

1 COMMISSIONER STEVENS

2

3 HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

4

5 WEDNESDAY, 1 NOVEMBER 1995

6

7 RESUMING 9.40 A.M.

8

9 MR SMITH: The programme for today, Mam, the
10 situation is that Miss Nelson needs to ask some
11 questions of the Museum staff witnesses - Margaret Amon
12 and Francesca Alberts - and I understand that is not
13 going to take too much time. However, there is a little
14 bit of additional evidence from the witness Margaret
15 Amon and also there is a new witness from the Museum,
16 Neva Wilson, who has some evidence which I think the
17 Commission needs to hear.

18 The programme for today is, first of all, Neva
19 Wilson, a new witness. I've handed statements to
20 counsel. Margaret Amon will be recalled and there will
21 be some short further evidence from her and some
22 examination by Miss Nelson. Francesca Alberts, some
23 examination by Miss Nelson. Then, there will be
24 argument as to the question of confidentiality in
25 connection with Dr Fergie's evidence and then
26 cross-examination of Dr Fergie followed by the
27 cross-examination of Steven Hemming.

1 MR SMITH CALLS

2 NEVA LEONA WILSON SWORN

3 EXAMINATION BY MR SMITH

4 Q. I think you're an employee of the South Australian
5 Museum; is that correct.

6 A. Yes, it is.

7 Q. Currently, what is your position at the Museum.

8 A. I'm an assistant research officer with the Aboriginal
9 Family History Project.

10 Q. I think that was your position going back to 1995 -
11 sorry, going back earlier in 1994.

12 A. Yes.

13 Q. In that connection, you have worked with Doreen
14 Kartinyeri for several years, haven't you.

15 A. Yes, I was an assistant to her.

16 Q. I think in connection with the inquiry that this
17 Commission is making, you supplied a statement some time
18 ago to the Commission, did you not.

19 A. Yes, I did.

20 Q. Looking at this statement which I produce to you, do you
21 recognise that as a statement which you provided to the
22 Commission on 31 July 1995.

23 A. That's right.

24 Q. I think you would draw attention, for the sake of
25 everybody that has a copy, to a small correction made on
26 p.2 where the date is recorded as 21 June 1994 and you
27 have changed that to 1995, haven't you.

28 A. Yes, that's so.

29 EXHIBIT 246 Statement of Neva Wilson tendered by
30 Mr Smith. Admitted.

31 Q. You have a copy of that in front of you.

32 A. Yes, I have.

33 Q. You can look at that if you need to.

34 A. Thank you.

35 MR SMITH: The correction that needs to be made for
36 the people who have a copy that is uncorrected is on
37 p.2, the 4th paragraph, should read `21 June 1995'.

38

1 XN

2 Q. Your statement in substance deals with the problem that
3 arose concerning the fact that you and your colleague in
4 the Museum, Michelle Cole, provided a copy of the Rigney
5 genealogies to someone who attended at the Museum.

6 A. Yes, that's right.

7 Q. And that caused some concern with Doreen Kartinyeri, I
8 think, and she insisted that you give a statement about
9 that.

10 A. Yes.

11 Q. Or she would have you subpoenaed to give evidence in a
12 Royal Commission.

13 A. Yes, that's right.

14 Q. That's what she said.

15 A. That's correct, yes.

16 Q. That caused some problems at the Museum and eventually
17 it was dealt with by Mr Craig at the Museum.

18 A. Yes; Barry Craig and the director of the Museum.

19 Q. Can I take you, however, to p.2 of your statement and to
20 the bottom section of the statement. A few days after
21 this incident, that is where Doreen was angry with you,
22 wasn't she.

23 A. Yes, she was.

24 Q. Very angry.

25 A. Yes.

26 Q. And so it's a few days after 21 June 1995; is that
27 right.

28 A. Yes, that's right.

29 Q. She came to you, I think - and I'm now referring to the
30 second last paragraph on p.2.

31 A. Yes.

32 Q. You say there 'Approximately a few days later, Doreen
33 Kartinyeri returned and showed me a piece of paper which
34 she said related to the women's business at Hindmarsh
35 Island'.

36 A. Yes.

37 Q. That incident, where did that happen in the Museum.

38 A. It happened in our Family History Office on the 4th

- 1 floor.
- 2 Q. She showed you a piece of paper. Would you be able to
3 describe the piece of paper to us.
- 4 A. I can't recall if it was handwritten or it was a typed
5 piece of paper. Really can't.
- 6 Q. Looking back to it now, you know what I mean by cursive
7 writing.
- 8 A. Yes.
- 9 Q. Did it have cursive writing on it.
- 10 A. No, I really can't remember.
- 11 Q. Was it only a single sheet of paper.
- 12 A. No. It was a sheet of several papers, but she had it
13 turned to that one particular page.
- 14 Q. So was it sort of an ordinary sized quarto page.
- 15 A. Yes, it was.
- 16 Q. And, what, she had it folded in some way, did she.
- 17 A. Yes, she actually did, she had it folded.
- 18 Q. She showed you that piece of paper and your statement
19 reads `There were two names on the paper Gladys Elphick
20 and Olga Fudge'. These women had apparently spoken
21 about the women's business in relation to Hindmarsh
22 Island and had known about it for many years.
- 23 A. Yes.
- 24 Q. So Doreen came to you. She presented you with these
25 several sheets of paper folded in some way; that's
26 right.
- 27 A. Yes.
- 28 Q. Where you say `There were two names on the paper Gladys
29 Elphick and Olga Fudge', did you actually see those two
30 names.
- 31 A. Yes, I did.
- 32 Q. You know of those two ladies, do you.
- 33 A. Yes, I do.
- 34 Q. In broad terms, what do you know of Gladys Elphick.
- 35 A. They were very prominent ladies in the Aboriginal
36 community and were considered leaders, both of them
37 actually.
- 38 Q. Olga Fudge as well.

- 1 A. Yes.
- 2 Q. Both now deceased.
- 3 A. That's right.
- 4 Q. What did Doreen say to you when she did this. Can you
5 give us - I know you won't be able to remember every
6 word, but could you put it in as direct language as much
7 as possible. She said what having presented this piece
8 of paper to you.
- 9 A. She was trying, she was aiming to prove to me that this
10 Hindmarsh Island women's business actually had existed.
11 She was - with the intention of persuading me to sign a
12 statement to appear in relation to that incident with
13 that young man coming to ask for the Rigney information.
- 14 Q. For the Rigney information.
- 15 A. Yes.
- 16 Q. She said words to that effect to you as she put the
17 piece of paper in front of you; is that right.
- 18 A. That was her intention. She did say 'Look, it's all
19 right, this women's business does actually exist', and
20 by showing me that piece of paper with the involvement.
- 21 Q. The involvement of those two ladies mentioned.
- 22 A. Yes.
- 23 COMSR
- 24 Q. What did she say their involvement was.
- 25 A. That they knew about the Hindmarsh Island women's
26 business going back many, many years, so it wasn't
27 something that had just happened.
- 28 XN
- 29 Q. Those two ladies being Gladys Elphick and Olga Fudge.
- 30 A. Yes.
- 31 Q. No other name on the bit of paper.
- 32 A. No. I didn't see any other name.
- 33 Q. Did Doreen mention any other names to you in this
34 conversation.
- 35 A. She did say that going back to that particular time
36 there was a lot of women who knew about it and one of
37 the women's name was - I can't remember - we called her
38 Auntie Koomi Wilson.

N.L. WILSON XN (MR SMITH)

XXN (MR TILMOUTH)

XN (MR SMITH)

1 Q. In that conversation, Doreen said that, did she.

2 A. Yes.

3 Q. But the piece of paper just showed Gladys Elphick and
4 Olga Fudge.

5 A. That's right.

6 CROSS-EXAMINATION BY MR TILMOUTH

7 Q. Do I understand the correct procedure to be that if
8 somebody comes in, as this person did, seeking
9 information, they're supposed to give their correct
10 personal details, such as name.

11 A. Yes.

12 Q. Also to sign for or sign against any material that they
13 take out of the Museum.

14 A. That's right.

15 Q. In this case, that wasn't done by this person on two
16 occasions; is that right.

17 A. No, it wasn't.

18 Q. The fact of the matter is, could I suggest that Doreen
19 Kartinyeri saw this as an attempt by somebody
20 surreptitiously to obtain some information against her.

21 COMSR: How will this witness be able to answer
22 that?

23 MR TILMOUTH: Because of her perceptions of what
24 Doreen Kartinyeri said and did in her presence.

25 QUESTION REPHRASED

26 Q. Quite apart from Doreen's attitude, it was evident to
27 you, wasn't it, that she was upset, Doreen was upset
28 because she saw somebody had tried to gain some
29 information wrongly to use against her.

30 A. That's right.

31 BY CONSENT, MR SMITH SEEKS LEAVE TO FURTHER EXAMINE THE
32 WITNESS. LEAVE GRANTED.

33 FURTHER EXAMINATION BY MR SMITH

34 Q. I think there's a practice in the Museum and there was a
35 practice existing at least in 1993 of putting in
36 quarterly reports on the work you have done.

