

What is the Status of The Aboriginal and Torres Strait Islander Voice Process? *The Decision End Point or a Decision-Making Aid: A Conflict Management Perspective*

Dr Ted Christie, 14 July 2023



Disclosure Statement

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The Federal Government intends to hold a referendum sometime between September and December 2023.

The [draft 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?*”

However, divergent public opinion and controversy has arisen in Australia over one of the proposed amendments to the Constitution.

Specifically, that an advisory body known as the Aboriginal and Torres Strait Islander Voice (“the Voice”) may make representations to Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander peoples.

But the information about the “*the Voice process*” to enable everyone to vote according to their own opinion on the referendum has been an issue.

In this regard, it would be prudent for Government to give effect to one of the most important principles for effective public participation: “*Communities and other interested parties should be given adequate, readily intelligible information on which to make decisions*”.

A **conflict management** framework provides the basis for achieving this goal: Relevant information provided in the public domain should focus on the “**interests**” (or **needs and concerns**) the public have in relation to the referendum question - rather than the voting “**position**” they may hold.

One such **need** is to ensure **public awareness of the linkage** between the Voice and the *United Nations Declaration on the Rights of Indigenous Peoples*. The Declaration promotes, amongst other things: -

“The full and effective participation by Indigenous peoples in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development”.

The **Essential Report (13 June 2023)** and its polling outcomes on the referendum question provides remarkable insight into understanding the **concerns** of the Australian public. In response to the following question: “*Reasons against the Voice to Parliament*”, the polling results were: -

- ❖ It will divide Australians (**34%**)
- ❖ It will give Indigenous Australians rights and privileges that other Australians don't have (**33%**)
- ❖ It won't make a real difference to the lives of ordinary Indigenous Australians (**26%**)
- ❖ Indigenous Australians don't agree on it (**7%**).

An Outline of “the Voice Process”

A key address by **Prime Minister Anthony Albanese** on 29 May 2023, provides a constructive understanding of the mechanism of “*the Voice process*” and some of its features: -

- *It will be “a body that will be representative of Aboriginal and Torres Strait Islander communities and chosen by Aboriginal and Torres Strait Islander people”*
- *The Voice process “will be about consultation, an ongoing conversation. It will be about listening”.*

- *It is "Indigenous Australians who will provide advice – and that's what it will be advice – on matters that affect them".*
- *"And because of [the advice], governments will be more strongly equipped to make better decisions – co-ordinated, streamlined decisions – leading to better outcomes".*
- The Voice *"won't have a power of veto¹".*

*These features of the Voice process
resonate with public participation processes
which already exist to resolve public interest conflicts in Australia:
Community consultation and Commissions of Inquiry ("Public Inquiry").
Processes which are equally available to all Australians,
regardless of ethnicity or race.*

Features of Existing Public Participation Processes in Australia

Community consultation

A two-way process of information exchange between Government and the community. Community views and public comment *e.g., by written submissions*, are sought during the consultation period.

However, the advice received during community consultation may not always be taken into account to any particular degree, in decision-making by Government.

Therein lies a source of a potential problem with community consultation: Where the final decision made by Government does not give effect to some of the outcomes of consultation?

*A statutory obligation to consult is an obligation to consult,
not an obligation to agree –
unless such power is provided for in the statute.
Such a **legal obligation** is generally not provided for
in Australian legislation.*

Commissions of Inquiry

Where the public interest conflict is complex and controversial, a Commission of Inquiry becomes the pathway for Government decision-making.

The essential features of a Commission of Inquiry include: -

- ❖ Terms of reference for the scope of the Inquiry are set by Government.
- ❖ Statutory procedures are prescribed for public notice and comment *e.g., written submissions by the public; public hearings where oral evidence could be examined.*
- ❖ The Commission reports to Government its findings of fact, and the recommendations which follow.

*A Commission of Inquiry
acts as a fact-finding agent for the Government,
rather than as a court of law.
The Commission's recommendations are not binding on Government.
Instead, the norm for Government
is to selectively choose what recommendations to implement².*

COMMENT:

- ***It should be clear that the community consultation process and Commissions of Inquiry are a decision-making aid for Government for resolving public interest conflicts - and not the decision end-point.***
- ***Also, both processes do not have a power of Veto***
- ***The fact that the final decision made by Government following the community consultation process and a Commissions of Inquiry is a political one, highlights the need for reasonableness in the outcomes sought through any public participation process in Australia. That is, an awareness of the reality of limits to political action.***

Conclusions

1. *The concern held by 26% of Australians that the Voice "won't make a real difference to the lives of ordinary Indigenous Australians" would be offset if "the Voice process", in practice, resonated with the United Nations Declaration on the Rights of Indigenous Peoples.*

2. *The concern held by 33% of Australians that the Voice "will give Indigenous Australians rights and privileges that other Australians don't have" would be offset if "the Voice process" was consistent with the decision-making framework that applies in existing public participation processes in Australia: Processes that are equally available to all Australians regardless of ethnicity or race.*
3. *This would require the Voice process to be acknowledged as a decision-making aid and not the decision-end point; an obligation that seems appropriate given the mechanism of the Voice Process appears to mimic the existing community consultation process in Australia.*
4. *The Prime Minister has already acknowledged the Voice does not have a veto power.*
5. *Where Government relies on consultation with the Voice as the cornerstone for collaborative decision-making, it is not abandoning its power to make the final administrative decision.*

*Rather, that **Government is willing to share power** to find a solution that is responsive to the needs of Indigenous Australians in a process that is transparent, that leads to a commitment that is firm, that can be implemented and is sustainable - as well as a sense of ownership in the outcome.*

Ultimately, Government is accountable for the final administrative decision being consistent with legislative obligations.

End Notes

¹ *The plain meaning of **veto power** is "an official power or right to refuse to accept or allow something".*

² *Rarely does Government adopt all recommendations made by a Commission of Inquiry e.g., former Queensland Premier Mike Ahern's commitment to implement all of the Fitzgerald Corruption Inquiry recommendations, "**lock, stock and barrel**".*