CRITIQUE OF 'VOICE VERSUS RIGHTS'

ASMI WOOD*

This article was written and submitted before 14 October 2023.

This article broadly examines and critiques some key issues, points and arguments raised in the lead article of Issue 46(3), 'Voice[1] Versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis' ('the article') by Gabrielle Appleby, Ron Levy and Helen Whalan ('the authors'). This critique will focus on the article's impact on Indigenous peoples on this Continent now called Australia ('the Continent') and, in the view of this paper and in practice, the Voice's only vulnerable stakeholder, thus necessarily taking a different standpoint from that of the authors, as will be evident below.

> Our ultimate objective is, of course, the assimilation of Aboriginal Australians as fully effective members of a single Australian society.[2]
>
> – John Gorton

I INTRODUCTION

The authors of the article are non-Indigenous, and explicitly declare their standpoint.[3] It takes an Indigenous supportive perspective, *never* questions the

---

* Asmi Wood is a Professor at the ANU College of Law.

1 'The Voice' for this paper is as set out in *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth) ('*Constitution Alteration Act*'). For a discussion of the authors' use of 'Voice', see text accompanying n 10 below. The term 'First Nations Voice' to represent Aboriginal and Torres Strait Islander Peoples is used by both Indigenous and non-Indigenous people in discussing the Voice: see, eg, Gabrielle Appleby, Ron Levy and Helen Whalan, 'Voice Versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis' (2023) 46(3) *University of New South Wales Law Journal* 761, 782 n 102 <https://doi.org/10.2139/ssrn.4339744>. The existence of multiple shades of meaning in words relating to Aboriginal and Torres Strait Islander peoples' interests is expressly acknowledged by the authors (at 761 n 1) and is also acknowledged in this critique. However, it is often difficult to know which of these range of meanings is being employed unless it is evident from the context.

2 John Gorton, 'Aboriginal Affairs' (Address, Conference of Commonwealth and State Ministers Responsible for Aboriginal Affairs, Melbourne, 12 July 1968) 2.

3 See below discussion accompanying n 22 for the authors' standpoint. The author of this critique identifies as Indigenous and hence the different standpoints that necessarily will arise, including from the racial biology imposed on Indigenous people by the *Constitution*.

validity of relevant Indigenous claims while appealing to the majority from a non-Indigenous standpoint, with its particular strengths and limitations. The author of this critique is Indigenous, and this standpoint brings with it its own strengths and limitations. The two standpoints apply as a general gloss across this critique.

Some Indigenous Elders say that the current predicament *is* an Indigenous issue and one that Indigenous peoples alone must address. However, section 128 of the *Constitution* militates otherwise and Indigenous people unfortunately *must* rely on the majority if constitutional reform, such as the Voice to Parliament, is the path to addressing Indigenous criticism of the colonial program.[4] On the other hand, the difficulties of amending the *Constitution* generally, to make it more attuned to contemporary mores on issues such as race or to rectify historical wrongs that undermine its broader legitimacy, inhere in its present text. It has little to do with Indigenous aspirations and therefore, issues are best kept separate. Further, this critique does not wish to diminish the right of people to free and fair debate, but friendly assistance should be consistent with the right of Indigenous people to gain a measure of self-determination.

In analysing the article, this article very broadly segments potential electors[5] into three groups, electors who will determine the entrenchment or otherwise of a Voice and thus potentially impact, and vice versa, the community, but primarily Indigenous people. The three groups of electors are:

(a) the 'yes camp'; those intending to vote 'yes' at a referendum to be held on 14 October 2023 ('Referendum') seeking to entrench the Voice in the Constitution. The authors unambiguously support a Voice noting that their intention is 'not to diminish the Indigenous methodology ... behind the Uluru Statement … but to further highlight it';[6]

(b) the 'progressive no camp'; largely Indigenous led, who consider the Referendum as quite inadequate to address current Indigenous problems. The 'progressive no' campaign supports a 'no' vote because they believe, and not unreasonably so, that the Voice is only a small concession, a claim not contested here. This camp opposes incrementalism as too slow but offers few contemporaneous practical alternatives, and hence this critique questions the wisdom of 'arguing for nothing' over an opportunity to 'make some gain' and, in time, to progress to truth telling and treaty formation; and

(c) the 'antagonistic no' camp; people who want to give Indigenous people even less than an advisory body, which means giving nothing, as they make no new counteroffers. It is sometimes racist (and an antagonistic

4 Reliance of a domestic framework alone could be disadvantages to Indigenous peoples, see generally Asmi Wood and Christie Gardiner, 'Identifying a Legal Framework for a Treaty between Australia's First Peoples and the State', in Diane Smith et al (eds), *Developing Governance and Governing Development: International Case Studies of Indigenous Futures* (Rowman & Littlefield, 2021) 63.

5 That is, 'electors' in the meaning of s 128 of the *Constitution*.

6 Appleby, Levy and Whalan (n 2) 765.

subset),[7] but is largely an apathetic group, to whom the mantra of the appeal 'if you don't know, vote no!' is an appeal to the lowest form of indolence.

The success (or otherwise) of the Referendum is dependent on their collective votes, the majority who are non-Indigenous. The three groupings set out above are self-evident. About 80% of Aboriginal and Torres Strait Islander voters intend to vote 'yes' at the Referendum, with the rest, falling into group (b), while a few Indigenous and other politicians on the political right, but not exclusively so, and the remaining electors, falling into (c).[8] Unless it is otherwise clear from the context, the form and scope of the Voice used in this critique, is set out in schedule 1 of the *Constitution Alteration Act* and specifically as:

> [T]he Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples … [9]

The authors of the article address the Voice as a key issue.[10] The article sometimes uses a broader definition for Voice (than under the *Constitution Alteration Act*) but it appears that they do not do so exclusively.[11] This choice clearly influences the article.[12] The authors seek to 'engage reciprocally: to explore just some of the depth and sophistication of the Regional Dialogues',[13] an engagement which is an intrinsically worthy endeavour, particularly for those not privy to the Dialogues and the *Yulara* processes leading to the *Uluru Statement from the Heart*[14] ('Statement' or '*Yulara* processes').[15] However, as the Referendum is in train, the timing of the article's broader speculation on scope is less helpful and can muddy the waters. Conclusions the authors have drawn from a definition of the 'Voice' varying from that of the *Constitution Alteration Act* could reasonably differ significantly from a conclusion relying on the legislation.