37 A. Yes.

- 1 Q. Looking at this document produced to you, - I will
2 supply copies eventually - I think this is a composite
3 quarterly report for the division of anthropology for
4 July to September 1993.
5 A. Yes, that's right.
- 6 Q. If we look at p.2 under the heading `Research and Field
7 Work', I think you get a mention there, don't you.
8 A. That's right.
- 9 Q. Is it the case, and looking at that heading `Research
10 and Field Work', that you attended a women's ceremony at
11 Baroota from the 5th to the 8th of August.
12 A. That's right.
- 13 Q. And that's 1993, of course, isn't it.
14 A. Yes.
- 15 Q. That involved women from the Port Augusta/Port Pirie
16 regions.
17 A. Yes.
- 18 Q. They are regarded as Western Desert people.
19 A. Yes, they are, yes.
- 20 Q. You attended that ceremony and was Doreen Kartinyeri
21 there.
22 A. She was.
- 23 Q. What was the ceremony in aid of.
24 A. It was to welcome Doreen who had just recently moved to
25 live there at Baroota and it was to welcome her into the
26 community.
- 27 Q. Baroota is near Port Augusta.
28 A. Port Augusta and Port Pirie.
- 29 Q. Doreen was present. The ceremonies that were performed
30 related to a dreaming that is quite well known.
31 A. Yes, the Seven Sisters Dreaming.
- 32 Q. Could I go back to your statement for a moment. Could I
33 go to the bottom paragraph on p.2. Have you had a think
34 about that overnight, the question of what names were
35 mentioned.
36 A. I didn't really think about it because I already knew.
- 37 Q. You have two names specifically mentioned there.
38 A. Yes, that's right.

5540

CJ 59A

N.L. WILSON XN (MR SMITH)

- 1 Q. And you added a third name this morning.
- 2 A. I did not see that written on the piece of paper that
- 3 was shown to me by Doreen, but it was used in
- 4 conversation.
- 5 NO FURTHER QUESTIONS
- 6 WITNESS RELEASED
- 7 EXHIBIT 247 Quarterly report tendered by Mr Smith.
- 8 Admitted.
- 9 MR SMITH SEEKS LEAVE TO RE-CALL WITNESS MARGARET AMON
- 10 LEAVE GRANTED

1 WITNESS MARGARET M. AMON CONTINUING

2 FURTHER EXAMINATION BY MR SMITH

3 Q. I remind you that you are still on oath.

4 A. Yes.

5 Q. I have got some further questions I want to ask you. In
6 your capacity as - I think it's the Clerk of the
7 Anthropological Division.

8 A. Yes, that's right.

9 Q. You are sometimes called upon to process what is called
10 the quarterly reports.

11 A. That's right.

12 Q. In the quarter April to June 1994, I think it was the
13 case, wasn't it, that Doreen Kartinyeri was working from
14 her home in Port Germein.

15 A. That's right.

16 Q. When she did that, she, from time to time I think, faxed
17 details of the work she had been doing for the quarterly
18 reports that are kept at the Museum.

19 A. Yes, that's right.

20 Q. I produce to you this document headed 'Quarterly Report,
21 April to June 1994, Doreen Kartinyeri'. Do you
22 recognise that.

23 A. Yes, I do.

24 Q. I think that's a document which has been typed up by
25 you.

26 A. Yes, that's right.

27 Q. I think it was typed up from a rough handwritten copy
28 faxed by Doreen Kartinyeri to you from Port Germein.

29 A. That's right.

30 Q. The rough handwritten copy, I think, is no longer in
31 existence.

32 A. No. The reason I retyped it from the faxed paper was
33 because I know that thermal papers slowly disintegrate
34 over time and I retyped it so that this could be kept as
35 a record.

36 Q. When you typed it, I assume that so far as you could do
37 it, it was an accurate transcript.

38 A. I typed it word for word as best I could, yes.

- 1 Q. You see there the third paragraph 'I went to Goolwa with
2 Shirley Biersley'.
3 A. Yes.
4 Q. Could that be 'Shirley Piersley'.
5 A. It could be. At that time when I typed it, I had been
6 in the division only three months, so I was very
7 unfamiliar with people's names and people's communities,
8 so it could have been a P or a B. So, it could very
9 well have been a P.
10 EXHIBIT 248 Typed quarterly report tendered by Mr
11 Smith. Admitted.
12 CONTINUED

1 CROSS-EXAMINATION BY MISS NELSON

2 Q. Looking at Exhibit 203, when did you first meet Mr
3 Hemming.

4 A. I had my - when I first started working in the
5 anthropology division I knew of Steve Hemming working in
6 the museum, but I didn't know him until I actually
7 worked in that division. I started in March 1994.

8 Q. You knew, at that stage, did you not, that Mr Hemming
9 wasn't based in the North Terrace building.

10 A. Yes, that's right.

11 Q. Is the position that, in April 1994, that's perhaps six
12 weeks, for the first six weeks that you worked in the
13 division, you didn't see very much of him at all.

14 A. No, no.

15 Q. No that's wrong or no you didn't see very much of him.

16 A. No, I didn't see much of him at all.

17 Q. You have been asked specifically, I imagine, about a day
18 when a letter was sent to Mr Tickner.

19 A. Yes.

20 Q. When were you first asked to recollect the events of
21 that day.

22 A. I remember I mentioned it to Phillip Jones and also to
23 Phillip Clarke, maybe a week, two weeks after, mainly
24 because it was an issue, a topic of issue that was
25 talked about in the museum. So I remember telling
26 both of those, Phillip Clarke.

27 Q. Telling them that a letter had been faxed to Mr Tickner.

28 A. No, I can't recall that, but I do remember talking about
29 Hindmarsh Island, Doreen's involved in the Hindmarsh
30 Island.

31 Q. Let's see if I can help you there. A week or two weeks
32 after the letter was sent, you spoke to Phillip Jones
33 and Phillip Clarke, separately or together.

34 A. Probably separately.

35 Q. The reason you did that was because at that stage the
36 Hindmarsh Island bridge was being discussed within the
37 museum.

38 A. Yes, yes it was.

- 1 Q. First of all, what did you say to Phillip Jones.
2 A. I have no idea, I am sorry, I don't remember.
3 Q. What did you say to Phillip Clarke.
4 A. I actually remember saying to - the reason I remember
5 what I said to Phillip Clarke was because he reiterated
6 my words back to me months and months later, and they
7 were -
8 Q. He reminded you of what you had said.
9 A. Yes. So, I had actually forgotten and he reminded me of
10 what I said to him and when he did say those words I do
11 remember saying them.
12 Q. What did he reiterate to you some months later.
13 A. Well, it was, listening to Doreen and Steve in the
14 tearoom and words that they were using, and I mean I
15 wasn't paying much attention to the conversation, but,
16 words that I was picking up.
17 Q. On the day that this letter was sent there was a
18 conversation in the tearoom.
19 A. Yes.
20 Q. You weren't paying much attention, but you picked up a
21 few words here and there. Is that a fair summary.
22 A. Yes, that's right.
23 Q. You spoke to Phillip Clarke a week or two later about.
24 A. The conversation.
25 Q. The conversation.
26 A. Yes, about the tearoom, yes.
27 Q. You then spoke to him a few months later about that
28 conversation.
29 A. Yes. It was probably earlier this year.
30 Q. Early this year in 1995.
31 A. It was actually - it was the time that the people were
32 discussing whether the Royal Commission should be held
33 and things like that.
34 Q. That would have been this year, wouldn't it.
35 A. Yes, it was, yes.
36 Q. He raised the subject, did he not.
37 A. Yes.
38 Q. When he spoke to you this year, is it correct to say

- 1 that you had no memory of what had been said in the
2 tearoom.
- 3 A. I had forgotten about it, yes, I did.
- 4 Q. He said, you tell me if I am right or not, 'You told me
5 last year that you heard the following words' or
6 something like that.
- 7 A. He didn't quite say it like that.
- 8 Q. What did he say to you when he raised the topic.
- 9 A. I think he mentioned to me that I could say what I had
10 said to him and -
- 11 Q. Say to whom.
- 12 A. To the Royal Commission, if it was going to be held.
- 13 Q. So, at that stage, there was a discussion between you
14 and Dr Clarke about whether you would give evidence at
15 the Commission.
- 16 A. Yes.
- 17 Q. Who suggested you should, was that Dr Clarke.
- 18 A. Well, it wasn't suggested that I should but he mentioned
19 that I had picked up - known what was going on.
- 20 Q. That's what he said, is it.
- 21 A. It was not quite his words, but that was the idea.
- 22 Q. That is the thrust of what he said.
- 23 A. Yes.
- 24 Q. Did he come and see you, for the purpose of talking to
25 you about whether you would give evidence or not.
- 26 A. No, no in - where I am located in the division, I am in
27 a very central location. I have people coming and going
28 all the time and it was very common for people just to
29 stop and chat all the time.
- 30 Q. This is the position; he came to where you were working.
- 31 A. Yes.
- 32 Q. And he came there, apparently for the purpose of
33 discussing with you what evidence you could give at the
34 Royal Commission.
- 35 A. Well, maybe not specifically. He might have come to get
36 his mail, maybe to see Phillip Jones whatever. I'm not
37 sure what his purpose was.
- 38 Q. You do know what he talked to you about.

