THE VOICE
THE FACTS

CFMEU
WESTERN AUSTRALIA

FOREWORD

Our Indigenous brothers and sisters working in construction stand with us on job sites across this country every day to demand a proper voice for workers and a better, fairer, safer industry for all.

And our Union stands with them in their demand for a proper Voice to Parliament to advocate for a better, fairer, safer world for themselves and their families.

The Voice to Parliament does not give Indigenous Australians extra say in the Parliament. It gives them no extra vote or political advantage. All it does is make sure that the Government must meet with and hear from Aboriginal and Torres Strait Islander people before passing any legislation that could affect their lives.

This is exactly the same demand we make as workers; that those in charge must meet with us, discuss problems in the workplace, and consult with us on production and safety issues that could affect us in our work and our lives.

It's having enough respect to sit down with people and listen to their ideas and concerns before making decisions that impact them. It's only right. It's only fair. And it's nothing more than we demand for ourselves every day in every workplace.

They stand with us. I'm asking every CFMEU member to stand with them and vote yes to a Voice to Parliament for Indigenous Australians.

Mick Buchan
State Secretary, CFMEU Construction & General WA

SUMMARY OF RECOMMENDATIONS - VOTE YES

A referendum to be held on 14 October 2023 will ask Australians to approve an amendment to the Commonwealth Constitution to establish The Voice.

The historical fact acknowledged in *Mabo* is that indigenous people "were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement" in a process that "underwrote the development of the nation"'. The preamble in the Native Title Act identifies that indigenous peoples "have been progressively dispossessed of their lands" and, as a consequence, "have become, as a group, the most disadvantaged in Australian society". The body politic of the Commonwealth of Australia is uniquely responsible for that consequence, and it is uniquely placed to redress it.

The proposed referendum wording, if passed, will create a body that is constitutionally enshrined but legislatively controlled. Its constitutional power will be limited to making representations to government. It will have no power to veto legislation or government decisions.

The idea of a Voice had its origins in one of the many panels and committees created to advise government over the past decade. It is based on the ideas that indigenous people are best placed to provide the solutions to the problems that confront them, and that government can be better informed when making laws and policies that affect indigenous people.

The Voice is a result of widespread consultation and the democratic wishes of regional indigenous communities. First Nations Regional Dialogues and regional meetings were held in every State and Territory, and engaged with over 1200 indigenous delegates. The Regional Dialogues culminated in a four-day First Nations National Constitutional Convention at Uluru in May 2017 where the delegates overwhelmingly approved the Uluru Statement from the Heart which called for a First Nations Voice enshrined in the Constitution.

Those who designed and led the Regional Dialogue process concluded that "enshrining The Voice would usher in a new era of stability and continuity in Aboriginal and Torres Strait Islander affairs" as it "directly addresses the fundamental imbalance between Indigenous people and government".

That fundamental imbalance is manifested in The Gap, which recognises historical and existing inequalities in such key metrics as indigenous incomes, life expectancy, health, birth weights and incarceration rates.

The Gap has manifested despite the fact that the Commonwealth Constitution contains a Race Power that has been used to make laws specifically directed at indigenous Australians. The Referendum Council recommended that The Voice should serve to monitor and inform the exercise of the Commonwealth's use of the Race Power.

The Voice is the means chosen by indigenous peoples themselves after over a decade of consultation and inquiry in order to address the fundamental power imbalance in the Constitution, and The Gap that has persisted despite efforts to address it.

Despite the scare tactics that have been inserted into the present debate, the Commonwealth Solicitor-General has advised that The Voice will be "an enhancement" of Australia's constitutional system of government, and that it "will not fetter or impede" the powers of the Parliament or of the Executive government.

The Union movement, based as it is on the principle of strength in unity, can think of no greater social justice ideal than supporting the cause of reconciliation, and helping those indigenous people in the wider Australian community who have suffered current and generational disadvantage resulting in The Gap in living standards and quality of life. A first world country such as Australia should not bear such outcomes when they are within the nation's power to address, ameliorate and hopefully overcome.

WHY THE UNION SUPPORTS THE VOICE

The people of Australia will soon be asked to vote on a referendum to determine whether to amend the Australian Constitution to provide for a body called The Voice.

The referendum question will be:

A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.

Do you approve this proposed alteration?

