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1 IN THE STATE OF SOUTH AUSTRALIA
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3 ROYAL COMMISSION
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5 BEFORE MRS I.E. STEVENS, ROYAL COMMISSIONER
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17 HINDMARSH ISLAND BRIDGE ROYAL COMMISSION
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26 TRANSCRIPT OF PROCEEDINGS
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31 WEDNESDAY, 19 JULY 1995 AT 10.15 A.M.
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- 1 COMSR: This is the first day of sitting of
2 this Royal Commission. I will start the hearing by
3 asking the Secretary to the Royal Commission to read
4 the Commission.
- 5 SECRETARY: South Australia, Her Excellency, Dame
6 Roma Flinders Mitchell, Companion of the Order of
7 Australia, Dame Commander of the Most Excellent Order
8 of the British Empire, Governor in and over the State
9 of South Australia.
10 To: Iris Eliza Stevens
11 Greetings
12 Whereas:
- 13 1. On 9 July 1994, the Honourable Robert Tickner MP,
14 Minister for Aboriginal and Torres Strait Islander
15 Affairs in the Commonwealth Government signed a
16 declaration pursuant to s.10 of the Aboriginal and
17 Torres Strait Islander Protection Act, 1984, which
18 declaration prevented the construction of a bridge
19 between Hindmarsh Island and the mainland at Goolwa
20 (hereinafter called 'the declaration');
 - 21 2. In making the said declaration, the aforesaid
22 Minister relied upon a report made to him by
23 Professor Cheryl Saunders AO, which report made
24 reference to secret 'women's business' which was
25 more particularly described in sealed envelopes
26 annexed to or attached to the report.
 - 27 3. There have been allegations that the secret 'women's
28 business' is a fabrication.
 - 29 4. There has been significant disagreement within the
30 South Australian Aboriginal communities regarding
31 the 'women's business' and the allegations.
 - 32 5. The Government is or was contractually bound to
33 construct the bridge and is desirous that the
34 construction of the bridge should proceed unless to
35 do so would be unreasonable and inappropriate having
36 regard to Aboriginal tradition.
 - 37 6. It is necessary to investigate the allegations in
38 order:

- 1 (i) to provide a factual basis for the resolution
2 of the disagreement within the South
3 Australian Aboriginal communities;
4 (ii) to enable the South Australian Government to
5 determine, as a matter of policy, whether it
6 would be unreasonable and inappropriate,
7 having regard to Aboriginal tradition for the
8 construction of the bridge to proceed; and
9 (iii) to enable the South Australian Government to
10 determine whether it should make further
11 submissions to the Commonwealth Government
12 (including to any inquiry established by the
13 Commonwealth Government) relating to the
14 declaration made by the aforesaid Minister and
15 to provide a factual basis for any such
16 submissions.

17 I, the Governor, with the advice and consent of the
18 Executive Council, do hereby appoint you to be a Royal
19 Commissioner to inquire into and report upon the matters
20 set out in the following Terms of Reference:

- 21 1. Whether the `women's business' or any aspect of the
22 `women's business' was a fabrication and, if so:
23 (a) the circumstances relating to such a
24 fabrication;
25 (b) the extent of such fabrication; and
26 (c) the purpose of such a fabrication.
27 2. You may seek and obtain such advice or assistance on
28 matters relating to Aboriginal tradition as you may
29 consider necessary for the purpose of your inquiry,
30 and, in particular, you may seek information,
31 including relevant documents and records, from
32 all agencies of the Government which are hereby
33 directed to provide you with such assistance as
34 you may require.
35 3. In conducting your inquiry and in your report, you
36 are required to:
37 (a) avoid prejudicing any judicial proceedings
38 relating to the declaration made by the

- 1 Minister for Aboriginal and Torres Strait
2 Islander Affairs of the Commonwealth
3 Government;
- 4 (b) protect the confidentiality of any information
5 which could properly be regarded as confidential
6 whether pursuant to Aboriginal tradition or
7 otherwise; and
- 8 (c) comply with s.35 of the Aboriginal Heritage
9 Act, 1988,
10 and for this purpose, you may conduct your inquiry
11 or parts of it in private and to report in part by
12 way of confidential report and/or to report by way
13 of general descriptions or summaries, or to take
14 such other steps as you consider to be appropriate
15 to comply with paragraphs (a), (b) and (c) hereof.
- 16 4. This appointment does not prevent your appointment
17 to any other public office under the Crown in
18 right of the State of South Australia, which
19 appointment is intended to facilitate and assist
20 your inquiry.
- 21 5. You are required to make your inquiry expeditiously
22 and to furnish a final report not later than 1
23 September 1995.

24
25 In these Terms of Reference:

26 `aboriginal tradition' means the body of traditions,
27 observances, customs and beliefs of Aborigines generally
28 or of a particular community or group of Aborigines, and
29 includes any such traditions, observances, customs or
30 beliefs relating to particular persons, areas, objects
31 or relationships.

32
33 `women's business' means the spiritual and cultural
34 significance of Hindmarsh and Mundoo Islands, the waters
35 of the Goolwa channel, Lake Alexandrina and the Murray
36 Mouth within the Aboriginal tradition of Ngarrindjeri
37 women which is crucial for the reproduction of the
38 Ngarrindjeri people and of the cosmos which supports

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1 their existence.

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3 Given under my hand and the Public Seal of South
4 Australia, at Adelaide, 16th June 1995.

5 By command, the Premier.

6 God save the Queen.

1 COMSR: Having heard the Terms of Reference of
2 the Commission, it will be apparent that the matters to
3 be inquired into by the Commission are directed to
4 fairly specific issues. They arise from a proposal by a
5 developer to build a bridge linking the mainland at
6 Goolwa to Hindmarsh Island. Since the bridge was first
7 proposed, a great many issues have arisen. A number of
8 those issues have been given public prominence. It is
9 useful to point out, however, that other than the
10 matters set out in the Terms of Reference, those issues
11 are not the subject of this inquiry.

12 Clearly, it is not the task of this Commission to
13 inquire into nor report upon the merits of any proposal
14 to construct a bridge, nor is the Commission to inquire
15 into nor report upon the contractual obligations of any
16 persons arising out of any such proposal. In general
17 terms, this is an inquiry into whether or not particular
18 representations referred to as 'women's business', or
19 any parts thereof, were fabricated and, if so found, in
20 what circumstances did that fabrication occur, how much
21 was fabricated and for what purpose; a difference has
22 arisen within the Aboriginal community on this matter.

23 While the exact parameters of the Terms of Reference
24 are matters upon which persons appearing before the
25 Commission will, no doubt, wish to be heard, it is, I
26 believe, fair to say those parameters are within
27 definite limits. This Commission intends, as fully as
28 it is able, to inquire into the matters referred to it.

29 Inevitably, where a Royal Commission is established
30 to inquire into matters of controversy, publicly raised,
31 there is an understandable expectation that the inquiry
32 will be conducted in public.

33 As far as is possible, this Commission will be heard
34 publicly. However, it must be said at the outset that
35 there are reasons why it may be necessary for
36 substantial parts of the evidence to be given in
37 private.

38 The Commission, in conducting its inquiry, has

1 specific directions incorporated into the Terms of
2 Reference relating to the matters of prejudice to
3 current court proceedings, to confidentiality and to
4 privacy. These directions will indicate the extent to
5 which the evidence can be taken in public.

6 Furthermore, where matters of Aboriginal traditions,
7 sites or religion are concerned, there are a number of
8 statutory provisions, both Commonwealth and State,
9 framed to protect the confidentiality of that
10 information.

11 The Aboriginal Heritage Act, the Racial
12 Discrimination Act and the Aboriginal and Torres Strait
13 Islander Heritage Protection Act all have provisions
14 relating to confidentiality. The Commission must have
15 regard to the requirements of its Terms of Reference and
16 to relevant legislative provisions as to
17 confidentiality.

18 Finally, the inquiry is to be conducted in a
19 sensitive manner. There may well be other submissions
20 advanced by parties as to the need for a private hearing
21 of particular evidence. I anticipate that parties will
22 wish to be heard on the matters of prejudice, privacy
23 and confidentiality.

24 The Commission, which was established on 16 June
25 1995, has, broadly speaking, three main tasks to be
26 completed by 1 September 1995, namely: to gather
27 information; to conduct a hearing; and, to report to the
28 Governor.

29 Soon after the Commission obtained premises, the
30 process of gathering information was commenced and it
31 continues. The stage has been reached for the hearings
32 to commence. However, any person who has not yet come
33 forward and who wishes to make a submission, should
34 advise the Commission as soon as possible.

35 Arrangements have been made for the media to have
36 access, during the course of the hearings, to an area on
37 the third floor of this building. I would ask members
38 of the media to extend to witnesses the courtesy of not

1 approaching them within the precincts of the building.
2 I am advised that there are witnesses who could feel
3 under pressure and even threatened by such approaches.
4 Accordingly, I ask you to respect their feelings.

5 One matter I should mention is that security matters
6 or arrangements within the Commission have been given
7 special attention; in particular, to ensure that the
8 confidentiality or secrecy of documents and records is
9 maintained. A system has been put in place to ensure
10 that any evidence or document is not accessible to
11 inappropriate persons.

12 I propose next to deal with applications for leave
13 to appear and, accordingly, I'll take a short break to
14 enable the audio and visual equipment to be removed from
15 the hearing.

16 ADJOURNED 10.26 A.M.

17 RESUMING 10.41 A.M.

18 COMSR: I propose now to deal with applications
19 for leave to appear. Today, I won't be dealing with the
20 terms on which leave to appear will be given - I'll deal
21 with that at the next sitting of the Commission - but I
22 would ask counsel to indicate the names of the persons
23 for whom they are seeking leave to appear and who
24 indicate they have a special interest in the matter.

25 MR SMITH: I appear with my learned friend Miss
26 Andrea Simpson as counsel assisting yourself.

27 MR MARTIN: I seek leave to appear for Mr Ian
28 McLachlan, the member for Barker.

29 COMSR: You have leave to appear.

30 MR TILMOUTH: I think we have sorted out the next
31 appearance. May it please the Commission, I appear for
32 the Ngarrindjeri men, but more particularly George
33 Trevorrow, Tom Trevorrow, Victor Wilson, Robert Day and
34 Henry Rankine. I don't formally seek leave to appear at
35 this stage because we are unaware of any precise
36 allegations, but I ask the Commission to note our
37 interest on behalf of those men at this stage. My
38 appearance is with Mr Kenny, my instructing solicitor.

1 COMSR: I note that you are foreshadowing that
2 you may make an application for leave. Is that the
3 situation?

4 MR TILMOUTH: That is the situation. We are unaware
5 of any allegations made against those men. We have no
6 direct knowledge of their interest, but we foreshadow we
7 will be seeking leave, if any are made, or may be
8 seeking leave.

9 MS LAYTON: Myself and Mr Collett appear for the
10 Aboriginal Legal Rights Movement. Just to preface the
11 information that your Honour, the Commissioner, is
12 seeking, we wish to just inform the Commission on
13 certain matters of importance.

14 As the Commission knows, the Aboriginal Legal Rights
15 Movement has taken an action in the Supreme Court
16 challenging the lawfulness of the Commission, and I
17 thought it important to inform the position of the
18 current state of that action at this point in time.

19 As the Commission knows, an application was taken to
20 have the action referred urgently to the Full Court of
21 the Supreme Court. That application was granted with
22 urgent dates still to be set. The interlocutory
23 injunction was refused, but an appeal has been lodged.
24 Our latest information is that a Full Court of the
25 Supreme Court may be able to be convened at 2.15 on this
26 Friday for the purposes of hearing that appeal, but we
27 will know more about that in the course of the
28 afternoon. Having said that, the ALRM, without
29 prejudice to its position with regard to that action,
30 seeks leave to appear and to be represented by myself
31 and Mr Collett.

32 COMSR: Yes. The ALRM has leave to appeal.
33 Now, you have leave to appeal to appear for the ALRM.

34 MR STRATFORD: I seek leave to appear on behalf of Mr
35 Timothy Wooley, a witness to be called before you.

36 COMSR: You have leave to appear.

37 MR MEYER: My name is Meyer and I seek leave to
38 appear for Thomas Lincoln Chapman and Wendy Jenny

1 Chapman.
2 COMSR: You have leave to appear.
3 MRS SHAW: I seek leave to appear as junior counsel
4 to Michael Abbott QC, senior counsel, on instructions
5 from Piper Aldermans. I propose to represent the five
6 Ngarrindjeri women who, in May last year, had the
7 courage to come forward and challenge the validity of
8 the Hindmarsh Island secret women's business.
9 COMSR: Perhaps if you give me the names of
10 those persons.
11 MRS SHAW: The names of those persons are: Dolcie
12 Wilson, Mrs Dorothy Wilson, Mrs Bertha Gollan, Mrs
13 Audrey Dix, Mrs Rita Wilson. I indicate to your Honour
14 that we have had contact with other Ngarrindjeri women
15 who will, no doubt, seek to be represented by us, or
16 certainly give evidence to the Commission.
17 COMSR: You're seeking leave on behalf of Mr
18 Abbott and yourself?
19 MRS SHAW: Yes, I am.
20 COMSR: You have leave to appear then in person
21 for the persons that you have named.
22 MRS SHAW: We also ask it to be noted that we have
23 the strongest objection to the ALRM being represented
24 and pursuing any particular course in the Commission.
25 But we will seek to argue that on Monday.
26 COMSR: That can be argued on the next occasion.
27 MR WARDLE: I seek leave to appear for Mrs Betty
28 Fisher.
29 COMSR: I take it that she has a specific
30 interest though, a special interest?
31 MR WARDLE: She does.
32 COMSR: You have leave to appear.
33 MR SYKES: My name is Sykes and I seek leave to
34 appear for Allen Dell Campbell (who is more commonly
35 known as 'Chirpy'), Amelia Campbell and John Gregory
36 Campbell. They are direct ascendants of the people who
37 have an interest, or planning members of the Hindmarsh
38 Island area, and they have a direct interest in this

1 Commission. I seek leave to represent them.

2 COMSR: Well, you have leave to appear then Mr
3 Sykes.

4 MS PIKE: I seek leave to appear with Miss Eszenyl
5 for Dr Deane Fergie, a witness to be called.

6 COMSR: You have leave to appear.

7 MR BOURNE: I seek leave to foreshadow an
8 application, as Mr Tilmouth did for his clients, to
9 represent Doug Milera.

10 COMSR: I will note that you are foreshadowing
11 that you may make an application for leave to appear
12 then.

13 MR WHITE: I seek leave to appear for Russell Henry
14 Aywood Smith and John Morgan in their capacities as
15 receivers and managers of the companies Benalong Pty Ltd
16 and Marina Services Co. Pty Ltd. I say that at this
17 stage I do not foreshadow that I would seek to actively
18 appear or make submissions and that it may be more
19 appropriate to say that I seek, or indicate that I may
20 seek, leave to appear if any matters concerning those
21 companies arise in the course of this Commission, or if
22 the Commission seeks books and records which may be
23 relevant to the Terms of Reference from those companies.

24 COMSR: Again, this is more in the nature of an
25 intimation that you may, in the circumstances, seek
26 leave to appear?

27 MR WHITE: That is correct.

28 COMSR: I will note that.

29 CONTINUED

- 1 MS O'CONNOR: I appear for the following Ngarrindjeri
2 women before this Commission.
3 I am instructed by Dr Doreen Kartinyeri, Margaret
4 Roberts, Margaret Jacobs, Rhonda Agius, Edith Rigney,
5 Denise Karpany, Glenys Wilson, Bronwyn McKenzie, Vicki
6 Hartman, Shelley Sumner, Eileen McHughes, Michelle
7 Saunders, Shirley Peisley, Muriel Van Der Byl, Veronica
8 Brodie, Margaret Brodie, Grace Sumner, Selina Sumner,
9 Janice Rigney, Dot Shaw, Hazel Wilson, Daisy Rankine and
10 Ellen Trevorrow.
11 The women do not seek representation before this
12 Royal Commission. They do not recognise the authority
13 of this Commission.
- 14 COMSR: I am sorry, I must have misunderstood
15 you.
16 Did you say you were seeking leave?
- 17 MS O'CONNOR: If I have, I meant I am simply
18 instructed by them to appear to explain to your Honour
19 why they do not seek leave to appear before this Royal
20 Commission.
- 21 COMSR: You are not seeking leave. Are you
22 foreshadowing that you may be seeking leave to appear?
- 23 MS O'CONNOR: I am instructed by the women whose names
24 I have mentioned. They do not seek leave to appear
25 before this Commission. They do not seek representation
26 before this Commission.
- 27 COMSR: I will note then that is the case.
- 28 MS O'CONNOR: They have reasons and they have
29 instructed me to read a statement, prepared by them,
30 which reflects those reasons.
31 I understand that a formal approach was made to your
32 Honour, on an earlier date.
- 33 COMSR: Just one moment.
34 I wonder if we could deal with the applications for
35 leave to appear, at this stage, and then perhaps you can
36 explain to me what it is precisely that you wish to do.
37 You are not seeking to represent anyone before the
38 Commission?

- 1 MS O'CONNOR: That's correct.
- 2 COMSR: I will note that you are not seeking
3 leave to appear.
4 So, obviously, I will not be making an order that
5 you have leave to appear.
- 6 MS O'CONNOR: No.
- 7 MR GRIFFITH: I seek leave to appear for the
8 Commonwealth Minister for Aboriginal & Torres Strait
9 Islander Affairs, limited to making short submissions,
10 which I would ask leave to make now, dealing with issues
11 of Commonwealth legislation and Commonwealth power and
12 the relationship to this inquiry.
13 I would then seek to withdraw.
14 May I make those submissions?
- 15 COMSR: All right. You are seeking leave to
16 appear?
- 17 MR GRIFFITH: To appear this morning, limited to this
18 morning, and to make short submissions, and then to
19 retire.
- 20 COMSR: I take it that you are here from
21 interstate and will be returning, is that right?
- 22 MR GRIFFITH: I will not return.
- 23 COMSR: You are not returning. I meant
24 returning from whence you came.
- 25 MR GRIFFITH: I will return from whence I came, but I
26 will not be returning from whence I am.
- 27 COMSR: You have leave to appear.
- 28 MR GRIFFITH: My instructions are that there are two
29 short matters particularly that the Minister will wish
30 to put and asks merely to put them and to retire. And I
31 desire to put those, on his behalf.
32 Of course, the Commission is familiar with the
33 historical background, because the Terms of Reference,
34 which were read out this morning, are built on that.
35 But, of course, the original matter was the Minister's
36 declaration under s.10 of the Commonwealth Heritage Act
37 preventing the construction of the Hindmarsh Island
38 bridge, and the course of the enquiries that, before

1 making the declaration, that the Commonwealth Minister
2 receives a report under sub-s.10 (4) of the Commonwealth
3 Act from Professor Cheryl Saunders concerning the
4 significance of the area to Aboriginals is described in
5 the judgment of O'Loughlin J given 15 February 1995.

6 And I will not take time, this morning, to refer to
7 that. But, as is known, there was a successful
8 challenge before O'Loughlin J to the Minister's decision
9 to make the declaration and that there has been an
10 appeal by the Minister to the Full Court, which was
11 heard in May, and judgment has been reserved on that
12 appeal.

13 The Commission, I think, also is aware that, by
14 announcement of the Minister, on 8 June 1995 - and I
15 have furnished a copy, this morning, of the press
16 releases, which I think the Commissioner does now have -
17 indicating that, once the Full Court has handed down its
18 decision, a further inquiry into the significance of the
19 Hindmarsh Island to Aboriginal people will be conducted
20 by Mathews J, which, depending on the outcome of the
21 Federal Court appeal, will be directed to whether the
22 Minister should vary or revoke the existing declaration,
23 or make a new declaration.

24 I should also advise you that the Minister has also
25 received a further application for declaration to be
26 made under the Commonwealth Act, which will be
27 considered in the light of the Full Court of the Federal
28 Court's decision.

29 Having summarised the factual background, so far as
30 the Commonwealth interest is concerned, may I make, in
31 particular, two submissions and a reference to a third
32 matter of difficulty which the Minister would desire to
33 bring to the attention of the Commission?

34 The first proposition that the Minister would like
35 to make is that he submits that the Royal Commission has
36 no power to inquire into the conduct of a Commonwealth
37 inquiry generally. And, in particular, into the
38 Commonwealth inquiry undertaken by Professor Saunders

1 under the Commonwealth Heritage Act, prior to the making
2 of the declaration by the Minister for Aboriginal &
3 Torres Strait Islander Affairs.

4 It is accepted that this Commission may inquire into
5 the matters the subject of the Commonwealth inquiry, as
6 it is possible for the Commonwealth and the States to
7 conduct inquiries into the same issues.

8 As authority for that, I refer the Commission to R v
9 Winneke; Ex parte Gallagher (1982) volume 1 152 CLR
10 p.211, in particular, at p.221, Mason J.

11 However, Commonwealth executive power extends to the
12 execution and the maintenance of laws of the
13 Commonwealth.

14 And whether a Commonwealth inquiry is conducted
15 under Commonwealth legislation or by executive act, it
16 is submitted that the actual conduct of such an inquiry
17 is within the Commonwealth's exclusive jurisdiction and,
18 on general principles of constitutional law, any
19 interference with its conduct by an exercise of State
20 executive or legislative power would be impermissible.

21 And I refer the Commissioner to Commonwealth v Bogle
22 (1953) 89 CLR p.229, in particular, p.260 per Fullager
23 J. And also to the Cigamic case (1962) 108 CLR p.372,
24 particularly at p.377.

25 The second proposition the Minister would like to
26 make as a submission to the Commission is that the Royal
27 Commission cannot compel a person who has made
28 representations to Professor Saunders for the purposes
29 of her inquiry to disclose the nature of those
30 representations or their source, as this would impair
31 the operation of the Commonwealth Heritage Act and be
32 invalid by virtue of s.109 of the Constitution.

33 S.10 of the Heritage Act provides that applications
34 may be made by or on behalf of Aboriginal persons
35 seeking the preservation or the protection of a
36 specified area from injury or desecration. Where such
37 an application is made, a report prepared by a person
38 nominated by the Minister must be considered by the

1 Minister before a declaration may be made.

2 S.10 (4) of the Heritage Act provides that a report
3 prepared for the purposes of the section must deal with
4 certain specified matters, including the particular
5 significance of the area to Aborininals and the nature
6 and extent of the threat of injury to, or desecration
7 of, the area.

8 In relation to the application made under s.10
9 concerning the Hindmarsh Island bridge proposal,
10 Professor Saunders was commissioned to conduct an
11 inquiry and to prepare a report for the Minister.
12 Certain persons made representations to that inquiry in
13 relation to the matters required to be dealt with in the
14 report.

15 As I have mentioned, a further s.10 application has
16 been made and a second Commonwealth inquiry is to be
17 conducted by Mathews J in relation to the Hindmarsh
18 bridge proposal after the decision of the Full Federal
19 Court is given. That inquiry will be directed to
20 whether the Minister should vary or revoke the existing
21 declaration or make a new declaration.

22 S.10 of the South Australian Royal Commissions Act
23 enables a Royal Commission in South Australia to require
24 the attendance of witnesses, to examine witnesses on
25 oath and to require that answers be given to questions
26 put by the Commission and to require the production of
27 documents.

28 It is submitted that the application of a State law
29 including that law which impairs or detracts from the
30 operation of a Commonwealth law will be inoperative by
31 operation of s.109 of the Constitution.

32 And I refer to *Victoria V The Commonwealth* (1937) 58
33 CRL p.618, particularly Dixon J, at p.630.

34 It is submitted that, if by the use of its
35 compulsive powers under s.10 of the South Australian Act
36 this Commission seeks to require witnesses to the
37 Commonwealth inquiry, which has already taken place, or
38 those who may give evidence to the inquiry, which is to

1 occur, as to what they said in the inquiry, or to
2 disclose their sources, the efficacy of the Commonwealth
3 inquiry process would be impaired.

4 Of course, the inhibition is not merely limited to
5 the past Commonwealth inquiry. One obvious and contrary
6 way in which the impairment to the Commonwealth inquiry
7 would arise is that the use of these compulsive powers
8 in relation to such witnesses will have a chilling
9 effect on the extent to which submissions to a future
10 Commonwealth inquiry under the Heritage Act is likely to
11 be made. And that is not merely limited to the
12 foreshadowed inquiry by Mathews J. It would have a
13 chilling effect with respect to all future Commonwealth
14 inquiries under s.10 of the Act. An appropriate analogy
15 is the well recognised general rule that a claim of
16 public interest immunity privilege is available where
17 the disclosure of information would be prejudicial to
18 the public interest by discouraging others in similar
19 circumstances from providing information of the kind
20 disclosed.

21 It is submitted that it is an obvious inhibition to
22 those who may give evidence to any future Commonwealth
23 inquiry to know that, in whatever terms that evidence is
24 given, they may be the subject of compulsive inquiry by
25 application of a State law.

26 And it is submitted that, in as much as the State
27 law has an operation which inhibits such conduct by
28 witnesses, such State law and its operation would be
29 inoperative.

30 The third matter that we draw to the attention of
31 the Commission is that it is submitted that the
32 Commission cannot compel Aboriginal persons to disclose
33 secret spiritual beliefs in a manner which would
34 infringe the Racial Discrimination Act by limiting or
35 impairing the enjoyment of human rights of Aboriginal
36 persons in a way that meant that they did not enjoy
37 those human rights on an equal footing with other
38 members of the community.

1 The Minister understands that those matters are
2 being ventilated in the Full Court by way of
3 submissions, particularly by Robyn Layton QC, who has
4 already announced her appearance. And the Minister, for
5 the moment, does no more than confirm his view as to the
6 relevance of the operation of the Commonwealth Racial
7 Discrimination Act to matters of this sort.

8 If the Commission pleases, those are the submissions
9 the Minister wishes to make and, otherwise, I seek no
10 leave to appear further.

11 COMSR: Thank you for the courtesy in attending
12 and your very helpful comments.

13 Are there any other applications for leave to
14 appear?

15 MS O'CONNOR: Perhaps if I had worded it the same way
16 as the Commonwealth had worded it, I would have been
17 able to say what I wanted to say.

18 I simply seek leave to appear for the women and make
19 a statement to the Commission, then I will be
20 withdrawing.

21 The statement has been prepared by them.

22 There was an approach made to your Honour's staff,
23 earlier in the week, to be able to read out a statement.
24 At that stage, however, the staff weren't told that it
25 was the intention of the women to only be represented
26 today. This is the only opportunity that they will have
27 to have a lawyer speak for them.

28 There are a number of women who have instructed me.
29 They have come a long way. Their tradition is via oral
30 tradition and it will be important to them to hear what
31 they have prepared for your Honour in an oral situation.

32 I can tender, of course, their letter, but they
33 would prefer it that your Honour hear what they have to
34 say to the Commission in this manner.

35 I seek leave to read that letter.

36 COMSR: For the purposes of making a short - or
37 a statement today, you are seeking leave?

38 MS O'CONNOR: Yes, shorter than the Federal one. That

1 was two short points. Mine is probably one and a half.

2 COMSR: All right.

3 MS O'CONNOR: This is addressed to the Commissioner
4 from the Ngarrindjeri women whose spiritual beliefs into
5 which this Royal Commission is seeking to find
6 fabrication.

7 We, as Ngarrindjeri women believe the women's
8 business, the subject of the Royal Commission into
9 Hindmarsh Island is true.

10 We are deeply offended that a Government in this day
11 and age has the audacity to order an inquiry into our
12 secret, sacred, spiritual beliefs. Never before have
13 any group of people had their spiritual beliefs
14 scrutinised in this way.

15 Under Aboriginal law women cannot speak about
16 women's business where there are men concerned.

17 Our law for Aboriginal women prohibits us from
18 talking about this business, not only the to any men,
19 but also to those not privileged to be given that
20 information.

21 It is our responsibility as custodians of this
22 knowledge to protect it. Not only the from men, but
23 also from those not entitled to this knowledge. We have
24 a duty to keep Aboriginal law in this country.

25 Women's business does exist, has existed since time
26 immemorial and will continue to exist where there are
27 Aboriginal women who are able to continue to practice
28 their culture.

29 It took the Mabo High Court decision to dispel the
30 myth of Terra Nullius. Eddie Mabo died before the
31 landmark decision was handed down. Acceptance through
32 the non-Aboriginal legal system that Aboriginal people
33 occupied this continent was vehemently resisted by a
34 large section of greater community in Australia. Each
35 and every citizen of Australia was affected in some way
36 shape or form.

37 Mabo is here to stay.

38 Along with the Mabo decision came the realisation

1 that Aboriginal people were not just a nomadic,
2 unorganised group of people. Aboriginal people are not
3 all the same. We speak different languages, have
4 different ceremonies, hunt and gather food in different
5 ways. We are all directly associated with our physical
6 environments. And, more importantly, there is the
7 recognition that Aboriginal people have a spiritual link
8 to that same whole environment - land, water and the
9 heavens.

10 Enlightened people, both Aboriginal and
11 non-Aboriginal are finally realising that there are
12 similarities and differences among the indigenous
13 peoples of this continent. The most common thread
14 linking all Aboriginal peoples is the way in which we
15 record our history. Aboriginal history is recorded
16 orally. It is passed on orally. Does that fact
17 invalidate our history? Aboriginal law is strict and
18 uncompromising. Despite all the efforts both past and
19 present of Government bodies and agents to cast the law
20 aside, stamp it out and ignore it, business exists.

21 We do not seek to be represented at this Royal
22 Commission. We do not recognise the authority of this
23 Royal Commission to debate and ultimately to conclude
24 that women's business relating to Hindmarsh Island
25 exists. We know women's business exists and is true.

26 We do not recognise you, Madam Commissioner, as a
27 custodian of law in our society. We shall continue to
28 practice our customs and law according to our customs
29 and law as Aboriginal people have since time began and
30 especially since the invasion.

31 Our only motivation for protecting our stories is
32 our responsibility to the land and surrounding waters
33 and to our people.

34 We refuse outright to recognise your Commission as
35 having any right to decide whether we have fabricated
36 anything, when we know that we have not.

37 There is also the issue that there is to be a
38 Federal enquiry into this matter. We are prepared to

1 participate and co-operate fully with this inquiry,
2 because we feel that we can be confident that this
3 inquiry will investigate the matters sensitively and
4 appropriately and with the respect our spiritual beliefs
5 warrant. We believe the Federal inquiry will achieve
6 the appropriate goals of uncovering the actual
7 fabrications in this matter and the motives and
8 corruption associated with those fabrications, determine
9 who is to benefit from those fabrications and make the
10 necessary recommendations.

11 The timing of Premier Brown's Royal Commission is
12 entirely inappropriate. The Federal Court is still to
13 determine the appeal before it and there is an appeal
14 before the South Australian Supreme Court that has yet
15 to be determined against the refusal yesterday to grant
16 an injunction. What is the hurry? Whose interests are
17 being served by the holding of this Royal Commission
18 now?

19 In addition to that, the women come today with two
20 items they wish to show you, traditional items. One is
21 a women's law ceremonial stick and one is a painting.

22 COMSR: You will recognise that I have shown a
23 great deal of latitude as far as your statement is
24 concerned. After all, this is an inquiry. However,
25 there must be some limits.

26 What is it that you wish me to do?

27 MS O'CONNOR: The women have come here today with two
28 traditional items important to the knowledge that this
29 inquiry is about. One is a painting -

30 COMSR: You wish to tender them?

31 MS O'CONNOR: No, they simply wish to show them to
32 your Honour.

33 CONTINUED

1 One is a painting and one is a ceremonial - a women's
2 law ceremony stick which is about women's law and which
3 they wish to show to your Honour. They are secret
4 women's business items and they would like to show them
5 to your Honour if all the men would vacate the room.

6 COMSR: I am sure we might be able to arrange
7 that perhaps in a more convenient way if you wish to
8 show me something of that nature. However, as I say,
9 I've been showing you a great deal of latitude,
10 considering the nature of your statement. I think I
11 will deal with the rest of the applications, if any,
12 before me and consider what you're requesting me to do
13 in respect of that. See, if the women are not going to
14 appear for any purpose other than to make a statement, I
15 take it that they are not wishing to lead any evidence?

16 MS O'CONNOR: At this stage, I am simply instructed
17 that the women do not seek to be represented before this
18 Commission. They are the extent of my instructions.

19 COMSR: I am, of course, able to inform myself
20 in any way concerning the matters that are the subject
21 of the inquiry, so that I would propose to view these
22 items, not by having all the males leave the room but by
23 arranging a suitable place where the items can be shown
24 to me. That, I take it, is the extent of your
25 appearance?

26 MS O'CONNOR: That's correct.

27 COMSR: Are there any other matters?

28 MR TOBIN: I am Frederick Tobin and I would like to
29 seek permission to make representation as a concerned
30 citizen.

31 COMSR: I'm afraid that it's necessary for you
32 to demonstrate some special interest over and above that
33 of the normal member of the public. Let me say that the
34 making of statements is not really part of the function
35 of the inquiry, but certainly I wouldn't propose to
36 allow a member of the public who has no interest that
37 could be called 'special interest' to make a statement
38 to the Commission. If you wish to put in a document of

1 some sort to counsel assisting me, by all means do so.
2 MR TOBIN: Especially to look at the philosophical
3 implications.

4 COMSR: Yes. I think I've made the situation
5 clear.

6 Are there any other applications before the
7 Commission at this stage? I will indicate that I
8 propose, at this stage, to adjourn the Commission until
9 next Monday and at that stage I will deal with the issue
10 of the terms upon which application for leave to appear
11 is given. Also, I'll hear submissions on the Terms of
12 Reference and submissions on the issues of prejudice,
13 confidentiality and privacy and any other matters of a
14 preliminary nature. But, in order to expedite the
15 hearing of any such applications, I request that any
16 person who would intend to make such a preliminary
17 application advise counsel assisting the Commission of
18 the nature of that application by 4 p.m. on Friday, 21
19 July 1995.

20 I understand that persons appearing, if represented
21 by counsel, have been supplied with a copy of the
22 proposed procedural directions. If not, such copies are
23 available for any counsel who wish them.

24 I propose now, subject to any other applications -
25 there are none - I propose then to adjourn until Monday,
26 24 July 1995 at 10.15 a.m.

27 ADJOURNED 11.15 A.M. TO MONDAY, 24 JULY 1995 AT 10.15 A.M.

1 COMSR STEVENS

2

3 HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

4

5 MONDAY, 24 JULY 1995

6

7 RESUMING 10.15 A.M.

8 COMSR: Before we commence today, there is one
9 matter I wish to clarify as there appears to be some
10 misunderstanding by the media concerning it. It was
11 reported that on opening day after adjourning the
12 hearing until today, I held a secret session or hearing
13 with a group of Aboriginal women. That is not correct.
14 The Commission did not reconvene in any secret or
15 private session. If that had been my intention, I
16 would have announce it to you.

17 After I had adjourned the hearing, in answer to a
18 request by a group of Aboriginal women to view two items
19 as a matter of courtesy, I agreed to do so. Their
20 counsel had already told me that they were not seeking
21 to lead evidence and, on that basis, I viewed the two
22 items. The view did not amount to a session or hearing,
23 secret or otherwise, of the Commission and nothing that
24 was seen or said amounts to evidence before this
25 Commission.

26 Consistent with the latitude I allowed their counsel
27 in making a statement, my intention was to demonstrate
28 the readiness of the Commission to listen to the
29 concerns of all persons involved in the issues before it
30 who might appear before this Commission.

31 MR SMITH: The programme for today is: first, to
32 hear submissions from counsel on the conduct and ambit
33 of the Terms of Reference; secondly, to hear submissions
34 on any procedural matters, such as matters related to
35 confidentiality, prejudice, et cetera; and, thirdly, to
36 hear submissions, if it is appropriate at this time, on
37 the questions of conditions to be imposed on leave to
38 appear, rights of cross-examination, et cetera.

1 I indicate to you and to those at the bar table that
2 I will not be making an opening statement this morning,
3 but I can indicate that I will be asking you to adjourn
4 to Thursday of this week, the 27th, at which time it is
5 envisaged evidence will commence. Thank you.

6 MR STEELE: I think I'm the only person here who has
7 not sought and obtained leave to appear. My name is
8 Steele and I do seek leave to appear on behalf of Dr
9 Neale Draper an anthropologist and archaeologist. Dr
10 Draper provided a report which is pertinent to the
11 matters before you.

12 HIS HONOUR: Mr Steele, I will give you leave to
13 appear and I will hear you on the conditions of that
14 leave to appear subsequently.

15 MR TILMOUTH: I seek leave to make a submission at
16 some stage in relation to representation. You may
17 recall that last Wednesday I appeared to announce who I
18 represented, but couldn't seek leave to appear at that
19 stage. That is still my position. I wish to explain
20 that at an appropriate stage. In short, at this stage,
21 the men I represent have no legal aid funding of any
22 kind whatsoever.

23 COMSR: Yes, Mr Tilmouth. Mr Smith, do you wish
24 to be heard on the question of Terms of Reference at
25 this stage?

26 MR SMITH: I think it would be appropriate if I
27 brought up the rear and that submissions be made in
28 order of seniority.

29 MR ABBOTT: Madam, we want to make some submissions
30 in relation to your terms of your Commission. We want
31 to make the submissions primarily directed towards the
32 procedure that you should follow, which we say is
33 mandated by the terms of the your Royal Commission.

34 May I take you to the preamble. You will note that
35 there are six numbered sections by way of preamble which
36 leads to a statement:

37 `I, the Governor, with the advice and the consent of the
38 Executive Council, do hereby appoint you to be a Royal

1 Commissioner to inquire into and report upon the matters
2 set out in the following Terms of Reference'.

3 Then, there is, in essence, really one substantial Term
4 of Reference which is at the top of p.2 of the copy
5 which I have which is, namely:

6 `Whether the "women's business" or any aspect of the
7 "women's business" was a fabrication ...' et cetera.

8 I observe that `women's business' is, to some
9 extent, defined, not exclusively but inclusively, as
10 meaning:

11 `The spiritual and cultural significance of Hindmarsh
12 and Mundoo Islands, the waters of the Goolwa channel,
13 Lake Alexandrina and Murray Mouth within the Aboriginal
14 tradition of the Ngarrindjeri women which is crucial for
15 the reproduction of the Ngarrindjeri people and the
16 cosmos which supports their existence.'

17 I'm not quite sure where that definition came from.

18 I point out that it contains the phrase `Aboriginal
19 tradition', which in turn is, we submit, some definition
20 to an exclusive definition which is contained
21 immediately above the inclusive definition of `women's
22 business'.

23 We say that the content of your Terms of Reference
24 can be seen by looking at the specifics of `Aboriginal
25 tradition', `women's business', and also by going back
26 to the preamble on p.1.

27 Perhaps if I take it in order and I can more
28 properly approach my submissions in this way. In
29 para.2 of your Commission, we read:

30 `In making the said declaration, the aforesaid Minister'
31 - that is The Honourable Robert Tickner - `Relied on a
32 report made to him by Professor Cheryl Saunders OA which
33 report made reference to secret "women's business" which
34 was more particularly described in sealed envelopes
35 annexed to or attached to the report.'

36 I observe that `secret women's business' is not in
37 anywhere defined or the subject of any attempted
38 definition. That is, in our submission, of some

1 importance because in para.3 we read:

2 `There have been allegations that the "secret women's
3 business" is a fabrication.'

4 The drafter of this Royal Commission, on the one hand,
5 uses `secret women's business' in paragraph no.2 and
6 paragraph no.3 and then deals with `women's business' in
7 para.4 and `women's business' in the Terms of Reference.

8 One of the matters that you will have to consider is
9 the interaction of `women's business' as an expression
10 and `secret women's business' as another expression used
11 in your Terms of Reference. We suggest that really what
12 the Royal Commission is talking about is for you to
13 examine, or, first of all, to obtain the material in the
14 envelopes which is the secret women's business material,
15 because it is that which is, in essence, what the
16 women's business is that you are to inquire into and
17 report upon.

18 I point out that the third paragraph of the preamble
19 says:

20 `There have been allegations that the "secret women's
21 business" is a fabrication.'

22 But your Terms of Reference are whether the women's
23 business, or any aspects of the women's business, was a
24 fabrication. We say that and do say that the Terms of
25 Reference are wider than by using the phrase `women's
26 business'. It is a wider expression than `secret
27 women's business'.

28 In our submission, Term of Reference one should be
29 construed in this way: That you are to inquire into
30 `women's business' generally, and that when the Terms of
31 Reference goes on to say `Or any aspect of women's
32 business', in our submission, that is a clear indication
33 that you are specifically to examine the secret women's
34 business which is referred to in the preamble.

35 In our submission, what this Royal Commission is all
36 about is an examination of `women's business' as it is
37 referred to in the definition section, which is a
38 general definition, so it's about women's business in

1 general. It's about 'secret women's business' in
2 particular because the preamble directs your attention
3 to the fact that there were allegations made by
4 unspecified persons that the secret women's business was
5 a fabrication. So, you are directed to inquire into and
6 report upon women's business in general, the secret
7 women's business in particular and to investigate
8 whether or not any aspect, including the specific aspect
9 of secret women's business, was fabricated and, if so,
10 the circumstances relating to such fabrication to the
11 extent of such fabrication and the purpose of such
12 fabrication.

13 It would seem to us essential, therefore, that the
14 'secret women's business', as it is referred to in the
15 preamble - namely, material which is in the sealed
16 envelopes and which was annexed to the report of
17 Professor Cheryl Saunders AO - should be produced to
18 this Commission. It would, in our submission, entirely
19 frustrate the Commission were those envelopes not to be
20 produced, because, unless you know what the secret
21 women's business is - either the generality of it or the
22 specifics of it - you will have no way in which you can
23 test the criticisms that are made in respect of the
24 generality to see if they are correct and, if so, what
25 weight you give them.

26 I understand that my learned friend, Miss Layton,
27 has given an undertaking to the Federal Court that those
28 envelopes - and I'm only relying upon what I read in the
29 media - will be retained to abide the result of the
30 Federal Court appeal in another matter. I would assume
31 that steps have been made by counsel assisting to obtain
32 them, so that - or at least to ascertain the position of
33 the ALRM in relation to those envelopes - so that we can
34 see whether or not they will or will not be produced for
35 consideration by this Commission.

36 The other aspect which is important is the question
37 of fabrication. My reading of the materials, that is
38 the media materials that I have, suggests that the word

1 `fabrication' was one which was first utilised by
2 members of the media in describing some concerns that
3 they, as members of the media, felt about the way in
4 which Professor Saunders proceeded and, indeed, the way
5 in which some of the informants of Professor Saunders
6 proceeded, principally Dr Fergie and Ms Doreen
7 Kartinyeri.

8 INTERJECTOR: Dr Kartinyeri if you please.

9 COMSR: Dr Doreen Kartinyeri.

10 MR ABBOTT: I will refer to Miss Kartinyeri as Dr
11 Kartinyeri from now on.

12 INTERJECTOR: Show a bit of respect please.

13 MR ABBOTT: The situation, as we see it, is that you
14 will need to know just what the secret women's business
15 is and to investigate and come to a view in relation to
16 the issue of fabrication. You will need to decide, not
17 necessarily at the outset but at some stage during the
18 course of your inquiry, what meaning you attach to the
19 word `fabrication'.

20 As I'm sure you are aware, there are a number of
21 meanings to the word `fabricate'. We have had recourse
22 to the normal avenues of dictionaries and it is obvious,
23 of course, that `fabrication' is open to a number of
24 meanings. The Oxford English Dictionary speaks of two
25 main definitions: The first being `making or
26 constructing'; and, the second being `inventing in the
27 sense of lying or embroidering, forging or making up a
28 story'. It may be proposed to proceed on this basis
29 that you adopt the more conservative definition
30 initially, keeping your options open as to the evidence
31 that you hear and the cross-examination on whether or
32 not the women's business/secret women's business was
33 manufactured or constructed on the one hand, or
34 invented, in the sense of made up - that is, as a false
35 and incorrect statement - on the other. It is one thing
36 to manufacture and construct, it is another to devise or
37 invent. But, it would appear to us to be essential for
38 you, given the Terms of Reference in 1(a) (b) and (c)

1 that unless you come to a decision as to the
2 interpretation of the word `fabrication', you will be
3 hard pressed to find what are the relevant
4 circumstances, what is the relevant extent and what is
5 the relevant purpose.

6 I emphasise that it would appear to us to be the
7 purpose of this Commission to establish when and in what
8 circumstances certain secret women's business came into
9 existence, how was it created; how it was created and
10 whether it was created upon a substratum of existing
11 tradition, and, if so, what that existing substratum
12 was.

13 For the benefit of those who seem to regard what I'm
14 saying as in some way critical, I stress I'm making
15 those submissions with the view of endeavouring to
16 assist you because it seems to us that there are a
17 number of interpretations that are possible on your
18 Terms of Reference and that you will, no doubt, have to
19 consider all of them and come to a view, having
20 considered all the possible permutations.

21 The secret women's business which I must return to,
22 because it looms large in the preamble - and may I say
23 something about the position of the ladies whom I
24 represent. They have not been able to see what is in
25 the envelopes. They have made statements and, in due
26 course, will, no doubt, be called and give evidence at
27 this stage not having seen what is in the envelopes, and
28 it will be very difficult for them to give all the
29 evidence they want to give without being allowed to be
30 told the substance of what is in these envelopes. I say
31 that because obviously some of their statements are
32 based upon a degree of assumption from the published
33 utterances of Dr Doreen Kartinyeri and others who are,
34 as it were, on her side of this matter.

35 In essence, therefore, you will need, in our
36 submission, to know exactly what the secret women's
37 business is. Further, you will need to decide the
38 interaction of the secret women's business in those

1 envelopes with the expression `women's business'
2 generally, because that is what your Term of Reference
3 is about.

4 At present, we do not even know whether the secret
5 women's business falls within the definition of `women's
6 business' which is in your Terms of Reference, because,
7 apart from Dr Kartinyeri, Dr Fergie, Dr Saunders and
8 presumably some selected others, we are all in the dark
9 about the content of that material.

10 We, in due course, will be making submissions as to
11 the way in which that material can be disseminated with
12 the appropriate safeguards on it to protect the concerns
13 that some people, obviously, have about the
14 dissemination of the material. But that is not part of
15 the submissions I want to make at present.

16 Those general comments are what we want to say at
17 present.

18 MR TILMOUTH: It would be appropriate if I go next.

19 COMSR: I understand at the present time that
20 you haven't been given leave. You are neither seeking,
21 nor have you been given leave.

22 MR TILMOUTH: I wish to make submissions to the
23 Commission about that and, more particularly,
24 submissions relating to the meaning of the Terms of
25 Reference in 1(a), the circumstances relating to such a
26 fabrication.

27 COMSR: And certainly, Mr Tilmouth, I welcome
28 such submissions, but I am unclear what your status is
29 at the present time as I understand it?

30 MR TILMOUTH: Can I put it this way: The problem is
31 and the reason why we haven't sought formally to
32 intervene is that all the Terms of Reference talk about
33 is `fabrication', but we have received no particulars at
34 all about whether any of the people I represent are said
35 to be involved. So, we are operating entirely in the
36 dark.

37 My submission to you was that the word
38 `circumstances' relating to such a fabrication must

1 necessarily include such things as: time or times, place
2 or places of fabrication, who was alleged to have been
3 present and who was alleged to have said what, if
4 anything, relating to the matter.

5 At the moment we understand there may be allegations
6 that some of the people I represent were present, were
7 involved, but we have no details. This is a very
8 important preliminary matter and we have a general term
9 for the Royal Commission, but there is absolutely no
10 flesh on the bone whatever.

11 CONTINUED

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1 COMSR: This is an inquiry and, of course, it is
2 expected that the flesh will get on the bone during the
3 course of the inquiry.

4 MR TILMOUTH: That is my difficulty. How can I
5 represent anybody until we know what it is said, if
6 anything, that they did or did not do? We stand
7 completely in a vacuum here. Things have been said in
8 the press which may or may not be reliable and at the
9 moment we have simply been given no particulars about
10 involvement whatsoever.

11 MR SMITH: If I could be heard and interrupt my
12 learned friend? This is not an appropriate request to
13 make, particulars in a Royal Commission. In any event,
14 as much as I can, I have provided my learned friend's
15 solicitor with a view about the way in which his
16 clients, or at least some of them, are involved.

17 That information did not constitute formal
18 particulars in the way we understand it in a criminal
19 trial or a civil trial, but I would suggest to my
20 learned friend that if he confers with his instructing
21 solicitor, he will know what, in broad terms, is alleged
22 against his clients, or some of them, and he should have
23 leave and make submissions on that basis, rather than
24 have a foot in both camps, as it were. Is he appearing
25 for the men? Does he have leave? Therefore, does he
26 have standing to make submissions about the terms of
27 reference?

28 COMSR: Mr Tilmouth, as I have indicated I, of
29 course, would welcome hearing anything from you by way
30 of submission, providing that you have leave to appear,
31 but I understand you are not seeking such leave. It may
32 well be, of course, that you will have instructions to
33 do so, but for the present I think it is a little
34 premature for you to be seeking to advance the argument.

35 MR TILMOUTH: It is impossible to get instructions on
36 virtually nothing. We wrote on 10 July pointing out our
37 interest in the matter and who we represented. We

1 sought assistance for legal funding. We have not had
2 the courtesy from anybody of a formal response.

3 The Attorney-General has gone on television on 15
4 July saying people will be funded, but as yet nothing
5 has been done about our application and your proper
6 inquiry, with respect, necessitates that the
7 circumstances are adequately investigated. That
8 includes a proper and reasonable cross-examination and a
9 proper advance inquiry about all the participants.

10 We cannot do any of those things because we do not
11 know what is being alleged and we have got no money in
12 which to embark upon a proper process. The men I
13 represent have not even been given proper preliminary
14 legal advice about the implications of this Royal
15 Commission for them.

16 COMSR: I think that is a matter that you should
17 discuss with counsel assisting, but as at present, as I
18 say, you are not making the application for leave to
19 appear and, therefore, I cannot invite you to make
20 submissions on the terms of reference, but I will
21 certainly hear from you if and when it should be the
22 case that you do appear.

23 MR TILMOUTH: As I said, we are put in this invidious
24 position.

25 COMSR: Yes, I understand your position and I am
26 inviting you to take it up with counsel assisting.

27 MR TILMOUTH: We are doing that.

28 COMSR: But not during the course of that
29 hearing.

30 MR TILMOUTH: I understand, and I would not do that,
31 but we have been doing that constantly and we cannot get
32 an answer. May I say one thing and I will leave it at
33 that? I understand, as well, that the Premier, for whom
34 this Royal Commission was instituted - it is by command
35 of the Premier - has made public statements that he does
36 not believe that the secret envelopes would be part of
37 this inquiry.

1 COMSR: Again, that is a matter that goes to
2 what the terms of reference mean and that is the matter
3 on which I have said I really cannot hear you at this
4 time.

5 MR TILMOUTH: I will leave it at that but, in my
6 submission, when looking at the terms of reference the
7 public statements of the Premier are very useful in
8 construing what he meant.

9 COMSR: That may be so, when your position
10 becomes clarified I will hear you on all those matters.
11 Who is next?

12 MS LAYTON: I think in terms of seniority I am. If
13 I could first of all deal with the terms of reference.
14 The terms of reference, as Mr Abbott has pointed out,
15 does have a reference in the preamble to `Secret women's
16 business' in the two paragraphs that he has illustrated
17 and then, when one gets to the terms of reference proper
18 as distinct from the preamble, it refers to `Women's
19 business' only without a reference to `Secret women's
20 business'.

21 As he points out in the definitions towards the
22 bottom of the page `Women's business' is described in a
23 very broad sense, as is `Aboriginal tradition'. Whether
24 it is inclusive or exclusive does not make a difference
25 from the point of view of the submission I may wish to
26 make at this point.

27 The ALRM submit that there are a number of ways in
28 which one could look at what is meant by `Women's
29 business' in a practical sense and much of that depends
30 on what the allegations of fabrication are. In other
31 words, this Royal Commission has been brought about by
32 allegations made with respect to fabrication of women's
33 business, but bearing in mind those allegations have
34 come from a quarter that Mr Abbott represents, it seems
35 to be putting the cart before the horse to say that a
36 whole lot of things ought to be proffered, including
37 envelopes which his clients say they have never read, in
38 in order to come to the approach that the commission

1 should take to the taking of evidence and the order of
2 evidence and the whole process.

3 Our submission is that where what is alleged is
4 unspecified - namely, that it is an allegation that
5 `Women's business' is fabricated without saying what
6 aspect of `Women's business' - is it that which was
7 told to Dr Fergie? Is it that which was told to
8 Professor Saunders? Is it that which is in the secret
9 envelopes? - it is for the persons making the
10 allegations to assert the fabrication and not to defend
11 the impossible and the unknown and the unspecified.

12 This is where the submission that Mr Tilmouth has
13 made in respect of his client also stands generically, I
14 would submit, for all persons who come before this
15 commission who are not making assertions of fabrication.
16 What is it that they are meant to answer? I talk here
17 primarily and obviously for Aboriginal people because
18 the ALRM represents the protection of the legal rights
19 of Aboriginal people, but I say it would also be true in
20 respect of most other persons who would be coming before
21 the commission.

22 We would submit that, in the absence of an opening
23 address by counsel assisting the commission, to know
24 what the fabrication is that is alleged, without
25 statements from the persons who say there has been
26 fabrication, there can be no preparation by any witness
27 for any statement about any aspect of fabrication. It
28 is the most unusual commission to start evidence without
29 an opening and to start evidence without being given
30 statements.

31 COMSR: I do not think that is intended, Ms
32 Layton, that the evidence will be -

33 MS LAYTON: We are on Monday and I understand that
34 we are to start Thursday and we have got nothing. This
35 is the most rapid commission. This is no disrespect to
36 you, commissioner, because you have been given a time
37 frame in which to operate and have got to do the best
38 you can within that time frame, but the net practical

1 reality is that there is nothing on the table from which
2 we can ascertain what it is that we are meant to do.

3 If it is the broad definition of `Women's business',
4 and we would submit that the terms of reference would
5 lend itself to that, then that means that `Women's
6 business' is looked at in the broad, but, again, it
7 depends on what are the allegations of fabrication that
8 are made?

9 Assuming them to be broad, and Mr Abbott seems to
10 preface that they are broad, then that encompasses all
11 sorts of things in respect of those who may wish to
12 tender evidence about whether or not it is fabrication.

13 That goes for both sides. Insofar as people may be
14 wishing to have material that is relevant to the broad,
15 again, they would have to have a focus to enable them to
16 assess what aspects are relevant. In particular,
17 anthropological evidence.

18 If I can move away from specific examples of the
19 conspiracy aspect that may suggest itself, but into the
20 anthropological. In order to look at women's business,
21 one needs to look at it in a context of Aboriginal
22 tradition. It is not taken in isolation, but, again,
23 what is it that has been fabricated?

24 So our starting point is, first of all, it would be
25 for the commission to consider whether `Women's
26 business' is defined in the broad or in the very narrow
27 and, in order to reach that position as a starting point
28 at least, one would have to know the extent of the
29 allegations which are being made with respect to its
30 fabrication.

31 Turning now to the meaning of `Fabricated', as my
32 friend Mr Abbott has indicated, there are a number of
33 possible interpretations of that. We would assume that
34 that would incorporate also: is it referring to a plan
35 by a person or persons to lie about the existence of
36 women's business? Is that part of the fabrication that
37 is alleged? In which case, what was the plan and
38 between whom? These need to be known so that the

1 persons who are alleged to have been involved in this
2 plan or construction or manufacture, can know that they
3 are one of the people being spoken of.

4 The second aspect of fabrication is: Is it not only
5 suggesting that there has been a plan to manufacture
6 women's business, but is it suggesting that women's
7 business in itself is a lie as to its existence and its
8 content? It would seem to me inferential, from what Mr
9 Abbott is saying on behalf of his clients, that both
10 aspects of that may be the subject of allegations which
11 are being proffered by his clients. But those are two
12 possible interpretations and I suspect both apply in
13 respect of this Royal Commission.

14 With respect to the secret envelopes, this is a
15 matter which the commission will have to decide, but,
16 again, we submit that it depends on the allegations
17 which are being made. Are Abbott's clients submitting
18 that that which they have not read is a fabrication? It
19 is quite a remarkable submission to make, but, in any
20 event, it is not a matter that can even properly come
21 before the commission, to consider whether or not you,
22 Madam Commissioner, should have the secret envelopes
23 before you until we know the extent of the alleged
24 fabrication.

25 Secondly, this will herald the problems that Dr
26 Gavan Griffith indicated to the commission when he was
27 here on the opening day as to constitutional problems
28 which would emerge because the envelopes themselves were
29 part of a Section 10 Inquiry, and to the extent that the
30 contents of those envelopes are made forcibly available
31 to the commission will immediately bring into play
32 questions of Section 109 inconsistency and, no doubt,
33 the Federal Government will be wished to be heard with
34 respect to that.

35 So I see the matter there as a twofold problem.
36 One, as to the relevance in the overall context, and,
37 two, if relevant, whether or not, because of

1 constitutional matters, they may ever be produced to
2 this commission.

3 The third aspect of that was that my friend
4 indicated that I had given an undertaking to the Federal
5 Court. The undertaking which I gave to the Federal
6 Court is that those envelopes would be kept protected
7 and secured until such time as the Federal Court
8 proceedings had been completed or in the event of any
9 High Court challenge, if there be one, being completed.

10 What happens with respect to that undertaking
11 depends on what request is made and from whom at what
12 point. I have given an undertaking as to their
13 security. That is not synonymous with them being in my
14 custody. To the extent that they are sought, other
15 people's consent would be required and not the least of
16 it would be Mr Tickner.

17 So, in summary, just on the terms of reference, and
18 I note that there are other matters to also come up for
19 a topic, we would submit the broad interpretation of
20 'Women's business', that fabrication includes the two
21 matters that I submitted, namely, whether or not there
22 was a plan or manufacture, and whether or not women's
23 business is itself a lie or whether it is true.

24 We also submit that there is nothing that can
25 reasonably be done without knowing the exact allegations
26 of fabrication that are to be proffered by those who
27 allege fabrication and that that should be the starting
28 point of any aspect of what is given to the parties to
29 know what they are meant to face in this commission. I
30 have nothing further on the terms of reference, if the
31 commission please.

32 MR STRATFORD: Commissioner, I do not wish to make a
33 separate representation to you at this stage. I simply
34 adopt the reasoning put forward by Ms Layton.

35 COMSR: Is there anyone who does wish to make a
36 representation?

37 MR WARDLE: I think I am next. The preamble asserts
38 two things of significance to this stage of the inquiry.

1 The first is that there have been allegations and the
2 second is that there have been significant disagreements
3 in relation to those. In my submission, it is not
4 possible for counsel to make any useful statement about
5 the terms of reference until we have at least sufficient
6 particulars to know what the allegations actually are
7 and who made them.

8 Furthermore, we need information about the areas of
9 disagreement that are said to exist in the preamble. So
10 I join with my friend Mr Tilmouth seeking further
11 details, whether they call those particulars or
12 otherwise.

13 MR ABBOTT: Could I make one response to something
14 my learned friend Ms Layton said?

15 COMSR: Yes.

16 MR ABBOTT: My learned friend suggested that my
17 clients were making allegations of fabrication in
18 respect of something they had not read. They are not
19 making allegations of fabrication about something they
20 have not read.

21 The comments and criticisms that they have made -
22 and whether they fall within the definition of
23 criticisms amounting to an allegation of fabrication
24 depends upon what construction you put upon that
25 terminology - is in relation to the reported utterances
26 of Dr Kartinyeri, Professor Saunders and Dr Fergie and
27 Dr Draper. In our submission, this Royal Commission
28 could and should not proceed without those who assert
29 that there is secret women's business being called upon
30 to put up or shut up.

31 MS PYKE: I would like to have it noted that I
32 adopt the submissions of Ms Layton and I would also like
33 to say that, at this stage, insofar as Dr Fergie is
34 concerned, we simply do not know what the allegations
35 are, whether there is some suggestion that she has been
36 implicit in some conspiracy to fabricate, whether there
37 is an allegation that her methodology as an

1 anthropologist was defective. We simply do not know
2 what it is we are going to be called to meet.

3 I understand there is anthropological evidence that
4 may be given. I have not got any statement. I am not
5 able to have my instructor take a proof from Dr Fergie.
6 I understand this evidence is likely to be the first
7 evidence called when the commission opens. I am in the
8 position of simply not having any idea what I am here to
9 represent in terms of representing Dr Fergie's
10 interests.

11 I reiterate that it seems to me that the allegation
12 is that there has been a fabrication. It is important
13 for us to know what it is being alleged. It is putting
14 the cart before the horse to say that secret business
15 must be amplified when what has actually started this
16 commission is this allegation that it was fabricated.
17 Certainly there is some basis for the allegation of
18 fabrication and we are entitled to know that so that we
19 can adequately represent the interests of our witnesses.

20 MR STEELE: My instructions are relatively new. So,
21 in a sense, I have to reserve my position on this issue,
22 but in the light of what Mr Abbott has now said, I quite
23 clearly adopt the submissions of Ms Layton, that if it
24 is being alleged that Dr Draper has played some part in
25 some alleged fabrication, then quite clearly we need
26 particulars of that.

27 MR BOURNE: I foreshadowed previously an application
28 for leave to represent Mr Doug Milera. I said then that
29 he appears to be a person with a special interest in the
30 commission. That certainly is his understanding, an
31 understanding formed as much on assumption at this stage
32 as on materials.

33 In that regard, as to the unavailability of all of
34 the material relevant for him to assess his position and
35 certainly to seek legal advice in respect to it, I would
36 respectfully adopt what has been said already this
37 morning by Mr Tilmouth and by Ms Layton, but I do seek,
38 nonetheless, to represent Mr Milera at this stage so

1 that I can complete the inquiry into relevant material.
2 I can make submissionss on the basis that I can, as
3 presently instructed, with the view to providing such
4 information as we can assess as being relevant to the
5 commission.

6 COMSR: You have leave to appear.

7 MR BOURNE: I wish to say, in respect of that leave,
8 that we would not wish it to be taken to be a commitment
9 to give evidence in the matter, nor to be represented
10 for the duration of the commission, nor of the hearing.
11 We will assess our position as material is acquired and
12 as we become aware of the allegations which are to be
13 the subject of the inquiry.

14 With respect to what has been said already, it does
15 appear to me that a substantial issue arises out of the
16 submissions made by Mr Abbott with respect to whether
17 the terms of reference are different and significantly
18 different from the preamble which follows, particularly
19 in relation to the issue of secret women's business.

20 It does seem to me that the question of whether you
21 are to investigate women's business in a general sense
22 or secret women's business needs to be addressed very
23 closely. We certainly require clarity in respect of
24 that before we can assess our position.

25 My client has no particular knowledge of `Women's
26 business' or `Secret women's business'. His involvement
27 is more in relation to other matters. But with respect
28 to whether the inquiry is about `Women's business'
29 generally or `Secret women's business' we, for example,
30 would refer or advise the commission of the comments
31 made by the Honourable the Premier in announcing and in
32 setting up the commission. He is on record, as I
33 understand it, from an ABC radio interview, in response
34 to a question from a reporter:

35 `Will you make them open - '

36 I guess referring here indirectly to the commission:
37 `the Royal Commissioner - open the sealed envelope that
38 contains the women's business? I mean that seems to be

1 the central point here.'

2 The Honourable the Premier replied:

3 'No, no. My view is that's not the central issue at

4 all. In fact, I would doubt very much whether in fact

5 the Royal Commissioner will be offered the envelopes.'

6 Reporter:

7 'Well then how can you check whether it's true or not if

8 you don't look what's in the envelope.'

9 The reply:

10 'Well that's not central to the term of reference that's

11 been prepared by Cabinet. And you can understand that

12 quite clearly. It has nothing to do - it doesn't refer

13 to the secret envelopes and we are not expecting the

14 Royal Commissioner to have the secret envelopes.'

15 COMSR: But what has that got to do with the way

16 in which I interpret my terms of reference?

17 MR BOURNE: As I understood Mr Abbott's submission,

18 it was to the effect that you must have the envelopes

19 and you must investigate the secret women's business.

20 That is the whole point of the commission. If that is

21 the whole point of the commission, and it would seem

22 from the preamble to the terms of reference that it

23 looms large - if it is not the central issue, then what

24 is the commission to achieve?

