Saturday Evening Dinner Address

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The Voice: Culture, Politics and Opportunity

Thank you, Dan, for your kind introduction.

In the balance between law and politics at this conference, my contribution this evening will be on the politics side. Former Chief Justice French has described the Voice as a 'High Return – Low Risk' amendment. When the politics of the Voice are taken into account, I believe the result is more likely to be the opposite: low return with high risk.

We have had some superlative contributions from the legal profession today, and the conclusion that I draw from these is that the consequences of embedding the Voice in the Constitution must be regarded as having a very high degree of legal uncertainty. A major source of this uncertainty has been the decision of the High Court in recent cases, two of which were analysed in detail by Allan Myers in his Sir Harry Gibbs Oration.

Allan Myers highlighted the High Court's willingness in the *Love Case*[1] to accept spiritual beliefs of Indigenous people generally, asserted without evidence, as a basis for limiting the Commonwealth's express immigration powers. He also drew attention to the Court's willingness in the *Palmer case*[2], which concerned the constitutional protection for travel between states, to effectively reverse the clearest possible statement in the Constitution itself that under S.92 intercourse between the states shall be absolutely free. The Court effectively decided during Covid that 'absolutely free' meant '*not* absolutely free,' significantly eroding further Australia's federal system of government. These decisions alone have created great uncertainty about how a proposed S129, and laws made under it, will be interpreted by the Court. Further, as Professor Nicholas Aroney has pointed out, there is also uncertainty about how the reference to 'peoples' in the first sentence of the proposed section will affect the interpretation of the section and subsequent laws, but in light of *Love* and *Palmer* the possibility is certainly present that it will be given a wide interpretation enabling the pursuit of more radical agendas.

Legal uncertainties are not, however, the only uncertainties that afflict the proposal for a constitutional Voice. The political, social and, indeed, economic implications of a constitutional Voice need much more thorough examination than has so far been given them. The long-term implications of such a Voice for Indigenous people and other citizens - and for Australia as a democracy - will be greatly affected by the politics generated by it, and the politics of the referendum campaign itself provide some insight into what these politics might look like. This evening, I will reflect on two questions: why is the case for the Voice so weak, so lacking in explicit argumentation or justification for the proposal, and what are the likely politics that will play out around a constitutional Voice?

Andrew Breitbart's often-quoted statement that politics is downstream of culture will be my guide. We are living in a time of great cultural change, and the politics of the referendum are already being affected by these changes. I suggest that, if it were not for the cultural revolution through which we are living, it is doubtful whether the proposal for a constitutional Voice would ever have come forward, let alone would ever have succeeded in generating the support it has. The proposal for a constitutional Voice is, after all, directly in conflict with the goal long supported by Indigenous leaders, at least from the 1938 Day of Mourning onwards, that Indigenous people should have equal citizenship with all other Australians. The Voice, of course, seeks not equal citizenship, but privileged rights of representation on the basis of race.

Culture Change

Politics is, as we are often reminded, a battle of ideas, and referendums tend to highlight this. If politics always centres on interests and power, newly influential ideas are affecting the definition of interests, and of new claims to power. This has become an age of identity politics, of new political language, of carefully policed narratives and censorious intolerance of different opinions, and of increasingly politicised decision-making. These ideas have encouraged, regrettably, a politics of virtue signalling on the one hand and moralistic personal abuse on the other, eroding the quality and civility of Australian political debate. Politicised inflation of the scope of terms like 'hate speech' and 'misinformation' have now made such manipulated language the shock troops of demands for censorship in a new war of words.

In the context of this conference, I will note that there are striking similarities between the politics of today and those with which Samuel Griffiths, twice Premier of Queensland, had to

deal both as a lawyer and as a politician. Griffith also lived in a time of great shifts in the political culture, and influential ideas that entered our political culture during his day are still with us, overlaid on ideas that came to Australia at the time of the Enlightenment.