The proposed wording will insert a new s.129 as follows:

Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

1. *There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;*

2. *The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;*

3. *The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.*

These words, if passed, will create a body that is **constitutionally enshrined but legislatively controlled.** Its constitutional power will be limited to making representations to the legislative and executive branches of government.

The relevance of such a power within the present constitutional setting is discussed below.

CONSTITUTIONAL CHANGE

There have been 44 referendum questions put to the Australian people since Federation in 1901. Of those, only 8 have carried the day.

The difficulty in securing an amendment arises because section 128 of the Constitution requires a *"double majority"*; meaning that there must be a majority of citizens voting to approve the change overall, as well as a majority of voters in a majority of the six Australian States.

The task at hand was made far more difficult when the Federal Opposition announced, on 5 April 2023, that it will oppose The Voice. There has never been a successful referendum without bipartisan support.

The people of Australia will decide the outcome on 14 October 2023.

HOW DID WE GET HERE? FROM LITTLE THINGS, BIG THINGS GROW

The First Peoples of this nation were omitted from the processes involved in framing Australia's constitutional arrangements.

In 1891, during the Easter adjournment of the first Constitutional Convention held in Sydney, the leaders from the various colonies, including premiers of Queensland and South Australia, and the person who was to become the first Prime Minister of Australia, boarded the steam paddler *SS Lucinda* bound for a cruise of the Hawkesbury River. There, those aboard settled the first draft of what would become the Commonwealth Constitution.

No indigenous person was involved in that process. To the contrary, those aboard the *SS Lucinda* proposed wording that excluded *"aboriginal natives"* when determining the numbers of *"the People"* for important constitutional calculations including the formulation of electoral divisions. When it came to approving the final draft of the Constitution by way of referenda held between 1898 and 1900, indigenous peoples had no right to vote in the colonies of Queensland and Western Australia.

The historical fact acknowledged in *Mabo* is that indigenous people "were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement" in a process that "underwrote the development of the nation".

The preamble in the *Native Title Act* identifies that indigenous peoples "have been progressively dispossessed of their lands" and, as a consequence, "have become, as a group, the most disadvantaged in Australian society". The body politic of the Commonwealth of Australia is uniquely responsible for that consequence, and it is uniquely placed to redress it.

The long process of legislative and constitutional reform to recognise the rights of indigenous peoples commenced after the Constitution came into force.

In 1937, Yorta Yorta elder, William Cooper, wrote a letter to King George VI in which he prayed that *"Your Majesty will intervene on our behalf, and, through the instrument of Your Majesty's Governments in the Commonwealth of Australia - will prevent the extinction of the Aboriginal race and give better conditions for all, granting us the power to propose a member of Parliament"*. The petition was signed by 1,814 indigenous peoples from across Australia.

In 1963, the first Yirrkala bark petition was presented to the Australian Parliament by the Yolngu people of Arnhem Land. It identified the lack of any indigenous voice: *"the people of this area fear their needs and interests will be completely ignored as they have been ignored in the past."*

Government inquiries in the 1930s and 1940s found that pastoral companies were *"quite ruthless in denying their Aboriginal labour proper access to basic human rights"*. Despite this knowledge, the exploitation and human rights abuses remained. Indigenous peoples were paid a fraction of the wages of other workers. At Wave Hill cattle station near Daguragu in the Northern Territory, indigenous workers were paid by way of food rations. On 26 August 1966, Vincent Lingiari, a Gurindji man, led a walk-off at Wave Hill station that lasted for seven years. On 16 August 1975, Prime Minister Gough Whitlam poured a handful of Daguragu soil into Vincent Lingiari's hand, confirming to grant land rights to the Gurindji people including over parts of Wave Hill station.

Modern Prime Ministers from Gough Whitlam through to John Howard spoke of the need for indigenous peoples to take *"their rightful place in this nation"* and be recognised in the Constitution. But these promising intentions never came to pass. A referendum question in 1999 that proposed altering the preamble to the Constitution to include recognition of various Australian values and groups including indigenous peoples *"for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country"* was rejected by over 60% of Australian voters.

In 2011, an Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution was established under the then Labor Government and co-Chaired by Mr Patrick Dodson. The Expert Panel's 2012 report recommended constitutional recognition of indigenous peoples. The theme of providing indigenous peoples with a *"greater voice"* in Australian democracy was frequently cited during the consultation process.