The implications of a Voice relying on the *Constitution Alteration Act* are:

(1) The Voice entrenches the recognition of Aboriginal and Torres Strait Islander peoples and acknowledges their occupation of the Continent from time immemorial. This recognition arguably is symbolic, but powerful. It

---

7 Geoffrey Robertson, 'Indigenous Voice: If Australia Votes No, Our International Voice Will Be Tainted', *The Sydney Morning Herald* (online, 16 September 2023) <https://www.smh.com.au/politics/federal/if-the-no-wins-the-world-will-think-we-re-racist-anyway-20230913-p5e4ar.html>.

8 'Fact Check: Do the Polls Show That Indigenous Support for the Voice Is between 80 and 90 per Cent?', *ABC News* (online, 1 August 2023) <https://www.abc.net.au/news/2023-08-02/fact-check-indigenous-australians-support-for-the-voice/102673042>.

9 *Constitution Alteration Act* (n 2) sch 1, s 129(ii).

10 Appleby, Levy and Whalan (n 2) (see title and abstract).

11 The *Statement* uses 'First Nations Voice', while the *Constitution Alteration Act* uses 'Aboriginal and Torres Strait Islander Voice': National Constitutional Convention, *Uluru Statement from the Heart* (Web Page, 26 May 2017) <https://ulurustatemdev.wpengine.com/wp-content/uploads/2022/01/UluruStatementfromtheHeartPLAINTEXT.pdf> ('*Statement*'); *Constitution Alteration Act* (n 2).

12 Appleby, Levy and Whalan (n 2) (see title and abstract).

13 Ibid 764.

14 *Statement* (n 11).

15 Appleby, Levy and Whalan (n 2) 782.

explicitly gives form to the Indigenous body-politic referred to by the majority in *Love v Commonwealth*,[16] and consequently recognition of Indigenous legal personality (arguably) at its fullest.[17]

(2) The Voice 'may make representations'[18] to the named institutions on matters tightly circumscribed by legislation.[19] *Nothing more* for now; but for the future, the processes currently in train may also provide a path to truth telling and treaty.[20]

It is posited that issues such as Indigenous sovereignty raised by the authors are best left to Indigenous people to prosecute at the appropriate time. This does *not* mean that non-Indigenous people may not consider these issues. Clearly not. It does not, however, authorise them to speak on issues clearly not related to the Voice, by claiming otherwise.

II SOME KEY ISSUES RAISED IN THE ARTICLE

The authors have disclosed their standpoint,[21] which makes it easier to identify any issues say for example, of not speaking on behalf of the 'other side'. One of the authors, Appleby, was a 'technical adviser to the Regional Dialogues',[22] and arguably has both an insight into *Yulara* processes, as well as access to their materials but *only* cites related, publicly available materials.[23] This still makes critique of the article difficult and perhaps unfair to the authors, as this critique relies on the *Parliament's definition of the Voice*, which is open to all sides.[24] In the view of Thomas Mayo, a delegate and person intimately involved with the *Yulara* processes, the Voice is about practical issues such as housing, employment etc,[25] and has a scope which fits better with the meaning of the *Constitution Alteration Act*.

The authors raise the 'Australian constitutional legitimacy crisis' ('crisis')[26] or 'dilemma'[27] which in their view is a central issue for resolution. The authors posit

16 *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* (2020) 270 CLR 152, 190 [73]–[74] (Bell J, as approved by the majority at 192 [81]) ('*Love*').

17 Asmi Wood, 'Self-Determination under International Law and Some Possibilities for Australia's Indigenous Peoples' in Laura Rademaker and Tim Rowse (eds), *Indigenous Self-Determination in Australia* (ANU Press, 2020) 269, 277 ('Self-Determination') <https://doi.org/10.2307/j.ctv1bvncz1.18>; Wood and Gardiner (n 4).

18 *Constitution Alteration Act* (n 2) sch 1, s 129(ii).

19 Ibid sch 1, s 129.

20 The authors acknowledge the importance of these future processes: Appleby, Levy and Whalan (n 2) 770 n 35.

21 Ibid 764.

22 Ibid n 9.

23 Ibid. See also ibid 782.

24 See definition quoted above at n 9.

25 Thomas Mayo, *Finding the Heart of the Nation: The Journey of the Uluru Statement towards Voice, Treaty and Truth* (Hardie Grant Explore, 2nd ed, 2022) 105.

26 Appleby, Levy and Whalan (n 2) 763, 767–8.

27 Ibid 763.

that 'that the normative foundations of public governance are unsettled',[28] an issue, primarily relevant for non-Indigenous people alone, but which remains unexpressed.[29]

The authors explicitly acknowledge the multiple sources of (non-Indigenous) disagreements on the issue of legitimacy,[30] reasonably and largely done by mainly citing non-Indigenous scholars. While Indigenous scholars cited in the article appear to confirm the crushing, practical effects of the Constitution, it is unclear that they are equally concerned with constitutional legitimacy *per se*. Constitutional legitimacy is *not really an issue for most Indigenous people*.

This is not to understate the practical difficulties of subjugation and that it is Indigenous peoples who have to contend with the practical impacts of the crisis including the deficiencies at Anglo-Australian law as 'rectified' by the legally fictitious claims to the Continent. A focus on these oppressive legal fictions and how they might be denied or corrected at law and in law schools,[31] something law deans have promised to consider for the future,[32] would be more useful than speculation on crises based on Indigenous interests.