The cultural change – some would call it a cultural revolution – that is occurring explains some of the most puzzling features of this referendum campaign and should be taken into account in forecasting the politics of a constitutional Voice. The way in which all parties define their interests and bid for increased influence has roots in the unusual cultural moment in which we find ourselves. Further, the impact of the Voice on the distribution of political power that the Voice, if implemented, will bring about, and its impact on Indigenous people and, indeed, all Australians will be shaped by the context of ideas that has emerged.

Firstly, as a general remark, given the history of referendums, it is puzzling that the Government has not made any serious attempt to secure bipartisan support from the Coalition. It clearly has not felt the need, and intense partisanship has led it to invite division rather than unity. Even if the government believed the Coalition would never agree, it has not been willing to make any concession to criticism from likely supporters such as the Uphold and Recognise alliance, concessions that arguably could have increased the final YES vote. The effort to achieve bipartisanship would certainly have strengthened the government's moral position. Almost the sole voices that have guided its actions appear to be Indigenous leaders who have taken advantage of the great goodwill that now surrounds Indigenous policy initiatives to seek maximum scope for the Voice, including the right to make representations to the Executive.

That the government has accepted the breadth of the scope for the Voice that these Indigenous leaders are advocating, and indeed, their claim for its entrenchment in the Constitution, says much about the stakes for which the Albanese government is actually playing. The strange use of the term 'generous' about the Voice proposal (accompanied as it is with a much longer 'explanatory memorandum' that omits any acknowledgement of what has been achieved so far) suggests the government's relief that these leaders have not asked for more. It is very hard to avoid the conclusion that the prime minister's highly partisan reading of the politics is that the government is still better off even if the referendum is defeated, and his belief (or hope) that the Coalition will be blamed, handing Labor a loyal, long-term voting alliance with Indigenous Australians, and Labor's more radical elements who have shown a propensity to support the Greens.

Secondly, however, and this is a pathway that will take us to Samuel Griffith and back, It is even more puzzling that the arguments offered by the government and almost all its supporters inside and outside the legal profession are so very thin, based on unexplored and unargued assumptions with just a few desultory attempts being made to show that the Voice will improve policy to overcome Indigenous disadvantage, let alone strengthen Australia's democratic political culture.

A weak YES Case

Let me illustrate. The collective nouns 'Aboriginal and Torres Strait Islander people' permeate the discussion to the point of implying the great importance of race and ancestry in an age when liberal principle points us to the need to make such distinctions less important, not more, and also implying a unity and distinctiveness that does not exist.

Former Chief Justice French and other Voice supporters have sought to mount an argument that the Voice proposal is based on Indigeneity, not race. The obvious weakness of this attempted distinction is that both Indigeneity and race (in common usage) both trace back to ancestry, and it is entirely legitimate to argue that a clause in the constitution that refers to Indigeneity is also a strengthening of race in the constitution, an aspect that is, of course, already there. Why the descendants of Indigenous people, even if they were the first peoples of the continent, have a collective claim today for a constitutional place above all other interests is not clear from any document or argument put forward that I have seen.

The YES case, as published, suppresses the actual history of Indigenous policy in several important ways. The government argues, for example, that the Voice will ensure consultation and, as a result, better policy, as if there have not already been enormous and continuing improvements in consultation in the last decade. Certainly, the potential for further improvement in no way depends on a constitutional amendment.

Again, the argument that recognition is not real without a constitutional Voice deliberately undervalues, and indeed never refers to, what has already been achieved in the way of recognition. Bipartisan agreement on some form of constitutional recognition at the level of symbolism remains an initiative that is very real in its potential further impact on public attitudes and national identity. Current policy frameworks are claimed to have failed, once again ignoring the enormous progress that has been achieved in the last half-century and continues today. This is not to say existing programs and wider opportunities cannot be

improved, and I believe there is much room for improvement, but to claim that existing approaches have failed and that constitutional change is necessary to promote further opportunities for a group of Australian citizens is an assertion without any supporting credibility or argumentation.

The government's case relies on evidence that progress so far made in relation to the selective targets of the 2020 National Agreement on Closing the Gap, is minimal two years later, but, of course, this ignores the extraordinary progress that has actually occurred over the last five decades.