In 2015, a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples issued a report which identified (based on a submission made by Mr Noel Pearson of the Cape York Institute) that constitutional recognition should include the need for indigenous voices to be heard because *"top down government measures do not work. Indigenous people live the Indigenous predicament. It is we who are best placed to provide the solutions to the problems that confront us"*.

In July 2015, 39 indigenous leaders met with the then Prime Minister and Opposition Leader in Kirribilli. The Kirribilli Statement presented at the meeting by the indigenous leaders identified two critical issues: the *"prevention of racially discriminatory laws and the proposed advisory body"*. The concern was that *"the Constitution as it stands enables current and future parliaments to enact discriminatory measures against Aboriginal and Torres Strait Islander peoples. Any reform option must address this concern"*.

In 2015, a 16-member Referendum Council was established under the Parliamentary Joint Select Committee with the aim of engaging in wide consultation with indigenous peoples on their views on identifying options for recognition. The Council established 12 First Nations Regional Dialogues and meetings which were held in every State and Territory between December 2016 and May 2017. The Dialogues engaged with over 1200 indigenous delegates – a greater proportion of the indigenous population than the proportion of the general population that Commonwealth Constitutional Conventions engaged with in the 1800s.

The Regional Dialogues culminated in a four-day First Nations National Constitutional Convention at Uluru in May 2017. The First Nations National Constitutional Convention was comprised of some 270 indigenous delegates elected by their communities. The Convention reached a consensus on the most meaningful and appropriate way to assist indigenous Australians in Closing the Gap.

The culmination of the First Nations National Constitutional Convention was the Uluru Statement from the Heart. The overwhelming majority of indigenous representatives present (250 delegates) rejected the idea of mere recognition in the Constitution, and instead sought a representative body that would have practical impact on indigenous peoples' place in Australian democracy – namely, a First Nations Voice enshrined in the Constitution. Seven delegates (from NSW and Victoria) dissented based on concerns about loss of sovereignty.

In 2017, the Final Report of the Referendum Council identified that, for the participants in the Regional Dialogues, the logic of a constitutionally enshrined Voice was that it provided *"reassurance and recognition that this new norm of participation and consultation would be different to the practices of the past"*, and recommended that one of the functions of the Voice would be 'monitoring' the Commonwealth's use of the existing Race Power and Territories Power in the Constitution (discussed below).

In 2018, the Final Report of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples identified that those who designed and led the Regional Dialogue process concluded that *"enshrining The Voice would usher in a new era of stability and continuity in Aboriginal and Torres Strait Islander affairs"* as it could directly address the fundamental imbalance between indigenous people and government. The Joint Select Committee recommended that there should be a *"co-design process"* that should *"consider national, regional and local elements of The Voice and how they interconnect"*.

In 2019, Ken Wyatt, the Minister for Indigenous Australians under the Coalition, announced the commencement of the Co-Design Process comprised of 52 members aimed at providing an Indigenous voice to government. Minister Wyatt established a Senior Advisory Group to oversee design options for a model that would ensure indigenous Australians were heard. The Senior Advisory Group was co-chaired by indigenous leaders, Professor Tom Calma AO and Professor Dr Marcia Langton AM. The Co-Design members led a public consultation and engagement process that involved 115 community consultation sessions and over 120 stakeholder meetings at 67 locations around Australia. Some 10,000 people provided feedback on the proposals in discussions both online and in-person.

In July 2020, a Coalition-led "National Agreement on Closing the Gap" recognised historical and existing indigenous inequality, established empirically and based on a large number of metrics such as incomes, life expectancy, health, birth weights and incarceration rates between Indigenous Australians and all others.

Importantly, the National Agreement identified the connection and rationality underpinning the Voice initiative, concluding that:

> *"When Aboriginal and Torres Strait Islander people have a genuine say n the design and delivery of policies, programs and services that affect them, better life outcomes are achieved".*

In July 2021, Minister Wyatt released the final report of the Co-Design Process. The recommendation from the report was to "progress an Indigenous Voice by implementing the Local & Regional Voices and National Voice proposals as set out in the Final Report". The report went into great detail as to how The Voice would be structured and function, including eligibility for membership and terms of appointment.

