be applied today inevitably involved a degree of subjectivity on the part of the judges involved.

What is informative in respect to Australia and the proposed Voice to Parliament is the role played in the Lands Case of an unelected, supposedly advisory body – the Waitangi Tribunal. This Tribunal was set up in 1975 under the *Treaty of Waitangi Act* to 'inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal.'[6] Thus its powers were intended to be limited to investigating claims by Māori people of alleged breaches of the Treaty and, upon making a finding, to make 'recommendations' to government.

In the Lands Case the Tribunal had made an interim report in which it found that the proposed transfers of land would be in breach of the Treaty. Another of the treaty principles enunciated by the Court was a requirement by the New Zealand government to remedy past grievances. The Court held that: 'If the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would be only in very special circumstances, if ever.'[7]

So in effect, what started as a purely advisory body was, by virtue of the Lands Case and the Waitangi principles laid down in the case, turned into a quasi-judicial body with the *de facto* power to impose outcomes on the New Zealand government to redress past Māori grievances.

4 [1987] 1 NZLR 641 ("the Lands Case").

5 Lands Case, p 675.

6 *Treaty of Waitangi Act 1975* (NZ) s 5(1)(a).

7 Lands Case, p 679.

Following the Lands Case, the rules laid out by judges based on their view of what the spirit of the Treaty entails have been infused into New Zealand's political discourse and legal and constitutional governance arrangements. The case 'has been viewed by New Zealand historians as one of the crucial measures that helped facilitate Māori development and identity through propelling extensive social and political change in New Zealand.'[8] It has become ubiquitous across government agencies, most large corporations, educational facilities, charitable organisations, and most other New Zealand institutions to include some acknowledgement of the 'Treaty principles' or an obligation to follow or promote them in all manner of documents such as operating policies, procedures, legislation, regulations, marketing material and recruitment advertising. Anyone familiar with the way that 'acknowledgements of country' have become ubiquitous on Australian government, corporate and other institutional websites and at the start of public gatherings, or how principles of 'diversity, inclusion and equity' have infused themselves into the policies and mission statements of every Australian company and institution would recognise the phenomenon. To take one example, the New Zealand government careers website provides the following helpful advice to job seekers:

> When you go for a job interview you can ask the employer what they're doing to honour the principles of Te Tiriti [the Waitangi Treaty]. The employer might also ask what you know about Te Tiriti and how you will use its principles in your mahi [job]. Prepare an answer by reading or watching videos about Te Tiriti. You can talk about how the principles show in your work decisions and relationships.[9]

The Waitangi Tribunal itself has played a role in all manner of governmental decisions. The Tribunal has been a predictable hand break on natural resource development,[10] but has moved far beyond mere land, mining and fishery rights. The Tribunal has ruled that the Treaty requires the New Zealand government to protect Māori languages, and thus Māori should have a say in the allocation of radio frequency licenses.[11] The Waitangi Tribunal dealt with a complaint about the New Zealand government's rollout of COVID-19 vaccinations.[12] The government had sought to prioritise the rollout of COVID-19 to the elderly aged over 65. However, as a group Māori are statistically much younger than the average New Zealander, and thus this was felt to treat Māori unfairly, which the Tribunal agreed with. One investigation, the 'Wai 262' claim,[13] involved no less than twenty government departments and recommendations as to reforms of 'laws, policies or practices relating to health, education, science, intellectual property, indigenous flora and fauna, resource management, conservation, the Māori language, arts and culture, heritage, and the involvement of Māori in the development

8 Susan Glazebrook, 'What Makes a Leading Case? The Narrow Lens of the Law or a Wider Perspective?' (2010) 41 *Victoria University of Wellington Law Review* 339 at 342.

9 Tertiary Education Commission, 'Te Tiriti o Waitangi in work' <https://www.careers.govt.nz/articles/te-tiriti-o-waitangi-in-work/>.

10 Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Claim* (Wai 2358, 2012).

11 Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (1990).

12 Waitangi Tribunal, *Haumaru: The COVID-19 Priority Report* (Wai 2575, 2021).

13 Waitangi Tribunal, *Ko Aotearoa Tenei: A report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuatahi* (Wai 262, 2011).

of New Zealand's positions on international instruments affecting indigenous rights.'[14] The Tribunal said in respect to this claim that Treaty dialogue needed to move beyond mere redress of grievances (the ostensible purpose of the Tribunal) to 'our ongoing relationships.' In effect it has granted itself the power to investigate and make recommendations on anything and everything.

