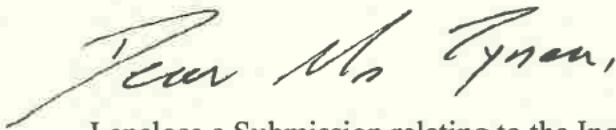


DF Jackson KC

11 April 2023

Committee Secretary
Joint Select Committee on the Aboriginal and Torres
Strait Islander Voice Referendum
PO Box 6201
CANBERRA ACT 2600

Email: jscvr@aph.gov.au



I enclose a Submission relating to the Inquiry being conducted by the Joint Select Committee. I have no objection to it being made public.

I am happy to appear before the Joint Select Committee if so requested.

My experience in relation to constitutional matters can be seen from the attached CV.
My 1963 BA from the University of Queensland was one majoring in Political Science.



D.F. Jackson

New Chambers
Level 34/126 Phillip Street, Sydney NSW 2000
Tel: (02) 9151 2009 Fax: (02) 9233 1850
Email: jacksonkc@newchambers.com.au



DAVID JACKSON AM KC

Bachelor of Arts - University of Queensland (1963)

Bachelor of Laws - University of Queensland (1964)

T +61 2 9151 2009

F +61 2 9233 1850

E jacksonkc@newchambers.com.au

Admitted to the legal profession

1964

Appointed Queens Counsel

1976

Also entitled to practise in

Australian jurisdictions (Commonwealth, State and Territory), New Zealand, Fiji, Vanuatu, Solomon Islands and Tonga.

David Jackson has appeared in hundreds of matters in the High Court of Australia, in both its original and appellate jurisdiction, and in numerous matters in federal, state and territory intermediate appellate courts in Australia. He has appeared in the appeal courts of Vanuatu, Fiji, Solomon Islands, Tonga and New Zealand. Prior to the abolition of Australian appeals to the Privy Council in 1986, he appeared in such appeals on four occasions (one as a junior, three as a silk).

He has acted as an arbitrator, expert determiner or mediator in Australia and overseas in relation to a wide range of disputes.

PROFESSIONAL EXPERIENCE

1963 – 1964 Associate to Sir Harry Gibbs, then a member of the Supreme Court of Queensland, later Chief Justice of Australia

16 December 1964 Called to Bar in Queensland

1965–November 1985 Practised from Brisbane as a member of the Queensland Bar

15 January 1976 Appointed Queen's Counsel

15 November 1985 Appointed Judge of Federal Court of Australia, based in Sydney

27 May 1987 Resigned Federal Court. Returned to practice at the Bar, based in Sydney

AWARDS OR PROFESSIONAL RECOGNITION

1962: Ross Anderson Memorial Prize (University of Queensland)

1964: Henderson Prize (University of Queensland)

1964: Wilkinson Prize (University of Queensland)

1964: Virgil Power Prize (University of Queensland)

1985 – 1987: Judge, Federal Court of Australia

2003: Fellow, Chartered Institute of Arbitrators

2011: Fellow, Australian Centre for International and Commercial Arbitration

2013: Fellow, Australian Academy of Law

2007: Member of the Order of Australia

2010: Sir Harry Gibbs Oration

2006: Sir Maurice Byers Lecturer

Member of Hong Kong International Arbitration Centre Panel of Arbitrators

Member of Kuala Lumpur Regional Centre for Arbitration Panel of Arbitrators

Arbitrator Member, Singapore Charter of Marine Arbitration

2014 – 2021: Best Lawyers. Listed for Bet the Company Litigation, Constitutional Law, Alternative Dispute Resolution and Litigation.