25 The commission is here to investigate things which

26 are extraneous, that is, 'Women's business' in a more

27 general wider sense than the concerns that are contained

28 in the preamble. It does seem that the terms of

29 reference do not reflect very adequately the preamble,

30 or they seem to address an issue which is somewhat wider

31 than the very specific term as is used in the preamble.

32 So, in order that I can advise my client, I would

33 certainly be seeking a ruling as to whether 'Women's

34 business', either in the general sense or the more

35 narrow sense, is to be the focus of the commission.

36 My client's concerns about the building of the

37 Hindmarsh Island Bridge are more to do with matters

38 outside the terms of reference. It is for that reason

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1 that he is not sure at the present time as to what
2 evidence he can usefully give to the commission. It may
3 well be that he elects to give evidence about those
4 matters, that is, the matters of interest to him to the
5 Commonwealth inquiry that has been announced.

6 COMSR: That is a matter that goes more to the
7 issue of the conditions of his leave to appear. At the
8 present moment we are addressing the issue of the terms
9 of reference as they appear in the commission and how
10 they are to be interpreted.

11 MR BOURNE: With respect to those, my client's
12 attitude will depend on what further material is made
13 available to him by way of full disclosure of the
14 material which touches upon him. I understand that he
15 is the subject of radio and/or television interviews
16 which I have not yet seen. That material has not been
17 provided.

18 COMSR: That may be the case, but I still think
19 you are addressing your remarks to the wrong issue at
20 the present moment.

21 MR BOURNE: Making those remarks by way of leading
22 to a comment, I wish to put, as to term 1 of the term of
23 reference, in particular the use in 1(a) of the terms of
24 reference, of the terminology 'The circumstances
25 relating to such a fabrication', it seems to me that
26 'The circumstances' as used there, must involve the time
27 or times of fabrication, the place or places of
28 fabrication, those who were present at that time and
29 place, and who said what in relation to the fabrication.

30 COMSR: I understand that to be the matters into
31 which the commission is to inquire.

32 MR BOURNE: My client's attitude towards allegations
33 of that sort will have to be formulated in response to
34 the material which is available which suggests that he
35 has knowledge about each of those things. At the
36 present time, I have a number of assumptions about those
37 things, but not full disclosure, and it seems that the

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1 other parties are complaining of lack of full disclosure
2 as to exactly what those allegations are.
3 COMSR: This is not a trial though. This is an
4 inquiry into -
5 INTERJECTOR: It is a monkey show.
6 COMSR: Just a moment. This is a preliminary
7 matter on a legal issue and I would expect people in the
8 hearing to be quiet while these matters are raised so
9 that I can follow the arguments that are being put.
10 CONTINUED
11

1 MR BOURNE: My argument is in order to advise my
2 client and obtain instructions and prepare for the
3 hearing with respect to, in particular, the
4 circumstances of the fabrication. I need to know what
5 are and are not. Necessarily, today, I will need to
6 know to enable me to prepare the matter the time and
7 times of the alleged fabrication, who was present and
8 what is alleged was said. Once I have the material, I
9 will be in a position to obtain his instructions in
10 relation to that particular Term of Reference.

11 COMSR: You're equating this as something of a
12 request for particulars in the file; is that what you
13 are saying?

14 MR BOURNE: To the extent that my client can
15 identify himself as a person with a special interest to
16 the Commission and give evidence, we need to know the
17 matter about which it is suggested he can give evidence.
18 At this stage, that is particularly unclear and that is
19 the effect of what I say.

20 INTERJECTOR: No-one knows.

21 MR BOURNE: With respect to your comment as to it
22 not being a trial, none the less with respect to the
23 allegation that there has been a fabrication, that
24 clearly, it seems to me, is an allegation which conveys
25 some criminal intent. The question of onus and the
26 proof will clearly assume some significance.

27 It seems from what Mr Abbott has said, for example,
28 that the onus should be on those who are alleged to have
29 fabricated to prove beyond reasonable doubt, or to prove
30 in some way they did not fabricate. Obviously, other
31 parties would suggest that the onus is on those who are
32 making the allegation to disclose what the allegation is
33 and for them to meet whatever is the appropriate onus.

34 In respect of that, we suggest that there is at
35 least a Briggenshaw1-type onus on those who are making
36 the allegation. So that my client can answer that, we
37 would seek full disclosure of what the allegations are.

38 COMSR: Are there any other counsel who wishes

1 to address any submissions as to the Terms of Reference?
2 Counsel assisting.

3 MR SMITH: As to the complaint that has been
4 repeated a number of times concerning the lack of
5 particularity, can I remind counsel at the bar table
6 that this is an inquiry. An `inquiry' is held by
7 definition because, in large measure, apart from
8 allegations and comments in places such as the media
9 about controversy, the case is unknown and the case will
10 unfold in the course of the inquiry and the
11 investigation.

12 I can provide to counsel a general picture of what I
13 now know of their involvement and I will do that, and
14 have done that. But it may be that I cannot do more and
15 I submit to you that the general gist of the interest
16 that various people here at the bar table have is known
17 to them. But I will do my best to provide more, but it
18 won't be in the nature of particulars, it cannot be.

19 As to my submission as to the Terms of Reference,
20 can I start by dealing with the structure of the
21 Commission document itself. Clauses one to five of the
22 preamble set out, in effect, the mischief sought to be
23 addressed by the inquiry. To some extent, those
24 preamble clauses are a flagging of what is alleged and
25 not alleged and what the province is.

26 Clause 6, the final clause of the preamble, sets
27 out, in effect, what I would submit is a brief to you,
28 or rather what the Government hopes to be able to
29 achieve from your report in this matter. The core term
30 in the Commission documents is the first Term of
31 Reference, clause one. The balance of the terms are two
32 to five and the definition addresses the ways and means
33 by which the core function of the Commission is to be
34 addressed.

35 I go now to clause one and `women's business' first
36 of all. `Women's business' in clause one is clearly
37 that which exists in appendix 2, and, as I understand
38 it, is further explained in appendix 3 in the sealed

1 envelopes. Because, Commissioner, the definition of
2 `women's business' in the final paragraph of the Terms
3 of Reference picks up the description of `women's
4 business' in the report of Professor Cheryl Saunders
5 dated July 1994 which, in turn, picks up the description
6 from the report of Dr Deane Fergie dated June 1994 which
7 will eventually be the subject of evidence. The
8 preamble, namely clause 2, also makes it clear.

9 In relation to `women's business' - and I agree with
10 my learned friends Mr Abbott and Miss Layton that there
11 is, first of all, a broad interpretation of `women's
12 business' and any aspect of it would capture, in
13 particular, secret women's business.

14 As to the confidential appendices 2 and 3, this is a
15 difficult area and the Commission is alert to this. I
16 submit, although I accept that it's a matter for your
17 decision, that the contents of the confidential
18 appendices 2 and 3 will need to be seen by at least
19 these people: Yourself, all the Ngarrindjeri women
20 represented in this inquiry in accordance with
21 Aboriginal tradition and perhaps female anthropologists
22 or historians involved in this hearing.

23 I draw to the attention of yourself that the
24 envelopes themselves, as the report of Professor
25 Saunders indicates, is marked `To be read by women
26 only'.

27 INTERJECTOR: That's right, not you.

28 COMSR: I would ask that people sitting in the
29 hearing room not make comments because it interrupts the
30 flow of an argument and makes it difficult for me to
31 follow the course of the argument, so I ask of you the
32 courtesy that you not interrupt while counsel's
33 addressing what is, after all, a legal argument to me.

34 MR SMITH: I make the -

35 INTERJECTOR: It's not a legal argument.

36 COMSR: Just a moment.

37 MR SMITH: I make the point that the envelopes
38 themselves are marked `To be read by women only', and I

1 wouldn't be seeking to read them myself at any stage.

2 I point out also in relation to this phrase in the
3 Terms of Reference that the privilege of knowing what
4 was in the envelopes has been extended, as the evidence
5 will establish, to: Dr Deane Fergie in June 1994,
6 Professor Cheryl Saunders in June 1949 and the
7 Minister's assistant Susan Kee in July 1994. Further,
8 it appears from the reports to hand and in particular
9 the report of Professor Saunders, that on 20 June at
10 Goolwa, the secret women's business was extended to some
11 of the younger women in the group of 35 gathered at a
12 meeting on that date.

13 I indicate that in relation to the secret
14 appendices, the Royal Commission has, by letter late
15 last week, requested that my learned friend Miss Layton
16 QC obtain instructions to disclose the contents of the
17 confidential envelopes to certain of the Ngarrindjeri
18 women represented here.

19 I move to the question then in relation to women's
20 business. What does the mention of that in the Terms of
21 Reference mean in terms of what evidence will need to be
22 the subject of this inquiry? It's my submission that
23 the scope and presentation of evidence as to this Term
24 of Reference, in so far as it relates to women's
25 business, is really demonstrated by the two definition
26 sections in the Terms of Reference themselves. To
27 determine whether women's business is fabricated, it's
28 necessary for the Commission to examine women's business
29 within the Aboriginal tradition of the Ngarrindjeri
30 people. The Aboriginal tradition is defined in the
31 Terms of Reference as being:

32 `The body of traditions, observances, customs and
33 beliefs of Aborigines generally or of a particular
34 community or group of Aborigines and includes any such
35 traditions, observances, customs or beliefs relating to
36 particular persons, areas, objects or relationships.'

37 So, therefore, this inquiry, in looking at the
38 question of women's business, will necessarily look at

1 the Aboriginal biological, the Ngarrindjeri history,
2 anthropological, archaeological history. The inquiry
3 will also necessarily examine the process by which
4 Aboriginal communities became involved in the Hindmarsh
5 Island development, including the construction of the
6 bridge. It will be the process by which Aboriginal
7 people became involved in the construction of the bridge
8 which will be the Commission's focus, not, of course,
9 whether the bridge should be build, the economic
10 considerations, conservation considerations, et cetera.

11 I turn to the question of fabrication, which is the
12 next consideration in clause one. I will hand to you -
13 and I won't read from a series of dictionary definitions
14 of the word `fabricated' and `fabrication', but I'm
15 referring to, for the sake of the record, the Third
16 Edition of the Oxford Dictionary, the First Edition of
17 the Macquarie Dictionary and the Collins Dictionary of
18 the English language, Second Edition. The distillation
19 of those dictionary definitions, rather than read them
20 out, produces, arguably, three aspects or meanings to
21 the transitive verb `to fabricate' -

22 INTERJECTOR: Wasn't `to fabricate'.

23 MR SMITH: The word comes from the Latin word
24 `fabricare': to build or to make. I submit to you,
25 Madam Commissioner, that there are, in the context of
26 this matter, three possible interpretations, or arguable
27 interpretations, of `to fabricate' or `fabrication'.
28 They are: Firstly, to make or create something new or
29 novel from actually existing components; secondly, to
30 make up or create something out of nothing, but not
31 necessarily with an intent to deceive or lie; and,
32 thirdly, to make up a story, tell a deliberate lie.

33 The Terms of Reference then require you,
34 Commissioner, if you find there to be a fabrication,
35 then you turn to the circumstances relating to such
36 fabrication, the extent of such fabrication and the
37 purpose of such fabrication.

38 If women's business is a fabrication or any aspect

1 of it is a fabrication, it is clear that in coming to
2 that conclusion, you will have explored all three of
3 those matters in any event; that is, you will have
4 looked at the circumstances relating to the issue, you
5 will have looked at the extent of it, you will have
6 heard details about the purpose of it. My submission to
7 you there is that the way in which that is phrased in
8 clause one, you will be addressing your mind to what the
9 Government wish you to report on.

10 I will now quickly deal with the balance of the
11 clauses which I have called the directives to you about
12 the conduct of the inquiry. First of all, you are
13 directed to avoid prejudicing any judicial proceedings
14 which are presently extant. You are directed to protect
15 confidentiality. Your attention is directed to s.35 of
16 the Aboriginal Heritage Act. You are required to look
17 sensitively at matters of confidence, and that sort of
18 thing.

19 Can I deal, first of all, with Professor Saunders'
20 report which is at the vanguard of previous judicial
21 proceedings. This inquiry will not be investigating the
22 report of Professor Cheryl Saunders of July 1994
23 obtained by the Federal Minister pursuant to s.10(4) of
24 the Aboriginal and Torres Strait Islanders Act, 1984.
25 The Commission has no interest and ought to have no
26 interest in looking at what Professor Cheryl Saunders
27 should or should not have done, or otherwise, as to the
28 conclusion reached in her report. Indeed, to do so
29 would be contrary to clause 3(a) and perhaps
30 unconstitutional. However, this Commission is entitled
31 and must inquire into the subject matter which
32 constitutes the surrounding circumstances of Professor
33 Saunders' report.

34 The second matter is the Federal Court action. The
35 Federal Court action between Thomas, Wendy and Andrew
36 Chapman v the Federal Minister & Ors cannot be
37 prejudiced by this inquiry. Again, that action
38 concerns, if I could broadly describe it, the

1 administrative efficacy of the Minister's decision, or
2 the exercise of power by the Minister under the
3 Aboriginal and Torres Strait Islanders Act 1984. This
4 inquiry is not concerned with and cannot be concerned
5 with how the Minister exercised this power and whether
6 or not what he did was properly reviewable.

7 Again, the subject matter of and the circumstances
8 leading up to that declaration will and can be the
9 subject of this inquiry.

10 The third matter which needs care and sensitivity in
11 this inquiry is the question of racial discrimination
12 and the Racial Discrimination Act of the Commonwealth,
13 1975. It is my submission to you that the Terms of
14 Reference direct to you that sort of problem, and
15 clearly any compulsion on the Ngarrindjeri Aboriginals
16 to divulge, in contravention of Aboriginal tradition,
17 their beliefs would have the potential to breach the
18 Racial Discrimination Act. Therefore, you, Madam
19 Commissioner, will take care in this sensitive area.

20 Fourthly, confidential matters of Aboriginal
21 tradition, subject to the terms of authorisation of the
22 Minister under s.35 of the Aboriginal Heritage Act, the
23 South Australian Act, the following matters will, I
24 submit, need some care in this inquiry. If there is
25 evidence that there may be a divulgence which amounts to
26 a contravention of Aboriginal tradition, then the
27 Commissioner will take such evidence in camera and the
28 evidence itself will be prohibited from publication.

29 Nextly, more specifically, if there is evidence
30 which is or is claimed to be secret women's business,
31 then, additionally, the hearing room can be cleared of
32 males.

33 Sixthly, there may be other categories of evidence
34 which may give rise to concern and require the taking of
35 such steps so as to protect confidentiality.

36 They are my submissions.

37 COMSR: I don't know if there are any further
38 submissions on that point? I wouldn't propose to give

1 my ruling on the meaning of the Terms of Reference this
2 morning.

3 MS LAYTON: Could I ask a point of clarification. I
4 want to see whether counsel assisting was indicating
5 that he was not going to give a public opening. As I
6 understood - and I might have inferred wrongly, and this
7 is the information I wish to clarify - as I understand
8 it, he was going to communicate individually to people
9 who may be involved in it, to say what their involvement
10 might be which. That seems, with respect, an
11 inappropriate process where it should be, in fact,
12 public.

13 The trouble is that all of the people here are
14 interrelated in some way and it should be by way of a
15 public opening that says: 'This is the way the evidence
16 is to be led'.

17 COMSR: We have been assured that there will be
18 an opening before any evidence is taken.

19 MS LAYTON: In particular, whether there is time for
20 people to take instructions. I mean, my friend has
21 indicated that certainly at this time there will be an
22 opening. Looking at the biological side as he said it,
23 I don't know quite how that fits, the archaeological
24 side and the traditional evidence with respect to the
25 Aboriginal tradition? This is an area in particular
26 that my client is significantly interested in and we
27 would have to have some forewarning of what it is that
28 the witnesses will say that they intend calling, because
29 these are areas in which we have a very specific
30 concern.

31 COMSR: You can take those concerns up with
32 counsel assisting, but I'm sure that if you find that
33 you have a problem there, that you will be addressing
34 some submission to me concerning that.

35 MS LAYTON: I am heralding that if there is not
36 sufficient time, (a), we submit that this opening should
37 be public. It shouldn't be a matter of conferring
38 individually with any particular people.

- 1 COMSR: I am saying there will be an opening.
2 MR SMITH: I will confirm there will be an opening,
3 a general opening statement, on Thursday morning.
4 MS LAYTON: To be followed by evidence on Thursday?
5 MR SMITH: Yes.
6 MS LAYTON: That is the problem. That is exactly
7 the problem I'm heralding. There can't be an opening on
8 the same day that evidence is adduced. One of problems
9 will be that the opening will disclose certain matters
10 on which we will immediately not necessarily be in a
11 position to be able to cross-examine on. We herald
12 that.
13 COMSR: It doesn't follow that everybody can
14 cross-examine at length. Cross-examination is a matter
15 for the discretion of the Commissioner. However, as I
16 say, it's always up to counsel to make a submission to
17 me concerning any problems that they're faced with.
18 MS LAYTON: If I can herald the possible problem.
19 If there is to be an opening on the Thursday for the
20 first time and to be followed immediately by evidence,
21 there may well be a problem so far as my client is
22 concerned.
23 The second aspect I wonder if I could address you
24 briefly on, and it arose in the context of the other
25 people who went before me. There was the analogy as to
26 whether it was a criminal matter or whether it was an
27 inquiry. The submission I wish to make on that is that
28 it's a matter of natural justice as an administrative
29 body, or a body that is dealing with an inquiry under
30 letters patent. It is quite clearly the need for those
31 who may be involved to know what it is that they may
32 have to face. It is not a matter of particulars in a
33 criminal matter, but to enable those that face being
34 involved to know what they're meant to meet, and that is
35 the purpose.
36 COMSR: Perhaps you might enlarge upon that
37 argument when we come to consider the terms of the leave
38 to appear and the conditions of the leave to appear.

1 MS LAYTON: Certainly. Thank you.

2 COMSR: As I indicated, I don't propose at this
3 stage to give any ruling on the question of the meaning
4 of the Terms of Reference, but I propose now to move
5 onto the next matter for counsel assisting, the issue of
6 confidentiality or the terms of leave to appear.

7 MR SMITH: To the extent that people have not
8 addressed those matters or they are unsatisfied with
9 some indications of what safeguards the Commission is
10 going to take, that can be addressed, but it may be that
11 no-one has anything to say about that, bearing in mind
12 what is being said.

13 COMSR: I will invite counsel if they have
14 submissions on the issues of confidentiality and privacy
15 to make any submissions on that, to do so.

16 MS LAYTON: I seem to be the only one standing on my
17 feet at this point. I will see if there are any other
18 advances, as it were.

19 COMSR: I'm more particularly interested with
20 regard to the Terms of Reference.

21 MS LAYTON: That is the confidentiality with regard
22 to the Terms of Reference. The two matters that I wish
23 to raise relate to: firstly, s.35; and, secondly,
24 confidentiality in general.

25 With regard to s.35, the ALRM is aware that an
26 authorisation has already been given by the Minister to
27 yourself and those assisting you to be able to receive
28 information in a way that without that authorisation it
29 would otherwise be an infringement of the State
30 Aboriginal Heritage Act.

31 If I could remind you, Madam Commissioner, of what
32 those terms are. It says:

33 `Except as authorised or required by this Act, a person
34 must not, in contravention of Aboriginal tradition' -

1 and I underscore those words - 'Divulge information in
2 relation to an Aboriginal site or Aboriginal tradition.'
3 The only way in which any information can be given by
4 any person which would contravene Aboriginal tradition
5 and the giving of evidence in accordance with Aboriginal
6 tradition is if the Minister has given an appropriate
7 authorisation.

8 The authorisation, as we are aware of at the moment
9 - and the Commission may be aware that that has been
10 challenged by the ALRM in the Supreme Court, but a date
11 has not yet been set for the hearing of that challenge
12 with regard to that authorisation - counsel assisting
13 indicated that if there were matters that came up within
14 the meaning of s.35, that that would have to be dealt
15 with by evidence being taken in camera, et cetera. Now,
16 the authorisation that that be given at the moment does
17 not allow, in turn, any information to be given by
18 either yourself as Commissioner nor counsel assisting to
19 anybody else. So, unless there has been a further
20 authorisation which the ALRM does not know about, the
21 suggested procedure that would be suggested by counsel
22 assisting would, in fact, offend s.35.

23 Now, it may well be that that has been apparently
24 overcome, although one of the challenges that is made in
25 respect to the overall authorisation that that be given
26 may well be true of any subsequent one.

27 I won't go through what the arguments are. That is
28 obviously a matter for the Supreme Court and not a
29 matter for you, Madam Commissioner. This is the first
30 thing: By what authorisation can any evidence be given
31 in accordance with the way that counsel assisting has
32 indicated would be the appropriate procedure?

33 The second aspect is connected with that, but can
34 stand alone from that. That is: the extent to which
35 information and the giving of it may, in fact,
36 contravene Aboriginal tradition. Some of the methods
37 that have been spoken of - namely, if 'women's business'
38 is to be the subject of any evidence - it's suggested

1 that the Commission could be cleared of any males.
2 That, of itself, is not the only aspect. Males are one
3 thing, appropriate women - be they white or Aboriginal -
4 is another. They are all related to the question of
5 what information and how information can be given that
6 is not in contravention of Aboriginal tradition.
7 CONTINUED

1 This would have to be on a case-by-case basis. In
2 other words, we herald what the problem is and that
3 information and the details that might be sought might
4 have to be held on an individual basis each time as to
5 the manner in which information should or should not be
6 given. So those are the two matters that I indicate.

7 There is a third matter with regard to section 35,
8 and that is, to the extent that information has already
9 been given pursuant to an authorisation given by the
10 minister, which is now the subject of legal challenge,
11 we would ask that until such time as that legal
12 challenge is heard, that the section 35 should in fact
13 be adhered to. We would request that.

14 Of course, there is no court order as to that, but
15 we would request it because there could be a significant
16 embarrassment for this reason: if information is given
17 contrary to tradition, like all confidential
18 information, once it has gone it has gone. It cannot be
19 taken back again. That is why it is a very significant
20 thing for information to be given which would contravene
21 section 35.

22 Section 35 was put there for the very good purpose
23 that it was meant to maintain those matters which were
24 traditional to Aboriginal people, for them alone, and
25 not to be divulged inappropriately. We would submit
26 that there is a very strong argument which will be put
27 to the Supreme Court about that, and we ask you to bear
28 that in mind, having regard to the challenge that we
29 have made with regard to the section 35 authorisation.

30 Those are our submissions that we wish to make with
31 regard to confidentiality.

32 MS PYKE: It would be my submission that it would
33 be inappropriate to make any order in general about the
34 nature in which confidential information is to be dealt
35 with. Dr Fergie, of course, occupies a particular
36 position in these proceedings. She was an
37 anthropologist who was commissioned by the Aboriginal
38 Legal Rights Movement to assist in the preparation of a

1 report for the section 10 declaration. I am not in a
2 position yet to obtain full instructions about the
3 manner in which she went about her task or the manner in
4 which confidential information was imparted to her.

5 I would seek, very particularly, to be able to
6 address the issue of the extent to which Dr Fergie
7 should or should not give evidence about information
8 that was conveyed to her on a specific case basis as and
9 when Dr Fergie gives evidence. I simply say I am just
10 not in a position at the moment to address full argument
11 on those particulars. There is a body of case law
12 relating to such issues as the extent to which
13 disclosure should be before the commission.

14 The other issue is that Dr Fergie is a person that
15 would otherwise, in my submission, come within the
16 province of section 35 of the Act, just referred to by
17 Ms Layton. I must say, I do not know if anybody else is
18 in the same position. I have not received, nor indeed
19 has Dr Fergie been served with, any document purporting
20 to release her from her obligations. I would ask that
21 that be noted, and that we be provided with a copy of
22 any document from the minister which purports to
23 authorise Dr Fergie to disclose information. They are
24 my submissions.

25 MR STEELE: My position is exactly the position that
26 has just been enunciated on behalf of Dr Draper.

27 MR ABBOTT: We have a few brief submissions on the
28 issue of confidentiality. May I make one observation
29 about my learned friend Ms Layton, who acts for the
30 Aboriginal Legal Rights Movement? She said, about
31 confidential material, it is not just a question of
32 `Women' but `Appropriate women'. If, by that, it is
33 intended to mean that my clients should be excluded from
34 seeing confidential material, when they are the very
35 people whom my learned friend says should come forward
36 with their allegations, it places my clients in a very
37 invidious position, in that they are forced to give

1 evidence yet not allowed to see the material in respect
2 of which the claim of 'Women's business' is made.

3 As I have mentioned before, so far they have had to
4 rely on either personal communications from Dr
5 Kartinyeri or other Ngarrindjeri community members, or
6 what they have read in the media or what has been told
7 to them as having been said to members of the media, I
8 also raise the issue of my learned friend standing to
9 make the sort of submission she made.

10 From our part, we would see that she would have been
11 in some grave difficulty in getting instructions to put
12 to you the submission as to who would be the appropriate
13 women, since her instructions in that regard could only
14 come from the very people who have already announced an
15 intention to boycott the commission. We would object to
16 the ALRM, as it were, representing the interests of
17 those who, on the one hand say they are boycotting it,
18 but, when it suits them, want to cross-examine
19 witnesses.

20 This leads me to the issue of confidentiality in
21 relation to witness statements. I note in the General
22 Procedural Direction, para.4, it is suggested that:
23 'Written statements will be distributed to counsel for
24 such persons as ... on the specific issue or matter to
25 which evidence relates'.

26 We have some concerns with the distribution of material,
27 particularly witness statements. In our submission,
28 there should be very strict rules relating to the
29 distribution of witness statements. I say that not to
30 suggest that the rules should not equally apply to us
31 who represent a group of women. Indeed, the rules
32 should apply across the board.

33 What I have in mind is this: There is obviously
34 considerable concern in the community and obviously very
35 great interest, as evidenced by the number of people
36 here today, in the workings of this commission. I am
37 concerned that witness statements are disseminated in

1 written form beyond counsel and that they escape from
2 counsel and come into the community at large.

3 I see that the Procedural Direction provides for the
4 statements to be distributed to counsel. In my
5 submission, counsel should be required - I include
6 myself - to give written undertakings that the material
7 received will be kept by counsel and the nominated
8 solicitor or solicitors. I am concerned that Procedural
9 Direction No.4 contains an exception. It says:

10 `Except for the purposes of taking instructions there
11 ... until a witness has confirmed it in evidence'

12 If, by that, it is intended to allow counsel to hand
13 over a copy of a statement to counsel's own witness to
14 invite counsel's own witness to comment on a written
15 document which is put into the witness's hands, then I
16 would ask that that procedure be tightened up.

17 I have read this on the basis that counsel could,
18 only via or with solicitors, seek oral instructions on
19 written material supplied by the Royal Commission and by
20 counsel assisting. However, it could be said we gave
21 witness X a copy of another witness's statement so we
22 could get instructions on it.

23 Once it gets into the hands of a person who has not
24 given an undertaking, the material can be disseminated
25 far and wide. We should take steps, I suggest, to make
26 sure that no material which is disseminated by either
27 counsel assisting to counsel or solicitors involved is
28 disseminated in any wider way.

29 As I have said, in another commission in which I was
30 involved in relation to sensitive material - and I
31 apprehend that most of the material in this commission
32 will be sensitive - counsel were required to give
33 written undertakings. I would urge your Honour to seek
34 from counsel appropriate written undertakings and,
35 indeed, from instructing solicitors.

36 The other matter that I want to raise is the issue
37 of the names of deceased Aboriginal persons. It is our
38 submission that a way needs to be formulated so that

1 those names are not mentioned at all and there should be
2 some guideline promulgated by you, first of all,
3 directing all participants not to mention the names of
4 any deceased person, but to allow for a way in which one
5 can ascertain who is being spoken of so that the
6 transcript makes sense.

7 Normally this will be readily achieved by counsel
8 assisting making it clear at the beginning of a passage
9 of evidence, in a way other than speaking about it, of
10 who it is the evidence is concerned. But that is a
11 matter that needs to be addressed and we ask that it be
12 addressed.

13 MS LAYTON: If I could respond to Mr Abbott about
14 the secret or the confidential annexures? The letter
15 that was sent to me - and I understand letters have not
16 only been sent to me but also other persons - but the
17 one that was sent to me asked if I could get
18 instructions on divulging matters or the secret
19 envelopes to certain persons.

20 If I could indicate that it is not for me to get
21 instructions from anybody. I have only given an
22 undertaking in the Supreme Court that those documents
23 will remain secure. They are not matters upon which I
24 can do anything other than that. The information that
25 has been sent to me, I will pass on to the relevant
26 persons.

27 It is not for me to get instructions from anybody on
28 that. There is no question of me doing so, or talking
29 on behalf of those persons. I speak on behalf of the
30 Aboriginal Legal Rights Movement only. I do not speak
31 on behalf Aboriginal women or a subgroup of them, and
32 neither does Mr Collett, who also represents the ALRM.

33 My friend mentioned a boycott. I do not know if he
34 was deliberately using that word. My recollection of
35 what Ms Claire O'Connor indicated was that the women
36 sought not to be represented at the hearing. I had not
37 heard that there was to be any inference drawn other
38 than that they seek not to be represented.

1 COMSR: Any other counsel wish to be heard?

2 MR MEYER: Only briefly. The suggestion by Mr
3 Abbott with regard to dissemination of witness
4 statements has all the hallmarks of common sense. I
5 would not have any difficulty from my clients in giving
6 such an undertaking.

7 COMSR: I do not think there will be any problem
8 with that unless somebody wishes to be heard in
9 opposition to that suggestion.

10 MS PYKE: I wonder whether that might be limited
11 in the sense that, as I understand it, there is an array
12 of evidence to be called. Some of it may not be
13 contentious. I could just envisage difficulties in the
14 speed with which instructing solicitors can take
15 instructions if, in some circumstances, they cannot hand
16 over the statement to their client to go away and
17 consider. I am thinking, for example, of the experts
18 and to then instruct. I can see there will be
19 substantial delays caused in the progress of these
20 proceedings if in fact no copies of any statement can be
21 provided. Again, it could be done on an individual
22 basis rather than a blanket rule.

23 COMSR: You are suggesting that except for the
24 statement of experts, the anthropological experts?

25 MS PYKE: No. What I am saying is that if we
26 could deal with each statement as it is due to be
27 disseminated and deal with it on an individual basis,
28 because it just seems to me that to make a blanket
29 ruling may put everyone in the position of having to
30 take lengthy oral instructions during the course of
31 evidence. None of us, for example, have seen any
32 statements thus far, with evidence due to start on
33 Thursday.

34 MR ABBOTT: In my submission, that could easily be
35 achieved and was achieved. We gave written undertakings
36 that, if required by counsel assisting, we would do so
37 and, for my part, we are prepared to give, as it were, a
38 blanket undertaking that on any occasion on which we are

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1 required by counsel assisting to maintain the
2 confidentiality in the way in which I have spoken, we
3 will do so.

4 MR SMITH: If there are no other submissions
5 touching on that third item, I request that we adjourn
6 the commission until 10 or 10.15 on Thursday, 27 July.

7 COMSR: There is still the issue of the terms
8 under which counsel have leave to appear. Are you ready
9 to pursue that matter?

10 MR SMITH: I envisage, in light of the submissions
11 that have been made so far, that you will receive
12 submissions from a number of the counsel saying that
13 they are not in the position to indicate the degree to
14 which they intend to participate until they receive some
15 detail of the alleged involvement of their clients in
16 the inquiry. But perhaps you could ask for submissions
17 about that.

18 COMSR: I take it there would be a number of
19 counsel in that situation. Without asking you to go
20 into any detail, I see a considerable number of counsel
21 have indicated they would be in that position. So what
22 you are suggesting is that I defer a ruling on that
23 matter until after the opening? Is that what you are
24 suggesting?

25 MR SMITH: Yes.

26 COMSR: In the circumstances, it would appear
27 that there are such a number of counsel who have
28 indicated that they would not be in a position really to
29 address me on that issue, that it looks to be the
30 sensible course to follow then to adjourn that
31 particular matter. I do not know if any counsel wish to
32 make any submission to the contrary, but I do it simply
33 for the sake of convenience. I have noticed quite a
34 number of counsel indicate that they are not in the
35 position to make an appropriate submission at this time.

36 MR MEYER: If it assists, as you are aware, I
37 appear for the Chapmans. I do not know what the
38 attitude of counsel assisting is, but my position for my

1 clients is that we have an interest in this matter from
2 the beginning to the end, as we have had all the way in
3 many other proceedings, and we would seek that there be
4 no limitation on our rights to cross-examine any witness
5 in any way at all.

6 Our position will not change, whatever particulars
7 are provided to whichever counsel may appear. I can
8 enlarge on that submission or, if counsel assisting says
9 that he has not got any objection to that course, your
10 Honour might be in a position to make a ruling.

11 MR SMITH: I suggest that we leave this question
12 until the resumption.

13 COMSR: Yes. It seems most convenient to deal
14 with them all at once. Your attitude and your comments
15 have been noted in respect of the parties that you
16 represent. Under the circumstances, I will adjourn
17 until Thursday, at 10 a.m.

18 MR SMITH: Some people have indicated that 10.15 is
19 a convenient time, but we need to set a time that will
20 involve getting the evidence through efficiently.

21 COMSR: I know it might be more convenient to
22 start at 10.15, but I think realistically we have got to
23 look at a starting time of 10 a.m., given the time
24 constraints within which the commission is working.

25 ADJOURNED 12.05 P.M. TO THURSDAY, 27 JULY 1995 AT 10 A.M.

1 COMSR STEVENS

2

3 HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

4

5 THURSDAY, 27 JULY 1995

6

7 RESUMING 10.05 A.M.

8 MR TILMOUTH: May it please the Commission. As a

9 formal matter, I seek leave to appear with Mr Kenny for

10 the men that I mentioned in the opening day of this

11 Commission.

12 COMSR: I will give you leave at present.

13 Later, I'll be requiring some more detail from all

14 counsel as to the parameters of special interest which

15 go to matters of the extent of cross-examination and

16 other matters.

17 MS LAYTON: Could I mention another formal matter.

18 I appear with Mr Bradshaw in lieu of Mr Collett for the

19 ALRM.

20 MR SMITH: If I could set the programme, and if

21 people have a special matter they wish to raise. The

22 programme for today is that if you will rule on the

23 Terms of References, I will then make a short opening

24 statement. Then, if it's convenient, you will hear

25 leave questions relating to the extent of rights of

26 participation in cross-examination of witnesses.

27 I would then be asking that you adjourn for a short

28 period before any evidence commences, during which time

29 written undertakings as to confidentiality will be

30 handed out to counsel and their instructing solicitors

31 to sign and/or to peruse and sign, and also the terms of

32 the recent s.35 authority from the Minister.

33 I propose the Commission will then resume to hear

34 any argument as to the consequences of the terms of the

35 s.35 authority. Subject to all of that, the evidence

36 will commence and it will commence with a short eight

37 minute film of the Ngarrindjeri, if I can.

38 MR ABBOTT: The report of a curse placed on the

- 1 Royal Commission, this hearing room, might, if true,
2 demonstrate the lengths to which those opposed to this
3 Royal Commission will go to.
- 4 COMSR: Wait a minute. What is the purpose of
5 this?
- 6 MR ABBOTT: I will tell your Honour what the purpose
7 of this is. The purpose of this is that we have
8 received information that the ALRM and other associated
9 parties -
- 10 COMSR: That is not - I mean, I don't want you
11 to recite the history of it. If are you making some
12 application?
- 13 MR ABBOTT: Yes, I am.
- 14 COMSR: Well, could you explain, without going
15 into detail, what is to be the nature of the
16 application.
- 17 MR ABBOTT: The application that I'm seeking and
18 which I propose to make is that you, Madam Commissioner,
19 take steps to assure my clients and others that the
20 acclaimed curse is of no effect, will not deflect you
21 from the investigation of these matters, and that you
22 will afford the appropriate protection to all witnesses,
23 and in particular my clients for whom I act, and for the
24 many other women who have come forward and asked us to -
25 have given us information. I am concerned that,
26 according to the newspaper reports, the Doreen
27 Kartinyeri's camp is using the pretext of -
- 28 INTERJECTOR: Disgusting.
- 29 MR ABBOTT: Have got you to look at -
- 30 COMSR: Just a moment.
- 31 INTERJECTOR: This is a joke.
- 32 MR ABBOTT: I want to say something about the
33 continuing interjections we are getting.
- 34 COMSR: I appreciate the nature of that problem.
35 But what you're seeking, as I understand it, is an
36 assurance that, what, in fact, there was no curse?
- 37 MR ABBOTT: Well, we do not know what happened. I'm
38 concerned that, according to the newspaper reports,

1 apparently in the pretext of getting you to look at the
2 law stick and a painting, the curse was allegedly placed
3 on this room. If that is true, if it's true, I say that
4 there was an advantage taken of a courtesy extended by
5 you on that basis, to take steps with the intention of
6 threatening and intimidating my clients.

7 COMSR: Now, as I understand it, your clients
8 are concerned that there may be a curse that has been
9 placed on the room. Unless they can be assured to the
10 contrary, they would feel intimidated by giving evidence
11 in this room. Is that what you are saying?

12 MR ABBOTT: It is not quite as broad as that. I
13 think that my clients, that those in respect of whom I
14 have announced appearances already, will not be
15 intimidated by this nonsense, but there are many other
16 Aboriginal women who have come forward to us and who are
17 concerned, to say the least, about what has been going
18 on and what has been said by way of what I can tell you,
19 Madam Commissioner, is an on-going campaign of
20 vilification and intimidation.

21 MS LAYTON: I object.

22 MR TILMOUTH: I object. You dealt with that the other
23 day in the statement you made about what happened in the
24 Commission in the opening day. That should be the end
25 of the -

26 MR ABBOTT: May I put this position. We were
27 excluded, first of all, all men then all women, or other
28 than Ngarrindjeri women, so it was said, when those whom
29 Miss O'Connor represented sought and received from you
30 the courtesy of you viewing or doing something in
31 relation to some objects. Whatever jurisdiction then
32 existed for that occasion being secret, has, in view of
33 this morning's newspaper report, now disappeared. My
34 clients need to know exactly what did happen as to that
35 so we can assure our clients that they have nothing to
36 fear. If I cannot be told exactly what went on, then
37 Mrs Shaw, my junior counsel, and Miss Freeman, my
38 instructing solicitor, can and should be told.

1 We want your assurance, Madam Commissioner, and for
2 you to give assurance, as I said, not merely to the five
3 women for whom we appeared but for many other in the
4 Ngarrindjeri Aboriginal community who, I must say, do
5 have concerns at the pressure and intimidation which is
6 currently being placed on them.

7 I haven't raised this topic before because I was
8 hoping to diffuse the issue. Today's newspaper report
9 raises it fairly and squarely and, as I've said, this
10 campaign which appears to -

11 COMSR: We are talking about a report in the
12 newspaper that -

13 MR ABBOTT: It's more than that. It is more than
14 that. I want to tell your Honour a few more things.

15 It's not just that, it seems to me that -

16 COMSR: Just a moment. Before we go on with
17 this question of you telling me a few more things, I
18 think we will deal with this one step at a time. Your
19 first - I suppose the most complete answer to the
20 concerns that have been expressed would be some
21 assurance that nothing in the nature of a curse occurred
22 on that occasion.

23 MR ABBOTT: And that assurance, firstly, should come
24 from you Madam Commissioner and, secondly, from those
25 who were there, or a representative of those who were
26 there. Because, Madam Commissioner -

27 COMSR: You are talking about Miss O'Connor?

28 MR ABBOTT: Miss O'Connor. Because we understand
29 that ALRM or interests associated with that -

30 MS LAYTON: I object at this stage, and I intend to
31 reply.

32 COMSR: There may be no need to go into any
33 detail because what, as I understand it, you're asking
34 for is an assurance by Miss O'Connor?

35 MR ABBOTT: Yes, and by you Madam Commissioner. I
36 want to say this: We understand that a Central
37 Australian woman from the Pitjantjatjara lands was
38 amongst the group. Although the group was represented

1 to you as being Ngarrindjeri, was amongst the group whom
2 you saw. If that is so, it raises grave concerns.

3 COMSR: The short answer to all of this, without
4 having to go into detail, is, first of all, to see what
5 steps can be taken to get the assurance that you're
6 seeking. If that should prove to be necessary and in
7 the event that there is a satisfactory assurance, I take
8 it that that would deal with the immediate problem?

9 MR ABBOTT: That would certainly deal with the
10 immediate problem. The other matter is the abuse and
11 continued interjections which have been coming from the
12 participants here. I apprehend that you, Madam
13 Commissioner, have not heard all of it because you are
14 seated some further distance away from where we are. I
15 can tell you that last Monday, when I was addressing
16 you, there was almost continual interjections by a
17 number of persons and I'm afraid that you only heard a
18 bit of the almost continual barrage of abuse and comment
19 that was conducted whilst I was on my feet.

20 COMSR: I do understand that in the position I'm
21 seated it is not possible for me to hear as clearly as
22 where you are. Of course, one cannot permit continued
23 interjections of that sort to go on. In the event that
24 that should be the case, well, then, of course, I will
25 have to consider what steps should be taken.

26 MR ABBOTT: I would ask that you, Madam
27 Commissioner, make it clear that any interjector who
28 continues will be excluded; and, more particularly, that
29 any person who, directly or indirectly, attempts to
30 threaten or intimidate any proposed witnesses, not just
31 my clients, will be subject to proceedings for contempt
32 in that case in this Royal Commission.

33 I submit that it's appropriate, given the report in
34 the Advertiser this morning, that you publicly offer all
35 witnesses, who may be minded to come before you, the
36 protection and comfort which is within your power to
37 give as a means of allaying any fears that those persons
38 may have in coming to the Royal Commission and giving

1 evidence. They will be subject to, I say it fairly and
2 plainly, a campaign of vilification and abuse that has
3 continued almost from the day my clients made their
4 views about this so-called secret women's business first
5 known.

6 The other matter I should mention is that the
7 campaign of vilification -

8 COMSR: Now, I know you categorise it as such.
9 No doubt there are specific instances which you rely on
10 for that, but -

11 MR ABBOTT: I'm not going to call them that. I want
12 to say something else about me and the lawyers who act
13 for my clients because of the rumours that are
14 circulating. I want to make it -

15 MR TILMOUTH: I object. If we are going to have a
16 Royal Commission into rumours, we will be here for
17 months.

18 MR ABBOTT: This is not a Royal Commission about
19 rumours.

20 MR TILMOUTH: Mr Abbott has talked about things that
21 there is no evidence about whatsoever. You made a
22 statement the other day with respect to what happened in
23 this room. There is no reason to believe, on the face
24 of what Mr Abbott is saying, that you can't deal with
25 the matter. What he is saying about the alleged
26 threats, and so on, is merely belittling Aboriginal
27 beliefs and religion and trying to create some kind of
28 an atmosphere of a witch doctor mentality and -

29 COMSR: Just one moment. If there is going to
30 be any further discussion of this nature, I would
31 propose that it not be before the public. But, at this
32 stage, I take it that whatever the basis of the
33 apprehension which you say that your clients feel, be it
34 true or otherwise, that there is a way of dealing with
35 it.

36 MR ABBOTT: I would hope so.

37 COMSR: I don't think we need to take it any
38 further than that at this stage, because it may be that

1 we are able to, without ruling in any way on the merits
2 of what you had to say, Mr Abbott, it may be that we are
3 able to allay the fears, justified or otherwise, in that
4 respect.

5 MR ABBOTT: I'm happy to leave the rest of what I
6 have to say until another time. But - or, if necessary,
7 not in the public arena.

8 COMSR: I would think that would be certainly
9 more practical.

10 MR ABBOTT: These are important matters. Important
11 not just to my clients for whom I act, but to a large
12 number of other Aboriginal women.

13 COMSR: I take your point. I think it's more
14 properly raised before me in private than it is here.

15 MR ABBOTT: I am happy to do so.

16 MS LAYTON: Mr Abbott mentioned the ALRM on two
17 occasions in the course of what I can only call 'a media
18 stunt'. This is not a parade of lawyers for the
19 purposes of making grandiose statements of a sort that
20 is reflecting on, as Mr Tilmouth said, a media
21 accusation. It is quite inappropriate to the extent
22 that the name of ALRM has been mentioned in any alleged
23 intimidation, curse or any other similar association.
24 We completely dissociate ourselves with that and want to
25 make that plain to everybody here.

26 COMSR: There is certainly no evidence that has
27 been placed before the Commission of any such
28 association, but this is a matter which I would propose
29 to refer for a hearing in chambers, as it were, before
30 me rather than to deal with it now. I take the point
31 that on whatever basis, however it may be based, there
32 is a way that the concerns may be met.

33 MR ABBOTT: I would hope so, but it will need both
34 you and Miss O'Connor.

35 COMSR: Yes. Mr Smith -

36 MR BOURNE: Before Mr Smith rises, I have a
37 preliminary matter, and a less controversial matter so
38 far as my client, Mr Milera, is concerned. However, it

1 is a matter of substance. My instructions today are to
2 indicate that my client no longer seeks to be
3 represented in this Commission; that is, Doug Milera.
4 You might recall that on the two occasions on which I
5 have previously spoken in this Commission, I
6 foreshadowed that my application for leave to appear on
7 his behalf was contingent upon material which would be
8 obtained and upon which I would give him advice. My
9 instructions are to put to the Commission the reasons
10 why Mr Milera has so instructed me and then to withdraw.
11 I seek the opportunity of doing that now.

12 COMSR: Do I need to know anything more than
13 that in that sense?

14 MR BOURNE: You do, with respect. As council
15 assisting reminded us on Monday, this is an inquiry and
16 not a trial. No doubt whether my client is here or not,
17 with council assisting, any person with an interest in
18 the matter may attempt to make use of material which
19 directory affects my client. He wants to have on the
20 record the reasons why he either maintains or rejects
21 information which might be put to this Commission in his
22 absence. He only seeks to do that in a very general
23 way. However, if that is not done and that is not put
24 on record here, undoubtedly there will be speculation
25 and innuendo and media reporting on a whole range of
26 things which may be said about that. It is not fair to
27 the Commission nor to those with an interest in the
28 outcome of the inquiry for that to be on trial with
29 innuendo, rumour and media speculation rather than the
30 reasons generally as they are to be placed on the
31 record.

32 COMSR: It is not a trial of any sort by rumour
33 or speculation. This is an inquiry into an attempt to
34 gather the facts relating to the matters that are within
35 the ambit of the Terms of Reference.

36 MR BOURNE: Quite so. In respect of that, my
37 client, before making a final decision, had hoped to
38 have this fully disclosed and have access to the

1 materials directly affecting him and the part that he
2 might play in this inquiry - I include in that media
3 tapes of interviews with him - so that he can be fully
4 informed and to state clearly to the Commission his
5 reasons for the decision that he has reached.

6 I regret that this has not occurred, that we have
7 not got this information, despite requests and calls for
8 the material comprising, in particular, media tapes of
9 interviews and discussions. But my client is not
10 prepared to wait until that occurs before he makes the
11 decision and commits himself to the course that he is
12 concerned the Commission will take.

13 Mr Milera is concerned that before there is an
14 opening statement and before evidence commences, his
15 position is made clear and his reasons, as I say, put on
16 the record.

17 In that context, I ask to put to you, by way of my
18 client's statement to the Commission, his reasons for
19 that decision -

20 MR SMITH: Commissioner, I object to this course
21 being taken now. The appropriate course is for my
22 learned friend to speak to me about such matters and we
23 will resolve it. Making a statement such as this in the
24 Commission at this stage is holding up the proceedings.
25 The Commission is going to go on for a number of weeks.
26 My learned friend, Mr Bourne, and myself ought to
27 discuss this matter to find out why it is that Mr Milera
28 is not willing to assist the Commission, and I will see
29 if I can address those matters. A statement such as
30 this now is quite inappropriate.

31 MR BOURNE: I can't discuss any further matters
32 after today with Mr Smith or anyone. My instructions
33 are withdrawn. My instructions, but for putting my
34 client's reasons to you, are terminated. After that, I
35 can do no more. If by some media process, as one would
36 readily accept in the current climate, there is
37 speculation and innuendo about what the matter might
38 have been, that is regrettable, in my submission, and I

1 seek to make the statement on my client's behalf now.

2 COMSR: You sought leave to withdraw.

3 MR BOURNE: The application I made is for two
4 reasons which my client wishes to put and one is on the
5 record.

6 COMSR: For whatever reasons, you have sought
7 leave to withdraw on the basis that you no longer have
8 instructions to act.

9 MR BOURNE: My instructions are not terminated until
10 I have done what my client instructs me to do, and that
11 is to read to you this statement:

12 `I have been -

13 MR MEYER: I object.

14 COMSR: I would like to know what the tenor of
15 this statement is. As I understand it, the application
16 before me is for leave to withdraw. Is there any reason
17 why I can't grant you that leave?

18 MR BOURNE: The application is not merely for leave
19 to withdraw. The application is to place on record the
20 reasons for my client's decision to withdraw. It's in
21 the public interest that those reasons, general though
22 they may be, that they be made made known to the
23 appropriate forum: and that is this Commission. It
24 says:

25 `I have been involved in the Hindmarsh Island Bridge -

26 MR MEYER: I object to this course. The
27 appropriate way of putting the material in is by way of
28 giving evidence. I support what the counsel assisting,
29 Mr Smith, has put to you and I oppose the reading of the
30 statement by Mr Bourne.

31 COMSR: I must say I don't consider it an
32 appropriate course for you to adopt in the
33 circumstances.

34 MR BOURNE: With the considerable media interest in
35 the matter, there is no doubt that my client won't be
36 able to contain what will happen from here as far as
37 that is concerned. That means that the trial by media,
38 which I suggest should be avoided, is going to take a

1 course of its own.

2 COMSR: There won't be a trial by media within
3 this inquiry.

4 MR BOURNE: Not within the Commission.

5 COMSR: That is the point.

6 MR BOURNE: I seek a normal ruling with respect to
7 the application to put the reasons on record.

8 COMSR: I am prepared to grant you leave to
9 withdraw. If you wish to provide a written statement of
10 the reasons to counsel assisting -

11 MR BOURNE: I don't have those instructions.

12 COMSR: You have leave to withdraw then.

13 MR BOURNE: If the Commission pleases.

14 MR BOURNE WITHDRAWS

15 MR SMITH: We have reached the stage of your
16 address to the Terms of Reference.

17 COMSR: That's right, yes. I was about to give
18 my ruling on the preliminary issues.

19 Having heard submissions on preliminary issues from
20 counsel for parties given leave to appear, I will give
21 my rulings. The first issue to be determined, issues to
22 be determined, are those of the interpretation of the
23 Terms of Reference and the extent to which those terms
24 require the exercise of my powers under s.6 and 16(a) of
25 the Royal Commissions Act either to take evidence in
26 private or to forbid the publication of specified
27 matters.

28 The Letters Patent refer to certain sealed envelopes
29 being sent to The Honourable Robert Tickner, MP,
30 Minister for Aboriginal and Torres Strait Islander
31 Affairs in the Commonwealth Government. These sealed
32 envelopes were reported by Professor Cheryl Saunders,
33 AO, to contain secret women's business. The 'secret
34 women's business' is said to be more particularly
35 detailed in the sealed envelopes. The document refers
36 to allegations being made that the secret women's
37 business is a fabrication. The Terms of Reference
38 relate to the secret women's business as contained in

1 the sealed envelopes.

2 I am not required to inquire into nor report upon
3 the general issue of secret women's business. The Terms
4 of Reference do not invite an extension of the inquiry
5 beyond the particular representation contained in the
6 sealed envelopes and reported on by Professor Saunders.
7 Therefore, I make the following ruling:

8 **THE COMMISSIONER'S TERMS OF REFERENCE**

9 (1) This clause refers to the `women's business'
10 contained in the sealed envelopes sent to the
11 Minister and reported on by Professor Saunders. The
12 Commission is directed to inquire into and report
13 upon the issue of whether that `women's business' or
14 any part thereof was fabricated. It is only in the
15 event that the Commission is able to conclude that
16 there was some element of fabrication that the
17 subsequent Terms of Reference need to be separately
18 considered. In the context of this inquiry,
19 `fabrication' involves the deliberate manufacture of
20 secret women's business where it did not previously
21 exist.

22 1(a) This clause requires the Commission, in the
23 event that it determines there was some degree
24 of fabrication, to consider in what
25 circumstances the fabrication occurred.

26 1(b) This clause requires a consideration of the
27 extent of any such fabrication.

28 1(c) This clause requires a consideration of the
29 intended aims or objectives of such
30 fabrication; that is, what was intended to be
31 achieved by such fabrication.

32 **PREJUDICE AND CONFIDENTIALITY**

33 In relation to the powers contained in sections 6 and
34 16(a) of the Royal Commissions Act, there are specific
35 provisions in clause 3 of the Terms of Reference
36 relating to prejudice, confidentiality and
37 non-disclosure, and provision that the inquiry, or parts
38 thereof, may be conducted in private and to report, in

1 part, by way of confidential report or to report by way
2 of general description or summaries.
3 3(a) This clause requires of the Commission that it
4 avoid prejudicing the proceedings currently before
5 the Federal Appeals Court in respect of a
6 determination made on 12 May 1994 by the Minister
7 pursuant to s.10 of the Aboriginal and Torres
8 Strait Islanders Protection Act 1984 and varied on
9 9 June 1994.
10 CONTINUED

- 1 3(b) This clause requires the Commission to protect any
2 information that could properly be considered as
3 confidential, for whatever reason, be it because of
4 Aboriginal tradition or for some other sufficient
5 reason.
- 6 3(c) This clause forbids the publication to anyone,
7 except as authorised by the State Minister of
8 Aboriginal Affairs of any matters relating to
9 Aboriginal sites, and traditions, where such
10 publication contravenes Aboriginal tradition.
- 11 The definition clauses identify the meaning to be
12 attached to the expressions `Aboriginal tradition' and
13 `women's business'. It is in general considered
14 desirable that the proceedings of the Commission be
15 conducted in public, without restriction on publication.
16 However, the subject matter of this inquiry, and clause
17 3 of the Terms of Reference, underline the necessity to
18 have regard to confidentiality. Substantial parts of
19 the evidence, unless they are already in the public
20 arena, may need to be heard in private to protect
21 confidentiality, and considerable material may need to
22 be suppressed from publication. Furthermore, as the
23 issue of whether or not the secret `women's business'
24 was a fabrication remains to be determined, the
25 Commission will treat any information or evidence as to
26 details of such secret `women's business' as secret and
27 requiring special provision for confidentiality.
- 28 In order to protect against an inadvertent
29 publication of material which might contravene clause 3,
30 I propose to make an order, suppressing from
31 publication, until further order, anything which the
32 commissioner determines:
- 33 (a) May prejudice or tend to prejudice any judicial
34 proceedings relating to the declaration made by the
35 Minister of Aboriginal and Torres Strait Islander
36 Affairs of the Commonwealth Government.
- 37 (b) May destroy or tend to destroy the confidentiality
38 of information which the Commissioner determines to

1 be information which could properly be regarded as
2 confidential pursuant to Aboriginal tradition or
3 otherwise.

4 (c) May contravene or tend to contravene Section 35 of
5 the Aboriginal Heritage Act.

6 (d) May reveal or tend to reveal any detail of secret
7 'women's business'.

8 I will hear submissions from the parties as to the
9 making of this order. I do not propose to hear those
10 submissions now, but there are copies of my ruling which
11 will be handed out to counsel. I propose to hear
12 submissions tomorrow, if that is a convenient time. I
13 think you have in mind, Mr Smith, that you would now
14 proceed to your opening.

15 MR SMITH: Yes, make an opening statement to the
16 extent that I can. As a preliminary matter, on behalf
17 of the Commission, I acknowledge that this inquiry,
18 which relates to Ngarrindjeri people, is being held on
19 Kurna lands, and this inquiry acknowledges the fact of
20 that in the presence of an Elder of the Kurna people, Mr
21 Lewis O'Brien.

22 On behalf of the Commission, I would like to
23 emphasize, in case this object has been lost sight of in
24 this third day, that the task of the Commission is to
25 adduce all relevant evidence without fear, favour or
26 bias. It therefore urges all parties interested to come
27 forward on that understanding.

28 At this stage the Commission can only lead evidence
29 that it, itself, unearths, and what interested parties
30 bring forward. Again, the Commission assures all
31 parties, and in particular Aboriginal interests, that it
32 will take all reasonable steps to ensure secrecy and
33 confidences.

34 On the last occasion that the Commission sat, there
35 was much said about allegations and particulars. I
36 indicate to counsel that the allegations spoken of in
37 the Terms of Reference are those ventilated in the
38 electronic and print media in the year or so since the

1 declaration by the Federal Minister. Most of that
2 material is available to all interested parties through
3 the Commission now: That is, newsprint items and, in
4 particular, copies of Channel 10 videos. So, in
5 connection with allegations, I invite the parties that
6 are represented here at the bar table to take advantage
7 of that facility.

8 Moreover, the allegations, as they have been called
9 in the Terms of Reference, are set out, if you like, in
10 the judgment of DeBelle J in the recent judgment of 26
11 July 1995 on pp.3 and 4. We would like to emphasize -
12 that is, the Commission - that they are not the
13 Commission's allegations. The Commission makes no
14 allegations at all. The Commission has an obligation to
15 investigate.

16 I will not and cannot open in the sense in which I
17 would do so in a court of law or a proceeding which is
18 adversarial in nature. This is an inquiry. Much of the
19 evidence is still not to hand. Indeed, the Practice
20 Direction which was issued a week or so ago does not
21 require statements to be submitted to myself until
22 tomorrow, Friday 28 July.

23 Some parties involved in this inquiry, we accept,
24 would not even be able to comply with that timetable.
25 Accordingly, it is obvious that I will not know, and
26 could not possibly know with any reasonable detail, what
27 evidence is to unfold.

28 I refer my learned friends at the bar table, who on
29 the last occasion appeared to think I had some sort of
30 obligation in this area, to the 1982 edition of 'Royal
31 Commissions and Boards of Inquiry' by Leonard Arthur
32 Hallet at p.217, where the learned author recommends
33 that counsel assisting, to use his words, should do
34 little more than generally outline the course it expects
35 the inquiry might take. I propose to follow that
36 course. And I now tell the Commission and those here
37 that the evidence, as I approximately see it at this
38 early stage, will be in three stages.

1 Stage one will constitute evidence from the South
2 Australian Museum. This evidence will not only deal
3 with the historical and anthropological evidence as to
4 `women's business' general, but it will also touch upon
5 Aboriginal traditions, heritage and culture related to
6 the Ngarrindjeri people.

7 It will also touch upon certain other events in the
8 time leading up to the Federal Minister's decision to
9 halt the construction of the bridge. This evidence will
10 be called immediately and, on behalf of the Commission,
11 I indicate to counsel with a specific interest in this
12 evidence, that by reason of the lack of notice of its
13 content, they will be accorded an opportunity to
14 consider and take instructions on what is said by the
15 witnesses.

16 Stage two of the evidence falls into two broad
17 parts. Firstly, evidence as to the history of
18 Aboriginal involvement in the proposed development on
19 Hindmarsh Island, including the bridge; and the second
20 part, the emergence of significant disagreement between
21 the Ngarrindjeri people as to the secret `women's
22 business'.

23 I return to part one of that stage two, namely, the
24 history of Aboriginal involvement in the proposed
25 development on Hindmarsh Island, including the bridge.
26 This evidence will be, in the main, background material
27 and will include evidence from Tom and Wendy Chapman and
28 from their solicitor. Much of this evidence will be
29 capable of proof by acknowledgment of documents and its
30 focus will not be on the approvals, inquiries and
31 consents which dominated the years leading up to the ban
32 on the construction of the bridge on 9 July 1994, but
33 will rather focus on the degree of Aboriginal
34 involvement in consultation.

35 The evidence will indicate that, in this period up
36 to 9 July 1994, there were experts' reports obtained and
37 environmental impact statements made, and, to some
38 extent, consultation with Aboriginals and Aboriginal

1 communities. The reports of an expert nature came from
2 Dr Vanessa Edmonds, an archaeologist; Dr Rob Lucas,
3 anthropologist; Dr Neale Draper, an archaeologist. The
4 reports will be tendered in the course of evidence,
5 together with the environmental impact statements.

6 Importantly, this stage of the evidence will also
7 involve evidence more closely related to the events
8 which led up to the final declaration on 9 July 1994,
9 namely, as to meetings in April 1994 of Ngarrindjeri
10 women as to a particular meeting at Mouth House on about
11 9 May 1994, which resulted in a letter being faxed to
12 the Federal Minister and signed by a number of women.

13 The Commission will receive evidence just
14 establishing that on 12 May 1994 an emergency
15 declaration was made by the Federal Minister, halting
16 the construction of the bridge for some 30 days, and
17 later that was extended to 60 days. Again, those events
18 will probably be proven by way of documents.

19 It is known to all here that on 23 May 1994,
20 Professor Saunders was appointed by the Federal Minister
21 to report to him pursuant to section 10, subpara.4 of
22 the Aboriginal and Torres Strait Islander Act. In May,
23 June 1994, Dr Deane Fergie was commissioned by the ALRM,
24 firstly to facilitate a meeting of Aboriginal women with
25 Professor Saunders, and later she was commissioned by
26 ALRM to prepare a report which, together with a
27 submission from ALRM, went to Professor Saunders.

28 In June 1994, and the evidence will touch upon this,
29 there was a series of meetings involving Ngarrindjeri
30 women and others, including Dr Deane Fergie and
31 Professor Saunders, at which Aboriginal tradition was
32 discussed.

33 The Commission again encourages any person who was
34 present at those meetings to give evidence to the
35 Commission. The Commission has in place safeguards to
36 protect and maintain confidentiality of any such
37 evidence. If necessary, the disclosure of any such
38 information or evidence requiring it, may be limited to

1 women only in a private hearing. There may be other
2 conditions which may be appropriate to giving of
3 evidence at this stage and the Commission will give
4 serious consideration to implementing proper measures by
5 which this evidence can be advanced.

6 The second part of the second stage, as I said
7 before, is the emergence of significant disagreement
8 within the Ngarrindjeri people as to secret 'women's
9 business'. This evidence will come from Mr Abbott's
10 clients and has been ventilated in the media and will
11 be the subject of evidence statements and evidence.

12 There are at least three other Ngarrindjeri women, who
13 are not clients of Mr Abbott, who will or may be giving
14 evidence before the Commission.

15 Stage three will be anthropological evidence. The
16 Commission will hear expert and independent
17 anthropological evidence from Robert Tonkinson,
18 Professor of Anthropology, University of Western
19 Australian. It was Professor Tonkinson who wrote the
20 extensive foreword to the book 'A World That Was' which
21 is the seminal work on the Ngarrindjeri people written
22 by the renowned anthropologists, Ronald and Katherine
23 Berndt with Mr Stanton.

24 The Commission will also hear from a female
25 anthropologist, Dr Dianne Austin-Broos. The nature of
26 this closing evidence will be an overview of the
27 anthropological evidence in total and its methodology in
28 the context of this inquiry. That is all I wish to say
29 in terms of an opening.

30 MS LAYTON: I wonder if I could interrupt. If my
31 learned friend has finished the opening, I would seek an
32 adjournment for a short period of time for a combination
33 of reasons, one to consider the rulings that you have
34 given with regard to the Terms of Reference; and, two,
35 to consider the opening that my friend has given. I
36 just wonder if that indulgence could be given? I am
37 only thinking of a period of ten minutes, no more.

1 COMSR: Probably all counsel would appreciate
2 the opportunity to consider the Terms of Reference.

3 MR SMITH: Just so we do not have two adjournments,
4 we wish to hand out to counsel and other legal
5 representatives of interested parties at the bar table,
6 a proposed written undertaking as to confidentiality
7 which we would be pleased to have executed by counsel
8 and instructing solicitors, and copies of the terms of
9 the section 35 authority which we received this morning
10 from the Minister, just in time to facilitate this
11 hearing today.

12 I had proposed, on handing that material out, to
13 seek a short adjournment so that counsel could consider
14 those documents and raise any matter with you, in
15 particular, as to what steps relating to confidentiality
16 ought to be taken, bearing in mind the terms of the
17 Section 35 authority.