- 1 A. Yes, I do.
- 2 Q. And what he talked to you about is what you could tell
3 the Royal Commission, isn't that right.
- 4 A. Yes.
- 5 Q. At that stage you didn't remember anything of this
6 conversation.
- 7 A. I remembered the event taking place.
- 8 Q. But, you don't remember what was said.
- 9 A. Just the words, yes.
- 10 Q. You tell me what words you remembered on the occasion
11 that Dr Clarke approached you about giving evidence at
12 the Royal Commission.
- 13 A. I remember Steve's words.
- 14 Q. Just a moment - I am talking before he reiterated or
15 reminded you of something.
- 16 A. Yes, I do remember Steve's words after I faxed the
17 letter. I remember him asking me whether it had gone
18 through and said 'Good, good.'
- 19 Q. So you remember that.
- 20 A. Yes, I do remember that quite clearly, because we had a
21 lot of difficulty getting it through. I do recall those
22 words and I do remember in the tearoom Steve - I don't
23 know his exact words because I don't pay - I mean, I
24 shouldn't have been paying attention to what they were
25 talking about. But, I just remember Steve supporting
26 Doreen and using words to support her and thinking that
27 he can help her.
- 28 Q. Did Steve say something like this, 'I will support you
29 Doreen in your right to have your say.'
- 30 A. I didn't hear those words.
- 31 Q. You heard the word 'support.'
- 32 A. No, not that I can recall.
- 33 Q. You tell me then, what words you remembered of the
34 conversation in the tearoom before Dr Clarke reiterated
35 something to you, to use your word.
- 36 A. I don't recall any conversation before Phillip Clarke
37 reminded me.
- 38 Q. What did Phillip Clarke remind you, what did he say.

- 1 A. He reminded me that I remember hearing Steve say 'I will
2 back you up Doreen. Don't worry, I will back you up'
3 something similar like that.
- 4 Q. Did Dr Clarke say why he was reminding you of those
5 words.
- 6 A. No.
- 7 Q. What else did he say to you about that conversation.
8 Did he say why you should give evidence about it at the
9 Commission.
- 10 A. No.
- 11 Q. What did he say about the conversation.
- 12 A. Nothing that stands out.
- 13 Q. Just cast your mind back; you are at work, he comes
14 along, he starts talking to you about giving evidence.
15 Presumably, am I right, you said to him 'I don't
16 remember what the conversation was about' or words to
17 that effect.
- 18 A. I didn't tell him that I didn't remember. I didn't tell
19 him that I didn't remember the incident. But, I mean,
20 when a conversation starts I probably would have said
21 something about the facts and then he might have perhaps
22 gone on to tell me what I had said. But, also, that if
23 I am - I am always interrupted by phones, the door, so
24 conversations don't just happen in a span of five
25 minutes, 10 minutes, there can be gaps, of a snippet
26 here and a snippet there.
- 27 Q. I understand that, but, I want you to tell me what Dr
28 Clarke said about the type of evidence you could give
29 or how you could help the Commission. Did he say
30 anything like that.
- 31 A. No, no, not at all.
- 32 Q. You said a minute ago, that he said something about you
33 giving evidence because you knew what was going on.
- 34 A. Well, he said 'You could probably use it as evidence,
35 use it to give to the Royal Commission.'
- 36 Q. Use what as evidence.
- 37 A. My understanding of what happened that day and faxing
38 the letter to Robert Tickner.

- 1 Q. Did he say anything else.
2 A. Not specifically, no.
3 COMSR
4 Q. I think it is fairly clear by now the witness doesn't
5 have much of a recollection.
6 A. It is just that, honestly, if I knew I had to pay
7 attention I probably would have, but I do have
8 conversations with staff at a high turnover and a lot of
9 conversations are bypassed by me, once they are finished
10 with I forget them, unless I have to remember something
11 specific.
12 COMSR: I don't know how much further we can
13 take this.
14 MISS NELSON: I want to go back to the conversation on
15 the day the letter was sent.
16 XXN
17 Q. You were in and out of that room.
18 A. I was in there most of the time, because I was eating my
19 lunch and was interrupted to get Robert Tickner's
20 fax number and I do remember just going back to finish
21 eating my lunch. So I was in there most of the time.
22 Q. Well, you have spoken of certain words you are quite
23 adamant that you heard. Are you absolutely positive,
24 you couldn't be mistaken.
25 A. I know, yes, there were words used, whether they were
26 the exact words I'm not sure, but they were words very
27 similar to that effect.
28 Q. What are you giving us is the impression that you got of
29 the words that were used.
30 A. Very similar, yes.
31 Q. You don't remember anything else that was said, either
32 by Doreen or by Steve, is that the position.
33 A. Yes.
34 NO FURTHER QUESTIONS
35 WITNESS RELEASED

1 MR SMITH RECALLS

2 F.W. CUBILLO-ALBERTS

3 CROSS-EXAMINATION BY MISS NELSON

4 Q. You said in evidence that in May of this year you were
5 approached by Steve Hemming and Doreen Kartinyeri, do
6 you remember that.

7 A. That was May of last year.

8 Q. Do you recall which day.

9 A. No. In my statement I mention the dates the 12th, the
10 13th or the 17th when I would have been approached. I
11 recollect - I use those indicators because I had written
12 an appointment in my diary on the 19th of May and I knew
13 that it was a few days before that I had been
14 approached by both Doreen.

15 Q. Why do you pick on the 12th, 13th or 17th. Is that
16 because it is before the 19th and with reference to what
17 you were doing at that time.

18 A. Yes, it was. And I mentioned in my previous evidence,
19 that the 17th was the day that I attended seminars at
20 university, so - sorry, the 18th was the day I attended
21 seminars, so it couldn't have been that date when I was
22 approached. It may have been the 17th because I was in
23 the office that day. It wasn't the 16th because that
24 was a public holiday, then the weekend, so it was either
25 Wednesday, sorry, Thursday, Friday or Monday.

26 Q. Who of the two of them asked you to record some
27 information about Hindmarsh Island that was sensitive.

28 A. Well, I couldn't give you specifics as to who it was.
29 It was a while ago that the incident took place. I was
30 in my office. I was approached by both Doreen and
31 Steve. They both came into my office. The door was
32 closed and then we did have the discussion. So I
33 couldn't tell you exactly who it was that actually led
34 the conversation or made it.

35 Q. Do I understand it was put to you that, because you were
36 female and an anthropologist, it would be appropriate
37 for Doreen to confide in you rather than a man.

38 A. That's correct.

- 1 Q. Then, in fact, Doreen didn't keep the appointment.
2 A. That's right.
3 Q. Did you ask her afterwards why she didn't keep the
4 appointment.
5 A. No, I didn't. Doreen wasn't working in the division at
6 that time, she was working from home, so Steve was
7 around and I had asked him about the appointment,
8 whether she still wanted me to record that information,
9 and he said 'No' it wasn't necessary, because they had
10 Dr Deane Fergie in mind.
11 Q. Do you know when that conversation took place.
12 A. No, I couldn't put a specific date on it. It would have
13 been the week following that incident I suspect, a week
14 - sorry, it was a couple of days afterwards. It may
15 have been the following Monday.
16 Q. It may have been later.
17 A. No, because I had made an appointment, Steve and Doreen
18 approached me about it and I wanted to find out whether
19 I would still be needed.
20 Q. Mr Hemming has given evidence that what his commitments
21 were and when he was away on field trips and in hospital
22 and in Melbourne and on that timetable, it could not
23 have been before the 22nd or 23rd of May that that
24 appointment - that that conversation.
25 A. The conversation took place - well, all I know, all I
26 can recollect from the situation was that, Doreen hadn't
27 made the appointment and I followed up with it, with
28 Steve and it would have been after the appointment was
29 made, but I couldn't say it didn't take place prior to
30 the 22nd, or that it took place after the 22nd.
31 Q. Either could be right.
32 A. Yes.
33 Q. You are sure that she said - you said just a minute ago
34 that they had or Doreen had Dr Fergie in mind.
35 A. That's correct.
36 Q. Is that your recollection of what was said.
37 A. That's what I remember.
38 Q. Of course, Dr Fergie had been your supervisor for a

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- 1 period of time.
- 2 A. This year, that's correct. She wasn't my supervisor -
- 3 Q. At that time.
- 4 A. No, she wasn't.
- 5 Q. But, she has been since.
- 6 A. Yes.
- 7 Q. She was known to you at that time.
- 8 A. She was, yes.
- 9 NO FURTHER QUESTIONS
- 10 WITNESS RELEASED

- 1 MR SMITH: The next witness, although there is some
2 argument to be addressed on this witness, is Dr
3 Deane Fergie, but I don't recall her because I think
4 there is confidentiality argument to be made by Mr
5 Abbott.
- 6 MR ABBOTT: I understood that you haven't yet ruled
7 on what Dr Fergie should be required to answer?
- 8 COMSR: That's correct.
- 9 MR ABBOTT: I wasn't here on Monday when the
10 arguments were addressed to you, I am here today to
11 respond to the arguments. Could I ask whether those on
12 the other side have put all their arguments or can I
13 respond to them.
- 14 COMSR: I gather.
- 15 MS PYKE: Just on this issue, I would like to
16 tender a letter, dated 31 October 1995, addressed to my
17 client and signed by Doreen Kartinyeri, M.J. Roberts,
18 Rhonda Agius, E.J. Rigney any Maggie Jacobs.
- 19 COMSR: I suppose I can read it.
- 20 MR ABBOTT: I invite you to read it and I would like
21 to make a comment on it afterwards.
- 22 CONTINUED