The authors also raise the need for 'apex decision-maker[s]'.[33] The practical reality for Indigenous peoples, is that 'apex decision-makers' are all part the domestic colonial system. The unfairness of such unilateral arrangements between very different peoples is an underlying aspect of colonialism and is acknowledged by the authors,[34] and are issues that should, it is argued, be negotiated and settled under treaty and not in a constitutional change involving an advisory Voice.[35]

The approach taken in this paper might not, perhaps not unreasonably, be considered negative by those not familiar with Indigenous affairs in Australia. However, Indigenous experience with settler communities has largely been one-sided and exploitative, and to presume otherwise could again prove to be a folly for Indigenous people. The Statement's appeal to the public is premised on government inaction.[36] Perhaps more precisely the Voice's appeal is that it might address the ineffective Government policies, with minimal consultation with

28 Ibid.

29 This approach is arguably an appeal to the 'no' campaigners by drawing attention to their own self-interests directly associated with the Voice legislation.

30 Appleby, Levy and Whalan (n 2) 765.

31 Asmi Wood, 'Unmasking Indigenous Invisibility: Reforming the Pedagogy of Terra Nullius' in Foluke Adebisi et al (eds), *Decolonisation, Anti-Racism, and Legal Pedagogy: Strategies, Successes and Challenges* (Routledge, forthcoming 2023) ('Unmasking Indigenous Invisibility').

32 'Statement on Australian Law's Systemic Discrimination and Structural Bias Against First Nations Peoples', *Council of Australian Law Deans* (Web Page, 3 December 2020) <https://cald.asn.au/blog/2020/12/03/cald-statement-on-australian-laws-systemic-discrimination-and-structural-bias-against-first-nations-peoples/>.

33 Appleby, Levy and Whalan (n 2) 765.

34 Ibid 782–3.

35 Wood and Gardiner (n 4).

36 *Statement* (n 11); Productivity Commission (Cth), *Closing the Gap: Annual Data Compilation Report* (Annual Data Report, 12 July 2023) 43–4.

impacted Indigenous communities. Effective consultation,[37] potentially engaging with the Voice, is likely to save billions of dollars by minimising ineffective expenditure!

The authors analyse the 'crisis', and its amelioration, through two broad lenses.[38]

Firstly, through introducing substantive equality rights into the Constitution through the use of anti-discrimination clauses[39] – reforms that, in their view, can be achieved through the Expert Panel's recommendations[40] – using what that the authors term are two different sets of 'recognition reforms',[41] employing a rights-based approach.[42] That is, the implication that the 'crisis' is mutually shared and again, by implication, a concern equally experienced by both sides (and by clear implication because the authors are speaking simultaneously for both sides) is unfair and unnecessary. Broad, unqualified claims and assertions hide the nuances for the negative Indigenous experience, eased for non-Indigenous people through a series of legal fictions,[43] taught to law students, as if these contentious and contested issues were fact. The crisis intrinsically is important, but *surely* not in the context of the Voice. They do so by suggesting that structural reforms could be achieved through a political Voice to Parliament. The authors note that the Statement, has taken 'key steps in this direction'.[44] The Voice, if successfully adopted into the *Constitution*, will be a vehicle for the recognition of Indigenous peoples as the first peoples.[45] However, the Voice in the meaning of the *Constitutional Alteration Act* does not purport directly to address issues of structure, equity or equality although it potentially may make representations to this effect. In Part III of the article, the authors speculate how the Voice will address the crisis through processes that 'should be capable of being seen as legitimate by every party to the dispute'.[46] The Voice as envisioned in the *Yulara* processes may well have done this but not in the meaning of the *Constitution Alteration Act*.[47]

Secondly, the authors then examine the crisis, including through the lens of 'sovereignty, constitutional legitimacy, and the ongoing relationship between the

37 See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 10, 11, 19, 28, 29 ('*UNDRIP*') – an instrument Australia has now endorsed: see Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Statement, 3 April 2009) <https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>.

38 Appleby, Levy and Whalan (n 2) 761–2.

39 Ibid 762. This was part of the Expert Panel's recommendations: Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Report, January 2012) 231 ('*Recognising Aboriginal and Torres Strait Islander Peoples*').

40 Appleby, Levy and Whalan (n 2) 762, referring to *Recognising Aboriginal and Torres Strait Islander Peoples* (n 39).

41 Appleby, Levy and Whalan (n 2) 762.

42 See, eg, the title of Appleby, Levy and Whalan (n 2).

43 Wood, 'Unmasking Indigenous Invisibility' (n 31).

44 Appleby, Levy and Whalan (n 2) 762.

45 *Constitution Alteration Act* (n 2) sch 1, s 129(ii).

46 Appleby, Levy and Whalan (n 2) 764.

47 See above discussion accompanying n 10.

state and First Nations',[48] issues that are central to Indigenous emancipation. The authors state that it is the 'apparently incompatible sovereignty claims [that] form the core of the constitutional legitimacy crisis'.[49] It is unclear what the qualifier 'apparently' adds to the sentence. Clearly, the question of legitimacy directly *is related* to the underlying, legally unsupported, difficult-to-support claims for sovereignty by the Crown, and is acknowledged by the authors.[50] This is not an issue for resolution by Indigenous peoples.

The authors assert that the settler community (believes)[51] that their own claims to sovereignty are 'ultimate and exclusive'[52] and 'trum[p]'[53] Aboriginal claims, not least because of the constant re-statement of unfounded claims,[54] 'supported' by manufactured legal fictions. More broadly the authors' unqualified notion of 'two sovereignties'[55] is rejected here as not representing the views of the majority of Indigenous people.

The article posits that 'a key strand of reasoning that animated the call'[56] for an institutional political Voice included independent strands of Indigenous thinking related to sovereignty,[57] a sovereignty which the authors recognise is at the core of Indigenous claims.[58] The Voice in the meaning of the *Constitutional Alteration Act* neither makes nor demands any concessions on sovereignty, an antagonist 'no' camp fallacy.