The report recognised that the *"National Voice would have to be grounded in community and place" and recommended "a two-way advice link between the National Voice and Local & Regional Voices".* Minister Wyatt presented the final report to Cabinet where it was approved by both Liberal and Nationals Ministers.

In July 2022, during the Garma Festival, the newly-elected Labor government released the proposed wording of the constitutional amendment for public discussion. That proposed wording was considered by a Referendum Working Group, comprised of 21 representatives from First Nations communities across Australia including the late Galarrwuy Yunupingu. The Referendum Working Group received legal support from a Constitutional Expert Group which comprises some of Australia's leading constitutional experts.

On 30 March 2023, after receiving the recommendations of the Referendum Working Group, the Government introduced the Constitution Alteration Bill into the Parliament, which formally proposed a referendum to approve a new s.129 to be inserted into the Commonwealth Constitution, creating the Voice.

Also on 30 March 2023, the House of Representatives and the Senate agreed to establish the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum. The Committee was appointed to inquire into and report on the provisions of the Bill introduced by the Government. Public hearings began on 14 April 2023. The Bill was passed by both Houses on 19 June 2023.

On 5 April 2023, the federal Liberal Party announced it would oppose The Voice. The reason given by the Opposition Leader at the time was that The Voice would be *"divisive"*. This was despite the many recommendations for a Voice stemming from a decade of Coalition-led processes as detailed above. Mr Wyatt would later resign from the Liberal Party in protest over its stance on the Voice, as would the Shadow Attorney-General, Julian Leeser.

CONSTITUTIONAL ARRANGEMENTS PERTAINING TO INDIGENOUS PEOPLES

The Australian Constitution is not colour blind. It contained race-based provisions from the outset, and some of those provisions remain and continue to be used with respect to indigenous Australians.

Section 25 – Recognition that the States had the power to ban "any race" from voting

The Commonwealth *Franchise Act 1902* prevented *"aboriginal natives of Australia"* from having their names placed on the federal electoral role - unless they were allowed to vote at State elections.

Section 25 of the Constitution, however, recognised that States could (and did) disenfranchise indigenous peoples. Laws preventing indigenous peoples from voting were enacted in Queensland (1885), Western Australia (1893) and the Northern Territory (1922). Section 25 provides:

25. Provision as to races disqualified from voting.

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

The participation of indigenous Australians in two World Wars occurred whilst their own country refused to include them as part of the franchise. To address this hypocrisy, the Chifley Government made a small compromise and gave indigenous people the right to vote at Commonwealth elections from 1949 - if they had been members of the defence forces.

Indigenous Australians had no general federal right to enrol to vote until 1962, however, enrolment was thereafter voluntary. Voting was not made compulsory (as it had been for other Australians) until 1984.

Section 51(xxvi) – The Race Power

Section 51 of the Constitution sets out the various subject matters that the federal Parliament can legislate upon. It includes a power to make laws with respect to Race.

51. Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxvi.) The people of any race for whom it is deemed necessary to make special laws:

Section 51(xxvi) is called the *"Race Power".*

The Australian people voted at a referendum in 1967 to extend the Race Power to *"the aboriginal race in any State"*.

Since 1967, the Commonwealth Parliament has enacted laws pursuant to the Race Power in respect of indigenous peoples. In 1996, the Howard Government used the Race Power to pass the *Hindmarsh Island Bridge Act,* which expressly removed the subject of the bridge's construction from the application of the Racial Discrimination Act. The Act was passed to the detriment of the local indigenous people who objected to the bridge.

The Race Power was also used to suspend the operation of the Racial Discrimination Act when the federal government enacted the Northern Territory National Emergency Response (also known as The Intervention) in the lead up to the 2007 election.

Section 127 (repealed in 1967)

When the Constitution came into force in 1901, section 127 was accompanied by a note, *"Aborigines not to be counted in reckoning population"*, and provided that:

> *127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.*

This provision meant that indigenous peoples would not be counted amongst the people of Australia. The consequence was that the numbers of indigenous peoples would not be used to inform the content of the franchise so as to avoid 'advantaging' those States with larger indigenous populations.

Section 127 was deleted by referendum in 1967.