- 1 MS PYKE: Clearly it pertains to the argument of
2 confidentiality and I would seek to tender it in support
3 only of that argument, being a letter addressed to my
4 client.
- 5 MR SMITH: I suppose you could accept it on the
6 voir dire, as it were.
- 7 COMSR: Yes, it is evidence as to their
8 attitude, I take it?
- 9 MS PYKE: Yes, what they specifically indicated to
10 my client.
- 11 COMSR: I will just mark it for identification,
12 I think, at this stage.
- 13 MR ABBOTT: Could we learn who actually wrote the
14 letter?
- 15 MS PYKE: I have no idea. It is addressed to my
16 client.
- 17 COMSR: It is addressed to your client?
- 18 MR ABBOTT: It doesn't mean your client didn't write
19 it.
- 20 MS PYKE: I ask Mr Abbott to withdraw that.
- 21 MR ABBOTT: I would like to know who wrote it.
- 22 MS PYKE: I don't know. My client received that
23 letter.
- 24 MR ABBOTT: She must have made some enquiries,
25 surely?
- 26 COMSR: You mean, who actually penned the
27 letter, as it were?
- 28 MR ABBOTT: Yes.
- 29 MS PYKE: I have got no idea.
- 30 COMSR: I don't know that Ms Pyke would be in a
31 position to answer that, because she tells me she read
32 it, not that she wrote it. But, in any event, have you
33 had a copy of it?
- 34 MR ABBOTT: Yes.
- 35 COMSR: So that we can hear argument on it - I
36 take it there will be some - I will just mark it for
37 identification, at this stage.
- 38 MFI 249 Letter, dated 31.10.95, marked 249 for

1 identification.

2 MS PYKE: There is only one other matter, a case
3 reference, at this stage, that I want to put to your
4 Honour. I haven't been able to get a copy of it. It is
5 the Waramungu land claim Federal Court decision heard by
6 Bowen CJ, Toohey and Woodward JJ and it is no.VG237 and
7 VG336 of 1985. And I just want to quote to you comments
8 of Woodward J, at p.7 of the reasons for judgment.

9 MR ABBOTT: Could I can enquire whether my friend is
10 referring to the Aboriginal Sacred Sites Protection
11 Authority v Maurice 65 ALR 247?

12 MS PYKE: What I have actually had provided to me,
13 and it might be -

14 MR ABBOTT: If it is the same report, I can assist.
15 I was in the case, acting for the Aboriginal Sacred
16 Sites Protection Authority.

17 MS PYKE: I will just check that. That may well
18 be. I was given it under some other reference and I
19 haven't actually double-checked that it was the same
20 one. I have got Maurice and it was Woodward J.

21 MR ABBOTT: Does your Honour have a copy of this
22 case?

23 COMSR: No.

24 MR ABBOTT: I hand up a copy to your Honour.

25 MS PYKE: I will check that. I have referred you
26 to the case, but, if that is in there, I won't quote it
27 any further. If it is in there, I will just simply read
28 the passage to you, Commissioner:
29 `In my opinion, the proper protection of minority rights
30 is very much in the public interest ... '

31 That is at p.256. The reference was sent to me by a
32 concerned anthropologist and I didn't realise it was the
33 same judgment:

34 `... the proper protection of minority rights is very
35 much in the public interest ... to whom they had
36 extended it is their confidence.'

37 I just want to point that out, in particular.

38 I assume you have probably read this?

1 COMSR: Yes.

2 MR ABBOTT: Could I ask if there is anyone else that
3 rises to support Ms Pyke's position on the argument of
4 confidentiality or any other matters pertaining to the
5 arguments that I want to respond to?

6 As there is no answer, I will get on with it then.

7 The only argument that has been addressed to you has
8 been one of 'confidentiality'. There has been no
9 argument addressed to you on the issue of public
10 interest immunity, or legal professional privilege. It
11 is not alleged that there is some legal professional
12 privilege component that attaches to the evidence of Dr
13 Fergie. Nor has there been any suggestion raised by Ms
14 Pyke that there is a public interest immunity point of
15 the type that was discerned by Woodward J in this
16 judgment. And I will come to Aboriginal Sacred Sites
17 Protection Authority v Maurice, because Woodward J was
18 the only one of the three judges who wholeheartedly
19 adopted the arguments I was putting to him. And, in
20 that regard, he was in the minority unfortunately, but I
21 will deal with this case in a minute, because, as I
22 said, I had a great deal of involvement in it, having
23 acted for the Aboriginal Sacred Sites Protection
24 Authority throughout the Waramungu protection claim.
25 The issue, therefore, is confidentiality and only
26 confidentiality. And, as I perceive the issue, it is
27 whether or not Dr Fergie should be compelled or required
28 by you to answer certain questions that relate to the
29 existence or otherwise of secret sacred women's
30 business. My first submission is that your Royal
31 Commission requires you to require her to answer these
32 questions.

33 I invite your Honour's attention to the wording of
34 the Royal Commission. This Royal Commission which you
35 accepted which was given to you refers in para.6 to the
36 Government's necessity, or what the Government asserts
37 to be the necessity to investigate the allegations.

38 In that regard, your personal views are irrelevant.

1 You have accepted a Royal Commission, which is to
2 investigate the allegations, because the Government
3 deems it necessary to do so.

4 Firstly, to provide a factual basis for the
5 resolution of the disagreement within the South
6 Australian Aboriginal communities.

7 Secondly, to enable the Government to determine, as
8 a matter of policy, whether it would be unreasonable and
9 inappropriate, having regard to Aboriginal tradition,
10 for the construction of a bridge to proceed.

11 And, thirdly, to enable the Government to determine
12 whether it should make any further submissions to the
13 Commonwealth Government relating to the declaration made
14 by the Minister and to provide the factual basis for any
15 such submissions. Because the Government has seen fit
16 to produce this Royal Commission and you have seen fit
17 to accept it, you have therefore taken on the task of
18 assessing whether women's business or any aspects of
19 women's business was a fabrication against the
20 background of what the Government perceives to be the
21 necessity to investigate those allegations.

22 I say this with respect, but for you not to require
23 Dr Fergie to answer these questions would not be
24 carrying out or giving full faith to the terms of your
25 Royal Commission.

26 COMSR: Which questions are you now referring
27 to?

28 MR ABBOTT: I am talking about the questions -

29 COMSR: Of what is contained in the -

30 MR ABBOTT: I am talking about that, yes, of what is
31 in the secret envelopes. And I am talking also about
32 the questions about what is not in the secret envelopes.
33 I am talking about the questions as to what she was told
34 at the Graham's Castle meeting. What she was told on
35 subsequent occasions by Doreen Kartinyeri. And that she
36 should be required to answer questions relevant to what
37 is in the public domain from sources such as Doreen
38 Kartinyeri and others as to whether or not they were

1 part of the materials that she heard or took on board
2 during the course of her association with this matter.

3 Your Royal Commission is an investigation into
4 whether the women's business was a fabrication. And
5 women's business has been defined, for your purposes, by
6 a direct lift from the Fergie report. You are obliged
7 to investigate whether it was a fabrication and, in
8 other words, whether or not what Fergie reported as
9 being the women's business, whether she called it
10 women's business or not is irrelevant, was or was not
11 fabricated.

12 You have already heard argument on the construction
13 of your Terms of Reference and you have made a ruling,
14 on a date which escapes me, that you defined the women's
15 business, apart from the definition contained in the
16 last paragraph of your Commission, to be referable to
17 the so-called secret sacred women's business contained
18 in the envelope which contains appendices 2 and 3 on the
19 Fergie report. And so I say that, by your own rulings
20 and by the terms of the Commission which you have
21 accepted, it would be quite contrary to the task that
22 you have accepted that you will carry out not to require
23 Dr Fergie to answer the questions, notwithstanding that
24 she claims that there is an issue of confidentiality.

25 Not to allow the questions to be asked will, I
26 suggest, make a mockery of the task that we have been
27 engaged on for many months. We have all been here to
28 assist you in the task that you have set out. Some of
29 us have provided more assistance than others. But that
30 assistance must be referable to the heavy burden that
31 you have undertaken in accepting this Royal Commission,
32 and, moreover, accepting a Royal Commission which is
33 deemed to be necessary to investigate the allegations so
34 that the tasks referred to in para.6 (1), (2) and (3)
35 can be used by the Government. This Royal Commission
36 has not operated in a vacuum. The Government has deemed
37 it appropriate to have this Royal Commission for the
38 reasons that it states in para.6 and, therefore, your

1 investigation should do all that it can to help the
2 Government in that task. They are the social issues
3 which the Government states are relevant to your
4 Inquiry.

5 That is all I want to say about the Royal Commission
6 and Terms of Reference, but I do want to say a lot more
7 about what has been asserted as being confidential.

8 It is apparent, from a reading of the transcript and
9 from what I heard from Dr Fergie on Saturday, that
10 unless and until she is directed by you she won't answer
11 anything, any question or provide any information to you
12 for your assistance that would enable you to discern the
13 nature and extent of the women's business in the
14 envelopes. Not only will she not do it directly, that
15 is, tell you what is in the envelopes, but she won't
16 even do it indirectly by telling you what is not in the
17 envelopes, whether what is in the media and in the
18 public correspondence in whole or in part, to what is in
19 the envelopes, or to what was said to her during the
20 course of her investigations. She will not allow us, at
21 present, because of a claim of so-called
22 confidentiality, to test in any way any of her
23 assertions in her report. The very report which has
24 been used by the Government as the basis of defining
25 women's business, which is the centrepiece on the
26 central issue in your Commission.