18 MS LAYTON: I wonder, in that case, whether we could
19 have half an hour?

20 COMSR: Perhaps I could indicate that I will be
21 considering the terms under which leave to appear
22 applies in each case. It will be necessary for me to
23 obtain from counsel some idea of the parameters of the
24 special interests they represent, because it may be
25 necessary for me, from time to time, to determine who
26 should remain in the courtroom at times. And there is
27 also the question of the extent to which a particular
28 party would be permitted to cross-examine, or
29 cross-examine at all, certain witnesses.

30 Although, the different groups have been permitted
31 to appear, counsel have been given leave to appear
32 before this Commission, that was in order to promote the
33 efficiency of the inquiry, having regard to the time
34 limits within which we are working. It is still
35 necessary for me to have some idea, in respect of each
36 other individual person or each group, the extent of the
37 interest of that group. Therefore, I will be asking
38 counsel to consider those matters after we have the

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- 1 adjournment so that you are in a position to assist me
2 in that respect also. Are counsel agreed that half an
3 hour would be a sufficient time for this adjournment to
4 enable you to consider the documents?
- 5 MR TILMOUTH: Can I be bold enough to suggest quarter
6 to 12? I have a feeling that, as things stand, time
7 might blow out and it might be better just to be a bit
8 cautious on that.
- 9 COMSR: I notice some people assenting. If it
10 is felt necessary, yes.
- 11 MR TILMOUTH: Better to be safe and sure, in other
12 words.
- 13 COMSR: I would sooner be in the position of
14 being fully informed by each counsel as to the limits of
15 their representation than to have to adjourn again. We
16 will adjourn until quarter to 12.
- 17 ADJOURNED 10.55 A.M.
18 RESUMING 11.50 A.M.
- 19 MS LAYTON: I have indicated just briefly to my
20 friend, the assisting counsel, that we haven't been able
21 to take the full instructions that we need, particularly
22 with regard to the Section 35 declaration. I wonder if
23 the Commission would grant us the indulgence until after
24 lunch, because we have instructions to get? I
25 understand other people might share that view.
- 26 COMSR: I take it that other counsel join in
27 that application?
- 28 MR ABBOTT: No, we do not. We want to get on with it.
- 29 MS LAYTON: We are not being obstructive in the way
30 my friend seems to suggest. He can't help but add
31 pejorative terms to everything he does.
- 32 COMSR: Perhaps if I could deal with one matter
33 first and get this out of the way. Have all counsel
34 signed the applications as to confidentiality?
- 35 MS LAYTON: No.
- 36 MR TILMOUTH: We didn't get to it. It was nothing
37 more than that.
- 38 COMSR: I take it you are in the same situation?

1 MR TILMOUTH: Yes, I am. I should have expressly
2 said. I wanted to say we just haven't thought about the
3 undertakings. The fact that we haven't signed them
4 means nothing more than that. We were just too busy
5 thinking about other things.

6 COMSR: I am as anxious as anyone to get a start
7 on the hearing, but clearly if the situation is that
8 counsel have not been able to properly consider the
9 implications of the material that has been placed before
10 them, it would be more advantageous to take the
11 additional hour that is involved for the adjournment,
12 rather than matters be prolonged while individual
13 counsel have got to delay matters. Would that be the
14 extent of any adjournment that is required for this
15 purpose?

16 MS LAYTON: I would hope so. I am trying to get
17 things done as speedily as I can.

18 COMSR: Although I sympathise with your view, Mr
19 Abbott, that it would be helpful if we could commence
20 the evidence, I feel that in the circumstances I should
21 allow the additional time and I propose to adjourn until
22 after lunch.

23 MR SMITH: Is that 2 o'clock?

24 COMSR: I will make it 2.15 in the
25 circumstances.

26 MR BOURNE ENTERS HEARING ROOM

27 MR BOURNE: Before you adjourn, I am mindful of the
28 fact that I have been granted and had leave to withdraw
29 and have withdrawn, and my client has withdrawn from
30 this Commission. I am mindful of a ruling which you
31 gave, although I don't have the transcript before me, in
32 regard to the media respecting the rights and the
33 privacy of the persons involved in the inquiry,
34 potential witnesses.

35 My client of course remains, I suppose, a potential
36 witness in the matter, and I do not know whether a
37 decision might be made to compel or attempt to compel
38 him to give evidence in the matter. I would ask you to

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1 remind the media of the ruling which you gave and
2 expressly to rule that my client not be approached by
3 the media and that his wish for privacy, and to add
4 nothing to what has already been said by him on his
5 behalf, be respected.

6 COMSR: I do not know that I have so much as
7 made a ruling as said that I would expect the media not
8 to approach any witnesses within the precincts of the
9 building because it might intimidate the witnesses. I
10 am not sure that what I said amounted to a ruling on the
11 matter.

12 MR BOURNE: Perhaps it would be sufficient at this
13 stage if I ask you to remind the media of that
14 expression by you in opening the Commission.

15 COMSR: I can certainly do that. Any members of
16 the media present, you have heard that Mr Milera,
17 through his counsel, has indicated that he personally
18 does not wish to say anything to the media. In the
19 circumstances, I can only ask that the media to respect
20 his wishes.

21 MR MEYER: The difficulty that arises with that is
22 that, as I came back from the adjournment, I was
23 approached by the media and invited to read a statement
24 of Doug Milera, which starts off with the word `I'. It
25 is headed `Stanley and Partners' on the piece of paper,
26 but it is a direct statement which has apparently been
27 given by Mr Milera to the press.

28 COMSR: I do not know how it might have found
29 its way into the hands of the press.

30 MR MEYER: Nor do I, but it appears that what is
31 happening is it is a cake-and-eat-too situation, `I will
32 give it to the media, but I don't want to talk.

33 COMSR: Be that as it may, I have done the best
34 I can to encourage the media to respect the expressed
35 wish by Mr Milera not to be approached by any members of
36 the media.

37 ADJOURNED 11.56 A.M.

1 RESUMING 2.20 P.M.

2 MS LAYTON: I am particularly grateful for the
3 indulgence, until 2 o'clock this afternoon, to obtain
4 some instructions.

5 There are some very important matters that the
6 Aboriginal Legal Rights Movement wish to raise as a
7 consequence of the combination of the opening of counsel
8 assisting as well as the rulings that the Commission has
9 given this morning. And I wonder if I can indicate what
10 those concerns are?

11 And, in doing so, I preface it by going back to the
12 letter patents and the Terms of Reference in order to
13 make the point.

14 Para.2 of the preamble of the Royal Commission
15 refers to Professor Saunders's report having made
16 reference to secret women's business which in the
17 preamble says is more particularly described in the
18 sealed envelopes.

19 Then para.3 goes on to say that there have been
20 allegations that the secret women's business was a
21 fabrication.

22 The preamble continues, in para.4, to say that there
23 has been significant disagreement within the South
24 Australian Aboriginal communities regarding the women's
25 business and the allegations. And I underscore
26 `allegations'.

27 Then proceeds, in para.6, to state:
28 `It is necessary to investigate the allegations.'

29 And then I interpolate to say that is the
30 allegations that secret women's business was a
31 fabrication.

32 Clearly then just at that point the Royal Commission
33 in its preamble is indicating that it was designed to
34 investigate the allegations that secret women's business
35 was a fabrication, which, in turn, leads to the Terms of
36 Reference in para.1 asking the Commission to inquire as
37 to whether the women's business, or any aspect of it,
38 was a fabrication.

1 Our submission is that the very starting point of
2 this Commission must be; what are the allegations of
3 fabrication of women's business which set the parameters
4 of the inquiry of the Royal Commission? And we submit
5 that the Royal Commission cannot commence the taking of
6 any evidence without identifying what those allegations
7 are and indicating what evidence is to be adduced about
8 those allegations. And, in particular, supplying
9 statements from the persons who make the allegations of
10 fabrication in the usual way that is done in Royal
11 Commissions. Namely, Royal Commissions do not usually
12 commence the giving of evidence without statements being
13 provided. And in this Royal Commission we say that the
14 statements must be related to what are the allegations
15 of fabrication.

16 The Royal Commission, as you, Commissioner, have
17 announced in your rulings is that the women's business,
18 which is to be the subject of this Royal Commission, is
19 to be the secret women's business which is contained in
20 the secret envelopes. And, as you have ruled,
21 Commissioner, it is not an inquiry into the general
22 issue of secret women's business.

23 Also, counsel assisting has indicated that the
24 allegations with regard to, I presume, secret women's
25 business are those ventilated in the electronic media.
26 And what he has done is he has invited counsel to look
27 at the material which is available in order to see what
28 it is that those allegations are, but we haven't yet
29 seen it. There have been some documents that have been
30 provided, which stand roughly two and a half inches
31 high, which are alleged to be the electronic media. We
32 don't know, at this stage, whether that is the entire
33 media, but we do know, from looking at it cursorily,
34 that it contains extracts only and certainly does not
35 pretend to be a complete record of what is in the
36 electronic media. But, in any event, before any of us
37 have had an opportunity of looking at that, the evidence
38 is meant to commence.

1 Further, he added in his outline that the
2 allegations that are being made are those set out in the
3 judgment of DeBelle J at pp.3 and 4 which was delivered
4 on 26 July 1995. And that, as you, Commissioner, would
5 be aware, related to an appeal that was taken by ALRM
6 with regard to the interlocutory injunction.

7 Looking at the matters that are set forth in paras.3
8 and 4 of his Honour's reasons, the first overt matter is
9 that his Honour didn't have before him all of the media.

10 He was just selecting aspects of it. And, in
11 particular, he refers only to three named media
12 publications together with two unnamed. And, by that, I
13 mean undated publications. And we know, from the two
14 and a half inches of material, that that is by no means
15 complete.

16 The next aspect is this; that that is what is
17 proffered as being the allegations of fabrication for
18 the purpose of then dealing with para.6 of the preamble
19 to the Royal Commission - namely, the necessity to
20 investigate the allegations - that is put forward as the
21 allegations. And we say that that is entirely
22 unsatisfactory, for this reason:

23 Firstly, the allegations of fabrication which are
24 proffered are derived from people and not media reports.
25 That is how allegations of fabrication would usually
26 come about, not secondhand and perhaps thirdhand by the
27 time it has been edited. Also synthesized and also
28 incomplete.

29 Secondly, the written media coverage is extensive
30 and, as I have indicated earlier, contains extracts
31 only. And we don't know whether there are to be any
32 notes from journalists which may be associated with any
33 of this media publication in order to know the full
34 extent, if one is looking only at the question of media
35 being the source of allegations of fabrication.

36 Thirdly, it is quite obvious, from just a cursory
37 glance at the media publications, that those media
38 publications indicate that allegations of any sort that

1 are being made are confusing, conflicting, often
2 retracted and incomplete.

3 How is any person who may be interested in giving
4 evidence before this Commission or making submissions to
5 be sufficiently informed on what the actual allegations
6 of fabrication are in order to proffer any evidence?

7 Further, how can persons who may be referred to in
8 the media articles know whether they are meant to be
9 part of any alleged fabrication of women's business?
10 There are many names mentioned there as being in some
11 way involved.

12 How are they to know what is being alleged as being
13 fabrication and whether they are part of that
14 fabrication by virtue of media articles alone?

15 And, in what way are they meant to be involved?

16 What are the circumstances in which it is alleged,
17 obviously not by this Royal Commission, but those who
18 allege fabrication, what is it and who is it that they
19 are saying are involved in all of this to enable persons
20 to proffer appropriate material, focused material to
21 assist this Commission in its inquiry?

22 Further, it is submitted that, having regard to the
23 importance of the allegations of fabrication in respect
24 of what this Royal Commission is to do, the Royal
25 Commission, through counsel assisting, must identify,
26 out of that plethora of material, including what
27 statements it may have from persons who allege
28 fabrication, as to what aspects of fabrication are made
29 with regard to, as the Commission has indicated, the
30 secret women's business.

31 It is submitted that the Royal Commission must,
32 before any evidence is given, have before it the
33 statements as to what the allegations of fabrication are
34 and from whom, before anybody should be called upon to
35 put any statements in, or hear any evidence. There is
36 no way in which one could cross-examine in a vacuum.

37 It is suggested that the first part of the material
38 might be historical or anthropological.

1 There is no way in which anybody can sensibly
2 cross-examine anybody on any aspect, without knowing
3 what it is that are the parameters of this particular
4 Royal Commission and what the allegations of fabrication
5 are.

6 Further, the Royal Commission has identified that
7 the only subject to be the subject of this inquiry is
8 the secret women's business contained in the secret
9 envelopes.

10 The question is, what are the allegations that have
11 been made or are being made about fabrication of the
12 contents of those envelopes, or even the existence of
13 those envelopes?

14 It is our submission that, before any evidence is
15 called at all, that the following should be done by way
16 of opening and by provision to all of those - and, in
17 particular, we talk about the ALRM - of the following
18 matters; we ask that the following matters be
19 identified:

20 1. What allegations are being made about the secret
21 women's business, as contained in the secret envelopes,
22 which is alleged to be fabrication?

23 2. Who are the persons who have alleged that the
24 women's business, or any aspect of it, as contained in
25 the secret envelopes, was a fabrication?

26 3. Who are the persons alleged to be involved in
27 the fabrication and the nature of their involvement?

28 That cannot be merely gleaned from media reports.

29 4. When, where and how are persons alleged to have
30 been involved in any fabrication?

31 We have heard cursory references to meetings.

32 Is it suggested that at any meeting or meetings
33 there has been any grouping of people or a person who
34 has been putting forward information which may in some
35 way be said to be part of a fabrication of secret
36 women's business?

37 Whilst my friend has indicated from the authority
38 that he cited of Hallet that an opening can be general,

1 we would submit that it is entirely inappropriate, in a
2 case like this which is all about whether or not there
3 has been fabrication, to name the people that are
4 alleged to have fabricated.

5 And 2. Say what it is that is alleged to have been
6 fabricated.

7 One cannot start off in a total vacuum and have
8 evidence unfolding at large, which is the way in which
9 Mr Smith is submitting it will unfold. He has got
10 categories of information. But, as I understand it, was
11 almost apologetic, because, as he says, the date by
12 which statements are to be given has not yet passed.
13 Namely, by the close of business tomorrow. And yet we
14 are embarking on the evidence. If ever I have heard the
15 cart put before the horse that would have to be the best
16 example. And it is done in a context which is entirely
17 unknown and unspecified and, as I said, without the
18 supply of statements.

19 So, we would submit, at this stage, two things and
20 we ask this Commission to respond to this request:

21 Firstly, that there be specification of the
22 allegations of fabrication as we have requested.

23 Secondly, that the counsel assisting the Commission
24 confirm that they will provide statements to us of those
25 who are alleging fabrication by close of business on
26 Friday; or, if it is not received, that there be an
27 indication, from this Commission, that, until such time
28 as statements are received by this Commission from those
29 who allege fabrication, that there be no continuance of
30 that evidence.

31 The point that I also wish to make on this is that
32 it is for those who allege fabrication to proffer
33 evidence, first - to use Mr Abbott's colourful
34 expression - to put up or shut up. They should go first
35 and we should know what it is that we are all meant to
36 face.

37 Further, it has been suggested that at least five
38 women - and I take it to be Mr Abbott's clients - will

1 be proffering evidence.

2 It seems to be a fair way down the chain of
3 evidence, if I understand Mr Smith's outline, but also
4 there is a suggestion of another three women.

5 Now, we don't want to have a situation where we have
6 some statements and then evidence is given and then
7 later on some further material comes to light.

8 If there is known evidence or suggestions of
9 evidence by those who suggest that there is fabrication,
10 that should all be taken first and those statements
11 proffered in the usual way.

12 So that is our request.

13 There is also another matter that I mention and it
14 is unrelated to that, but it is related to the
15 envelopes. This was raised on Monday and the request,
16 as the Commission would know, had been made by a letter
17 to me, bearing in mind that I had given an undertaking
18 in the Supreme Court to ensure that the envelopes were
19 kept safe pending the Federal Court proceedings and any
20 High Court proceedings which may occur. And the request
21 was made that I obtain instructions with regard to
22 providing those envelopes to certain named Ngarrindjeri
23 women. Namely, Bertha Gollan, Dorothy Wilson and Dulcie
24 Wilson.

25 As I indicated to the Commission, at that time, I
26 had to speak with other people. I am not the custodian
27 of that material, but I have in fact spoken to persons
28 who are not my clients and I have been informed that the
29 envelopes will not be made available and a letter has
30 been written to three Ngarrindjeri women informing them
31 as to why. And I have been sent a copy of that letter
32 and I think I should indicate that I have been requested
33 to read it out.

34 CONTINUED

- 1 It's only short and I will read it to the Commission.
2 This particular letter is written to Dulcie Wilson, but
3 I understand that similar letters have been written to
4 the other two Ngarrindjeri women.
- 5 MR ABBOTT: Can I rise to ask whether my friend is
6 reading this out on the basis of any instructions, or
7 because she wishes to take up some time?
- 8 MS LAYTON: I have been given - I can answer you if
9 you don't mind sitting down.
- 10 MR ABBOTT: I apprehend that the ALRM, if they are
11 fulfilling their charter, should not be acting for any
12 particular group of women. I would expect my friend, if
13 she has received instructions along the line indicated,
14 would be acting for a particular group, since this
15 letter is obviously a response to my clients who do form
16 a particular group. I would conceive that the role of
17 the ALRM, in so casting themselves, appears to be
18 directly in breach - and certainly in breach - of the
19 spirit of the heart of charter.
- 20 MS LAYTON: I'm referring directly to a letter that
21 was written to me asking if I could get instructions
22 from certain people. I indicated I can't get
23 instructions, but I will obtain information as to the
24 issues that were raised in that letter. I indicate they
25 are not my clients, and I predicated that. I was
26 informed that the persons would not make available that
27 information and I was requested to impart the
28 information to you. That is the basis upon which I
29 intend to do it. I'm not acting as the ALRM, I am
30 acting as an officer of this Commission, if I can put it
31 that way, wanting to say something in response to a
32 letter that was written to me asking for certain matters
33 to be ascertained, and this is what I have been told to
34 do.
- 35 MR ABBOTT: You're reading out a letter that is
36 addressed to my clients, aren't you?
- 37 MS LAYTON: Yes.
- 38 MR ABBOTT: Can't we wait until I get it? I have

1 never seen it.

2 MS LAYTON: I'm responding to the request made by
3 the court.

4 COMSR: But that is a request made by counsel.

5 MS LAYTON: That's correct. I'm responding to it.

6 COMSR: The normal way might be to -

7 MR SMITH: Respond to me.

8 MS LAYTON: I'm happy with that. I was asked if I
9 could convey the information to the Commission and I had
10 thought I would do it that way because everything had to
11 be done publicly on this aspect, and I thought that it
12 would be appropriate to respond publicly. It's only a
13 short letter and sets out why, and I would have thought
14 that would have been very relevant.

15 COMSR: Perhaps the counsel -

16 MR SMITH: We are struggling to start evidence in
17 this Royal Commission. Thus far, we have had three days
18 which have been indispersed with the proffering of
19 statements and utterances from the bar table. It's got
20 to come to the evidence. The evidence must start. I
21 object to this. The letter, I haven't received a
22 response to the letter, as counsel assisting the
23 Commission, or what the Commission wrote to Ms Layton.
24 If it could come to me first, we can work from there.

25 MS LAYTON: I'm quite happy to hand it over in the
26 light of all of that. I do not wish to do something in
27 any way that could be construed as destructive. I hand
28 that letter to Mr Smith as counsel assisting.

29 At this point, I tell the Commission that I wish to
30 make two requests: one, that particulars be given; and,
31 two, that an undertaking - 'undertaking' is the wrong
32 word, an affirmation that statements will be provided by
33 the close of business on Friday, or, if not, then
34 statements be proffered by those who are alleging
35 fabrication to all of those who should receive it at
36 this bar table before any evidence whatsoever commences
37 with regard to this Royal Commission. That is our
38 request.

1 MR TILMOUTH: I would like to rise to support the
2 submissions which have been made. If I could, I
3 generally adopt the submissions made by Ms Layton. I
4 would like to add a few submissions of my own.

5 The primary dictate in the Letters Patent of this
6 Royal Commission are in para.6, being it is necessary to
7 investigate the allegations'; namely, the allegations of
8 fabrication. In my submission, for this Tribunal to be
9 properly constituted and proceed correctly, it should,
10 first, do just that, which is what the constituting
11 document of this Royal Commission requires it to do.

12 In my submission, Miss Layton is, therefore, right
13 in her submissions to you that the way to go about it is
14 to produce these statements, give us time to take
15 instructions and consider them before the evidence is
16 given.

17 In fact, if the Commission pleases, I understand
18 that it is proposed this afternoon that we go into
19 evidence, albeit of a Museum nature. That appears to
20 be contrary to our expectations as raised in para.4 of
21 the general procedural direction that statements would
22 be circulated in advance, as Mr Smith said today in his
23 opening, and then with sufficient time upon which
24 instructions can be taken and investigations made, if
25 required.

26 COMSR: I take it that counsel have circulated
27 to counsel assisting the statements of all the
28 witnesses?

29 MR TILMOUTH: We have got nothing.

30 MS LAYTON: Nothing.

31 MR TILMOUTH: Nothing whatsoever.

32 COMSR: I'm saying that on behalf of the parties
33 you represent, that you have prepared statements?

34 MR TILMOUTH: On what? That's the point we are
35 making. What are we supposed to prepare statements on?
36 We have no idea, with respect, what is supposed to be
37 investigated and what their involvement is alleged to
38 have been.

1 Could I add the point that on the media statements
2 that Ms Layton talked about, we were only given those at
3 12 o'clock today. It may not have been clear from what
4 she said, but - and so far as we have had the
5 opportunity to go through a small number of them, in
6 many respects they only appear to be summaries. In some
7 cases, they appear to be only what went to air; that the
8 whole interview, whether it went to air or not, does not
9 appear to be available.

10 Fundamental points need to be made in what, I
11 submit, is hearsay. What is required to properly
12 investigate, as I have submitted under para.6 of the
13 recitals, is the original statements upon which it is
14 said that there are reliable allegations of fabrication.
15 With respect, your ruling in para.1 on p.2 is only in
16 the event that the Commission is able to conclude that
17 there was an element of fabrication. That the
18 subsequent Terms of Reference need to be separately
19 considered is, with respect, correct.

20 But, at the outset, what needs to be embarked upon
21 is an inquiry as to whether or not there is any credible
22 evidence of fabrication, first, and whether there is
23 something to amount to a prima facie case. If it's not
24 credible or not a prima facie case, there is no need to
25 go through the Museum evidence and the anthropological
26 evidence, and all the rest of it.

27 More than that, the fact of the matter is that with
28 just general aspersions through the secondary source of
29 the media reports is totally inadequate to convey what
30 lies behind the true allegations. People's reputations,
31 their careers in some cases, their credit and, indeed,
32 their religious and cultural beliefs are all supposed to
33 be under attack, but nobody is prepared to explain just
34 how, why or where.

35 I make the final point that although Hallet still
36 remains, I think, the only book on Royal Commissions,
37 the opening statement that Mr Smith read, or the basis
38 of the opening statement that Mr Smith read in the

1 quotation from Hallet this morning at p.217 is supported
2 by reference to Victorian Royal Commissions which
3 occurred between 1966 and 1977. Since 1977, a great
4 deal of law in natural justice has developed since then
5 and, in my submission, things are quite different these
6 days from what they were in those years upon which that
7 statement is based.

8 The fact of the matter is that the Royal Commission,
9 as I said in my opening submissions before I formally
10 sought leave, encompasses, as you have ruled, the
11 circumstances of who, whether, where, what and how and
12 it makes direct allegations in the end result that
13 certain people are involved in fabrication.

14 Now, in my submission, there must be, first of all
15 before we can go anywhere else, a firmly based and
16 reliable prima facie case of that, established or
17 otherwise. If the predicate of the Royal Commission has
18 not been satisfied, then there is no reason to make any
19 further inquiry.

20 I make one final point and that is a procedural
21 rather than substantive point. We were advised only
22 yesterday - and some others are in the same position -
23 of limited availability of funds for legal
24 representation. It includes no provision at all for
25 preparation or reading. It only relates to Commission
26 days and it also contains, for want of a better word, an
27 embargo on the receipt of any other funding. That
28 means, of course, that at any stage we are instructed to
29 take any challenge to the Royal Commission, that funding
30 will cease. Obviously, those types of conditions have
31 grave problems and they are effectively limiting the
32 ability to give effective and proper representation. In
33 fact, if one construed it narrowly, to come along on
34 Commission days and hold the hand of people for whom we
35 represent and no more, is a token rather than a
36 substantial gesture under proper representation under
37 the Act.

38 MS PYKE: I would like to adopt the submissions of

1 Ms Layton.

2 MR STEELE: I adopt the position put by Ms Layton
3 and Mr Tilmouth. I want to speak of my client because
4 it exemplifies the possibility of the position in which
5 he and I are faced.

6 COMSR: Who is your client?

7 MR STEELE: My client is Dr Neale Draper, who is an
8 archeologist and anthropologist. He is a resident of
9 Queensland now. He is not in this State physically, nor
10 does he have the means of coming to this State to
11 provide me with instructions, nor do I have funding to
12 bring him to this State to provide me with instructions.
13 He has professional and personal responsibilities in
14 Queensland which prevent him leaving on a long-term
15 basis.

16 Until this morning, I had no means of obtaining
17 instruction from him. In any event, until this morning,
18 there was no authorisation by the Minister pursuant to
19 s.35 which enabled Dr Draper to give me any
20 instructions, except of the most general kind.

21 Obviously, an important aspect of his evidence
22 pertinent to this matter is the report which has been
23 mentioned from time to time through the submissions. I
24 have not seen that report. I have no means available to
25 advise him. I have no means available to protect him.
26 I have no means available to cross-examine any
27 witnesses.

28 I was told last night for the first time that an
29 anthropologist's evidence would commence today. I was
30 told that it would be only Museum evidence from a Museum
31 witness. I was not told who they were and what they
32 would say. I was not told whether there would be an
33 attack on my client's professional integrity. I was not
34 told if there was to be such an attack or the form of
35 that attack. I have no possibility of obtaining any
36 instructions on that at all.

37 In those circumstances, I completely agree and adopt
38 the submissions of Ms Layton that it is incumbent to

1 those who are making allegations of fabrication to say
2 what the allegations are and to say what is anticipated
3 in the making of the fabrication. Until that is done,
4 it is a denial of natural justice to require any party
5 to participate in a sensible way.

6 COMSR: Are there any other counsel that wish to
7 be heard in respect of this?

8 MR STRATFORD: You will remember that I represent Mr
9 Tim Wooley. Mr Wooley is a solicitor employed by the
10 ALRM and he initially took instructions from the Lower
11 Murray Aboriginal Heritage Committee back on 12 October
12 1993. He continued to act for that committee through
13 until this Royal Commission came into being.

14 As early as 25 October 1993, he drafted letters for
15 his clients to send to the State Minister for Aboriginal
16 Affairs and the Federal Minister for Aboriginal and
17 Torres Strait Islander Affairs.

18 On 23 December 1993, he wrote to Mr Tickner, the
19 Federal Minister, seeking a s.10 declaration under the
20 Aboriginal and Torres Strait Islander Heritage
21 Protection Act. Between taking instructions and the
22 making of the order by Mr Tickner, he was involved in an
23 extensive exchange of correspondence with the relevant
24 Ministers and was involved in extensive discussions with
25 the anthropologists Draper, Deane and Saunders.

26 From about 20 June 1994, he was acting for five
27 senior women as well as for the Heritage Committee. The
28 nature of this secret women's business and how the
29 bridge might affect it have never been explained in any
30 detail to him.

31 It was really not until around 18 April 1994 that
32 his instructions became clear, that the main reason his
33 clients objected to the building of the bridge was
34 because it somehow upset the spiritual circumstances of
35 Hindmarsh Island and its surrounds for the women. Once
36 this secret women's business was raised, matters were
37 largely out of his hands and taken over by the
38 anthropologists.

1 COMSR: I'm not quite clear what point you're
2 making in reciting the background?

3 MR STRATFORD: It is important that you understand
4 something of Mr Wooley's position in a general way
5 before I make the submissions that I now come to. It's
6 on the basis of the second point that was made by Dr
7 Griffiths when he graced us with his presence.

8 It's fairly obvious, if his argument is valid, that
9 Mr Wooley is not a compellable witness because he made
10 an application on behalf of his clients pursuant to s.10
11 back in December 1993. So, to put it another way:
12 Evidence disclosed by Mr Wooley in support of s.10
13 application and then given this inquiry might impair the
14 efficacy of the further Commonwealth inquiry to be
15 headed by Matthews J.

16 The next issue that I raise is the status of files
17 held by the ALRM if Mr Wooley is to give evidence.
18 Clearly, it's desirable that Mr Wooley should have
19 access to these files to prepare his statement, to give
20 his evidence and to have available to him if he is
21 cross-examined. They are not his files. They are
22 either owned by his employer or by his clients. He
23 cannot refer to them unless privilege is waived. He
24 can't refer to confidential information unless he can
25 rely on the exemption that was provided this morning by
26 the Minister.

27 All of this means that for Mr Wooley to provide a
28 statement and to give evidence, the files have to be
29 obtained from the ALRM. Further, the Lower Murray
30 Aboriginal Heritage Committee will have to be asked to
31 waive privilege. The five women that Mr Wooley acted
32 for will have to waive privilege and he will have to
33 feel confident in being able to rely on the exemption
34 provided this morning by the State Minister.

35 I also take up the point that has been raised by Mr
36 Tilmouth in relation to funding. It was not until ten
37 to six last night that I received a response to a
38 request delivered on 13 July. This response was an

CJ 3D

- 1 offer to pay limited costs for the purpose of proofing
- 2 Mr Wooley and attending while he is giving evidence.
- 3 CONTINUED

1 Unless this situation changes, this means that he
2 has no funding for any of the arguments on the issues I
3 have raised in this submission. He will have no
4 representation when others give evidence, and that
5 includes anyone who might say anything, suggesting that
6 he knew of a fabrication or was involved in it and,
7 therefore, he will not have anyone available to
8 cross-examine those witnesses on his behalf to test the
9 allegations.

10 All of this is to be taken against the background of
11 having only the broadest picture of secret 'women's
12 business', which he probably cannot use, and no
13 knowledge of the nature and extent of the allegations of
14 a fabrication involving him or anyone else. Without
15 funding, it is difficult to see how Mr Wooley will get a
16 fair go. They are my submissions.

17 MR SMITH: I can only repeat what I said this
18 morning, that spelling out the allegations is to provide
19 the witnesses represented by people like Mr Abbott.
20 That cannot happen today and the statements are due to
21 be filed tomorrow - or at least some of them.

22 I suggest only to the Commission that we start today
23 with the anthropological evidence, or at least evidence
24 from one party from the museum on that topic. I
25 indicate to counsel at the bar table that, as they have
26 had no adequate notice of that evidence, that you
27 nonetheless receive it, and they be given an opportunity
28 to cross-examine that witness at a later time in the
29 Commission.

30 I have been through the question about allegations.
31 This is not an ordinary piece of litigation, with
32 plaintiff against defendant, where such things are
33 appropriate. The allegations that are made have been
34 broadcast abroad, and it is our function here to inquire
35 into those allegations; that is, to call evidence to see
36 if those allegations can be made out indeed; the
37 allegations that occur in both the print media and the
38 electronic media. So that that is the function. We,

1 the Commission, do not have, as it were, a mortgage on
2 those allegations. They come from witnesses whom we
3 will call.

4 As to the question of calling evidence without
5 statements in advance, that occurs regularly in such
6 inquiries as these. Witnesses are called often, as we
7 put it, on the blind, and statements need not
8 necessarily be provided in advance by counsel assisting.
9 By and large, as this Commission gets underway, in
10 accordance with the Practice Direction, that will
11 happen.

12 We have heard now another array of submissions
13 really that have the effect of delaying the Commission.
14 It was my understanding that the submissions you were
15 going to hear this afternoon were to be addressed to the
16 question of the rights and extent of examination and
17 cross-examination, and the impact of the Section 35
18 authorisation. That is all I have to submit.

19 MS LAYTON: At this stage we indicate, in view of
20 the fact that notwithstanding our request for
21 particulars of the allegations of fabrication, and on
22 the basis that there has been no commitment that there
23 will be no evidence adduced pending statements being
24 supplied with regard to those who allege fabrication as
25 to what those allegations of fabrication are, we will at
26 this point withdraw from the Commission, and we do so
27 for this reason. The ALRM, as you know, is a body that
28 protects the legal rights of Aboriginals and, in
29 particular, their traditional religious beliefs. We
30 cannot continue to participate in what we see to be an
31 unlawful and inappropriate investigative process. This
32 is quite apart from the application that we have made in
33 the Supreme Court with regard to the actual issuing of
34 the Royal Commission. We now say that this process that
35 is to be adopted is an abusive process and we submit
36 that we cannot continue to be part of it.

37 There are two ways in which this inquiry could have
38 been conducted. One was to investigate the allegations

1 of fabrication once they had been nominated. The second
2 was to investigate the religious beliefs of people as to
3 whether or not that included what is alleged to have
4 been fabricated. It appears as though the lack of
5 particularity about allegation means that the second is
6 the process and, in particular, the focus on the
7 confidential envelopes demonstrates more clearly than
8 ever before, that this inquiry is one as to the
9 religious beliefs of Aboriginal people and not an
10 inquiry into the allegations of fabrication, which still
11 are not articulated. On that basis, Madam Commissioner,
12 we seek to withdraw.

13 COMSR: You can, but, of course, you have made
14 some submissions to me, I have heard you and I have
15 heard counsel assisting. I do not know that I have as
16 yet indicated what I propose to do, but, however.

17 MS LAYTON: If there was anything different from
18 what counsel intended to do, perhaps we should hear. I
19 understood that counsel was now pursuing the calling of
20 evidence and I assumed that you, madam Commissioner, in
21 not saying anything, were accommodating that process.
22 If that is not to be the case, then I sit down at this
23 point.

24 COMSR: I must say that I was still mulling it
25 over in my mind. I have heard submissions from a
26 variety of counsel. I was considering your request that
27 there be at least two particulars provided.

28 MS LAYTON: I named four in all.

29 COMSR: I certainly do not propose to just, as
30 it were, dismiss it out of hand without considering the
31 matters that have been put, Ms Layton, but I am, of
32 course, mindful of the time constraints of this inquiry.
33 I have allowed counsel some time to consider the various
34 documents. I propose to consider what has been put, but
35 I note that another day has virtually gone on these
36 preliminary matters.

37 However, I have had a number of submissions put to
38 me by counsel. I do not know if it has exhausted all

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1 that counsel for all the parties want to say on the
2 matter, before I consider what might be appropriate in
3 the circumstances, but what I would propose to do is at
4 least to take a short break while I consider the matter.
5 I will withdraw from the hearing for a while, while I
6 have regard to what you put to me and what the other
7 counsel have put to me concerning the conduct of the
8 inquiry.
9 ADJOURNED 3.10 P.M.

1 RESUMING 4.32 P.M.

2 MR SMITH: To assist you with your ruling on the
3 questions raised by a number of counsel before the
4 break, as counsel assisting the Commission, I indicate
5 that the Commission is prepared, subject to your ruling,
6 to make a more detailed opening, including particulars,
7 attempting to answer the particulars sought by counsel,
8 Ms Layton and Mr Tilmouth, on Monday. Statements for
9 the first segment of evidence will be provided in
10 accordance with the strictures under the Section 35
11 authority on Monday, and the evidence to commence on
12 Wednesday.

13 COMSR: What you are seeking is an adjournment
14 for those purposes?

15 MR SMITH: Yes. I will be attempting to insist
16 that the evidence starts and submissions finish on that
17 day and that the Commission gets underway.

18 COMSR: It seems to me a lot of the difficulties
19 that are arising seem to be because the functions of the
20 Commission - that is, its investigatory role - do not
21 appear to be perhaps fully accepted. This Commission,
22 of course, has been set up to collect information about
23 the allegations of fabrication, and the allegations
24 having been made, the inquiry has to obtain information
25 concerning them. Those allegations have been publicly
26 made and I understand that there is material available
27 which, I take it, Mr Smith, you are prepared to make
28 available to the parties.

29 MR SMITH: Yes. I indicate that all the media
30 evidence that we have collected will be made available
31 to counsel.

32 COMSR: Of course, the Commission cannot know at
33 this stage what information might be uncovered during
34 the course of the inquiry, because we are continuing to
35 uncover facts as the inquiry progresses. However,
36 counsel assisting have tried to meet the concerns
37 expressed by counsel by undertaking to give a more
38 detailed opening on Monday and, subject to the

1 conditions of the authority given pursuant to Section
2 35, undertaking to provide statements. I am prepared to
3 grant an adjournment to Monday for that purpose.

4 However, I must indicate that I will be proposing to
5 commence with the evidence on the Wednesday and that I
6 have to have regard to the time limits in which this
7 Commission is to operate. However, I consider that many
8 of the concerns that have been expressed will be met by
9 the provision that has now been made by counsel
10 assisting.

11 There is one matter though that I think I should
12 cover before we do adjourn this afternoon, and that is a
13 matter that is of concern to Abbott's clients that he
14 voiced this morning. It may assist if I explain, in a
15 general way, that there are provisions in the Royal
16 Commission's Act to deal with disruptive conduct and
17 intimidatory conduct. I do not expect to have to have
18 recourse to such provisions at this inquiry. However, I
19 point out that a Commissioner could not be expected to
20 permit a hearing to be disrupted or witnesses
21 intimidated.

22 In any event, if it proved necessary to do so, the
23 evidence of a witness who felt intimidated could be
24 taken in private. Having said that, I am not to be
25 taken to be suggesting that there was any conduct in
26 this hearing today which would call for any action on
27 the part of the Commission. Indeed, if I might say so,
28 I have probably had more trouble from the two benches in
29 front of me. I am not wishing to be facetious, but I
30 just want to make the point that there has been nothing
31 in the conduct of anyone in the courtroom today that has
32 caused me to make those observations that this
33 Commission, like any Commission, would deal with
34 disruptive conduct and take what steps were available if
35 and when the need arose. I do not know whether that
36 answers your concerns, Mr Abbott?

37 MR ABBOTT: It would answer some of them. It
38 doesn't answer the issue as to whether or not there was

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1 anything in the nature of a curse placed on this
2 courtroom.

3 COMSR: That is a matter that I haven't
4 overlooked and I am pursuing.

5 MR ABBOTT: I will wait until Monday.

6 COMSR: On Monday I would expect, of course,
7 when we are dealing with the question of releasing
8 statements, to hear from counsel, as I have indicated
9 previously, the extent of their special interests so
10 that I am able to deal with the question of the release
11 of the statements.

12 ADJOURNED 4.40 P.M. TO MONDAY, 31 JULY 1995 AT 10 A.M.

1 COMSR STEVENS

2

3 HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

4

5 MONDAY, 31 JULY 1995

6

7 RESUMING 10.10 A.M.

8 MR SMITH: The programme for today has been
9 distributed to all counsel and other people interested
10 so that, with your leave, I immediately embark upon the
11 further opening that the Commission agreed to give.

12 By way of introduction, given the requests of
13 counsel last Thursday, the Commission now extends the
14 time for the lodging of witness statements to Friday, 4
15 August 1995 at 10 a.m. Apart from the Museum evidence
16 or statements, which statements will be distributed
17 today on the basis of certain safeguards and conditions,
18 there will be no introduction of other evidence
19 statements until the earliest Friday afternoon, 4
20 August. Again, that distribution of witness statements
21 will be subject to conditions relating to such matters
22 as confidentiality and the like. The Museum evidence
23 will commence on Wednesday at 10 a.m.

24 The following opening statement will necessarily
25 highlight the allegations of fabrication, so it is
26 necessarily a focus upon the existence of evidence
27 against there being secret and other sacred women's
28 business associated with Hindmarsh Island and it being
29 fabricated in the months leading up to the banning of
30 the construction of the bridge on 9 July 1994.

31 Some conversations to which I will be referring in
32 this opening will necessarily be modified to avoid me
33 opening on precisely what is said about secret and/or
34 sacred women's business.

35 What then is sought by way of my opening, what is
36 sought by way of further detail, is set out in the
37 transcript of proceedings on Thursday, 27 July 1995, and
38 in particular at p.93 of the transcript.

1 The requests are as follows: First, what allegations
2 are being made about the secret sacred women's business
3 as contained in the secret envelopes which is alleged to
4 be a fabrication?; Two, who are the persons who have
5 alleged that the women's business, or any aspect of it
6 as contained in the secret envelopes, was a
7 fabrication?; Three, who are the persons alleged to be
8 involved in the fabrication and the nature of their
9 involvement?; and, Four, when where and how are the
10 persons alleged to have been involved in any
11 fabrication.

12 I am answering these questions from a combination of
13 witness statements already to hand from the South
14 Australian Museum, from the Chapman group, from media
15 material and from evidence which the Commission reliably
16 expects to have based upon information supplied to me by
17 counsel and the legal representatives of some parties.

18 So, I now deal with the first question: What
19 allegations are being made about the secret women's
20 business as contained in the secret envelopes which is
21 alleged to be a fabrication?

22 It is alleged that there is no secret and/or sacred
23 women's business connected with Hindmarsh Island or its
24 environs. In short, it is alleged that such business
25 does not exist. Evidence will be led that there is no
26 history or cultural tradition of secret sacred women's
27 business associated with Hindmarsh Island. It is
28 alleged that Doreen Kartinyeri fabricated the secret
29 sacred women's business with the support and
30 encouragement of others. It is not necessarily the
31 existence or the fact of their being women's business in
32 respect of Hindmarsh Island which is alleged to be
33 fabricated by arrangement, it is the claimed existence
34 of secret and/or sacred women's business which is
35 challenged as a fabrication.

36 The second question: Who are the persons who have
37 alleged that the women's business, or any aspect of it
38 as contained in the secret envelopes, was a fabrication?

1 The persons who allege the fabrication are in five
2 groups. Collectively, their evidence amounts to an
3 allegation of fabrication. I deal with each of the five
4 groups in turn. Firstly, those who were at Mouth House
5 on 9 May 1994 and who witnessed or who participated in
6 the discussions and who were, amongst other people, the
7 men, namely: Victor Wilson, and Douglas Milera, to name
8 two. These people, who were the persons who alleged the
9 fabrication, are: Dorothy Wilson, Sarah Milera, Douglas
10 Milera. I ask you to note that in naming Sarah Milera
11 and Douglas Milera, I am relying solely on what they
12 have said to the media; and, in Douglas Milera's case,
13 to other parties, such as Kym Denver. Neither Sarah nor
14 Douglas Milera at the present time appear to be prepared
15 to give evidence to the Commission. None the less, it
16 is appropriate that evidence of statements made by them
17 to other parties be heard by the Commission.

18 The second group of people who are the persons who
19 have alleged that the women's business, or any aspect of
20 it as contained in the secret envelopes, was a
21 fabrication, are certain Ngarrindjeri women of seniority
22 and standing who assert that they have no knowledge of
23 secret sacred women's business associated with Hindmarsh
24 Island; and, furthermore, say that they would know if
25 there was such secret business in existence. These
26 women are: Dulcie Wilson, Phillis Byrnes, Bertha
27 Gollan, Rita Wilson, Audrey Dix, Jennifer Grace, Betty
28 Tatt and also Dorothy Wilson - she being not so senior
29 as the others. Some of these women have been given some
30 information about what is supposed to be in the
31 envelopes.

32 The third group of witnesses who come under the
33 heading of persons who, in a sense, allege that the
34 women's business, or any aspect of it contained in the
35 secret envelopes, is a fabrication, are two academics
36 from the South Australian Museum, an historian and a
37 anthropologist historian, both of whom have a long
38 history of academic and personal contact with the

1 Ngarrindjeri culture and the Aboriginal people of the
2 Lower River Murray. These men assert that the secret
3 sacred women's business is, from their perspective, a
4 recent invention. They are: Philip Geoffrey Jones and
5 Philip Clarke. Their expert views about the
6 non-existence of secret sacred women's business, based
7 as it is on the voluminous literature about the area, is
8 reinforced, to some extent, by their eye witness
9 observations in the Museum of events leading to the
10 emergence of this business.

11 The considerable anthropological data and literature
12 from, amongst others, Meyer, Taplin, Tindale and, in
13 particular, Ronald and Kathryn Berndts reveals a wealth
14 of detail of private matters of sexuality, initiation
15 and birthing to do with both men and women of the
16 Ngarrindjeri people. This data purports to reach back
17 to a time earlier than the European invasion. This data
18 reveals no secret sacred women's business associated
19 with Hindmarsh Island and its environs. This will be
20 the subject of evidence before the Commission.

21 The fourth area of evidence that supports, if you
22 like, or that indirectly answers the second question of
23 'Who are the persons who have alleged secret women's
24 business, or any aspect of it as contained in the secret
25 envelopes, was a fabrication?', are those people who
26 give evidence here about the late emergence of the
27 secret and other sacred secret women's business. In the
28 sense, the evidence as to the late emergence of the
29 secret and/or sacred women's business is relevant to the
30 issue of whether it existed at all. Accordingly, what
31 occurred or rather did not occur in the early years of
32 the Chapman development in the Hindmarsh Island from,
33 say, 1981 to 1993, is material - and you will hear some
34 evidence as to it.

35 In this period, the evidence proposed to be adduced
36 identifies some consultation by the Chapmans and a
37 number of experts employed by them and Government
38 departments with Aboriginal interests. Women's business

1 and in particular secret sacred women's business, is not
2 raised or identified at any stage during this period
3 until April 1994.

4 The next category of evidence that addresses this
5 second question is to do with the Ngarrindjeri people
6 themselves. There will be evidence of meetings of
7 Ngarrindjeri people, including Ngarrindjeri women, and
8 these meetings took place at some considerable time
9 prior to the emergence of the women's business in
10 mid-October 1993. There was a meeting of Ngarrindjeri
11 people at Camp Coorong near Tailem Bend. At the
12 meeting was Dorothy Wilson. The meeting was called by
13 Daisy Rankine, Vic Wilson, George Trevorrow, Doug Milera
14 and Robert Day. There was a discussion about the bridge
15 at that meeting, but in the context of sacred burial
16 sites. There was no suggestion at this meeting of
17 women's business.

18 Again, in November 1993, there was, at the Port
19 Adelaide College, a meeting of Ngarrindjeri women,
20 including Dorothy Wilson. Again, it was at that meeting
21 that the Ngarrindjeri people were asked to go to Goolwa
22 and protest about the bridge.

23 So, they are the five areas of evidence that
24 address, in my submission, the second question; as far
25 as the evidence that we know of thus far.

26 I now move to questions three and four, which I will
27 deal with together. Question three is: 'Who are the
28 persons alleged it to be involved in the fabrication and
29 the nature of their involvement?'. Question four is:
30 'When, who and how are persons alleged to have been
31 involved in any fabrication?'. In my view, the
32 appropriate way of answering these questions is to
33 attempt to identify, in the evidence which is to be led
34 to the Commission from the various interests, the
35 context in which secret sacred women's business emerged,
36 the persons involved and the events surrounding it.

37 I commence with early April 1994. Prior to 12 April
38 1994, a matter of days prior, Dr Doreen Kartinyeri

1 telephoned Philip Clarke of the South Australian Museum
2 from her Mid-North home. She told Philip Clarke that
3 she required information on Hindmarsh Island and said
4 that they had very little to stop the bridge and were
5 looking for anything that may help them. Philip Clarke
6 provided Dr Kartinyeri with some references and agreed
7 to give her a printout from his site database prepared
8 for his thesis; his thesis deals with the Lower River
9 Murray Ngarrindjeri people.

10 Philip Clarke's diary shows that on 12 April 1994,
11 he reminded himself to send the material to Dr
12 Kartinyeri, and he did so. A short time after 12 April
13 1994, Dr Clarke spoke again with Dr Kartinyeri. She
14 said to him that she was interested in the similarity
15 between the Ngarrindjeri word Kumari, meaning
16 'pregnant', and the place name of the island recorded by
17 Taplin which has Kumarangk, meaning 'the points'. There
18 was a conversation between Dr Kartinyeri and Dr Clarke
19 about the word and its meaning.

20 From early April, or around about early April, the
21 Anthropological Division of the South Australian Museum
22 received a number of informal requests for information
23 from Aboriginal communities. Then, there were two
24 particular visits by Aboriginal people to the Museum to
25 specifically look at the Tindale collection for
26 information on Hindmarsh Island.

27 Firstly, Douglas Milera and Victor Wilson came into
28 the Museum and Philip Clarke showed the Tindale
29 collection to them, which was in the process of being
30 unpacked in Philip Jones's room. Indeed, Tindale had
31 died only in November 1993. Both Douglas Milera and
32 Victor Wilson told Philip Clarke that they were looking
33 for something that might strengthen their case to stop
34 the bridge and that they had very little upon which to
35 base their argument.

36 A few days later, in the first half, or thereabouts,
37 of April 1994, Doreen Kartinyeri, Hilda Day, Sarah
38 Milera arrived at the Museum and saw there Mr Steve

1 Hemming and Dr Philip Clarke. Dr Kartinyeri said that
2 she knew something about the significance of Hindmarsh
3 Island and wanted to find something to confirm it in the
4 Tindale collection.

5 Sarah Milera, whilst looking at the photographs
6 unearthed from the Tindale collection, appeared to go
7 into some sort of trance. The collection was
8 considerable and the ladies asked Mr Hemming and Mr
9 Clarke to work as quickly as possible to find for them
10 references to Hindmarsh Island and the extent of the
11 Coorong region. They said that the `business' had
12 become important to them as Ngarrindjeri women.

13 Between 15 April and 11 May, Dr Philip Clarke was on
14 leave from the South Australian Museum. During his
15 leave, Stephen Hemming rang him requesting all his data
16 on Hindmarsh Island in order to help him; that is, Mr
17 Hemming to assist Dr Kartinyeri. Philip Clarke
18 questioned Stephen Hemming as to why he was getting more
19 deeply involved and Mr Hemming said that Dr Kartinyeri
20 had sought his special interest in interpreting the
21 information. Philip Clarke gave the data to Mr Hemming.

22 The next event was 26 April 1994. On 26 April 1994,
23 there was a meeting in a cafe near the North Terrace
24 offices of ATSIC between Steven Michael Palyga, Thomas
25 Chapman, Matt Rigney of ATSIC and Peter Walsh, an
26 Australian Government solicitor acting for ATSIC.
27 During the course of the meeting Matt Rigney told the
28 gathering that Hindmarsh Island was significant and he
29 described the shape of Hindmarsh Island in relation to a
30 part of a woman's anatomy and he said there were women's
31 issue to do with birth associated with the island.

32 I now move to what has been called the `Mouth House
33 meeting' of 9 May 1994. The Lower Murray Aboriginal
34 Heritage Committee called a meeting of Aboriginal women
35 from the Nunga's Club at Murray Bridge for 9 May 1994.
36 On Friday, 6 May 1994, Dorothy Wilson, who was the
37 programme director of the Nunga's Club, heard about the
38 meeting and decided to go. 15 or so Ngarrindjeri women

1 travelled to Goolwa on Sunday in a bus; Sunday, being 8
2 May. The women stayed in a place called The Bunkhouse
3 on the northern end of Hindmarsh Island. On 9 May, on
4 the Monday, at The Bunkhouse, Doreen Kartinyeri spoke to
5 the women, including Dorothy Wilson, and said, amongst
6 other things: 'The men have been down here for months
7 trying to stop the bridge and they can't stop it, so
8 it's now up to us women to stop the bridge.' Dr
9 Kartinyeri then told the women the story about women's
10 business and why the island was sacred. There was
11 considerable discussion about it.

12 Then, Eileen McHugh wrote out a letter to be sent to
13 - the meeting decided it should be sent to Mr Tickner.
14 It was signed by all the women present. Sarah Milera
15 took the letter in order to fax it to the Minister from
16 Signal Point on Goolwa Wharf.

17 At the end of this meeting at The Bunkhouse, Sarah
18 Milera asked Dorothy Wilson to come to her to Mouth
19 House - which, Commissioner, is a holiday cottage at the
20 southern end of the island looking into the mouth of the
21 River Murray. Sarah and Doug Milera were, at that time,
22 living at Mouth House. The other women from The
23 Bunkhouse followed to the Mouth House cottage. At the
24 Mouth House, evidence will be led that present were
25 Shirley and George Trevorrow, Doug Milera, Sarah Milera,
26 Vic Wilson, Tim Wooley, Doreen Kartinyeri and some of
27 the other women who had come from The Bunkhouse.

28 CONTINUED

1 Doreen Kartinyeri told Sarah Milera to show the
2 letter which had been written out in Bunkhouse and
3 signed by the women there to Tim Wooley. Sarah Milera
4 gave the letter to Tim Wooley and he appeared to read
5 it. He then said that he did not think there was enough
6 in the letter to stop the bridge and that they needed to
7 have more information in the letter. There was then
8 conversation about 'Kumarangk', the Aboriginal name for
9 Hindmarsh Island, being the word for 'fertile' or
10 'pregnancy'. Patti Kropinyeri started writing some
11 further material in the letter, which had come from
12 Bunkhouse. It was at about this time that Vic Wilson
13 went to a colour aerial photograph of the island on the
14 wall of the shack and said 'Look at the map up there.'
15 Then it is alleged Doug Milera said that the island and
16 the waters around it were sacred to Ngarrindjeri women
17 and he said 'Look at the photo. What does it remind you
18 of?' And he said words to the effect that what was
19 represented in the photograph was a representation of a
20 woman's body. Doreen Kartinyeri said, after a minute or
21 so, 'Oh, yes, I can see it. Yes, it's true,' she added,
22 indicating the map and pointing to it and saying
23 something about its resemblance. Dorothy Wilson left
24 Mouth House, at about this time, and, when she returned,
25 the second part of the letter, which was originally
26 composed in Bunkhouse, had been completed. She did not
27 sign the letter again. Police officers were in
28 attendance at Mouth House, at about this time, and there
29 was talk about the protest planned for the next day.
30 The police officers talked to Vic Wilson, Doug Milera
31 and George Trevorrow and also spoke to Tim Wooley.
32 Dorothy Wilson drove Sarah Milera to Signal Point on the
33 Goolwa Wharf, where Sarah went into the office.

34 The next event, Madam Commissioner, upon which we
35 have some evidence, or indication of evidence, is 12 May
36 1994.

37 On 12 May 1994, Dr Doreen Kartinyeri, who, of
38 course, was employed in the Family History Unit in the

1 South Australian Museum, was in the museum, assisted by
2 Mr Stephen Hemming, to compose and send a letter to the
3 Federal Minister, Mr Tickner. The Anthropology
4 Division's clerical officer, Ms Margaret Amon, who was
5 present, on that day, assisted with the faxing of the
6 letter to Mr Tickner and also heard conversation between
7 Mr Hemming and Doreen Kartinyeri. Some of that
8 conversation to the general effect that Mr Hemming would
9 back Dr Kartinyeri all the way.

10 It was at about this time that Dr Philip Clarke, of
11 the South Australian Museum, spoke with Mr Hemming about
12 the part played by him in the matter. In conversation
13 with Mr Clarke, Mr Hemming conceded that some invention
14 of tradition had taken place, but that he felt that
15 overall it was valid in that Maggie Jacobs and Connie
16 Roberts could remember something too. Mr Clarke
17 protested to Mr Hemming about Mr Hemming's active role
18 in the matters. And Mr Hemming said that, because of
19 his close association with these elderly Aboriginal
20 people, he considered he was justified in backing the
21 effort to stop the bridge. There was conversation
22 between the two of them about the role which the South
23 Australian Museum ought to be playing in such a matter.

24 I pause here to remind you, Madam Commissioner, that
25 it was on 12 May that an emergency declaration was made
26 by the Federal Minister halting the construction of the
27 bridge. That was later extended from 30 days to 60 days
28 and finally the declaration was made on 9 July.

29 And I also pause just to note, for the sake of
30 keeping things in some chronological order, that
31 Professor Saunders was engaged in late May 1994 to
32 report to the Minister, pursuant to s.10 (4) of the
33 Torres Strait Islanders Act.

34 And it was in about May or June of 1994 that Dr
35 Deane Fergie, an anthropologist, was commissioned by
36 ALRM, firstly, to facilitate a meeting of Aboriginal
37 women with Professor Saunders and later she was
38 commissioned by ALRM and, in particular, Tim Wooley to

1 prepare a report, which, together with a submission from
2 ALRM, went to Professor Saunders.

3 I now move to the next incident, which is the
4 gathering of Ngarrindjeri women at Goolwa and the
5 meeting with Professor Saunders. The gathering being on
6 19 June, that is a Sunday. And the meeting with
7 Professor Saunders on 20 June, the Monday.

8 On the Sunday, going back, to 19 June, approximately
9 35 women journeyed to Goolwa. Included in this group
10 were Dorothy Wilson. Doreen Kartinyeri was also
11 present. The women travelled by bus from Adelaide and
12 some had come from as far off as Point Pearce.

13 After tea on the eveing of 19 June, at Graham's
14 Castle, at Goolwa, Doreen Kartinyeri addressed the
15 women. She explained that Mr Tickner was sending
16 Professor Saunders down to talk to them and that they
17 had to convince Professor Saunders that there was
18 women's business on the island in order to stop the
19 bridge. She said that the men had tried to stop the
20 bridge but couldn't. Doreen Kartinyeri said that she
21 was present to tell the women all about the women's
22 business at Hindmarsh Island. She said that Grandma
23 Sally and Auntie Rose had told her of these things and
24 she then went on and elaborated and pointed to a map.
25 There was discussion between the women.

26 The next day, which was 20 June, Professor Saunders
27 arrived with her assistant, Anne Mullins. Dr Deane
28 Fergie was also present. On that day, there were
29 discussions between the women and with Professor
30 Saunders and with Deane Fergie and the party went on a
31 tour of the island down to the Murray Mouth. The tour
32 which involved, amongst other things, the indication of
33 sacred burial sites, was conducted by George Trevorrow
34 and Doug Milera.

35 I now move on to that week of 19 June.

36 Professor Saunders - and I deal with the Professor
37 Saunders's visit to the museum - Professor Saunders
38 visited the South Australian Museum on about Wednesday,

1 22 June 1994. Neither Philip Jones, who was, at that
2 time, the Head of Division of Anthropology at the
3 museum, nor the Director of the Museum, received any
4 formal notice of Professor Saunders's visit. Just prior
5 to the visit, Doreen Kartinyeri telephoned Philip Jones,
6 from within the museum, and asked whether it was
7 possible for Professor Saunders to view material which
8 had been collected in association with a burial platform
9 from Hindmarsh Island. Philip Jones told Doreen
10 Kartinyeri that the museum did not have anything like
11 that in the collection, but that the museum did have
12 material of that kind from Salt Creek, which is well to
13 the south along the Coorong. Philip Jones asked Doreen
14 Kartinyeri from whence she had got that information and
15 Dr Kartinyeri told Philip Jones that it was from Mr
16 Hemming. Philip Jones then told Doreen Kartinyeri that
17 it was his view that Stephen Hemming knew very well that
18 the material was from Salt Creek. And that it was
19 misleading to suggest that it had anything to do with
20 Hindmarsh Island. Doreen Kartinyeri made it clear to
21 Philip Jones that she was searching hard for anything
22 convincing to place before Professor Saunders and Philip
23 Jones told her that she should be careful about making
24 connections of the sort that Stephen Hemming suggested.

25 Now, Madam Commissioner, I move to some events
26 following the declaration halting construction of the
27 bridge on 9 July, which, in my submission, are capable
28 of being relevant to the issue of whether or not there
29 has been fabrication and the purposes thereof.

30 Madam Commissioner, there is some sensitivity in the
31 Aboriginal community in mentioning the name of a
32 deceased person, particularly if the period of mourning
33 has not lapsed. A person who features, to some extent,
34 in this matter is now deceased. Her name is Nanna
35 Laura. I would be pleased if you could suppress from
36 publication the mention of her name and I won't mention
37 it again, other than to refer to her as the deceased
38 daughter of Pinkie Mack. And perhaps, when I conclude,

1 Madam Commissioner, I could ask you to make that order.

2 Within days of the Mouth House meeting of 9 May
3 1994, Dorothy Wilson spoke to Pinkie Mack's daughter and
4 conveyed to her two aspects of the secret women's
5 business which she understood was contended for by
6 Doreen Kartinyeri. And Pinkie Mack's daughter told
7 Dorothy that she knew nothing of such secret women's
8 business.

9 In late October 1994, Dorothy Wilson met with Doreen
10 Kartinyeri at the Murray Bridge Nunga's Club. Stephen
11 Hemming and Maggie Jacobs were with Doreen Kartinyeri,
12 at that time. Dorothy Wilson told Doreen Kartinyeri
13 that the daughter of Pinkie Mack had never heard of the
14 women's business. Doreen Kartinyeri protested that the
15 daughter of Pinkie Mack had knowledge of the business
16 and, if she was saying she didn't, she was lying.
17 Indeed, the daughter of Pinkie Mack came to the Nunga's
18 Club at Murray Bridge that afternoon in order to visit a
19 great-granddaughter there. Dorothy Wilson spoke to her
20 for a second time about this women's business and she,
21 the daughter of Pinkie Mack, repeated to Dorothy Wilson
22 that she did not know anything about the business.

23 In March of 1995, the daughter of Pinkie Mack signed
24 a letter stating that she knew nothing about the women's
25 business and this letter found its way into the hands of
26 a Member of State Parliament - a Member for the area
27 including Hindmarsh Island, Mr Peter Lewis - who tabled
28 the letter in Parliament. Soon thereafter, still in
29 March of 1995, or thereabouts, representatives of ALRM
30 visited the daughter of Pinkie Mack and apparently
31 obtained a form of retraction of that letter and that
32 retraction featured in a television interview in the
33 media, at about this time.

34 I now move to 23 April 1995, which was the date of
35 the reconciliation meeting at Graham's Castle at Goolwa.

36 A number of Ngarrindjeri women attended a meeting at
37 Graham's Castle, on 23 April 1995, including Dorothy
38 Wilson, Doreen Kartinyeri and the director of the ALRM

1 Ms Sandra Saunders. There was considerable discussion
2 about the question of the women's business and Professor
3 Saunders and the stopping of the construction of the
4 bridge. There was anger at Dorothy Wilson who had
5 indicated her opposition to women's business. In the
6 course of the discussions at some stage during the
7 meeting Dorothy Wilson complained to Doreen Kartinyeri
8 that a number of Ngarrindjeri women in Murray Bridge did
9 not know of this meeting and Sandra Saunders said that
10 the meeting was only for Ngarrindjeri women who wished
11 to stop the bridge. Dorothy Wilson then said to Sandra
12 Saunders that their culture includes all Ngarrindjeri
13 women who have a right to know what is going on when
14 culture is being talked about. And Sandra Saunders's
15 reply was words to that effect 'Well, it's not about
16 culture. It is about stopping the bridge.' Dorothy
17 Wilson's retort was something to the effect 'I knew that
18 all along. I just wanted to hear you say it.'

19 I now move to other matters; conversations that took
20 place on about 27 April 1995.

21 Dulcie Wilson was a person, Madam Commissioner, who
22 spoke out early against the notion of secret women's
23 business.

24 In November of 1994, she spoke at a Rotary meeting
25 in Murray Bridge. She hails from Millicent and she was
26 the guest speaker. The speech was printed in the Argus,
27 a local paper, and it contained a reference to women's
28 business and Hindmarsh Island.

29 On 27 April 1995, or thereabouts, Doreen Kartinyeri
30 rang Dulcie Wilson and Dr Kartinyeri said to her that
31 she had heard that Dulcie was not supporting women's
32 business. Dulcie told Doreen that she didn't know
33 anything about women's business and was never told
34 anything by her grandmother or her aunties and,
35 therefore, would not support something that she did not
36 know about. Doreen Kartinyeri informed Dulcie Wilson
37 that her grandmother had told her about it. Dulcie said
38 that Grandmother Sally had come from Poonindie, on the

1 west coast. Doreen then said that Auntie Rose had told
2 her. Dulcie Wilson then said 'Well, Auntie Rose did not
3 tell me anything and I am older than you.' The
4 conversation between the two ended on the basis that
5 Dulcie Wilson indicated to Doreen Kartinyeri that, in
6 Aboriginal culture, all should know about these things.
7 And Doreen replied with words to the effect that she was
8 the only one chosen.