Conclusion on race-based constitutional provisions

Constitutional law reveals the path of a nation's history. The glaring omission of indigenous voices from the founding of the nation has meant that the Australian Constitution has not only failed to recognise and protect the inherent rights of the First Peoples, but it has continued to prove completely ineffective in protecting indigenous peoples from discrimination at the hands of the majority.

The Voice is the means chosen by indigenous peoples themselves, after over a decade of consultation and inquiry, to address both the fundamental power imbalance in the Constitution, and The Gap that has persisted despite efforts to address it.

DISPOSING OF THE MAIN ARGUMENTS AGAINST THE VOICE

a) The Voice is "racist"

First, there is already a Race Power entrenched in s.51(xxvi) of the Constitution that extends to indigenous Australians. The Voice would, at the very least, mediate the exercise of that power.

The ability for indigenous peoples to have a say in laws directed at them is a very important practical benefit identified in the 2015 Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples and the National Agreement on Closing the Gap, and in the Kirribilli Statement.

Second, steps taken to address "The Gap" are consistent with accepted conceptions of political liberalism which include the making of laws for the purpose of overcoming disadvantage or ameliorating the effects of past discrimination.

The High Court in *Gerhardy v Brown* (1985) unanimously held that South Australian legislation whose purpose was to vest land rights in the traditional owners was valid as a special measure taken for the sole purpose of securing adequate advancement of certain racial groups. The law was therefore not inconsistent with the *Racial Discrimination Act 1975* (Cth).

The Court reached this conclusion despite the fact that the Land Rights Act was intended to set up a permanent and separate regime to preserve and protect the culture of indigenous peoples.

Trying to help people who experience such privations as lower *per capita* incomes, life expectancy, health, birth weights and incarceration rates is not racist.

Third, a society ceases to be a democracy in the true sense when a subset of its citizens, who suspect that their interests have been sacrificed to advance the better-off, are unable to properly engage and participate in the institutions of government. In order for citizens to have equal opportunities to influence politics, regardless of their wealth or status, a country's institutions should be framed towards achieving political legitimacy through fairness of opportunity. To do so, justice-as-fairness demands that the inequalities work to the benefit of the least advantaged.

A study done at Princeton in 2014 looked at US government policies over a 20-year period from 1981, and found that almost no policies were enacted to benefit 'the people'.

Rather, policies were directed to the special interests of large corporations, banks and the finance industry. The conclusion was that the US system of government bore far greater resemblance to an oligarchy (government controlled by the rich) than a democracy.

Much of that conclusion has to do with this fact: there are more full-time lobbyists working in Washington for tech companies such as Amazon than there are Senators. The message is this - voices to government can make a big difference.

The High Court has similarly recognised that the "great underlying principle" of the Constitution involves securing the rights of individuals by ensuring they each have an equal share in political power. In legal-speak, the equality of opportunity to participate in the exercise of political sovereignty via the implied right of political communication is an aspect of the representative democracy guaranteed by the Constitution.

To allow the great underlying principle to be realised, it is legitimate for levers of State to be adjusted to create a more level playing field so that no one voice is overwhelmed by another by factors such as wealth and circumstances. The Voice seeks to do exactly that.

b) There are "no details"

The details are in the proposed wording.

The design is simple – a constitutionally-enshrined Voice with the power to make representations on matters relating to indigenous peoples that is controlled by parliament.

A very detailed Voice design is proffered in the 2021 final report of the Co-Design Process. However, the proposed s.129(iii) will empower the Commonwealth parliament to control the manner in which the Voice will make representations to government, including its composition, functions, powers and procedures. The "details" of what the body would look like and how it would make representations are therefore questions that are within the control of all future parliaments, and can be changed from time-to-time by simple legislation.

The generality of the words in the proposed s.129 reflects the fact that the Constitution is intended to be an enduring instrument of government.

In 1946, for example, the people of Australia voted to approve a referendum which amended s.51 of the Constitution to give the federal government power to make laws with respect to social services including the provision of *"maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services, benefits to students and family allowances"*.

That amendment introduced a huge suite of welfare powers because, at the time, there was thought to be a need for the government to provide security for people after the end of WWII and beyond.

The power has since been used for many and varied laws, including the creation of Medibank nearly 30 years later. The Labor government in 1946 could not, however, have provided a list of all the possible things it would enact with this new power into the future. Moreover, nobody back then demanded to know such "details" before they voted the amendment up.

c) The Voice "will not help indigenous peoples"

The Gap between Indigenous Australians and all others is real and established empirically.