2014 – 2023: Chambers Global and Chambers Asia-Pacific. Dispute Resolution Australia- Star individual

2020: DoYLES Guide leading Commercial Litigation and Dispute Resolution Senior Counsel

Since 2012, the University of Queensland's Prize for Outstanding Advocacy in mooted competitions has been named as the David F Jackson Prize

PROFESSIONAL MEMBERSHIPS

1969 – 70, 1972 – 1974, 1976 – 1978, 1979 – 1980, 1981 – 1983: Member of Committee of Bar Association of Queensland

1982 – 1983: Vice-President, Bar Association of Queensland

1975 – 1985: Member, Barristers Board of Queensland

1984 – 1985: Chairman, Constitutional Law Committee of Law Council of Australia

1984, 1985: Law Council of Australia Observer at Australian Constitutional Conventions –

1994 – 1995: Chairman of New South Wales Bar Association's Standards and Specialisation Committee

1996 to 2001: Convenor of New South Wales Bar Association's Constitutional Law Section
Foundation lecturer at Bar Practice Centre in Brisbane ("Leading Evidence")

1995 – 1998: Member (part-time) Judicial Commission of New South Wales

1999 – 2003: Committee Member, Australian Association of Constitutional Law

2002 – 2014: Head of Chambers, Seven Wentworth

2014 – 2016: Head of Chambers, New Chambers

PUBLICATIONS

"Mining Act 1968-1971". A paper delivered to the 1971 Joint Symposium of Queensland Law Society Incorporated and Bar Association of Queensland, published at 2 Q.L.S.J.149

"Commonwealth and State Powers in Relation to Offshore Mineral Resources". A paper presented to the Southern Central Queensland Conference of The Australian Institute of Mining and Metallurgy (July 1974)

"Federalism in the Future: The Impact of Recent Developments". A paper delivered as Leader of the Law Society of Western Australia's 24th Law Summer School (February 1984) published at (1984) 58 Australian Law Journal 438

"Constitutional Commission". Report of the Advisory Committee on the Australian Judicial System *with R.E. McGarvie, G.A. Kennedy, W.M.C. Gummow and R.C. Jennings* (1987)

"Selection of Judges: Who, When and By Whom". A paper presented at the 1989 Australian Legal Convention

"Such is Life - The Media's Importance to Australian Culture". A paper presented to a joint seminar of lawyers and journalists at Brisbane in 1991

"Appellate Advocacy". A paper delivered on 29 April 1991 as part of the NSW Bar Association's Continuing Legal Education Programme, and published in 8 Aust. Bar Rev. 235

"The Australian Judicial System: 1992 and onwards". A paper delivered to the joint Australian Institute of Judicial Administration and Law Council of Australia Conference in Melbourne (1992), published in Zariski (ed) - *Evidence and Procedure in a Federation* (1993)

"The Lawmaking Role of the High Court". A paper delivered on 10 May 1993 as part of the NSW Bar Association's Continuing Legal Education Programme and published in 11 Aust. Bar Rev.197

"Special Leave Applications and Appeals to the High Court". A paper delivered to the College of Law, Sydney, 23 October 1993 and published as part of *"Courts of Appeal"*, CLE Paper No. 93/72

"The Superannuation Industry (Supervision) Act 1993 - Constitutional Validity". A paper delivered to the Superannuation Conference February 1994 and published by the Leo Cussen Institute

"The Constitution - The Unwritten Part". A paper delivered at the Australian Bar Association's Biennial Conference, Noosa on 4 July 1994

"The Role of the High Court in Guaranteeing a Fair Trial". A paper delivered to the Public Defender's Weekend Conference 26 November 1994

"If Privy Council Appeals are Abolished, What Appellate Structure Should New Zealand Have". A paper delivered at the New Zealand Bar Association Conference, Queenstown on 22 July 1995

"The Role of the Chief Justice". A paper delivered at *"The Mason Court and Beyond"*. Conference conducted by the University of Melbourne Law School, Centre for Comparative Constitutional Studies on 9 September 1995 and published in Saunders (ed) - *Courts of Final Jurisdiction* (1996)

"The Implications of the Constitution". A paper delivered at the Law Council of Australia 29th Australian Legal Convention on 27 September 1995

"Is it Necessary to have Three Tiers of Government?" A paper presented to a "People's Constitutional Convention" at Sydney during Law Week 1996