9 There was further conversation in which Doreen
10 Kartinyeri told Dulcie Wilson some part of the women's
11 business. Nonetheless, Dulcie did not support it.

12 Soon after that conversation, and on the same
13 evening, Sandra Saunders, from ALRM, rang Dulcie Wilson
14 and the gist of the conversation was as follows; Sandra
15 Saunders asked Dulcie Wilson 'Is it true that you
16 support - ' and she named the daughter of Pinkie Mack -
17 'who says she knows nothing about all this?' Dulcie
18 replied 'Of course I know nothing of all this.' And
19 Sandra Saunders said words to the effect 'You don't want
20 to forget all that has happened to the Aboriginal people
21 over 200 years ago.' There was further conversation
22 about atrocities and the conversation ended with Dulcie
23 Wilson insisting that she stood by what she said.
24 Namely, that she never knew anything about women's
25 business and had never heard of it.

26 I now come to the conclusion of this further
27 opening, Madam Commissioner.

28 There were further incidents at the museum which are
29 capable of supporting or at least are evidence relevant
30 to the allegations of fabrication. And I will briefly
31 summarise those.

32 On 11 July 1994, Dr Philip Clarke spoke to Dr Deane
33 Fergie over the telephone. Amongst other things, Dr
34 Clarke argued that Dr Fergie should consult more broadly
35 and he gave her a long list of both male and female
36 researchers who had worked in the Lower Murray. Dr
37 Fergie responded to the effect that, since none of them
38 had worked within the feminist anthropological

1 tradition, they were not crucial to the issue of whether
2 women's business, as described by Dr Kartinyeri, existed
3 in the Lower Murray. There were on-going vigorous
4 discussions between Philip Jones and Philip Clarke, on
5 the one hand, and Stephen Hemming, on the other, at the
6 museum about such topics as whether the literature on
7 the Lower Murray supported the notion of secret and/or
8 sacred women's business.

9 I mention, by way of conclusion, Madam Commissioner,
10 how it is that experts such as Dr Deane Fergie and, for
11 instance, Dr Neale Draper could be of assistance to the
12 Commission.

13 Dr Deane Fergie was involved in the meeting with
14 Professor Saunders and her report supports the existence
15 of confidential secret and/or sacred women's business.
16 Her methodology and conclusions are very much the focus
17 of this inquiry.

18 Dr Neale Draper was, during the months leading up to
19 the banning of the bridge construction, the senior
20 archeologist in the employ of the Government. He was
21 involved for many months with what was happening on the
22 island.

23 In his report, on 29 April 1994, compiled for the
24 Minister of Aboriginal Affairs, he makes reference to
25 'highly confidential cultural tradition associated with
26 the island.'

27 In the light of such views and the matters raised in
28 this inquiry, Dr Draper will have some information, I am
29 sure, which could assist this inquiry.

30 I suggest, from what I have said about the matter
31 generally, the other represented parties can identify
32 their interest in this inquiry.

33 CONTINUED

1 Can I end by making the point that this further
2 opening is unusual, and, as I said in my opening
3 remarks, it necessarily focuses upon the evidence that
4 we have thus far against there being `secret sacred
5 women's business'.

6 Thus far, this Commission has no indication of, at
7 least in the form of evidence statements or the like,
8 willing evidence to the contrary. So that, in an effort
9 to open and answer the four questions that were raised
10 on 27 July, I have named people, and, in particular,
11 Aboriginal people, and, in particular, Ngarrindjeri
12 women.

13 Having done this and, therefore, in a sense, raised
14 these people into public prominence - indeed, if they
15 are not in prominence already - I am told by their legal
16 representatives that they do not wish to speak to any
17 people about these matters: that is, the matters that I
18 have raised here in this opening, other than their legal
19 representatives and those people to whom they choose to
20 speak. Accordingly, they do not wish to be approached
21 by any other people concerning this, and I would ask
22 you, on behalf of the Commission, to view any
23 unauthorised contact with these women or with their
24 families as being viewed very seriously by the
25 Commission.

26 Could I ask you immediately then for the order
27 suppressing from publication the use of the name `Nanna
28 Laura'.

29 COMSR: Pursuant to Section 16A(1)(c) of the
30 Royal Commissions Act, I forbid the publication of the
31 name of the witness `Nanna Laura'.

32 MR ABBOTT: Before my learned friend concludes,
33 could I make one qualification on what my learned friend
34 has said apropos of my clients? There is always a
35 difficulty with nomenclature. He has spoken of my
36 clients and their rejection of there being `women's
37 business'. I want to make it clear that the rejection
38 that my clients have spoken of is, at all times, `secret

1 sacred women's business' in relation to Hindmarsh
2 Island.

3 MR SMITH: I did not intend to convey anything
4 other than that.

5 COMSR: There are a few comments I would like to
6 make. You have had the benefit of the detailed opening
7 you requested from counsel assisting. At the request of
8 the parties, counsel assisting has identified, from the
9 available material, the possible manner in which parties
10 are likely to be involved. This can only be based on
11 the material which the Commission has at this stage.

12 The work of the investigation continues. Clearly,
13 there is a body of information which is not yet to hand,
14 and I would invite any person who has information
15 concerning this matter, of course, to come forward and
16 make a statement to the Commission.

17 This Commission makes no allegations at all about
18 anyone who has been mentioned by counsel. Counsel has
19 supplied, from the materials available, what inferences
20 might possibly be drawn on the basis of that material.
21 However, of course, there is a whole body of information
22 that is not yet before this Commission, and I make the
23 point that that information, of course, may well cast a
24 different aspect on any inferences that might be drawn.

25 Of course, all the parties here have been given
26 leave to appear for persons. It is apparent, of course,
27 that there are various groups with adverse interests or
28 conflicting views about the issues before this
29 Commission, and it is also apparent that this Commission
30 has not heard from all of those groups. Certainly, the
31 efficacy of the inquiry would be enhanced if all those
32 groups were separately represented before the
33 Commission, and if they put material before this
34 Commission. In my view, it would be proper that all
35 groups do appear before the Commission.

36 I understood at the last hearing that some counsel
37 were not readily able to identify in what manner they
38 might be said to have a real or substantial reason to

1 appear. The approach I adopted, in granting leave
2 without further inquiry, was where, on the face of the
3 public allegations, there was an apparent interest, then
4 I granted leave.

5 Of course, no-one better than the person applying
6 would know how he or she was likely to be affected.
7 However, if any counsel now considers that the party
8 they have leave to represent - he or she - does not have
9 a real or substantial interest, then I would be prepared
10 to consider any applications by counsel if they wish to
11 withdraw.

12 I point out that the Commission has certain coercive
13 powers under the Royal Commissions Act. It has
14 refrained from using its coercive powers in such a
15 sensitive inquiry as is before it. Furthermore, there
16 are legal issues yet to be resolved by the courts of the
17 extent to which those coercive powers are curtailed by
18 the provisions of the Commonwealth Racial Discrimination
19 Act.

20 The Commission does have certain statutory powers in
21 relation to intimidation of witnesses who appear before
22 it. Given that complaints of intimidation have been
23 made, I make the general observation that I will take
24 whatever steps are available to me, and appear to be
25 most effective, to protect any witness from harassment
26 or intimidation. I note, in particular, the request of
27 Mr Abbott, that the parties he represents ask that they
28 not be approached by anyone with respect to the evidence
29 that they will give. I also would like to remind the
30 press that their presence and their questions can be
31 intimidating to witnesses, and repeat my request that
32 they not approach any witnesses in the precincts of the
33 building.

34 There is another matter that I thought I would
35 mention. I referred briefly to the matter of statements
36 which are made and published in the media or shown on
37 television by persons who apparently have knowledge of
38 the matters being inquired into by the Commission. A

1 statement to a newspaper or shown on television is not
2 evidence before the Commission. It does not become
3 evidence until such time as the person appears at this
4 hearing and, in the witness box, gives testimony, or
5 until his statement is tendered and received in
6 evidence. Counsel are no doubt well aware of this.

7 A great deal of the work of the Commission is of a
8 preliminary nature and it consists of gathering
9 statements from potential witnesses. The mere
10 collection of statements or documents does not make them
11 evidence.

12 On the last occasion on which the Commission sat,
13 counsel for one of the parties, who had been released
14 from appearing, sought leave to read a statement from
15 the party. This was refused. He then asked that I
16 protect the party from the attentions of the press. He
17 later apparently distributed a statement to the press.
18 The publication of that statement in the newspapers and
19 on the television does not make it evidence before me.
20 That material could only become evidence if the witness
21 appeared or if, in some way, the evidence was received
22 before me. I make those observations.

23 I propose that we will adjourn this hearing until
24 Wednesday of this week, but before I do so, I will ask
25 if there are any applications by counsel. There are
26 some procedural issues which I think are best dealt with
27 perhaps informally at this stage. I would propose,
28 after the adjournment of this hearing today, that I meet
29 with counsel, as it were, in chambers, to discuss a few
30 of those procedural issues so that they can be dealt
31 with before this hearing resumes and before the taking
32 of evidence commences.

33 MR SHORT: If there are no other applications by
34 Counsel, my name is Short. I seek leave to appear for
35 Advertiser Newspapers Limited in relation to a discrete
36 issue, which I understand was canvassed when the
37 Commission last sat, in relation to the publication of
38 the proceedings of the Commission. Perhaps initially, I

1 seek leave to make submissions in relation to that
2 issue. Do you wish to hear me any further in relation
3 to the issue of leave?

4 COMSR: I do not know if counsel assisting
5 wishes to.

6 MR SMITH: I could probably assist. I think Mr
7 Short would be content with just being given leave to be
8 heard at the appropriate occasion if there is an order
9 of suppression or an order relating to confidentiality
10 or the restriction of material, rather than to have a
11 general right of appearance. The Commission's position
12 would probably be that that is the position in respect
13 of all media.

14 MR SHORT: That is certainly so, Commissioner.

15 COMSR: All right, Mr Short, I am prepared to
16 grant leave for that restricted purpose only. That you
17 have leave to make submissions at appropriate times, if
18 and when I am contemplating making an order restricting
19 publication or any other order as to confidentiality.

20 MR SHORT: Just on that matter, from reading the
21 transcript on Friday, it appeared that you were
22 proposing to make an order in relation to four separate
23 matters. Is it convenient for the Commission to make
24 submissions on that proposed order at this time, or
25 would you prefer that to be at some other time?

26 MR SMITH: Again, I could probably allay my learned
27 friend's fears. If there is a suppression looming, I,
28 as counsel assisting, will communicate with the media
29 and with those media organisations who are represented,
30 to let them know what parts of the evidence are going to
31 be suppressed and why. I think at each stage of that,
32 the media or the legal representatives of the media can
33 be heard, if they want to be.

34 For instance, there is some evidence in the museum
35 evidence, as I have called it, which is both expert
36 evidence and narrative evidence. The expert evidence
37 cannot be the subject of wider publication because of
38 the implications of Section 35 of the Aboriginal

1 Heritage Act. Not so the narrative component. So I
2 will advise the media as to all of that, and my learned
3 friend, Mr Short, too. If he has some problem with that
4 method of dealing with it, he can deal with it at the
5 time of the order.

6 Can I add, in case all the media present are going
7 to flee off and get a legal representative to make a
8 similar application to that of Mr Short, that will not
9 be necessary. I will do my best to communicate with the
10 media on this topic, whether they are represented or
11 not.

12 COMSR: Will that be sufficient as far as you
13 are concerned?

14 MR SHORT: Yes, that is a very sensible approach.

15 COMSR: What I propose to do is adjourn at this
16 stage, take a short break and then, as I have indicated,
17 discuss some procedural issues with counsel. I think
18 the only room large enough will be in this room, so I
19 suggest perhaps if we resume with counsel only, because
20 the hearing will have been adjourned at that stage.

21 MR MEYER: Does your Honour include in that
22 instructing solicitors?

23 COMSR: Yes. I meant that it was implicit in
24 that. However, we will adjourn now until Wednesday, 2
25 August 1995 at 10 a.m.

26 ADJOURNED 11.05 A.M. TO WEDNESDAY, 2 AUGUST 1995 AT 10 A.M.

1 COMSR STEVENS

2

3 ROYAL COMMISSION INTO THE HINDMARSH ISLAND BRIDGE

4

5 WEDNESDAY, 2 AUGUST 1995

6

7 RESUMING 10.03 A.M.

8 MR STEELE: On Monday, I reserved my position with
9 respect to Dr Draper's appearance, continued appearance,
10 in the Commission. I have now had the opportunity to
11 take instructions. As I indicated to you on Monday, Dr
12 Draper is resident in Queensland and his sole source of
13 income is from a consultancy which he conducts in
14 Queensland. If he attends in Adelaide, he is without
15 income - which, of course, he is not in a position to be
16 in. The Government has declined to fund him a witness
17 fee.

18 In the absence of allegations made against him in
19 the further opening by my learned friend Mr Smith, Dr
20 Draper's instructions are that I should withdraw, if
21 only temporarily. It may be that allegations will be
22 made against him either personally or professionally in
23 the course of evidence. If that is so, my friend Mr
24 Smith will advise me in advance and I will return to the
25 Commission at that time. It may be that Dr Draper will
26 be called to give evidence in the matter and I would
27 seek to return to the Commission at that time. Pending
28 those develops I would withdraw.

29 COMSR: I note that you are withdrawing and will
30 be returning in that event.

31 MS NELSON: I seek leave to appear for Stephen
32 Hemming.

33 COMSR: Stephen Hemming has leave to appear, has
34 he not?

35 MS NELSON: Not that I'm aware of.

36 MR SMITH: Certainly our position was that he
37 should get leave and until now he hasn't had counsel,
38 but simply -

- 1 COMSR: Perhaps if you could explain his
2 application, the basis on which you are seeking leave.
3 Has he a special interest, or is he likely to be
4 prejudiced by some evidence led during the course of the
5 inquiry? Is that the basis of your application?
- 6 MS NELSON: Certainly that is correct. My client
7 will be called to give evidence by counsel assisting the
8 Commission and I understand, although I wasn't here, but
9 I've had the benefit of some precis that in his opening
10 my learned friend, Mr Smith, made certain allegations
11 relating to my client which affect him both personally
12 and professionally and there is a statement which was
13 published in yesterday morning's Advertiser which
14 suggests, at least by innuendo, that he has somehow been
15 a party to the fabrication of material to be
16 investigated by you. To that extent, he does have a
17 special interest and that requires protection.
- 18 COMSR: I think perhaps if I clarify something.
19 As far as I'm concerned, the Commission isn't making
20 allegations against anyone. Mr Smith was asked to
21 outline, as I recall, on what basis it could be
22 suggested from the evidence that he has to hand that
23 certain matters of fabrication arise. But I don't
24 understand it to be any allegation either by Mr Smith or
25 coming from the Commission itself. You appreciate that?
- 26 MS NELSON: Now I do. That is not, of course, how
27 it is reported.
- 28 COMSR: I appreciate how it is reported and that
29 it might be slightly different.
- 30 MS NELSON: I have assumed that Mr Smith is, in
31 effect, putting forward material which are allegations
32 likely to be made by witnesses before this Commission.
33 But to encapsulate, that is basically -
- 34 COMSR: That is the basis on which you seek
35 leave?
- 36 MS NELSON: That's right, at this stage.
- 37 COMSR: I take it from what Mr Smith has said
38 that he doesn't wish to be heard on that?

- 1 MR SMITH: I accept, Madam Commissioner, that Mr
2 Hemming has a vigorous interest in the matter.
- 3 COMSR: Yes. Miss Nelson, you have leave to
4 appear on behalf of Mr Hemming.
- 5 MS NELSON: May I indicate that because I'm only
6 recently instructed, although Mr Smith very carefully
7 provided me with all the material which is relevant to
8 my interest in the matter, I'm not confident that I can
9 necessarily do justice to my client's case without some
10 time to consider that material. I'm not seeking an
11 adjournment at this stage.
- 12 COMSR: You would be hard-pressed to get one at
13 this stage.
- 14 MS NELSON: I thought I might be pushing my luck a
15 bit. I foreshadow, I believe that the first witness
16 will be Philip Clarke and I do have a vigorous interest
17 in cross-examining Mr Clarke. It may be that I cannot
18 do justice to the full extent in that cross-examination
19 without appropriate time for consideration.
- 20 COMSR: I appreciate there are some concerns
21 about that. I am sure Mr Smith will address that
22 matter.
- 23 MR LOVELL: I seek leave to appear on behalf of Mr
24 Christopher Kenny, who, as I understand from discussions
25 with Mr Smith, may be a witness later in the Commission.
- 26 COMSR: Well, it is not apparent to me at this
27 stage quite what his special interest might be. Are you
28 seeking leave at this stage, or is it a matter that can
29 be deferred?
- 30 MR LOVELL: It certainly is a matter that can be
31 deferred.
- 32 COMSR: I will note that you are making the
33 application and that when you wish to pursue it I'll
34 bring it on again.
- 35 MS LAYTON: We have been instructed by the ALRM that
36 it no longer seeks to be represented at the hearings of
37 this Commission. Whilst it's inappropriate in this
38 Commission to give reasons, for reasons that you have

1 raised before, because of the public importance of this
2 decision and the fact that it hasn't been taken lightly,
3 the ALRM would seek to make four short points and to
4 make one or express one legal concern. I would wish to
5 do that.

6 COMSR: Are these matters that are more
7 appropriately brought forth in another forum, and
8 probably have already been brought forth in another
9 forum?

10 MS LAYTON: We consider not. We submit that the
11 transcript ought to record why a body such as the ALRM
12 seeks to withdraw, and we only seek to make them
13 briefly. The legal matter that we wish to raise is
14 something that should definitely be recorded, in view of
15 the evidence which is to be given this morning. The
16 four short times are these, that -

17 COMSR: Are you simply going to nominate the
18 points?

19 MS LAYTON: I'm not going to enlarge on them. In
20 respect of the matters that you have indicated before,
21 it's quite inappropriate to give lengthy reasons.

22 The first short point is that the ruling of the
23 Commission as to its Terms of Reference and also the
24 further opening given by counsel assisting have
25 confirmed that this Royal Commission will inevitably
26 inquire into Aboriginal traditional beliefs. You are
27 already aware that there is a Supreme Court action
28 seeking declarations. There will, therefore, be a
29 further ground added as a result of the opening which
30 occurred last time.

31 As you know, the Royal Commission is proceeding on
32 what the ALRM is challenging as unlawful authorisation
33 by the Minister. There is a further authorisation and
34 the evidence which will be given today is based upon the
35 validity of that authorisation. So, the first point is
36 that the ALRM cannot here endorse what it believes to be
37 unlawful proceedings.

38 The second point is that the Terms of Reference of

1 the Royal Commission have included that the resolution
2 of the disagreement within the South Australian
3 Aboriginal community has been one of the reasons for the
4 holding of the Commission. However, we see that this
5 can never resolve such a disagreement and is being
6 further divisive and includes the anthropological
7 profession. We cannot be part of a process which
8 further divides the Aboriginal community.

9 The third point is that the ALRM has not and cannot
10 represent any particular Aboriginal groups - and that
11 has included the women who were represented by Miss
12 O'Connor, which included Doreen Kartinyeri. To the
13 extent that it may have been inferred that by ALRM that
14 Miss O'Connor's clients could be represented by us, we
15 wish to disabuse anybody of that position.

16 COMSR: You are saying that it is mutually
17 inconsistent to be -

18 MS LAYTON: That is correct. Therefore, that
19 includes Doreen Kartinyeri and those whom Clare O'Connor
20 represented and who still remain unrepresented before
21 this Commission.

22 MR ABBOTT: By choice.

23 MS LAYTON: This is my turn, Mr Abbott. The ALRM
24 also no longer wishes to be represented as an
25 organisation, but any of its employees whose names may
26 be raised in evidence may wish to be separately
27 represented; like, for example, Tim Wooley has been in
28 this Commission.

29 Therefore, in summary on those points, the ALRM has
30 decided it could not continue to seek protection of
31 Aboriginal traditional beliefs by challenging the
32 validity of the Royal Commission, including its
33 processes, but, at the same time, participate in what it
34 considers to be an unlawful process.

35 The legal point that we wish to make today,
36 particularly having regard to the planned evidence, is
37 this -

38 COMSR: Well now, you want to make a legal point

1 here?

2 MS LAYTON: Yes. It is appropriate that we make it
3 here, if the Commission pleases, because the Commission
4 may wish to consider this point in the light of what it
5 seeks to do by way of planned evidence this morning. We
6 consider it appropriate to raise it. It's only short.

7 COMSR: Well, as you are withdrawing from the
8 Commission, it really seems inappropriate to me that you
9 would be seeking to raise a legal point.

10 MS LAYTON: The reason I would raise it,
11 notwithstanding that the ALRM is withdrawing from
12 representation, is that there are certain matters such
13 that if there is a fundamental legal problem, this
14 should, in fact, be brought to the attention of the
15 Commission. I do it on that basis - and it is only a
16 short point, as I indicated.

17 COMSR: If you can just say what the point is
18 without going into it.

19 MS LAYTON: Certainly. I didn't want to go into it.
20 The short point is that the Commission cannot receive
21 into evidence any of the reports of Dr Draper, Mr Lewis,
22 Dr Edmonds, Dr Deane Fergie or Professor Cheryl Saunders
23 without the calling of those witnesses. Further, that
24 any witnesses called by the Commission cannot rely on
25 those reports in the absence of the appropriate
26 authentication of those reports.

27 I understand that evidence is to be given this
28 morning which may well rely on those. We would submit
29 that, for reasons which have been elucidated by Gavin
30 Griffith, it would be an unlawful process. That is the
31 point we wish to make.

32 COMSR: I note, Miss Layton, that you have
33 withdrawn from the Commission.

34 MS LAYTON: That's correct. With Mr Collett.

35 MISS LAYTON AND MR COLLETT WITHDRAW

36 MR CHARLES WITHDRAWS

37 MR TILMOUTH: I wish to make points on behalf of my
38 client.

1 COMSR: In respect of what? Now, we have a
2 programme for this morning, Mr Tilmouth. I can't be
3 spending the day listening to statements.

4 MR TILMOUTH: I understand that there is a programme
5 today. The first point I want to make is that we still
6 haven't been given any statements whatsoever.

7 COMSR: That's right.

8 MR SMITH: I will deal with that.

9 COMSR: Mr Smith will deal with that. I'm going
10 to ask Mr Smith to outline what is going to occur today
11 and that might well traverse the matters that are of
12 concern to you.

13 MR TILMOUTH: I seek to be heard after he raises those
14 matters.

15 COMSR: We will see.

16 MR SMITH: The authorisation of the Minister for
17 Aboriginal Affairs, the last authorisation dated 27 July
18 1995, by clause 8 empowered you to require undertakings
19 to make directions and to impose requirements in respect
20 of persons taking the benefit of the authorization.
21 Accordingly, by letter dated 28 July 1995, the
22 Commission required that persons having information
23 divulged to them, pursuant to the authority, agreed to
24 give evidence if required as a precondition to being
25 forwarded certain reports and evidence statements; in
26 particular, evidence statements from the witnesses from
27 the South Australian Museum. Some parties did not give
28 that undertaking. Others did. Accordingly, there are
29 some parties represented in this inquiry who do not have
30 notice of the evidence about to be led from the
31 employees of the South Australian Museum.

32 Now, it could be said: be that on their own heads.

33 But, it's the position of the Commission, as I
34 understand it, that, none the less, some leeway will be
35 granted to those people. So that the evidence from the
36 South Australian Museum will be called by me commencing
37 this morning and will be in-chief over the next two to
38 three days. That other counsel, if they wish, can

1 reserve their rights to cross-examine on Monday, 7
2 August - that's depending on what occurs and subject to
3 review by you, Madam Commissioner. Material, of course,
4 will be handed out this morning.

5 As to rights of cross-examination and subject to
6 what occurs in the next two days, that may not arise
7 until Monday. The order of cross-examination normally
8 will be based upon the degree of interest in the
9 witness.

10 Taking Mr Clarke as an example, I would envisage
11 that Miss Pyke for Dr Fergie, perhaps, and also Miss
12 Nelson for Mr Hemming would have the most interest in
13 the witnesses Clarke and Jones, and Mr Abbott perhaps
14 the least. The converse would be true in the case of Mr
15 Hemming's evidence.

16 I emphasise to counsel on your behalf that it's
17 always the case that the extent to which
18 cross-examination over the same ground will be permitted
19 is in your discretion.

20 I mention, by way of an opening statement, the s.35
21 problems and the question of media reporting. Evidence
22 will be led from the Museum witnesses by the tendering
23 of statements of evidence settled by oral testimony, as
24 there is a mixture of expert and eye witness evidence.
25 Taking the case of Dr Philip Clarke, for instance, his
26 statement of evidence and his oral testimony can be or
27 will be in three parts. First of all, he will tell you
28 and those here of the history of the Ngarrindjeri people
29 - and that part of his evidence will also include a
30 short eight minute film. The second part of his
31 evidence will be an examination by him of the culture
32 and tradition of the Ngarrindjeri people with particular
33 reference to women's business and secret sacred women's
34 business. The third part will be what I've called
35 'narrative evidence' as to certain events in the South
36 Australian Museum in the months leading up to and beyond
37 the banning of the bridge on 9 July 1994.

38 Madam Commissioner, I would contend to you that the

1 second section of this evidence has, at least, a risk of
2 involving discussion of or divulgence of information in
3 contravention of Aboriginal tradition, in breach of s.35
4 of the Aboriginal Heritage Act - subject, of course, to
5 the authorization. So, I will be suggesting to you,
6 Madam Commissioner, that the court be cleared for that
7 section of the evidence and that there be a suppression
8 order on production of that part of the evidence and
9 that part of the transcript until the Commission is
10 satisfied that there is no such illicit divulging.

11 For the sake of those present, by 'clearance' it is
12 meant that only Commission staff, parties given leave to
13 be represented on their behalf who have an interest in
14 the area of the evidence and their legal representatives
15 should be present. There may be other occasions which
16 arise in the evidence which will be dealt with in like
17 manner.

18 I suggest, if it be possible before we start with Mr
19 Clarke's evidence, that you deal with the question of
20 who should be entitled to be present in that middle
21 section of the evidence of those at the bar table.

22 Before I sit down, there must be a signed
23 undertaking as to confidentiality by counsel before they
24 have an entitlement to even ask for leave to remain in
25 the closed hearing. If I could have an assurance from
26 counsel that the original confidentiality undertaking,
27 not the second one, be executed.

28 CONTINUED

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1 MR ABBOTT: We are able to give that assurance.

2 MR TILMOUTH: That assurance is given, but I still
3 seek leave to make a submission to you on the process
4 that has been undertaken today. I can put it briefly.

5 COMSR: If, at the conclusion of the evidence,
6 you feel that fairness to your client demands or
7 suggests that certain concessions be made, I will hear
8 you then, but, as I understand it, your concern is with
9 having sufficient time, is it?

10 MR TILMOUTH: The concern is with the whole process.
11 It is better to divulge the material from the start, so
12 that we can have adequate notice rather than to give it
13 on the blind. In my submission, that whole process is
14 totally unsatisfactory, but I will just have to wait and
15 see, on the current proposal, where we stand.

16 May I make the point as well, without elaborating,
17 the question of funding with respect to my client is
18 still not resolved. At the current stage, I propose to
19 leave Mr Kenny here to deal with the situation.

20 MS NELSON: I give a similar assurance relating to
21 the undertakings. I just want to raise something
22 briefly in relation to the foreshadowed application to,
23 in effect, hold certain parts of the hearing in camera.
24 I would not be concerned if that were to happen,
25 provided that, at the end of that period, I was entitled
26 to invite you to review that situation.

27 My client's position is that he has been very
28 publicly vilified and that is likely to be happening in
29 the context of the narrative of events that took place
30 and discussions that it is alleged he had with, for
31 example, Philip Clarke, and what he may or may not have
32 said in those discussions. I cannot see that, on the
33 face of it, there is any reason why, for example, his
34 explanation of what happened, and his denial of certain
35 allegations that I understand Philip Clarke will make,
36 should not be made public, because it really does not
37 offend against any of the matters that attract

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1 confidentiality. I would be disturbed if that aspect of
2 the evidence were somehow closed to the public.

3 If I can indicate that my interest is confined to
4 that aspect of it. I accept that there are other
5 aspects of it that do attract confidentiality, but
6 perhaps it is better to look at it in context when you
7 actually come to that situation.

8 COMSR: Perhaps I will just clarify, Mr Smith,
9 is the portion of the evidence that Ms Nelson has
10 alluded to, part of that which you say must, of
11 necessity, be heard in private?

12 MR SMITH: No, the narrative part is not to be
13 heard in private. It does not involve any divulgence
14 which would amount to a contravention of Aboriginal
15 tradition - at least, the in-chief part of that.

16 MS PYKE: Perhaps I will make one comment. It
17 seems to me that in terms of the closing of the court,
18 that anything that otherwise is in the public arena, the
19 court should not be closed for. It might be that
20 aspects or parts, for example, as my friend has just
21 opened, may need to have the court closed, but it seems
22 to me that a whole lot of evidence about culture and
23 tradition is quite readily available and forms part of,
24 if not the public record, certainly is in the public
25 domain. I think to close the court unnecessarily is, I
26 would submit, inappropriate. Certainly there will be
27 issues that perhaps require the court to be closed.

28 COMSR: The point is this though, that I have to
29 ensure that the terms of the authorisation are not
30 exceeded and that there is no divulgence of information
31 contrary to the provisions of Section 35 of the
32 Aboriginal Heritage Act. Of course, that can happen by
33 inadvertence, it can happen during the course of
34 questioning, and, as I see the situation, that
35 authorisation should be strictly construed, and the
36 possibility that there will be some inadvertent
37 divulgence must be guarded against.

1 As that particular section deals with matters of
2 Aboriginal tradition, I do not think that we can be
3 closing the court, opening the court, closing the court,
4 as each section is dealt with. In my opinion, the only
5 practicable way is to deal with the whole of that
6 section in private, otherwise there is at least the
7 possibility that the terms of the authorisation will not
8 be complied with.

9 MS PYKE: Our concern is this: if there is, what I
10 might term, healthy debate between anthropologists, that
11 should be in the public arena and not behind closed
12 doors.

13 COMSR: I appreciate your concern, but I, of
14 course, am constrained by the terms of the authorisation
15 and I have to ensure that the possibility of something
16 being revealed that should not be revealed does not
17 occur, because once the damage is done, it cannot be
18 undone.

19 MS PYKE: Might I say, part of our difficulty is
20 that we do not have any of the material, so we fall in
21 that category.

22 COMSR: In that case, the sooner the evidence
23 gets underway, the sooner it will be known to you.

24 MR ABBOTT: Could I make a suggestion that was
25 followed in the State Bank Royal Commission, where one
26 of the Terms of Reference were to avoid any damage to
27 lenders from the State Bank, and this occurred
28 regularly? The evidence was taken in camera, as it
29 were, and the lively debate did or did not occur in
30 camera, and the Commissioner then decided whether parts
31 or the whole should be released to the media and to the
32 public generally. That proved to be, I suggest, a
33 satisfactory way of dealing with it.

34 There is no reason why such a procedure could not be
35 adopted here. That would have the effect of not
36 stifling the debate. At the same time, if it transpired
37 that none of the debate transgressed the provisions of

- 1 Section 35, the material could then be released for
2 public inspection and examination.
- 3 COMSR: That is something I could bear in mind.
4 At this stage I have not -
- 5 MR ABBOTT: Any evidence taken in camera does not
6 have to always remain in camera.
- 7 COMSR: That is so, but I am certainly not
8 making a ruling on that at this time.
- 9 MR SMITH: Can I suggest at this stage, before we
10 embark on Mr Clarke's evidence, which we are ready to do
11 right now, that we be given five minutes to just ensure
12 that all the people who are entitled to be present
13 during that part of Mr Clarke's evidence, for which the
14 court will be closed, have signed the requisite
15 undertaking. Therefore, we can just move straight into
16 that section of the evidence without any problems.
- 17 The counsel, instructing solicitors and any clients
18 that are likely to be given leave by you to remain,
19 should sign this undertaking now. We have the forms
20 present. It would take five minutes perhaps. Can I
21 indicate, just for those present who are interested in
22 the commencement of this evidence, that the commencing
23 evidence will take approximately an hour, in any event,
24 before any orders are to be made by you.
- 25 COMSR: We will take a short break.
- 26 ADJOURNED 10.33 P.M.
27 RESUMING 10.51 A.M.
- 28 MR SMITH: Madam Commissioner, we have reached a
29 considerable milestone, I am about to call a witness.
- 30 COMSR: I take it that you are in receipt of the
31 necessary undertakings as to confidentiality?
- 32 MR SMITH: Yes. Perhaps there is one matter we
33 could settle. Mr Sykes, who represents Mr Campbell,
34 wishes to leave the hearing, but with a reservation.
- 35 MR SYKES: Yes. Commissioner, I addressed you on
36 Monday in connection with my client's interest in the
37 inquiry, and I have leave. I will not be in a position
38 to be here this afternoon. There will be occasions when

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1 I cannot be here throughout the hearing of the evidence
2 of the witnesses.

3 I have spoken to counsel assisting and I would be
4 available to read the transcript, and I would like, in
5 fact, a copy of the transcript so that, when I do
6 appear, I am fully apprised of what the witnesses have
7 said in their evidence.

8 The reason why I cannot be here is simply because of
9 other commitments. Some of those commitments are, in
10 fact, the taking of statements which, of course, are
11 due. I have to attend to those, so I physically cannot
12 be in two places at once.

13 If I have access to the transcript then I will be
14 fully apprised of the proceedings and be in a position,
15 when I do appear, to proceed to represent my client's
16 interest. I understand that that is acceptable to
17 counsel assisting.

18 COMSR: Mr Sykes would be a person who, you
19 would say, should be permitted to remain?

20 MR SMITH: He would be a person permitted to remain
21 during the closed session and, therefore, would be a
22 person entitled to any suppressed portion of the
23 transcript.

24 COMSR: Under those circumstances, I am prepared
25 to release a copy of the transcript, on your undertaking
26 as to confidentiality.

27 MR SYKES: I signed the undertaking. I can assure
28 the Commission that that is so.

1 MR SMITH CALLS

2 PHILIP ALLAN CLARKE SWORN

3 EXAMINATION BY MR SMITH

4 Q. Mr Clarke, I think you are a historian and
5 anthropologist currently in the employ of the South
6 Australian Museum. Is that correct.

7 A. Well, rather than an historian, I would rather classify
8 myself as an anthropologist and a human geographer, but
9 I do frequently employ the methodology of an historian,
10 so it is still correct, yes.

11 Q. I think it is the case, isn't it, that in connection
12 with this matter, you have prepared a lengthy report
13 which touches on a number of matters, but, in
14 particular, the history of the Ngarrindjeri people,
15 matters relating to 'women's business', as well as a
16 documented narrative of the part you have played, or you
17 have observed being played, in the development of the
18 Hindmarsh Island Bridge matter, is that so.

19 A. That's correct.

20 Q. Looking at this document produced to you, is that indeed
21 the report you have prepared for the purposes of this
22 inquiry and signed by yourself.

23 A. Yes, it is.

24 Q. I think, in broad terms, that report is divided into two
25 sections, is it not.

26 A. That's right.

27 Q. You would describe those two sections as what. Perhaps
28 I could lead you on that. I think it is the case that
29 what has been regarded as your expert view is set out
30 under a number of headings.

31 A. That's right.

32 Q. And then, in addition to that, you have set out, in a
33 chronological way, your observations of certain events
34 leading up to the banning of the Hindmarsh Island Bridge
35 and the aftermath, is that correct.

36 A. That's right.

37 Q. I think the report, in the sense that it is signed by
38 you, is dated 26 July, 1995, is that right.

1 A. That's right.

2 MR SMITH: I intend now to go into that report. It
3 might be the most expeditious way to have it tendered at
4 this stage, subject to me taking Dr Clarke through it.
5 I seek to tender that report. I have handed copies to
6 all my learned friends.

7 EXHIBIT 1 Report of Philip Allan Clarke tendered
8 by Mr Smith. Admitted.

9 COMSR: Of course, Exhibit 1 will have to be
10 protected by some order as to privacy.

11 MR SMITH: Yes, because some sections of the report
12 canvass the matters that are possibly sensitive, you
13 will need, at this early stage at least, to suppress it
14 in its entirety.

15 COMSR: Yes, I do. I make an order suppressing
16 the Exhibit 1 from release, and I forbid the publication
17 of any portion of the report.

18 MS PYKE: Commissioner, at this stage can I simply
19 say that this was handed to me as Mr Smith got to his
20 feet. I am not able to indicate whether I have
21 objection to any part of it. I wish to reserve my
22 right, once I have read it, to make any objections.

23 COMSR: I appreciate that.

24 MR SMITH: That is taken.

25 COMSR: Meanwhile, of course, the report has
26 been suppressed and no portions of it are to be made
27 available for publication, so I think your interest is
28 sufficiently protected there.

29 XN

30 Q. Can I ask you, first of all, to turn to page 24 of the
31 report. I think at page 24 of the report, you set out
32 there, your present position and the history of your
33 work experience. Is that so.

34 A. That's so.

35 Q. And also, could you tell us, in addition to what you
36 have set out there, for how long you have been working
37 at the museum.

38 A. A little over 13 years.

- 1 Q. You then list your formal qualifications; Bachelor of
2 Science majoring in botany and zoology, University of
3 Adelaide, 1979 to 1981. Bachelor of Arts majoring in
4 anthropology, University of Adelaide, 1983 to 1986.
5 Master of Arts Qualifying course in geography,
6 University of Adelaide, 1989 and a PhD in social
7 anthropology and human geography, university of
8 Adelaide, 1990 to 1994 and that is correct, is it.
9 A. That's correct.
- 10 Q. Can you tell Madam Commissioner when it was that you
11 started work at the museum.
12 A. Early in 1982.
- 13 Q. What did you do, what did that involve.
14 A. I had a number of jobs, in that year. First doing
15 voluntary work and then working on a grant conducting
16 research into the materials we had in the museum that
17 related to the Darwin area. So, I was employed to
18 compile lists of publications, researching the archives
19 and to compile lists of the objects that we had in the
20 museum that related to this research project. That was
21 in 1982.
- 22 Q. In 1983, I think you started working on something to do
23 with secret sacred men's objects, is that correct.
24 A. That's right. In 1983, the museum was being approached
25 by various Aboriginal organisations with a view of
26 repatriation of certain classes of objects. At that
27 stage, the museum didn't really know what we had in the
28 way of such objects in our collection, so I was employed
29 to go through the registers and start coming up with a
30 list of objects to enable, sometime later, negotiations
31 and consultations to take place. I also started
32 physically organising those objects in an appropriate
33 storage area.
- 34 Q. I think it was later in 1983 that you took up a
35 permanent position at the museum, is that so.
36 A. That's right. As a museum assistant, at that stage.
- 37 Q. Your direct superior was, whom.
38 A. Mr Steve Hemming.

- 1 Q. I think it was in the 1983 year that you started your
2 Bachelor of Arts degree, is that so.
- 3 A. Yes, that would be right, yes.
- 4 Q. What was your major, when you started your degree.
- 5 A. The Bachelor of Arts?
- 6 Q. Yes.
- 7 A. It was a double major in anthropology, but I did other
8 subjects in archaeology and human geography.
- 9 Q. I think one of your tutors, during the 1983 year, was Dr
10 Deane Fergie, was it.
- 11 A. That's right.
- 12 Q. Over the years following 1983, I think you moved through
13 the following hierachical steps in the museum;
14 registrar, collection manager, curator and senior
15 curator, is that right.
- 16 A. That's right.
- 17 Q. What is your position now.
- 18 A. I am a senior curator, at the moment, working on a
19 project which is of - with a national focus; and that is
20 the compiling of an inventory of restricted men's
21 objects from right across the country: objects from
22 other museums and other cultural institutions.
- 23 Q. Do you have a status in some part of the Aboriginal
24 community in Australia which enables you to do this sort
25 of work.
- 26 A. In order to work with restricted men's objects, I do
27 have an informal status as a senior man who can work
28 with such materials when senior men come down from
29 remote regions in northern Australia, to either take
30 back or store or just talk or use objects that are in
31 our collection. So I and one or two other senior people
32 in the museum do have an informal initiated status.
- 33 Q. Having graduated, I think, in 1986 with your BA majoring
34 in anthropology, you commenced your Masters Qualifying
35 course in geography, is that correct.
- 36 A. There was a couple of year break for that, in which I
37 was engaged in field work and publishing, but, yes, the
38 qualifying course I commenced in 1989.

- 1 Q. Were you under the supervision of any particular person.
2 A. In that year, Professor Fay Gale.
3 Q. I think that was a bridging course to your PhD, was it
4 not.
5 A. Yes, it was a course that was offered by Professor Gale
6 to enable me to get into a postgraduate degree, without
7 having to spend several years doing an honours degree in
8 anthropology or geography.
9 Q. You then advanced to your PhD and I take it that you had
10 supervisors for that, did you not.
11 A. Yes, I had three supervisors: I had Dr Kingsley Garbett
12 from the Anthropology Department of the University of
13 Adelaide; I had Mr Peter Smailes from the Geography
14 Department of the University of Adelaide, and I had a
15 third supervisor, Dr Chris Anderson, who was, for the
16 most of the degree, Head of the Anthropology Division,
17 but, towards the end, he was and is the Director of the
18 South Australian Museum.
19 Q. Your PhD I think was conferred on you in April 1995, is
20 that correct.
21 A. That's right.
22 Q. It therefore took approximately four years.
23 A. Yes, I submitted it in March 1994 and it took - it
24 wasn't conferred until April the following year.
25 Q. Is that about average, or is that a -
26 A. No, that would be considered very fast, but, because of
27 my extensive field work in the Lower Murray region,
28 which was the focus of the PhD, I was basically able to
29 commence writing as soon as I was formally enrolled in
30 the postgraduate degree.
31 Q. At p.25 of your, I will call it `report', Exhibit 1, you
32 have listed your publications there, haven't you.
33 A. That's correct.
34 Q. I think the final publication you have mentioned, over
35 on the bottom of p.26, is, indeed, your thesis.
36 A. That's right.
37 Q. Entitled `Contact, Conflict and Regeneration.
38 Aboriginal Cultural Geography of the Lower Murray, South

1 Australia'. The title itself suggests that it had very
2 much to do with the Lower River Murray region; and, to
3 ask you an obvious question, that is the case, is it.

4 A. That is the case. Lower Murray defined as the cultural
5 and physical region roughly from the tip of Cape Jervis
6 in a straight line through to Wellington and then down
7 to Kingston. That sort of triangular area that takes in
8 the lower lakes, the Coorong and the coastal region of
9 Encounter Bay.

10 Q. The publications you have mentioned, leading down to
11 your thesis, at the bottom of p.26, in excess of 20 or
12 so publications, how do you regard a publication. What
13 is a publication, in the context of your discipline.

14 A. The publications I have put here are the more major ones
15 that I produced. Ones that reflect my field work and
16 research interests. So, starting from the mid 1980s, my
17 main publications are to do with Aboriginal use of the
18 physical environment; particularly in the Lower Murray,
19 but also the southern South Australian region in
20 general. There are also publications relating to my
21 professional role in the museum in relation to computers
22 and object registers. But, during the last five years,
23 I have been moving into the area of Aboriginal
24 cosmology, the more cultural aspects of Aboriginal
25 perception and use of the landscape, and they are the
26 publications that I am currently working on, and I have
27 got a number that are in the process of being submitted.

28 Q. The book I produce to you, is that, indeed, your thesis.

29 A. That's correct.

30 Q. That runs to some, just to be precise, 425 pages.

31 A. That's correct.

32 Q. The field work that you did to compile that thesis, can
33 you give us and the Commissioner an idea of just how
34 much of the work involved field work and what it was.

35 A. Yes, early in the 1980s, I accompanied mainly Stephen
36 Hemming on quite a large number of field trips to the
37 Lower Murray and South East region, where we were
38 contacting Aboriginal people in the community who were

1 regarded by the rest of the community as knowledgeable
2 informants on particular aspects of Ngarrindjeri
3 culture. My particular interest earlier on, as I have
4 already stated, is the more hunting and gathering
5 technology part of it. But, as time went by, my
6 interests emerged into the mythology and history. Steve
7 Hemming's interest was mainly in the Aboriginal history
8 side of that field work. Sometime in the late 1980s, my
9 relationships with the Aboriginal community became less
10 formal, for a number of reasons. And my field work,
11 from that stage, tended towards more participant
12 observation type work and less, sort of, formal museum
13 visits. So, there are a number of tapes that document
14 the early part of that field work, but, over the last
15 seven or so years, I have mainly relied on participating
16 and just picking up knowledge through that
17 participation.

18 Q. By the time of the conferring of your PhD, in April
19 1995, you were married, were you not.

20 A. That's correct.

21 Q. I think your wife is Susan, is that correct.

22 A. Yes, she was Susan Rankine, formerly a resident of Point
23 McLeay.

24 Q. And Susan is a Ngarrindjeri lady.

25 A. That's correct.

26 Q. And the daughter of Henry and Jean Rankine.

27 A. That's correct.

28 Q. Of Point McLeay.

29 A. That's correct.

30 Q. Would you describe Henry and Jean Rankine as prominent
31 Ngarrindjeri people.

32 A. Yes, very much so.

33 Q. We are to see a film entitled 'Ngurunderi. A
34 Ngarrindjeri Dreaming', prepared by the South Australian
35 Museum.

36 A. Yes, mainly by Steve Hemming.

37 Q. I think your wife features in that film, does she not.

38 A. Yes, she is one of the Ngurunderi's wives.

1 Q. Before I move into your report with you, you have been
2 embroiled in the debate about the Hindmarsh Island
3 bridge, have you not.

4 A. That's correct.

5 Q. Could you tell the Commissioner to what extent that has
6 caused problems for you and the Ngarrindjeri people you
7 know.

8 A. It has caused quite a few problems and, initially, I
9 tried to maintain a very impartial position on the
10 Problem, but, as it has developed among Aboriginal
11 people and anthropologists, it has been increasingly
12 difficult to stand back. So, my views that I have put
13 forward today would be entirely my own and certainly, or
14 not necessarily the views of my extended Aboriginal side
15 of my family. But, yes, a number of personal and
16 professional relationships that I have had with
17 Aboriginal people have suffered and I suspect, in a
18 couple of cases, they will never be back to the way they
19 were, before the Hindmarsh Island bridge issue.

20 Q. Do you hope that this inquiry will have somewhat of a
21 cleansing effect.

22 A. Yes, I suppose I am here, to some extent, representing
23 the anthropology profession, because I feel that
24 anthropology, as a discipline, has let down Aboriginal
25 people in this issue, but I am also here as someone who
26 has a lot of knowledge about the region and I hope that
27 the sharing of my knowledge with the Commission will
28 help to bring about some resolution.

29 Q. Can I take you to p.24 of your report, where, under the
30 heading 'Formal Qualifications', you have included a
31 heading 'Experience with Aboriginal Culture'. Is it the
32 case that your field work in the Lower River Murray
33 began in the 1980s with work you were doing with Stephen
34 Hemming on the Ngurunderi Exhibition.

35 A. Yes, that was a project that dominated our activities
36 through the early and mid 1980s.

37 Q. You have a botany and zoological background. At least,
38 your primary degree was focused on that, wasn't it.

1 A. That's right.

2 Q. Did your initial work in the Lower River Murray with
3 Stephen Hemming then concentrate on that.

4 A. Yes, I concentrated on developing lists of plants that
5 Aboriginal people utilised and recording the knowledge
6 that they had about how those plants were used. And,
7 yes, that eventually led me into looking at the cultural
8 aspects of plants and animals as well.

9 Q. Did that necessarily bring you into contact, in any
10 formal way, with Aboriginal people and, in particular,
11 Ngarrindjeri people.

12 A. Yes, we were in contact with quite a few elderly and
13 middle aged Aboriginal people. And, particularly in the
14 case of the elderly Aboriginal people, most of them are
15 now deceased. For anyone who is - who looked through
16 the acknowledgement section of my thesis, they will see
17 that we were working predominantly with women and
18 certainly the more informal part of my field work was
19 dominated with work and activities with Ngarrindjeri
20 women in the region.

21 Q. Your field work has been on-going since the 1980s, is
22 that so.

23 A. In relation to the Lower Murray, it has never stopped.

24 Q. No doubt it has some informality about it, by reason of
25 your marriage, also.

26 A. That's correct.

27 Q. Do you spend then time, social time, family time, in the
28 Point McLeay area.

29 A. Yes.

30 Q. Turning to your thesis, for a moment; it is entitled
31 'Contact, Conflict and Regeneration'. Could you paint
32 us a picture of what it is about.

33 A. Yes, I guess to reduce it to just a few sentences; what
34 I was trying to do was develop a model of an indigenous
35 culture that was going through rapid transformation. A
36 model that explained how they related to the landscape
37 which, in itself, was rapidly transforming. So, parts
38 of the thesis deal with the preEuropean period. Parts

- 1 deal with the nature of European and Aboriginal contact.
- 2 And then several chapters deal with the contemporary
- 3 ethnographic situation which was largely based on the
- 4 more informal part of my field work.
- 5 CONTINUED

1 So that there's, you know, three main clumps - and I've
2 tried through the thesis to come up with a model that
3 explained how Aboriginal people relate to the modern
4 landscape and tried to draw out threads of that
5 relationship that relate specifically to pre-European
6 influences and other influences that have really been
7 derived from their interaction with a sort of broader
8 non-Aboriginal controlling force.

9 Q. To prepare that thesis, to what extent did you
10 familiarise yourself with the existing data; talking
11 about both data, such as material culture and culture as
12 set out in the literature.

13 A. Yes. My thesis has over 500 references ranging from
14 fairly brief historical accounts from explorers to, you
15 know, more detailed ethnographic work in the region.
16 There is a lot of material there. Then, in order to use
17 such widespread material generated from different
18 sources, I had to develop a framework which gave the
19 reader of the thesis some idea of what the biases would
20 be for particular parts of that very large resource of
21 literature that I was drawing upon.

22 Q. Would you or would you not be able to say that, in the
23 course of preparing that thesis and studying generally,
24 you read all there is to be read.

25 A. As far as I know.

26 Q. In relation to the Lower Murray.

27 A. Yes. As far as I know, I've, you know, read every major
28 piece of ethnographic material that relates to the
29 region. Since submitting the thesis, one or two minor
30 things have cropped up. - and, of course, the Berndt
31 book - that is Ronald and Katherine Berndt's book of
32 'The Yaraldi World That Was' - was available after my
33 last draft of the thesis was already prepared, so I have
34 incorporated some of that material into the thesis.

35 That was a major body of work that wasn't addressed in
36 any major way, just because it came out just prior to
37 submitting the thesis.

38 Q. That's Berndt, B-E-R-N-D-T.

1 A. That's right.

2 Q. And Yaraldi.

3 A. Y-A-R-A-L-D-I.

4 Q. At the time of the conferring of your PhD in April 1995,
5 you having submitted it in March 1994, the Berndt book
6 was published, wasn't it.

7 A. That's right; it was available.

8 Q. Published in 1993. During the course of preparing your
9 thesis, were you able to refer, in any formal way, to
10 it.

11 A. I knew of its existence within the Museum, but there was
12 a rather torturous history of trying to get it published
13 and I was reluctant to refer to the thesis until I knew
14 - not the `thesis', refer to the Berndt manuscript until
15 I knew what its status to be. I was hoping it would
16 either appear earlier than the thesis, or appear well
17 after it.

18 Q. When it was finally published in 1993, the Berndt book I
19 should say, you had substantially finished writing up
20 your thesis; is that the case.

21 A. That's right.

22 Q. When you had finally been able to read the Berndt book,
23 did you make any comparisons as between their data and
24 your own.

25 A. Yes. I would have to be honest and say I was worried
26 before reading the Berndt book that it may present data
27 that led away from the picture that I was portraying
28 through the thesis. I found that in every major respect
29 that it reinforced aspects in my thesis. So, initially,
30 I had permission from my supervisors not to refer to the
31 thesis, but there were some examples in the Berndt book
32 that were very pertinent to my thesis, so I still
33 included them in a brief form.

34 Q. Did any aspects of the Berndt writings, as published in
35 the book, initially give you any concern.

36 A. Well, as Professor Tonkinson said in the foreword in the
37 book, it's an old-style ethnography. It's trying to
38 portray a culture in its totality without really

1 providing a lot of, you know, comparative material and
2 sort of historical framework. So, the book is really
3 the research notes, field notes of the Berndts and not a
4 great deal more. I guess I was worried that there was
5 quite a bit of historical material that they could have
6 referred to but didn't. But, on the other hand, you
7 know, others would regard that as the beauty of the book
8 in that it's, you know, their sort of account from the
9 1940s without much influence from other research. So, I
10 guess with its perceived weaknesses, in another light
11 would be seen as its strengths.

12 Q. There were some topics of Aboriginal culture, in
13 particular the Ngarrindjeri culture, which were dealt
14 with rather frankly, were there not, which interested
15 you.

16 A. Yes. I was aware, you know, through talking to people
17 like Steve Hemming, who was fairly familiar with the
18 manuscript, that there was a great deal of scorcery,
19 certainly in the manuscript, the Berndt manuscript. I
20 did raise on a couple of occasions with other staff
21 members that that might be a source of problem for
22 publishing the book. Scorcery is, you know, basically
23 used and portrayed in the book as a major weapon for
24 killing people, and I had concerns about how the
25 contemporary Ngarrindjeri community would view the
26 rather frank treatment of that.

27 Q. There were other topics dealt with rather frankly in the
28 Berndt book.

29 A. Yes. I guess I was, well, I was definitely more worried
30 with the scorcery. There is quite a bit of material on
31 the sort of female realm of Ngarrindjeri life; that is,
32 childbirth, menstruation, abortion, that type of thing.
33 There are initiations described. So there are quite a
34 few things that, if the publishing was going to become
35 more widely spread, particularly in schools, that would
36 cause problems.

37 Q. I return briefly for the moment to your list of
38 publications at p.25. The list shows, does it not, that

1 your early publishing career reflected your botany
2 background; is that so.

3 A. That's so, yes.

4 Q. Then, in 1990, if your publications are any indication,
5 your interest broadens.

6 A. Yes. I suggest that my interests broadened earlier than
7 that.

8 Q. There was certainly a couple of years' delay when you
9 didn't publish anything.

10 A. In the late '80s I became much more interested in the
11 cultural aspects of plants and animals and how they
12 fitted into the Ngarrindjeri cosmos. So, in a sense, my
13 earlier work had pretty well exhausted the historical
14 literature and a lot of those informants of the
15 biological side of my interests, you know, were
16 deceased. So, you know, it was a natural progression on
17 to sort of, you know, bigger and broader and more
18 challenging topics.

19 Q. Of course, there is a gap in your publishing career, it
20 seems, between 1991 and 1995 and that was because you
21 were working on your thesis in that time.

22 A. Yes. I didn't want to string out my thesis, so all of
23 my spare time - and I was never formally given any time
24 off from work to work on my thesis - so all my spare
25 time that I normally had would be taken up writing
26 papers which was used up to produce the thesis.

27 Q. Can I go to your commencement of your report, if I could
28 call it that, Exhibit P1. You deal in the first section
29 of your report with the history of the Ngarrindjeri
30 people. I think in conjunction with the history, as set
31 out there, you have divided that into: The pre-European
32 period and the effects of European settlement. In
33 conjunction with that, you have actually provided a
34 chronology or what you could call a 'Time Line'.

35 A. That's right.

36 Q. Can you refer us to that. That is in appendix A at
37 p.11.

38 A. Yes. That's a Time Line out of the back of the thesis.

1 I have truncated it in order to present it in a usable
2 form. I've - once having collected all of the
3 historical and ethnographic information available, it
4 was quite clear that there were three distinct phases
5 that Aboriginal people fell into in the sense of their
6 relationship with the landscape.

7 Q. Those three distinct phases are.

8 A. The exploration phase, which commences with - well, it
9 commences with the British Empire expanding into the
10 Pacific region. In terms of the Time Line, as I
11 presented here, it goes from Sydney being established
12 and goes through rather the severe small pox epidemic,
13 various sealers informally settling the southern coastal
14 regions of South Australians and, therefore, beginning
15 to interact with the Lower Murray people, the
16 Ngarrindjeri people. Then, the official colonisation,
17 the colonists who expressly came out from England to
18 settle in South Australia arrived in 1836. For a few
19 years, there was still much exploring to do and overland
20 routes to be established. However, as I have set out
21 here, by 1859, the first Aboriginal mission in Australia
22 was set up, and I called the commencement of that phase
23 'The colonial incorporation phase'. It was this phase
24 that Aboriginal people, those who had survived small
25 pox, were, you know, largely dispossessed of their land
26 and eventually forced onto missions, such as Point
27 McLeay which was established in 1859. However,
28 throughout the 19th century, there were still quite a
29 few Aboriginal groups in the Lower Murray who were
30 living a sort of joint hunting and gathering sort of
31 European existence and they had freedom, more or less,
32 to move around as they saw fit, particularly in the
33 southern and eastern parts of the Lower Murray. The
34 western side of the Lower Murray, by the late 19th
35 century, had largely been taken up by pastoralists and
36 farmers. Then, by the turn into the 20th century, the
37 Government started getting more heavily involved in
38 Aboriginal affairs. Through the 19th century, they were

1 more remotely involved. They left the running of
2 missions to, more or less, private organisations, but,
3 starting with the Aboriginal Aborigines Act in 1911,
4 Aboriginal people were officially segregated from main-
5 stream Australian society and places like Point McLeay
6 became even more important in terms of being a place
7 where the majority of Aboriginal people from the Lower
8 Murray Region were placed for one period or another.
9 Then in 1911 is what I would call the commencement of
10 the third phase, the final phase, or the Government
11 welfare phase. That's to signal the role of Government
12 increasing in relation to Aboriginal affairs. The Time
13 Line goes right through to the present with the activity
14 around the 1960s when Aboriginal people gained more
15 rights as citizens, right through to the early '70s when
16 missions were, Government mission stations were starting
17 to be handed back - well, handed to Aboriginal-run
18 councils for management right through to the present.
19 But the influence of or support of Government is still
20 strong in the Aboriginal, in those Aboriginal
21 settlements today.

22 Q. You come then to the conclusion on p.3.5 of your report
23 that Aboriginal culture is really a group of mission
24 cultures, do you.

25 A. Yes.

26 Q. In broad terms, that is what you include.

27 A. Yes. One of the findings in my thesis was that although
28 Aboriginal people often appropriate terms from the sort
29 of what we call in anthropology as 'tribe literature' to
30 classify their various groupings to date, in terms of
31 interaction within the Aboriginal community, the
32 tendency is towards finding people on whether they are
33 from Koonibba on the West Coast, to Point Pearce on
34 Yorke Peninsula, to Point McLeay, or as they prefer to
35 call it Raukkan. So, the roles of these Aboriginal
36 settlements - they are still Aboriginal settlements
37 today, but the roles of these former missions are very
38 important in terms of how Aboriginal people identify

- 1 themselves today. So that is some indication as to the
2 fact that the modern Nunga community, which encompasses
3 all of those southern Aboriginal groups, is largely
4 built upon pre-European elements of Aboriginal culture.
5 But, very heavily influenced by basically the race
6 relations then between them; that is, the Aboriginal
7 people and the colonisers, the Europeans. In order to
8 provide a working model of contemporary Aboriginal
9 culture is not sufficient to look back into the
10 pre-European Aboriginal literature and just extrapolate
11 the differences. There is a lot that the contemporary
12 Aboriginal community have developed which would neither
13 be regarded as assimilated European forms, nor could it
14 be regarded as pre-European forms. We are looking at
15 a group of people who have developed on their own line
16 and are not on some point between a pre-European past
17 and a European present.
- 18 Q. I think that you personally take the view - and I'm
19 referring to your Time Line and the history that you set
20 out that there were two significant events in the
21 history of the Ngarrindjeri people which has really
22 affected their cultural development.
- 23 A. Yes.
- 24 Q. Those two things are: the arrival of the white sealers
25 and the arrival of small pox.
- 26 CONTINUED

1 A. Yes.

2 Q. Why, of the sorry tale that is set out in your Time
3 Line, do you see those two events as significant.

4 A. I will take the arrival of small pox first. There are
5 various estimates of the effect that small pox had on
6 South-Eastern Australian Aboriginal populations, but
7 even fairly conservative estimates would place that a
8 majority of Aboriginal people suffered and possibly died
9 as a result of two waves of small pox which occurred
10 prior to official settlement in 1836. There are many
11 reports from colonists and early recorders of Aboriginal
12 culture, that record right from the Darling, right along
13 the river, Adelaide, through the South-East into Western
14 Victoria, that Aboriginal people who survived, that were
15 middle aged people by this stage, still bore the marks
16 of the small pox on their faces and bodies, and that the
17 majority of their groups had died through the result of
18 those two waves. I suppose it is really only a guess
19 what effect that would have had on Aboriginal society,
20 but it is possible that quite a few of the ceremonies,
21 and certainly the mourning rituals, were truncated in
22 order to get by such a large number of people dying in a
23 fairly short space of time. Yes, my statement is in
24 terms of the perceived impact that that had on the
25 society in terms of what Aboriginal people thought,
26 backed up by quite a few references in the easterly
27 ethnography. When the sealers arrived, and they appear
28 to have arrived during roughly one of the waves of small
29 pox, they tended to set up their sealing and, in some
30 cases, whaling depots on islands off the mainland, so
31 that they could avoid reprisals from mainland Aboriginal
32 groups. But it has been recorded, particularly for the
33 Tasmanian end of that sort of Southern Australian
34 coastline, that the effects of sealers forcibly
35 abducting Aboriginal women from the coastal regions led
36 to many groups virtually disappearing altogether. So
37 the sealers taking away women of reproductive age from

1 coastal communities certainly had a major impact on the
2 demography of the coastal region.

3 Q. Is it the case that many of the present Ngarrindjeri
4 people are descended from sealers and whalers.

5 A. Yes. It is difficult to know exactly how many, but with
6 the Wilson family and their connections to virtually
7 every other Ngarrindjeri family, we could be looking at
8 a thousand or more Ngarrindjeri people who are descended
9 from one of two sealers, Wilkins or Wilson.

10 Q. In 1830 or thereabouts, your research has thrown up how
11 many sealers and whalers that were working in the
12 southern waters near the Lower River Murray.

13 A. If we take in the whole region of Southern South
14 Australia, it is estimated - if we count the Aboriginal
15 wives, who were a major labour force for the sealers as
16 well - there has been an estimate of roughly 200. Other
17 people have suggested that is probably a bit
18 extravagant, but it does indicate, nonetheless, that
19 there were quite a large number of boats moving up and
20 down the coast from Tasmania, right through to the Great
21 Australian Bight and beyond.

22 Q. So the reason why you see those two events, apart from
23 what has been called 'Europeanisation', as significant,
24 is because of its devastating impact on the culture of
25 Ngarrindjeri people. Is that correct.

26 A. Yes. We have got a tendency of describing pre-European
27 culture - as the Berndts do with the title of their
28 book, 'Yaraldi: A World That Was' - in terms of
29 Aboriginal culture as it was recorded when the
30 missionaries, in particular the German missionaries,
31 arrived after official settlement. But what I am saying
32 is that there have been several major effects resulting
33 from European settlement that had occurred before those
34 earlier ethnographers - that is, the missionaries - had
35 arrived in South Australia. So really, in order - or
36 strictly speaking, to speak of pre-European culture, we
37 would have to rely more on archaeology and less on
38 social anthropology. So I have discussed that in the

1 thesis and I have tended to, rather than talk about
2 pre-European culture, which Aboriginal people and others
3 would often describe as traditional - I have tended to
4 talk about Aboriginal culture in the earliest years of
5 European settlement.

6 Q. So, is this the point then: that, even by the time of
7 the missionaries coming on the scene, as it were, that
8 the exploration events, including two catastrophes of
9 the arrival of the white sealers and the small pox, had
10 left Ngarrindjeri culture, to some extent, a crumbling
11 culture.