A key Treaty principle set out in the Lands Case was that the Treaty represented a 'partnership between races'.[15] The concept of 'partnership' between Crown and Māori has become the defining way to view New Zealand's constitutional arrangements since the Lands Case. In 2014 the Waitangi Tribunal went so far as to find that (despite the express words of Article 1 of the Treaty) Māori had indeed never even relinquished sovereignty over their land.[16] To this bifurcated arrangement can now be added the divisive racial policies of New Zealand's current Prime Minister Jacinda Ardern. In a plan called *He Puapua*, a report by a working group to implement the United Nations Declaration on the Rights of Indigenous Peoples, a proposed co-governance arrangement is laid out in which Māori people would be given substantial powers in respect to natural resource management, the power to make local by-laws, and would have an equal say in a wide range of government decision making.[17] *He Puapua* has the rather ominous meaning in English of 'a break' meaning, according to the authors of the report, 'a breaking of the usual political and societal norms and approaches.' The Ardern government has been steadily implementing the concept of co-governance in new policies such as the Three Waters System, in which four newly formed water management bodies will be jointly managed by Māori groups.[18] Similar arrangements are being put in place in respect to national healthcare services,[19] planning and environmental laws,[20] child welfare,[21] and local Councils.[22]

Given that Māori groups or individuals usually have equal or greater control over these government functions, yet Māori only make up about 15% of the population, co-governance in fact means disproportionate privileges for Māori people. This is fostering grievances among the non-Māori community[23] and leads to interminable debates over who is in fact a Māori and thus who gets to enjoy the benefits of these policies.[24] Added

14 'Report on the Wai 262 Claim Released' (accessed 1 December 2022) <https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>.

15 The Lands Case, p 664.

16 He Whakaputanga me te Tiriti The Declaration and the Treaty The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry Wai 1040, Waitangi Tribunal Report 2014.

17 Claire Charters et al., *He Puapua - Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (2019) 1 Whiringa-A-Riangi 2019.

18 James Perry, 'Changes to the Three Waters reform but co-governance to stay', *Te Ao Māori News,* 11 November 2022 <*https://www.teaomaori.news/changes-three-waters-reform-co-governance-stay*>.

19 *Pae Ora (Healthy Futures) Act 2022* (NZ).

20 *Natural and Built Environments Bill 2022* (NZ)

21 *Oranga Tamariki Act 1989* (NZ) s 7AA

22 *Canterbury Regional Council (Ngai Tahu Representation) Act 2022* (NZ).

23 Democracy Action, 'He puapua: The action plan to destroy democracy' (accessed 1 December 2022) <*https://www.democracyaction.org.nz/he_puapua_the_action_plan_to_destroy_democracy*>.

24 Tahu Kukutai, 'The Problem of Defining an Ethnic Group for Public Policy: Who is Māori and Why Does it Matter?' (2004) *Social Policy Journal of New Zealand* 23.

to this is New Zealand's unique constitutional arrangement of reserve Māori electorates. Since 1867, the representatives of certain seats (currently seven out of 72) in the New Zealand Parliament are chosen by votes cast solely by Māori citizens.

Thus, in modern day New Zealand, a citizen's racial status influences what say that citizen has in the running of their country. Race is instrumental in determining opportunities to participate in the management of resources and other government functions, it influences for whom a citizen can vote in a national election, it impacts what rights to land, reparations and rights of redress they will have, and there is a special quasi-judicial body with, in effect, wide ranging powers to which recourse can be had only for those of a certain race. Racial politics permeates all levels of society from applying for a job to how government agencies operate, with the Treaty principles being entrenched into workplace policies, government procedures and laws and the charter documents for numerous organisations.

To the extent that the concepts of partnership, shared sovereignty and co-governance have contributed to this situation, it should be remembered that the actual terms of the Treaty of Waitangi provided for sole sovereignty of New Zealand to be exercised by the British Crown. Yet after the Lands Case, and with the connivance of activist groups and politicians, the exact opposite is being practiced today. Further, this has been greatly facilitated by the Waitangi Tribunal, a body set up solely with investigative and advisory powers. Yet the Tribunal's powers have expanded, and it has become entrenched into the New Zealand constitutional system. New Zealand's experience of the reinterpretation of constitutional provisions and the expanding power of entrenched constitutional bodies should be borne in mind in Australia before in embarks on its own adventure with race-based constitutional reform.