Report of the "Southern Cross Syndicate" Inquiry, December 1996

Practice in the High Court". A paper delivered on 25 March 1997 to the Constitutional Law Section of the New South Wales Bar Association, published in 15 Aust. Bar Rev. 187

"Stamp Duties - An Unconstitutional Excise?" The implications of Ha v. New South Wales and Walter Hammond & Associates Pty Ltd v. New South Wales. A paper delivered at the IBC Stamp Duties Symposium held at the Gold Coast on 7 November 1997

"Compulsory Acquisition" With Stephen Lloyd. A paper delivered on 23 July 1998 at the Annual Convention of the Australian Mining and Petroleum Law Association, Adelaide

"Federation In Australia - The First 98 Years". A paper delivered on 7 April 1999 at the New Zealand Law Conference 1999 in Rotorua

"Devolution - a view of the Scotland Act from an Australian lawyer's perspective". A talk given to the Anglo-Australasian Lawyers Society in London on 27 May 1999

"Griffith and the Australian Constitution". A paper delivered on 31 March 2001 to the Supreme Court History Society Conference in commemoration of the Centenary of Federation, and published in White and Rahemtula (eds.): *Sir Samuel Griffith – The Law and the Constitution* (2002)

"The Australian Judicial System: Judicial Power of the Commonwealth" (2001) 24(3) UNSWLJ 737, part of a Thematic Issue of the University of New South Wales Law Journal in commemoration of the centenary of the Federation in Australia.

"Globalisation of rights and the Constitution". A paper presented at the Australian Association of Constitutional Law's Convention in June 2001 at Perth, Western Australia.

"Brennan Court", "Leave to Appeal", "Gibbs, Harry Talbot" (jointly), articles contributed to the *Oxford Companion to the High Court of Australia* (2002).

"Relator Proceedings". A paper presented to the Australian Association of Constitutional Law, 22 August 2002.

"Sir Harry Gibbs". A Commentary delivered at the Supreme Court of Queensland Library's Conference on 29 March 2003, published in White and Rahemtula, *Queensland Judges on the High Court*, p.75.

Launch of Dr Andrew Bell's **"Forum Shopping and Venue in Transnational Litigation"** 12 June 2004.

"Appeals". A paper presented at the Queensland Law Society's "Symposium-04", 6 March 2004.

"The Development of Judicial Review in Australia over the Last Ten Years – The Growth of the Constitutional Writs". A paper presented at the Federal Court of Australia/Law Council of Australia Joint Seminar on Administrative Law, 3 April 2004.

"Comparative thoughts on Supreme Courts in Commonwealth Countries". A paper delivered to the United Kingdom branch of the Anglo-Australasian Lawyers Society, London, 21 July 2004.

Report of Special Commission of Inquiry into Medical Research and Compensation Foundation 21 September 2004

"Appellate Advocacy". A paper presented to the Bar Association of Queensland Conference 5 March 2005.

"Money, the Constitution and Me". A paper presented to the Challis Taxation Discussion Group, Sydney 5 August 2005.

"Sir Harry Gibbs and the Constitution", Inaugural Sir Harry Gibbs Oration sponsored by the Bar Association of Queensland, Brisbane 4 November 2005.

"Obituary – Sir Harry Gibbs" (2005) 79 Australian Law Journal 651.

"Current issues in civil and criminal litigation arising from the regulation of commerce and public authorities in Australia: the interplay between civil penalties and criminal penalties in Australian regulation". A paper presented to the Law Summer School, Law Society of Western Australia, 26 February 2006.

"The Implications of the Constitution", 2006 Sir Maurice Byers Lecture, sponsored by the New South Wales Bar Association, 20 March 2006.

"Appeals to the High Court of Australia". A paper delivered at Ebsworth and Ebsworth, solicitors, Sydney, 11 September 2007.

"Analysing a judgment". A paper delivered to the Bar Practice Course, Sydney, 10 October 2007.

Speech to Anglo-Australasian Lawyers Society Annual Dinner, Sydney, 7 March 2008.