12 A. It certainly had a significant effect. 'Crumbling'
13 would imply some judgment on what invasions, you know,
14 or truncations that the survivors would have done in
15 order to keep things going, so I perhaps would not
16 describe it as a 'crumbling' culture, more as a culture
17 that was reeling from the shocks of the first events
18 brought on by European colonisation.

19 COMSR

20 Q. Would you describe it as a transitional culture.

21 A. I guess all culture is transitional, in that culture is
22 constantly changing, including our own culture. But
23 there are certain events that bring upon change much
24 quicker, and I think, in one context, it is acceptable
25 to describe it as a transitional culture, yes.

26 XN

27 Q. With that in mind, can you compare the situation of the
28 Ngarrindjeri people with, say, the people in the Central
29 or Western Deserts of Australia.

30 A. Yes. The frontier, in terms of European intrusion into
31 Australia in relation to the Lower Murray, is really
32 around the turn of the century, the 18th into the 19th
33 century - and Encounter Bay, which is in the Lower
34 Murray - and when Adelaide was set up in 1836, the
35 frontier then started moving sort of inland. In terms
36 of places like the North-West of South Australia, the
37 frontier, in terms of European intrusion, didn't arrive
38 until the 1930s. By the 1930s the ways that the

- 1 Europeans were reacting to Aboriginal affairs had
2 changed somewhat. So you can sort of build up a model
3 that explains why some communities have been able to
4 maintain their ritual religious life relatively intact,
5 whereas other communities, which have been heavily
6 missionised through that earlier period, because there
7 the frontier passed them much earlier that is why that
8 aspect of their life has suffered more.
- 9 Q. Are there then Aboriginal people, say in the North-West
10 area, who have not long ago existed in the
11 hunting/gathering mode of pre-European culture.
- 12 A. That's correct.
- 13 Q. But that was a long-gone situation as far as the
14 Ngarrindjeri people were concerned.
- 15 A. That's right. Around the turn of the century there were
16 still one or two Aboriginal groups living a modified
17 hunting/gathering existence down the southern end of the
18 Coorong, but they were roped into the mission around
19 about 1911, and due to the change in legislation.
- 20 Q. On p.3, the second paragraph of your report, you make
21 the point that I made earlier to you, that the
22 Ngarrindjeri culture today is a group of mission
23 cultures that, together, comprise what is known as the
24 Nunga Community.
- 25 A. I was going to say, Ngarrindjeri culture, to some
26 extent, equals Raukkan or Point McLeay culture. They
27 are not completely the same thing, but can often be used
28 interchangeably in the same context. So if we look at
29 Nunga culture as being all of the Aboriginal people who
30 could - well, who have sections of their community
31 living in Adelaide, then we would be looking at people
32 from Koonibba, Point Pearce and Point McLeay mainly, and
33 they are people that have been living in Adelaide at
34 least since the Second World War and, collectively, tend
35 to call themselves Nungas. Ngarrindjeri culture is
36 something that has existed perhaps earlier, but it is an
37 identity that is still being shaped and modified through
38 the central role of the Point McLeay Mission.

1 Q. So the conclusion you make there about that, bears on
2 this question in what way.

3 A. In this report, I summarise what was the state of play
4 in terms of what we were able - Steve Hemming and I,
5 that is - to discuss with Aboriginal people through the
6 1980s, and there was a general pattern of that repeated
7 everywhere, and that is that, although certain myths -
8 there was a lot of knowledge about the big sort of
9 dreaming epics, there seems to be virtually no
10 information available, and, even when elderly people did
11 know of the story, they didn't know too many of the
12 sites. So, in my thesis, I basically explain that by
13 being - through the rather restricted relationship that
14 Aboriginal people have with the landscape being based on
15 missions rather than, you know, moving across the
16 landscape and relating with various mythological sites.
17 So the model of having a - or looking at a contemporary
18 culture as one based around these important places in
19 the history of Aboriginal people over the past 200 years
20 is quite important in determining the contemporary world
21 view.

22 Q. So you are really saying to us that we should recognise,
23 in looking at Aboriginal culture, the corrupting
24 influences of European exploration and what followed.

25 A. I would perhaps hesitate towards calling it
26 'corrupting'. I would be trying to look at it in more
27 anthropological and less emotive terms. But there has
28 certainly been, you know, very heavy influences on
29 Aboriginal culture and restrictions - very heavy
30 restrictions on the passing down of information and the
31 transference of that knowledge from roughly 1800 through
32 to the present, 1995.

33 COMSR

34 Q. Just so I can clarify what you are saying. You are
35 saying that culture is dynamic and it evolves with
36 changing circumstances.

37 A. Yes, constantly changing.

1 XN

2 Q. Can I take you to the topic of the Ngurunderi epic. The
3 museum have a display which features the Ngurunderi
4 epic, isn't that the case.

5 A. That's correct.

6 Q. I think you, predominantly, Stephen Hemming and Philip
7 Jones, worked on that display and exhibition, did you
8 not.

9 A. Yes. Steve Hemming was the curator, who had the task of
10 putting it together. Philip Jones was employed as a
11 research officer initially, to compile a bibliography
12 and to conduct the research that would be needed to
13 start building cases. My initial role was as a museum
14 assistant, and then as a biologist, who could add
15 something in terms of the more hunting and gathering
16 interaction with a physical environment than of the
17 display.

18 Q. I think the museum produced a film which is a
19 distillation, is it not, of aspects of the differing
20 stories about Ngurunderi. Is that correct.

21 A. Yes. There is no one correct version of Ngurunderi. I
22 have written a paper, which is referred to in my report,
23 which will appear later this year in the museum records,
24 whereby I put forward a great number of these variations
25 and account for them in terms of the socio-political
26 environment which produced all the variations. In terms
27 of the display upstairs, one version had to be picked if
28 we were to produce a film, and that is mainly the Berndt
29 version, which was taken from a publication which was a
30 precursor of 'Yaraldi: A World That Was', a publication
31 from 1940. Steve Hemming consulted with the Aboriginal
32 community and there were a couple of points which needed
33 modification in order to reflect the contemporary
34 situation and on how people viewed the past. But
35 perhaps Steve would be a better one to flesh that in.
36 But, in a sense, the Ngurunderi video is a version that
37 has come about in its own right for the display. It is

1 not a version that would, in its totality, have been
2 received from an Aboriginal person.
3 MR SMITH: If now is an appropriate time, I would
4 like to show that video and seek to tender it.
5 VIDEO SHOWN
6 CONTINUED

1 VIDEO ENDS

2 EXHIBIT 2 Video cassette tendered by Mr Smith.

3 Admitted.

4 XN

5 Q. The landscape in and about Hindmarsh Island and the
6 Coorong and the Murray Mouth, in relation to Ngurunderi
7 and the literature, is there any analogy drawn, or is
8 there -

9 A. Ngurunderi's activities, or his perceived activities in
10 the Dreamtime were considered by Aboriginal people to
11 have created at least some of the major landscape
12 features throughout the Murray basin. In terms of the
13 actual course of the river, that was through chasing a
14 cod. The lake already appears, in terms of the main
15 versions of Ngurunderi, to have existed, although other
16 versions state that the lakes were created by Ngurunderi
17 to drown his two wives. But then there are other
18 versions of the Ngurunderi story where the wives are the
19 pages. So, there is almost an endless series of
20 variation in terms of how the various bits of landscape
21 were formed. There are a few of the place names,
22 particularly around the Murray Mouth, which refer to
23 body parts. And it is published, in the Berndt book,
24 that the Younghusband Peninsula and the Sir Richard
25 Peninsula are the legs of Ngurunderi. So, we do see
26 aspects of Ngurunderi in the landscape.

27 MR SMITH: Madam Commissioner, we have now reached
28 the stage, in Dr Clarke's evidence, where he is to deal
29 with women's business.

30 COMSR: You say it is to do with women's
31 business. It is not to deal with it in such a way that
32 all males at the bench need to leave, I take it?

33 MR SMITH: It is to deal with in a way in which
34 s.35 comes into play. I could perhaps indicate that
35 this section of the evidence would be substantially over
36 by the luncheon adjournment.

37 COMSR: I understand there is some problem with
38 the air conditioning in this room. It is not working,

1 at the present time, so perhaps it is an appropriate
2 stage to indicate that only those persons whom I
3 specifically permit to be present, during this part of
4 the evidence, are to remain in the room. Those persons
5 who have not been permitted to remain, must leave.

6 Perhaps I will adjourn, while that is taking place,
7 for a few minutes, and let a little bit of air into the
8 room.

9 ADJOURNED 12.13 P.M.

KC 5FP

P.A. CLARKE XN
(CLOSED HEARING)
(SUPPRESSION ORDER LIFTED 3.8.95)

1 RESUMING 12.25 P.M.

2 COMSR: I just want to ensure that there is
3 no-one in the hearing room, other than those persons who
4 have been permitted to remain. That is, parties and
5 their legal representatives and hearing staff and
6 reporters and counsel assisting and the witnesses.

7 Are there any other persons, in any other category?

8 MR SMITH: Yes, there is one other category. That
9 is, there are two anthropologists, in addition, who have
10 given an undertaking, who have a vigorous interest in
11 the anthropological evidence, and those two people are
12 here.

13 COMSR: Who are they?

14 MR SMITH: Rod Lucas and Philip Jones.

15 COMSR: Are they to be witnesses before the
16 Commission?

17 MR SMITH: At least one of them is.

18 COMSR: In the event, which one are we talking
19 about?

20 MR SMITH: Philip Jones is the next witness. And
21 Mr Rod Lucas reported in the early years of the Hindmarsh
22 Island development's development. And his report is
23 going to be one of the exhibits. And he may well be
24 giving evidence, but that is a matter that is still,
25 shall I say, a contingency. He should be entitled to be
26 here, because this material may be canvassed with him.

27 COMSR: I will permit the two anthropologists to
28 be present during this private hearing of the
29 Commission.

30 WITNESS P.A. CLARKE, EXAMINATION BY MR SMITH CONTINUING IN
31 PRIVATE

32 Q. Can I take you to p.3 of your report, Exhibit 1, under
33 the heading 'Women's Business'. First of all, can I
34 just take you away from the document, for a moment, and
35 take you to the Berndts; Ronald and Katherine Berndt:
36 Their work 'Yaraldi. A world That Was', is that
37 regarded, at least until your thesis happened on the

P.A. CLARKE XN
(CLOSED HEARING)
(SUPPRESSION ORDER LIFTED 3.8.95)

1 scene, as the seminal work on the Ngarrindjeri people.

2 A. Seminal, published work, yes.

3 Q. It certainly is an intensely detailed, what would you
4 call it, ethnographic work, is that fair.

5 A. Yes, it is a social anthropologist's description of what
6 they considered to be a - well, it is really a language
7 group-cum-tribe, but a complete society.

8 COMSR: I just wonder, before we proceed, if I
9 shouldn't formally make a direction in connection with
10 the hearing.

11 I think I will formally do so.

12 I direct that all persons, except the witness, legal
13 advisers, Inquiry attendants and the transcript
14 reporters leave the Inquiry and that this evidence be
15 heard in private. Parties given leave to remain can
16 remain and also the two named anthropologists.

17 I further direct that copies of the transcript of
18 this private part of the hearing not be given to, nor
19 made available for inspection by any person, other than
20 the legal representatives of the persons given permission
21 to remain in the hearing.

22 Does that cover the situation?

23 MR SMITH: Yes, I was going to say, it doesn't
24 cover Michael Sykes, but he is here.

25 XN

26 Q. I appreciate that the answer to this question may
27 require a degree of interpretation, but, if it doesn't,
28 say so. The Berndts' work does not refer to any secret
29 sacred women's business, does it.

30 A. No.

31 Q. Ronald and Katherine Berndt worked extensively around
32 wider Australia in addition to the Lower River Murray
33 region, did they not.

34 A. That's correct.

35 Q. The work they did in the Lower River Murray with Albert
36 Karloan and Pinkie Mack was done in the 1940s, wasn't
37 it.

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- 1 A. That's right. And there were two main field work
- 2 periods around the 1940s, yes.

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1 Q. Would you spell Karloan for the reporters.

2 A. K-A-R-L-O-A-N.

3 Q. Could you tell us a bit about the Berndts. First of
4 all, did you know them, did you come to meet them.

5 A. Yes. Professor Berndt mainly, sometimes with his wife
6 Dr Katherine Berndt. They used to pass through Adelaide
7 on their way back to their home in Perth. So, from
8 about the early to mid-1980s right up to, well, both of
9 their deaths within the last few years, they were
10 visitors perhaps once, sometimes twice, a year at the
11 South Australian Museum. Professor Berndt in particular
12 was keen to keep up a rapport with us because he, after
13 40-odd years of recording this Lower Murray material,
14 this Yaraldi material, he was starting to work on it in
15 the 1980s and he was quite enthusiastic about it and he
16 knew of our interests in the Lower Murray as well. So,
17 in our area of the anthropology division, we knew the
18 Berndts reasonably well.

19 Q. They had no children.

20 A. That's correct, as far as I know.

21 Q. They were both dedicated anthropologists.

22 A. Yes. Anthropology was obviously their whole life. They
23 were a team. Professor Berndt would often tackle the
24 parts of Aboriginal culture that were seen as more in
25 the male realm and Katherine Berndt worked often with
26 Aboriginal women by themselves, but she was particularly
27 interested in the female realm. And I think it's fair
28 to say that her writings and body of writings on, you
29 know, that female realm of Aboriginal culture would
30 place her as one of the first feminist anthropologists
31 in Australia working with Aboriginal culture.

32 Q. They worked intensely in the Lower River Murray area in
33 the '40s.

34 A. That's right.

35 Q. You said that they have recently died, deceased, both of
36 them.

37 A. Yes.

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- 1 Q. In the time between then and, say, the publication of
2 their work in 1993, did they continue to work throughout
3 Australia.
- 4 A. After working the Lower Murray, they did intensive field
5 work in the west coast Ooldea region of Central
6 Australia, Arnhem Land, a bit of work in the Kimberlies.
7 I know that there are at least some publications in
8 relation to parts of Queensland - although I don't think
9 that was a stronger area - and a little bit of work in
10 Melanesia.
- 11 Q. Your position is that in their work `Yaraldi, A World
12 That Was', there is no reference to sacred women's
13 business.
- 14 A. That's correct.
- 15 Q. Were they keen publishers of the work.
- 16 A. Yes.
- 17 Q. They did.
- 18 A. Yes. Their publication record is immense. They were
19 probably the only anthropologists in Australia who had
20 this cross-the-continent overview of the Aboriginal
21 culture as it was in its more pre-European state, due to
22 the fact that they were working often in sort of
23 frontier fringe situations, but also working with the
24 people like Karloan and Pinkie Mack, whom they
25 considered to be part of what they call a `memory
26 culture'; that is, people who had lots of records in
27 their head which related to a much earlier period.
28 Their field work was very intensive right across
29 Australia, and particularly with Katherine Berndt there
30 was a sort of sharp focus on her work on things that, in
31 a general broad sense, we would call using Aboriginal/
32 English women's business.
- 33 Q. Their publications in relation to their works in other
34 areas of Australia, did any of those publications allude
35 to secret business of any sort.
- 36 A. Well, Professor Berndt put out an iconography series
37 where he looked at religion cycles and the role of

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1 mythological and sacred sites. That is a fairly major
2 part of his work. The work of Katherine Berndt was in
3 the area of woman's knowledge of ritual religion and
4 sacred sites is quite significant as well, and there are
5 in her material for parts of Australia, such as Central
6 Australia, she does afford a status of secret sacred at
7 least to some of that knowledge.

8 Q. Is this the position: That in some of the published
9 works of the Berndts in respect of other areas of
10 research in Australia, they have alluded to secret
11 sacred business.

12 A. That's right. In their book 'The Yarlaldi, A World That
13 Was', they make a broad comparison with other regions
14 where they worked. And it was fairly obvious to them -
15 and they used to say this during their visits and they
16 have said it in print as well - that it was really the
17 Central Australian Western Desert Region which, in their
18 opinion, there was a perception of a sharp distinction
19 between things that are secret sacred men's business and
20 secret sacred women's business. But, in much of the
21 rest of Australia, particularly coastal regions like
22 parts of Arnhem Land and Melville and Bathurst Islands
23 on the coast of Northern Australia, where they did a lot
24 of work, and in particular the Lower Murray, they
25 couldn't find evidence for that same gender distinction.
26 And Tononkinson, in his foreword to 'The Yarlaldi, A
27 World That Was', also comments on that overview that the
28 Berndts used to give in relation to the role of men and
29 women in Aboriginal society across Australia.

30 Q. In your report, Exhibit 1, there is a discussion of
31 women's business on the one hand and secret and/or
32 sacred women's business on the other.

33 A. Yes.

34 Q. Is it important to make a distinction in the context of
35 this inquiry between those concepts.

36 A. Well, the term 'secret sacred women's business' is
37 really a description of what has been put forward by the

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- 1 supporters of the secret sacred women's business as it
2 relates to the Hindmarsh Island side of the issue.
3 There is certainly no argument from me that women's
4 business exists in all Aboriginal cultures across
5 Australia. `Women's business' is a realm of knowledge
6 often relating to dance and ritual that was, you know,
7 largely held by Aboriginal people, by Aboriginal women
8 as distinct from Aboriginal men. Where I differ from
9 the other people who support the women's business on
10 Hindmarsh Island is the fact that, whether it was secret
11 sacred women's business - and secret sacred women's
12 business would go against the ethnography from the Lower
13 Murray which affords men's business and women's business
14 on equal footing and, therefore, so much
15 interconnection, that it can't really be separated out.
- 16 Q. I was asking you whether the Berndts had, in contrast to
17 what they published about the Lower River Murray in
18 other areas, published material alluding to secret
19 sacred business, and your answer that was, yes, they
20 have.
- 21 A. Yes.
- 22 Q. No doubt you take some solace then from the absence of
23 that in the Berndts book in relation to the Lower River
24 Murray in terms of your views about it.
- 25 A. Yes. A lot could be said about what the Berndts did say
26 or didn't say. They were the people who recorded that
27 material in the 1940s. They had a specific interest in
28 the role of gender in that society. So, their own
29 conclusions, or their own material must be considered to
30 be more significant than perhaps a reappraisal of that
31 same material in the present light without there being
32 significant additional material collected from the same
33 time as the Berndts.
- 34 Q. Whilst we have been pre-occupied with the Berndts, there
35 are numerous other ethnographers who have done work in
36 that area; isn't that the case.
- 37 A. Yes. There are several periods of ethnographic work in

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1 the Lower Murray. If we broaden ethnographic work to
2 include any historical record of Aboriginal people and
3 their customs and beliefs in that region, we are looking
4 at what I've argued is the most heavily recorded area in
5 southern Australia, or certainly southeastern Australia.

6 So, the Lower Murray Region is not a gap in the
7 literature from that point of view. In terms of
8 ethnography, a single study of an Aboriginal culture is,
9 in its totality, a single Aboriginal culture. There are
10 very few studies anywhere in southern Australia - and
11 the Berndts work is significant outside the Lower Murray
12 Region for that very reason.

13 Q. You have done some work, some anthropological work, as
14 it were, in Australia yourself.

15 A. That's right. It's more - I've worked in virtually all
16 parts of South Australia in relation to my current role
17 in terms of identifying and recording men's secret
18 sacred objects. I have been having to deal with
19 Aboriginal councils right across Australia, and in many
20 cases not just dealing with senior male elders from
21 those groups who have come down to Adelaide, but also to
22 visit them out in their homelands. So, I've been -
23 that's the role in terms of my overall career, the role
24 of compiling this massive inventory of secret sacred
25 objects. I have visited places such as the Kimberlies
26 and the Macdonnell Ranges and Musgrave Ranges over the
27 last few years.

28 Q. There has been reporting by scholars, such as yourself,
29 in the course of time as to the topic of secret sacred
30 women's business in published materials, has there not.

31 A. What published materials are you referring to?

32 Q. I am thinking of Keen, for instance. He has published
33 material concerning secret sacred matters.

34 A. Yes. His volume, which I think was published last year,
35 is specifically focused upon the role of sacred
36 knowledge in the Yolngu area of the Arnhem Land. There
37 have been - that's the volume that Chris Anderson's

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1 editing at the moment which has got a number of articles
2 from anthropologists who have been working with land
3 councils and working with the secret sacred objects
4 repatriation issues over the last few years. So, there
5 will be another book very soon that will have a number
6 of papers that deal with the role of sacred objects and
7 secret sacred information in relation to Aboriginal
8 society.

9 Q. What of the suggestion, however, that male
10 anthropologists and male publishers of information such
11 as this wouldn't be likely to hear about it.

12 A. I think the overall picture is far more complex in
13 saying yes or no to that question. For instance, some
14 of our most important - I will give you an example which
15 shows why. Some of our most important secret sacred
16 men's objects that we have in the Museum were collected
17 by female anthropologists, particularly during the 1930s
18 through to the 1950s. For the purposes of the men who
19 gave those objects up, it's quite clear that they
20 regarded the European women as basically being without
21 gender. So, there are examples, such as that, that show
22 that it's not just a simple case of saying 'Well, white
23 female anthropologists work with Aboriginal women and
24 male white anthropologists work with Aboriginal men'.
25 It's far more complicated than that. Sometimes a
26 person's life history might be important in terms of, as
27 an anthropologist, how they will be received by a
28 community. Certainly, you know, having children and
29 being middle-aged is probably going to give someone
30 better access than being a young honours, or - well, a
31 young graduate student in anthropology. It's a lot more
32 complicated than providing a simple model. In terms of
33 - I mean, a big part of this issue is whether men could
34 even have knowledge that the secret sacred women's
35 business could even exist. There's - one opinion is
36 that it could exist without men knowing. If that was
37 the case, then we are not looking at secret sacred

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1 women's business, but secret secret sacred women's
2 business. And I would argue that knowledge, regardless
3 of what gender, if it's considered to be secret sacred,
4 could not exist in a complete vacuum. There would have
5 to be enough knowledge at least of its existence and its
6 general structure in order for those who are to lie as
7 outsiders to be able to know where the boundaries of
8 that knowledge would lie in order not to transgress what
9 the rules associated with that knowledge may be.

10 Q. For instance, if I could give a lay example: If there
11 was a sacred object in a cave.

12 A. The women would have to know that that cave, or perhaps
13 that side of the hill was to be kept away from. I know
14 from field work up in the northwest of South Australia,
15 that some of the most important sites are right on the
16 edge of major settlements, and because there's general
17 knowledge, even with children, about keeping away from
18 such places and even the broadest terms why they have to
19 keep away from those places, then, you know, things
20 proceed reasonably well. There is no sort of constant
21 break in the rules or trespass onto those areas. And
22 people who don't have, you know, rights to see or
23 observe objects, there is no threat of those people
24 coming in contact with such material. So, there has to
25 be at least the barest knowledge of the secret sacred
26 business which has a gender which may be ascribed to.
27 There has to be the most basic information available in
28 order to define insider versus outsider, and it's that
29 aspect of sacred, secret sacred application that Keen
30 talks about in his publication.

31 Q. In any event, is it not the case that of all the
32 chronicles of ethnographic data, not Lower River Murray,
33 there are some women who have published.

34 CONTINUED

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- 1 A. Yes. I have already mentioned how it is a very heavily
2 worked area, but there are women who have worked in the
3 region. Alison Harvey is quite significant in the
4 context of this Commission. She worked in the late 30s
5 with people like Pinkie Mack in the sort of Wellington
6 area. There is Katherine Berndt, of course, whose work
7 we have already talked about. There are people such as
8 geographers, who have worked from the late 50s through
9 to the 80s, people such as Faye Gale and some of her
10 female students, Jane Jacobs and Joy Wundersitz, being
11 people who have had some exposure to Lower Murray
12 culture. There are also people that are a bit hidden, I
13 suppose, like Dorothy Tindale, who was often used by
14 Norman B. Tindale, curator of the museum, that is
15 significant, if not in his own right. Dorothy was often
16 used to get information from Aboriginal women that
17 Norman B. Tindale felt that he perhaps couldn't ask, or
18 it would constitute what, in Aboriginal English would be
19 called, shame. So there are women who have worked in
20 the Lower Murray region as ethnographers.
- 21 Q. You would expect at least to have reported the fact of,
22 if not the contents of any secret sacred `women's
23 business'.
- 24 A. Yes. I would expect that, even if information was not
25 forthcoming, that the reasons why that information
26 wasn't given, would have been spelt out and, in
27 particular, would have appeared in Katherine Berndt's
28 material because of her special interest in that area.
29 But I would also expect to see it in at least some of
30 the other work of those female anthropologists and
31 geologists.
- 32 Q. From a lay reader's point of view, there appears, in the
33 Berndt work at least, to be quite some intimate detail
34 about matters of sexuality, birthing, menstruation and
35 that sort of thing.
- 36 A. Yes. There is quite a bit of detail in there, and it
37 appears to have been gathered from both Albert Karloan

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1 and Pinkie Mack. So even the source of the information
2 wasn't restricted to either male or female, and it
3 doesn't appear to have been a major impediment to be
4 either male or female in terms of being the recorder.

5 Q. Can you offer any explanation, as an anthropologist, for
6 the distinction that you make the point about between,
7 say, the desert Aboriginal people from North-West and
8 Central Australia, as opposed to the people of the Lower
9 River Murray.

10 A. It is difficult to come up with a definitive answer, but
11 it may - some of the factors that would need to be taken
12 into consideration I think would be the social
13 organisation of the Western Desert, Central Australian
14 Region being quite a bit different from most other
15 regions, particularly temperate regions such as
16 South-Eastern Australia. It has been suggested by more
17 than one archaeologist that the Murray Darling Basin,
18 not just the Lower Murray but extended right through to
19 New South Wales, was the area where there was the
20 highest density of Aboriginal people living before any
21 European settlement. So we could be looking, in the
22 Lower Murray, of quite a large population that didn't
23 move about to the same degree as the Western Desert,
24 Central Australian groups had to. Their social
25 organisation, therefore, and the way that their society
26 was organised, would naturally have been along quite
27 different lines. So it may not have been possible to
28 have areas of knowledge and areas of the landscape that
29 had very sharp determinations or divisions on exactly
30 who could go there. We are looking at a landscape that
31 was full of people basically.

32 Q. And sedentary or, at least, to some extent -

33 A. Approaching the sedentary, but, you know, use of the
34 landscape, yes.

35 ADJOURNED 1.00 P.M.

36 RESUMING 2.20 P.M.

37 COMSR: Perhaps, I had just better formally get

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1 an acknowledgment that there is no-one present in this

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- 1 room that has not been permitted by me to be present.
2 You cannot see anyone, Mr Smith, who is not?
3 MR SMITH: No. I have had a look, there is nobody.
4 I tender Philip Clarke's thesis. I do not expect you to
5 read it, but I tender it only on the basis of
6 establishing his expertise and scholarship in this area.
7 EXHIBIT 3 Thesis by Philip Alan Clarke's tendered
8 by Mr Smith. Admitted.
9 XN
10 Q. You have in front of you Exhibit 1, your report. Could
11 you go to p.4, the last paragraph. Under the heading
12 'Initiation' you make the point first that women are
13 very much a part of the decision-making life of the
14 Ngarrindjeri people. Is that correct.
15 A. That's correct.
16 Q. You then move on to talk about initiations of both boys
17 and girls, and make the point that it was centred around
18 a certain mythology. Would you spell that and pronounce
19 it for us.
20 A. I would pronounce it as Waiyungari, and I spell it here
21 W-A-I-Y-U-N-G-A-R-I.
22 Q. Why is that significant.
23 A. What it does show is that, although males and females
24 were initiated at different times, they were still put
25 through the same myth cycle. They were considered, both
26 males and females, to be actors, if you like, in the
27 same myth. So what it does do is show that, in the area
28 of initiation, it is the same basic information which -
29 cultural information that is being used to initiate
30 people.
31 Q. Does that diverge in any way from your experience of
32 other Aboriginal groups in other parts of Australia.
33 A. Female initiations are not that well recorded in other
34 regions, but I am sure that I could find examples where
35 there were differences between males and females, but I
36 am not putting myself forward as an expert in female
37 initiation anywhere else.

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1 Q. I produce to you the Berndts work. Can I take you to
2 the foreword of Professor Tonkinson. First of all, in
3 relation to him, I imagine he is but can you tell us
4 whether or not it is true, he is a person of standing in
5 the anthropological community.

6 A. He is a significant anthropologist, both in terms of his
7 academic standing as Professor of Anthropology at the
8 University of Western Australian, but also as someone
9 who has done field work. Although I have read some of
10 his material, I am not intimate with it. But, from my
11 understanding, he has done extensive field work in the
12 northern parts of Western Australian, and probably other
13 areas as well.

14 Q. You have read the Berndt work, of course.

15 A. Yes, I have gone through it several times, albeit for
16 different reasons, but I am reasonably familiar with it.

17 Q. The foreword is unusually long and detailed, am I
18 correct.

19 A. Yes. I think the reason for that is the fact that this
20 body of work, in the way it is structured - I am talking
21 about chapters and the way the information is parcelled
22 up - would be considered a bit old fashioned in terms of
23 what anthropologists are writing now. So Tonkinson had
24 to put this ethnography into context. The Berndts kept
25 to the structure because their 1940s data presumably was
26 organised along these lines. They didn't want to
27 significantly re-work it. They did want to sort of
28 bring their better overview of - a more informed
29 overview of Australia in, but, at the same time, they
30 didn't want to re-work all their data, so they have
31 stuck to this sort of structure, and Tonkinson comments
32 on that on a few issues. Tonkinson thought it was worth
33 drawing out a couple of points from it. Gender
34 relations is one example. But there are other things
35 that Tonkinson obviously thought needed to be said in
36 order to put the work into context.

37 Q. Can I take you to page XXII of the foreword.

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1 A. Yes.

2 Q. You see at about point 6 of the page, Tonkinson makes
3 the point 'Certainly no evidence exists that there was
4 any issue of secret sacred versus public sacred or
5 non-sacred material that could conceivably have divided
6 senior Yaraldi people in terms of whether or not to
7 divulge such information to outsiders.'

8 A. Yes, I see that.

9 Q. That is your finding as well from the material.

10 A. Yes, it does back up my statements.

11 Q. As we come over to the end of your treatment of 'women's
12 business', about p.5, para.2, you set out there your
13 conclusion, do you not, from all documented evidence
14 available.

15 A. That's correct.

16 Q. Just to complete that for the record 'From all
17 documented evidence available, the only possible
18 conclusion to draw is that there was no secret sacred
19 aspects of the ritual and ceremony of Ngarrindjeri women
20 in the pre-European period that could be described as
21 women's business.' Then at the end of the next
22 paragraph, you conclude by saying 'Women's business, as
23 a secret sacred realm of Ngarrindjeri culture,
24 originates from people in the urban context of the
25 1990s'.

26 A. That's correct.

27 Q. Is it your position then that any notion of secret
28 sacred women's business is simply not documented in the
29 wealth of material available in this area.

30 A. That's right.

31 Q. And ought to be documented, if it existed.

32 A. It ought to be documented. What is documented are
33 separate roles of women to do with dance and ritual. I
34 mean, there are documents, particularly from outside of
35 the immediate Lower Murray area and further up the
36 river, that demonstrate that women, in ceremonies, had
37 particular roles, and they were, for those phases of

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1 those ceremonies, different, but that is an enormous

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1 leap away from elevating that type of separateness to
2 completely secret sacred realm of female knowledge.

3 Q. I suppose it is one thing to say it is not documented
4 and, therefore, it doesn't exist. Can you deal with it
5 on a higher plain by saying: What is documented gives
6 you an indication of what should or should not exist.
7 Do you know what I mean by that.

8 A. What is documented is that, in the Lower Murray region,
9 women and men had a great deal of overlapping knowledge
10 on most parts - or much of their culture, and in the
11 part of their culture that related to what we perhaps
12 call religion, to do with their beliefs about the cosmos
13 and dreaming, senior women were certainly authorities
14 and had the status of being knowledgeable people in
15 relation to that knowledge and to initiations, but there
16 appears to be restrictions for younger people about
17 whether they could have that knowledge. So what we are
18 really seeing is, rather than there being a strong
19 gender division of that knowledge, being one where age
20 would have been more decisive on what knowledge people
21 had. So the indications are here, not just from the
22 Berndts' material, but also backed up, as is stated in
23 my report, from other sources such as Tindale, that the
24 picture that we get from all of that is that women and

25 men, in terms of their knowledge of the dreaming, had
26 pretty much the same knowledge. There may have been, as
27 Berndt suggests in a couple of points in the book, some
28 aspects of certain dreamings that women would perhaps
29 give more emphasis to. There were parts of the myth and
30 knowledge of the dreaming that women would have a
31 varying account of, so they would be giving different
32 emphasis to different parts of that dreaming. But there
33 is no evidence that suggests a body of knowledge that
34 women had that men didn't. And I would say the same
35 would happen the other way, that because senior women
36 were involved, to a large degree, in the critical life
37 of a Ngarrindjeri society, including the initiations and

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1 that level of activity, that you couldn't really argue
2 that there would be a separate secret sacred men's
3 business in the Lower Murray. So what has to be - you
4 know, for there to be another conclusion other than
5 that, then there really needs to be some hard evidence,
6 not evidence that cannot really be taken into
7 consideration, I believe, as evidence that just shows
8 some separation between what men do and women do, either
9 to do with birthing, menstruation or hunting. There has
10 to be more than just separation. There has to be more
11 than just separation in activities. A lot of the
12 factors that led to women having separate activities to
13 men are more or less explained by Aboriginal - in this
14 case Ngarrindjeri beliefs - about contamination. I am
15 referring specifically here to blood, but it also goes
16 for pregnant women. There was a prohibition commonly
17 called taboo in Ngarrindjeri society, and it seems to
18 have been widespread throughout at least South-Eastern
19 Australia, whereby women who were pregnant or who were
20 menstruating were not allowed to come in contact or
21 anywhere near water courses because it was considered a
22 contaminating influence on the fish in that water, and
23 they would be netted and speared as a consequence.
24 CONTINUED

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1 As a consequence, that is an example. And there are
2 other examples, but that is an example of a separation
3 of activity that is not based on separate knowledge, but
4 it is more separate practice and it is explained by
5 their perception of the world.

6 Q. At Roman numeral 22 of the foreword of Berndt, I omitted
7 to draw your attention to the last sentence, that
8 paragraph at about .6. `All the material gathered by
9 the Berndts, including that pertaining to sorcery,
10 beliefs and practices, was freely available and public.
11 Just as it had been traditionally according to the
12 Berndts' "Yaraldi Teachers".' And that is what you
13 found, in your all researches.

14 A. That certainly appears to have been the case back last
15 century when there were people still actively
16 practising sorcery. I was certainly worried, as has
17 already been stated, about how contemporary Ngarrindjeri
18 people would view that, but the fact is that, as far as
19 I know, there hasn't been any complaints about the
20 sorcery in this book. And, so, in a sense, the
21 contemporary situation is along the lines of as the
22 situation last century. So obviously sorcery practices
23 were fairly openly talked about and the informants of
24 the Berndts didn't have any problem with talking about
25 it. And, yet, these are practices that are attributed
26 to killing quite a few people, even earlier this
27 century. So that is an example of knowledge that was
28 considered very powerful, but it was not veiled with
29 any secrecy to any large degree. And, from the
30 material in this book, it is clear that both men and
31 women could be sorcerers.

32 MR SMITH: I tender the Berndts' work, because it
33 is to be the subject of much examination and
34 cross-examination.

35 It is `A World That Was', by Berndt and Berndt,
36 1993.

37 EXHIBIT 4 Book, `A World That Was', tendered by Mr

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1 Smith. Admitted.

2 XN

3 Q. Your report under this heading then deals with a number
4 of headings: 'Oral History', the effect of Christianity,
5 and a heading 'Not Known By Men?'. First of all, 'Oral
6 History'; you there are addressing the suggestion, are
7 you, that, notwithstanding the absence of material in
8 the literature, could this sort of information or
9 knowledge be exclusively the domain of oral history.

10 A. That question sort of raises a number of points, but, as
11 I say in the report, oral history has this tendency of
12 coming into direct conflict with recorded sources of
13 history. So, by its very nature, oral history is -
14 changes its very form virtually with every speaking of
15 it. So, it is - although certain themes are likely to
16 remain through several tellings of a particular story or
17 a historical account, or postEuropean account, the
18 actual stress, the meaning put into those facts and some
19 of the outcomes are likely to change with each telling.
20 So, there is a real problem with putting forward oral
21 history as something that is a valid alternative to
22 academic history. But, I mean, oral history in the way
23 that I have used in my thesis is a cultural artefact in
24 itself and worthy of study and it does tell a lot about
25 the speakers of that oral history. But, as a narrative
26 in its own right which informs people about the past, it
27 cannot be taken as a replacement to Aboriginal history.
28 It needs very careful use and the researcher, in this
29 case, say, an anthropologist, would have to put a lot of
30 effort into developing a framework in order to interpret
31 that oral history that he or she may collect.

32 Q. The framework or the structure, if you like, of the
33 culture of the Ngarrindjeri people does not leave any
34 room, or does it, for any contention that secret sacred
35 women's business focused in and around Hindmarsh Island
36 and that area could possibly have missed the
37 ethnographers and be handed down.

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- 1 A. In my opinion, based on particularly in my field work
2 and history of close interaction with Aboriginal people,
3 I could would say the answer to that is, no. That I
4 have been struck, while doing field work, that there are
5 a number of themes that are often spoken about by
6 Aboriginal people when they are talking about the past.
7 And there is some consistency throughout the community,
8 and that is on the basis of their shared history.
9 Individuals put the stress in different ways and
10 sometimes change the facts and get them the other way
11 around, but you can still - almost like a mythology, you
12 can still see some underlying structure there that
13 relates accounts, say, on early mission history or
14 shipwrecks down the Coorong, you can still see some
15 overlying structure that lumps all the accounts
16 together. I believe, if there was secret sacred women's
17 business relating to Hindmarsh Island, that there would
18 be more indication of it. If not by myself, as a male,
19 if it did have that prohibition about me, as a male,
20 hearing about it, I would still have expected that there
21 would be very firm evidence, from female researchers,
22 who have worked in the area. And I mean actual
23 contemporaneous notes from the 1960s right through to
24 the present, at least stating that such knowledge
25 existed, even if there was no detail. But I am not
26 aware of any evidence of that kind. And, until that
27 evidence has been brought out, I would say that my
28 answer to that question, whether it could exist as an
29 oral history independent of any record of it, I would
30 say the answer is, no.
- 31 Q. You then deal with Christianity and the point you are
32 addressing there is, is it, that the missionary society
33 that developed, as it were, provides some sort of
34 barrier for received culture. Is that the point that
35 you are addressing there.
- 36 A. There is several points I have got in the 'Christianity'
37 part of my report. I suppose, to start with the more

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1 preEuropean sounding of the subject matter, I deal with
2 I have got here the example of preEuropean mythology.
3 That is of Ngurunderi, who we have already seen the
4 video about. That mythology having been taken by
5 Aboriginal people and adapted and modified into a form
6 of Christianity. And, by that, I mean that Ngurunderi
7 essentially became God, or perhaps God became
8 Ngurunderi. It is not a one way process. It is a
9 blending, you could say. But, initially at least,
10 Aboriginal people in the Lower Murray absorbed
11 Christianity as if they were absorbing a new Dreaming
12 and, as is often the case, they absorbed that new
13 Dreaming by implanting the names of ancestors from their
14 own Dreaming upon it. So, this is - this comes out very
15 strongly in the Taplin Journals. And I refer to a
16 Couple of entries in the Taplin Journals in this report.
17 But, there is even elements of it today. In this
18 report, I talk about a young adult who was, in this
19 case, female, who told me, in the 1980s - late 1980s,
20 that 'Ngurunderi is like Jesus. God gave Ngurunderi to
21 the people. God spoke to the people through
22 Ngurunderi.' And I have got other examples there of a
23 syncretism of tradition, which I won't go into, but
24 there are other examples of mythology blending with
25 Christianity. I suppose the point of what you started
26 off with with this question was really will the
27 relationship of the church in the mission - and I mean,
28 by definition, a mission is based around a church, or
29 certainly the missions that were being set up in South
30 Australia last century. The church was - had a central
31 role in the community. And some of the main families
32 that produced people who later on main informants for
33 anthropologists' interview are represented in those
34 church records. So, the point I make here is that the
35 Point McLeay church, originally it was congregational;
36 I think sometime this century it became Salvation Army.
37 The church has had an impact on every Ngarrindjeri

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- 1 family, in one way or another. In some families, it has
2 been more so than others. And I refer specifically to
3 Dulcie Wilson here, because I know that there is at
4 least one theory that she perhaps did get this secret
5 sacred women's business, because she was a church
6 person. I am saying that that, from my experience and
7 what I know of the history, her church background,
8 wouldn't have been an impediment to her receiving this
9 business. There are examples in Central Australia of
10 prominent law people, as they are called, law men and
11 women, who are considered custodians of a great number
12 of Dreamings. They are cut throughout their country and
13 yet they still have senior status as Christians. So,
14 there is not a dichotomy between a believer in
15 Aboriginal mythology and the Christian. So, I reject
16 that outright.
- 17 Q. You then move on to deal with 'Not Known By Men?', and,
18 to some extent, you have dealt with that already,
19 haven't you.
- 20 A. Yes.
- 21 Q. In answering other questions.
- 22 A. Yes.
- 23 Q. But could you sum up what you have said there about why
24 it is that an answer to this question about the
25 existence or nonexistence of secret sacred women's
26 business is not as simple as saying 'You are a man, you
27 wouldn't know.'
- 28 A. Yes, as I was saying before, if the secret sacred
29 women's business did exist in the Lower Murray, then
30 there would still be enough knowledge of it, outside of
31 the group of women who were the custodians, just to
32 define who was an insider and who was an outsider. So,
33 it is not - in my opinion, it is not possible that that
34 information could have existed in a complete vacuum.
35 And, as I said, earlier, if it did - and I don't think
36 it did - but it would then have to be called secret
37 secret sacred information, but I reject that, as a

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1 category. And I think even the - well, I know that the
2 Central Australian material that I am familiar with
3 would also reject that there would be a sort of corpus
4 of information that could exist in a complete vacuum.
5 By 'complete vacuum', I mean no knowledge whatsoever
6 that that secret sacred information existed.

7 Q. Is the other way of approaching that to do, what, to
8 look at the model of the culture that the ethnographers
9 have built up as not affording any support to even the
10 secret secret sacred women's business.

11 A. There are sort of, you know, broad models which describe
12 cultural trends across Australia and, in terms of the
13 Western Desert, the practices of subincision and
14 circumcision are quite important and have had an effect
15 on - I believe have had an effect on how those societies
16 in the Western Desert Central Australian region have
17 dealt with the secret sacred category. Areas such as
18 the Lower Murray and the Murray Mallee and down to the
19 southeast Western Victoria, that was part of Australia
20 which didn't have subincision circumcision. Whereas the
21 evidence suggests that the Adelaide-Mid North-Flinders
22 Ranges area did have some of these practices, but it may
23 have been a relatively recent movement from out of the
24 desert region. So, it is possible to broadly classify
25 societies around Australia in terms of the types of
26 ceremonies and whether they have initiations and what
27 type of initiations they are. You see a little bit of
28 this on Norman B. Tindale's map. I am not suggesting
29 the tribes are necessarily meaningful, but he does have,
30 on that big map that was published in 1974, he does put
31 in the circumcision subincision lines and it is
32 interesting that it is really the desert cultures that
33 have such practices. The coastal regions, generally,
34 don't. I have already mentioned the demography of
35 Aboriginal society that could also have had or probably
36 would have had a major effect on how people define
37 secrecy.

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1 Q. Moving to the next heading, the passing on of the
2 business, you talk there of - you quote there something
3 obviously said by Dr Fergie like 'Women's business is
4 stated to be "like a fission-reactor".'

5 A. Yes.

6 Q. What did you understand that to mean, having dealt with
7 it there.

8 A. I imagined that Dr Fergie was trying to make the point
9 that this knowledge to Ngarrindjeri women like Dr
10 Kartinyeri was so incredibly important to them that it
11 was as powerful as a nuclear generator, but it also had
12 the potential of destroying them. So, yes, I imagine
13 that is what Dr Fergie meant by using that metaphor.

14 Q. You then say - you move from that metaphor on to saying
15 that it is inconsistent with the components of the
16 knowledge for it to be handed down to Dr Kartinyeri,
17 when she was a young girl. Can you explain that to us.

18 A. As I have - in the next sentence, which I will probably
19 read out, that is probably the best way of explaining
20 it. I have got here 'If such business existed, it would
21 almost certainly have been handed on to mature
22 Ngarrindjeri women who have proven themselves in the
23 eyes of the community. In particular, senior
24 postmenopausal women.' If knowledge which is so
25 important to be compared to something like a
26 fission-reactor was to be handed down, it would be
27 handed down to someone who had proven themselves, that
28 they could deal with that information and could be
29 trusted and knew what to do with that information. I
30 don't believe that - I certainly know of no examples in
31 the literature of such important knowledge that would
32 have been handed on to someone who was fairly junior and
33 particularly back then when it has been the demography
34 of all small towns, I suppose, that the majority of
35 young people leave the region.

36 CONTINUED

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1 Then, Ngarrindjeri being in that process as well, the
2 city and other regions have been pulling people out of
3 places like Point McLeay, you know, since the Second
4 World War. So, it doesn't seem consistent that such
5 important information would have been handed down to
6 just one or two or three or, for that matter, young
7 women who were basically just starting their life. In
8 Central Australia, knowledge is handed down in bits and
9 pieces and the emphasis is on the person receiving the
10 information proving that they are worthy to receive the
11 information and knowing how to deal with it. And it's
12 not conceivable, in my opinion, that someone - and I
13 believe Dr Kartinyeri's, on a couple of occasions,
14 varied who she actually got the information from, but I
15 believe that it's not consistent that whoever that
16 person was would have trusted a young girl. And there
17 were certainly many mature Ngarrindjeri women who were
18 in middle age around at that time. It's usual that the
19 middle-aged people in every society are the most
20 politically active and they would have been the people
21 who would have sought out the information if they had
22 known it existed. The two generations involved in the
23 passing down of this information - supposedly an elderly
24 woman, who I don't know who that would be, and a young
25 girl, who Dr Kartinyeri was then a young girl - those
26 two generations, I don't think, would have been the way
27 that the information would have been transferred. It
28 would have had to have been transferred on to mature,
29 probably middle-aging Ngarrindjeri women who knew the
30 landscape, knew other myths and the like and had a world
31 view that was, you know, worthy to hand this information
32 down to.

33 Q. You make mention there that this sort of knowledge is
34 typically stored latterally.

35 A. Certainly that is the case in other parts of Australia
36 where important knowledge that may be associated with
37 increased ceremonies - that is ceremonies that keep on

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1 rebuilding the proproductive potential of the world in
2 the eyes of those Aboriginal people - that that
3 knowledge is not just handed down in one direction.
4 That people who are often described as 'law people' have
5 also received that information. They may not have
6 rights to speak of it, but they receive that
7 information. And elderly women who had that role of
8 receiving really important information - even in the
9 Western Desert you could have a normal line where
10 information is transferred down and coming to an abrupt
11 end, and yet there are people in the system who may not
12 have rights for the information but could then speak
13 with authority. And the information, the business, to
14 use that Aboriginal English, could then be set back on
15 the right track again.

16 Q. You then end up under that heading of 'Passing on the
17 business' to make the point that Albert Karloan and
18 Pinkie Mack instructed the Berndts in a last resort way.

19 A. Yes. Certainly the picture that the Berndts portray is
20 that Albert, and possibly to a lesser extent Pinkie, but
21 both of them, were very keen to record their culture.
22 They were aware that they were the last people who had
23 relatively intact knowledge about the pre-European
24 culture. The Berndts also talked to a couple of other
25 people, such as Mark Wilson, but, in terms of what the
26 Berndts considered intact knowledge, it was Albert
27 Karloan and Pinkie Mack. And so, you know, they were
28 considered by the Berndts to be the most knowledgeable
29 in form, certainly to do with the Yaraldi and of the
30 Ngarrindjeri constellation.

31 Q. You move from that proposition to the proposition then
32 of the 'Absence of a mention'.

33 A. Yes. The absence of at least a mention of secret sacred
34 women's business is a very important point. I mean,
35 there could be a lot of discussion trying to explain why
36 Pinkie, for example, wouldn't have told Katherine. But,
37 I mean, my trust is in that the Berndts were excellent

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1 social anthropologists and they would have tried in
2 every possible way to at least map out the area, the
3 state of play that their informant's knowledge was at.
4 Although Pinkie Mack, in the 1940s, for example,
5 couldn't remember some of the initiation songs that were
6 sung 60 years ago, we cannot sort of take that fact and
7 then say 'She was holding back', because people do
8 forget things; and it is a memory culture that the
9 Berndts are describing. They make it quite clear that
10 they couldn't describe a pre-European type society and
11 they were describing a society from the point of view of
12 a handful of knowledgeable informants. So, yes.

13 Q. Your final paragraph is under the heading 'The invention
14 of tradition'. To put that in sentence, you are there
15 suggesting to us that secret sacred women's business has
16 been recently invented.

17 A. Yes. I mean, the term 'invention of tradition' is a
18 title of a book, an anthropological book, which actually
19 looks at changing tradition among European society. So,
20 I'm not suggesting that Aboriginal people are the only
21 people who re-invent tradition or invent totally new
22 traditions. It's the fact of culture that, from time to
23 time, the perception of the past and, you know, the role
24 of the past in framing the present is going to be
25 massively changed. There are minor changes in culture
26 all the time. But there are incidents through our own
27 history where we have basically, as Australians for
28 example, re-invented our past. And I'm involved in
29 writing at the moment a number of papers where I'm
30 writing Aboriginal people back into the colonial history
31 of South Australia, because, through our own
32 re-invention of our own past, we tended to write them
33 out. That is an example of the types of processes I'm
34 talking about. There is some literature on the way that
35 Aboriginal people, you know, as historians come up with
36 explanations of events that were, you know, often
37 separated considerably by space and time, they

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- 1 amalgamate all of these events and places into one
2 single narrative and place them in one part of the
3 landscape. I refer to a couple of papers. There is
4 quite a bit of literature on this. I sort of go on in
5 the report to put forward a possible explanation. I say
6 `possible' because I don't know what is inside the
7 sealed sections of the Fergie report. I put forward my
8 view of how - what I've said in terms of invention of
9 tradition, to a large extent, explains some of the
10 information that Dr Kartinyeri and others have been
11 giving you through the press in relation to the
12 mythological significance of Hindmarsh Island.
- 13 Q. You mentioned writing back into Australian or colonial
14 history, or Australian history, the Aboriginal role.
15 That's by a process of academic investigation.
- 16 A. That's right.
- 17 Q. You are not suggesting that is the case here, or are
18 you.
- 19 A. No. I'm saying that my own research - I'm trying to
20 correct what Australians have done to Aboriginal people
21 in the sense of writing them out of the fairly major
22 roles in our own, that is European Australian's,
23 settlement of Australia. So, I was - I may have
24 confused people. I was basically saying that this is an
25 example of how I, as an academic, as a professional
26 anthropologist, am trying to go against an invention of
27 tradition that Europeans and Australians had in relation
28 to how they came to a wild landscape and tamed and
29 settled it. Going back to my report, in terms of how
30 Aboriginal people often bring together all of these
31 events that they relate to and places they relate, this
32 is in the single account. The importance here is that
33 to Aboriginal people, these accounts have to make sense
34 in Ngarrindjeri history, in the case of the Lower
35 Murray, but it's the truth which lies in the overall
36 message, not the fact. So, it's for that reason that I
37 believe that Dr Kartinyeri does believe in the basic

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1 account that she has to do with Hindmarsh Island. She
2 does believe in it because of her knowledge - and it's
3 not knowledge through, necessarily through academic
4 history, but through her own extensive work. But, you
5 know, it's knowledge that she's made sense of, she's
6 worked it out and she's come up with a narrative and
7 she's placed it in the landscape. So - but how, and
8 this relates back to the oral history part of my
9 testimony, how academic history is to treat that is
10 another thing.

11 COMSR

12 Q. If you were to write into Australian history the
13 Aboriginal presence, if I can put it that way, would you
14 be in any sense rewriting our history of Australian
15 history.

16 A. Yes. I mean there are various, you know, trends in
17 Australian history which I wouldn't, by any means, be an
18 expert in. There has been a Manning Clarke style,
19 basically writing the story and about the nation of
20 Australia - and which I argue is a bit of a myth - but,
21 in the process of doing that, being fairly selective
22 with the information that it incorporates. And,
23 according to, say, a post-modern feminist critique of
24 that, he is basically replicating - not `replicating',
25 creating a model of Australia which is overtly
26 masculine, you know. So, it denies in many cases the
27 role of women. But it certainly denies the role of
28 sealers because they weren't official explorers. It
29 denies the role of Aboriginal people who were trackers.
30 In the case of the early phase of settlement in South
31 Australia, they were, you know, doing a lot of the
32 collecting food and all of that essential level of work
33 when the first settlers arrived. What I'm doing is
34 trying to go back and be more objective. And armed with
35 perhaps a more informed, more critical view of what
36 previous historians have done, I'm coming up with
37 another story. And I suppose history will, in the

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1 future, possibly take my accounts and modify them. That
2 is the nature of the academic work.

3 Q. That is the difference between what you are doing, that
4 is, rewriting what was Australian history by introducing
5 the Aboriginal presence, and you say there by obtaining
6 a more complete and accurate portrayal of what took
7 place.

8 A. What I'm doing is going back through diaries of early
9 merchants who were coming through the region, the first
10 settlers, and using a sort of a scientific - yes, a
11 scientific approach of what is collecting data and then
12 building a picture from that. So, it's become
13 abundantly clear to me that without Aboriginal people in
14 the landscape, European settlement in South Australia
15 could not have gone the way it did. I mean, even the
16 location of Adelaide where we are sitting now was
17 impacted upon through the link that the sealers had with
18 Aboriginal women and the fact that it raised the fact
19 that the Aboriginal people in the Peninsula were less
20 conducive with the interaction with Europeans.
21 Aboriginal people, through the burning regime of the
22 landscape on the land, as distinct from Kangaroo Island,
23 produced a sort of a much more open landscape that was
24 suitable for grazing of stock and moving around. So, I
25 mean, I'm sort of making lots of jumps here of the types
26 of points that I brought out particularly in one chapter
27 in the thesis where I argue that, you know, we have
28 totally, in many cases, totally ignored the impact and
29 that the pre-European population had no terms of
30 modifying the landscape. Also, the impact of all of
31 that upon European settlement. Also, the role of
32 Aboriginal people in terms of showing Colonel Light
33 where the Onkaparinga River would go, for example, and
34 showing people where the soakages were.

35 Q. As I understand it, you justified what, I suppose, is
36 rewriting the history on the basis that it's legitimate
37 to do so from the sources which you consider are

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1 reliable and trustworthy.

2 A. Yes. I have gone back and started from as close as
3 possible from primary sources where I can't say -

4 Q. I appreciate that. You see nothing wrong in producing
5 an account which was not previously there. What I mean
6 is, you don't say that that is not a legitimate
7 exercise.

8 A. Well, I think -

9 Q. Leaving aside for one moment what you consider to be the
10 reliability of the background source material, you would
11 say that there are circumstances in which it's a
12 legitimate exercise to rewrite the culture or the
13 history.

14 A. Yes. What I'm doing, I'm as much a part of that
15 cultural process as what I'm describing in a sense. I
16 mean, it's no accident that someone like me in the 1990s
17 is, through my training and the influence I've had from
18 various trends, from the sort of academic area that I'm
19 going back and not taking as gospel certain standard
20 histories, I am trying to come up with a more balanced
21 approach. But I'm not arrogant enough to think that
22 that is going to end there. I think society does have
23 to come to terms with, you know, who it is, you know,
24 from time to time. We are approaching another milestone
25 and I think that is one in terms of the change in the
26 next century and the republic and everything. People
27 are being a lot more aggressive in challenging some of
28 the bases upon which the Australian society is built
29 upon, and Aboriginal people are certainly part of that
30 process.

31 Q. What I'm trying to follow is: You think, as I understand
32 it, that it's a legitimate exercise to reappraise the
33 culture at this stage by delving into the past on
34 settlement and what is already written, as it were, on
35 the white culture.

36 CONTINUED

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- 1 A. I think things should be able to be challenged at any
2 time. I do not hold that there is any part of
3 Australian society that is sacred, if you want to use
4 that.
- 5 Q. I appreciate that. You say you think that is legitimate
6 on the basis of anthropologically acceptable facts.
- 7 A. Historical.
- 8 Q. Do you rule out the possibility that it would also be
9 acceptable on the basis of some other approach.
- 10 A. Are you talking about an Aboriginal approach of
11 formulating?
- 12 Q. Yes.
- 13 A. That is a problem that I have within myself, in that,
14 had there not been a question to do with this Hindmarsh
15 Island business of: does secret sacred women's business
16 exist say before the 1990s, then I could quite easily
17 accept contemporary Aboriginal views of their past as
18 being real, if they believe them. So I'm not
19 challenging anyone's view of the past, except in the
20 context of: Was there secret sacred women's business
21 connected with Hindmarsh Island before the 1990s? I am
22 having to sort of step back from an anthropologist's
23 position, whereby everything is real and therefore
24 everything is unreal type position, basically the post
25 modern world view, which is that there is no sort of
26 single world view. I am having to basically become more
27 scientific and factual, and try and document when it was
28 that people came up with a new formulation. Whereas
29 often anthropologists would probably not be as
30 interested in the historical side of what they are
31 presented with, but be more interested in what they
32 could describe in the present.
- 33 Q. I just want to be sure I am following what you have had
34 to say concerning the formulation of 'secret women's
35 business' and the way in which, as I understand it, you
36 think modern Aboriginal women have persuaded themselves
37 it existed. That is, that they have gone back to the

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1 past and obtained - and have, as it were, concentrated
2 material from several sources and introduced it into the
3 present.

4 A. Yes.

5 Q. And the distinction that you see between that process
6 and your process of righting an historical account of
7 white culture, is that you believe in the reliability of
8 your sources.

9 A. Well, in a way. Although, there is some overlap in what
10 I would be trying to do as a white academic, and what
11 Aboriginal people would be trying to do in terms of
12 explaining their own contemporary situation. The
13 reasons why I, as a white academic, am doing it are
14 quite different, in that therefore the methodology, the
15 tools that I use, are quite different. Normally, I
16 wouldn't put forward my views of the past on the basis
17 of what I had records for, to challenge what a
18 contemporary Aboriginal person thought was the case. I
19 would not do it. If there are Aboriginal people, and
20 particularly if it is more than just an individual, a
21 number of people have got a certain belief, I certainly
22 would not go out of my way to challenge their view, but,
23 as I said before, unfortunately, this very issue about
24 'Did it exist?' is important and, therefore, I am coming
25 up head on with an Aboriginal interpretation. I
26 wouldn't say, by any means, a widespread belief in the
27 past, but at least a few women have come up with this
28 moral. I am coming up, you know, head on with them,
29 whereas, normally I would avoid that.

30 XN

31 Q. Have you any experience of any other, say, Western
32 Desert or Central Australian concept that might explain
33 what has happened here. For instance, I have heard
34 talk, in the context of this case, about the Seven Stars
35 Dreaming. Does that, in your view, have any relevance
36 to what has developed here in relation to Hindmarsh
37 Island.

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- 1 A. That is a mythology that, on the basis of what I know -
2 and, again, I don't know what the core of the secret
3 sacred women's business is about - but, from my
4 knowledge, that was mythological information that was
5 overlaid, if you like, once the basic secret sacred
6 women's business had been formulated. There are
7 examples, some of them documented, whereby particularly
8 Western Desert people have used their dreamings, and
9 they tend to use more pan-Aboriginal dreamings like the
10 Seven Stars, but used dreamings such as that to extend
11 their sphere of influence. I know, among
12 anthropologists, we often describe the Pitjantjatjara as
13 the imperialists of the Aboriginal world through this
14 very process. So they have been increasing their sphere
15 of influence, and they often do it through these types
16 of issues. So there is some consistency there in terms
17 of recent history. But if we were to go back and look
18 at the cultural blocs, as they are referred to in my
19 thesis, and look at the distribution of culture early
20 last century, then it is quite clear that the Western
21 Desert culture had only marginal influence in the sort
22 of Flinders Ranges to Adelaide region, and no influence
23 in terms of language or shared ceremony, or any of those
24 sort of parameters, no influence on the Lower Murray
25 region. So, I suppose - I was going to call it an
26 importation of mythology, but I would argue it is really
27 an export of mythology from the point of view of the
28 Western Desert. It is something that has been going on
29 for presumably hundreds of years, but in relation to
30 Adelaide and the Lower Murray it is very recent, and in
31 relation to Hindmarsh Island, I would say it is just a
32 couple of years.
- 33 Q. So the Seven Stars Dreaming is some mythological women's
34 business matter - dreaming, is it.
- 35 A. Yes, you could call it women's business, in terms of how
36 that would be defined in the Western Desert. With all
37 this talk of women's business, no-one has really

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- 1 explained it. But in terms of Aboriginal pigeon,
2 `business' refers to just general ritual or ceremony.
3 So that `women's business' would be ritual or ceremony,
4 not necessarily secret, sacred at all.
- 5 Q. Who are the appropriate custodians for knowledge such as
6 is contended for here, secret sacred women's knowledge -
- 7 A. Often in these situations, right across Australia, the
8 ultimate authorities are spoken of as being `The old
9 people' and there are elements of that, from my
10 perception in looking through the media, in this issue,
11 that initially people who were active on the Hindmarsh
12 Island issue were active on behalf of `The old people'.
13 But, as so often happens, old people are at the stage of
14 their life where they don't really want to be heavily
15 involved in such things. So there is often a little bit
16 of tension between older people and very politically
17 active middle aged people. So, although, that is an
18 aspect of this issue, I think that's something that you
19 would see in the politics of quite a few more remotely
20 placed Aboriginal communities around Australia.
- 21 Q. My question really was, in the context of this matter,
22 do you understand who the alleged custodians of the
23 secret sacred women's business are.
- 24 A. I have heard several reports. Did you want me to name
25 them?
- 26 Q. Can I suggest to you that they are suggested to be
27 Doreen Kartinyeri, Connie Roberts, Maggie Jacobs and
28 Edith Rigney, amongst others.
- 29 A. They are the names that I've heard.
- 30 Q. As opposed to Dulcie Wilson, Bertha Gollan, Rita Wilson,
31 Audrey Dix, Jenny Grace, Betty Tatt, Phillis Byrnes and
32 Margaret Lindsay. Can you help us, from your knowledge
33 of the family structures and genealogies of Ngarrindjeri
34 people whom you know, in terms of saying what group may
35 or may not be custodians in the way contended for.
- 36 A. I suppose if there is any pattern, it is the fact that
37 both camps probably don't have a pattern. The

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- 1 custodians are people, although roughly of similar age -
2 I think Mrs Jacobs would be the oldest - they have had
3 quite different life histories. Mrs Jacobs, for
4 example, left Raukkan as a young girl and has lived a
5 lot of time in Darwin and, I believe, Cairns. Mrs
6 Roberts has spent time in fringe camps in the Lower
7 Murray and the latter part of her life up in the
8 Riverland. And Doreen, of course, leaving as a young
9 girlfriend, being in Adelaide and then Point Pearce.
10 Edi Rigney, from my knowledge - I have always known her
11 as someone that has either lived on Point McLeay or at
12 Murray Bridge. But we have got four fairly different -
13 at least in terms of location - life histories there.
14 In terms of the other women, I think they are also sort
15 of fairly widely spread. So, yes, I couldn't guess at
16 who would have more rights. I suppose -
17 COMSR
18 Q. If you couldn't guess, I don't suppose it is going to
19 help me very much.
20 A. Okay, I will leave it.
21 XN
22 Q. I produce to you a copy of the report of Dr Deane
23 Fergie, dated 4 July 1994.
24 MS PYKE: I am not sure whether my friend is about
25 to try to have the witness refer to that or tender it,
26 or what. Perhaps I will wait and hear.
27 MR SMITH: Simply identify it. I will mark it for
28 identification.
29 XN
30 Q. You have received a copy of that document, which
31 purports to be a report of Dr Deane Fergie dated in July
32 1994, is that correct.
33 A. That's correct.
34 Q. You have looked through that, I think, haven't you.
35 A. Yes, I have.
36 Q. You have considered its contents.
37 A. Yes, I have.