# Australian Judicial Activism

Is such an outcome possible in Australia with respect to the Voice? A key turning point in New Zealand's race-based constitutional development was the willingness of judges to infuse additional rights or to impose new obligations into the Treaty of Waitangi, in order to give effect to the 'spirit' of that treaty. Australian Courts have shown a willingness in the past to adopt similar approaches.

Australia's Constitution does not contain a Bill of Rights or an express 'freedom of speech' such as the First Amendment to the United States Constitution. However, in two High Court Cases in 1992[25] the Court decided that the Australian Constitution contained an 'implied' right to freedom of communication on political matters. This freedom could be implied by virtue of Australia's system of representative government, as established by the Constitution. Chief Justice Brennan observed:

> To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential: it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.[26]

The implied constitutional right of political communication has become an established feature of Australia's constitutional framework. It has been wielded to help defend against defamation allegations by politicians,[27] to shield animal rights investigations that involved trespassing on a possum meat factory,[28] to shield environment protesters from prosecution,[29] and much more. But it should be remembered that no such rights or freedoms expressly appear anywhere in the text of the Constitution. Could comparable judicial activism be used to transform the powers and role of the Voice, to read into the proposed constitutional change powers, rights, obligations, and limitations that do not appear in the literal terms agreed to by the Australian people at a referendum?

The starting point for interpreting any provision in the Australian Constitution is the long-established principle set out in the *Engineers Case* that the Constitution should be interpreted the same as any piece of legislation.[30] The ordinary rules of statutory interpretation are that a court must start by 'first giving close attention to the relevant provisions',[31] but if the words are unclear or in order to give full effect to the intention of those words, regard may be had to 'the context, the general purpose and policy of a

25 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 *("Nationwide News")* and *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

26 *Nationwide News* at 47.

27 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

28 *ABC v Lenah Game Meats* [2001] HCA 63.

29 *Brown & Anor v The State of Tasmania* [2017] HCA 43.

30 *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited and Ors* (1920) 28 CLR 129.

31 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 92.

provision and its consistency and fairness.'[32] This is in effect the same as looking at the 'spirit' of the text as was undertaken in the *Lands Case*.

Adopting this process, and starting by paying close attention to the actual provisions of the Constitution introducing the Voice, it is unclear exactly what the role and status of the Voice should be. The key word in the second clause of the proposed change is that the Voice may make 'representations' to Parliament and the Executive Government. In her book *The Concept of Representation*, author Hanna Pitkin highlights the difficulty that different scholars and commentators have had defining the concept. 'Representation' has variously been described as 'vague or ambiguous', that it 'may sometimes mean one thing, sometimes the other,' the term is used 'in various senses in different connections,' that 'theories of representation are something of a morass' and even that we abandon the word representation and 'stop using it because of its complexity.'[33]

Pitkin claims that the term representation in a political context means 'making present', that something that is not present in fact is nevertheless made present. In the context of the Voice, this may be interpreted as meaning that even though the Voice is not present in Parliament or present when a government decision is made, that the Indigenous Voice is 'made present'. This interpretation would seem to suggest that the Voice should be treated as if it is in fact present in Parliament or the Executive Government. It would seem difficult to give effect to this intention if, for example, Parliament or the Executive Government simply ignored the Voice.

If this were the interpretation adopted by an activist court, the uncertainty it might cause can be readily illustrated by the judicial approach to Australia's obligations under international treaties, where courts have found ways to prevent Australian governments from simply ignoring them. Under Australian law international treaties entered into by the Commonwealth government do not become binding law unless the provisions of the treaty are enacted as legislation passed by Parliament. Thus, when Australia entered into the United Nations Convention on the Rights of the Child ("the Convention") in December 1990, the terms of the Convention did not automatically become part of domestic Australian law. However, in *Minister of State for Immigration and Ethnic Affairs v Teoh*,[34] a case involving a judicial review of a government decision to deport minors from Australia, the High Court held that there was a 'legitimate expectation' that the relevant government decision maker would take into account Australia's obligations under the Convention. As this had not been done, the deportation order was quashed. International treaties remain non-binding in Australia unless enacted, but the case stands for the proposition that they nonetheless should have persuasive weight on government decision makers.