"Advocacy – the art of persuasion". A paper delivered to the Young Lawyers, Sydney, 16 July 2008.

"Corporate responsibility: the fall-out of the James Hardie Inquiry on Australian Corporate Law". A paper delivered to the National Workplace Safety Summit 2008, Melbourne, 31 July 2008.

"Adversarial And Inquisitorial Systems". A paper delivered to the Medico-Legal Society of New South Wales, Sydney, 4 March 2009.

"The Supreme Court of the United Kingdom – An Australian Perspective". A paper delivered to the United Kingdom branch of the Anglo-Australasian Lawyers Society, London, 23 July 2009.

"Human Rights Legislation - Should the Commonwealth enact human rights legislation for Australia? What rights should be covered by any such legislation? How should such rights be enforced?". A paper delivered at the Queen's Club, Sydney 12 March 2010.

"Liability of Company Directors in 2010", with Jack Hynes. A paper delivered to the North Queensland Law Association, Cairns, 29 May 2010.

"Sir Harry Gibbs Oration 2010", Emanuel College, Brisbane, 13 August 2010

Judge in New South Wales Bar Association/New York Bar Association Moot 29 October 2010.

"The Constitution in 2011". A paper delivered to the Salvation Army Legal Service Conference on 22 October 2011.

"Trusts and the Commonwealth Constitution". A paper delivered to the Society of Trust and Equity Practitioners at the Supreme Court of New South Wales on 28 November 2012.

Role of Counsel in Commissions and Inquiries". A commentary on a paper by Peter Dunning QC at the Supreme Court of Queensland on 22 May 2013.

Statutory Interpretation in the First Quarter of the 21st Century", with Caspar Conde. A paper delivered to the Family Court of Australia Judges Conference, Melbourne on 7 November 2013.

Tax Dispute Resolution Process and Litigation in Courts". A paper delivered to the Heads of Tax Roundtable, Sydney 31 May 2014.

Professional Responsibilities of In-House Counsel". A paper delivered in Brisbane on 26 February 2015.

What should we do with the States?". A paper delivered on 21 May 2015 as part of the Current Legal Issues 2015 Seminar Series arranged by the Bar Association of Queensland, the University of Queensland, the Queensland University of Technology and the Supreme Court of Queensland Library.

Appellate Advocacy". A paper delivered to the New South Wales Bar Association on 25 May 2015.

Chapter III Courts". A paper delivered to the Supreme and Federal Courts' judges conference, Brisbane on 26 January 2016.

Sir Harry Gibbs". A paper presented to the Selden Society, Brisbane on 17 March 2016.

Advocacy in International Arbitrations". A paper delivered on 24 May 2016 to the Chartered Institute of Arbitrators, Australia.

Advocacy in Arbitration". An address delivered on 13 August 2016 to the New South Wales Bar Association's 2016 ADR Master Class.

A Note concerning Advocacy in International Arbitrations". An address given at New Chambers to attendees of the IBA Arbitration Course on 10 October 2017.

Written Submissions for Appeals: Winning it on the Papers". Advanced Advocacy Seminar, Sydney, 2 March 2018.

A Note concerning Advocacy in International Arbitrations" (Reprise and update, including discussion of submissions to Gyles Inquiry). New Chambers CLE June 2019.

Written Submissions for Appeals: Winning it on the Papers" (Reprise and update). Legalwise Evidence and Advocacy Masterclass, Sydney. 28 February 2020.