27 There are many, many other issues which I must
28 advert to on this topic of confidentiality. And I will
29 need to take you to the Aboriginal Sacred Sites
30 Protection Authority v Maurice. Since the issue of
31 Aboriginal confidentiality in Aboriginal matters has
32 been raised in that case for the first time and, as far
33 as I am aware, this is the only reported case on the
34 issue of confidentiality in Aboriginal matters. Let me
35 go to that case, because the proposition that I will be
36 putting to your Honour is that confidentiality, as a
37 social benefit - and I recognise that the law, put at
38 its highest, respects confidences - the law, as I

1 understand it, says that, if it is not necessary for a
2 confidence to be broken, then the law will not require a
3 confidence to be broken. But we are not talking about a
4 situation where, for example, a journalist has given
5 evidence in this Royal Commission and the journalist has
6 said 'I don't want to reveal my source. I want to keep
7 my source confident. I am happy to tell you what I was
8 told, but I don't want to reveal my source.' That is an
9 example of the law respecting confidences. But Ms Pyke
10 has taken that to mean you have got to apply the same
11 rule to Dr Fergie in relation to information and
12 identification. It is just a non sequitur. The law
13 respects confidences and the confidences that
14 journalists wish to protect in relation to their sources
15 is one such example. And no-one, not even Ms Pyke,
16 suggested that there was a reason why any of the
17 journalists who came along here, Mr Kenny, etc, should
18 have to tell you who was their sources on a particular
19 occasion. There was no perceived social benefit, no
20 addition to the body of knowledge that could usefully be
21 obtained by the revelation of the source. And so,
22 although it never really came down to it, we all here
23 conducted our own balancing act as to the necessity for
24 the journalist to reveal his source or the desirability
25 for the journalist revealing his source against the
26 benefit of keeping that source confidential.
27 CONTINUED

1 In the end, as I have said, none of us, indeed,
2 least of all your Honour, came to the view that it was
3 necessary to ask the journalists for their source. This
4 is not the case with Dr Fergie. She comes here as an
5 expert, with an expert's report, giving expert opinions.
6 She is here and her evidence, whether she likes it or
7 not, flies directly in the face of what my clients have
8 been asserting since July of this year - or, in fact,
9 May of this year - that there is no secret sacred
10 women's business which is site related known to
11 Ngarrindjeri women of the type claimed in the media.

12 But, on the present attitude of Dr Fergie, she won't
13 even tell us whether what's claimed in the media is
14 consistent with or different from what she was told by
15 Doreen Kartinyeri, and anyone else. So the first aspect
16 that you need to take into account in the weighing up of
17 the social desirability of the law respecting
18 confidences on the one hand, and the greater benefit to
19 the community on the other, is to look at your Terms of
20 Reference very carefully and look at the evidence that's
21 been given by the so called dissident women,
22 particularly Dorrie Wilson, who gave you an account of
23 what happened at Graham's Castle on 19 June 1994, and
24 particularly the evidence of Dulcie Wilson, who told you
25 that she asked Doreen Kartinyeri what's actually in the
26 envelopes and got an answer.

27 Your Royal Commission demands, I suggest, that
28 Fergie be required to answer the questions which will
29 either support or confirm the evidence of those other
30 witnesses who have already come forward. The resolution
31 of any so called balancing process between the law
32 respecting the confidences that are reposed in Fergie on
33 the one hand, and the evidence that my clients have
34 given on the other, must, in my submission, firmly come
35 down on the side of a revelation of the disclosure
36 rather than the keeping of the confidences.

37 There are other examples to which I will turn in a
38 moment after I have dealt with Aboriginal Sacred Sites

1 Protection Authority v Maurice. I must give your Honour
2 a bit of background to this case, because it is not
3 entirely evident from the report just what the
4 background was.

5 This case concerned the Waramungu lands claim and a
6 claims book that was put forward some years before and a
7 new and substituted claims book which was also put
8 forward, and there were a large number of
9 anthropologists, Dianne Bell, Peter Sutton, Bruce
10 Rayburn, to name but three, who were involved in this
11 matter.

12 All of them had received information from Aboriginal
13 informants that were relevant to the Waramungu land
14 claim. They were involved in giving evidence and the
15 issue was, at least in this part of the case - because
16 the other side of this case is Attorney-General from the
17 Northern Territory v Maurice, which deals with privilege
18 and waiver issues on the land claim book itself - the
19 issue in the Aboriginal Sacred Sites Protection
20 Authority v Maurice was whether or not the
21 anthropologists could be required to answer in respect
22 of, or required to discover documents, and that is, in
23 effect, produce confidential material.

24 Mr Ian Barker, who was acting for the Northern
25 Territory Government, asked the Commissioner, Mr
26 Maurice, to issue orders for production of documents by
27 the anthropologists and others in connection with the
28 land claim.

29 The Aboriginal Sacred Sites Authority of the
30 Northern Territory, for whom I appeared, intervened in
31 the proceedings to allege that they had locus standi,
32 because it was said and argued by us that there was a
33 public interest in the maintenance of the confidences,
34 and that the public interest for which the Aboriginal
35 Sacred Sites Protection Authority was claiming, was that
36 it would adversely affect the work of the Aboriginal
37 Sacred Sites Protection Authority if a precedent were to
38 be set that anthropologists' notebooks and documents

1 were to be revealed and would reveal, therefore, sacred
2 sites.

3 The case was argued before Maurice J on two bases.
4 First of all, public interest immunity, and secondly,
5 breach of confidence or confidential information. I
6 pause to emphasize that Ms Pyke makes no claim of public
7 interest immunity, only breach of confidence. Maurice
8 J, in a lengthy judgment - which I don't have with me,
9 but which I can obtain - eventually ruled that the
10 material that was sought to be discovered must be
11 discovered and disclosed, but he attached restrictions,
12 of course, on its discovery.

13 If you read from the judgment of Bowen CJ, you will
14 see at the bottom of p.248, he says:

15 `The Sacred Sites Authority appeared before the
16 Commissioner and resisted the production of the
17 documents prepared by its employees, or persons under
18 contract to it -'

19 These were anthropologists:

20 `in connection with the application to have sacred sites
21 recorded under the Aboriginal Sacred Sites Act. The
22 ground of opposition was out of public interest
23 immunity -'

24 Which it is not here:

25 `stating the matter, in a summary way, claimed that the
26 information in question was gathered under a promise
27 ... and the standing and working of the Sacred Sites
28 Authority would be greatly prejudiced'.

29 All those arguments are arguments which I addressed to
30 the full Federal Court, and which I had addressed to
31 Maurice J.

32 In relation to the issue of public interest
33 immunity, only one of the three judges found that the
34 categories of public interest immunity should be
35 extended to cover Aboriginal material. Your Honour may
36 recall that there are various categories of so called
37 public interest immunity, and the main issue in this

1 case was whether or not the categories should be
2 increased.

3 His Honour Woodward J, at the middle of p.256, said:

4 `I believe, with respect, that Maurice J was in error
5 insofar as he based his decision on this issue on the
6 ... a fresh category of public interest immunity should
7 be recognised, covering secret and sacred Aboriginal
8 information and beliefs'.

9 That was not, I regret, the opinion of the majority.

10 But, in any event, no claim for public interest immunity
11 is advanced before you in relation to Deane Fergie.

12 I go back to the Bowen CJ's judgment, line 10 on
13 p.249:

14 `Justice Maurice held that there was insufficient basis
15 for a claim of public interest immunity'.

16 In that regard the Full Court upheld him. Then at
17 line 11:

18 `But that if he were wrong in that view, it would be
19 necessary to balance the public interest in favour of
20 non-disclosure against the public interest in favour of
21 disclosure.'

22 In other words, Maurice J held that, absent a category
23 of public interest immunity, when you are dealing merely
24 with confidential information, it is necessary to
25 balance the public interest in favour of non-disclosure
26 against the public interest in favour of disclosure.

27 That, I submit, is the exercise which you must do
28 here. The Full Court, in brief, in *Sacred Sites*
29 *Authority v Maurice*, held that he had done the right
30 balancing exercise and that there was no way in which
31 they could discern that his discretion had miscarried,
32 and, accordingly, his judgment was upheld on both
33 grounds: by the majority on the ground that he was right
34 in saying there was no category of public interest
35 immunity known to Australian law that protected
36 specially Aboriginal material, and secondly, by all,
37 that he conducted the correct balancing exercise and

1 achieved the right result notwithstanding that there
2 were arguments both ways.

3 I take your Honour to p.250, where briefly the
4 issues on public interest immunity are canvassed. Then
5 at p.251, line 25, Bowen CJ sets out the argument that
6 we were running for the existence of a special category
7 of public interest immunity in relation to Aboriginal
8 secret sacred Aboriginal material. Then at p.252, the
9 top of the page, Bowen CJ held:

10 `In the result, I have come to the conclusion that the
11 authority is entitled to take objection on the ground of
12 public interest immunity'.

13 As we had standing to make the objection we did make.
14 He went on to say:

15 `This, of course, does not mean it is necessary and
16 entitled to have its objection upheld, but it does mean
17 ... weighed to the detriment of the public interest
18 involved in non-disclosure'.