In response to the decision, the Commonwealth government sought to amend the *Administrative Decisions (Judicial Review) Act* (1977) to remove any legitimate

32 Per Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397.

33 Hanna Fenichel Pitkin, 'The Concept of Representation' (University of California Press, 1972) at 5-6.

34 (1995) 183 CLR 273.

expectation for government decision makers to take into account international treaties. The proposed amendments were never passed, and the extent of the concept of legitimate expectation was limited in a subsequent case.[35] Both these developments following from the *Teoh* case are illustrative of the issues that might arise regarding the Voice to Parliament. In *Teoh*, the court expanded the legal role that international treaties had previously thought to play in Australia, but it was an option for parliament to simply amend the law to reverse this. This will not be the case in respect to the Voice to Parliament, as it will be constitutionally enshrined. If judicial activism expands its powers, only a subsequent referendum could reverse that, a very difficult political process. Further, the limitation of *Teoh* in a subsequent High Court case is reflective of the fact that when judicial activism creates new rights or obligations, the parameters and limits of these must be determined by subsequent cases, and may expand or contract based on the decisions of differently constituted courts. For example, subsequent cases have held that the implied right to political communication does prevent a government from reducing the cap on third party political campaign funding from $1.5 million to $500,000,[36] but does not prevent the government limiting campaign funding by property developers, tobacco companies, and the liquor and gambling industry.[37] The right did protect Bob Brown from prosecution for protesting against logging at a forest, but did not protect anti-abortion activists from laws preventing protests outside abortion clinics.[38] These cases do have one thing in common however, and that it is that ordinary Australian voters have had no say in them, or in what the parameters of free speech should be.

What is clear is that, based on the wording of the proposed changes introducing the Voice, there will be ample scope for an activist court to find ambiguity in the terms, and thus they will feel empowered to embark on the process undertaken in the New Zealand Lands Case, as well as the Australian cases establishing the implied right of political communication. The courts in those cases went beyond the strict terms of the relevant text (the Treaty of Waitangi and the Australian Constitution respectively) to establish what the true 'spirit' or 'context' was in order to give full effect to that spirit. In the case of the Voice to Parliament, a future review of the surrounding circumstances of the proposed referendum introducing it will likely suggest that it had meaning and significance well beyond its literal terms.

The Voice to Parliament was one of the proposals arising from the Uluru Dialogues in 2017, the outcomes of which formed the Uluru Statement from the Heart. This statement would almost certainly form part of the 'context' and 'spirit' informing the meaning of the precise wording of the Voice. Included in the Statement from the Heart are the comments: 'With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.' It goes on: 'We seek constitutional reforms to empower our people and

35 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

36 *Unions NSW v New South Wales* [2019] HCA 1.

37 *McCloy v NSW* (2015) 257 CLR 178.

38 *Clubb v Edwards* [2019] HCA 11.

take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.'[39] Thus the Voice is intended to be 'substantive change' that 'empowers' Indigenous people.

The Referendum Council Final Report concluded that any constitutional change should be 'both modest and substantive.'[40] But what does 'substantive' mean? The Indigenous view expressed in the report was that 'any reform must involve substantive changes to the Australian Constitution. It must lay the foundation for the fair treatment of Aboriginal and Torres Strait Islander peoples into the future.'[41] Thus the Voice is not intended to be purely symbolic. This is stressed by some academic commentators also: 'The purpose of constitutional recognition is best described as practical and structural in nature, rather than merely symbolic.'[42]

Thus, future legal scholars, judges, and historians will have ample scope to conclude that the constitutional text incorporating the Voice to Parliament should be interpreted liberally and expansively.

What expansions to the role or powers of the Voice beyond the literal constitutional text might be possible in the future? Some issues seem readily foreseeable. First, although paragraph 3 of the proposed wording of the proposed constitutional change makes it clear that the 'composition, functions, powers and procedures' of the Voice are to be determined by Parliament, this may not extend so far as Parliament having the power to repeal the Voice in the future, or significantly curtail its powers.

A non-binding Voice to Parliament could be established by legislation alone, but one of the arguments in favour of a constitutionally entrenched Voice, beyond its symbolism, is to ensure the longevity of the Voice and protect it from being neutered by, for example, being abolished or defunded. According to the federal government's website:

> a legislated Voice would be vulnerable to defunding or abolition by the government of the day, as were the National Aboriginal Consultative Committee (1973–77), the National Aboriginal Conference (1977–85), the Aboriginal and Torres Strait Islander Commission (1989–2005), the National Indigenous Council (2005–07), the National Congress of Australia's First Peoples (2009–19) and the Prime Minister's Indigenous Advisory Council (2013–c. 2019).[43]

Presumably a Constitutionally enshrined Voice is not intended to be so vulnerable.