Advocacy in appeals when appearing for the individual" Australian Lawyers Alliance New South Wales, 10 March 2023

SELECTED CASES

Inquiries

David Jackson has conducted a number of inquiries for the national and state governments

In 1986 – 1987 he was Chairman of the Commonwealth Government's Constitutional Commission's Advisory Committee on the Australian Judicial System

In 1996 he conducted the "Southern Cross Syndicate" Inquiry for the Australian Government

In 2004 he was appointed by the New South Wales government as a Special Commission of Inquiry into the Medical Research and Compensation Foundation established by the James Hardie Group

In 2011 he was appointed by the New South Wales government as Chairman of the Recall Elections Panel of Experts

Dispute Resolution

David Jackson has acted as an arbitrator or expert determiner or mediator in domestic and international arbitrations in relation to a wide range of disputes, including:

- resolving major contractual disputes;
- fixing the rent for leasing government owned waterfronts;
- determining the wholesale price for supply of gas from producers to energy companies and to industrial users;
- determining the amounts payable by one Australian government for the use by its residents of the hospital services of another Australian government under an intergovernmental agreement;
- resolving disputes as to the amounts payable for supply of energy;
- resolving major disputes between contractor and principal in relation to the installation of a new telecommunications network;
- resolving disputes concerning the supply of coal from Australia to other countries;
- resolving insurance disputes, including disputes about reinsurance;
- determining the final amount payable under a major development agreement between land owner and developer.

High Court

David Jackson has appeared in hundreds of matters in the High Court of Australia and in numerous matters in the federal and state intermediate appeal courts. Prior to the abolition of Australian appeals to the Privy Council in 1986, he appeared in such appeals on four occasions (one as a junior, three as a silk).

Some recent matters in the High Court of Australia are:

[ADCO Constructions Pty Ltd v. Goudappel](#) (2014) 254 CLR 1

[Apotex Pty Ltd v. Sanofi-Aventis Australia Pty Ltd](#) (2014) 253 CLR 284

[Clark v. Macourt](#) (2014) 253 CLR 1

[Williams v. The Commonwealth \(No 2\)](#) (2014) 252 CLR 416

[Electricity Generation Corporation v. Woodside Energy Ltd](#) (2014) 251 CLR 640

[Versi v. The Queen](#) [2014] HCA Trans 163

[Brookfield Multiplex Ltd v. Owners Corporation Strata Plan 61288](#) (2014) 254 CLR 185

[Queensland Nickel Pty Ltd v. The Commonwealth](#) (2015) 255 CLR 252

[Fortress Credit Corporation \(Australia\) II Pty Ltd v. Fletcher](#) (2015) 254 CLR 489

[Cassegain v. Gerard Cassegain & Co Pty Ltd](#) (2015) 254 CLR 425

[Independent Commission Against Corruption v. Cunneen](#) (2015) 256 CLR 1

[Moreton Bay Council v. Mekpine Pty Ltd](#) (2016) 256 CLR 437

[Hall v Hall](#) (2016) 257 CLR 490

[Paciocco v Australia and New Zealand Banking Group Limited](#) (2016) 258 CLR 525

[Simic v. New South Wales Land and Housing Corporation](#) (2016) 260 CLR 85

[Bondelmonte v. Bondelmonte](#) (2016) 259 CLR 662

[Palmer v. Ayres](#) (2017) 259 CLR 478

[Western Australian Planning Commission v. Southregal Pty Ltd](#) (2017) 259 CLR 106

[Re Kakoschke-Moore](#) (2018) 263 CLR 640

[Amaca Pty Ltd v. Latz](#) (2018) 264 CLR 505

[SAS Trustee Corporation v. Miles](#) (2018) 265 CLR 137

[Palmer v. Australian Electoral Commission](#) [2019] 269 CLR 196

[Connective Services Pty Ltd v. Slea Pty Ltd](#) [2019] 93 ALJR 1079

[Australian Securities and Investments Commission v. King](#) [2020] 270 CLR 1

Clayton v Bant (2020) 95 ALJR 34

Mineralogy Pty Ltd v State of Western Australia (2021) HCA 30

Tapp v Australian Bushman's Camp Draft and Rodeo Association Ltd (2022) 96 ALJR 337