19 In other words, that is the restating of the balancing
20 exercise. At the line 15 of that page, his Honour says:

21 `I do not consider any error was shown in his Honour's
22 ... produced and disclosed in a restricted fashion set
23 forth in his reasons for judgment'.

24 The restricted fashion was that the documents, the
25 anthropologists' field notes and books, are set out at
26 p.256, at the bottom, the last four lines.

27 `In fact, Maurice J has proposed to limit access to the
28 restricted documents to himself, his associate, counsel
29 assisting him, counsel for the Attorney-General, and
30 possibly a consultant anthropologist ... confined in
31 its use for the purposes of a land claim hearing would
32 go a long way toward reducing the strength of the public
33 interest argument against disclosure'.

34 So I say that, in relation to Dr Fergie, if there
35 are any reservations that you feel - I am not asking
36 that the questions be asked in open hearing. I would
37 propose that my cross-examination be conducted in closed

1 hearing, and that you would then decide how much, if
2 any, of the transcript could then be released.

3 That would, I submit, to use the words of the Full
4 Court, go a long way towards dealing with the problems -
5 to reducing the strength of the public interest argument
6 against disclosure. Woodward J, who has been quoted by
7 my learned friend, unfortunately doesn't give quite the
8 support that, at first blush, he may seem to be giving.

9 Woodward J, I have emphasized, was in a minority
10 view, and he, at p.255, line 40, explained why he was
11 prepared to create a new category of public interest
12 immunity. He said:

13 `In my view, once it is accepted that the categories of
14 public interest can be ... merely because that type of
15 information is -'

16 Then he goes on to talk about the other established
17 categories of public interest immunity. He then talks
18 about there may be, to use his phrase at the bottom of
19 the page, `equally deserving categories of recognition'.
20 Over onto p.256 he comes to the view that, in his
21 personal view, secret sacred Aboriginal information does
22 provide a new category which should now be recognised.

23 Unfortunately, he is the only one, and he is the
24 only judge in any case since 1986, when this was
25 decided, who has espoused that view in relation to
26 public interest immunity, and, in my submission, it can
27 be put aside.

28 The passage which Miss Pyke's helpful but anonymous
29 anthropologist faxed through to her over the weekend,
30 presumably, or last night, starts at the top of p.256.
31 The passage that she read out is Woodward J's basis and
32 argument for coming to the view `a fresh category of
33 public interest immunity should be recognised'.

34 It is not an argument which Woodward J espouses for
35 asserting that, in a balancing exercise between the
36 public interest in disclosing information versus the
37 public interest in not disclosing information, these
38 sorts of matters are of any greater importance than any

1 other one matter. Woodward J goes on, at line 30 of
2 p,256, after dealing with his view about the new
3 category:
4 `However, that's not the end of the matter in this or
5 other cases. In the words of Stevens J, quoted above,
6 ... discretion, had he found it necessary to do so. As
7 his Honour pointed out - '
8 This is important because this is the same sort of
9 illogical claims that are made:
10 `it would be anomalous if aborigines could rely on the
11 Aboriginal Sacred Sites Act to provide protection for
12 their sites and then refuse to allow sufficient
13 revelation to enable persons legitimately in the area to
14 avoid giving offence'.
15 I say it is equally anomalous for Dr Fergie to claim
16 that there exists secret sacred women's business without
17 telling us what it was and how she came to the view that
18 it existed.
19 COMSR: I don't know that she claims that there
20 was secret sacred women's business.
21 MR ABBOTT: I don't want to get into a semantic
22 argument.
23 COMSR: It is not a semantic argument.
24 MR ABBOTT: Secret women's business, women's
25 business, whatever one calls it. I will relate it to
26 your Terms of Reference. In my submission, it is
27 equally anomalous for Dr Fergie to resist answering
28 questions designed to ascertain whether or not the
29 women's business, as defined in your Terms of Reference,
30 have been fabricated, as it is for the proposition that
31 Woodward J sets out.
32 His Honour went on to say:
33 `Aboriginal people must understand that when such
34 claims are made, they have to be tested by inquiry - '
35 This is the same judge who was the - I can hear the
36 proponents voicing opposition to these - author of the
37 helpful bit that Ms Pyke read out this morning from the

1 anonymous anthropologist. He goes on:
2 `and this may involve recourse to materials prepared in
3 aid of the formal recognition or proclamation of sacred
4 sites pursuant to the Sacred Sites Act'.

5 This Hindmarsh Island Bridge matter is nothing more
6 than a claim made in respect of Hindmarsh Island, and I
7 submit it is entirely legitimate to test that claim by
8 inquiry, and if that involves recourse to materials
9 prepared by Dr Fergie, then they should be produced and
10 cross-examination allowed on them.

11 His Honour Woodward J goes on to say, relevantly:
12 `I do not doubt that this would be understood and
13 accepted by Aboriginal people, provided they knew that
14 disclosure going beyond the authority itself would be
15 kept to the necessary minimum'.

16 There is no reason why we cannot keep any so called
17 secret sacred business to a necessary minimum by closing
18 the court, by you imposing the usual constraints that
19 you have throughout this inquiry, and by you vetting, at
20 your leisure, the extent to which the transcript of my
21 cross-examination should be released into the public
22 arena.

23 CONTINUED

1 Then, Woodward J set out the restrictions which Maurice
2 J had already imposed as the basis for allowing the
3 confidences to be disclosed. Then, Woodward J accepted
4 what Maurice J said as to the substantial public
5 interest arguments in favour of disclosure of material
6 which searches to test the validity of the claim. That
7 is what we are doing here. There is a claim made,
8 according to the Royal Commission, of women's business.
9 You are testing the validity of that claim.

10 Woodward J went on to say about or to mention the
11 people who would be affected by the claim that was being
12 made vis-a-vis the confidential information in the land
13 case. I pause to interpolate in this case that you must
14 have regard, in weighing the public interest for
15 disclosure, to the categories of people who are
16 affected. Let me show you what those categories are.
17 The categories of persons fabricated by non-disclosure
18 of Fergie's material are, firstly, my clients because
19 they have come here. The report, as its presently
20 framed - untested in essence - is in contradistinction
21 of what they have said. You would have then their
22 evidence having been tested by rigorous
23 cross-examination and Fergie's evidence untested by
24 virtually any cross-examination, or at least any
25 relevant cross-examination. The second group who are
26 directly affected by Dr Fergie's evidence are the
27 Chapmans. They have their own solicitor, so I shall say
28 no more about them. The third group are the traditional
29 owners of Hindmarsh Island, the Campbell clan. The
30 fourth group are the people of Goolwa who are interested
31 in Hindmarsh Island and what happens. The fifth group
32 are the people of South Australia generally. There is a
33 recognised public interest in disclosure and that the
34 voice of a vocal minority, such as we find seated in the
35 back of this Commission from day to day, should not be
36 considered or be held to be the voice of the majority.

37 You need to consider, in conducting the weighing
38 exercise - which I submit the law requires you to do -

1 to weigh all those factors. As was pointed out by
2 Woodward J at line 7, 'Many people who are affected to a
3 greater or lesser extent', is what the business of the
4 Waramungu land claim was all about. He spoke of
5 residents of the area at the time, miners, families in
6 the area, commercial enterprises were likely to be of
7 value to the inquiry. He said:

8 'The subject of the debate is ... for his Honour.'
9 I submit exactly the same situation pertains before you.
10 Once the factors are identified - and Miss Pyke has only
11 identified one factor - Dr Fergie claims that she will
12 not breach the confidence of people who have now told
13 her, by letters dated 31 October 1995, that they do not
14 want material that she received from them ventilated at
15 this Royal Commission. There has only been one reason
16 offered and that is the desire of Doreen Kartinyeri to
17 keep the information confidential. That desire, I
18 suggest, is not entirely altruistic. You must weigh up
19 what you consider of the statement by Doreen Kartinyeri
20 that Dr Fergie keep the information which she, Doreen
21 Kartinyeri, has given to Dr Fergie. You must weigh that
22 up with the public utterances of Doreen Kartinyeri which
23 you have heard throughout in the media and in which she
24 herself, Doreen Kartinyeri, has vowed safe to the media
25 time and time and time again; the very same information
26 that Dr Fergie will not tell us about because of some
27 so-called confidence in her. It's an argument that only
28 needs to be put to demonstrate its absurdity.

29 The other matter that was dealt with in the
30 Waramungu Land Claim case was the confidentiality of
31 communications to anthropologists. I said there were a
32 large number of anthropologists, not all of whom joined
33 in in Full Court proceedings, although they had joined
34 in the application with Maurice J. Bruce Rayburn, a
35 well-known anthropologist in Central Australia, through
36 his counsel Pam Ditten, ran an argument other than
37 public interest immunity that was based upon the cases
38 in America where anthropologists worked for the Navaho

1 Indians who were endeavouring to establish in the
2 American Supreme Courts not a category of public
3 interest immunity, but a category of community immunity;
4 which is like priest and penitent, solicitor and client,
5 doctor and patient, journalist and source. So there
6 should be some judicial recognition of anthropologist
7 and interviewee.

8 That was dealt with in the Waramunga land claim.
9 The argument that was put was that there should be some
10 knew category created between an anthropologist and his
11 source and which did not find favour with any member of
12 the Full Court. You will see at line 30 it says:

13 `Another question which this court was called upon to
14 deal with was the ... of confidentiality.'