The Statement refers to the Crown's sovereignty as 'co-exist[ing]'[59] with that of Indigenous peoples', a concession on sovereignty, attributable only to the signatories and the authors of the Statement. The resulting use by the Statement and the authors of the term First Nations, a North American term, importing the

---

48 Appleby, Levy and Whalan (n 2) 762. This critique avoids the use of the term 'First Nations' to refer to Aboriginal and Torres Straits Islander Peoples: see the below discussion accompanying n 131.

49 Ibid 766.

50 Ibid 767. See also the notion of *uti possidetis*, the effects of which briefly are examined below at text accompanying n 61.

51 See below discussion accompanying n 130, for the concession on sovereignty made in the Statement.

52 Appleby, Levy and Whalan (n 2) 763. There is no legal basis for such an assertion either under domestic law or international law. The High Court in the *Murray Island Case* clearly denied jurisdiction over such acts of state: *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 31–2 (Brennan J) ('*Murray Island No 2*'). (For cultural reasons some Indigenous communities do not the use the names of people who have passed, and on for a period after their passing naming individuals is strongly avoided. Hence, this case will be referred to as the *Murray Island No 2* case, the name of the island, Murray Mer, the home island of the three plaintiffs in that case.) International law does not recognise the settlement of a populated parcel of land: *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 39 [79].

53 Appleby, Levy and Whalan (n 2) 766.

54 *Murray Island No 2* (n 52) 26 (Brennan J).

55 Appleby, Levy and Whalan (n 2) 790. It is conceded that the authors could reasonably make this claim based on the Statement, a position as argued here is rejected by most Indigenous people. This paper, however, also does not accept the homogenised view of Indigenous peoples as is also reflected in the term First Nations, while expressed in the plural are often considered as a single group presumably possessing the 'other' sovereignty, ie, of the two identified sovereignties.

56 Ibid 763.

57 As noted in the Statement, that 'sovereignty that was never ceded' (followed by a qualification by the Statement's authors – see discussion accompanying n 131): *Statement* (n 11).

58 Appleby, Levy and Whalan (n 2) part II, 765–76.

59 See below discussion accompanying n 131.

notion of 'domestic dependent sovereignty'[60] and is a natural consequence of the concession (with no accompanying explanation or qualification for such a crucial issue) of the wording of the Statement.

On the other hand, under international law, the absence of a valid claim for sovereignty by non-Indigenous claimants, the doctrine of *uti possidetis* holds that sovereignty *must* remain with the original possessors of these rights,[61] which uncontentiously here means the Indigenous people of this Continent.

Consequently, the wider conflation of important issues, including sovereignty and self-determination for Indigenous peoples with the Voice, is unnecessary and unwise. The speculative broadening of scope raised by the authors does not fall within its meaning in the *Constitution Alteration Act*. The discussion is unwise because antagonistic segments of the 'no' campaign, have also disingenuously conflated a range of peripheral or unrelated issues – issues clearly not directly relevant to the Voice as narrowly circumscribed in the *Constitutional Alteration Act*.

The authors' approach, however, might address the angst of many of the White/non-Indigenous community but is unlikely to influence their vote (and are unlikely to read the article anyway). However, even at this stage of the campaign, the Voice is struggling to be heard for the cacophony of 'voices' crowding the airways, often with half or untruths, some 'too silly for words',[62] but also well intentioned aspirational 'scope creep' in the Voice (explicitly or otherwise), unfortunately, often in accord with the 'progressive no' camp. In a contest between reason and emotion, emotion often wins which is unfortunate for Indigenous people.

For example, the authors claim that the 'government and Parliament will *be obliged to engage* with the Voice in certain defined areas'[63] – insights arguably gleaned from the Dialogues – but also go on to concede 'the Voice's lacks of formal binding effect',[64] both points arguably overstated, as the *Constitution Alteration Act* provides that the Voice 'may [only] make representations [to …]'.[65] Others, such as the prominent 'no' advocate, Mr Ian Callinan, spoke about the Voice as creating an unstoppable *moral*, but not legal, obligation.[66] The authors did

60 *Johnson v M'Intosh*, 21 US (7 Wheat) 543, 574 (Marshall CJ) (1823); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1, 17 (Marshall CJ) (1831); *Worcester v Georgia*, 31 US (6 Pet) 515, 559 (Marshall CJ) (1832) (together, the 'Marshall Trilogy'). See below discussion accompanying n 131.

61 Wood, 'Self-Determination' (n 17) 273–4.

62 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 May 2023, 3239 (Linda Burney, Minister for Indigenous Australians), quoting Bret Walker SC.

63 Appleby, Levy and Whalan (n 2) 786. It is unclear from the context whether this obligation is moral or legal, as is considered below.

64 Ibid 789.

65 *Constitution Alteration Act* (n 2) sch 1, s 129(ii).

66 Ian Callinan, 'Examining the Case for the Voice: An Argument Against', *The Australian* (online, 17 December 2022) <https://www.theaustralian.com.au/inquirer/examining-the-case-for-the-voice-an-argument-against/news-story/e30c8f2ffcbae73eaa3921e82bf174a9>. His Honour is a former justice of the High Court of Australia. It is noted that his Honour's arguments for the negative arguably represented a more socio-political vantage rather than issues based solely in the law. His Honour argued that there would be strong social or political pressure (but not legal obligation) for the Government of the day to acquiesce to the recommendations of the Voice.

not cite him or others with a similar view or qualify the nature of the 'obligation'. What can arguably be inferred is that some issues raised or considered at the deliberations were ultimately excluded from the legislation.

III THE ARTICLE'S ANAYLSIS OF THE HIGHLIGHTED ISSUES

The authors identify as non-Indigenous academics.[67] This is a useful standpoint issue as it pertains to deciding 'what is best for whom'.[68] The authors also helpfully draw on John Stuart Mill to acknowledge that 'one person cannot necessarily rely on another to understand and express one's own interest or preferences'.[69] This makes the article quite transparent, but see the analysis below on 'Whiteness' for the context of non-Indigenous claims often disadvantaging Indigenous peoples.