RF 5LP

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- 1 Q. I just want you to answer this question in one line. Do
2 you agree with that report or not.
3 COMSR
4 Q. We don't want you to go into an explanation. I think it
5 leaves open to a yes or a no virtually.
6 A. I was going to - sorry, can you ask that question again?
7 XN
8 Q. It is not my place to canvass that report with you at
9 all, but I just want you to acknowledge that you have
10 seen it and considered it, and what is your view about
11 it.
12 A. As shortly as possible, I would say -
13 COMSR: Is this going to -
14 MR SMITH: I am just going to mark that for
15 identification.
16 COMSR: I know, but the witness is being invited
17 now to a discourse on it, as it were, on the contents of
18 it. Is that what you are -
19 MR SMITH: I just want the witness to say, in a
20 short sentence, his view about the opinion. Then I am
21 going to leave the matter.
22 COMSR: Whether he concurs or disagrees with the
23 opinion?
24 MR SMITH: Yes.
25 COMSR
26 Q. Are you able to say whether you concur or whether you
27 disagree, or is that not possible to do it in that way.
28 A. Well, I disagree with the report.
29 MR ABBOTT: I am concerned that we have counsel for
30 Dr Fergie, making some assertion to you, Madam
31 Commissioner, that we don't know this is Dr Fergie's
32 report, and how can we prove it. Dr Fergie is
33 represented by counsel. This document has been
34 circulated. If there is any claim that this is not Dr
35 Fergie's report, let it now be stated so we can get on
36 with examining what is Dr Fergie's report.
37 I suggest that much time is going to be wasted if

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1 there is some plan that this report has to be strictly
2 proved in some way as emanating from Dr Fergie. Dr
3 Fergie has been given permission to stay throughout this
4 examination, and I would have thought that that
5 permission is on the basis of at least a limited degree
6 of co-operation with this Commission. If that limited
7 degree of co-operation does not extend to acknowledging
8 what is plainly her own report, let us hear it.

9 MS PYKE: It is not for me to conduct the case of
10 counsel assisting. As I indicated earlier, it is not,
11 by any stretch, clear whether Dr Fergie will or will not
12 be giving evidence, for the reasons we outlined earlier
13 in the week. I have been given permission to -

14 MR ABBOTT: Is it his report or not?

15 MS PYKE: I haven't seen it. It has not been
16 distributed to me.

17 COMSR: This is one of the problems that seems
18 to be rather difficult to counter, is the suggestion
19 that this is a trial and that counsel assisting is
20 conducting a case in some way. This is, of course, an
21 inquiry, and my role is to obtain information.
22 Counsel's role in these circumstances is not that of
23 conducting a case against anyone. You seem to be
24 assuming that this is a courtroom situation in what you
25 are putting to me under those circumstances.

26 MR SMITH: If I could show Ms Pyke the report and,
27 if she agrees it is Dr Fergie's report, then I propose
28 to tender it. I am not doing this in a back-door way to
29 avoid calling Dr Fergie or anything like that. It is
30 just that there is going to be an anthropological debate
31 here. Dr Fergie is in the debate. Are we going to
32 pretend that her report doesn't exist, that it didn't
33 play a part in this affair? I am happy to show Ms Pyke
34 the report. I cannot believe she hasn't got a copy of
35 it.

36 MS PYKE: Might I say, that I understand, for
37 whatever reason, various documents that my friend is in

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1 the process of tendering have been circulated to some of
2 us who are at the bar table, but not others. I haven't
3 been privy to the documents that are going to be
4 tendered. Clearly some others have. But my fundamental
5 submission would be that it would not be appropriate,
6 notwithstanding that this is an inquiry and not a court
7 of law, to tender as an exhibit, a report, if the maker
8 of that report is not called to give evidence.

9 COMSR: I am able to receive evidence. I am not
10 obliged to comply with the Rules of Evidence. There is
11 nothing inappropriate about that course being adopted
12 for a Commission of inquiry.

13 MS PYKE: If that is the plan that you are
14 adopting, which is that you will receive into evidence
15 reports, notwithstanding that the maker of the reports
16 may or may not be called to give evidence, I cannot make
17 any other submission, but I would want you to rule on
18 that.

19 CONTINUED

20

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- 1 COMSR: No, I am in a situation where the legal
2 representative of a person who is given leave to appear
3 can verify whether or not it is the report. That is the
4 situation that confronts me, at the present time.
- 5 MS PYKE: As I say, I am not privy to the
6 circulated material.
- 7 MR SMITH: There was a reason for that. Ms Pyke
8 wouldn't agree to proffer Dr Fergie voluntarily as a
9 witness and that was the condition as to the
10 distribution. There was no sinister reason why she
11 didn't get the material and there isn't and anything
12 that is tendered in the course of evidence today will be
13 distributed to everybody, but perhaps I will show Ms
14 Pyke a copy of the report.
- 15 MR KENNY: If I may also say, I haven't got a copy
16 of that report.
- 17 MR SMITH: If it gets tendered, everyone will have
18 a copy of it.
- 19 MS PYKE: I might have to show it to Dr Fergie, to
20 get her to have a look at it, which I do.
21 Yes, there is some difficulty about the report and
22 markings on it that my preliminary instructions would
23 indicate are on the -
- 24 COMSR: I see, there are some markings added to
25 the report, is there?
- 26 MS PYKE: Yes.
- 27 COMSR: Is there a clean copy available that can
28 be handed to Dr Fergie?
- 29 MS PYKE: Dr Fergie is just looking at it. I
30 haven't been able to speak to her. It seems to me it
31 can be marked for identification totally and as and when
32 we indicate that it is indeed Dr Fergie's report as she
33 prepared it, we will let you know.
- 34 COMSR: Yes, but we won't be proceeding with any
35 examination on the report before it goes in.
- 36 MR SMITH: No, I don't intend to do that, even if
37 it is accepted as an exhibit. It is not my role.

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1 Is that not going to advance any further then?

2 MS PYKE: I am not going to hold things up while
3 Dr Fergie is looking at it.

4 COMSR: Dr Fergie is looking at an unmarked
5 copy, I take it, of the report?

6 MS PYKE: Perhaps I can indicate this: that there
7 are markings on this document which Dr Fergie says are
8 not hers and, of course, it doesn't have the
9 confidential appendices. It is not complete, in that
10 sense.

11 COMSR: But, apart from that, she acknowledges
12 it as her report, is that the situation?

13 MS PYKE: Yes.

14 MR SMITH: On that basis, then, I tender the
15 report. And I indicate that, to the extent that it has
16 got scribbled marks on it, we should ignore those. We
17 will replace the exhibit with a clean copy. That would
18 be the best.

19 COMSR: Yes, I think that would be preferable.
20 It is a report of Dr Fergie without any confidential
21 appendices attached.

22 MR ABBOTT: It has one appendice attached. It
23 doesn't have appendices 2 and 3.

24 EXHIBIT 5 Confidential report of Dr Fergie and
25 appendix 1 tendered by Mr Smith.
26 Admitted.

27 COMSR: At this stage, it has been acknowledged
28 as Dr Fergie's report and can be - you are tendering it,
29 at this stage, are you?

30 MR SMITH: Yes.

31 COMSR: It will be admitted and marked Exhibit
32 5.

33 MR SMITH: This next document I want to show the
34 witness has got a special problem. It was provided to
35 the Commission, at the moment, on the basis that it be
36 shown only to the anthropologists: the three museum
37 anthropologists. So that, could I - and I want to put

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1 it to this witness. But I can't, at the moment, until
2 we are released from that undertaking, show it to
3 anybody else, other than to identify it.

4 I could do this probably next week, because Dr
5 Clarke is back next week.

6 COMSR: Yes, I think that it would be the
7 preferable course to do that. Mind you, it being marked
8 for identification, doesn't make it available to anybody
9 to look at.

10 MR SMITH: I would like to get it on the record, at
11 the moment, and have it marked.

12 COMSR: Yes, if it is marked for identification,
13 we shall ensure that it is not made available for the
14 perusal of anyone other than this witness.

15 MR SMITH: At the moment. Although, Mr Hemming and
16 Mr Jones have seen it.

17 XN

18 Q. Looking at the statement - and I can identify the
19 statement, produced to you, which I could describe as
20 statement from Elizabeth Marie Fisher, which has a date
21 stamp on it of 31 July 1995; you have seen that
22 statement, this morning, I think, haven't you.

23 A. That's right.

24 Q. To the extent that you have taken on board, as it were,
25 the information in that statement, what effect does it
26 have on your opinion.

27 COMSR: That is not in evidence, at this stage,
28 is it?

29 MR SMITH: No, it is not in evidence yet.

30 COMSR: I don't want it to get in, as it were,
31 by a back door method through the witness.

32 MR SMITH: Everyone at the bar table, for the time
33 being, won't be able to ask questions about it until the
34 profferer of that document releases us from that
35 undertaking.

36 MR ABBOTT: We will agree to that. Obviously the
37 witness can give evidence about it, if he has taken it

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1 into account.

2 MR SMITH: Yes, all the anthropologists - although
3 with the exception of Dr Fergie and her husband Mr Lucas
4 haven't seen this, I should say - but the three museum
5 anthropologists were given permission, by the maker of
6 the statement, to see it. We want to extend that, of
7 course, because it is unsatisfactory, to that extent.

8 Could I have an answer from Dr Clarke?

9 COMSR

10 Q. Do you remember the question now.

11 A. I think it was, does it change my -

12 Q. Does it change anything that you have expressed an
13 opinion on today.

14 A. A lot of it supports my general views of the landscape
15 and how people were relating to it. There are a couple
16 of statements in here that, if they - if the proof was
17 produced, that those statements had been recorded in
18 1967, would - yes, I would have to modify my views. So,
19 what I am saying is, this is a statement about evidence
20 that, at this stage, I can't look at, so I can say that
21 this statement supports a lot of what my views would be.
22 But there are one or two parts of it that say there is
23 information elsewhere and it hints at what that
24 information is. And I would need to see that
25 information, in order to come to some decision about
26 what this statement is about.

27 MR SMITH: I won't take it any further than that.

28 And I just ask that be marked.

29 MFI 6 Statement marked 6 for identification.

30 MR SMITH: We have finished now the topic that was
31 feared to be sensitive. So that the hearing room can be
32 opened.

33 COMSR: Perhaps we will take a five minute break
34 now and we will open up the hearing room then.

35 ADJOURNED 3.45 P.M.

1 RESUMING 3.55 P.M.

2 MR MEYER: Before my friend, Mr Smith, proceeds, in
3 relation to the material that has been given by way of
4 evidence since the order was made to clear the court, I
5 make an application that, in fact, all of that material
6 be now released. If we consider the point from where it
7 started - and I won't go into the detail, obviously,
8 because that would defeat the purpose of having it
9 closed - but it started with a reference to Professor
10 Berndt and his published works and it progressed from
11 there and dealt with material which is in the public
12 domain and not gained from any source which has been the
13 subject of a dispensation pursuant to s.35. S.35 of the
14 Aboriginal Heritage Act provides:

15 `Except as authorised or required by this Act, a person
16 must not, in contravention of Aboriginal tradition,
17 divulge information relating to an Aboriginal site,
18 object, or remains, or Aboriginal tradition.'

19 The material, in respect of which evidence has been
20 given, doesn't traverse any of the matters that are
21 covered by s.35. In fact, it all related to published
22 material, either by way of the publication of `A World
23 That Was' by Berndts and Berndt, or a publicly received
24 thesis by Dr Clarke, which has been placed before the
25 court. The only possible area which is subject to a
26 limitation in relation to what I will call the MFI
27 exhibit, without disclosing it further than that,
28 because of the limitations that were placed on it on the
29 basis upon which it was put before the court, but, apart
30 from that, there is no material which should not be
31 released.

32 In support of the application, I say, clearly, it is
33 in the public interest that as much of this Inquiry,
34 this Commission, be in the public domain. And, whilst
35 there is an obvious need to, not only comply with the
36 relevant legislation, but a need to be properly
37 sensitive to it also, the material that has come forth,
38 in fact, should be released.

1 That is my application.

2 MR KENNY: As you are aware, I act for a group of
3 Aboriginal men, in relation to this matter.

4 I have some concerns about what my friend has said
5 on the divulgence of that material. I mean, some of
6 that material, I suggest, that we did talk about may
7 well have arisen from the Berndts and Berndts report,
8 but I would say that this Commission has no idea
9 concerning whether that divulgence of that information
10 is in contravention of Aboriginal tradition. I think
11 the position, is we simply, at this stage, do not know.

12 You will appreciate I don't have instructions in
13 relation to that, because, actually, this is the first
14 time that I have seen or heard it. I do, however,
15 maintain my objection in relation to the release of that
16 information, even without my client's instructions,
17 because I am aware that they do have serious concerns
18 about the matter. I think, at very least, we should
19 perhaps have the opportunity to consider whether they
20 believe the divulgence of that information is in
21 contravention of Aboriginal tradition or not. Despite
22 the fact that this perhaps is in the public domain in
23 other places. They have serious concerns about a lot of
24 the information. And I suggest that some of the
25 information that we did talk about, that is contained in
26 that book, could very easily raise concerns.

27 MR KENNY: I don't want to list them, in open
28 court.

29 COMSR: No, certainly not. I wouldn't expect
30 you to.

31 MR KENNY: I think there are some matters there
32 that do raise some serious concerns and I would at least
33 like to speak to my clients about it, before it is
34 received.

35 COMSR: Yes, I am in the position of not being
36 able to consider that information, in its entirety.
37 And, of course, s.35 is designed to protect against
38 unauthorised divulgence any information concerning

1 Aboriginal tradition where it is contrary to Aboriginal
2 tradition to do so. And any authority that I have I
3 consider that I should construe very strictly. So that
4 I have to be assured, in my own mind, that there is no
5 information of the sort that we have been discussing,
6 before I would approve the release of any of that
7 information. And it will take some consideration. I
8 don't think I am in a position, at this stage - I am not
9 saying it won't be done - I am just saying that I don't
10 consider that I am in a position, at this stage, to
11 confidently release the transcripts of what took place,
12 during the private hearing.

13 MR ABBOTT: We suggest, as a first step, that you
14 ought to ask this witness - and that is not the end of
15 it - this witness's view, but he ought to be asked,
16 without detailing it, whether there is anything that he
17 regards as appropriate, under s.35. And, if there is
18 not, that is at least a factor you can take on board.

19 COMSR: Yes, but counsel have put to me that he
20 is not in a position, as yet, to do that and he doesn't
21 know what the concerns are. And I certainly want to be
22 sure, in my own mind, that there is no problem there, Mr
23 Abbott, because it is my responsibility.

24 MR ABBOTT: Exactly, which is why I am suggesting
25 that each witness that gives evidence you ought to at
26 least make an enquiry of them, because it may assist you
27 in making a decision. I am suggesting an enquiry ought
28 to be made of this witness.

29 COMSR: I don't know that that is the end of
30 it.

31 MR ABBOTT: I think it specifically wouldn't be the
32 end of it, but at least it is a start.

33 COMSR: Yes, I don't think I can too hastily
34 accede to any such request. I am not denying it, I am
35 not dismissing it. I am just saying that it is a
36 situation that requires me to proceed with a degree of
37 caution.

38 MR ABBOTT: Undoubtedly.

1 XN

2 Q. Can I take you now to what we have been calling the
3 `narrative of events'.

4 COMSR: I suppose we should note that the
5 inquiry has now resumed in public session.

6 XN

7 Q. As at April 1994, Dr Doreen Kartinyeri was an employee
8 of the Museum, wasn't she.

9 A. That's right.

10 Q. She was employed in what capacity.

11 A. She was employed in the Aboriginal Family History
12 Project, and more specifically she was employed to do
13 research into Aboriginal families and publish
14 information she gathered into family history books.

15 Q. As at April 1994, she had been working at the Museum for
16 some time.

17 A. Yes, for some time. Although she had been working from
18 her home, she got special permission to work away from
19 the North Terrace site.

20 Q. Her home was where, as you understood it.

21 A. Up in the Mid North. She was at Warooka and then she
22 moved to Port Germein. I have never visited her in
23 either of those places. I'm not quite sure of her exact
24 movements.

25 Q. There was an occasion in early April 1994 when she
26 telephoned you at your Museum.

27 A. That's right.

28 Q. You had a conversation with her, and in relation to that
29 conversation supplied her with some material; is that
30 right.

31 A. That's right.

32 Q. Is there any documentation at all concerning either the
33 conversation or the supply of materials.

34 A. I've got a copy of the material I faxed to her. I kept
35 those copies because I thought that I would probably be
36 asked for that material from other people; and, in fact,
37 I did use some of that material for other people some
38 months later. So, I do have that material with me here

1 today.

2 Q. I'll come to that in a moment. Did you make any note
3 either in connection with the conversation or the
4 material and, if so, where.

5 A. Yes, in my normal diary, as distinct from the field
6 notebook. In my normal diary, I made a reference that
7 was of one word, the word 'Carter', and that word
8 'Carter' related to one of the photocopies. And from my
9 memory Doreen rang me a couple of times for the
10 material, and whilst still on the phone I just wrote
11 that name on a certain page, a page of my diary, so I
12 wouldn't forget to fax it to her.

13 Q. Have you got your diary with you.

14 A. Yes, I have.

15 Q. I want to know the date in which you wrote this entry.
16 You did it, yes, and would you please refer to your
17 diary.

18 A. Yes. Actually, the entry that I put on this page is
19 'Carter burial' and the date is April 12th.

20 Q. Of what.

21 A. 1994.

22 Q. So, 12 April 1994 in conjunction with that entry means -
23 what exactly is that, the day you sent the material off,
24 is it, or the day that you got the telephone call.

25 A. That would have been the day that I received a telephone
26 call and that was written down to remind me to get the
27 materials together and send them to her.

28 Q. Can you throw your mind back then to the telephone
29 conversation.

30 A. Yes.

31 Q. What was said by Dr Kartinyeri to you and what did you
32 say in reply, as near as possible.

33 COMSR

34 Q. Could I establish something first. Do you have any
35 record of the conversation, or are you relying on your
36 recollection of it.

37 A. I don't have any notes taken on that day. I have my
38 memory, and the faxes that I sent to her I do have.

1 XN

2 Q. So, tell us of the conversations.

3 A. Well, it's very hard to reconstruct the exact words, but
4 the gist of it was that she was, you know, desperate for
5 information in relation to Hindmarsh Island and the
6 environs around Hindmarsh Island, so.

7 Q. What did she say about that.

8 A. Just that she needed the information and it was in
9 relation to the Hindmarsh Island issue. It was a
10 general policy, you know, that we give out raw data and
11 she's a colleague and she asked for the raw data and I
12 undertook to send her that raw data.

13 Q. Was there something said about the bridge in this
14 conversation.

15 A. It was in relation to the bridge, that's all that I can
16 remember. There certainly wasn't any mythological or
17 there was no secret sacred business, or anything like
18 that. It was strictly she needed all the information
19 she could get and it was in relation to stopping the
20 Hindmarsh Island bridge.

21 Q. Did she say anything to you about what she had.

22 A. She gave me this very strong impression that she had
23 nothing, or next to nothing. I can't remember whether
24 she said she had little or nothing, but it was certainly
25 the message that I got that she was starting at, you
26 know, at the base line.

27 Q. What was your response to that.

28 A. My response was that, you know, to give her the raw data
29 - and I discussed with her roughly, from my knowledge of
30 the literature, what was around. And the note here
31 `Carter burial' refers to a newspaper reference that I
32 had only just been, some time around about then, given
33 by a friend and colleague Robert Foster. I had that
34 with me, as well as I had a data base that I constructed
35 a couple of years previously as part of the build-up for
36 writing the thesis. So, in fact, it probably would have
37 been four or five years old, the data base, and that
38 data base contained basic references to Taplin and

1 Bellchambers and basically gave a rough sketch on the
2 few records there on the Aboriginal people connected
3 somehow to Hindmarsh Island and the Goolwa region.

4 Q. You had faxed off that material to Dr Kartinyeri.

5 A. That's right.

6 Q. You have actually a copy of that material.

7 A. That's right. I have it with me.

8 Q. For anyone that wants to see it.

9 A. Yes.

10 Q. Can you produce it so that we can see what it looks
11 like.

12 A. Yes.

13 WITNESS PRODUCES DOCUMENT

14 Q. That is the copy of the material that you sent off to Dr
15 Kartinyeri.

16 A. That's right, yes.

17 EXHIBIT 7 Copy of faxes sent to Dr Kartinyeri
18 tendered by Mr Smith. Admitted.

19 Q. Did you talk to Dr Kartinyeri subsequent to sending her
20 that material.

21 A. In relation to the material, yes, I possibly spoke to
22 her several times, but certainly one time sticks in my
23 memory.

24 Q. Tell us what was said if it sticks in your memory.

25 A. Doreen was very interested in the apparent similarity
26 between Taplin's recorded place name, Aboriginal place
27 name for Hindmarsh Island which was 'Kumarangk'. Taplin
28 recorded that in 1874 and it apparently had the literal
29 meaning of 'The points'. However, Doreen said that it
30 was remarkably similar to a word that she had used for
31 'pregnant' called Kummari - I mean there could be other
32 ways that a linguist would spell it. I was aware of
33 that word being what some of the more older people
34 around Point McLeay would use for 'pregnant' where - I
35 can't say the contemporary word that the young people
36 would use today - would be Munthana. M-U-N-T-H-A-N-A -
37 I might spell that again later. Anyway, the point is
38 that she saw a relationship between a word that she knew

1 as a Ngarrindjeri word for `pregnant' and Taplin's word
2 for `Hindmarsh Island'. I cautioned her from making a
3 hasty conclusion about that by saying that, you know,
4 from my experience, only a linguist could tell whether
5 there was likely to be any relationship between the two
6 words. And it's been my experience that words that
7 often sound similar, a linguist would say are totally
8 unrelated. And I'm not here as an expert in
9 linguistics, although I do have expertise in Aboriginal
10 English.

11 Q. The role of the Museum in terms of, say, the dispute
12 over the bridge at Hindmarsh Island in terms of giving
13 data out, was what exactly, as you saw it.

14 A. Even before the Hindmarsh Island bridge issue, it was an
15 agreed - it was arranged through the Museum that Museum
16 staff had to be extra careful in giving out data which
17 could possibly lead to some form of legal action. And
18 there have been a couple of court cases where the Museum
19 had been basically in trouble through giving out faulty
20 advice. There were several cautions received from the,
21 or both the last two directors in relation to the
22 Museum's obligations in terms of giving data. And the
23 upshot was that we can give out raw data, that is raw in
24 the sense of being, you know, public domain - you know,
25 readily accessible if not from the Museum then from the
26 Library or out from, information from the public domain,
27 or written records which were historical in the archives
28 and part of the State collection. But, when it came to
29 interpreting that information, then we needed to take
30 more caution. And, on any issue that is likely to lead
31 to an investigation on the status of an Aboriginal site,
32 or an object, or anything of that nature, then we always
33 insisted that there be a formal request in writing and
34 that that request would then be discussed with the
35 relevant curator, head of the division, and in some
36 cases the director. So, it was an understanding in the
37 Museum and there are various circulars and notes and
38 things which indicate that curators had to exercise a

1 fair degree of caution in terms of their relationship
2 with outside bodies and giving information to outside
3 bodies.

4 COMSR

5 Q. By 'curator', what does that mean it was.

6 A. In the Museum, curators are the people who are employed
7 as researchers to do research, but also to have an
8 opinion in certain disciplines, whereas we have other
9 officers who, managers and information officers, who are
10 able to give out information. But that would be
11 restricted solely to the public domain area, whereas a
12 curator is someone who is regarded as having a more
13 research-orientated, you know, higher profile role
14 within the Museum.

15 CONTINUED

1 XN

2 Q. Can I take you to later in April. I think the
3 anthropology division received a number of informal
4 requests for information from the Aboriginal community
5 at large.

6 A. That's right. Just phone calls.

7 Q. Then that was followed by specific visits by two groups
8 of people, wasn't it.

9 A. Yes.

10 Q. Tell us of the first.

11 A. The museum had just received the Tindale collection,
12 which was covered in the press, and it was seen as a
13 great wealth of material, particularly in relation to
14 the Lower Murray and Coorong area. For that reason,
15 people, such as members of the Lower Murray Aboriginal
16 Heritage Committee, were eager to tap into this resource
17 in relation to the Hindmarsh Island Bridge issue. We
18 had barely unpacked it - the material arrived some time
19 in February, I believe, and we were still unpacking it
20 through the first part of April, but the main body of
21 journals had just been unpacked and we had several
22 visits from Aboriginal people from all over Australia,
23 but in particular we had a visit from the two Aboriginal
24 men who were representing the Lower Murray Aboriginal
25 Heritage Committee, and that was Mr Doug Milera and Mr
26 Victor Wilson.

27 Q. Where was the collection at this time.

28 A. The collection was in an unused office out the back of
29 the museum. It was in a high security area, but it was
30 pretty well cramped into one office. It is an office
31 space that is currently being used by Philip Jones.

32 Q. Doug Milera and Vic Wilson were shown the collection by
33 whom.

34 A. By me. Just by myself.

35 Q. Did you speak with them during the course of doing that.

36 A. Yes. They obviously thought that the collection was,
37 you know, well organised. So they came thinking that it
38 was just a matter of pulling down a volume, you know,

1 entitled 'Hindmarsh Island', but they quickly saw that
2 the information was far more dispersed through - I am
3 just guessing - about 50 or 60 odd volumes of journals
4 and numerous books of photographs and card files and
5 mountains of loose paper. So they asked that I and/or
6 other museum people look through that collection for
7 anything on Hindmarsh Island, and they were also
8 desperate - I mean, they desperately needed cultural
9 information. They put it across that they needed to
10 stop the bridge and they needed information to stop the
11 bridge.

12 COMSR

13 Q. It was quite apparent, was it, to you at that time that
14 the Aboriginal community as a whole was against the
15 building of the bridge.

16 A. At that stage, it was more just the groups that, as a
17 museum, we tend to interact with, like the Lower Murray
18 Aboriginal Heritage Group, who were against it.

19 XN

20 Q. So I suppose you would expect those groups to be
21 interested in the anthropological material that was
22 available.

23 A. Yes. We had had several other similar sort of heritage
24 issues in relation to Granite Island and Cape Jervis,
25 and others. And at that stage - in the stage of this
26 Hindmarsh Island visit - I and the rest of the museum
27 were treating it in just the same way, that we had a
28 public collection and we would give out the information
29 but we wouldn't get involved, and if we were asked by
30 other parties for that information, that they would get
31 it as well.

32 COMSR

33 Q. But nothing unusual that you could see in the request to
34 peruse the available material.

35 A. Not at that stage. That's right.

36 XN

37 Q. Did you say anything to them about that request to find
38 something.

- 1 A. I mean, I told them that there was difficulties with the
2 collection. I told them that there was secret sacred
3 objects from other regions that were sketched and
4 photographed in it. I wanted them to get the picture
5 that it wasn't just Lower Murray material in the Tindale
6 collection. I also said - and this was speaking from my
7 authority of having done the thesis - that, in my
8 opinion, it would be very unlikely - the Tindale
9 collection, that is - to have much information on
10 Hindmarsh Island in view of the bias that the literature
11 has towards the Coorong and the Southern Eastern side of
12 Lake Alexandrina, and also because Tindale's main
13 informants being people whose main sort of country was
14 peripheral to Hindmarsh Island. So I didn't want them
15 to get their hopes up that there was something there. I
16 said I would look through it, and I did. But, as it
17 turns out, I was correct and there was very little
18 information in the Tindale collection.
- 19 Q. A few days after that visit from Doug Milera and Vic
20 Wilson, did you have a visit from another group of
21 Ngarrindjeri people.
- 22 A. Yes. On this occasion it was Doreen - Dr Kartinyeri,
23 Mrs Hilda Day and Mrs Sara Milera, three women. On this
24 occasion, I had forewarning enough that they were
25 coming, so I contacted Steve Hemming, who was then
26 working out at the Fullarton Road annexe, I believe, to
27 come in and help me out. So all five of us went into
28 the room where the Tindale collection was stored.
- 29 Q. About what time. What are we talking about here. What
30 time in April. Approximate date.
- 31 A. I would have to look through my notes. It was before I
32 went on leave, and it was obviously after we unpacked
33 the Tindale collection. It was after the Mr Milera and
34 Mr Wilson visit.
- 35 Q. What notes do you need to look at just to fix that time.
36 When you went on leave.
- 37 A. No, it would have been prior. Have you got the figures
38 of when I went on leave? I can look them up.

- 1 Q. You have to supply them, I am afraid.
- 2 MR MEYER: I would have thought the date he went on
3 leave would have been non-contentious. For my part, I
4 certainly do not object to him being led on that.
- 5 XN
- 6 Q. I think you went on leave on 15 April.
- 7 A. Yes, that is what my book says.
- 8 Q. So it is before 15 April.
- 9 A. Yes.
- 10 Q. And after the 12th, you have said.
- 11 A. Some time around about then. It is very difficult to
12 put it at an exact date, but I have got an early and a
13 late date as a range to give it a fix.
- 14 Q. Is the sequence of events: the telephone call from
15 Doreen Kartinyeri, that you have told us about; some
16 visits from Aboriginal people, but, in particular, a
17 visit from Doug Milera and Victor Wilson.
- 18 A. Yes.
- 19 Q. Then another visit from Ngarrindjeri people, being
20 Doreen Kartinyeri, Hilda Day and Sara Milera.
- 21 A. That's correct.
- 22 Q. And Stephen Hemming came in from the annexe.
- 23 A. That's correct.
- 24 Q. Tell us what happened and what was said.
- 25 A. On that occasion it struck me straight away that there
26 was a difference in the way that Doreen was talking
27 about the Hindmarsh -
- 28 COMSR
- 29 Q. I wonder if you could tell us what was said on that
30 occasion.
- 31 A. Okay. The basis of what happened on that occasion, what
32 was said, was along the lines that Dr Kartinyeri said
33 that they now knew something, as Ngarrindjeri women,
34 about the Hindmarsh Island area. It was quite clear
35 that she wasn't going to go any further than that, but
36 she said that they were now wanting material to back
37 that up from the Tindale collection.

1 Q. She wanted to see if there was anything of relevance in
2 that Tindale collection, did she.

3 A. That's right.

4 XN

5 Q. Did you assist her with that. Did anybody.

6 A. We had a look through a few of the volumes, steering
7 away from ones that we thought would have some
8 restricted material from other areas in them. So we
9 looked at photos. While looking at those photos, Mrs
10 Sara Milera suddenly appeared to be in a trance and said
11 she saw something spiritual in a particular photo, but
12 Dr Kartinyeri and Mrs Day didn't seem to be caught up in
13 that belief. So it was basically looking through the
14 material, and it was left with Dr Kartinyeri instructing
15 Steve Hemming and myself, with some urgency, to go
16 through as much of the collection as we could, looking
17 for things to do with Hindmarsh Island and the adjacent
18 Coorong/Goolwa region.

19 Q. I think you then went on leave on 15 April.

20 A. That's correct.

21 Q. And that leave, was that 15 April to 11 May.

22 A. Yes. I had to extend it a bit. I took leave because my
23 wife was due to have a baby and that baby arrived some
24 ten days late. So I was sort of tacking on as much
25 leave as possible, but, again, that event meant that I
26 was able to use that event to sort of fix the position
27 of what happened earlier on in my leave.

28 Q. By the time you went on leave, had you searched the
29 journals for references to Hindmarsh Island.

30 A. Yes, I had been completely through the journals at least
31 twice, and parts of the journal I went back a third and
32 a fourth time because I was following up leads relating
33 to other projects as well. So at that stage I was
34 probably the most familiar person in the museum on the
35 journals relating to the southern regions of South
36 Australia.

1 Q. I think whilst you were at home on leave you had a
2 telephone call from one of your colleagues at the
3 museum.

4 A. Yes, Steve Hemming rang me. It was during the day. It
5 was early in my leave. As I have said, I know that
6 because I was caught up in other events later on and
7 didn't have any contact with the museum. He rang up
8 early during my leave and requested that I give him,
9 over the phone, all of the information I had on
10 Hindmarsh Island and the related areas.

11 Q. At that time it was the case, wasn't it, that Dr
12 Kartinyeri had been sent, by you, all the relevant
13 historical data from your thesis material.

14 A. That's correct.

15 Q. That is already Exhibit 7. So what was your response
16 then to Mr Hemming.

17 A. I questioned why he needed that information, because
18 Doreen already had it, and in response to that he said
19 that he was assisting Dr Kartinyeri in interpreting that
20 material. So my interpretation of that was that -

21 OBJECTION Ms Nelson objects.

22 COMSR

23 Q. Don't tell us what you thought about that.

24 XN

25 Q. Don't give us your interpretations about that. What did
26 you do then. Did you speak with him, say anything more
27 to him, or did you comply with his request.

28 A. I complied with his request.

29 Q. How did you do that.

30 A. The phone was in my living room and the computer was in
31 the other end of the house, so I had to boot up that
32 computer, get into the data base, call up the records,
33 scribble down the information on scraps of paper, and go
34 back to the phone and give that information to Steve
35 over the phone.

36 CONTINUED

37

1 He was particularly interested in page numbers of books.
2 He had a rough idea of where much of the information
3 was, but he needed it quickly and he knew, of course,
4 that I had this data base.

5 MR KENNY: Before we finish today, the witness has
6 referred to his diary, on a number of occasions, for the
7 purpose of fixing dates.

8 I am wondering if my friend was going to tender
9 that?

10 MR SMITH: I can hold it. I wasn't going to tender
11 it.

12 COMSR: You would like an opportunity to peruse
13 it?

14 MR KENNY: Certainly.

15 MR SMITH: Why don't we just mark it, for the
16 moment?

17 MR KENNY: I would be happy with that. I would
18 just like to make sure there is access.

19 MFI 8 Witness's diary marked 8 for
20 identification.

21 MR ABBOTT: I take it he will only be allowed to
22 examine the relevant entries? He may not want his
23 diary -

24 COMSR: No, Mr Smith will be able to go through
25 with the witness and mark the relevant passages.

26 ADJOURNED 4.37 P.M. TO THURSDAY, 3 AUGUST 1995 AT 10 A.M.

1 COMSR STEVENS

2

3 ROYAL COMMISSION INTO THE HINDMARSH ISLAND BRIDGE

4

5 THURSDAY, 3 AUGUST 1995

6

7 RESUMING 10.33 A.M.

8

9 MR KENNY: Before we start this morning, I don't

10 want to go into great detail, but I didn't note my

11 objection to the tender yesterday of Dr Fergie's report.

12 I want to perhaps adopt the submissions made by

13 Griffiths when he was here -

14 COMSR: I will deal with that later. There is

15 another issue I wish to deal with at this time. Counsel

16 assisting the Commission have advised me that there have

17 been grave concerns expressed by the women who are

18 prepared to come forward and have co-operated to date

19 with the Commission, for which I give them full credit.

20 I am concerned about statements made in open hearing and

21 in press releases to the media which have intimidated

22 these women and have been contemptuous to the Commission

23 itself.

24 Additionally, the Commission has made every effort

25 to resolve the issue of the fears that a curse has been

26 placed on this hearing and the Commission itself. A

27 request for reassurance has met with no co-operation

28 from those representing the women concerned. It is a

29 serious issue for the women who feel under threat.

30 In order to address these serious matters, I propose

31 to adjourn the hearing this morning until 2.15 p.m. when

32 a statement will be made by me concerning these matters.

33 MR SMITH: Before you leave, Madam Commissioner, I

34 ask you to dispose of one outstanding matter which was

35 left over from yesterday, and that is the question of

36 the release of the evidence taken in camera from Dr

37 Philip Clarke and his report Exhibit 1. It is my advice

38 to you, based on the anthropological advice to the

1 Commission and concurred with by Miss Francis Nelson for
2 Steven Hemming, who is also an anthropologist, that the
3 evidence is not capable of being regarded as in breach
4 of s.35 of the Aboriginal Heritage Act, and so can be
5 divulged.

6 MR KENNY: I have objected to this material being
7 released yesterday. I have obtained brief instructions
8 from my client broadly outlining the evidence - not in
9 any detail I might add. He hasn't signed the
10 undertaking as he is not here in Adelaide and not able
11 to do so. I can assure you that they consider that the
12 material that was discussed in camera yesterday did, in
13 our opinion, concern Aboriginal tradition, their
14 tradition.

15 MR ABBOTT: How can it be their opinion if you
16 haven't talked to them?

17 MR KENNY: In that case, I seek that this material
18 be withheld from release until I have had the
19 opportunity to obtain the necessary releases and show
20 them copies and take detailed instructions from them in
21 relation to it. It is a serious concern. They are very
22 concerned that this discussion or that discussion was
23 about their traditions and that they believe it's
24 improper that that be discussed in open forum. Even
25 that sort of material in general is, some may say is,
26 and they have very serious concerns about it.

27 COMSR: This can be quickly disposed of by
28 recalling the witness briefly to the stand and obtaining
29 from him his opinion as to whether or not these matters
30 are already in the public arena.

31 MR KENNY: If I may submit, that is not the
32 problem. A lot of that material, I concede, is in the
33 public arena. That was released, I say, in the public
34 arena at a time when they did not have the powers they
35 do today to prevent that release and they are most
36 concerned that it not be released. It is not a question
37 of whether it is already in the public arena - I agree a
38 lot of it is - but the point is it is still their belief

1 that that material should not be discussed openly and in
2 public. I'm not saying that it is not already in the
3 public arena or not available for those who wish to go
4 and look. They believe that this Commission should not
5 be party to release this information as it is offensive
6 to them.

7 MR SMITH: I call Dr Philip Clarke.

8 MS NELSON: Before Dr Clarke gives his evidence, I
9 want to make my position clear, if I may. Mr Smith
10 raised the issue with me and I said that in my opinion,
11 as a matter of law, I felt that the matters discussed
12 yesterday were in the public domain and that the release
13 would not contravene s.35. I simply don't want it to be
14 interpreted as my client having expressed that opinion.
15 That is my opinion, not his.

1 WITNESS P.A. CLARKE CONTINUING

2 EXAMINATION BY MR SMITH

3 Q. I remind you that you are still on oath. You heard the
4 discussion that has passed concerning whether or not the
5 contents of your evidence yesterday taken in camera and
6 that part of your report or statement of evidence,
7 Exhibit 1, has the potential or contravenes the
8 provisions of s.35 of the Aboriginal Heritage Act and,
9 in particular, involves a divulgence which is in
10 contravention of Aboriginal tradition. Could you
11 proffer your advice to the Commission about whether
12 there is any such divulgence.

13 A. It's my opinion that there is nothing in what I said
14 yesterday that would contravene s.35.

15 Q. Your witness statement or report Exhibit 1.

16 A. There is nothing there that I would consider would
17 contravene s.35.

18 COMSR

19 Q. I take it from that that these are matters are already
20 in the public arena and would not be contrary to
21 Aboriginal tradition to divulge them.

22 A. That's correct.

23 MR KENNY: I seek to ask the witness a couple of
24 short questions. About this matter only.

25 MR ABBOTT: On what instructions? Does he give an
26 undertaking to give evidence?

27 COMSR: I think it is a matter for me to
28 determine this. I have to satisfy myself whether or not
29 the authority that has been given to me under s.35
30 necessarily comes into play. On what has been put to me
31 and on my reading of the evidence, I can see nothing in
32 the publication of what would contravene s.35. I
33 propose, therefore, to release that evidence.

34 MR KENNY: I ask that you note my client's
35 objection to that and also note that my request is that
36 you conduct a fuller inquiry in relation to whether or
37 not it is contrary to Aboriginal tradition not to
38 release the information. We have here one witness whom

1 I have sought to cross-examine about those matters and I
2 have been prevented from doing so, so there has really
3 been only one side of the evidence presented in relation
4 to the release of the material. On that basis, I make
5 my objection.

6 MR SMITH: Could I add only perhaps the release of
7 the transcript of evidence from yesterday because this
8 witness has not yet finished his evidence and it would
9 be premature to release Exhibit 1.

10 COMSR: I release the transcript of this
11 witness's evidence taken during the private hearing
12 yesterday.

13 MR SMITH: And Dr Fergie's report still remains
14 suppressed?

15 COMSR: Yes. I'm only releasing the transcript
16 of evidence and not the exhibit that attaches to that
17 evidence at this stage. As I indicated, unless there is
18 any further matter, I will be adjourning until 2.15 this
19 afternoon, at which time I'll make a statement
20 concerning those issues which I indicated are of
21 particular concern to the Aboriginal women who have been
22 prepared to co-operate with the work of this Commission.

23 ADJOURNED 10.44 A.M.

RF 6B

1 RESUMING 2.20 P.M.

2 COMSR: I consider it appropriate at this
3 juncture, in the light of recent events, to clarify a
4 number of issues. I said on 24 July 1995 that my
5 intention was to demonstrate the readiness of this
6 Commission to listen to the concerns of all persons
7 involved in the issues before it who might appear before
8 this Commission.

9 Thereafter, I have attempted to conduct the
10 Commission in the spirit of encouragement to all persons
11 to come forward to present evidence before it, knowing
12 of the tensions within the Aboriginal community. In
13 such a climate, the suggestion of coercion would appear
14 to be counterproductive.

15 In the result, unfortunately, rather than evidence
16 being proffered to the Commission, there have instead
17 been statements made both inside and outside the
18 Commission which have undermined the work of this
19 Commission and have, I have been informed, had the
20 effect that they have intimidated those who are prepared
21 to come before the Commission to give evidence.

22 I wish to make it clear that I propose to continue
23 the work of this Commission, unless, of course, some
24 legal restraint is imposed, and not to be diverted by
25 actions outside the Commission by parties who have
26 chosen to withdraw from the Commission.

27 On the opening day I courteously allowed the legal
28 representative of a group of Aboriginal women to make a
29 statement, and I also met informally with a large group
30 of Aboriginal women to view two items, at her request.
31 This latitude was to demonstrate the willingness of the
32 Commission to hear what the concerns of this group were.

33 Unfortunately, this courtesy resulted in fears that
34 both this hearing room and the Commission were cursed.
35 The very real concerns that there was a curse cannot
36 lightly be dismissed. If it is of concern to potential
37 Aboriginal witnesses, then it is of concern to this
38 Commission.

1 In order to dispel those fears for prospective
2 Aboriginal witnesses, counsel assisting wrote to the
3 legal representative, asking her to get instructions as
4 to whether or not those fears were unfounded. No proper
5 response, either to allay those fears or to confirm
6 them, has been forthcoming.

7 I have instructed counsel assisting to pursue the
8 matter vigorously. I understand that those fears of a
9 curse persist. Therefore, this morning, I have made
10 arrangements to provide an alternative hearing room for
11 any Aboriginal witness who feels threatened by those
12 rumours. I can assure anyone who feels so affected that
13 they need not give their evidence in this hearing room.

14 Statements have been made outside this Commission,
15 asserting that the inquiry will be divisive and that the
16 process is adversarial. I have attempted to emphasize
17 that the Royal Commission will hear from any person who
18 chooses to give evidence, relevant to its Terms of
19 Reference, whether such evidence supports or refutes
20 such allegations of fabrication.

21 Those who have already indicated their willingness
22 to participate can only be applauded. Given the
23 tensions within the Aboriginal community, I can
24 appreciate the pressure their decision has caused them
25 and will no doubt continue to cause them.

26 I deplore that continuing statements have been made
27 to the media suggesting that the Commission is unlawful
28 before that issue has been resolved in the proper forum,
29 that is, in the Supreme Court. An inference might be
30 drawn that it is intended to discourage people coming
31 forward to give evidence. I am most concerned to hear
32 that it is having that effect on Mr Abbott's clients.
33 And, if that should continue, then I will take steps to
34 counter it. The Commission encourages people to come
35 forward. It will consider all evidence impartially.

36 I mention another matter. It now appears from the
37 response given to the Commission by Ms Layton QC, that
38 the confidential envelopes will not be provided to the

RF 6B

1 Commission. I can make it clear that I do not intend to
2 compel witnesses to disclose the contents of the
3 envelopes. I do not consider that it is necessary for
4 me to view those envelopes consistent with the Terms of
5 Reference. That material can, in my view, be obtained
6 from other sources, such as anthropological sources;
7 statements made to others, and given in evidence; and
8 from individuals such as Mrs Betty Fisher. It is from
9 those sources that it appears to the Commission that it
10 is
11 not necessary that any coercive steps be taken, even if
12 it were possible to do so, to obtain access to the
13 contents of those secret envelopes. I do not wish to
14 add anything further to that.

1 WITNESS P.A. CLARKE, EXAMINATION BY MR SMITH CONTINUING

2 Q. Dr Clarke, we had reached the stage yesterday where you
3 were telling us of certain events that you observed
4 taking place at the museum, and we had reached about mid
5 May of 1994, after you had provided some data to Mr
6 Hemming on the telephone whilst on leave.

7 A. That's correct.

8 Q. I think you came to know, in about mid May of 1994, that
9 a letter had been sent from the museum to the Federal
10 Minister, Mr Tickner. Is that correct.

11 A. That's correct.

12 Q. I think at about this time you had conversations with
13 your colleague, Mr Stephen Hemming, concerning the
14 Hindmarsh Island issue; is that not so.

15 A. Yes. I had several conversations with him, one of which
16 would have been shortly after I came back from leave in
17 mid May of 1994.

18 Q. Was the topic of the letter to Minister Tickner one item
19 of conversation upon your return.

20 A. Yes.

21 Q. Can you tell us, so far as you can remember, what was
22 said between you and Mr Hemming about the letter to the
23 Minister.

24 A. The gist of that part of our conversation was that Steve
25 considered that he was merely acting as a servant and
26 that he wasn't composing the letter, but just simply
27 typing it out for Dr Kartinyeri.

28 Q. Was there conversation about the topic of the validity
29 of the women's business.

30 A. Yes, there was.

31 Q. What was said.

32 MS NELSON: If my friend is leaving the topic of the
33 letter, I note that the question he put to the witness
34 was `Did you become aware that a letter had been sent
35 from the museum to the Minister' and the witness said
36 `Yes'. It is not for me to know whether there was more
37 than one letter, but it is clear, as the questioning has
38 gone on, that my learned friend, Mr Smith, is referring

- 1 to a letter sent by Dr Kartinyeri to the Minister, and
2 that letter did not emanate from the museum. I think
3 that should be clarified because, as it stands, it is
4 not correct.
- 5 MR ABBOTT: It is a fax from the museum. It did
6 emanate from there.
- 7 MS NELSON: I don't know where it was faxed from,
8 but it is not a letter from the museum.
- 9 COMSR: Rather than counsel debate the issue, we
10 will have the matter canvassed by the evidence.
11 XN
- 12 Q. Just to make it clear, the question of the letter that
13 went to the Minister, you were not present when such a
14 letter was composed, were you.
- 15 A. No, I was not present.
- 16 Q. You learned about such a letter being composed by
17 speaking to somebody else.
- 18 A. That's right.
- 19 Q. Who was it you spoke to. Don't tell us the
20 conversation, but to whom did you speak.
- 21 A. Mrs Margaret Amon.
- 22 Q. She is the anthropology clerical officer, is that
23 correct.
- 24 A. That's correct.
- 25 Q. Have you, yourself, seen that letter.
- 26 A. I've recently seen a copy.
- 27 Q. But only recently.
- 28 A. Only recently.
- 29 Q. I am not leading this as to the truth of it, but what
30 did you understand, in other words, what was in fact
31 told to you by Mrs Amon, about the letter.
- 32 A. The subject matter of the letter was unclear to me. The
33 fact that Margaret Amon told me -
- 34 OBJECTION Ms Nelson objects on the grounds of
35 hearsay and that Mrs Amon is not to
36 be called as witness.
- 37 MR SMITH INDICATES MRS AMON IS TO BE CALLED
38 XN

- 1 Q. Tell us what Mrs Amon said to you about the letter.
2 A. It was the issue of the involvement of Steve Hemming in
3 supporting the writing -
4 OBJECTION Ms Nelson objects.
5 A. No, this is what I was told, that Steve Hemming actively
6 supported the writing of the letter.
7 XN
8 Q. Did Mrs Amon tell you when it was that the letter was
9 prepared in the museum, in relation to your
10 conversation.
11 A. In relation to the conversation, it was days before the
12 conversation.
13 Q. That became the topic of conversation between you and Mr
14 Hemming.
15 A. That's correct.
16 Q. You have told us about that. I had gotten to the stage
17 of there was discussed between you and Mr Hemming, the
18 topic of the validity of the women's business.
19 A. That's right.
20 Q. Could you then, please, tell us what was said between
21 you and Hemming about that topic.
22 A. The gist of that conversation was that Steve Hemming
23 agreed with my model of 'Invention of tradition' to the
24 point that there was some of the reporting of the
25 women's business, he agreed, was a recent invention of
26 tradition. However, they were my words 'Invention of
27 tradition'. I was referring to anthropological writing
28 on the topic and 'The invention of tradition', as I said
29 yesterday, is a title of a book. Steve Hemming said
30 that he was familiar with that writing and he agreed
31 that it explained some of the women's business.
32 However, he made the point that Margaret Jacobs - or
33 Auntie Maggie to him - and Mrs Connie Roberts, knew
34 something, and, on the basis that there was some truth
35 in it, he was supporting the issue overall.
36 COMSR
37 Q. I just want to clarify something, because when you use
38 words such as 'Invention of tradition', that might sound

1 like a manufacture of it. Whereas, as I understand you,
2 this was significant in anthropological terms rather
3 than a suggestion that someone has done something.

4 A. It is referring to a cultural process whereby events are
5 reshaped, the perception of the past is reshaped to make
6 a new sense of the present. So it is - in cultural
7 terms, it is a manufacture.

8 XN

9 Q. Can you throw your mind back to the conversation on the
10 topic of the validity of the women's business, and give
11 us the words, as near as possible, that were exchanged
12 between you and Mr Hemming, rather than drifting into a
13 summary on them or a commentary on them. The gist of
14 the words.

15 COMSR

16 Q. Can you remember what he said to you and you said to
17 him, in other words.

18 XN

19 Q. Or the gist of it.

20 A. Well, that Auntie Maggie and Auntie Connie can remember
21 something, and because of that, he - that is Steve
22 Hemming - believed that there was at least some basis to
23 women's business in relation to Hindmarsh Island.

24 Q. Going back to a stage earlier than that, the topic must
25 have been introduced between you, wasn't it.

26 A. Yes.

27 Q. Can I take you back to that earlier part of the
28 conversation. What was said.

29 A. We were talking in general terms about museum
30 involvement in issues such as the Hindmarsh Island
31 debate.

32 Q. And there was some talk on the topic of the invention of
33 tradition between you and him.

34 A. That's right.

35 Q. And at some stage it got to mentioning Auntie Maggie and
36 Auntie Connie.

37 A. That's right.

38 Q. I want you to tell us the gist of what preceded that.

1 A. In this particular conversation, which is the one that
2 happened soon after coming back from leave, we were
3 talking about museum involvement in the Hindmarsh Island
4 issue. I had the view that we had a role simply as
5 giving out raw data, that is public domain information.
6 Mr Hemming, however, had views that he, in particular,
7 was justified in being more active than that.

8 COMSR

9 Q. So there was something in the nature of an academic
10 dispute between you as to your roles, or your
11 professional roles, was there.

12 A. Yes, yes.

13 XN

14 Q. Then the topic of the women's business, or the validity
15 of it, arose.

16 A. Yes, and because - and I stress they were my words that
17 I put to him 'Invention of tradition' - through him
18 agreeing that that model did partly explain women's
19 business on Hindmarsh Island, on an academic level we
20 were at least partially in agreeance. However, the
21 difference between his academic position on the issue
22 and mine was that he still believed that there was some
23 core truth to women's business as it was being put
24 forward by Dr Kartinyeri and others.

25 XN

26 Q. Was the topic of stopping the bridge the subject of that
27 discussion.

28 A. Only in that it was something that meant that the museum
29 had to be very careful in being involved with. Again,
30 it goes back to my earlier point that we were talking
31 about the museum's role in that debate and any other
32 debate along similar lines involving Aboriginal
33 interests - Aboriginal contemporary interests in parts
34 of the landscape.

35 CONTINUED

36

- 1 Q. You became aware, I think, that, on 9 July 1994, there
2 was a ban placed on construction of the bridge, for 25
3 years.
- 4 A. That's right.
- 5 Q. At least by then it was clear that the issue was no
6 longer just a local Aboriginal heritage matter.
- 7 A. That's right. That event signalled to me that
8 ultimately something like a core challenge, a
9 Commission, or some more serious activity than the
10 normal was going to happen.
- 11 Q. I think you had a telephone conversation with Dr Deane
12 Fergie, about this time, is that correct.
- 13 A. Yes, I have made a note in my notebook and the date on
14 that note is 11 July 1994.
- 15 Q. You refreshed your memory, as to the date, by looking in
16 your notebook, did you.
- 17 A. That's correct.
- 18 Q. Is that the diary that has been tendered, or been marked
19 for identification.
- 20 A. No, it is my professional field notebook.
- 21 Q. Do you have that with you.
- 22 A. Yes, I do.
- 23 Q. Could you produce that.
- 24 COMSR: Mr Smith, there is one aspect of
25 concern: we are not intruding into any area that is
26 covered by the Terms of Reference, are we?
- 27 MR SMITH: Nothing that touches on problems with
28 s.35, do you mean?
- 29 COMSR: No, I just want to clarify, before we go
30 any further, that nothing that is being traversed here
31 could be seen to have any possibility of prejudicing any
32 Federal proceedings?
- 33 MR SMITH: No.
- 34 XN
- 35 Q. Do you have your note - your original notebook.
- 36 A. I have the original and a photocopy.
- 37 MR SMITH: I will just pause, for a moment, and
38 show that to my learned friends.

P.A. CLARKE XN
VOIR DIRE
(MS PYKE)

1 XN

2 Q. When did you make a note of that conversation.

3 A. That would have been later on the day of the
4 conversation.

5 Q. At the time you made that note, were the facts of that
6 conversation, that is, what was said between you and Dr
7 Fergie, fresh in your memory.

8 A. That's right.

9 Q. Does your note accurately reflect the conversation.

10 A. My note is a broad overview of that conversation. The
11 conversation between Dr Fergie and I probably lasted a
12 half an hour or more. My note was just a very broad
13 summary of that conversation.

14 Q. I want to ask you now to relate to the Commission that
15 conversation, as near as possible, in sequence. Do you
16 ask Madam Commissioner's permission to refresh your
17 memory from that note, in order to give that evidence.

18 A. I would like to have it in front of me, yes, just to
19 refresh my memory.

20 MR SMITH: Subject to any questions on the voir
21 dire, I propose to.

22 COMSR: Are there any questions on the voir
23 dire?

24 MS PYKE ON VOIR DIRE

25 MS PYKE: I would simply ask this: I know that the
26 suggestion is from the witness that he made the notes on
27 that - on the day of the conversation with Dr Fergie.

28 A. That's right.

29 MS PYKE

30 Q. Whilst the conversation was still fresh in your memory.

31 A. That's correct.

32 Q. I note that your notes don't purport to actually record
33 the conversation.

34 A. Yes, the notes are - were written for my benefit, in
35 order of reminding me that I had a conversation and the
36 day that I had that conversation.

37 Q. But they don't in anyway purport to be details of the

KC 6C

P.A. CLARKE VOIR DIRE
(MS PYKE)
XN

1 conversation as opposed to a broad summary of topics
2 discussed.

3 A. That's right. Had I written down the detail, it would
4 have taken more than just a few minutes that it did
5 happen in order for me to note the fact the conversation
6 took place. I was becoming more interested in the issue
7 and was starting to take more attention - pay more
8 attention to the media exposure. And I was starting, in
9 the notebook, to write down various facts that may give
10 some indication to me what the cultural information that
11 was being put across was all about. I was not writing a
12 record that I considered to be - which would eventually
13 be used in a Commission or a court.

14 Q. So, in fact, your notes don't record the conversation,
15 as opposed to a general summary.

16 A. Yes, it is a general summary. It is not a detailed
17 record of a phone conversation.

18 Q. Because, in fact, it is not even a summary of the
19 conversation, as such. It is your interpretation of the
20 conversation; if I can put it that way.

21 A. That is a fair way of putting it.

22 MS PYKE: Yes, I object to the witness referring
23 To his notes, in those circumstances.

24 MR SMITH: It is a relatively contemporaneous
25 record of the conversation, albeit in summary form. It
26 is appropriate that the witness be, in order to give his
27 evidence about the conversation, able to refresh his
28 memory, when he needs to, from the summary.

29 COMSR: I haven't seen the book.
30 It is a record that a conversation took place, I
31 understand, on that day, and the topics of conversation?

32 MR SMITH: I will ask the witness.

33 XN

34 Q. Is it the case, that the various topics discussed, or at
35 least some of them are canvassed in the note.

36 A. At least some of them. Others, because it was a - I
37 wouldn't say heated, but it was a vigorous discussion

- 1 between Dr Fergie and I, other aspects of that
2 conversation are ones that are very clear in my mind,
3 even today.
- 4 MS PYKE: I still continue my objection. It
5 doesn't purport to be the conversation as opposed to the
6 witness's views of matters.
- 7 COMSR: In view of the fact that the witness is
8 claiming to have a very clear recollection of it -
- 9 MR SMITH: Let's forge on with the conversation and
10 see how we go.
- 11 XN
- 12 Q. Just put the notebook aside then, for the moment; first
13 of all, it was on the phone in your office, was it.
- 14 A. No, I was in another office. The phone rang and I
15 simply answered it. It was actually the phone of Mrs
16 Kate Allport, a colleague at the museum. I answered her
17 phone and it was Deane - Dr Fergie on the other end of
18 that phone.
- 19 Q. Does at least the date in your - it is your journal,
20 isn't it.
- 21 A. That's right.
- 22 Q. Does that correctly record the date of the conversation.
- 23 A. That's right.
- 24 MR SMITH: I take it you have no objection to the
25 witness referring to it, to give us the dates?
- 26 COMSR: For the purposes of telling us the date,
27 no.
- 28 XN
- 29 Q. Can you give us the date.
- 30 A. 11 July 1994.
- 31 Q. Can you take it slowly as you like; tell us what was
32 said in the conversation.
- 33 A. That was the first conversation that I had had with Dr
34 Fergie on any aspect of the Hindmarsh Island issue. I
35 put it to her that I thought that it was actually a poor
36 claim; that I didn't believe in the existence of the
37 women's business, as it had been - could be gleaned from
38 the media. So, that was the - that was, sort of, the

- 1 opening part of the conversation.
- 2 Q. Interrupting you there; were you aware, at that time,
3 that Dr Fergie was involved, if I can use that word.
- 4 A. My memory of exactly when I heard that Dr Fergie was
5 involved is not that clear to me. But I believe that it
6 was some days before that conversation.
- 7 Q. That you learnt that.
- 8 A. That I learnt that Dr Fergie was involved.
- 9 Q. What then was said between you: you made your position
10 clear about women's business.
- 11 A. Yes, I gave her reasons, you know, based on my own
12 knowledge of the ethnography; my own field work:
13 Reasons which I considered meant that there could not be
14 women's business, as had been reported in the media.
- 15 MS PYKE: This is purportedly the conversation.
16 Perhaps if we can get it into the I said/she said?
- 17 A. Okay. However, Dr Fergie believed that -
- 18 COMSR
- 19 Q. Did she say something.
- 20 A. Yes, okay. Dr Fergie - first of all, I put to Dr Fergie
21 a similar explanation that I had already put to Mr Steve
22 Hemming, and that was talking, once again, about
23 invention of tradition.
- 24 MS PYKE: Again, can we try and have the
25 conversation, as it unfolded?
- 26 COMSR
- 27 Q. Yes, are you able to put it 'I said', 'she said', in
28 that form.
- 29 A. I will try. I said that the women's business, as it
30 relates to Hindmarsh Island, was an invention of
31 tradition. Dr Fergie conceded that -
- 32 Q. What did she say.
- 33 A. She said that it was a possibility that some aspects of
34 the women's business were an invention of tradition, but
35 she said that she was aware of the literature that I was
36 referring to. However, she said that she believed that
37 there was still some basis to the women's business. She
38 also considered, she said, that she had 35 women who

1 believed in it. Therefore, it had a validity that she,
2 as an anthropologist, had to recognise. I argued and
3 said to her that nothing like the women's business had
4 been recorded in the literature, the ethnographic and
5 historic literature, relating to the Lower Murray area.
6 She said that she would have expected that it would have
7 been. She had the view that not much work had been done
8 in the region. I argued that it is a very heavily
9 worked region and I offered the names of Meyer, Taplin,
10 Brown, Tindale, Berndt. She came back with the fact
11 that none of those people - and, in particular, I also
12 had mentioned Allison Harvey and a few women who had
13 worked in the region - she came back with the statement
14 that, in her opinion, they hadn't been working in the
15 feminist anthropological tradition and, therefore, she
16 didn't consider that she needed to refer to those works
17 in any major way in order to do the work that she was or
18 had just done in relation to women's business on
19 Hindmarsh Island.

20 XN

21 Q. Was there conversation between the two of you about
22 confrontational issues and that sort of thing.

23 A. Yes, in part of the conversation, when we were talking
24 about invention of tradition, it was - I put forward the
25 view that -

26 MS PYKE: Again, can we have 'I said'?

27 A. I said that it was my opinion that, although identity
28 building and changing culture does take place, that I
29 was not comfortable that it was coming about through a
30 development, basically a development issue. She came
31 back with the comment that this type of identity
32 building often does occur in such confrontational issues
33 as a part of the process of confrontation over such
34 things as development sites. So she was still adhering
35 to her position that she was working on, in her opinion,
36 an authentic tradition.

37 XN

38 Q. Apart from women's business, was there talk between you

1 about women's issues.

2 A. We never got to the point in the discussion of defining
3 secret sacred women's business, or women's business,
4 although I had put forward a model of the Central
5 Australian influence upon Doreen Kartinyeri and
6 mentioned to her the influences that Doreen had on her
7 through her extensive connections with people from the
8 Ooldea west coast region of South Australia. She
9 dismissed that view that there was a Central Australian
10 influence involved. And my reason for introducing that
11 fact, and I told Deane, was that it was my opinion that
12 the definition that Doreen was using of women's business
13 was an importation from Central Australia. She rejected
14 that idea.

15 COMSR

16 Q. So, again, there was a difference of professional
17 opinion, was there.

18 A. We had a - yes, a difference. It was a professional
19 difference, yes.

20 XN

21 Q. Was there a discussion about the topic of consultation
22 and the breadth of consultation.

23 A. Yes, I was trying to get as much information out of her
24 in terms of who were the 35 women and who they
25 represented and I offered a number of names to her, as a
26 way of trying to find out who the 35 women that she had
27 just spoken of to me were. And I offered some names, a
28 couple of which, from memory, she confirmed were there.
29 Others she couldn't remember.

30 CONTINUED

- 1 Q. Was there also any conversation between you about
2 methodology, anthropological methodology, in terms of -
3 A. I've already mentioned the part of the conversation
4 where we were talking about other people who had worked
5 in the area. She told me that, you know, she - it
6 wasn't important to her work to do the level of
7 historical work that I was suggesting.
- 8 Q. In connection with methodology, was the topic of broad
9 consultation discussed.
- 10 A. I offered a few names to her of people that I
11 considered, through my field work, would be considered
12 by other Ngarrindjeri people to be knowledgeable on
13 things to do with mythological and what is often
14 described as 'old people's culture', the culture of the
15 old people.
- 16 Q. What was her response to that.
- 17 A. There was - from memory, there was no response one way
18 or another.
- 19 Q. What names did you provide, do you remember.
- 20 A. I remember a few of the names. The name of one person
21 would have been the person in the Commission we are
22 calling the daughter of Pinkie Mack. Another name I
23 offered was Dulcie Wilson, another name was Bertha
24 Gollan, and I would be guessing if I added other names
25 to that list.
- 26 OBJECTION Miss Pyke objects.
- 27 Q. Do your notes record the names.
- 28 A. No, they don't.
- 29 Q. Did Dr Fergie respond to you with any names.
- 30 A. No. I was - well, in the sense that I was exploring who
31 the main women were, I receive names such as Maggie
32 Jacobs and Connie Roberts and Doreen, of course - and
33 other names weren't given. She obviously didn't have
34 the list in front of her and she was not expecting to
35 speak to me.
- 36 Q. Can you remember then anything else that was spoken of
37 between you on this topic.
- 38 A. As I'm sitting here, no.