The disappointing thinness of the case for, noted by some of its supporters such as Professor Greg Craven, is an invitation to look further into the politics behind the case. Why is the YES case so weak? Why does the government think it can get away with such a weak case? What is the justification for the failure to even attempt to *demonstrate* that the Voice will have positive consequences for the government of the country and for Indigenous people?

Identity politics, the corporate state, and humanitarianism

I suggest that there are three ideas that have pushed Australia towards this moment. One is a recurrent, but never successful idea, known in Griffith's time as the class war, today, in its second manifestation today, known as identity politics. The second is a deep-seated belief in the Labor party that politics (including economic policy) is best organised through negotiation between powerful interests, what we might call Labor's corporate state culture expressed in Griffith's day in the formation of a union-controlled party, and more recently in a love for summits and accords. Society runs better, in this view, when the powerful who claim to represent collective interests negotiate policy. The third is a deep-seated element of Australia's general culture that has been strong throughout our modern history and is probably stronger now than ever as an influence on thinking, *humanitarianism*: the desire to offer a helping hand to those in need. The first two of these ideas, identity politics and the corporate state, became embedded in aspects of our political culture in Griffith's time. The humanitarian strand in Australian culture stretches all the way back to the modern country's Enlightenment foundation.

Identity politics has its roots in socialist and Marxist radicalism, which divides society into two classes comprising oppressors and victims. The socialist radicalism which came to Australia in Griffith's time saw society in terms of conflicts between classes. The divisive

political class war that divided the community into capitalists and exploited workers inflicted serious damage on the Labor Party and Australian politics into the mid-twentieth century. It led in policy terms to the establishment of national compulsory arbitration in 1904, introduced ultimately by Liberals, that provided a legislated and legalised voice to a trade union movement provided it organised itself in a fully corporate manner, greatly increasing the power of union officials over their members, who were effectively conscripted in many cases into membership so the system could work.

Today's neo-Marxist radicalism seeks to represent society as a continuing conflict between races and between genders. Both then and now, the ideas powering this radicalism derived from a perspective that divides the world into oppressors and oppressed: capitalism versus the proletariat, white versus coloured races, the patriarchy versus women. Then and now, these radicalisms have elevated the group over the individual and have sought a world in which collective decision-making represented in government replaced individual decision-making represented by extensive personal freedom, free choice, and markets and prices, replacing these with the demand for a centrally imposed policy conformity.

The Voice is an expression of the identity politics narrative. It would be hard to explain why there is such ready acceptance by media, corporate, and university leaders of a constitutionally entrenched Indigenous Voice -available in the Government's view for the asking - were we not living in an age when the idea that Aboriginal people must be primarily regarded as an exploited oppressed race, and that a solution to this oppression requires a race-based and, we will discover, corporatist solution granting power to leading activists with whom the government can negotiate.

The radical elements of our tertiary educated ruling class, schooled in these neo-Marxist social theories, eagerly support such a solution. The appeal to a public which, generally speaking, does not accept such a narrative, necessarily appeals to the more general and deep-seated cultural value of humanitarian sentiment: the desire of most Australians to elevate and empower those in need to take charge of their lives. Inspired by the opportunity to support a good intention, Australia's corporate world – its universities, the national broadcaster, its unions and state Labor parties – have jumped on board in a frenzy of virtue signalling, but apparently without any capacity to articulate why such a Voice is the best policy other than that it has been asked for by Indigenous leaders.

Humanitarianism, and the goodwill that it evokes, is a powerful sentiment, yet without an accompanying and credible policy to effect change based on such a sentiment, it is only a good intention, and you know the cliché about the road to hell: that it is paved with good intentions. Since the government first proposed a constitutional voice, there have been continuing demands for more details about the shape of the Voice and its proposed powers, its composition, functions and procedures. But I suggest that the most important thing missing at the moment is any compelling argument for the Voice, or any demonstration that it will be effective in expanding opportunity for the most disadvantaged Indigenous people. It is as if constant reiteration of key words that demand applause in this age of identity politics is enough, with no explanation or argument required.