The Joint Select Committee on Constitutional Recognition Final Report concluded similarly:

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39 'Uluru Statement from the Heart' <*https://ulurustatemdev.wpengine.com/wp-content/uploads/2022/01/UluruStatementfromtheHeartPLAINTEXT.pdf*>.

40 Referendum Council Final Report, p 38.

41 Referendum Council Final Report, p 5.

42 Shireen Morris, 'The Torment of Our Powerlessness: Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call For a First Nations Voice in Their Affairs' (2018) 41(3) *UNSW Law Journal* 629 at 643.

43 Sally McNicol & James Haughton, 'Indigenous Constitutional Recognition and Representation' (Parliamentary Library Briefing Book, Parliament of the Commonwealth of Australia, 2022).

> Stakeholders argued that a First Nations Voice, supported by a double majority of Australians during a referendum and enshrined in the Australian Constitution, would be less vulnerable than a Voice founded solely in Commonwealth statute. The Prime Minister's Indigenous Advisory Council and the Indigenous Peoples Organisation both asserted that constitutionally enshrining a First Nations Voice would politically and legally mandate its permanence, where legislation has been demonstrated to be inadequate. They argued that providing for the permanence of a Voice is important given the abolition of past statutory representative bodies such as the Aboriginal and Torres Strait Islander Commission (ATSIC) and the underfunding of Congress.[44]

Given these comments, and the sentiments arising from the Uluru Statement from the Heart that the Voice enshrines Indigenous recognition, any attempt to repeal, defund or perhaps even curtail or reform the Voice is likely to face legal and constitutional challenges. This may be problematic if the form of the Voice changes over time and no longer operates as intended.

A second foreseeable expansion of the Voice might be some variation of the 'legitimate expectations' argument. If the Voice has provided recommendations, it may be that government decision makers will be bound to take those views into account, to 'make present' the Indigenous perspective. Former High Court justice Kenneth Hayne recently alluded to this possibility. When questioning whether the executive might be bound to have regard to the Voice he concedes it is a 'matter of debate.' He went on:

> Assume, however, that the decision-maker were bound to consider what was said [by the Voice], isn't that the very point of the voice – to give First Peoples a voice in matters relating to First Peoples? And the most that could happen is that the decision-maker would be told to remake the decision. And in remaking the decision, what the voice said would be one matter to take into account. It would not dictate the outcome.[45]

Although it is true that an obligation to take something into account does not dictate outcomes one way or another, it is in practice likely to sway decision makers. Thus, a body of people constituted on the basis of their race, may develop an outsized influence on government policy which no other Australian group could enjoy.

How the role of the Voice may be interpreted in the future, and how its powers may be expanded cannot be predicted with certainty. The drafters of the Australian Constitution would likely be very surprised that later in the twentieth century all income taxes were collected by the Commonwealth government and not the states and that the High Court had found a right of political communication hidden within its terms. The extent of any expansion would depend on the extent to which future Australian courts are willing to partake in judicial activism.

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44 Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of the Commonwealth of Australia, *Final Report* (2018) [3.17] and [3.18].

45 Kenneth Hayne, 'Fear of the voice lost in the lack of legal argument', *The Australian*, 28 November 2022.

One of Australia's most influential High Court justices, Michael Kirby, wrote in 2006 glowingly about the benefits of judicial activism. 'Some jurists suffer from acute nervous anxiety at the thought of doing anything that strays from a legal text' he claims in his unique prose. He decries judges that adopt strict legalism, '[t]rembling, fearful that they may import the slightest personal opinion into the meaning of legal words.' He dismisses those who complain that such activism is undemocratic as '[p]eople who have such childlike faith in triennial encounters with the ballot box.' He concludes:

> Getting the big decisions right is the constant challenge for the judiciary, especially the judiciary in the highest court. History judges us all. But it judges most harshly those who fail to perceive the big challenges when they come or who respond to them with formulae that deny the judiciary's creative role despite the overwhelming evidence of its precious existence and benefits over the centuries have a debased vision of the Australian Constitution.[46]

How might a future judge, enthused with such passion for judicial activism, expansively interpret the powers of the Voice? Since Justice Kirby's musings, Australia has had to endure numerous examples of judicial activism, such as:

- The High Court determining that Commonwealth laws banning prisoners serving terms of less than three years from voting in Commonwealth elections were unconstitutional, but laws banning prisoners from serving terms greater than three years were lawful.[47]
- The High Court ruling that closing the electoral rolls on the day that Commonwealth writs of election are issued was unconstitutional but closing the rolls seven days later was lawful.[48]
- The High Court creating a new category of people – non-alien, non-citizens – when they held that a man born in New Zealand who was not an Australian citizen could not be deported because of his Aboriginal heritage.[49]
- A Federal Court Judge finding that the Commonwealth environment minister had a duty to take reasonable care to protect children from climate change when deciding on whether to proceed with a new coal mine,[50] a decision subsequently overturned on appeal.
- A Magistrate dismissing charges against a climate protester who blocked the Sydney Harbour Tunnel by locking her head to a car because she had experienced the trauma of climate change.[51]

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46 Michael Kirby 'Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty.' *Melbourne University Law Review* [2006] 576 at 582, 584, 591, 593.

47 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

48 *Rowe & Anor v Electoral Commissioner & Anor* (2010) 243 CLR 1.

49 *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3.

50 *Sharma and others v. Minister for the Environment* [2021] FCA 560.

51 Jack Mahoney, 'Climate protester escapes conviction after locking themselves to a car steering wheel and blocking Sydney Harbour Tunnel', *Sky News*, 28 September 2022 <*https://www.skynews.com.au/australia-news/climate-protester-escapes-conviction-after-locking-themselves-to-a-car-steering-wheel-and-blocking-sydney-harbour-tunnel/news-story/912c8316af20e8679062ee6835ea82e9*>.

In the hands of a future activist High Court it is almost inevitable that the rights and powers of the Voice will be expanded, and the ability of Parliament to repeal, limit, or control this body will be narrowed. How precisely future judges might interpret the role, function, powers and limitations of the Voice to Parliament cannot be known with certainty, but assurances that the Voice will not be a third chamber or have a veto ring hollow given the history of past judicial activism in Australia.

# An Activist Voice

Almost as important as any expansion in the legal and constitutional scope of the Voice will be its political and cultural scope. In New Zealand, the principles said to underly the Treaty of Waitangi gained considerable political and cultural force after the Lands Case, which has probably had more impact than any strict constitutional consequences. The decisions of the Waitangi Tribunal became, as a result, *de facto* edicts. In the same way, it's possible that the wishes of the members that make up the Voice will become *de facto* edicts, and it will indeed have an effective moral veto over all government decisions.

The Prime Minister has signaled the possibility of this being the case: in an interview with ABC News' David Speers at the 2022 Garma Festival, Mr Albanese stated 'it would be a very brave government' who ignored a representation put forward by the Voice.[52]

This should be of concern as the Voice will almost certainly be made up of activists, due to the methods being proposed for the appointment of its members. The proposed model for appointing the 24 members of the Voice is not via direct elections. A system where only a certain race is allowed to vote for the members of a constitutional body would be grossly unfair and contrary to the rule of law, but it would at least offer the prospect of the Voice being representative of and accountable to ordinary Aboriginal and Torres Strait Islander people. Instead, there will be separate local and regional Voices made up of local groups that appoint the relevant members of the national Voice. Ironically, one of the key reasons for rejecting direct elections was the difficulty in determining Aboriginality and thus who would be entitled to vote.[53] Better, apparently, to dispense with voting altogether. This decision, if implemented, will mean that appointments to the Voice will be at the mercy of local activist groups. Ordinary working Indigenous Australians may have the time and inclination to vote for their representative to the Voice but are unlikely to have the time to be involved in the byzantine politics of local Indigenous groups. It will be the professional activists, politicians, and academics that take over. This will inevitably mean the Voice will not represent the views of local Indigenous communities but the values of the professional political class, which invariably lean left-of-centre.

Modern race-based political activism is infused with the philosophies of critical race theory. A key concept within this theory is that racism is 'normal, not aberrational.'[54] That is, racism is not the aberrant behaviour of certain individuals, but systematic. Accordingly, critical race theorists argue in favour of 'equity', that is policies that ensure proportionally equal outcomes amongst races within society (in terms of employment, income, admission to universities, incarceration in prison and so on) based on the percentage that each race makes up of the total population of that society. Only in this way can apparent systemic racism be countered.

52 ABC News, Interview with Anthony Albanese (David Speers, 31 July 2022)

53 Co-design Final Report, p 114.

54 Britannica, 'Basic tenets of critical race theory' (accessed 1 December 2022) <*https://www.britannica.com/topic/critical-race-theory/Basic-tenets-of-critical-race-theory*>.