CJ 6D

P.A. CLARKE XN
VOIR DIRE (MS PYKE)
VOIR DIRE (MR ABBOTT)

1 Q. If you were to look at your notes that we have had a
2 discussion about, would that help you or at least alert
3 you to any other topics that you haven't mentioned.

4 A. I will have a quick look.

5 Q. Don't do that yet, not yet. But can you tell me whether
6 that may refresh your memory as to other topics at
7 least.

8 A. It might.

9 Q. So, do you ask Madam Commissioner's permission to refer
10 to your notes just for that purpose; that is, to remind
11 you if there are any other topics noted that you haven't
12 explored.

13 A. All right.

14 MS PYKE: I maintain my objection and I might ask
15 a question.

16 MS PYKE ON VOIR DIRE

17 Q. Have you recently looked at those notes.

18 A. I haven't looked at them probably for a week or more.

19 MS PYKE: I maintain my objection.

20 MR ABBOTT ON VOIR DIRE

21 Q. You have now exhausted your memory of topics that you
22 questioned in your discussion with Dr Fergie and that is
23 why want to refresh your memory at present.

24 A. That's correct.

25 Q. As I understand your notes, they contain if not word for
26 word, then at least a number of topics that you noted
27 down at or about the time of your discussions with Dr
28 Fergie.

29 A. That's correct.

30 Q. It's those list of topics that you now want to refer to
31 for the purpose of refreshing your memory.

32 A. That's correct.

33 MR ABBOTT: I submit that he ought to be allowed.

34 COMSR: The witness may look at his notes simply
35 for the purpose of refreshing his memory as to this
36 topic. Mr Clarke, you have leave to refer to your
37 notes.

CJ 6D 254

P.A. CLARKE XN

1 PERMISSION TO REFER TO NOTES

1 XN

2 Q. Have a quiet look through them. Perhaps if I give you a
3 hand. First of all, is there a mention of `court' as a
4 topic.

5 A. Yes, there is mention of a `court'.

6 Q. Tell us what was said between you about that.

7 A. Just that it was expected that there would be - am I
8 allowed to look at my notebook again?

9 COMSR

10 Q. I understand your notebook only assists you to this
11 extent - and I may be wrong as I haven't seen it - that
12 it refreshed your memory as to the topic, but not the
13 content of the conversation.

14 A. That's right.

15 XN

16 Q. There is a note in your notebook, isn't there, about the
17 topic of `court'.

18 A. Yes.

19 Q. There is a note, albeit in summary form, of what was
20 said by Dr Fergie about that, isn't there.

21 A. That's right.

22 Q. Do you ask Madam Commissioner's permission just to look
23 at the note to refresh your memory as to what she said,
24 albeit that you recorded it in a summary form about
25 `court'.

26 A. Okay.

27 Q. Do you.

28 A. Yes.

29 PERMISSION TO REFER TO NOTES

30 COMSR: Again, subject to the same query that I
31 made before, Mr Smith, we are not in any danger in
32 pursuing this line of prejudicing anything in the
33 Federal Court proceedings?

34 MR SMITH: I do hope not.

35 COMSR: I think there had better be more than
36 `hope not'.

37 MR SMITH: All we are doing is traversing the
38 subject matter. If anyone wants to contend to the

1 contrary, we are doing no more than that. This does not
2 encroach on any of the subject matter of the Federal
3 Court hearing because the Federal Court hearing was to
4 do with the administrative efficacy of the exercise of
5 power of the Minister. The question of the
6 anthropological support for women's business, secret
7 sacred women's business, was not at the heart of
8 anything that went on in the Federal Court.

9 Q. Can you tell us what was said between you and Dr Fergie
10 about the question of 'court'.

11 A. Yes. Dr Fergie was concerned that the matter was going
12 to end up in court.

13 OBJECTION Ms Pyke objects to the witness not
14 giving the actual conversation had.

15 WITNESS: Can I read it out?

16 COMSR

17 Q. That is to refresh your memory, and I take it that that
18 is half the conversation, that is what Dr Fergie had to
19 say.

20 A. That's right. She was concerned that the matter -

21 Q. Did she say something.

22 A. Yes. She said that she was concerned that the Hindmarsh
23 Island Bridge matter was going to end up in court:
24 Chapmans versus the Government.

25 XN

26 Q. Was there any conversation about the question of sites.

27 A. Yes.

28 MS NELSON: I wonder whether we are not perhaps now
29 getting into an area that could conceivably offend
30 against s.35? I'm looking at Dr Clarke's statement and,
31 on the face of it, it seems to me that there is at least
32 an argument that this particular issue may well fall
33 within the ambit of that section.

34 COMSR: If it does, as I have indicated, I
35 intend to err on the side of caution.

36 MR SMITH: I think we can leave that until the end
37 rather than to do anything drastic at the moment and I
38 will withdraw the question for the time being.

1 QUESTION WITHDRAWN

2 COMSR: I should explain that if it does, there
3 is an absolute prohibition, as it were, on the
4 divulgence of that information except to persons whom
5 are permitted to be in the court hearing. So that I
6 would have no authority to permit that to be canvassed
7 at this stage in the court.

8 XN

9 Q. You have told us of the question of the discussion
10 between you about the re-invention of tradition. There
11 was, was there not, a discussion on the topic of the
12 definition of tradition as you were discussion it with
13 her.

14 A. Yes.

15 Q. What was said about that.

16 A. I was - I was talking about problems. I said there were
17 problems with the definition of tradition. Essentially,
18 there's tradition that is spoken of particularly by
19 Aboriginal people, but others in general, as if it's a
20 40,000 years of continuous history, and then there's
21 tradition that is of more recent origin and constantly
22 changing.

23 MR SMITH: There is a potential area there, but I
24 think I'll come back to that on another occasion with Dr
25 Clarke with some other topics in the same area which I
26 will canvas with him. Therefore, drastic measures such
27 as closing the court won't be necessary.

28 Q. Apart from further refreshment of memory from your
29 notes, is there nothing more you can remember about that
30 conversation.

31 A. If the topic of sites is to be picked up later on, then
32 the answer is no. There is nothing else at this stage
33 that I can remember.

34 Q. I think in all the stages of the Hindmarsh Island
35 dispute, as you knew it, you were not consulted by any
36 person in relation to the development; that is, the
37 developments on Hindmarsh Island itself and the
38 construction of the bridge.

- 1 A. If you are talking about the whole issue from its very
2 origins, I was consulted probably circa 1990 by Rod
3 Lucas. Around about that time, Suzie Hutchins, who was
4 in the Aboriginal Heritage Branch, had also contacted me
5 about development issues on Hindmarsh Island in a
6 general sense. They were official to the extent that
7 they had approached the Museum and they were working in
8 an official capacity and requiring data from someone in
9 the Museum with that expertise. In terms of the more
10 recent part of the Hindmarsh Island, Hindmarsh Island
11 issue, there were no official attempts or requests for
12 information from people acting in an official capacity.
- 13 Q. Save for the visits that you have told us about
14 yesterday from Aboriginal groups.
- 15 A. Yes. Although they were somewhat informal, there was
16 never any paperwork. After the - after July of that
17 year, there was an approach by Dr Neale Draper.
- 18 Q. That was to you personally, was it.
- 19 A. As an - initially, a phone call to our head of division,
20 a phone call from Dr Draper to the head of division,
21 Philip Jones.
- 22 Q. Then, as to your contact with Draper, what form did that
23 take.
- 24 A. Out of the conversation between Dr Draper and Mr Jones,
25 some time later in August, I do have the diary notes for
26 the actual dates, but some time later in August.
- 27 Q. So, you can help us with the date by reference to your
28 diary.
- 29 A. That's right.
- 30 Q. Looking at MFI 8.
- 31 A. Sorry, you said `diary', I meant notebook which I have
32 behind me here.
- 33 Q. That is the notebook you have. Do you ask Madam
34 Commissioner's permission to refresh your memory as to
35 the date at least.
- 36 A. Yes, I do.
- 37 PERMISSION TO REFER TO NOTES
- 38 Q. Have a look at 31 August 1994.

- 1 MS NELSON: Whilst the witness is looking at the
2 notebook, he has now been asked on more than one
3 occasion to refresh his memory from it and I ask that it
4 be marked for identification.
- 5 MR SMITH: I will do that at the end.
- 6 A. The phone call between Draper and Jones was on 9 August
7 1994. The actual visit by Dr Draper to the Museum when
8 he saw me, that was followed up by a couple of other
9 days closely following it. The first day that Dr Draper
10 came in was 31 August 1994.
- 11 Q. Did he do some work in your presence.
- 12 A. He initially came and talked to me and then I took him
13 into the room where we are storing the Tindale Journals
14 and he commenced work mainly with the, what we call,
15 `camp site journals' of Norman B. Tindale.
- 16 Q. Did you speak with Dr Draper about the purpose of his
17 visit.
- 18 A. Yes. I did speak to him and he told me that he was, he
19 said that -
- 20 OBJECTION Ms Pyke objects to this evidence being
21 given on the basis that Dr Draper is not
22 going to be a witness in these
23 proceedings.
- 24 MR SMITH: That is not necessarily so. Madam
25 Commissioner, I undertake to convey this to Mr Steele
26 who represents Dr Draper.
- 27 COMSR: You undertake to convey what?
- 28 MR SMITH: This topic of evidence I'll convey to Mr
29 Steele who represents Dr Draper.
- 30 COMSR: I don't know if that is the concern.
- 31 MS PYKE: It seems to me we are getting evidence
32 of conversations with people who are not part of the
33 proceedings and it would be, ordinarily, hearsay and not
34 relevant to this.
- 35 MR ABBOTT: It has got to be. I rise to protest
36 against that. It is absolute nonsense if we cannot have
37 the discussions of what took place between people
38 because Doreen Kartinyeri has decided not to turn up to

1 this Royal Commission. This would make a nonsense of
2 the whole Royal Commission.

3 COMSR: The rules of evidence do not apply
4 strictly in this Commission. No doubt you will address
5 me on the weight of certain matters. There is no reason
6 why I can't receive the evidence.

7 OBJECTION OVERRULED

8 XN

9 Q. What did Dr Draper say to you; what was the purpose of
10 his visit, if he said anything.

11 A. Dr Draper said that he was getting material for his
12 report, archaeological report, on Hindmarsh Island.

13 Q. Did you see what he investigated when he came into the
14 Museum.

15 A. As I have already said, it was mainly the camp site
16 journals, the archaeological journal of Norman B.
17 Tindale. He also took a copy of my thesis and
18 photocopied at least some sections from that thesis.

19 Q. Did you otherwise speak to him.

20 A. I spoke to him for somewhere between half an hour and an
21 hour.

22 Q. Again, did you - I'm loath to mention this, did you note
23 this conversation in your diary.

24 A. Yes, I did - sorry, my notebook.

25 Q. In your notebook.

26 A. Yes.

27 Q. In the same way which you noted the conversation with Dr
28 Fergie.

29 A. Yes.

30 Q. Do you have a recollection, however, of what was said.

31 A. It was mainly a one-sided conversation. He spoke of
32 townships, Aboriginal townships, that he had discovered
33 in the Goolwa area.

34 CONTINUED

1 He mentioned, briefly, the interaction that he had had
2 with Professor Saunders and, from my memory, that was
3 about it. It was a one-sided conversation. When I
4 tried to put forward my skepticism, he wasn't interested
5 so, therefore, he did not hear a great deal from me on
6 that topic.

7 Q. Again, can you do your best. I know this might seem
8 artificial to you, but Draper would have said things,
9 some of which you can remember, and you made a reply to
10 it. Can you tell us what that was, rather than
11 summarising it and dismissing it.

12 COMSR

13 Q. Do you have an actual recollection of the conversation,
14 any parts of it.

15 A. Just in the broader sense that I have outlined.

16 XN

17 Q. Again, you noted the conversation in the same way that
18 you did the conversation with Dr Fergie.

19 A. That's right.

20 Q. Again, at least listing topics.

21 A. That's right.

22 Q. And the conversation took place over what period of
23 time.

24 A. From half an hour to an hour.

25 Q. And would it refresh your memory if you looked at your
26 note, if only to refresh your memory as to the topics
27 that were discussed.

28 A. Yes, it would.

29 Q. You ask the Commissioner's permission to refresh your
30 memory from your notebook for that purpose.

31 A. Yes, I do.

32 PERMISSION TO REFER TO NOTES

33 Q. What page of your notebook is it.

34 A. It is volume 18, p.100.

35 Q. What was the first topic of conversation.

36 A. My notes reflect that he spoke of what he called towns
37 around Goolwa, and he put forward his view, which he
38 said was new to Aboriginal archaeology, to look at

1 Aboriginal occupation as being very intensive in that
2 region around Goolwa. So he was speaking professionally
3 and saying that he considered that - he said that there
4 were many many Aboriginal people living in the area of
5 Goolwa, roughly near the punt, and he thought that was
6 very important for the Hindmarsh Island issue.

7 Q. And what else was said.

8 COMSR

9 Q. We are not in any danger here of traversing matters that
10 require a Section 35 authorisation.

11 A. I am coming to the limits of my memory of what Dr Draper
12 said, and I don't believe there is anything that he said
13 to me at all on that occasion that would be in
14 contravention of that section.

15 XN

16 Q. What was the rest that he said to you.

17 A. He was talking about just his involvement as an
18 inspector under the Aboriginal Heritage Act in terms of
19 sorting out the dispute that occurred on the day that
20 one of the protests down at Goolwa were held. My
21 knowledge of the actual day he was referring to is not
22 good, so I won't attempt to go any further, other than
23 to say that was the topic that he was talking about.

24 Q. Can I take you to late 1994.

25 MR KENNY: At this stage, I just indicate that,
26 from the notes of Dr Clarke, there appears there is some
27 very sensitive material contained, if he is talking
28 about the last page of those notes. I ask that that not
29 be discussed in open court.

30 COMSR: I haven't seen the last page, but if we
31 are going to hear any submissions about a sensitive
32 matter that might have to be heard in private, I would
33 not propose to hear the submissions on it in public.

34 MR SMITH: I don't know whether I agree with that,
35 but out of an abundance of caution, that is actually the
36 last topic in any event.

37 COMSR: So you propose to leave it as you have
38 been previously?

- 1 MR SMITH: Would you mind if we adjourned for five
2 minutes, just to resolve the question whether it is
3 truly a Section 35 problem with my learned friend, Mr
4 Kenny, because I do not believe it is.
- 5 COMSR: I do not have a copy of the notebooks.
- 6 MR SMITH: For the time being, before taking the
7 drastic measure that obviously flows from any assertion
8 that this is a breach of Section 35, could we please
9 have a break for five minutes?
- 10 MR ABBOTT: I understood this statement had been
11 tendered as an exhibit.
- 12 MR SMITH: It is suppressed.
- 13 MR ABBOTT: I would urge you to read this section in
14 the course of the break because, if necessary, one could
15 produce newspaper accounts which refer to this very
16 topic. So we can show, if necessary, it is a matter
17 already in the public domain.
- 18 ADJOURNED 3.27 P.M.
- 19 RESUMING 3.37 P.M.
- 20 MR SMITH: I suggest we adjourn until 10, the
21 question of whether this forthcoming topic being in the
22 public arena could possibly amount to a breach of
23 Section 35 to see if it can be resolved before then. It
24 has been suggested to me that, out of an abundance of
25 caution, you should order the suppression of a small
26 part of this witness's evidence as to Goolwa town sites
27 mentioned to him by Mr Draper.
- 28 COMSR: Suppressed from publication, you mean?
- 29 MR SMITH: Yes.
- 30 COMSR: I will suppress from publication that
31 portion of this witness's evidence which deals with the
32 topic of town sites near Goolwa.
- 33 MS PYKE: The township site near Goolwa and the
34 punt.
- 35 COMSR: Near Goolwa and the punt. It is a
36 matter that will have to be resolved clearly. I am the
37 one who exercises an abundance of caution, too, when
38 these matters have to be dealt with.

RF 6E

P.A. CLARKE XN

- 1 MR SMITH: Perhaps the witness's notes ought to be
- 2 at least marked for identification.
- 3 COMSR
- 4 Q. Do they go in chronological order at all.
- 5 A. Yes, they are in chronological order.
- 6 MFI 9 Dr Clarke's field notebook, volume 17,
- 7 marked 9 for identification.
- 8 MFI 10 Dr Clarke's field notebook, volume 18,
- 9 marked 10 for identification.
- 10 ADJOURNED 3.40 P.M. TO FRIDAY, 4 AUGUST 1995 AT 10 A.M.

1 COMSR STEVENS

2

3 ROYAL COMMISSION INTO THE HINDMARSH ISLAND BRIDGE

4

5 MONDAY, 7 AUGUST 1995

6

7 RESUMING 10.06 A.M.

8 MR ABBOTT: Madam Commissioner, I'm able to announce

9 that we now act for in excess of ten Ngarrindjeri women.

10 We have provided statements to counsel assisting from, I

11 understand, nine of them already and we have, I think,

12 at least two more statements, two more women to come.

13 There are other Ngarrindjeri women who have indicated

14 and expressed an interest - and I put it no higher than

15 that - in coming to this Commission and giving evidence.

16 I don't propose to name the additional people for whom I

17 act at this stage, except to say that the names have

18 been communicated to counsel assisting and I don't think

19 it's an appropriate time to announce the names of those

20 women. I will leave that until the

21 appropriate time arrives.

1 WITNESS P.A. CLARKE CONTINUING

2 EXAMINATION BY MR SMITH

3 Q. I start by merely reminding you that you are still on
4 oath. I take you back to your conversation with Dr
5 Deane Fergie on 11 July 1994. You were refreshing your
6 memory from your note on that as you were giving
7 evidence.

8 A. That's right.

9 Q. You provided, you said, to Dr Fergie a long list of both
10 male and female researchers who had worked in the Lower
11 Murray; that's so, isn't it.

12 A. That's correct.

13 Q. Dr Fergie's response to that, according to you, was
14 that: 'Since none of them had worked within the
15 feminist anthropological tradition, they were not
16 crucial to the issue of whether women's business existed
17 in the Lower Murray'.

18 A. That's correct.

19 Q. Do you have an understanding of what the 'feminist
20 anthropological tradition' is.

21 A. In its broader sense, it would be a methodology where
22 by someone investigating an ethnographic situation
23 would, be sensitive towards issues of gender. In its
24 more narrowly defined sense, it could possibly mean
25 other things in terms of the more recent literature. In
26 its broadest sense, people such as Catherine Berndt
27 would be considered to have been early feminist
28 anthropologists.

29 Q. Of the list, or what you have described as the long list
30 of both male and female researchers who had worked in
31 the Lower Murray, was Catherine Berndt included in that.

32 A. That's right.

33 Q. Any other female researchers.

34 A. Alison Harvey. That is someone who I would have
35 mentioned. Jane Jacobs, if I broadened out the list of
36 researchers to anthropologists and cultural geologists.

37

38

- 1 OBJECTION Mr Miss Pyke objects on the ground
2 that the witness has not stated that he
3 would have mentioned Jane Jacobs.
- 4 WITNESS: Yes, I would have mentioned Jane Jacobs,
5 yes.
- 6 COMSR:
- 7 Q. Do you recall whether you did or didn't mention Jane.
8 A. Yes, I do recall mentioning Jane Jacobs, and I also
9 recall mentioning Faye Gale.
- 10 XN
- 11 Q. Your recollection is that there were four people:
12 Alison Harvey, Jane Jacobs, Catherine Berndt and Faye
13 Gale.
- 14 A. That's right.
- 15 Q. And who is the pre-eminent of those.
- 16 A. Kathering Berndt.
- 17 Q. Is Catherine Berndt regarded as a feminist
18 anthropologist.
- 19 A. No. In the broadest sense, I would certainly regard her
20 as a feminist anthropologist; that is, an anthropologist
21 who is looking specifically at gender relations in
22 Aboriginal culture.
- 23 Q. Can you tell us if your knowledge of the literature in
24 the area and the commentators on the area, whether she
25 is so regarded by other anthropologists.
- 26 A. Yes. Well, she was highly regarded enough in the
27 feminist anthropological tradition to be asked to put in
28 a chapter in the Aboriginal, or the `Woman's Rites and
29 Sites' volume edited by Peggy Brock. She is an author
30 in that volume.
- 31 Q. Looking at this text produced to you, is that the text
32 book you have just mentioned.
- 33 A. Yes, it is.
- 34 Q. What is the nature of that text book exactly.
- 35 A. This book grew from a report that was commissioned to
36 look into Aboriginal women's issues in relation to
37 Aboriginal heritage in South Australia.
- 38 Q. As to contributors, how many are there.

- 1 A. There are about four or five or six contributors.
2 Q. Including.
3 A. Catherine Berndt in chapter one, and there are six other
4 contributors.
5 Q. I think the introduction, or foreword, is there written
6 by Jane Jacobs.
7 A. No. Jane Jacobs has written chapter five entitled
8 'Women Talking Up Big'. The first chapter is written by
9 Catherine Berndt.
10 Q. I think Catherine Berndt is acknowledged by such people
11 as Jane Jacobs as being a feminist anthropologist.
12 A. Yes.
13 Q. In that volume, in particular at p.81, is that right.
14 A. That's correct.
15 EXHIBIT 11 Book entitled 'Women Rites and Sites'
16 edited by Peggy Brock, published in
17 1989, tendered by Mr Smith. Admitted.
18 Q. Can I take you to another topic altogether now: The
19 question of methodology in connection with reporting,
20 for instance, or advising in respect of Aboriginal links
21 to land. Can you tell us what the anthropological
22 methodology for advising in such an area would be.
23 COMSR: Before we proceed any further, we are
24 not in danger of intruding into any area where we should
25 be careful?
26 MR SMITH: Well, Madam Commissioner, the Federal
27 Court proceedings infringement are you thinking of?
28 COMSR: No, I was thinking of s.35 actually, but
29 the Federal Court proceedings as well.
30 MR SMITH: Not yet. I will flag that when we come
31 to it.
32 Q. So, do I need to repeat the question.
33 A. If I've got the question correct, you want know an
34 outline, a methodology, for writing a report on
35 Aboriginal links to land?
36 Q. Yes. In a general way, what are the sorts of things you
37 would give attention to.
38 A. In a very brief way, I would start by discussing what is

1 the report or the assessments actually directed at that
2 would bring in straight away any key concepts which will
3 be dealt with in the report. That introductory part of
4 the report would also discuss any of the Aboriginal
5 groups involved and who was funding the report, who the
6 target audience for the report would be. Then, would go
7 into a bit more detail describing in more detail who the
8 Aboriginal people involved in the target publication of
9 the report. So, by that, I mean just describing briefly
10 their history in terms of any aspect of their history
11 that would have shaped them in the present. It would
12 include a rough demography where people were living and
13 why they were living in such places. In terms of what
14 it is the reports are aiming at, there would then need
15 to be a discussion on the transfer or knowledge within
16 that community, which may mean describing family and
17 sort of broader political structures in the community,
18 and would ultimately - particularly if it was a land
19 claim type of report - would need extensive geniality to
20 demonstrate how certain information is being
21 transferred, you know, within that community. So, there
22 would need to be a reasonable introduction, and part of
23 that would be framing the reason for the report within
24 the literature. For example, a report involving the
25 Central Australian area would need to refer to key
26 seminal works that relate to various aspects that the
27 report would touch upon. So, the report would have to
28 place itself somewhere in the literature. Once that is
29 done, you would get into, you know, the main
30 ethnographic part of the report. Depending on what the
31 report is I'm aiming to achieve, there would be many
32 ways of doing that, but you would prepare, you know, the
33 body of the ethnographic information which -

34 Q. Could I interrupt you there. You mentioned the
35 literature. For instance, if you were doing a report
36 relating to - did you say Central Australia.

37 A. Yes. You would then look for the anthropological
38 literature that related to the Central Australian

1 region.

2 Q. Would that be to identify, for instance, a model or a
3 structure from which you could -

4 A. Yes. That literature would come with, well, several
5 models. There would be one model which would be
6 relevant to the report and the writer of the report
7 would need to recognise that and be aware of possible
8 discrepancies that their own data may bring out at the
9 same time for the other areas that literature would
10 reinforce. The literature would need to be addressed in
11 order to strengthen the outcomes of the report.

12 Q. Just to descend from the general into the particular for
13 the moment. In respect of this particular inquiry, if
14 the model threw up, that is the discretion of the
15 literature and the establishing of the model of the
16 culture threw up, no secret sacred women's business,
17 then that would cause some concern to the reporter,
18 would it.

19 A. That's right. It would have to be flagged as a major
20 discrepancy and the writer of the report would then be
21 obliged to account for that discrepancy; and there may
22 need to be new or different data added to the report in
23 order to support a new model that the writer would be
24 putting forward.

25 Q. That's the way that you -

26 A. I was, I hadn't got to the end of the report which would
27 be a summary of the findings. And, at that stage, once
28 again, one would have to draw attention to departures
29 from the literature and at the end of that process come
30 out with recommendations and the outcome of the report.
31 The report would also, should have by way of an
32 appendices a list of people consulted, a reasonable
33 bibliography, including both ethnographic sources and
34 sources of anthropological strategies and methodology.
35 And the report should make it clear whether there's been
36 some form of peer review, or at least certain aspects of
37 the report having been discussed with other
38 anthropologists who would have expertise with various

1 parts of that report. So, that is as a general model.
2 Of course, that could be modified to varying degrees in
3 terms of what is actually, you know, the report's trying
4 to achieve. But, in general, that would be a scholarly
5 approach to an anthropological problem.

6 Q. Where one of the dominant elements of the report was
7 concerned with the conveyance of knowledge from
8 Aboriginal persons to the reporter, does your
9 methodology include any care to be taken in terms of who
10 it is that is conveying the knowledge and the question
11 of presentation, if you like.

12 A. Well, one, an anthropologist doing such a research would
13 have to be very critical of all sources of their
14 information. So, naturally, they wouldn't rely on just
15 one or two informants. There would have to be a process
16 whereby the researcher investigated all the possible
17 variations that may occur within the target community in
18 terms of what the information that is relevant, what the
19 variation is within that information. So, if there are
20 several different schools of thought on a particular
21 issue that the report's addressing, then there has to be
22 some sort of explanation - even if it's background
23 research - that goes some way towards explaining why
24 there are different opinions on the information from the
25 side of the Aboriginal informants. Part of that may
26 well be contacting other anthropologists with other
27 experience with that community to try to develop a model
28 that explained differences of opinion that may present
29 themselves after interviewing quite a wide range of
30 informants.

31 CONTINUED

- 1 Q. Do traditional owners, bearing in mind that there is
2 linkages with land that are being reported upon, is it
3 necessary to establish some contact with traditional
4 owners.
- 5 A. It would be. For many parts of the Australia within the
6 community, there is quite strong - within the Aboriginal
7 community, there is quite strong notions of particular
8 groups within that community that have more rights to
9 speak for certain land, certain mythological traditions.
10 In terms of more heavily settled parts of Australia,
11 there are still anthropological records, such as the
12 ones that the museum holds, which still indicate
13 possible traditional owners in the present-day
14 community. So, there is an archival source of
15 establishing traditional owners and there is a
16 contemporary field work of establishing those
17 traditional owners.
- 18 Q. Looking at the text book, now before you, Exhibit 11,
19 which has just been tendered, on p.16 of that text book,
20 that is part of an article, is it not, written by, can
21 you tell us.
- 22 A. Catherine Berndt.
- 23 Q. If we go to p.16, about .6, the topic being discussed
24 there, by Catherine Berndt, is oral tradition, is it
25 not.
- 26 A. That's correct.
- 27 Q. At .6, Catherine Berndt makes a point about seeking
28 information about cultural knowledge, doesn't she.
- 29 A. That's correct.
- 30 Q. Would you read that paragraph into the record.
- 31 A. I am quoting 'In seeking information about cultural
32 knowledge in these circumstances, it is, of course, not
33 enough to choose an Aboriginal person or a woman. That
34 is likely to be a surface or bandaid measure defeating
35 the purpose of such an inquiry.'
- 36 Q. And that is the end of the quote.
- 37 A. That is the end of that quote.
- 38 Q. That is the end of that paragraph and, of course, that

- 1 has to be read in context; but, can you tell us what you
2 understand to be the meaning of that: what is Catherine
3 Berndt telling us there.
- 4 A. I interpret it as meaning that, between doing field
5 work, one would have to be very rigorous in being
6 critical of all of the data that they are receiving. I
7 think, in today's circumstances, whereby the media,
8 whether it be published works or videos or TV, radio,
9 carries an enormous load of cultural knowledge.
10 Therefore, one would have to try and work out what the
11 basis of the cultural knowledge that an anthropologist
12 would be receiving, whether it is information that has
13 come through a particular line in the community, or
14 whether it is information that has possibly filtered in
15 from nonAboriginal sources.
- 16 Q. Are you there then drawing - indicating that it is
17 necessary to identify, what, contemporary political
18 impetus.
- 19 A. That's correct. Catherine Berndt also talks on this
20 page about internal checks and sanctions on information.
21 So, what she is saying is that one would have to fully
22 explore the circumstances which produce the cultural
23 knowledge. It is not enough just to receive the facts
24 of that knowledge and then to report on them.
- 25 Q. Would that be particularly the case, if the cultural
26 knowledge that is being received did not fit in with the
27 model that had been identified in the literature as
28 appropriate to that culture.
- 29 A. Yes, that's correct. An anthropologist, from whatever
30 part of that wide discipline, would have to come to
31 terms with the sociopolitical factors that produce that
32 knowledge.
- 33 Q. And genealogies have a part to play in that, that proper
34 compilation of the report.
- 35 A. Genealogies and also lists of people that have been
36 living on certain parts of the landscape. So, getting
37 an idea of the demography, at large, but genealogies
38 being a big part of that, as a way of demonstrating the

1 connectedness between some informants.

2 Q. If you were driven to report on a matter quickly and
3 without, say, an ideal amount of time to do a thorough
4 job, what would an anthropologist do, short of not
5 reporting, at all, of course, assuming that.

6 A. Yes, if I have found myself having to do a report, in an
7 area where I had not actively done field work, I would
8 try to, as quickly as possible, build a bibliography
9 that - which included historical and ethnographic
10 sources. So, I would try to quickly build a model of
11 who the people that I would be reporting on were. I
12 would also get on the phone and contact other
13 anthropologists, who have worked in that general area -
14 geographical area. If the report was based on a
15 particular part of the function of that community, then
16 I could also contact people who are - who have expertise
17 in particular aspects of the community, as well, but in
18 a sort of broad sense. I would be reluctant to do such
19 a report without having at least time to do that. There
20 would always be the risk of overlooking significant
21 pieces of literature that pretty well already covered
22 the scope of the report.

23 Q. Would you do what lawyers often do, couch the report in
24 terms of having a reservation, if you felt you hadn't
25 had enough time to do justice to the brief.

26 A. Yes, I think, the longer you would have to do the
27 report, perhaps the more game you could be, in terms of
28 feeling confident. If some of the findings of the
29 report were going to greatly challenge the existing
30 literature, I would also, once the report had been
31 completed, be wanting at least parts of it to be run
32 through by other colleagues in the area, even if it was
33 a matter of just getting them on the phone and running
34 some of the findings through.

35 Q. Looking at Exhibit 5, the report of Dr Deane Fergie,
36 dated 4 February 1994, now before you; we are not going
37 to go into any detail here, but you have read that
38 report.

1 A. That's correct.

2 Q. And considered it.

3 A. That's correct.

4 Q. I think you told us, the last time you gave evidence,
5 that you disagree with much of that report.

6 A. That's right.

7 Q. I think you have also considered the - over the last few
8 days or more, the statement of your colleague, Mr Steven
9 Hemming, in the same way.

10 A. That's correct.

11 Q. Does the same comment apply; that you have disagreement
12 with some of what Mr Hemming has said, in his statement
13 of evidence.

14 A. That's correct.

15 Q. I think you have also had occasion to consider, in the
16 last week, or so, the report of Professor Cheryl
17 Saunders, dated in July of 1994.

18 MR ABBOTT: 7 July.

19 XN

20 Q. 7 July.

21 A. There are parts of that report that I have read. I have
22 not seen the whole report.

23 MR SMITH: There is one more topic I want to raise
24 in chief, as it were, with this witness which encroaches
25 into the area of women's business and brings into play
26 problems with s.35.

27 COMSR: I have to consider the ambit of my
28 authorisation, under s.35 of the Aboriginal Heritage
29 Act, and who can be permitted to remain at a hearing,
30 while this evidence is being canvassed?

31 MR SMITH: Yes, and I would be suggesting that you
32 should close the hearing, on the same basis as you did
33 before. And perhaps I could indicate for you and for
34 those present who may not be able to be present during
35 the next section of evidence, that this will be a short
36 topic of evidence and that, as I understand it, Ms
37 Nelson will commence cross-examination, at the finish of
38 Dr Clarke's evidence, and much of her cross-examination,

1 at least the commencement of it, will not involve
2 problems of s.35. So that the hearing room will not
3 necessarily have to be closed, for any great length of
4 time.

5 COMSR: I will propose, then, having regard to
6 the terms of my authorisation, under s.35 of the
7 Aboriginal Heritage Act, to close this hearing, except
8 to those persons whom I permit to be present; and they
9 are: counsel acting for or representing parties, counsel
10 assisting, Commission staff necessarily present during
11 the hearing and, where parties are not represented,
12 there are no legal representatives here, I will see if
13 those persons should be permitted to remain at the
14 hearing. But I would ask all other persons to vacate
15 the hearing room, while this part of the evidence is
16 being dealt with.

17 Perhaps, when the others have gone out, I will hear
18 you as to whether or not you should be permitted to
19 remain in court, during this part.

20 I can see there are two ladies whom I don't identify
21 as being parties, as such, to the matter before me.

22 Is it your application that you should be permitted
23 to remain at the hearing, during this passage of the
24 evidence; the two Aboriginal ladies?

25 MS KEEF: We would sort of like to stay, if we
26 possibly could?

27 MR SMITH: Should I speak to those ladies, quietly?
28 They may feel some reticence speaking up in an open
29 hearing.

30 COMSR: It may be that there is nothing contrary
31 to Aboriginal tradition for these ladies to remain at
32 the hearing. So, you can ascertain that, if you like,
33 Mr Smith.

34 I will ask my clerk to make a list of those persons
35 who are present at the hearing during this closed
36 session today.

37 MR SMITH: One of the ladies is a Ngarrindjeri lady
38 and the other is an Aboriginal lady of another people.

1 They simply ask that they be enabled to remain and you
2 have power to allow that, if you want to.

3 COMSR: Yes, I appreciate that.

4 MR SMITH: Their interest is to that extent.

5 MS PYKE: Can I perhaps say something?

6 That Dr Fergie, my client, has just indicated that -
7 expresses some concerns about the nonNgarrindjeri woman
8 remaining present. Given the nature of the evidence
9 that may be called or may be given, that it might
10 possibly infringe on the confidentiality of the
11 Ngarrindjeri women.

12 MR ABBOTT: We also have some concerns about this
13 setting a precedent. If this is to start with a woman
14 claiming to be a Ngarrindjeri lady, then how many more
15 are we to let in? Why should others be excluded? It
16 would seem to me that your ruling is that parties,
17 counsel present, are permitted to remain and, until that
18 ruling is varied in a way that impacts upon those that
19 might want to come, that is the way it should be.

20 COMSR: Yes, Mr Abbott, the authorisation is
21 only required under circumstances where the divulgence
22 of information is contrary to Aboriginal tradition. It
23 is my understanding, I suppose, that what we are talking
24 about is the possibility does arise, as it happens, if
25 we are talking about - if there is a claim that secret
26 women's business is known only the to certain persons
27 and not to others, I suppose the possibility does arise.
28 But, here, I can't see that being the circumstance where
29 we have a male witness about to give evidence.

30 MR ABBOTT: No, I wasn't suggesting that this
31 necessarily comes - that anything could deleteriously
32 happen by that. I am wondering where you draw the line,
33 that is all.

34 COMSR: I can understand that. And I do have
35 some problem.

36 The Ngarrindjeri lady, the lady who says she is a
37 Ngarrindjeri lady, what is your name?

38 MS KEEF: My name is Pam Keef.

1 COMSR: I do have this problem, of course, when
2 I am called upon to make a decision at the hearing on
3 the spur of the moment; and that is the verification, if
4 I can put it that way. You might know that you are a
5 Ngarrindjeri lady, but I have a problem of having to
6 make a decision at a hearing on the spur of the moment,
7 when probably you have not given any thought to the
8 difficulty I am confronted with, under those
9 circumstances.

10 MR SMITH: I think the safest course, bearing in
11 mind what has happened before, where everybody was
12 excluded - and meaning no disrespect to anybody - apart
13 from counsel, legal representatives and their clients,
14 the safest course might be to follow the same course; at
15 least for the time being.

16 COMSR: Yes, I am in this difficulty; that,
17 under this particular authorisation, I have to decide
18 who should be permitted to remain and I am not in a
19 situation where I have got any verification from you
20 ladies.

21 MS PYKE: I wonder if I might comment?
22 Dr Clarke tell us that he has a substantial
23 involvement with the Ngarrindjeri community. Perhaps he
24 could comment on whether he knows this woman to be a
25 Ngarrindjeri woman?

26 MR SMITH: I think it is a problem. It has the
27 capacity of being a problem, making ad hoc exemptions,
28 Madam Commissioner, to this order.

29 MR MEYER: Could I endorse counsel assisting? I
30 think there is a straight problem in this. If people
31 are going to be represented outside of the parties,
32 there is the opportunity for representation. And, other
33 than that, I heartily agree with your Honour's comments.
34 Otherwise, we have all sorts of problems of who may
35 remain.

36 COMSR: I have the difficulty; I am reluctant to
37 ask ladies with a genuine interest to leave, but I hope
38 you appreciate that I have a difficulty.

- 1 MS KEEF: That is all right.
2 COMSR: Is there anyone else in the room who
3 isn't a party?
4 Is there a gentleman at the back there who is
5 indicating that he is not?
6 MR SMITH: Yes, Brian Martin represents Ian
7 McLachlan and you gave him leave. This is Mr Miller,
8 from Mr McLachlan's office.
9 COMSR: I don't wish to be niggly about this.
10 MR MEYER: I can verify who this man is. I have
11 met him, on a number of occasions. I recognise Mr
12 Miller as being Mr Miller. He is Mr McLachlan's
13 right-hand man and he is on Mr McLachlan's staff.
14 COMSR: Yes.
15 MS PYKE: I would object - it is not Mr McLachlan
16 - if we are going to start having proxies.
17 COMSR: Yes, that is the problem. If it were a
18 legal representative, I wouldn't have a problem, at all.
19 So, again, unfortunate though it might be, I am going to
20 have to ask you to leave.
21 MR SMITH: And that leaves one other; Philip Jones,
22 an anthropologist.
23 On the last occasion, we exempted generally
24 anthropologists who are giving evidence.
25 COMSR: Was that subject to a written
26 undertaking as to confidentiality being obtained from
27 the anthropologist?
28 MR SMITH: It was. And we have obtained one from
29 Mr Jones.
30 COMSR: As no counsel wishes to be heard about
31 that permitted exception, Mr Jones will be permitted to
32 remain in court.
33 We have a full list of the persons permitted to
34 remain in court.
35 HEARING CLOSED

Closed hearing.

7.8.95

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1 COMSR: Mr Lovell, I understand you have an
2 application?

3 MR LOVELL: Yes, I appeared the other day and
4 foreshadowed an application for leave to appear and I
5 renew that application this afternoon.

6 COMSR: Leave to appear on behalf of?

7 MR LOVELL: Of Mr Kenny, a journalist who was
8 involved in some of the matters that eventually led to
9 this Royal Commission being called.

10 I understand that he will be called, or he is most
11 likely to be called as a witness. We see our position
12 as not taking a particularly active role.

13 COMSR: Except in the event that he is called as
14 a witness?

15 MR LOVELL: Yes, or through matters raised by other
16 witnesses directly involving Mr Kenny. We only seek
17 leave to that respect.

18 COMSR: Upon Mr Smith undertaking, I suppose, to
19 let you know of any matters raised during the course of
20 the hearing?

21 MR LOVELL: Yes.

22 COMSR: You have leave to appear on behalf of Mr
23 Kenny in the event that he is called as a witness to
24 give evidence in the hearing.

25 I take it that that is on the basis that Mr Kenny
26 might feel that something prejudicial could be said of
27 him, during the course of that?

28 MR LOVELL: Yes, that is so.

29 CROSS-EXAMINATION BY MS NELSON

30 Q. Your primary degree was a Bachelor of Science undertaken
31 at the University of Adelaide in which you majored in
32 botany and zoology.

33 A. That's correct.

34 Q. Putting it in simple terms, that is the study of plants
35 and the study of animals.

36 A. Yes, there was an ecological focus through both of those
37 majors. So, on a broader level, biology and ecology,
38 yes.

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- 1 Q. You completed that degree, in 1981.
2 A. That's correct.
3 Q. You would have been admitted to that degree in 1982, is
4 that right.
5 A. That would be right, yes.
6 Q. Then, in 1983, you commenced a Bachelor of Arts degree.
7 A. That's correct.
8 Q. You completed that, in 1986.
9 A. That would be right, yes.
10 Q. You said that you started work at the museum in early
11 1982.
12 A. That's correct.
13 Q. At which time you had finished your degree in botany and
14 zoology, but you had not commenced your study of
15 anthropology.
16 A. Part of my Bachelor of Science degree included one
17 subject in anthropology. So, I had - I did come to the
18 museum with some background in anthropology.
19 Q. Over how many years did that one subject -
20 A. That was one year, one subject.
21 Q. You would agree, at that stage, that your knowledge of
22 anthropology was limited by reason of that limited
23 study.
24 A. I had general knowledge, but no specific knowledge.
25 Q. You said that you worked first as a volunteer.
26 A. That's correct.
27 Q. For how long did you work as a volunteer.
28 A. That was for several months.
29 Q. What work were you doing, when you were working as a
30 volunteer.
31 A. I was going through a collection of artefacts that was
32 or had never been put in order and I was sorting out,
33 initially, categories of objects, such as weapons, into
34 a taxonomic system.
35 Q. Were they Aboriginal artefacts.
36 A. That's correct.
37 Q. Belonging to which community, if any.
38 A. It was cross cutting. It was categories of objects

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1 covering the whole of Australia.

2 Q. How long did you do that.

3 A. That was for several months. I haven't got a precise
4 figure on that.

5 Q. It is correct, is it not, that you were not employed in
6 any permanent capacity, until 1983.

7 A. Even in 1983, technically, it wouldn't have been
8 permanent. I - the first lot of employment I received
9 was on the basis of grants up to six months at a time.

10 Q. When, then, were you employed permanently.

11 A. Without going back over my employment record that I
12 would have to have a look at, it was - would have been
13 sometime in 1984, I imagine.

14 COMSR

15 Q. Just to clarify something; you were working full-time,
16 but on a grant system, from 1982 to 1984, is that what
17 you are saying.

18 A. From part of 1982, right through to about 1984, yes, I
19 was working on six month grants.

20 XXN

21 Q. After you finished the work which involved organising
22 and listing these artefacts, what work did you then do.

23 A. The first long-term grant that I had in the museum
24 involved getting together a catalogue of artefacts
25 relating to the Darwin region and exploring what we had
26 in the archives and doing a literature survey. I say
27 the first major grant; while I was a volunteer, I was
28 getting some paid work, doing visitors surveys for
29 another section of the museum.

30 Q. Visitors surveys.

31 A. Yes, that was just an hourly paid job that I had in the
32 museum, while I was a volunteer. Just a few hours a
33 week.

34 Q. What did that involve; working out the sort of people
35 who came there and how many.

36 A. That type of thing.

37 Q. Like a market survey.

38 A. Yes, it was a market survey.

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- 1 Q. How long did you do the cataloguing relating to the
2 Darwin region.
- 3 A. I think it was something like six months.
- 4 Q. What was the next work that you did.
- 5 A. The next work that I did would have been or was
6 background research for our secret sacred men's objects
7 repatriation programme. That involved, again, putting
8 together a catalogue and doing a basic research of
9 sources that were in our archives and a literature
10 survey of things that related to those secret sacred
11 men's objects.
- 12 Q. What you are talking about there is looking at objects
13 which the museum already had.
- 14 A. Looking at objects that we already had, but, in some
15 cases, we had no idea whether they were in the
16 restricted category or not. So, we have got something
17 like 30,000 Aboriginal and ethnographic items alone.
18 So, it involved quite a bit of physical work, as well as
19 searching records.
- 20 Q. What do you mean by 'physical work'.
- 21 A. Physical work of going through the stores and tracking
22 down objects that could relate to that category and then
23 organising them into a new system.
- 24 Q. Were they objects from all over Australia, or from one
25 specific part.
- 26 A. They were predominantly objects from the northern
27 regions, but that encompassed the Kimberleys, right
28 through to Central Australia and Arnhem Land and
29 Northern Queensland.
- 30 Q. But, as I understand it, you weren't going out and
31 collecting these; they were already there. It was
32 simply your job, if you could, to distinguish between
33 those which were capable of being generally publicised
34 and those which could be categorised as secret sacred
35 objects.
- 36 A. That's right. The work was museum-based.
- 37 Q. In order to establish whether or not they should belong
38 to the restricted category, you referred to the existing

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- 1 literature.
- 2 A. That was largely so. We did have the benefit of
3 occasional anthropologists coming through. So, there
4 was a network out there, as well. But mainly going
5 through our own archives, our own records that came in
6 with the objects and compiling an object history for
7 each object, as far as possible.
- 8 Q. Did you work on this project alone, or under someone's
9 supervision.
- 10 A. I was supervised by Steve Hemming.
- 11 Q. He was already in the employment of the museum, was he
12 not, when you started.
- 13 A. He was an acting curator, yes.
- 14 Q. How long did you work cataloguing these various objects.
- 15 A. We had one grant and then that was extended. So, I
16 imagine that work took roughly a year. The cataloguing
17 of men's secret sacred objects.
- 18 Q. What was your next task.
- 19 A. At that stage, a vacancy appeared in the museum, as a
20 museum assistant. It was a permanent job. So, I took a
21 cut in pay, as a research officer, to enable myself to
22 get into permanent employment. So, I was employed as a
23 museum assistant.
- 24 Q. What work did that involve.
- 25 A. That involved much broader tasks involving
26 administration, assisting in field work, answering
27 enquiries, public enquiries, helping visiting
28 researchers, including Aboriginal people, when they came
29 in. Broader tasks, but tasks that contributed to the -
30 what we called the Australian Ethnology Section. This
31 is before we had a Division of Anthropology.
- 32 Q. When you say assisting people who came in and
33 particularly Aboriginal people with enquiries, as a
34 museum assistant, you were not empowered to give them
35 advice, or your interpretation of anything.
- 36 A. I was empowered to give advice of the general categories
37 in terms of what were the registers, what I knew to be
38 in the collection. So, I did have powers, at a general

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1 level, but it was expected that I would know where the -
2 where I would have to defer to a curator, if a high
3 level of information was being sought.

4 Q. At what level did you consider you would have had to
5 defer to a curator.

6 A. If I had a, for example, phone call, which was from an
7 organisation that we didn't have any prior arrangement
8 with, I would collect the details and not move on their
9 request, until I had spoken to the curator. And that is
10 one example. So, certainly outside from the museum
11 contact would have to be run past the curator.

12 Q. If there was an existing prior arrangement with an
13 organisation, was that reduced to written guidelines, so
14 you knew what you could tell them and what you were not
15 empowered to tell them.

16 A. Yes, there would be a general understanding, if there
17 was already a relationship, a joint working practice, of
18 how I would proceed. And I would proceed within those -
19 with that general understanding that I had with the
20 acting curator, at that time.

21 Q. Of course, you would have been limited, in any event, by
22 your own particular lack of expertise in certain areas,
23 at that time, would you not.

24 A. In the museum we, were encouraged to be eclectic with
25 our expertise. I can't imagine where I would have
26 received an enquiry that I wouldn't have been able to at
27 least fulfil at a basic level. If the inquiry came in
28 about - which involved archaeology or human biology, I
29 would naturally have referred that on to the archaeology
30 staff. So, it is a matter of recognising who would be
31 the best person within the museum framework, in order to
32 redirect those type of enquiries.

33 Q. Did you not consider, yourself, that you had certain
34 limitations on what you could help people with.

35 A. On the basis of the reading I was doing when I started
36 there, my own particular research interests being the
37 Aboriginal use of the environment, I quickly gained
38 expertise of at least one area. What we are asked to do

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1 in the museum is often on a most basic level. So,
2 someone who knows the basic texts in the library to
3 refer to can get by. So, I did gain expertise, over a
4 couple of years, quite quickly.

5 Q. Was that something in your own estimation, or was there
6 some sort of refereeing system within the museum
7 structure, itself, where someone superior to you would
8 indicate that you could now go a step further than basic
9 material.

10 A. The fact that I had been classified as a research
11 officer, when I was doing the initial research for the
12 Darwin material and the secret sacred material shows
13 that the museum considered that I was a researcher, in
14 my own right. I mean, there is quite a broad area of
15 Australian anthropology, Aboriginal anthropology. There
16 is certain basic knowledge that can be gleaned from
17 basic texts and then people's own specific interests
18 sort of take on from there. So, you know, very quickly,
19 anything that was an enquiry that related to projects,
20 such as the Darwin area and secret sacred material that
21 I had already been working on, plus my own research
22 interests, in terms of Aboriginal use of the
23 environment, well, naturally, I would take on the major
24 role in answering that. You know, answering that would
25 entail showing it to other people in the division. I
26 might mention that Philip Jones was around when I
27 arrived. He also, to some extent, supervised my role
28 within the division when it took - when projects
29 overlapped with the project that he was being employed
30 on as a research officer.

31 Q. What position did Philip Jones have, when you first
32 started at the museum.

33 A. He was - he had done one grant as a research assistant
34 for Roger Dubers, going through the collections. He, at
35 that stage, was commencing work on the proposal for a
36 new gallery, which turned out to be the Ngurunderi
37 gallery.

38 Q. I don't think you answered the question; what was his

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- 1 position. You told me what he was doing, but not what
- 2 his position was.
- 3 A. I'm not sure exactly how he was defined. You would have
- 4 to direct that question to him.
- 5 CONTINUED

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- 1 Q. After you finished cataloguing the secret sacred men's
2 objects, you then became a Museum assistant. How long
3 did you work as a Museum assistant.
- 4 A. When I became a Museum assistant, it was at a time when
5 the Museum and the public service at large was
6 redefining its structure. Again, I would have to refer
7 to my employment docket in the Museum to come up with an
8 exact date for that.
- 9 Q. Approximately will do.
- 10 A. It was possibly something up to about two years.
- 11 Q. By which time you had completed your Bachelor of Arts.
- 12 A. Yes. That sounds correct.
- 13 Q. What was your next position in the Museum.
- 14 A. When the public service had redefined the roles of
15 various people in the Museum, out of that, I was
16 classified as Registrar of the Anthropological Division.
17 That also - part of that was an upgrade of public
18 service position.
- 19 Q. Whilst you were a Museum assistant, you have told us
20 that you had a broader role and part of that involved
21 assisting in field work.
- 22 A. That's correct.
- 23 Q. For how much of that two year period did you actively
24 assist in field work.
- 25 A. There would have been a number of trips, some of them up
26 to a week, a week and a half in length, so it's
27 difficult to put a figure on it. But it would be, you
28 know, maybe four or five weeks, six weeks of actual
29 on-site field work for each year.
- 30 Q. Four to six weeks each year.
- 31 A. For one year it may have been higher. It's hard for me
32 to come back on figures which are - you know, we are
33 looking at sort of roughly ten years ago worth of field
34 work. I could refer to my notebooks if you require a
35 more precise figure.
- 36 Q. Did you only assist Steve Hemming, as you told us in
37 your evidence, or did you assist other people as well.
- 38 A. Yes. I embarked on some field work with Philip Jones up

1 in the Flinders Ranges region.

2 Q. When you assisted Steve Hemming in his field work in
3 this two year period that you were a Museum assistant,
4 where did his field work take him.

5 A. His field work at that stage was mainly around the Lower
6 Murray and South East region of South Australia.

7 Q. Did you understand that he had a particular interest in
8 that area.

9 A. Yes. We all had interests in the area because of the
10 gallery.

11 Q. That may be so. Did you understand that he had a
12 particular interest.

13 A. No. I think he had a fairly broad interest in the area.

14 Q. Which area.

15 A. In the Lower Murray, South East, or shall we call it the
16 Ngarrindjeri area.

17 Q. Perhaps I put a bad question and I got the answer I
18 deserved. Did you understand his interest in
19 Aboriginal culture was in particular to that area as
20 opposed to another area in Australia.

21 A. That's right. Yes, he was focused on the Ngarrindjeri
22 area.

23 Q. When you say that you assisted him in his field work,
24 what did your assistance involve, what role did you
25 play.

26 A. There is the practical end of driving, you know,
27 organising money for various reasons, sometimes for
28 paying Aboriginal people as informants. Also, assisting
29 him in the sense of identifying plants and taking on the
30 recording of the Aboriginal use of the environment.

31 Q. As I understand your evidence at that time, your own
32 focus was on the cultural aspects of plants and animals.

33 A. Yes. The 'cultural aspects' being initially what plants
34 and animals were being used and then, as the project
35 developed more, recording the roles of plants and
36 animals in mythological and other sorts of less - in
37 western European terms, less empirical function within
38 the culture.

- 1 Q. What do you mean by that.
- 2 A. I mean things that plants, for example, that may be used
3 as food as distinct from plants that are believed to
4 have some, you know, curing property. But it's really
5 the ritual use of that plant that imparts the sort of
6 healing property rather than something that western
7 Europeans would analyse and come up with some chemical
8 basis of how those plants are used.
- 9 Q. So you would accompany Mr Hemming when he spoke to
10 Aboriginal people in that area.
- 11 A. Yes. There were field trips to the Lower Murray with
12 Philip Jones, but mainly Steve Hemming - and I would
13 accompany him, yes.
- 14 Q. Had you an opportunity to observe his interaction with
15 those people.
- 16 A. I interacted with them as well and I observed his
17 interaction, yes.
- 18 Q. From your observation, did he appear to have a good
19 rapport with those people.
- 20 A. Certain people he had quite a good rapport with. There
21 were other people that were, you know, made it quite
22 obvious they did not want to speak to the Museum and so
23 we didn't put too much pressure on them.
- 24 Q. From your experience, now that is often the position,
25 isn't it, that you can establish a rapport with certain
26 members of the community and not with others.
- 27 A. Yes. By establishing rapport with certain members,
28 sometimes in doing that you are automatically alienating
29 yourself from other members of the community.
- 30 Q. And there are times you are also encouraging other
31 members to be a bit more forthcoming.
- 32 A. I'm sorry, I'm not sure what you mean there?
- 33 Q. I have in mind that you have to break the ice, so to
34 speak, so that often you can establish a rapport with
35 some members and the more reticent members will become
36 more communicative as you obtain a degree of trust.
- 37 A. Yes. It is a long process.
- 38 Q. You have to be very patient.

1 A. That's correct.

2 Q. And in general terms from the work that you have done
3 with Aboriginal communities as opposed to other
4 communities, they are not people who are generally
5 forthcoming to someone they don't know.

6 A. There are difficulties with all generalisations. It's
7 often the case of just being seen often enough in a
8 community for Aboriginal people to get used to you can
9 explain why you are there and any implications there
10 might be for speaking to you. So it's a rather complex
11 interaction. It's not a matter of breaking the ice.
12 There are - it's a whole sort dynamics of exchange
13 between the researcher and the people that the
14 researcher may want to get information from.

15 Q. So, it's a lengthy process and one where you have to be
16 seen frequently, where they have to trust you personally
17 and have confidence in the institution you represent.

18 A. All of those things. Although, in terms of the
19 institution, often that becomes less important.
20 Aboriginal people would rather, in many cases, you know,
21 deal with the individual rather than necessarily set up
22 a relationship with the institution and, therefore,
23 speak to anyone from that institution who comes down.

24 Q. In you don't have a personal rapport with some
25 individuals, you are not going to get any information
26 out of them that is relevant, are you.

27 A. Not necessarily. You are talking about fairly normal
28 field work techniques. With less normal techniques, you
29 can get abundant information from people who are not
30 formally handing you information as information. I
31 mean, we are - up to now, you have been talking about
32 formal field work techniques whereby someone arrives and
33 pulls out a tape recorder and then says: 'Tell me
34 everything you know'. There are other less intrusive
35 field work techniques, and even to the extent of often
36 what people don't say. But the way they don't say can
37 still impart quite a bit of knowledge. Sometimes, it
38 might be the actions of someone who doesn't particularly

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1 want to tell the anthropologist anything that may be
2 interpreted by other members of the Aboriginal community
3 who could then comment on what is going on. You know, I
4 think you have a rather simplistic model of what field
5 work is compared to. It's a lot more complicated.

6 Q. You tell me what other techniques there are apart from
7 direct communication.

8 A. Participant observation. That means getting involved in
9 the community through - or in some cases any means
10 available. By putting up a local display there during
11 NADOC week - that is, Natural Aborigines and Islander
12 Day Observance Committee week - that is one of several
13 Aboriginal functions that appear during the year. So,
14 often just getting some involvement in supplying a
15 school at a place like Point McLeay with resources,
16 temporary displays and things, enables a researcher to
17 be around and start to communicate and communicate with
18 Aboriginal people on levels other than formal situations
19 whereby information is asked and may be delivered.

20 Q. Do you mean in the course of social interaction.

21 A. That would include social interaction. Sometimes
22 interaction that may involve some official function, but
23 not a function that is necessarily one that is aimed
24 towards the anthropologist eliciting information for the
25 purposes of a display or research project. The example
26 that I gave of being involved in, say, the Aboriginal
27 school down at Raukkana is one mechanism of gaining some
28 rapport with the Aboriginal people in that community.

29 CONTINUED

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- 1 Q. Have you personally been involved in a NADOC display.
2 A. Yes. I've probably put together a dozen or more NADOC
3 displays over the years, ranging from places like Point
4 McLeay, to other towns in the Lower Murray, to even
5 Places further afield in South Australia.
- 6 Q. Similarly, have you been involved in displays or
7 something similar at the school.
- 8 A. Yes, I have been involved, and I've been asked to put
9 on.
10 A display for cultural week in two weeks time. So it is
11 a regular event for me to be rung up and asked to
12 contribute in any way possible with cultural functions
13 involving the school.
- 14 Q. It still comes back though, doesn't it, to your ability
15 to communicate. That is a skill you need, isn't it, in
16 your discipline.
- 17 A. Yes. You've got to have a skill to communicate with a
18 broad range of people, and you have got to have
19 patience, yes.
- 20 Q. The quality and depth of the information you get may be
21 a reflection of your own communication skills.
- 22 A. If you are talking about information about how
23 contemporary people are living and how they are thinking
24 and feeling, there is some truth in that. I mean, there
25 are other sources of information. There is quite an
26 extensive literature on contemporary Aboriginal
27 experience. So I wouldn't say that it's the only way of
28 tapping into that information, but it is certainly an
29 important way of doing it.
- 30 Q. The literature, of course, is based upon the author's
31 ability to communicate.
- 32 A. Yes, and you've got a way of measuring how successful
33 they are from your own field work and the field work of
34 others.
- 35 Q. I have taken you off at a tangent. You were telling me
36 that you became the registrar of the anthropology
37 division. How long did you occupy that post.

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- 1 A. Again, I have difficulty coming up with a precise figure
2 because -
- 3 Q. I am not at any time asking you for a precise figure.
4 An approximate figure will do for my purposes.
- 5 A. It was probably a year, maybe two years.
- 6 Q. What did that job entail.
- 7 A. The biggest part of that job would have been the
8 organisation of our museum records into a computer
9 system - the museum records relating to our Aboriginal
10 family history project. That had to be computerized, as
11 well as some records relating to our archives and our
12 records relating to Aboriginal artefacts of Aboriginal
13 people that we had in our collection. So that was
14 actually work that was started before I was termed a
15 registrar, but it is a function that I retained, even
16 though I had other designations, right up until a
17 couple of years ago.
- 18 Q. What was your next position after you became registrar
19 of anthropology.
- 20 A. Collection manager for the anthropology division.
- 21 Q. How long did you hold that post.
- 22 A. One to two years.
- 23 Q. What would that involve.
- 24 A. That was really a redefinition of the registrar's
25 position that I had. It also would have involved a
26 change in my level of public service position. It
27 essentially was recognising my management function
28 within the division of anthropology.
- 29 Q. What was your next position.
- 30 A. I was then made a curator of anthropology.
- 31 Q. When was that.
- 32 A. Roughly about four years ago.
- 33 Q. About 1990.
- 34 A. Somewhere in that vicinity, yes.
- 35 Q. Can you relate it to this: Was it before or after you
36 started your PhD.
- 37 A. It would have been during - well, after - yes, it would
38 have been after I started the PhD.

- 1 Q. Is that your present position.
2 A. No. I've since been made senior curator.
3 Q. When was that.
4 A. That was in November of 1994.
5 Q. Last year.
6 A. That's right, 1994.
7 Q. Whilst you worked as a curator, what did your work
8 involve.
9 A. That was the time that Mr Steve Hemming had gone off,
10 left the museum for 18 months or so. So I took on the
11 bulk of his work, which, in particular, was the work
12 that involved southern South Australia. I was already
13 involved in working on a number of those projects, so I
14 took over the running of his several existing projects,
15 the ones that he didn't take with him that were left.
16 And I also had supervising functions. Supervising two
17 Aboriginal women, for example.
18 Q. What were the existing projects of Mr Hemming's that
19 you took over.
20 A. The -
21 Q. I don't really want the details of them. Just give me
22 a general description.
23 A. They were display orientated functions.
24 Q. Display at the museum.
25 A. No - well, yes, an upgrade of the Ngurunderi display was
26 one function. There was also a display that we had been
27 working on together involving the Murray Bridge area,
28 and when he left I took over the sole running of that
29 particular display project. So that was a display that
30 was going to go up at Murray Bridge.
31 Q. You have told us that you completed your thesis or your
32 doctorate in 1994.
33 A. March. It was submitted in March 1994.
34 Q. Then there is a period when it is examined.
35 A. That's correct.
36 Q. That takes some time.
37 A. Yes, it took some time.

- 1 Q. But at some stage you were advised that you would be
2 admitted to the doctorate.
- 3 A. That's right.
- 4 Q. Do you recall when you were advised that you would be
5 admitted to the doctorate.
- 6 A. It would have been around about September or October
7 1994.
- 8 Q. Who were your examiners.
- 9 A. I had - sorry, examiners?
- 10 Q. You have told us who your supervisors were, but who
11 were your examiners.
- 12 A. I had a social anthropologist as an examiner and a
13 cultural geographer. But normally it is not required
14 that I even know who my examiners are. So I would
15 consider that information in that area I would have
16 rights to withhold.
- 17 Q. Early in your evidence, some days ago now, you described
18 the various periods, in a general sense, of Aboriginal
19 history and you characterised the pre-European
20 occupation as one phase.
- 21 A. No, that's not correct. I was - are you talking about
22 the phases on my Time Line?
- 23 Q. Yes.
- 24 A. No, that's not correct. I was talking about the
25 exploration phase.
- 26 Q. Is that prior to occupation.
- 27 A. No, no. Well, it could be. You can't have explorers in
28 a region without, you know, Europeans coming into
29 contact with that region. It also included the sealers'
30 occupation of Kangaroo Island and, even when South
31 Australia was settled, they were still exploring the
32 landscape in terms of overland routes and tracks and
33 water holes and that type of thing.
- 34 Q. If I can adopt the phrase 'the exploration phase', is
35 that prior to the settlement of South Australia.
- 36 A. No, it's not.
- 37 Q. When do you date that from.