PRINCIPAL AREAS OF PRACTICE

ARBITRATOR / MEDIATOR

COMMERCIAL LAW

Alternative Dispute Resolution

Arbitration

Appellate

COMMON LAW

Alternative Dispute Resolution

Appellate

CRIMINAL

Appellate

EQUITY

Alternative Dispute Resolution

Appellate

PUBLIC AND ADMINISTRATIVE LAW

Alternative Dispute Resolution

Appellate

Constitutional law

TAXATION AND REVENUE

Alternative Dispute Resolution

Appellate

**JOINT SELECT COMMITTEE ON THE ABORIGINAL AND TORRES STRAIT
ISLANDER VOICE**

SUBMISSION

D.F. Jackson AM KC

A. INTRODUCTION

1. I thank the Joint Select Committee for inviting me to make a written submission on the referendum proposals for the Aboriginal and Torres Strait Islander Voice. I am happy to appear in person at a hearing of the Joint Select Committee if it so desires.
2. My experience in constitutional and related political matters is referred to in the accompanying letter. Two particular aspects I would mention are:
 - (a) that I do not belong to any political party; and
 - (b) that I have acted as counsel in the High Court both for and against the interests of Aboriginal and Torres Strait Islander peoples.
3. The **proposed constitutional amendment** would add to the text of the Constitution a further Chapter (Chapter IX) in the following terms¹:

“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

¹ A consequential addition to the Constitution’s Table of Provisions would also be made. It does not require separate comment.

Islander Voice, including its composition, functions, powers and procedures.”

4. The **proposed referendum question** to be put to voters is as follows:

“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?”

B. SOME PRELIMINARY OBSERVATIONS

5. No doubt different minds will have different views whether there should be *some* recognition in the Constitution of Aboriginal and Torres Strait Islander peoples (I will use “First Peoples” from time to time for brevity). Assuming, however, that there is to be such recognition, the core question, however, is the form which such recognition should take.
6. It will be seen that the scheme contemplated by the proposed s. 129 involves the following elements:
- (a) Proposed s. 129(1) mandates that there is to be – until s. 129(1) is itself amended or repealed by a later referendum process at some point in the future – a body which is the Voice.
 - (b) By proposed s. 129(2) the Voice referred to in proposed s. 129(1) may make “representations” (submissions or arguments or proposals) to the Commonwealth Parliament and the Executive Government of the Commonwealth on “matters relating to Aboriginal and Torres Strait Islander peoples”. Two aspects may be noted in passing. One is that proposed s. 129(2) excludes, sensibly, representations to the judicial branch of the Commonwealth. The other is that the “representations” referred to in proposed s. 129(2) are not necessarily reactive; there seems no reason why they should not include new proposals by the Voice for measures or action.
 - (c) The proposed s 129(3) sensibly gives very broad powers to the Parliament to determine, amongst other things, the composition, functions, powers and procedures of the Voice required to be established by proposed s. 129(1). No doubt there will be difficult questions arising for Parliament under proposed

s 129(3). For example decisions will need to be made about the composition of the Voice. Will First Peoples resident in the Australian Capital Territory² be entitled to representation, perhaps membership, of the Voice on the same basis as First Peoples residing in the Northern Territory? Will Parliamentarians be excluded from participation in the Voice? These issues are by no means insoluble, however.

7. Greater potential difficulty is provided by the phrase “subject to this Constitution” in proposed s 129(3). That usage would ordinarily cause no difficulty, but one provision which would be likely to fall within it would be the proposed s 129(2). If a law made pursuant to s 129(3) had the effect that the Voice (however constituted under s 129(3)) was not empowered to make a representation of the nature referred to in s 129(2), the relevant provisions enacted pursuant to s 129(2) would be invalid.
8. A further question is what happens if the Parliament does not continue to make laws under proposed s 129(3) providing for the continued existence of the Voice. Is the Voice contemplated by ss 129(1) and (2) to fall into a form of constitutional desuetude like the Inter-State Commission under ss 101, 102, 103, with there being attempts every so often to revive a version of it?
9. Or if there is at any time no legislation providing for the Voice, but Parliament proceeds to make laws on “matters relating to Aboriginal and Torres Strait Islander peoples”, are such laws invalid because the proposed s. 129(1) *requires* that there be a Voice, however constituted, which is able to make representations to Parliament on such matters?