The influential American critical race theory activist Ibram X. Kendi has proposed entrenching 'anti-racism' into the American Constitution. Anti-racism is the process of ensuring racial equity (racially equal outcomes) by affirmative action policies for disadvantaged races and (if necessary) discrimination against races that may be outperforming. To help achieve this vision, Kendi proposed amending the US Constitution to:

> establish and permanently fund the Department of Anti-racism (DOA) comprised of formally trained experts on racism and no political appointees. The DOA would be responsible for preclearing all local, state and federal public policies to ensure they won't yield racial inequity, monitor those policies, investigate private racist policies when racial inequity surfaces, and monitor public officials for expressions of racist ideas. The DOA would be empowered with disciplinary tools to wield over and against policymakers and public officials who do not voluntarily change their racist policy and ideas.[55]

Such an agency would, despite being unaccountable to the electorate, yield enormous power over all systems of government, but being constitutionally entrenched could not be repealed. All in the name of racial equity. Equity, anti-racism and critical race theory have similarly infused themselves into Indigenous activism in Australia and New Zealand. The Māori grievance taken to the Waitangi Tribunal regarding the New Zealand government's rollout of COVID-19 vaccinations (referred to above) is an example. It was certainly fair and reasonable of the New Zealand government to prioritise vaccines to those most vulnerable to COVID-19 – the elderly. However, it would have a disproportionate outcome on Māori as a group due to their statistically much younger average age. The Waitangi Tribunal dutifully agreed that an ostensibly racially neutral policy was unfair, and Māori should get preferential treatment. This sort of argument is straight out of the critical race theory playbook. Society should be looked at through the prism of racial groups and policies judged based on their effect on each group, regardless of overall fairness, justice, scientific rationality, or the rule of law.

The very design of the proposed Voice will likely result in similar thinking. The Co-design process Final Report recommends that there be strict gender equality amongst the 24-member body. Not only in total, but for each state and territory. This poses a problem because some states, the Northern Territory, and the Torres Strait will each have three members. To resolve this the Report sets out a tedious rotation system in which if Queensland has two male and one female member and, say, NSW the opposite for one term, then this must be reversed in the next membership cycle. How transgender people should be dealt with is not considered beyond a vague comment that 'People who identify as gender diverse could be selected for one or more positions,'[56] and ambiguous assurances that representation on the Voice will include a focus on marginalised groups such as 'those identifying as LGBTIQ+.'

55 Ibram X. Kendi, 'Pass an Anti-Racist Constitutional Amendment,' (Politico Magazine, 2019).

56 Co-design Final Report, p 124.

It might be reasonable to query whether such sentiments represent the priorities of ordinary Indigenous people, or those of activists, but what is clear is that the membership of the Voice will be determined by processes wholly at odds to those for membership of parliament. Membership of parliament is meritocratic based on competitive elections. But with the Voice, if two of the three best candidates for Queensland happen to be women, but it is the turn for two men, then one of those women will have to give way. Quotas are the language of equity, not meritocracy, and it might signal where the priorities of such a body lie.

If the Voice to Parliament ends up having a *de facto* legal or moral veto over government legislation and decisions, and its membership becomes stocked with political activists insistent on imposing racial equity, then any law or decision that does not produce perfect racial equality may be vulnerable. The Voice could become an instrument for allocating scarce national resources – from hospital beds to university placements, from radio frequencies to vaccines – preferentially in favour of certain groups, based solely on race. To avoid following in the footsteps of New Zealand ushering in divisive racial politics via the constitutional back door, we should not invite such constitutional uncertainty into Australia's political system in the first place.

# THE VOICE TO PARLIAMENT: AN ANALYSIS OF THE NEW ZEALAND EXPERIENCE AND AUSTRALIA'S HISTORY OF JUDICIAL ACTIVISM

## About the Institute of Public Affairs

The Institute of Public Affairs is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom. Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape. The IPA is funded by individual memberships, as well as individual and corporate donors.

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**John Storey** is a Research Fellow with the Institute of Public Affairs Legal Rights Program. John is a lawyer, author and military historian. John has been a practicing lawyer for two decades. He was a partner in a large national law firm and founded and managed his own law firm as managing director. His recent book *Big Wars – Why do they happen and when will the next one be?* looks at global historical trends in military technology and tactics and what they can tell us about how warfare will look into the future.