15 I've told your Honour what the argument is. That is not
16 specifically stated in this report. His Honour went on
17 to say at p.258, line 30:

18 `All these considerations were, I believe, taken into
19 account by ... of confidentiality.'

20 So, then he ordered that the review be dismissed.

21 Toohey J, who is the third member of the bench of
22 the Federal Court before his elevation to the High
23 Court, gave a judgment similar in tone to that of Bowen
24 CJ. I need do no more than to refer you to p.261 - in
25 fact, down the bottom of p.260 is important where it
26 refers to `where the commission's function are
27 essentially quizzitorial', which is the case here, Mam,
28 I would suggest, where you are not a million miles away
29 from the proceedings of this. The judgment reads:
30 `The commission's function is essentially quizzitorial
31 ... judgment of the Commissioner.'

32 The important matter in the judgment is three lines
33 above where his Honour said:

34 `In particular where the evidence concerns matters of a
35 secret sacred nature ... circulation of that evidence.'

36 That is the non-production of it upon the circulation of
37 it.

38 I don't argue in any way as to what constraints upon

1 the circulation you deem appropriate to put on the
2 evidence that I propose to elicit from Dr Fergie. I
3 address no argument to you at all. I leave it up to you
4 and counsel assisting as to what constraints are put
5 upon the circulation of that evidence.

6 COMSR: One constraint that is suggested
7 throughout the hearing is that whatever else might be
8 said of it, it should not be revealed to anyone other
9 than women.

10 MR ABBOTT: I will go so far as I can, and if you
11 think there is an appropriate constraint, Mrs Shaw will
12 take over the questioning.

13 COMSR: That is the obvious constraint to
14 discuss.

15 MR ABBOTT: I recognise that. That shouldn't stand
16 in the way of the disclosure being made by you, which is
17 what I'm arguing about. His Honour went on to say at
18 p.263: 'There is an affidavit of Mr Ellis'. That is the
19 same Mr Ellis who has received a mention in these
20 proceedings. Then, we read that he dealt with the
21 authorities of public interest immunity. His Honour
22 came to the view that there was no new category.

23 At p.273, is Bruce Rayburn's new argument. At p.273
24 line 35, he says:

25 'Counsel for Rayburn submitted that information of a
26 confidential nature gathered by him from only
27 Aboriginals or made available to him should not be
28 required to be disclosed.'

29 That is nothing different from Dr Fergie. He goes on:

30 'The point was said to arise both as a form of
31 professional privilege ... maintaining confidences.'
32 Neither of those points are urged upon you by Miss Pyke.

33 He goes on:

34 'The relationship between anthropologist and Aboriginal
35 informant was considered by the Commissioner at some
36 length ... upon that disclosure.'

37 I emphasise that. Apparently no restrictions were
38 imposed upon the disclosure, other than to be disclosed

1 to women in general. This has already been disclosed to
2 a number of white women, so it cannot in any way be only
3 Aboriginal women. It has already escaped, if you like,
4 a wider area. In my submission, the suggestion that is
5 made that you should be prevented from hearing it,
6 should be rejected.

7 After due consideration and after going through the
8 weighing process which is suggested you should do in
9 this case, you should come down on the side of
10 disclosure.

11 There are some further matters I want to put to your
12 Honour which I say should incline your Honour to accept
13 my view of my submission as to the result of the
14 balancing process.

15 I have mentioned that my clients have given
16 evidence. I mentioned the other day that they were
17 cross-examined and Miss Pyke put to Dorothy Wilson what
18 are obviously her instructions from Dr Fergie about what
19 took place. I think it's 474. If she is right, then I
20 cannot put to Fergie my clients' view or instructions
21 about what took place. Moreover, both Doreen Kartinyeri
22 and Deane Fergie have given media interviews - in the
23 case of Doreen Kartinyeri numerous media interviews - in
24 the course of which they have indicated they have both
25 indicated the nature and extent, to a greater or lesser
26 degree, of women's business.

27 The law is quite clear, Mam, that they should not be
28 allowed to approbate and reprobate. They should not be
29 allowed to disclose to Ray Martin but not to you. It is
30 not a facile argument, as was characterised by Miss
31 Pyke. The law is clear: You cannot approbate and
32 reprobate. You cannot have it both ways, which is what
33 Dr Fergie is trying to do. Dr Fergie admits that some
34 of the women's business material is in the public domain
35 and has been revealed by Doreen Kartinyeri and others.
36 She admits that at p.5227. She is saying quite
37 speciously:

38 `Because Doreen Kartinyeri hasn't actually told me, then

1 it doesn't really matter what Doreen Kartinyeri tells
2 the media because she hasn't actually told me'.
3 That is a specious statement by Deane Fergie that is
4 imbibing the confidence.

5 Mam, a claim of a confidence must be considered
6 against the matrix of just what that confidence is and
7 whether the person who imposed the requirement of
8 confidentiality has demonstrated or not demonstrated a
9 desire that it be kept confidential. That whilst you
10 have had passed up to you today a letter dated yesterday
11 that Doreen Kartinyeri apparently still wants it kept
12 confidential, you have to take into consideration in
13 your balancing exercise the numerous talks she has given
14 to the media which, quite clearly, indicate that she
15 didn't want it kept confidential. She cannot have it
16 both ways.

17 COMSR: I suppose once it's been released into
18 the public arena -

19 MR ABBOTT: It is no longer confidential. And that
20 is one facet. But there is another argument that is
21 no longer confidential at all. I'm dealing with the
22 claim of this letter dated yesterday and just how you
23 cannot take that at face value. You can take it at face
24 value to a limited extent, but you have to look at the
25 other published utterances of the persons whose claims
26 are in that letter. That is what they mean by that
27 letter of 31 October that after they had heard of what
28 is happening in the Royal Commission in the
29 cross-examination of Dr Draper and others, they might
30 very well now like not to let the cat out of the bag.
31 But the cat, I'm afraid, escaped months ago.

32 What basically is Dr Fergie's objection? It is
33 obvious that she won't divulge, unless ordered to do so
34 by you, because she claims it is her informant's
35 decision. It is her informant's decision, so she says,
36 to decide whether she, Dr Fergie, will say anything at
37 all.

38 At p.5235, she came out with a gem:

1 `That is a decision that Aboriginal women must make, not
2 me'.
3 In truth, the decision is yours, not hers. To allow
4 that sort of attitude to be carried forward in this
5 Royal Commission, in my submission, subverts the entire
6 purpose of this Royal Commission. To allow a witness
7 like Dr Fergie to come along, present a report and
8 refuse to answer questions as to how she arrived at the
9 conclusions in her report, as to what were the bases of
10 the information for some of the amazing assertions in
11 the report, do not detest in any proper way her report
12 at all and does a grave disservice to your Terms of
13 Reference.
14 CONTINUED

1 In my submission, you must conduct the balancing
2 exercise and if it takes the rest of the day for you to
3 consider the matter then you should consider it. But, I
4 would urge you to come to a speedy decision. I don't
5 suggest that you should make your decision here and now,
6 but, you have obviously had several days to consider it
7 already, because you have heard Ms Pyke's argument on
8 Saturday and Monday, and, in my submission, your Honour
9 should be able to come to a decision, well, at the
10 appropriate time, however long it takes. I will need to
11 know before I embark on my cross-examination of Dr
12 Fergie.

13 COMSR: There are other considerations of course
14 which have been raised and that concerns the provisions
15 of the Racial Discrimination Act has been a bar to my
16 pursuing or seeking to coerce the information.

17 MR ABBOTT: From Dr Fergie?

18 COMSR: No, not from Dr Fergie.

19 MR ABBOTT: The racial discrimination would surely
20 only apply to those, if it applies at all, to those who
21 actually held the belief.

22 COMSR: That may be so, but I am saying, these
23 are the considerations which have been raised and
24 which -

25 MR ABBOTT: Not to someone whom they reported the
26 belief.

27 COMSR: No.

28 MR ABBOTT: They are the submissions I wish to make.
29 Unless there is any aspect that you wish me to make.

30 COMSR: We do have a request, don't we, from the
31 Commonwealth?

32 MR SMITH: I need to draw to your attention that we
33 have been getting these letters on a regular basis, the
34 letters from the Commonwealth Attorney-General. I
35 placed a letter before you this morning, suggesting that
36 if you were contemplating compelling Dr Fergie to answer
37 such questions, that is questions related to - well,
38 the request was couched in very general terms, but, the

1 pith of the request was that, if you were contemplating
2 making a ruling which had the effect of requiring Dr
3 Fergie to disclose what was in the secret appendices,
4 that the Commonwealth Crown would want notice of that to
5 be heard. I just put that on the record, although the
6 letter is or I can proffer the letter for the voir dire.

7 COMSR: Of course the Commonwealth is
8 apprehending there may be some conflict between the
9 provisions of the Commonwealth and State legislation.

10 MR SMITH: Yes and the other point made by the
11 Commonwealth Solicitor-General's office was that, there
12 may be a constitutional issue involved with compulsion
13 also, that they would want to be heard on. So,
14 I think you need to consider not only Mr Abbott's
15 argument, but the degree to which you allow the
16 Commonwealth an opportunity to be heard.

17 MS PYKE: There are just a couple of comments I
18 would want to make about Mr Abbott's submission. He has
19 referred, at length, to the issue of public interest
20 immunity. The thrust of our submission is, of
21 course, that the concept of confidentiality and indeed
22 it is fairly summed up at p.255 of the Maurice
23 judgment:

24 `There are, however, cases when confidentiality is
25 itself a public interest.'