C. VIEWS

10. The discussion above allows me to express relatively briefly my views on the amendment to the Constitution now proposed.
11. The **first observation** I would make is that in the light of the Parliament’s existing legislative powers under ss 51(xxvi), 122 and 51(xxxix) of the Constitution the proposed Chapter IX seems quite unnecessary.

² A significant number of whom are likely to work in government.

12. Under s 51(xxvi) of the Constitution the Commonwealth Parliament *already* has power to make laws with respect to:

“(xxvi) the people of any race for whom it is deemed necessary to make special laws”.

13. Under s 122, so far as the territories are concerned, the Constitution already provides relevantly that:

“122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth...”.

14. And under s 51(xxxix) laws may be made by the Commonwealth Parliament with respect to:

“(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament ... or in the Government of the Commonwealth ... or in any department or officer of the Commonwealth.”

15. It cannot be seriously argued that s 51(xxvi) is not widely enough expressed to empower the making of laws creating and regulating a body of the nature contemplated by the proposed referendum. Any such law of its nature would be a law with respect to the people of a race (in fact two races - Aboriginal and Torres Strait Islander) and it would be a “special law” which the Parliament has “deemed necessary” for the people of those races. This view is supported by the decisions discussing s 51(xxvi). Thus it is for the Commonwealth Parliament to determine whether a law is “deemed necessary”: *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 460 per Mason C.J., Brennan, Deane, Toohey, Gaudron and McHugh JJ.

16. Whilst s 122 is to be read with other provisions of the Constitution: (*Queanbeyan City Council v. ACTEW Corporation Ltd* (2011) 244 CLR 530 at 539, [7] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) it seems clear that the Commonwealth Parliament has very broad legislative powers on the subject presently under consideration in relation to the Territories, whether it be pursuant to s. 51(xxvi) or s. 122 or both.

17. And one can add the “incidental” legislative power conferred by s 51(xxxix).
18. The short fact is that there is no reason at all why the Parliament cannot now legislate to establish a body which has features similar to those proposed for the Voice in proposed s 129.
19. If that is the case, what is the point of a referendum to insert a *further* legislative power in the Constitution? I can understand the desire to give some recognition to Aboriginal and Torres Strait Islanders in the Constitution, but why could this not be done simply enough by adding a third paragraph to the Preamble to the Constitution along the following lines:

“And whereas the Aboriginal peoples of Australia and those originating from the Torres Straits were the first inhabitants of the lands which are the Commonwealth of Australia”.

The above suggestion is conceptual, rather than an exact proposal. No doubt it could be better drafted.

20. I also accept that much does need to be improve the lot of many, though not all, of the Aboriginal and Torres Strait Islander people in Australia. It can be done already through the use of the legislative powers referred to above, and by suitable government action.
21. One point which appears to be made in support of the proposed amendment is that it ensures that there will *always be* a Voice. But why should there be, *in perpetuity*, a Voice *entrenched constitutionally*? No very satisfactory answer has ever emerged.
22. One answer has been that Aboriginal and Torres Strait Islander peoples are not happy with recognition in the Preamble, but want more. But the issue is what the people of Australia want. Suitable recognition of the First Peoples in the Preamble, together with governmental action appropriate from time to time should be sufficient.
23. There is also a **second aspect**, albeit having some relationship to the first.

24. The inclusion of the proposed s 129 would mean that we become a nation where, whenever we or our ancestors first came to this country³, we are not all equal.
25. Surely the way in which the joint aims of recognition of the First Peoples on the one hand and equality of all Australians on the other is as suggested above, i.e. an amendment to the Preamble to the Constitution along the lines of that discussed above. The government of the day could then make such provisions as become, or remain, necessary to ensure that the lot of those First Peoples needing assistance is satisfactorily dealt with.

11 April 2023



D.F. Jackson AM KC

³ A very large proportion came after World War II, for example.