John joined the IPA because he is passionate about free speech, the rule of law, and protecting Australia's classical liberal heritage. John is an avid reader on the topics of history, politics and security issues and is a sought-after public speaker on tax, legal and military matters.

Institute of Public Affairs

DECEMBER 2022

# IPA POLL: AUSTRALIANS DO NOT BELIEVE IT IS RACIST TO OPPOSE THE VOICE TO PARLIAMENT

Institute of Public Affairs

# Australians do not believe it is racist to oppose the Voice to Parliament

This poll of 1,000 Australians was commissioned by the Institute of Public Affairs. Data for this poll was collected by marketing research firm Dynata between 28 November and 2 December 2022 and rounded to the nearest whole number.

## QUESTION 1:

| Is it racist for someone to oppose the Indigenous-only Voice to Parliament? | |
|---|---|
| **Yes** | **23%** |
| **Unsure** | **28%** |
| **No** | **50%** |

| | By gender | |
|---|---|---|
| Column % | Male | Female |
| Yes | 19% | 26% |
| Unsure | 22% | 33% |
| No | 59% | 40% |

| | By state | | | | | |
|---|---|---|---|---|---|---|
| Column % | NSW | QLD | SA | TAS | VIC | WA |
| Yes | 28% | 19% | 16% | 24% | 22% | 21% |
| Unsure | 28% | 26% | 34% | 33% | 30% | 22% |
| No | 44% | 55% | 49% | 43% | 48% | 57% |

| | By preferred political party | | | | | |
|---|---|---|---|---|---|---|
| Column % | Coalition | Labor | Greens | Teal independent | One Nation | Other |
| Yes | 16% | 26% | 36% | 33% | 16% | 20% |
| Unsure | 23% | 28% | 39% | 28% | 23% | 32% |
| No | 62% | 46% | 25% | 39% | 61% | 48% |

## QUESTION 2:

**There should be a separate entity of the federal parliament, solely comprised of Indigenous Australians, to advise on all laws for every Australian.**

| | |
|---|---|
| Agree | 38% |
| Unsure | 28% |
| Disagree | 34% |

| | By gender | |
|---|---|---|
| Column % | Male | Female |
| Agree | 37% | 40% |
| Unsure | 24% | 31% |
| Disagree | 40% | 29% |

| | By state | | | | | |
|---|---|---|---|---|---|---|
| Column % | NSW | QLD | SA | TAS | VIC | WA |
| Agree | 45% | 32% | 34% | 29% | 41% | 33% |
| Unsure | 29% | 22% | 34% | 38% | 28% | 25% |
| Disagree | 26% | 47% | 32% | 33% | 31% | 43% |

| | By preferred political party | | | | | |
|---|---|---|---|---|---|---|
| Column % | Coalition | Labor | Greens | Teal independent | One Nation | Other |
| Agree | 30% | 45% | 57% | 39% | 21% | 27% |
| Unsure | 21% | 28% | 33% | 33% | 29% | 41% |
| Disagree | 49% | 27% | 10% | 28% | 50% | 32% |

## QUESTION 3:

**The National Party of Australia's announcement that it is officially opposed to the Indigenous-only Voice to Parliament is a good thing for Australian democracy as it ensures there will now be a debate on the matter.**

| | |
|---|---|
| Agree | 50% |
| Unsure | 32% |
| Disagree | 18% |

| | By gender | |
|---|---|---|
| Column % | Male | Female |
| Agree | 58% | 43% |
| Unsure | 22% | 41% |
| Disagree | 20% | 16% |

| | By state | | | | | |
|---|---|---|---|---|---|---|
| Column % | NSW | QLD | SA | TAS | VIC | WA |
| Agree | 53% | 51% | 51% | 33% | 48% | 51% |
| Unsure | 31% | 31% | 32% | 43% | 32% | 34% |
| Disagree | 17% | 17% | 18% | 24% | 20% | 15% |

| | By preferred political party | | | | | | |
|---|---|---|---|---|---|---|---|
| Column % | Liberal | Nationals | Labor | Greens | Teal independent | One Nation | Other |
| Agree | 64% | 83% | 40% | 39% | 33% | 63% | 41% |
| Unsure | 29% | 12% | 33% | 36% | 39% | 29% | 44% |
| Disagree | 8% | 5% | 26% | 25% | 28% | 8% | 15% |

Institute of Public Affairs

Australians do not believe it is racist to oppose the Voice to Parliament