Non-Indigenous perspectives (and thus interests) almost inevitably will not align with those of Indigenous people. The authors limit their own critique to non-Indigenous history and law but unfortunately do so using the Voice as a fulcrum. The article is not fully focused on the impact of the Voice for Indigenous peoples, but on how it directly impacts their own constitutional crisis, an issue that is not high on the contemporary list of Indigenous problems.

The authors assert that 'there may be no widely agreed source of 'social legitimacy': no common perception, among the people or peoples'.[70] They note that such crises are not unique to Australia,[71] arguably referring to the other settler-colonial states. This is clearly *not* how Indigenous people view this issue. Indigenous issues of legitimacy are considered self-evidently established, and are confirmed by the High Court that held that *terra nullius* was a fiction,[72] and with the natural implications that *must* flow. Even non-Indigenous scholars of legal history reject claims that the Continent was ungoverned or that its peoples did not possess civilisation, legitimacy or law.[73]

And yes, it is up to non-Indigenous peoples to settle their own issues of legitimacy. However, the critique here is that non-Indigenous peoples should avoid addressing these deficiencies through the Voice or other Indigenous attempts for some form of redress. They should do so independently.

Another focus in the article is on democracy and deliberative democracy.[74] It is also important to Indigenous sensitivities in this context – where 97% of the

67 Appleby, Levy and Whalan (n 2) 764.

68 Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (University of Queensland Press, 2000) 60, quoting Marilyn Frye, 'The Necessity of Differences: Constructing a Positive Category of Women' (1996) 21(4) *Signs: Journal of Women in Culture and Society* 991, 1009 <https://doi.org/10.1086/495128>.

69 Appleby, Levy and Whalan (n 2) 774, citing John Stuart Mill, *Considerations on Representative Government* (Parker, Son, and Bourn, 1861) 4, 27–34, 133–6.

70 Appleby, Levy and Whalan (n 2) 763.

71 Ibid.

72 *Murray Island No 2* (n 52).

73 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Murray Island No 2* (n 52).

74 Appleby, Levy and Whalan (n 2) 764.

majority will determine what is of significant importance to Indigenous peoples.[75] The outcome of the Referendum itself matters very little to the majority interests in a direct sense. From an Indigenous perspective, Australian democracy, in practice, is more akin to the proverbial 'dictatorship of the majority' than it is (here of Indigenous people) to people speaking for themselves – ironically the central purpose of the Voice. Indigenous people are constitutionally reliant[76] on the majority, to gain a say in their own affairs, a majority that is either largely disinterested or can relatively easily be 'ma[de] … fearful'[77] into voting 'no'. 'Fear', in this instance, of granting Indigenous people what the Prime Minister Mr Anthony Albanese has said several times, is a modest concession, but one that could nonetheless, practically and importantly[78] improve Indigenous lives.

The fear arguably is a constructed fear of 'Aboriginal gains' and cynically promoted by the no campaign.[79] Susan Young provides some background to the underlying conditions based in Whiteness. She notes generally that: 'A lot of non-Aboriginal people are scared of Aboriginal people. Why is that? ... [this is] not [a] question[n] about Aboriginality, [this is a] question about whiteness'.[80]

This observation is apt in the context of what is generally termed as a 'fear campaign' promoted by the 'antagonistic no' campaign, including several false premises.[81]

Whiteness and its unstated assumptions allow non-Indigenous people to focus on flawed legitimacy and other concerns with the *Constitution*. In this vein, Moreton-Robinson notes that '[r]ace continues to be a basic categorical object in the production of knowledge in modernity',[82] here disadvantaging Indigenous peoples.

The article uses the vehicle of the 'Voice' and 'rights' and as a means of addressing the crisis. While people are free to exercise their academic freedom, it is posited that the debate on the Voice, particularly from those who wish us well, should, in light of significant disinformation, focus on the intrinsic merits or otherwise of the Voice, as a means only of giving Indigenous people an

75 See ibid 785–6. for the authors' discussion of the difficulties minorities experience in this regard.

76 *Constitution* s 128.

77 'Foreign Minister Penny Wong Speaks to 7.30', *ABC News* (Australian Broadcasting Corporation, 22 August 2023) <https://www.abc.net.au/news/2023-08-22/foreign-minister-penny-wong-speaks-to-7.30/102762636>.

78 See above discussion accompanying n 26.

79 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 2023, 25 (Mark Dreyfus, Attorney-General).

80 Susan Young, 'Social Work Theory and Practice: The Invisibility of Whiteness' in Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 104, 104, quoting T Muirhead, 'Interview', *Aboriginal Independent Newspaper* (Perth, January 2001).

81 See above n 77.

82 Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 75, 77 ('Whiteness, Epistemology and Indigenous Representation').

opportunity 'to make representations', on issues that directly impact them, as opposed to repairing a faulty *Constitution* (in its entirety).[83]

The Voice addresses only one aspect of the Constitution's omissions but ironically entrenches settler-colonial illegitimacy which also irks the 'no' campaign. The crucial element of Indigenous Recognition,[84] unfortunately,[85] receives less attention from detractors, and sometimes supporters, of the Voice. The debate is centred on the *entrenchment* of the Voice alone, largely excluding the merits of a Voice as well as the multi-party support for a legislated Voice. The authors speculate too on an expanded breadth and scope of what a Voice might be capable of in the future. Unfortunately, however, this may also add to the 'no' fodder.

Advocates for the 'no' campaign, largely but not exclusively, non-Indigenous people, focus on powers they believe are within the scope of the legislation. Many imaginary 'problems' were raised and some of the fallacies debunked. These distractions should not too easily be forgotten, including: a fantastic scope for the Voice encompassing an imaginary 'veto power' over Parliament's legislative authority; that the Voice would be a 'third chamber' in Parliament; or that non-Indigenous people would need to pay Indigenous people for using their local beach or 're-racialise' the Constitution;[86] and generally have blown out the Voice's scope. Clearly it is not the Voice, but the wild imaginations of some in the 'no' camp that are flooding their imaginary High Court under these imaginary powers leading to imaginary causes of action and generally feeding a fear campaign.