Making inroads to addressing The Gap will be greatly benefitted by – as the *National Agreement on Closing the Gap* identified – indigenous people having a genuine say in the design and delivery of policies, programs and services that affect them so that better life outcomes can be achieved.

The United Nations Declaration on the Rights of Indigenous Peoples recognises the relationship between democratic involvement and positive outcomes.

Article 18 of the Declaration provides that:

> *Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*

Article 19 states that:

> *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*

These provisions identify a need to establish indigenous decision-making institutions to have input into decisions that may affect them.

Having a Voice to mediate the exercise of the Race Power is therefore entirely consistent with Australia's obligations under international law.

The Government's Budget Review of 2019–20 identified that, in 2015–16, the federal Government directly spent $14.7 billion on indigenous people, of which 77% ($11.3 billion) was through mainstream programs that all Australians access such as Medicare, social security payments, child care benefits and the like. Only around 23% ($3.3 billion) was spent on Indigenous-specific programs such as ABSTUDY, Indigenous-specific health programs, or Indigenous rangers programs.

Similarly, the most recent Productivity Commission report on indigenous expenditure estimated that only 18.6% of the total expenditure spent on the indigenous population was provided through indigenous-specific or targeted services. The balance was made up of general expenditure such as Defence spending and Foreign Affairs that every Australian benefits from.

There is a need to ensure that such sums are properly targeted where needed. The decades-long process of engagement and research has concluded that monies will be more effectively spent when there is input from indigenous people at the coal face. This conclusion is entirely intuitive.

Some support for the utility of The Voice has emerged from its chief critic, the now Shadow Minister for Indigenous Australians. On Sunday, 16 April 2023, Senator Jacinta Nampijinpa Price appeared on the ABC's *Insiders* and stated that she advocated for the amplification of regional and remote indigenous voices. The Senator also stated that these various regional voices would need to be heard *"in Canberra"*. The Senator thought that such regional voices would make a positive difference to indigenous lives.

The Senator's proposal is redolent of the final report of the Co-Design Process which similarly advocated for Local and Regional Voices to advise a National Voice which would be grounded in community and place. The difference between Senator Price's position and the proposed Voice is one of degrees.

d) The Voice "will interfere with the Government"

The Voice *"may make representations to the Parliament and the Executive Government"*.

With those words, it is clear that the body is not itself part of *"Parliament or the Executive Government"*. It has no decision-making power as the Parliament has, and it has no power to enforce laws as the Executive government does. The Voice will have no power of veto.

During the public hearings into the Voice by the Joint Select Committee, five members of the government's Constitutional Expert Group which advised the Referendum Working Group on the proposed wording appeared at the Committee and overwhelmingly supported the proposed wording. One member, Professor Greg Craven, raised concerns that the Voice's

power to make representations to the Executive Government would leave open the prospect that the width and breadth of the federal government and its agencies would be obliged to consult with the Voice before making any decisions.

Bret Walker SC appeared before the Committee and dismissed such concerns as *"too silly for words"*. The former Chief Justice of the High Court, Robert French, similarly submitted to the Committee that *"there is little or no scope for constitutional litigation arising from the words of the proposed amendment".*

Mr Dutton and many No campaigners, however, picked up on the apparent issue over the Executive Government despite those concerns also being rejected by the Solicitor-General, the former Chief Justice of the High Court, Robert French, and Kenneth Hayne, who sat on the High Court for 18 years and is a member of the Constitutional Expert Group.

Mr Dutton's concerns must be put into context. In January 2023, Mr Dutton chose to publish a letter he wrote to the Prime Minister containing 15 questions, each calling for various "details" as to how The Voice would operate in practice. Not one question in Mr Dutton's letter related to or identified any issue about the power of the Voice to make representations to the Executive Government.

The concerns are, in any event, put to rest by the Explanatory Memorandum that accompanied the *Constitutional Alteration Bill* and the subsequent written advice provided by the Solicitor-General of the Commonwealth.