- 1 A. I date it from the first sighting of the coastline of
2 South Australia to several years after settlement,
3 European English settlement in Adelaide and Encounter
4 Bay.
- 5 Q. Prior to the first sighting of the South Australian
6 coast, it is your understanding, isn't it, that the
7 recording of Aboriginal history has been oral.
- 8 A. Sorry, I can't understand that. The recording of
9 Aboriginal history is oral?
- 10 Q. The Aboriginal people, prior to the first sighting of
11 the South Australian coast, were an illiterate people,
12 were they not.
- 13 A. That's correct.
- 14 Q. So that, in order to hand down any folklore or history,
15 it was by word of mouth from one person to another.
- 16 A. That's correct. The landscape though has a role. The
17 proof - the evidence of a lot of what would be handed
18 down would be surrounding Aboriginal people. It's not a
19 matter of saying the information was just conveyed
20 through lots of - Aboriginal people experienced the
21 landscape and received information through an oral
22 tradition that explained that landscape and their role
23 within the landscape and the cosmos.
- 24 COMSR
- 25 Q. I know I keep repeating this, but if you feel that any
26 of your answers are going to encroach, as it were, upon
27 section 35, would you be able to indicate that to me.
- 28 A. Yes, I will indicate it.
- 29 XXN
- 30 Q. As I understand what you are saying, there is an oral
31 tradition, but there is one constant in that, which is
32 the landscape itself, which doesn't change.
- 33 A. The landscape is changing. It is an evolving thing as
34 much as Aboriginal culture is changing, and there are
35 basic elements in the landscape, such as Rocky hills and
36 things that may not be moving, but, particularly in an
37 area like the Lower Murray, we are looking at massive

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1 change within generations - just a couple of generations
2 of people.

3 Q. But what you do know is that the Aboriginal community
4 had no means of putting a record of their cultural
5 knowledge in any durable way.

6 A. Their rock art is one example, whereby symbols which
7 appear on - even appear on trees and things, but there
8 are symbols that are painted onto rock shelters and are
9 there for some level of interpretation by generations.

10 I am not putting that forward as a major way that
11 information was conveyed, but you seem to be pushing
12 towards me to say that there is an oral tradition and
13 that was the only tradition. I am just saying it is a
14 little bit more complicated than that. Although, I
15 accept that interaction between people, particularly
16 during dance ceremonies and things, were occasions when
17 information could be handed on laterally, downwards,
18 whatever, with some degree of modification.

19 Q. But even rock symbols, although there is something which
20 is pictorial, described in an enduring form, need the
21 interpreter. The significance of the symbol requires
22 oral interpretation, does it not.

23 A. Yes, and oral interpretation doesn't come just from
24 within the group. We are looking at a situation where
25 Aboriginal cultural groups are moving across the
26 landscape in relation to environmental and other social
27 factors. So you have got new traditions coming into new
28 areas and supplanting themselves and, in some cases,
29 incorporating other elements. It is not just a matter
30 of receiving information from an elder of one's own
31 group. There is quite a bit of information that is
32 being exchanged at ceremonies and things.

33 Q. Is it fair to say that interpretations and
34 re-interpretations are inevitable in any tradition, but
35 perhaps particularly an oral tradition.

36 A. That's right.

37 Q. Because, as I understand your evidence, in the
38 traditional past of an Aboriginal community -

- 1 A. I don't recognise a traditional past. I would say, if
2 you have read part of my statement about mission
3 cultures, that contemporary culture has traditions just
4 like earlier cultures had tradition. So I don't accept
5 That you would put forward traditional culture as
6 pre-European as distinct from everything else.
- 7 Q. Because tradition is an evolutionary process. It is not
8 simply something that has happened in the past.
- 9 A. I wouldn't say it is evolutionary. That implies that
10 there are better forms coming out of weaker forms.
- 11 Q. I will withdraw that word. It is a changing process.
- 12 A. It is a changing process, but the rate of change can
13 change as well, depending on what the social
14 environmental factors are.
- 15 Q. So there is a change in tradition that reflects the
16 attitude of a particular community from time to time,
17 and community values and that sort of thing.
- 18 A. These changes come about in fairly complex ways and may
19 not even be acknowledged by communities of there having
20 been a change. So it really depends on what level of
21 change you are talking about. There can be deep sort of
22 structural changes, and there can be relatively minor
23 changes or realignments of facts making up a particular
24 tradition.
- 25 Q. Perhaps you could just explain to me if it is possible,
26 in general terms, the mechanism by which that change
27 takes place.
- 28 A. In the context of the Lower Murray - and I'm steering
29 well away from things cultural, because I am aware of
30 the problems with Section 35 - but such an event as
31 small pox, for example, which wiped out a significant
32 number of people - it is difficult to know how many, but
33 maybe we are looking at 60, 70, 80 per cent of Lower
34 Murray people during those two waves of small pox - that
35 would have put a lot of pressure on the survivors of
36 that episode in terms of shortening their mortuary
37 rituals and other practices which were really based on
38 a much larger number of people. Clan boundaries and

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1 things like that, you would also expect to be modified
2 from time to time, depending on the particular fortunes
3 or misfortunes of particular groups within the Lower
4 Murray. So I see it as something that is changing, but
5 the broader - the deeper parts of the culture, in terms
6 of their relationship with the dreaming, would be
7 something that wouldn't change - wouldn't as readily
8 change. There would be modification in terms of some of
9 the facts in the dreaming, but not necessarily to the
10 main dreaming itself, particularly if a dreaming story
11 such as Ngurunderi is so heavily imbedded in the
12 identity of Lower Murray people.

13 Q. The interpretation by a community of certain matters
14 can also change, can it not.

15 A. I wouldn't agree that a community would have an
16 interpretation as a community on many of the aspects of
17 say a dreaming story. You would find that, although
18 the general story line would be adhered to by everybody,
19 there would be various forces within the community to
20 say that such and such an event happened here, rather
21 than other clan groups within the Lower Murray who
22 would disagree and say that it happened in their area.

23 Q. So there would be varying interpretations within a
24 community from time to time.

25 A. Varying interpretations of the detail of a myth within
26 that sort of broader community, but the myth would still
27 be readily identifiable throughout the community.

28 Q. Earlier in your evidence you talked about re-writing
29 history. You said, in effect, you were engaging in
30 that yourself.

31 A. I should qualify that re-writing could be taken two
32 ways. I used it in the context of introducing new
33 evidence that had been gained in a scientific approach
34 and, therefore, I was improving an existing history
35 which had not accounted for the facts that came about
36 through my empirical exercise. So that is what I was
37 referring to. In a sense, I was editing history rather
38 than coming up with a totally new paradigm in history.

1 I was introducing facts that I am arguing have not been
2 accounted for. But I don't say that the facts that I
3 come up with are necessarily all the facts that might
4 relate to the general issue, the general area I'm
5 writing in. But I was not re-writing in the sense of
6 dismissing facts that other historians had already come
7 up with. My re-editing, which is a better way of
8 looking at it, was incorporating the existing facts and
9 adding to those facts, and then coming up with what I
10 consider a more informed narrative. It doesn't imply
11 that I reject the facts that other historians had come
12 up with for their particular treatment.

13 Q. But you said, I think, that they used the past and
14 recorded the past selectively because of their own
15 particular perception of what was significant and what
16 was not.

17 A. Yes. The particular historian that I mentioned, with
18 the benefit of more facts available, I think that
19 criticism of mine was valid. Had he had the benefit of
20 reading my work, then, of course, his account would
21 have been quite different. So it is a fact of life that
22 We all stand on the shoulders of people who have worked
23 before us.

24 ADJOURNED 1.01 P.M.

1 RESUMING 2.23 P.M.

2 XXN

3 Q. When we adjourned, we were talking about oral tradition.

4 Do you agree that, generally speaking, oral tradition is
5 transmitted vertically from one generation to another.

6 A. No, I don't.

7 Q. Why is that.

8 A. Because the information can be and often is preserved
9 laterally. It's not just a movement down a lineage from
10 one level to another, although that would be a primary
11 movement. But even having said that, it would not
12 necessarily be from father to son, or mother to
13 daughter. There are combinations such as grandmothers
14 to granddaughters, uncles to nephews, depending on what
15 the information is. But, in secret sacred information,
16 it is more likely to be discussed among men who have, in
17 the case of male secret sacred information, who have
18 already reached a certain initiation status. I'm
19 talking in terms of the Central Australian material.

20 Q. I simply had in mind in an older generation to a younger
21 generation. Logically, it seems to me that that must
22 have been the major process of transmission; do you
23 agree with that.

24 A. If you are talking about net movements of information,
25 that could well be the case. Even there, you have got
26 information coming in from different areas, so I don't
27 want to put forward a simplistic model that things are
28 being, you know, just moving in one direction.

29 Q. But it is a teaching and a learning process.

30 A. A process whereby even the teachers are gaining more
31 knowledge of the dreaming as its being revealed to them.

32 Q. Revealed to them by what or by whom.

33 A. Revealed to them by their own, well, dreams in some
34 cases. Revealed to them through talking to other senior
35 people, that type of process.

36 Q. That suggests to me that there is a continuing process
37 of acquisition of knowledge.

38 A. Acquisition and transference, checks being in place for

1 certain information, those checks being explored, the
2 landscape changing. That - you know, that could
3 initiate certain events that senior people in a culture
4 would have to come to terms with when we are talking
5 about a whole complex of interactions, so.

6 Q. Aboriginal beliefs are related to the landscape to a
7 large extent, are they not.

8 A. Aboriginal beliefs? In what part of their beliefs are
9 are you talking about?

10 Q. Any parts of their beliefs, their traditional beliefs.

11 A. The type of traditional beliefs? I've said that there
12 are old traditions, new traditions. What part of their
13 beliefs are you talking about?

14 Q. I don't want to go too far down that track.

15 A. I make the point that you are asking a question that
16 doesn't have a simple answer, because the nature of
17 their knowledge is fairly diverse.

18 COMSR

19 Q. I think Miss Nelson might be concerned about going into
20 detail which is going to get us in problems.

21 A. Yes.

22 XXN

23 Q. I'm happy to come back and cover it in more depth when I
24 apply to have the court closed to the public, as I will,
25 of necessity, have to do at some stage. So I'll leave
26 that topic. It seems to me that your evidence as a
27 whole suggests that there is a passing on of knowledge
28 within a community from time to time, generally from the
29 more senior people to the younger people in the
30 community. Now, do you agree with that so far.

31 A. Yes, so far.

32 Q. It also seems to me that you suggest that there will be
33 some differences within an individual community in terms
34 of the perceptions of different factions of that
35 community.

36 A. Depends how we are defining 'community'. If we define
37 it as all the Lower Murray people in a pre-European type
38 situation, the answer is yes.

1 Q. Then, there is the perception of the person transmitting
2 that piece of knowledge which may affect what is told
3 and how it is told and the interpretation of certain
4 matters.

5 A. An individual could reveal different parts of a story,
6 depending on who they are talking to, what time of their
7 life, or, indeed, the local politics that they are
8 immersed in at that time.

9 Q. There may be an interpretation of the material by the
10 receiver of the material which reveals some sort of,
11 sort of subjective perception on his or her part, maybe
12 not.

13 A. The receiver of that information, to a large extent, has
14 already had their world view shaped by that culture. So
15 that would, that shaping or a precondition, if you like,
16 of that person before receiving the information would
17 tend towards acting as a check towards change that was
18 outside of, you know, the general beliefs of that
19 cultural group.

20 Q. Information received by an observer or a recorder of
21 that information outside of an Aboriginal community
22 would be interpreted as against the cultural background
23 of that observer, would it not.

24 A. I'm sorry, you will have to run that past me again.

25 Q. I'll try again. When you or anyone else go along to
26 someone and receive information, it's a question and
27 answer process basically, isn't it, however you do it.

28 A. No, it's not. Much of the information in my thesis that
29 comes about through participating and observing.
30 Participating in the sense that, or to a degree whereby
31 I've become part of the woodwork in the situation, if
32 you put it that way, and that I'm - I am an observer
33 pretty much along the lines of Aboriginal people who are
34 also observing certain events. However, I recognise
35 that my anthropological training would - with
36 anthropology as a tradition and having an outsider's
37 perspective would lead me to come out of a situation
38 where I'm observing cultural activity with a different

1 perspective than the people participating, or other
2 observers who are Aboriginal and who are in the vicinity
3 of that cultural action.

4 COMSR

5 Q. What you have been discussing, that is all covered in
6 published anthropological work.

7 A. Yes. There is quite a bit of material on that.

8 XXN

9 Q. Your approach to everything and, indeed, everyone's
10 approach is against your own cultural background, isn't
11 it.

12 A. No, I don't see there being a dichotomy of contemporary
13 Aboriginal culture versus - or, in my case, middle-class
14 white culture. As I stated and laid out in my
15 statement, contemporary Aboriginal culture is as much a
16 product of its pre-European forms as it is in terms of
17 that contemporary culture being a product of its
18 interaction with Europeans over the last, roughly, 200
19 years. We cannot look at contemporary Aboriginal
20 culture without recognising and considering the
21 interaction that it's had and the influence that it's
22 had from its non-Aboriginal forces that have helped to
23 shape that culture.

24 Q. That may be right, but you also, as a person with
25 certain views and beliefs, have been shaped by the
26 tradition in which you have been brought up; isn't that
27 a fact.

28 A. There is one of several factors that would influence my
29 perception of what is going on. The fact that I
30 personally have access through my marriage to an
31 Aboriginal woman of that group, I have access to an
32 insider's interpretation of that culture is something
33 else that I can take account of. I'm not saying that I
34 incorporate those views as objective anthropological
35 data, but I would incorporate those views as cultural
36 artefacts which are worthy of being part of the raw data
37 that I would utilise to come up with a model of what is
38 happening.

1 Q. Is it fair comment to say that some of the earlier
2 recordings of Aboriginal culture and tradition suffer
3 from the cultural attitudes of the people who recorded
4 it.

5 A. In general terms, that's a fair statement.

6 Q. In fact, considerable criticism has been levelled by
7 more contemporary anthropologists at those people who
8 did record or purport to record, say, in the 19th
9 century.

10 A. There are good examples and bad examples of
11 ethnographers from last century. I would hesitate to
12 put all recorders of Aboriginal culture in that same
13 category. However, even knowing that some recorders
14 have particular biases, we are, through recognising
15 those possible biases and the data today, able to some
16 extent to take that into account and use their data, you
17 know, to shed light on some cultural behaviour that we
18 might be studying.

19 Q. That recognition of bias is a relatively recent
20 recognition, is it not.

21 A. How recent are you talking about?

22 Q. Say, within the last 40 years.

23 A. Previously, anthropologists tended to study quite
24 different aspects of Aboriginal culture, so much of the
25 writing today is, in terms of Aboriginal culture,
26 looking at quite different aspects. So, it is difficult
27 to compare too closely the anthropologists who were
28 working earlier this century who were intent to
29 describing as much as possible a pre-European Aboriginal
30 culture, whereas work from around the Second World War
31 onwards tended to, particularly after the Berndts' field
32 work in the Lower Murray, but work tended towards
33 looking at Aboriginal people as they were being
34 incorporated into society based in rural towns and
35 missions, and Adelaide itself. So, would have got
36 different phases of the literature. I would hesitate to
37 compare them too closely in terms of who is right and
38 who is wrong. I don't think that is the issue.

- 1 Q. I didn't put that forward as the issue. I was
2 suggesting there were certain deficiencies in earlier
3 anthropological recordings because of the attitudes of
4 the people recording the information.
- 5 A. I would go the opposite way and say that in some cases,
6 the first ethnographers came up with perhaps better
7 records for some aspects of Aboriginal culture precisely
8 because they were people who were not heavily embraced
9 by a particular discipline. Observers and some of the
10 early missionaries are in this category whereby their
11 records are simple observations without too much theory
12 being, or that data being embedded in theory. They have
13 come up with data that today is quite useful for
14 re-analysis.
- 15 Q. But the early observers were men whom you wouldn't
16 expect them to have access to any knowledge of secret
17 women's business.
- 18 A. Some of the early observers were women. And also those
19 men had female relatives who were observing for them; in
20 particular, George Taplin refers to observations that
21 his wife made. You can have access to those in the
22 Taplin journals.
- 23 Q. The Reverend George Taplin was a missionary and he
24 established Point McLeay Mission Station in 1859.
- 25 A. That's right, he was a missionary.
- 26 Q. He was concerned to convert the Aborigines to
27 Christianity, was he not.
- 28 A. That's correct.
- 29 Q. He had certain attitudes towards their society and
30 aspects of it which he considered to be immoral.
- 31 A. There were some aspects of that society he considered to
32 be against his ultimate aim of Christian conversion.
- 33 Q. Would you agree with this comment: That he did his best
34 to destroy Aboriginal culture as a living culture.
- 35 A. I think that's a generalisation that I would hesitate to
36 make. It's a definitive statement and I don't think all
37 of his actions would be explained by it.
- 38 Q. It's a definitive statement made by Catherine Berndt in

1 this book that was tendered 'Women, Rites and Sites' in
2 the chapter she wrote which is entitled 'Retrospect and
3 Prospect, Looking Back Over 50 years'. I take it you
4 don't agree with that.

5 A. It's a matter of emphasis, it is not a matter of whether
6 I agree or disagree.

7 Q. She went on to say: 'Its place' - that is Aboriginal
8 culture - 'As he saw it was in the past surviving an
9 only written account of what had be done there before it
10 was replaced by Christianity'. I would have thought
11 from the evidence you have given about the changing of
12 tradition and interpretation that you would perhaps have
13 agreed with that.

14 A. If you are talking in a general sense about their
15 culture being to do with initiations and if you were, as
16 Taplin obviously did, trying to convert their
17 mythological or helping in the conversion of
18 Ngarrindjeri mythology into a Christian mythology, you
19 are correct. But there are also other aspects of their
20 culture that Taplin was actively engaged in in
21 recording; and part of his personal fortune of becoming
22 a collector of ethnographic data was in the area of him
23 being able to talk to knowledgeable people. So, his
24 ultimate aim being one of Christian conversion for all
25 the Aboriginal people is quite clear, but I don't think
26 that, for example, that he was so against the religion
27 that he couldn't record it. So, against the culture
28 that he didn't, couldn't record it - I mean, his records
29 of Ngarrindjeri culture are very important. They are a
30 crucial part of the evidence for certain practices that
31 we do have today.

32 Q. Nevertheless, he ignores some aspects of culture, does
33 he not.

34 A. What aspects?

35 OBJECTION Mr Abbott objects on the ground that
36 the witness should be shown the book and
37 be able to read the whole text being
38 quoted.

1 EXHIBIT PRODUCED TO WITNESS

2 Q. I was asking you some questions about Taplin. He was a
3 missionary there for some 20 years, wasn't he.

4 A. That's correct.

5 Q. I was suggesting to you that his recording of Aboriginal
6 culture in that area is significant in what it does not
7 record.

8 A. That's a suggestion that until you come forth with more
9 information, I couldn't agree with.

10 CONTINUED

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1 Q. To start with, he doesn't record aspects of the women's
2 area in the religious ceremonies, does he.

3 A. Part of his work was, in one volume that he published, a
4 series of surveys that he sent around all over South
5 Australia, but he also filled in that survey, as it
6 related to the Lower Murray area. And, if my memory
7 serves me correct, and I can check this, if I am
8 allowed, part - one of those questions did refer to
9 ceremonies.

10 Q. It is suggested, by some of the more contemporary
11 ethnographers or anthropologists, that the work of those
12 earlier recorders of Aboriginal culture is defective,
13 because their own perception of the role of Aboriginal
14 women is contaminated by their perception of the role of
15 women in European society.

16 A. Who are those ethnographers who suggested that,
17 contemporary?

18 Q. I think I suggest to you that Faye Gale makes that
19 observation.

20 A. Faye Gale's paper utilises the information gathered from
21 a man, Edward John Eyre, from the Mid Murray. She used
22 information, gathered from a male ethnographer, to
23 modify her model, or the model that she perceives in
24 relation to the role of Aboriginal women.

25 Q. That is certainly true; and what she says is this, if
26 you would like to look at p.124 of that book, Exhibit
27 11, at the fourth paragraph `Other observers with more
28 opportunity to obtain further details than Sturt could
29 have done also give us little insight into the position
30 of women or of their religious or ceremonial function.
31 Undoubtedly the fact that all the early observers were
32 men would have prevented them from exploring much of the
33 secret life of women, but, as Eyre has demonstrated,
34 there is much that men could have observed had they
35 cared to do so. We can thus only assume that the early
36 British inhabitants of the southern areas of South
37 Australia had cultural blinkers that prevented them from
38 seeing what was in front of their very eyes. It is

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- 1 undoubtedly this cultural blindness that has remained
2 until the present-day rather than the mere fact of the
3 maleness of the observers.' Do you accept that, as an
4 appropriate view.
- 5 A. I would accept the general points that she has made.
- 6 Q. And she goes, at p.125, to comment that even when women
7 did begin to write about Aboriginal people, they didn't
8 seem to be seeing any more than did their white male
9 counterparts. Do you see that, in the fourth paragraph
10 there.
- 11 A. Sorry, what paragraph?
- 12 Q. P.125, I have described it as the fourth paragraph. The
13 line beginning 'Unfortunately none of the earliest
14 writers were women, however even when women did begin to
15 write about Aboriginal people in southern South
16 Australia they did not seem to see any more than did
17 their white male counterparts. In fact, most
18 fieldworkers in the second part of the 19th century in
19 the southern part of the State were missionaries or
20 "philanthropists". Their concern was more with
21 "rescuing" Aboriginal women than with recording their
22 "pagan" beliefs.'
- 23 A. Nevertheless they did record those beliefs. So, there
24 must have been interest in providing Aboriginal beliefs
25 that they had observed providing accounts of those to
26 the broader public of South Australia as well as the
27 growing academic anthropological disciplines based in
28 the northern hemisphere.
- 29 Q. Faye Gale makes that concession, though, does she not,
30 in that paragraph where she says that 'Mrs Smith gives
31 some insight into areas not recorded by the male
32 ethnographers of the time.' Do you see that sentence.
- 33 A. I see that sentence, and I am quite familiar with
34 Christina Smith. That is the 'Mrs James Smith' that is
35 listed here. Her real name is Christina Smith. I am
36 quite familiar with her records and I am not sure that
37 she is quite as unique as is being suggested in this
38 paragraph.

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- 1 Q. You see, isn't the point that Faye Gale is making this;
2 that Mrs Smith, and the other female early writers, do
3 not discuss Aboriginal people, or record their tradition
4 from a cultural or traditional viewpoint.
- 5 A. I am sorry, I have lost the point again. You are saying
6 that Christina Smith is unique; is that what you are
7 saying?
- 8 Q. No, I am not saying that, at all. What I am suggesting
9 is that Faye Gale, in this article, is making the point
10 that, first of all, the early writers, male or female,
11 had cultural blinkers, which prevented them from seeing
12 certain aspects of Aboriginal tradition. Therefore, it
13 is not recorded.
- 14 A. I am saying that, although those cultural blinkers are
15 there, it is more a matter of how the emphasis is placed
16 in the writing, rather than suggesting that those
17 cultural blinkers would make whole Aboriginal practices
18 invisible.
- 19 Q. Are you saying that Mrs Christina Smith and writers of
20 that era did, in fact, record, particularly from the
21 point of view of women, accurately cultural practices
22 and beliefs.
- 23 A. I would say they are no more - in general, no more
24 accurate or in error than their male counterparts.
- 25 Q. And their male counterparts, because of their own
26 cultural standpoint, did not accurately record - because
27 they left out certain aspects - Aboriginal culture and
28 tradition: is that not the point that is being made.
- 29 A. I mean, you are assuming, of course, that it is possible
30 for a researcher to come in and record a whole culture.
31 Culture is such a big and diverse thing, that it is not
32 possible for anyone to come in and record every aspect
33 in detail. So, we have to rely on people's attempts at
34 coming up with an overview of that culture. And,
35 initially, much of the emphasis was in terms of language
36 and what is described as manners and customs, because
37 people were interested in those aspects of Aboriginal
38 culture that would either inhibit or, in other cases,

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- 1 make easy their Chirstianisation. So, I would say that
2 firm bodies of knowledge relating to secret sacred
3 women's business would have been recorded, because they
4 would have been considered - that would have been
5 considered necessary data for the first wave of
6 ethnographers who were the German missionaries. It
7 would have been crucial knowledge towards them
8 understanding the culture enough to then gain their
9 Chirstianisation process.
- 10 Q. The primary agenda was to convert these people to
11 Christianity; isn't that your understanding.
- 12 A. No, not entirely. That was part of it. They also -
13 there would also have been an attempt to create, out of
14 the indigenous population, a working class, which could
15 then be incorporated into the economy as a labour force.
16 So, I mean, they had practical requirements for the
17 study. It wasn't all just interests of men in their
18 spare time. There was a practical need for doing these
19 studies.
- 20 Q. Apart from creating a workforce, the significance, as
21 you saw it, of them gaining some understanding into,
22 let's say, secret women's business, sacred secret
23 women's business, would be in order to understand it in
24 order, basically, to eliminate it, because that would
25 hasten the conversion to Christianity.
- 26 A. We are talking theoretically, of course, here, because I
27 am arguing there wasn't secret sacred women's business
28 in the Lower Murray, but -
- 29 Q. At all.
- 30 A. But there may well have been aspects of that that they
31 may have wanted to encourage. I mean, we are dealing
32 with a hypothetical situation here.
- 33 Q. Is it your position that there never existed, in the
34 Lower Murray, any sacred secret women's business.
- 35 A. On the basis of all the information we have, to this
36 point, I would have to say, yes.
- 37 Q. Do you think you have got all the information.
- 38 A. In my thesis, I refer to over 500 works. It would be

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1 rather bold of me to suggest there wasn't one or two
2 pieces of literature still out there. However, I
3 consider that I have covered all the major sources of
4 ethnographic information at present known to exist in
5 relation to the Lower Murray.

6 Q. This is all information that has been recorded by
7 someone else.

8 A. In my thesis, two whole chapters consist of my own
9 ethnographic material, plus significant chunks of other
10 chapters, as well. So, I include myself as an
11 ethnographer on the basis of all the field work I have
12 done through my work history that you outlined for me
13 earlier.

14 Q. Do you accept that, with the influx of European - I
15 hesitate to use the word 'civilisation', given the
16 current state of affairs in the world. I will use the
17 word occupation, disrupted the transmission of knowledge
18 in the Lower Murray.

19 A. The effects of European intrusion, if we call that, into
20 the Lower Murray was felt differently in different
21 regions, just because of the process by which Europeans
22 entered. However, there were phases of that European
23 absorption of the Lower Murray that would not
24 necessarily have negated the possibility of preEuropean
25 type information being passed on. I am thinking now of
26 the period in which the Lower Murray was dominated by
27 large stations and that Aboriginal people were,
28 particularly around the lower lake, given free range
29 over some of the larger stations to camp in areas
30 whereby - which did relate to areas where they had
31 camped in preEuropean times. However, as I have stated,
32 by the time of the 20th century, the European absorption
33 of the landscape was at a phase whereby the Closer
34 Settlement Act broke up most of the big stations in the
35 early part. Aboriginal people, through the Aborigines
36 Act of 1911, were forced on to stations. And, later,
37 from about the 1920s through to the 1940s, the river
38 system was drastically altered through, first of all,

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- 1 locks being placed on the river and then the barrages
2 which were completed in about sort of 1940. Does that
3 answer your question?
- 4 Q. Partly, but you earlier spoke of the small pox epidemic.
5 A. That's correct.
- 6 Q. And you said that your belief is that perhaps up to 80%
7 of the population perished, as a result of that.
8 A. That's right.
- 9 Q. It follows then, doesn't it, that there would have been
10 fewer people who had the knowledge, able to pass it on.
11 A. Are you talking about statistically fewer people, or
12 fewer people, in total?
- 13 Q. Let's leave statistics out of this.
14 A. No, it is important in the fact that, obviously, if you
15 have got a smaller population, you don't need as many
16 people with that knowledge to keep passing it on, but,
17 if you have got a larger population -
- 18 Q. But you have got fewer recipients, too.
19 A. That's correct, yes.
- 20 Q. The reason I suggest you keep statistics out of it is
21 because I don't understand any statistical data to have
22 been collected, at that time.
23 A. Sorry, at what time?
- 24 Q. When the small box epidemic went through.
25 A. No, we have only got the estimates that archeologists
26 could provide.
- 27 Q. Based on those estimates, is it your view that it would
28 follow, of necessity, that there were fewer people who
29 were the custodians of traditional knowledge, able to
30 pass it on.
31 A. Is this after the small pox?
- 32 Q. Yes.
33 A. Initially that would have been the case, I would
34 imagine, yes.
- 35 Q. Then is it the case that the intrusion of the
36 missionary, to some extent, affected the transmission of
37 cultural beliefs.
38 A. If you are talking about the first missionary, H.A.E.

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1 Meyer, I don't think he would have had much impact. His
2 mission was, at that stage, essentially on the frontier
3 at Encounter Bay. He was there very early, from the
4 late 1830s to the first years of the 1840s, he was
5 teaching the Aboriginal people basic skills and, through
6 that, he recorded manners and customs and language. The
7 number of people passing through his school were
8 probably a very small percentage of the Lower Murray
9 people who were alive, at that stage.

10 Q. What about those who followed Mr Meyer.

11 A. There is a big gap after Meyer when George Taplin
12 arrives on the scene setting up the mission, as you have
13 already stated, in 1859. By that time, Aboriginal
14 people had become or many of them had incorporated
15 themselves into things like the fishing industry,
16 cutting wood for paddle steamers and Aboriginal people
17 were being employed to help with the harvest. So,
18 throughout Taplin's lifetime - and he died in 1879 -
19 again, he only had a small percentage of the total Lower
20 Murray population, at any one time on his mission. And
21 he had very little coercive powers, in terms of keeping
22 them on the mission. That, of course, changed a lot
23 after his death in the advent of the 20th century.

24 Q. It is true, is it not, that Taplin, notwithstanding his
25 missionary work, was one of the earlier recorders of
26 Aboriginal cultural beliefs.

27 A. No, I would consider people like George French Angas and
28 Richard Penney and Meyer being more important in the
29 sense of recording a preEuropean type culture. By that
30 I mean people who are moving around the landscape more
31 or less at will without being overly restricted by
32 European land acquisition. So, all of those people I
33 have mentioned relate to the late 1830s/1840s. It is a
34 big jump then to George Taplin in 1859.

35 Q. But, apart from the fact of European land acquisition,
36 which would have inhibited the ordinary living habits of the
37 Aborigines, the impact of the missionary was significant,
38 was it not, in disturbing their usual way of life.

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- 1 A. No. It is quite clear, through the Taplin journal, that
2 Aboriginal people took advantage of the resources that
3 the mission had, to drop in when they were on the way
4 from say Mundoo Island through to Wellington or down the
5 Coorong. So the fluctuation in the population level of
6 Point McLeay was enormous, just because there was quite
7 a bit of activity going on and people were more or less
8 using it as a roadside cafe, in the sense they were
9 stopping there for a while, sometimes engaging in
10 cultural activities, such as bartering and settling
11 disputes, and then they would move on.
- 12 Q. Were Taplin's observations confined to what he observed
13 at the Point McLeay Missionary station.
- 14 A. Yes, largely. Later on in the period, when he was at
15 Point McLeay, he sent some trained Aboriginal preachers
16 out to Mundoo Island and down the Coorong, but he tended
17 to restrict himself to the mission, and his records
18 largely refer to events on the mission property or
19 neighbouring properties.
- 20 Q. To that extent then, there were certain inherent
21 inhibitions upon the type of knowledge that he acquired,
22 were there not.
- 23 A. With such a wide diversity of Lower Murray people
24 passing through, I would say that, even being in one
25 spot, he was still being exposed to variation, cultural
26 variation, from within the extended Lower Murray
27 community. He was also interacting with George Mason,
28 particularly early on, who was established at
29 Wellington.
- 30 Q. Faye Gale suggests that reading the work of Taplin
31 teaches us little about the religious and ceremonial
32 roles of Aboriginal women. I will take you to the
33 precise reference, if it is necessary. But if you
34 accept that is an accurate observation of what he says,
35 do you subscribe to that view or not.
- 36 A. I would subscribe to it as far as saying that he never
37 probed too deeply in any particular aspect of the
38 culture. What he provides is an overview, and, as an

1 overview, it is quite useful. But he was not a trained
2 anthropologist. He was a lay anthropologist or he was
3 an ethnographer, a collector of data.

4 Q. Looking at p.126 of Faye Gale's article 'Roles
5 Revisited', she says in the last paragraph 'However, we
6 learn little about the religious and ceremonial roles of
7 Aboriginal women. Taplin leaves us with the same
8 impression that most ethnographers, until very recently,
9 have given, namely, that women were largely irrelevant
10 in the whole religious spiritual sphere. Indeed, as one
11 seeking to convert the people away from their own
12 religious beliefs and practices, he saw the women, whom
13 he assumed had less religious involvement, as easier
14 targets than the men.' Do you agree with that
15 observation.

16 A. I think she has probably put too much emphasis on it, in
17 that, although Taplin deals with male initiations to
18 some extent, it is in no way the same sort of detail
19 that the Berndts provided. But I would accept, as a
20 general point, that Taplin himself had more luck - if
21 that's the word - with Aboriginal women. That may well
22 have been through the role of his wife or - it is very
23 hard to actually draw much out of that actual quote.

24 Q. I thought that the point that Faye Gale was making was
25 this: That until very recently, ethnographers have not,
26 for various reasons, recorded or obtained much
27 information, if any, about the religious and ceremonial
28 roles of Aboriginal women.

29 A. And until recently, that covers the Berndt period as
30 well, does it? Because I would find that -

31 Q. I include that because Faye Gale is making this
32 observation, is she not, in 1989. That's when this book
33 was published.

34 A. We don't have an abundance of knowledge about
35 initiations and religious and ceremonial business if we
36 take the Berndts out of the equation. We have got an
37 indication of some of the terminology and some of the
38 mechanics of the initiations and the fact that they

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1 existed, but in terms of anthropology - that's why the
2 Berndts record is so important, just because that detail
3 is in there in relation to the Lower Murray.

4 Q. Why is it that until we get to Berndts, which is the
5 early 1940s, we don't have that knowledge.

6 A. Anthropology has gone through many phases since it sort
7 of came about in the 1850s and the 1860s, and it would
8 have taken a while in this century to recognise that
9 there were still knowledgeable informants about the
10 Taplin period. There was an enormous push from lay
11 anthropologists or data collectors to go out and collect
12 all the data that was about, and then things tended to
13 lapse a bit, with the assumption that there were no more
14 - and I use the word with reservation - traditional
15 people, that is, people who the anthropologists would
16 regard as pre-European in terms of their world view. So
17 the Berndts came along, as did Tindale, and found that
18 there were some knowledgeable informants, and then
19 started another period of field work just prior to the
20 Second World War, and, in the case of the Berndts,
21 through the Second World War.

22 Q. Is this what you are saying, that the information about
23 traditional beliefs is restricted, first of all, by the
24 number of informants that are available, or whether
25 there are any informants available.

26 A. It would only take a few informants, if they were
27 widespread through the Lower Murray, to get something of
28 an overview. We would have to look at what part of the
29 country the informants came from. In the case of the
30 Berndts' study, they had several people who defined
31 themselves as Yaraldi. Therefore, there is a strong
32 case that they have covered the basics of Yaraldi
33 society, but their informants wouldn't have known as
34 much about the Coorong area. But Tindale had tended to
35 work mainly with Coorong informants. So I wouldn't want
36 to make a general statement about how many informants he
37 would need. Naturally you would try and get as many
38 informants as possible. If it meant talking to

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1 everybody in the community that had knowledge, then you
2 would do that. That seems to have been the approach
3 that Radcliffe-Brown took in the early part of this
4 century, when he went to Point McLeay and set up his
5 model of social organisation in terms of Australian
6 tribes, as he called them. He set about to interview
7 every possible informant that he could in terms of
8 coming up with a map of where people were living and
9 what the names of the so called tribes, or lakalinyeri,
10 as others have called them, as they were spread through
11 the Lower Murray region. So I would say that you need
12 more than just a couple of informants, but if you are
13 dealing with, as the Berndts were, a memory culture,
14 then you just have to be content with the informants
15 that you have access to.

16 Q. Does that mean that the information that the Berndts
17 collected was limited by the number of informants they
18 had and the memory of those informants.

19 A. They were limited in the fact that they were describing
20 a culture that was a hundred years down behind them.
21 They make it quite clear that they are dealing with a
22 memory culture. In fact, Albert Karloan and Pinkie Mack
23 were describing events and practices that they had just
24 heard about in their own childhood. So the Berndts
25 considered that they had access to the main informants
26 on Yaraldi culture, and Yaraldi culture being something
27 that they were describing from the point of view of its
28 pre-European type characteristics.

29 Q. If your object is to record Aboriginal cultural beliefs
30 in any designated area, why do you need more than a
31 couple of informants.

32 A. As I stated when I was giving an overview of the
33 methodology for an anthropological report, an
34 anthropologist would be obliged to get the full range of
35 opinion that would be available or exists on various
36 aspects of the culture. No one person you would trust
37 to have all the information, because that one person
38 will have particular links to particular descent groups

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- 1 that may have slightly different versions of particular
2 dreaming stories. So you are really obliged to,
3 certainly if you have got the time and you are doing an
4 ethnography as distinct from a report produced for a
5 particular reason - if you are studying a group of
6 people, then you would have a vested interest in
7 obtaining as much information from as many people as
8 possible in order to plot the boundaries of knowledge
9 within that community.
- 10 Q. The Berndts' field work in the Lower Murray was done in
11 the early 1940s, is that right.
- 12 A. Yes.
- 13 Q. Although their book isn't published until 1993 or
14 thereabouts, they were relying on data that they
15 acquired in the early 1940s.
- 16 A. They acquired the data in two blocks in that early
17 period. Berndt describes how his first attempts with
18 Karloan came up with mixed results, but after Berndt had
19 gone away and presumably come back with Catherine,
20 Berndt had gone away and become a trained
21 anthropologist, Karloan remarked that Berndt was now
22 able to ask the questions that he wanted to answer -
23 words to that effect. So although the Berndts were
24 possibly worried about the quality of their earliest
25 data, they were trained anthropologists when they had
26 finished collecting that 1940s data.
- 27 Q. I just want to be clear. All of the data was collected
28 in the 1940s, is that your understanding.
- 29 A. All of the Lower Murray data was collected then, but of
30 course they had opportunity to do field work in other
31 places in order to develop their overview of what was
32 unique in the Lower Murray.
- 33 Q. In relation to information that they acquired of
34 traditional culture in the Lower Murray, their
35 informants seem to have been Albert Karloan and Pinkie
36 Mack almost exclusively, do they not.
- 37 A. No. Mark Wilson gave them information. I think you
38 will find in the Berndt ethnography that they got

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1 information from a person named Frank Blackmoor, and
2 there had been opportunity to talk to other Aboriginal
3 people such as the person they call Clarry Long but we
4 know in the museum as Milerum. So there were some
5 conversations they had with the Coorong man. Also, they
6 would have had contact with other Aboriginal people who
7 had been exposed in some way or another to Lower Murray
8 culture, such as Barney Warrior. I mean, I accept that
9 the bulk of their data was from Pinkie and Albert, but
10 they did have the chance to explore the extent of that
11 literature and the consistency of it with other
12 Aboriginal people.

13 Q. You said earlier in your evidence last week, that
14 Karloan and Pinkie Mack seem to be the only people who
15 have that particular knowledge that was recorded. I am
16 not using your exact words. Is that your impression
17 from Berndt's work.

18 A. Berndt made the comment that people like Mark Wilson had
19 knowledge of the culture, but wasn't initiated and
20 didn't speak Yaraldi fluently. So although Mark Wilson
21 would still have been an important informant, he was not
22 considered to have the type of knowledge that Albert
23 Karloan and Pinkie Mack had.

24 Q. You really have to take Berndt's word for that state of
25 affairs, don't you, that is, the extent of Pinkie Mack's
26 and Albert Karloan's knowledge and what other knowledge
27 might have existed.

28 A. Given that they are social anthropologists of high
29 calibre, until I have knowledge that they were wrong, I
30 do accept their statement.

31 Q. I understand that. It is the position, isn't it,
32 though, that Catherine Berndt makes a point of saying
33 that when she first started working with her husband,
34 she didn't appreciate how important it was for her to
35 align herself with the women, and that until she
36 understood that, she felt that perhaps she didn't get as
37 much information as she might otherwise have done.

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- 1 A. I am not familiar where that's written, but I could well
2 imagine from my own field of work that there are certain
3 situations which would create what they call in
4 Aboriginal, English shame. So, therefore, it might be
5 embarrassing to talk about some things with your spouse
6 there, or someone who is not a close relative, or maybe
7 in some situations with a close relatives. It is fairly
8 complicated exactly what would be spoken in what
9 situation. But I accept that Catherine Berndt would
10 have been feeling her way around in terms of developing
11 field work techniques, as she would have been fairly new
12 to the anthropology game back in the - circa 1940.
- 13 COMSR: Mr Smith has covered a fair bit of this
14 area. I am just wondering how much of this particular
15 line of cross-examination is needed to be covered.
- 16 MS NELSON: I don't think, with respect, that Mr
17 Smith - I don't want to be rude about it - really
18 explored the difficulties that have been encountered
19 until very recently.
- 20 COMSR: I understand that that is what you have
21 been doing, you have been exploring them. It is just
22 that I am concerned that we don't cover the same ground
23 twice, given that we have to -
- 24 MS NELSON: I am conscious of the time limitation.
25 I am really not asking questions for the fun of it. I
26 don't want to leave the area inadequately covered,
27 because I think that would be most unhelpful.
- 28 COMSR: If you feel there are areas that we
29 haven't touched on at this time.
- 30 CONTINUED
31

1 XXN

2 Q. There are areas, are there not, of knowledge which are
3 not spoken and they are not publicly expressed when we
4 start talking about secret sacred business.

5 A. Perhaps defined as, you know, circumstances where you
6 have got, you know, a mixed group of people of varying
7 age, gender, race, I would accept, yes.

8 Q. There are areas where women will not communicate to a
9 male observer knowledge of sacred secret women's
10 business.

11 A. Which area of Australia are we talking?

12 Q. Let's talk about the Lower Murray.

13 COMSR: I'm a bit concerned we don't get into
14 too much -

15 A. The answer is easy: I don't believe there is secret
16 sacred women's business in the Lower Murray.

17 XXN

18 Q. Why do you say that.

19 A. It's in my statement. My own reading of the
20 ethnography, my field experience, all of that. It would
21 take me an hour to go back over that.

22 Q. You talk about your field experience. If such a thing
23 existed, do you really think that the women who had that
24 knowledge would tell you as a male outsider.

25 A. You have jumped from the point of whether I would know
26 whether secret sacred women's business existed to the
27 point of whether I would actually hear that secret
28 sacred women's business.

29 Q. No, I hadn't. I'm simply asking you whether you would
30 expect those women to tell you of its existence, never
31 mind about the details.

32 A. I would expect that in some manner, I and other
33 Aboriginal people in that community would be given the
34 knowledge that it at least existed, even if it was just
35 to the extent of us not embarrassing them by probing
36 into normally areas of their culture that might offend
37 them.

38 Q. How would you, as a field worker, establish that you

1 were intruding into an area where you might embarrass
2 them by further questioning.

3 A. My informants would find ways of making it quite clear.
4 Even if it was to the extent of warning my wife or
5 another person that I worked with that it's best that I
6 not take a certain approach of questioning, or that I
7 not be around on certain occasions. But I've not had
8 that experience so, therefore, I assume, as I've just
9 stated, that the secret sacred women's business does not
10 exist.

11 Q. Have you, in your field work, sought to ask people about
12 that.

13 A. It's not a good field work technique to just turn up and
14 start asking questions like that. Aboriginal people
15 from all over Australia will make it quite clear that
16 you get information at various stages at various times
17 and when the context is right and when my credentials,
18 as someone who can be trusted, have been established by
19 them. Or, there may need to be something that would,
20 some people that would need to relay that information on
21 rather than to others, so it's quite complicated.

22 Q. Do you concede the possibility that perhaps you haven't
23 been in the right place at the right time to be able to
24 access that type of information.

25 A. No, I wouldn't concede that. I would say that - again,
26 I would say that if such information existed, then I
27 would have been at least told of its existence, or it
28 would have been made apparent to me that it existed.

29 Q. In what context and by whom.

30 A. Since we are talking hypothetically, it's difficult for
31 me to come up with a hypothetical situation that would
32 explain it. But it would be made obvious. It would be
33 made obvious to me that such information existed, even
34 if it was just to the extent that I shouldn't ask
35 certain questions on certain topics or go to certain
36 parts of the landscape or, you know, whatever. That
37 hypothetical secret sacred, you know, women's business
38 would be.

1 Q. You made the point, and I think you have made it twice,
2 that Catherine Berndt and her husband record that the
3 gender bias in terms of ceremonial and religious matters
4 in the Lower Murray is minimal.

5 A. And that's a point that they make and Professor
6 Tonkinson in the foreword.

7 Q. That's not, of course, to say that separate secret
8 women's business does not exist, is it.

9 A. I'm sorry, what was that question?

10 Q. When they say - I'll rephrase it. When they say that
11 both men and women have access to religious ceremonial
12 beliefs, they don't make that categorical statement,
13 they simply say that the separation of men's and women's
14 business is minimal in the Lower Murray, don't they.

15 A. I would think that would imply the former.

16 Q. When you say they say its minimal, don't they concede
17 that there are some areas, they may not be large, but
18 there are areas where they are separate.

19 A. No, I think you're wrong there. I think they are
20 talking about emphasis that, say, a male would put on
21 certain parts and a female put on others. I don't see
22 that as separate at all; in the contexts, are still
23 there.

24 Q. That's your interpretation, is it, of what they are
25 saying.

26 A. I would have thought that was a reasonable
27 interpretation.

28 Q. It is, of course, an interpretation which supports your
29 particular approach, isn't it.

30 A. Yes, it is.

31 Q. Do you concede that there is another interpretation
32 which is reasonable and that is: That they are saying
33 that although there's not a lot of secrecy between men
34 and women in the Lower Murray, there are some areas
35 where there is secrecy.

36 A. No, I think that is taking it too far.

37 Q. The statement they make is, this is a statement made by
38 Catherine Berndt at p.11: `Gender-based difference in

- 1 the sense of inclusion or exclusion in religion and
2 other affairs were minimal'. You say that should be
3 read as meaning that there are no gender-based
4 differences in the sense of inclusion or exclusion in
5 religion and other affairs.
- 6 A. I mean, you talk about division as I think it would not
7 be implied by her statement.
- 8 Q. Well, have a look at her article in that book at p.11.
9 Do you say that that statement that I've read to you
10 means that there was no area of traditional culture
11 where, for example, men were excluded from women's
12 business and vice versa.
- 13 A. How are we defining `women's business'? In anything
14 associated with women? I mean, there are a lot of
15 problems with that statement. I would look at it the
16 other way and say that that statement doesn't imply a
17 sharp division between the genders. Certainly in the
18 area of, you know, their cosmology and their secret
19 sacred knowledge, I have never argued that there isn't
20 women's business, but -
- 21 Q. You say it isn't secret sacred.
- 22 A. Secret sacred women's business in the Lower Murray, yes.
23 Something could be religious without being secret
24 sacred.
- 25 Q. I understand the point you make there. The point you
26 made earlier in your evidence was that you reached the
27 position that there is no secret sacred business from
28 all the documented evidence.
- 29 A. That's correct.
- 30 Q. You go on to say `If it existed, it ought to be
31 documented'.
- 32 A. It's existence or, at the very least, ought to have been
33 documented.
- 34 Q. And documented by whom.
- 35 A. Documented by any of the large number of ethnographers
36 who have worked in the region, both male and female.
- 37 Q. Do you not concede that it may not be documented either
38 because their approach or their methodology, or whatever

- 1 you care to describe it as, or their ability to get
2 information has been impeded in some way.
- 3 A. No, I don't concede that. You have got a very fairly
4 big bunch of ethnographers there. I don't think that at
5 least the existence of secret sacred women's business
6 would have been entirely missed.
- 7 Q. It is the situation though, isn't it, that even in the
8 last four or five years you have become aware of matters
9 that you weren't aware of either in your own research or
10 anyone else's.
- 11 A. What matters are they?
- 12 MS NELSON: I am going to have to make an
13 application, I think at this stage, that the court be
14 closed.
- 15 COMSR: I will remind the persons in the hearing
16 that I'm constrained by the authorisations not to permit
17 certain persons in the hearing room while evidence
18 concerning Aboriginal traditions are being led. For
19 that reason, I'm going to have to ask you to leave the
20 hearing room while this portion of the evidence is being
21 examined, apart from those persons whom I earlier
22 indicated would be permitted to remain in the hearing
23 room.
- 24 ADJOURNED 3.39 P.M.

CLOSED HEARING

7.8.95

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E.M. FISHER XN

1 HEARING OPENS

2 MS SIMPSON APPLIES TO INTERPOSE WITNESS, E.M. FISHER

3 LEAVE GRANTED

4 MS SIMPSON CALLS

5 ELIZABETH MARY FISHER AFFIRMED

6 EXAMINATION BY MS SIMPSON

7 Q. Mrs Fisher, will you tell the commissioner where you
8 were born.

9 A. I was born at a place called Bracken Hill, Sheffield,
10 England.

11 Q. When did you come to Australia.

12 A. In 1927. I was one year and five months old when we
13 left the United Kingdom. I am now an Australian
14 citizen.

15 Q. I think, during the course of your life, you came to
16 know a woman called Gladys Elphik.

17 A. Yes.

18 Q. Can you tell the commissioner when you first met Gladys
19 Elphik and how you came to know her.

20 A. Yes. It was in 1964 or 65. I was in the International
21 Women's Day Committee and we had meetings at Port
22 Adelaide sometimes, and a woman called Dot Edwards was
23 always telling me about this wonderful Aboriginal lady
24 that I must meet. One day she turned up at my place and
25 said `Come on, you're coming to see Glads'. So I went
26 over and met this very tiny little woman who said `How
27 do you do? I'm pleased to meet you. You are going to
28 write the story of my people', and I staggered back and
29 said `Am I?' And she said `Well, I think we'll get
30 along and see how it goes'. So that began a long
31 friendship until Gladys died in 1988. From that time I
32 took notes and made tapes. Gladys was born in Adelaide
33 and lived - grew up on Point Pearce. During the time
34 when I knew Gladys, she would have friends there and
35 sometimes the friends were from Point Pearce, sometimes
36 they were from northern South Australia, sometimes they
37 were from Point McLeay.

- 1 Q. Just pausing there for a moment, before you met Mrs
2 Elphik, did you have an interest in historical matters.
- 3 A. Yes. I - my father was always wanting to trace back the
4 family history, and my mother knew a lot - well,
5 something of her own family history, and I was always
6 interested in history. I have read, in a kind of
7 amateurish way, across various matters of interest in
8 Australia. My mother had a respect for Aboriginal
9 people and - does that answer the question?
- 10 Q. Thank you. You have told the commissioner that you were
11 going to write a book about Mrs Elphik; is that right.
- 12 A. Yes. She asked me to write a book about her people
13 which would include her own childhood at Point Pearce,
14 about her grandmother, who was Kiednerto of the Nurrunga
15 tribe.
- 16 Q. Did you begin gathering material in order to write that
17 book.
- 18 A. Yes. I spent about 8 years going through old
19 newspapers. I spent a long time, of course, with Gladys
20 on an irregular basis. I have - I wasn't a wealthy
21 woman so I used what I had. I had a loan of a tape
22 recorder at first, a very hefty old thing, which I still
23 have, and then I got a slightly more modern reel-to-reel
24 tape recorder and I used to drag that down to Gladys's
25 place and record, yes.
- 26 Q. I think you recall on one particular day, when you were
27 talking to Gladys Elphik, meeting a friend of hers at
28 her house called Rebecca Wilson.
- 29 A. Yes. I was only ever commanded by Gladys to come to her
30 place on one occasion, but that was not the occasion.
31 The visits would be like this: I would ring up and say
32 'Gladys, I've got a free day, can I come down?' And she'd
33 say 'Yes, you can come down', and I'd arrive and there
34 may be a house full of people or Gladys might be totally
35 on her own. On the occasion that you refer to, there
36 was a woman called Rebecca Wilson, a little, a tiny
37 woman in stature. They were somewhat alike in stature
38 but Gladys was a little bit thinner than Rebecca Wilson.

E.M. FISHER XN

1 Q. Did you come to know something more about Rebecca Wilson
2 on that day, that is, who she was married to and where
3 she had come from.

4 A. Yes. I had gone down there with a purpose. I had
5 discussed on the phone with Gladys that we examine the
6 financial output and input, in and out, of Point Pearce
7 as a government reserve, that was in fact a farm and
8 mixed produce and so on, and that we would examine - and
9 she had some statements from government figures on how
10 much Point Pearce produced. We were having a discussion
11 on those questions and Rebecca Wilson was present at
12 that time.

13 Q. Can you tell the commissioner where you were having the
14 discussion. Was it in a particular room.

15 A. Yes. It was always at Gladys's table, her kitchen table,
16 and I would put the tape recorder on the table and she
17 would say - always she would say 'That's getting too
18 heavy for you' and I would say 'Not too heavy'. That
19 was always how it began. That had a meaning, you see.
20 The meaning of that meant 'What I'm telling you is too
21 much of a burden'. And what I was telling her by saying
22 'Not too heavy' was that it was no burden. That was a
23 style of speaking where you don't sort of directly refer
24 to things that are personal with Aboriginal people,
25 unless they have given you great permission to do this.

26 Q. On this particular occasion which you have recalled, you
27 were discussing financial matters to do with Point
28 Pearce, is that right.

29 A. Yes, yes.

30 Q. Did Gladys Elphik leave the room for a time.

31 A. She went - she moved over to - the kitchen - she was in
32 a small house, and the kitchen went around into her
33 bedroom. The kitchen was a smallish, like this
34 (INDICATES) and there was a table in this corner where
35 we always sat, and just over there, across a passageway,
36 was her bedroom. She'd move into the bedroom but she
37 could still hear me, or hear us, and - yes, so she moved
38 off to do that, yes.

E.M. FISHER XN

1 Q. While she was in the bedroom, did you continue talking
2 to Rebecca Wilson.

3 A. Yes.

4 Q. Did she have another name which you call her.

5 A. Well, she told me that her people called her Koomi.

6 Q. Could you spell that.

7 A. K-O-O-M-I.

8 Q. When you were talking to Rebecca Wilson, did you have
9 the tape on.

10 A. Yes, I did. There seemed - you have got a reel-to-reel
11 tape and I used to just dash out and buy them as a
12 needed them where I could find them fairly cheap because
13 we didn't have much money. There was never any reason
14 to stop a reel-to-reel unless I was instructed, and I
15 was always instructed by hand movement rather than by
16 voice, yes.

17 Q. So you had been talking to Gladys Elphik with the tape
18 going.

19 A. Yes.

20 Q. And you continued to talk to Rebecca Wilson while the
21 tape was still running, was that what happened.

22 A. Yes, yes. Gladys said something about 'I'll just go off
23 and find these papers'. She was looking for papers
24 which had statements about the production on Point
25 Pearce, yes.

26 Q. What did you talk to Rebecca Wilson about during that
27 time while the tape was running.

28 A. I asked her opinion - Gladys had asked me if I could give
29 her any reason why an Aboriginal person could trust a
30 white person, and I'd said, no, I couldn't give her any
31 reason. She went on to say that that's how they'd been
32 brought up, that white people aren't to be trusted
33 because of their experience among them. Koomi was
34 saying that it takes many many years for a white person
35 to understand Aboriginal people, and I understood what
36 she was saying. What she was saying is 'You will take
37 many years to understand us'. So I said 'Well, I
38 understand what you are saying, thank you very much'.

- 1 And she said 'No offence meant'. This was a method of -
2 an indirect method - Aboriginal people are very careful
3 not to insult you. They can say a number of things in a
4 number of ways, and if you are smart enough to catch it,
5 then you're smart and they should continue talking to
6 you. If you miss it, tough, next time around you might
7 catch it.
- 8 Q. How long were you talking to Rebecca Wilson while Gladys
9 was in the bedroom.
- 10 A. I suppose it would have been - I don't know, twelve
11 minutes, 15 minutes maybe.
- 12 Q. Gladys came back into the kitchen after that.
- 13 A. She came back and there was - she had a lot of papers
14 and she put them on the table and she was sorting
15 through and Rebecca Wilson kept on talking, a few
16 things. She told the story of a being on Point McLeay
17 and she told the story of how Taplin came and how they
18 sat him under a tree which was supposed to be inhabited
19 by this being, which we would call an evil being, I
20 suppose. They didn't want to kill him, but they sat him
21 under the tree and thought 'The evil spirit will get rid
22 of him'. He was alive and well the next morning so they
23 thought there must be something about this man, and she
24 said that he had a hard time convincing Aboriginal
25 people, et cetera.
- 26 COMSR
- 27 Q. This portion of the evidence has already been in the
28 public arena, has it?
- 29 A. It is a well known story.
- 30 Q. A well known story.
- 31 A. Yes, it is well known amongst -
- 32 Q. I only say that, you understand, because of my situation
33 in respect of Section 35.
- 34 A. Yes, indeed. Thank you for that. This has been told.
35 I don't know whether it is in recent literature. It is
36 certainly in early literature.
- 37 XN
- 38 Q. When Gladys came back with her papers from the bedroom,

E.M. FISHER XN

1 did you then resume your discussions with her about
2 Point Pearce.

3 A. Yes, yes, because Rebecca Wilson wasn't there as my
4 principal. I had no intention of interviewing her
5 because she was from another culture, a different
6 nation. I was concentrating on Nurrunga material, not
7 on Ngarrindjeri. I knew enough from Gladys not to ask a
8 lot of things of persons of a different culture. I was
9 prompted by her to speak more to Koomi later, and she
10 invited me down to Point McLeay later on.

11 Q. On this particular day, did you continue to record the
12 conversation you were having.

13 A. We came to the end of the tape and I said `Well that's
14 it, I haven't got another tape with me, Gladys'. And
15 she said `Well, let's go into the lounge, I want you to
16 talk to Koomi'. So we moved from the kitchen to the
17 lounge. The lounge was small. There was a lounge seat
18 along the wall there, and a picture on the wall, the
19 television set was there, and there was another chair.
20 I think I sat in this chair here, if I remember rightly
21 (INDICATES), on the right-hand side of the lounge, and
22 so she said `Go on, Koomi, you tell, Betty'. So Koomi
23 then related to me she was upset that something had been
24 ploughed up or bulldozed up or something and she was
25 upset, and Gladys then said in her forthright way
26 `They're digging up our culture'. Then Rebecca Wilson
27 proceeded to tell me some things that alluded to, in
28 general terms, the secret and sacred nature of many
29 places around that Ngarrindjeri area, north, south, east
30 and west, which she indicated, in specific terms, that
31 she couldn't talk about. She made it very very clear
32 that she wouldn't talk about it. So Gladys encouraged
33 her to talk and she said `You have to tell things so
34 that these kids will know'. Koomi was upset when she
35 started talking about it and related that - I can say,
36 in general terms - the Hindmarsh Island and the islands
37 and the waters surrounding those areas are extremely

E.M. FISHER XN

- 1 important - extremely secret and, above all, sacred to
2 Aboriginal people, and especially to women.
- 3 Q. I think when you were having this conversation with
4 Koomi, you didn't have the tape recorder on, is that
5 right.
- 6 A. Oh no. There was no tape recorder in the lounge when we
7 were talking. The tape had finished. I had the tape
8 recorder turned off. It was in the kitchen on the table
9 and if you saw it, it is quite a big one, you would
10 understand that I wouldn't willingly lump it around.
11 But the thing is that Koomi said 'There's no way. I
12 can't talk' and I said 'Well, can I make a note? Can I
13 make a note?' I had a little notebook and I'd already
14 written some pages, two or three pages. It was just a
15 little school notebook, a little memo book, and I'd
16 already written some pages in that that was Nurrunga
17 business from Gladys, because we'd been somewhere. I'd
18 been taking notes of something she said and I had that
19 book in my bag and I said 'Can I write in this?' And
20 after a while she was persuaded to let me make notes,
21 which I did.
- 22 Q. About how many notes did you make of that conversation,
23 can you remember.
- 24 A. Probably about all the book. The rest of the book. It
25 was just a small memo type book.
- 26 Q. Do you have the tape recording of Koomi's voice and the
27 notes that you made of that conversation now.
- 28 A. I haven't got them in my possession, no.
- 29 Q. Have you given them to somebody else.
- 30 A. You see, when - see, I was never going to bring this out
31 because I had promised Gladys. I promised Koomi I'd
32 never speak about her words. I promised Gladys that I
33 would never speak her words until the book was published
34 and I -
- 35 COMSR
- 36 Q. Which book are we talking about.
- 37 A. I was to publish a book on the life of Gladys Elphik and
38 the Nurrunga people, and I promised I'd never do that.

E.M. FISHER XN

1 In fact, I put all the tapes in the library in 1990, in
2 about May 1990, and they have been there until the day
3 when Sarah Milera's photograph appeared in the local
4 press.

5 Q. I think the question was, where are the tapes and the
6 book now.

7 A. I rang the Nurrunga people, who are responsible for the
8 tapes and everything, and I got their permission to
9 speak to Doreen Kartinyeri. I rushed down and I got the
10 notebook and the tape I had from my donor's copy from
11 the Mortlock Library, and I delivered them - my husband
12 drove me to town, I don't drive a car, and I delivered
13 them to the building where the Aboriginal Legal Rights
14 are and left them there for Doreen Kartinyeri.

15 CONTINUED

1 XN

2 Q. As far as you know, is that where they now are.

3 A. As far as I know. The rest of them are all in my
4 safekeeping. Madam Commissioner, you must understand.
5 I feel a huge personal responsibility for what I had
6 recorded. I feel extremely guilty that that book has
7 never been issued. My own life has been - had its
8 difficulties and has prevented me publishing this work.
9 I never dreamed that mine was the only recording of
10 this. I never even imagined that the unbelievable
11 situation would arise where I was - I hope I am not the
12 only one to have recorded these women. I hope someone
13 will come forward who is in my own position and will
14 have similar recordings. I just never dreamed, in all
15 my life, that this would be - this would occur, because
16 I have kept quiet and silence and I have kept my promise
17 to Gladys and Koomi and to others who were on the tapes,
18 including her son; whose name I won't say.

19 Q. Have you come to the part of your story now which is
20 about to concern the matters which Koomi told you
21 relating to the Ngarrindjeri area.

22 A. I can only just emphasise in general terms for the open
23 court that, in fact -

24 COMSR

25 Q. Are we going to go into something that -

26 A. I was just going to reiterate that she spoke about the
27 sacred and secret nature about the islands and the water
28 and I can't particularise that before anyone other than
29 women.

30 Q. I appreciate that, but you are being asked, have we
31 reached that stage of your evidence -

32 A. I think so, yes.

33 Q. That you are asking that the hearing be closed.

34 A. I am very aware I am very amateur at the question of all
35 this.

36 Q. Just so that I understand; you now say that, due to the
37 nature of the evidence that you are going to traverse
38 that it should be taken at a private hearing of the -

- 1 A. I would prefer it, in case -
2 Q. You say something that -
3 A. In case I run over into areas that - I have a very
4 strong understanding, Madam Commissioner, that 200 -
5 Q. I don't think you will have - I think I can say that, if
6 there is any potential for -
7 A. Yes.
8 Q. For this matter to be one that takes me outside of the
9 terms of my authority I would propose to close the
10 hearing to all excepting those persons whom I permit to
11 remain. And, at the very least, that means that only
12 counsel and parties and the members of the Commission
13 staff who are necessarily present will remain and then I
14 will hear if there is any problem in respect to that.
15 COMSR: This session of the -
16 MR MEYER: Before that order is made; we have been
17 handed a copy of a statement. I just want to be sure
18 where we stand in relation to it.
19 I assume that what I have been handed is MFI 6?
20 COMSR: Perhaps we could clarify that matter
21 now?
22 MS SIMPSON: Yes, that's correct.
23 COMSR: Is it a statement that has to be put to
24 the witness?
25 MS SIMPSON: It is a statement that Mrs Fisher gave
26 and it is - it does contain material, all of which
27 should be suppressed from publication, in any event.
28 MR MEYER: That fixes that problem.
29 COMSR: It is not an exhibit, at this stage, in
30 any case.
31 This hearing will now be closed and into a private
32 hearing.
33 HEARING CLOSED

CLOSED HEARING

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