The authors posit that '[the Voice] is also a structural mechanism through which First Nations can exercise their sovereignty and self-determination'.[87] This point is clearly overstated vis-à-vis the *Constitution Alteration Act* but perhaps not entirely inconsistent with the ethos of the *Yulara* processes.[88] It is not a realistic appraisal given the limited scope of the body itself.[89] The Explanatory Memorandum much more realistically states in relation to self-determination only that the Voice as prescribed in the Constitution Alteration Act is '*consistent with*' self-determination in the meaning of common article 1 of the *International Covenant on Civil and Political Rights* and the *International Covenant on*

---

83 The article addresses some concerns of the broader 'no' camp as it appeals to their self-interest. This critique largely is focused on the impacts of the Voice on Indigenous communities, and to dissuade speculation on all sides.

84 See heading of the *Constitution Alteration Act* (n 2) ch IX ('Recognition of Aboriginal and Torres Strait Islander Peoples').

85 The Recognition of Aboriginal and Torres Straits Islanders in the *Australian Constitution* has multi-party support and is not contentious. The 'no' Campaign, however, and perhaps again understandably, focuses on the entrenchment of the Voice alone, drawing on the attention and fear of the majority predominantly on this issue and its supposed consequences for the disadvantage of the majority.

86 Note that the founders included race as a notion in the *Constitution* and even after the 1967 Referendum which removed references to Indigenous people, sections 25 and 51(xxvi) still continue to provide race-based provisions, giving lie to the notion of re-racialising the *Constitution*.

87 Appleby, Levy and Whalan (n 2) 770.

88 Mayo (n 25) 97, 105, where the author agrees with the statement (at 97) that the *Yulara* processes was about 'the struggle for self-determination'.

89 *UNDRIP* (n 37) arts 3, 4, 46 (with respect to the protection of the territorial integrity of the nation-state).

Economic, Social and Cultural Rights and with the principle in article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').[90]

Using the Voice to examine the shortcomings of constitutional arrangements by considering various possibilities for the use of a Voice is clearly an interesting intellectual exercise of extracting every ounce of possibility from such a body. It could at this stage, however, prove to be a double-edged sword, particularly from the vantage of the majority of Indigenous peoples. This is because the no-Voice campaign is also examining every possible, remote way in which the Voice could challenge majority dominance, promotes these remote possibilities as probabilities,[91] and are urged to 'vote no' if they do not understand aspects of this speculative scope.

What the Referendum proposes for the Voice is that it will be a body regulated by Parliament through legislation amenable to change by the government of the day.[92] Ultimately, as most no-campaigners are supportive of a legislated Voice and thus need reasonably *to ground their opposition* in the issue of the 'dangers' of *entrenchment alone*. Nothing more!

IV DESIGN OF THE VOICE – SOME POSSIBILITIES

The authors broadly discuss Parliament–Voice interaction including the scope of the Voice using a deliberative democracy or through a 'mini-public'[93] lens.[94] The authors are careful not to overstate the impact of deliberative mechanisms on outcomes.[95] As they note, it is a useful mechanism for 'educating' relatively small groups.[96] The deliberative method has successfully been used in an Indigenous legal setting.[97] This 'mini-public' approach, however, is less helpful for educating the majority of the public. Given the requirements of section 128 of the *Constitution*, success at a referendum requires a much broader education.

The authors also explore some difficulties and disadvantages of democracy as a mechanism to protect minority rights[98] and discuss 'rights' as a means of ameliorating such disadvantage.[99] The authors further discuss Professor Lindell's

90 Explanatory Memorandum, Constitutional Alternation (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) 7–8 (emphasis added), citing *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 1, 2, 25, 26, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 1, 2(2) and *UNDRIP* (n 37) arts 2, 3.

91 See above text accompanying n 85.

92 *Constitution Alteration Act* (n 2) sch 1, s 129.

93 Appleby, Levy and Whalan (n 2) 787.

94 Ibid part III.

95 Ibid 782.

96 Ibid 781.

97 Asmi Wood and Ron Levy, 'A Mini-Public of Academics: Experimenting with Deliberative Democracy and Indigenous Cultural Competency in Legal Education' (2019) 28(2) *Legal Education Review* 1, 17 <https://doi.org/10.53300/001c.7595>.

98 Appleby, Levy and Whalan (n 2) 768–9.

99 Ibid. See also the discussion accompanying n 39 on the discussion of the Expert Panel's recommendations.

recommendations on improving the *impact* of a Voice.[100] These are important post-Referendum matters, but are less helpful when trying to keep the message relatively simple.

On the other hand, the authors set or impose, it appears, a western style democratic model as the only means for selecting/electing Indigenous peoples as representatives.[101] This cannot simultaneously be characterised, as the authors have done, as a self-determination. Clearly while election may be, and indeed is likely to be, the mechanism favoured by Indigenous peoples, as a matter of principle, mechanisms and modes of how representation is effected within their own communities should be left to means that are *compatible* with self-determination,[102] through free, prior, informed consultation.[103]

The authors reasonably raise how 'consultation' is practiced by the State in ways that 'perpetuate colonial power structures and continue to silence [Indigenous peoples]'.[104] The authors also discuss some examples of how 'consultative matters' are given effect,[105] although they do not claim these methods,[106] or even the 13 Regional Deliberative Dialogues, fall within the meaning of the term in *UNDRIP*.