The Explanatory Memorandum sets out what the Government intends the proposed wording to mean. The Explanatory Memorandum makes clear that the phrase *"matters relating to Aboriginal and Torres Strait Islander peoples"* in clauses 2 and 3 of the proposed Constitutional amendment would include:

a. *"matters specific to Aboriginal and Torres Strait Islander peoples"*; and

b. *"matters relevant to the Australian community, including general laws or measures, but which affect Aboriginal and Torres Strait Islander peoples differently to other members of the Australian community"*.

The Explanatory Memorandum also makes clear that proposed wording:

i. *"confers no power on the Voice to prevent, delay or veto decisions of the Parliament or the Executive Government"*; and

ii. *"would not oblige the Parliament or the Executive Government to consult the Voice prior to enacting, amending or repealing any law, making a decision, or taking any other action"*.

The federal Attorney-General in his Second Reading Speech for the *Constitution Alteration Bill* similarly stated that it will be *"a matter for the Parliament to determine whether the Executive Government is under any obligation in relation to representations made by the Voice"*.

The Coalition-appointed Commonwealth Solicitor-General, Mr Stephen Donaghue KC, was asked to advise on the compatibility of proposed section 129 with Australia's system of government established under the Constitution, and on the legal effect of the Voice's representations on decisions made by Government. The advice was delivered on 19 April 2023.

The Solicitor-General identified that a core rationale underpinning The Voice is to:

> *"Facilitate more effective input by indigenous peoples in public discussion and debate about governmental and political matters relating to them", and that The Voice "seeks to rectify a distortion in the existing system" namely the "barriers that have historically impeded effective participation by Aboriginal and Torres Strait Islander peoples in political discussions and decisions that affect them"*.

The Solicitor-General advised that, for these reasons, the proposed s.129 is not just compatible with the system of government prescribed by the Constitution, but will be *"an enhancement of that system"*, and that the Voice *"will not fetter or impede"* the powers of the Parliament or of the Executive government.

e) The Voice will be an elite institution - "The Canberra Voice"

It is entirely within the power of the Commonwealth Parliament to ensure that representatives on The Voice will be elected by their local communities.

Despite this fact, the Leader of the Opposition, Mr Dutton, has referred to the proposal as "the Canberra Voice". Of all of the criticisms levelled at The Voice, this label from Mr Dutton is the most ironic.

Mr Dutton - from Canberra - is telling the hundreds of indigenous regional delegates who, in Uluru and on behalf of their communities, called for a Voice to be enshrined in the Constitution of what they actually want. The indigenous communities have spoken. They want the Voice. Mr Dutton seeks to deny them by fronting the No campaign.

That is the ultimate example of the Canberra elite refusing to hear the regional voices of indigenous peoples. It is yet more reason to ensure that The Voice is enshrined in the Constitution and not subject to rejection at the whim of politicians in the future.

THE MAIN ARGUMENTS IN FAVOUR OF THE VOICE

A key question is this: will the proposed constitutional amendment help to Close the Gap and improve the lives of indigenous peoples?

The various bipartisan committees, after over a decade of extensive consultation with indigenous people including Elders, Traditional Owners and Native Title holders, communities and organisations culminating in the Uluru Statement overwhelmingly say yes.

Yunupingu, who spent his life on the task of reconciliation and sat on the Referendum Working Group, said yes.

The very best constitutional lawyers in Australia - from two former Chief Justices (Murray Gleeson and Robert French), a very conservative High Court judge who spent 18 years on that Bench (Ken Hayne), to the person with biggest High Court practice in the history of this country (Bret Walker SC) - all support The Voice and dismiss the concerns of the No case.

Australia's Solicitor-General advised that the Voice would be an *"enhancement"* of Australia's system of government.

These conclusions, coupled with the ability to condition the exercise of the existing Race Power in the Constitution as demanded by international law, overwhelmingly militates in favour of positive change.

THE UNION'S POSITION

The Union movement has always been defined as one in which the members look out for the interests of others. We find strength in unity – but in order to achieve that unity, we are always mindful that some people will not be dealt the same cards as others in life.

For this reason, we as a union negotiate terms and conditions of employment that cater for those who might have difficulties and suffer set-backs in life. If we were defined, instead, by pure individualism and self-interest, we would fail as a movement.

The Voice is a change that has been requested by indigenous peoples as representing a path to reconciliation. We have indigenous Australians who we are proud to include within our membership.