It is an appeal that must be called out as shallow and simplistic. The YES case, as it has emerged, is regrettably little more than an assertion of good intentions and unsubstantiated opinions about what the Voice might, but not necessarily will, achieve, bathed in a rhetoric that seeks to turn a demographic category of Australians with Indigenous heritage into a collective entity with unique disadvantage and overriding distinctive common interests – a rhetoric of soft racism.

The Government's rhetoric is that Indigenous Australians want the Voice, but the referendum is making clear that by no means all Indigenous Australians support a constitutional Voice. These differences of views are not surprising because Australia's open and flexible society has generated tremendous diversity among those with at least some Indigenous heritage. A student of politics will more easily see the Uluru statement itself as a treaty between activists, a bid for an influential and permanent place in Labor's corporate state, a compromise to hold together a coalition of supporters, including the more ambitious for increased political influence. The terms of this agreement are indicated in the brief form *Uluru Statement* and set out in detail in the more extensive commentary or explanatory memorandum that is attached to it.

A demographic category is not a sound basis for policy

If we look beyond the activists, the diversity of Indigenous Australia is astonishing. People with Indigenous heritage today are drawn from many ethnic, national and cultural backgrounds. The 2021 Census recorded that of 813 thousand people identified at that time as having Aboriginal and Torres Strait Islander ancestry, 516 thousand (63 per cent) also had other ancestries. These include some 200 thousand recording their English, Scots, Welsh and

Irish ancestry and another 277 thousand noting other undifferentiated 'Australian' ancestry. Whether that leaves some 300,000 with no ancestry other than Indigenous is unclear.

Again, it is important to note that 80 percent of people with Indigenous heritage live in major cities or regions, and a majority of people with Indigenous heritage are Christian. Treating such a diverse demographic as a single grouping is a poor foundation for policy success, and calls into question the policy value of the demographic comparisons used to measure the 'gap.' Only 1 in 5 with Indigenous heritage live in remote communities, where a range of specific circumstances have combined in a number of cases to foster community dysfunction and individual abuse and despair. This is principally where policy to overcome disadvantage needs to be targeted.

The Voice, I regret to say, is a tragic overreach that will set back but not end the long and, to this point, successful road to meaningful recognition. It is based on a distorted version of who Australians with an Indigenous heritage actually are in modern Australia, and it is not at all surprising that those with such heritage are divided in their attitudes to the proposal. The way forward for Australia is to continue to spread the benefits of education and economic opportunity. Nor should we imagine that a national voice of some 25 people drawn from the activist class will be able to maintain its legitimacy in communities whose distinctiveness is based on some 200 languages and a great diversity of circumstances and issues.

Substantial recognition has already occurred

The government's tactic in asserting that the Voice is the only acceptable form of recognition will inevitably bring back into debate the meaning of recognition itself. The ideas spelled out in the longer version of the *Uluru Statement* (what we might call its explanatory memorandum) and the claims of radicals such as Senator Thorpe and Thomas Mayo for sovereignty and possibly reparations will further throw the meaning of recognition into doubt. Will there ever be recognition until the most radical version is satisfied?

Recognition has been a goal for many decades, but finding a point at which we can say that all reasonable recognition has been given is important if the divisive issues uncovered by the referendum are not to be a permanent bar to national harmony. When will recognition be complete? To date, most Australians have not felt it necessary to enquire too deeply into the meaning of recognition. It has certainly meant the recognition of equal citizenship for all people with an Indigenous heritage.

In the last half-century, recognition has proceeded apace. Let me mention a few of the key steps.

In 1962, all people of Aboriginal heritage, men and women, were confirmed in their voting rights in federal elections, and the states were to follow. The *Racial Discrimination Act 1975*, for the first time, made unlawful discrimination in employment, accommodation, provision of goods and services, membership, and housing. In 1993 occurred one of the greatest acts of recognition that truly transformed Australia when the *Native Title Act* was negotiated with Indigenous leaders. This piece of legislation, dealing with the most fundamental aspect of Indigenous identity - connection to country – addressed in a profound way the dispossession that had occurred. The Native Title Act, for all its complexities and issues, must be regarded as an historic recognition and attempt as far as possible to overturn the dispossession that occurred. It was based on a negotiated agreement in relation to the central pillar of traditional culture. Not at all dissimilar to what is still being sought by some.