The *Yulara* processes also involved the assistance of both Indigenous and non-Indigenous lawyers,[107] and therefore arguably involved a mix of assistance and consultation, the differences of which were not explicitly examined in the article. 'Consultation', they rightly imply can be perfunctory and problematic, as it sought to 'domesticate'[108] Canadian Aboriginal peoples[109] or 'incorporat[e]' Indigenous people,[110] which in Australia means assimilation.[111]

While the authors do not discuss this particular standard, *UNDRIP* refers to 'free, prior and informed consent' ('FPIC'),[112] as a minimum applicable standard.[113] While the Regional Dialogue processes are a reasonable start, based on the authors' intimate knowledge of the *Yulara* processes, a direct comparison against

100 Ibid 788.
101 Ibid 786–7.
102 Explanatory Memorandum, Constitutional Alternation (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) 7–8.
103 National Indigenous Australians Agency (Cth), *Indigenous Voice Co-Design Process* (Final Report, July 2021). Consultations that have occurred in this context arguably might meet this 'free, prior informed consent' ('FPIC') standard, but unfortunately FPIC is not a yardstick that is applied consciously and explicitly – a criterion that would be a useful when applied explicitly and help build up a body of practice.
104 Appleby, Levy and Whalan (n 2) 782 (references omitted); Wood, 'Unmasking Indigenous Invisibility' (n 31).
105 Appleby, Levy and Whalan (n 2) 782–3.
106 Ibid.
107 See above discussion accompanying n 23.
108 Appleby, Levy and Whalan (n 2) 782.
109 See the authors' reference to John Borrows: ibid, quoting John Borrows, 'Domesticating Doctrines: Aboriginal Peoples after the Royal Commission' (2001) 46(3) *McGill Law Journal* 615.
110 Appleby, Levy and Whalan (n 2) 782.
111 See above discussion accompanying n 1.
112 *UNDRIP* (n 37) arts 10, 11, 19, 32.
113 Ibid art 43.

FPIC would also have been instructive and have helped actively to engage with *UNDRIP*.[114]

The authors note that questions on self-determination and sovereignty can be 'expected to arise',[115] on 'a wide set of subject matters'[116] as indeed could anything else if 'appropriately'[117] linked to relevant legislation,[118] although creative lawyering is what the authors likely have in mind here. It is unlikely, however, that the Parliament will directly legislate on sovereignty as a 'matter relating to' Indigenous peoples.[119]

The authors however, imprecisely, state that the High Court did 'not formally recognise sovereignty'[120] in cases such as the *Murray Island No 2* case and *Love v Commonwealth*.[121] The High Court formally denies jurisdiction over sovereignty claims, arguably closing the door to further claims through domestic courts.[122] The authors however, raise a not unreasonable possibility with respect to self-determination, where the Voice arguably could 'make representations' on the meaning of self-determination in international instruments incorporated into domestic legislation or endorsed by the Australian state.[123]

Parliament will possess the right to determine the functions, etc, of the Voice,[124] and they could thus give effect to a measure of self-determination through the Voice.[125] The design elements for the Voice as discussed in the regional dialogues[126] could at best be considered as persuasive,[127] but as mentioned such considerations, if necessary, are best contemplated, post-Referendum.

V DEFINITIONAL ISSUES

The Statement denies the cession of Indigenous sovereignty (in the past tense), but immediately is followed by a form of words in the present tense arguably that appears to acknowledge cession: 'It [sovereignty] has never been ceded or extinguished, and co-exists with the sovereignty of the Crown'.[128]

---

114 Ibid.
115 Appleby, Levy and Whalan (n 2) 784.
116 Ibid 785.
117 This is a test that is likely to be set out in the legislation itself or alternatively determined by the common law.
118 *Constitution Alteration Act* (n 2) sch 1, s 129(ii).
119 Ibid.
120 Appleby, Levy and Whalan (n 2) 20.
121 Ibid.
122 *Coe v Commonwealth* (1993) 68 ALJR 110.
123 Explanatory Memorandum, Constitutional Alternation (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) 7–8.
124 *Constitution Alteration Act* (n 2) sch 1, s 129(iii). See also the authors' similar conclusion: Appleby, Levy and Whalan (n 2) 786–7.
125 Explanatory Memorandum, Constitutional Alternation (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) 7–8.
126 Appleby, Levy and Whalan (n 2) 786.
127 *Constitution Alteration Act* (n 2) sch 1, s 129(iii).
128 *Statement* (n 11). The authors note that the spiritual notion (as also mentioned in *dicta* in *Love* (n 16) 189 [73] (Bell J)) of sovereignty cannot be ceded: Appleby, Levy and Whalan (n 2) 778. While a convenient

The Statement also uses the term 'First Nations', a relatively but not entirely new term in Australia arguably popularised after the release of the Statement to describe Aboriginal and Torres Strait Islander peoples.[129] This term, First Nations, is not defined at domestic Australian law. It, however, has a meaning in North American common law where it is a form of 'domestic dependent sovereignty',[130] a concept of sovereignty conceptually rejected by most Indigenous peoples.

If the 'one common law' thesis[131] applies within the United Kingdom and Australia and perhaps the United States of America, and in the absence of another statutory meaning, the term First Nations[132] is likely to be interpreted as in its North American meaning.[133] If this is correct, then the Statement arguably reflects a concession by some involved in the *Yulara* processes. Clearly, the authors, and those assisting the Indigenous people (lawyers and otherwise) with the *Yulara* processes *must* have known this as they provided no caveats with the use of this term.

Thus, the term First Nations when used to represent Aboriginal and Torres Strait Islander peoples, may involve a diminution of Aboriginal claims for full sovereignty. It helps with the continuing colonisation program on this Continent. The vast majority of Aboriginal people will therefore, including for an instinctual distrust of the 'elite', continue to use the term Aboriginal or Torres Strait Islander peoples (or 'Indigenous'), reinforcing traditional Indigenous claims to sovereignty.