The Union can think of no greater social justice ideal than supporting the cause of reconciliation, and helping those indigenous people in the wider Australian community who have suffered current and generational disadvantage resulting in The Gap in living standards and quality of life. A first world country such as Australia should not bear such outcomes when they are within the nation's power to address, ameliorate and hopefully overcome.

The Union strongly encourages all members to support and advocate for The Voice.

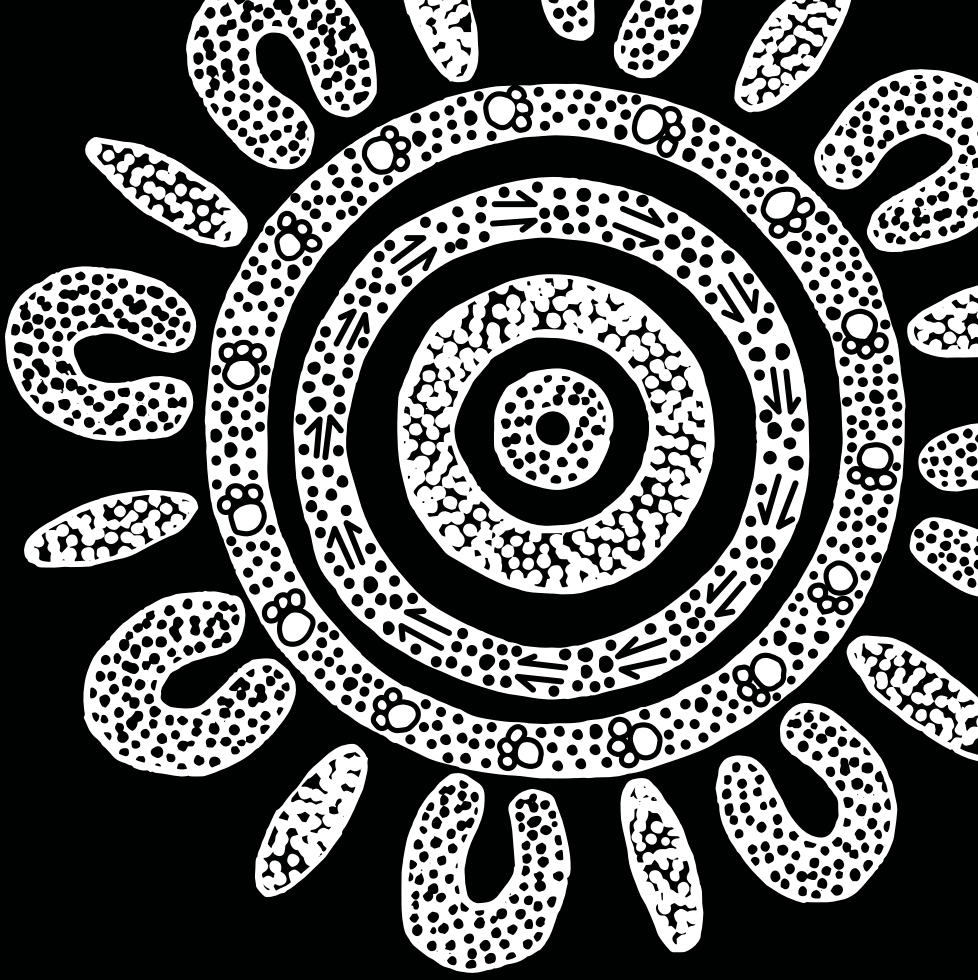
This booklet was written and prepared by Thomas Dixon.

Tom has degrees in Science, Economics and Law, together with a Masters degree from Columbia University, an Ivy League institution in New York City, specialising in constitutional law.

He achieved a higher distinction for his Masters dissertation in the field of constitutional law completed under the tutelage of Professor Lance Liebman, former director of the American Law Institute, and Professor Akhil Reed Amar of Yale University, one of the leading constitutional law scholars in the USA.

Tom was called to the Bar in NSW in 2003 and is also a member of the WA Bar Association.

CFMEU WA would like to thank Tom for his ongoing commitment to safety, fairness, and dignity for all Australians.



CFMEU
WESTERN AUSTRALIA

CFMEU Construction & General Western Australia
Trades Hall, 80 Beaufort St Perth 6000
08 9228 6900
info@cfmeuwa.com