Within this policy framework, government policy and the economic and social progress of a liberal economy and society have expanded opportunity in remarkable ways. Today, there are now between 12,00 and 16,000 Indigenous-owned businesses with a similar distribution across industry types as non-indigenous businesses. There are over 25,000 Aboriginal and Torres Strait Islanders in professional occupations, including over 600 solicitors and a similar number of health practitioners. In 2018, there were 18,062 Indigenous higher education students. Around 89 per cent of Indigenous Year 3 students in major cities met or were above national minimum standards in reading and numeracy in 2018. Certainly, there is a need for more - and more rapid - progress, but It is time to cease talking as if there has been no progress or recognition, to continue painting an overwhelmingly dark picture of our history and to test the claims for a constitutional Voice more critically, lest we be carried away by the emotional force of good intentions alone.

Could a constitutional Voice actually do harm? In its centralised corporate rearrangement of influence and power within Indigenous communities, there is, to date, no guarantee that remote Indigenous communities and areas of greatest need will find a representative voice in what will inevitably be an elite institution. Instead, a new power structure will be imposed on Indigenous Australians, which holds out a threat of reducing the incentive of government to listen widely to Indigenous voices and fostering organisations dominated by a few. The

Voice has a real danger of becoming just the key box to be ticked to support the claim that consultation has occurred.

The former chairman of the Productivity Commission, Michael Brennan, wrote recently (AFR 31/7/23) that for Indigenous people government has often been the problem: 'There is the troubled history of past government policies, and more recently, the dysfunction of "services' imposed on communities without co-ordination or real evaluation". Brennan saw the terms of the 2020 National Agreement on Closing the Gap as radically different from past approaches, requiring governments to "refocus their own agencies, and relinquish tight control over service design and delivery, not to mention data".

The Productivity Commission's recent review concluded, however, that there was little evidence that government was yet delivering. Although Brennan conceded that real reform takes time, "we should by now have seen some clear steps in the right direction". Unfortunately, the Commission found that engagement in consultation structures can often feel tokenistic, ticking the box, while under existing funding models it is government that still specifies outputs and imposes onerous reporting requirements. While there is much busy-ness, with 2000 initiatives identified, these, he concludes, are in large part "a hotted-up version of business as usual." He said: "The steps taken to date, even if replicated and multiplied, are unlikely to produce meaningful change. Moreover, it was not what was promised". The unanswered question he left hanging was, can government change its ways?

I think there is good reason to believe that the answer to Brennan's question is No. Government must be accountable. For that it needs rigorous financial accountability. The fundamental problem with government-centred solutions is that, in the absence of flexibility, there can be no or little innovation outside approved programs. Government is a system that relies on authority, and authority demands conformity, yet in a circumstance where there is a great diversity of issues, the obvious approach to solving problems is a state that limits its demands to matters where conformity is required but allows differences flexibly to be addressed in the society beyond government where there is a culture of respect and success and freedom and opportunity exists.

My conclusion is that the future of Australians with Indigenous heritage has been caught up in a frenzy of national virtue signalling and soft racism and is now threatened with a centralisation and narrowing of advisory channels. Despite the good intentions of many of the supporters of the Voice, the claim for special rights of consultation and advice for Indigenous

people, as a separate category of citizens, will tend to force many issues into a racial framework that will corrupt our political culture and divert our attention from what really matters. All Australians are presently entitled to be consulted and listened to within our existing democratic framework, and a new elite body will more likely narrow than expand the range of ideas aimed at equal opportunities for all Australians, and the overcoming of need.

[1] *Love v Commonwealth; Thoms v Commonwealth*, [2020] HCA 3
[2] *Palmer v Western Australia, [2020] HCA 5*