VI QUESTIONS OF WHITENESS

Ultimately, however, the Referendum is about Indigenous recognition and a minimalist form of representation against claims of exclusive state sovereignty, as the authors describe the entity.[134] The crisis of legitimacy facing the state is a useful matter for general discussion. However, juxtaposing this crisis against a minimalist claim for an Indigenous Voice is ultimately perhaps adding more heat than light to an already vitriolic debate on the Voice. This article seeks to assuage the underlying issues that excite majoritarian angst, and by addressing this angst. In the words of Moreton-Robinson, what does happen, often against the will of the

---

way of sidestepping the issue, this is not much help to Indigenous people as such statements receive no formal reciprocation on the part of the state on the notion of a shared from of sovereignty. For a possible means of the state sharing sovereignty, see Peter Kilduff and Asmi Wood, 'Determining Sovereignty: Through Law? Or a Political Option?' (2021) 50 *Australian Bar Review* 476.

129 See above discussion accompanying n 128, referring to the Statement stating that '[sovereignty] has never been ceded or extinguished': *Statement* (n 11).

130 *Marshall Trilogy* (n 60).

131 *Lipohar v The Queen* (1999) 200 CLR 485.

132 It is clearly stated here that making concessions on sovereignty is not the intention of many Indigenous people when forced to use this term for example by their employers, as is the case here, say, at the Australian National University.

133 See above discussion accompanying n 130.

134 Appleby, Levy and Whalan (n 2) 761 n 1.

authors, is a re-normalising and re-centring majoritarian issues, issues underpinned by whiteness.[135] Non-Indigenous races are not subject to equivalent legal tests and therefore, are not constrained by their 'race'.[136]

Moreton-Robinson urges all scholars today to undertake the following task to help undo the tools of colonisation through the examination of texts used to colonise. She notes that '[t]he task today is to name and analyse whiteness in all texts to make it visible in order to disrupt its claims to normativity and universality'.[137] Moreton-Robinson summarises the phenomenon with respect to Indigenous peoples and the White or non-Indigenous expertise that it uses to circumscribe the State's approach as:

> It is white scholars who have long been positioned as the leading investigators of the lives, values, and abilities of Indigenous people. Indigenous scholars are usually cast as native informants who provide 'experience' as opposed to knowledge about being Indigenous or white. The knowledges we have developed are often dismissed as being implausible, subjective and lacking in epistemological integrity.[138]

The declaration of their standpoint by the authors is unusual and helpful. Such disclosure is useful in allying some of Moreton-Robinson's cautionary words. A former Prime Minister, Mr John Howard, said that colonisation has been good (for non-Indigenous people).[139] Again, what remains unsaid undermines Aboriginal claims, and Mr Howard's view renders Indigenous people invisible.[140] For Indigenous people, to other than reject such sentiments as in any way representing them would be an invocation for suicide.

VII CONCLUSION

In an interview on the recent Productivity Commission Report, Mr Romlie Mokak, Australia's first Indigenous policy evaluation commissioner at the Productivity Commission, noted from the report that Australian governments are failing to understand the scale and nature of change required to improve outcomes for Indigenous peoples.[141] The failure is of non-Indigenous institutions to understand the problems and deliver solutions to Indigenous communities, a process that will continue to fail because it misses a simple element: listening to the issues that Indigenous people raise and ignoring the solutions that they offer,

---

135 Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' (n 82).

136 See the three-part test for Indigeneity: *Commonwealth v Tasmania* (1983) 158 CLR 1, 274 (Deane J) ('*Tasmanian Dam Case*'); *Love* (n 16) 190–1 [75] (Bell J); Asmi Wood, 'Australia and Pandemics v BLM: No, *Love* Lost (at the High Court) Part I' (2021) 46(3) *Alternative Law Journal* 178, 182 <https://doi.org/10.1177/1037969X211024064>. Race once was an explicit issue for all people in Australia in the past particularly during the White Australia Policy era.

137 Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' (n 82) 87.

138 Ibid 85.

139 Hannah Ritchie, 'Colonisation by British "Luckiest Thing" to Happen to Australia – John Howard', *BBC News* (online, 26 July 2023) <https://www.bbc.com/news/world-australia-66309637>.

140 Wood, 'Unmasking Indigenous Invisibility' (n 31).

141 'Governments Are Failing to Deliver on the Closing the Gap Agreement', *RN Breakfast* (Australian Broadcasting Corporation, 26 July 2023) <https://www.abc.net.au/listen/programs/radionational-breakfast/closing-the-gap-report/102647208>.

as opposed to solving the imagined problems of non-Indigenous policymakers delivering solutions from afar.

The Voice, which can make representations under the proposed changes, can potentially bring Indigenous thoughts and solutions to the attention of the Government and the bureaucracy.[142] It has the potential to ameliorate problems including to reduce the costs of non-Indigenous designed, sub-optimal programs.[143] Entrenching a legal mechanism for Indigenous people to represent their own interests is a modest request. To the apathetic electors in the 'no' camp, do not let your self-centred leaders use you,[144] then blame you as red-necks or racists[145] and generally treat you as fools; fight their mantra:[146] if you don't know, don't just vote no, but find out! It is pretty straightforward! These are some of the issues we wish non-Indigenous people would raise.

Contemporary settlers conveniently blame the exclusion of Indigenous peoples on the founders. The current self-righteous claim is that the settler-colony is a human rights-based society. Time will tell, but a rejection of the Voice by the majority clearly would mean that non-Indigenous peoples in 2023 will be little different in this regard to the founders in 1901. Discrimination in 1901 was cloaked in eugenics and race, in 2023 it is cloaked in the language of rights, equality and humanity. A 'no' result will demonstrate neither humanity nor positive ethical values, nor indeed a panacea for non-Indigenous crises.

Thus, the broader constitutional problems would have been better raised at a time not leading up to the Referendum and particularly not done in relation to the Voice.

142 *Constitution Alteration Act* (n 2) sch 1, s 129(ii).

143 'Governments Are Failing to Deliver on the Closing the Gap Agreement' (n 141).

144 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 2023, 25 (Mark Dreyfus, Attorney-General).

145 See above discussion accompanying n 8.

146 See above discussion accompanying n 7 regarding 'antagonistic no'.