26 That is what we say is at the nub of this matter.
27 You might recall that I read out a particular quote at
28 p.273. If you look at the lines preceding that quote it
29 refers to the balancing of public interest immunity and
30 wider aspects of the public interest. I don't join
31 issue with the fact that there has got to be a balancing
32 process and I see the issue of public immunity and
33 confidentiality, frankly, rolled into one. It is an
34 artificial distinction that I think Mr Abbott has
35 embarked upon, in sort of putting them in two separate
36 categories. But, I say this to you, that Mr Abbott has
37 not produced any authority to you, to support the
38 proposition, that where Aboriginal people have disclosed

1 information, for the purposes of protecting an
2 Aboriginal site, that they have then been compelled -
3 see this information has been disclosed, it has been
4 disclosed for a particular purpose, for a particular
5 restricted purpose. Indeed, for a purpose consistent
6 with the case of Maurice. That is, that there has been
7 a disclosure, a limited disclosure, for the purposes of
8 the protection of a significant traditional Aboriginal
9 sites. I just use that in the most general sense of the
10 word. There is no authority whatsoever, that
11 information conveyed by Aboriginal people, in that
12 circumstance, can then be compelled to be conveyed to a
13 different set of proceedings, set up, not for the
14 protection of Aboriginal sites, but for the purpose, for
15 example, as set out in your terms of reference.

16 MR ABBOTT: That is just nonsense. This was a land
17 claim opposed by the Northern Territory Government. It
18 wasn't obtained in the same set of proceedings. We're
19 talking about investigations anthropologists did for the
20 Aboriginal Sacred Sites Protection Authority and the
21 subpoenaing of their notes in a land claim. It is
22 exactly the case that Ms Pyke says there is no
23 authority for.

24 MS PYKE: I am suggesting to you there is no
25 authority, in essence, for Aboriginal people to be
26 compelled to have evidence about their beliefs, provided
27 in a confidential situation for the purposes of
28 protection of sites, for some proceedings not at all
29 related to Aboriginal sites and protection. This,
30 frankly, is a Commission set up by the Government for
31 its political purposes and they are set out in the terms
32 of reference. There is no doubt about that. It is to
33 assist the Government, the State Government, to make its
34 submissions to the Federal enquiry. It has got nothing
35 to do with protecting the rights of Aboriginal people.

36 COMSR: What you are putting to me is
37 that, the provision of confidential information, or the
38 purposes of one Tribunal, does not mean that it is

1 available for an entirely different type of Tribunal.

2 MS PYKE: Particularly in circumstances such as
3 this. That's something that I say you must weigh up
4 very very heavily as a public interest argument, and as
5 An argument of confidentiality.

6 COMSR: The basis of the argument of
7 confidentiality though, on which Dr Fergie relies, as I
8 understand what she has put to me, is that, or what you
9 have put to me previously, is that, she was given the
10 information in her capacity as an anthropologist.

11 MS PYKE: For a particular purpose, in support of
12 particular proceedings for the preparation of a report,
13 for the purposes of the Federal Minister. She was
14 instructed for a particular purpose. So, there were two
15 prongs to what I was saying. One is the issue of
16 confidentiality and the other is, of course, the
17 particular purpose for which the information was
18 supplied. Then, of course, we have got the argument of
19 the Commonwealth. But Mr Abbott has said -

20 MR ABBOTT: This is not reply. She didn't advert to
21 this other prong before.

22 MS PYKE: It is in the argument.

23 MR ABBOTT: It is not in the argument. You haven't
24 adverted to that other prong before. No doubt it came
25 from Mr Tilmouth this morning.

26 MS PYKE: With respect, I say that, quite clearly
27 when you look at my submissions, they were done on the
28 basis that my client had received information in
29 positions of confidence. She had an obligation and they
30 were there and you asked some questions of the witness
31 as we were embarking upon that debate. I am just saying
32 my friend is being artificial in his construction and we
33 would say it is very much a public interest argument,
34 this issue of confidentiality.

35 Mr Abbott has addressed at length the balancing of
36 public interest.

37 COMSR: That only gives you the right of reply
38 in relation to distinguishing matters. As I understand

1 it in the Federal proceedings - well, when the
2 information went to the Minister, he didn't open the
3 secret envelopes, so the intimation wasn't made to him.
4 And, as I understand it, that information has not been
5 made available to any of the judges who have dealt with
6 this matter.

7 MS PYKE: No, as I understand it. The information
8 has only been disclosed to those people who were
9 authorized recipients of the custodians - that
10 was the female assistant to the Minister Sue Kee
11 and Anne Mullins. It is a situation, under no
12 circumstances this situation being suggested to be
13 disclosed to men. It has never been suggested it could
14 be published at large or in any other set of
15 circumstances.

16 COMSR: I don't think it has been suggested here
17 either.

18 MS PYKE: What I am suggesting to you is, you
19 asked me and I said that it has only been disclosed
20 to a limited number of specific female people. There
21 has been no suggestion of disclosure to men, but I say
22 to you, that, to compel information of this nature to be
23 used in proceedings which were not even contemplated at
24 the time of the disclosure, and proceedings which are
25 perceived by the people who are the custodians of the
26 information as being offensive to them not for the
27 purposes associated with protection of any interest in
28 which they disclose the information, is repugnant
29 and must weigh exceedingly heavily in any element of
30 public interest or confidentiality.

31 MR PALYGA: I was involved in the Federal Court
32 proceedings. What you have assumed is correct, that
33 the contents of the envelopes weren't allowed to be seen
34 by any men, but one thing that was allowed, was for the
35 Minister's advisor, Sue Kee to tell the Minister whether
36 or not there was anything in the envelopes which
37 contradicted anything in the Saunders' report and I just
38 rise to say that, because it might be relevant to the

1 issue of whether questions can be addressed to Dr
2 Fergie, about whether other material was the same, the
3 same or similar or not, or consistent with or not
4 consistent with other statements made.

5 COMSR: Of course, the actual envelopes, the
6 original sealed envelope is at the direction of which
7 Court?

8 MR ABBOTT: Back at ALRM.

9 COMSR: I know it is back there, as part of an
10 undertaking given by Ms Layton.

11 MS PYKE: I don't know if it is at ALRM. I
12 thought it was under the control of Ms Layton. She has
13 given undertakings in relation to it. Mr Abbott might
14 be confused.

15 MR ABBOTT: It is placed in there with the other
16 copies from your client.

17 MS PYKE: I don't know that. I have no idea where
18 the original is.

19 COMSR: It is an issue where we may have to
20 consider what we might have to do in respect of the
21 Commonwealth request I suppose.

22 MR SMITH; I suggest you have a short break just to
23 consider your position.

24 COMSR: I might say, with the complexities of
25 this issue, that a short break might be a somewhat
26 optimistic view, what is required for the resolution of
27 it, but I will take a short break.

28 ADJOURNED 11.34 A.M.

1 RESUMING 12.27 P.M.

2 COMSR: I will give a ruling, at this stage.

3 I rule that I will not allow questions of Dr Fergie
4 which directly go to her knowledge of the contents of
5 the sealed envelopes. There are problems to be
6 considered of the applicability of the Racial
7 Discrimination Act and of possible inconsistencies under
8 s.109 of the Constitution. Furthermore, the s.10 matter
9 under the Aboriginal & Torres Strait Islander Protection
10 Act is before the Federal Court and the outcome of those
11 proceedings is unresolved. It must be remembered that
12 it is a specific Term of Reference of this Commission
13 that it not prejudice those proceedings. The direct
14 disclosure in this Commission of contents not known to
15 that court could well offend that Term of Reference.
16 This Commission has to have regard to all its Terms of
17 Reference. It is not a simple situation with no
18 dimensions other than those canvassed in the case of
19 Maurice. Whether or not Ms Pyke has raised these other
20 issues in her argument does not relieve this Commission
21 from having regard to the parameters of its Terms of
22 Reference and having regard to any statutory
23 restrictions which apply. Notwithstanding the
24 restrictions that these other matters impose upon the
25 ambit of the Inquiry, I should point out that it would
26 be quite wrong to assume that the Commission does not
27 have evidence before it from other sources which goes to
28 the issue of what is woman's business as defined in the
29 Terms of Reference. There is a body of evidence which
30 has been led touching on that matter.

31 As to the question of waiver of confidentiality,
32 where it appears that counsel for Dr Fergie has
33 canvassed a topic in her cross-examination of witnesses
34 on instructions, I will deal with that issue as it
35 arises. This ruling does not preclude questions arising
36 out of that situation.

37 Are we ready? Are we able to proceed on that basis?

38 MR ABBOTT: Yes, I am ready to proceed.

- 1 MR SMITH: I recall then Dr Fergie.
2 COMSR: It may be, at some stage, Mr Abbott,
3 that it may be necessary to consider the question of the
4 evidence which has been led and the extent to which the
5 present restrictions would apply to all of that
6 evidence. But that is a matter which will have to be
7 canvassed in a confidential session.
8 MR ABBOTT: I take it you have agreed to the release
9 to me of the evidence of my clients taken in the secret
10 sessions?
11 COMSR: I haven't, at this stage. And that is
12 one of the issues that we will have to consider, by
13 having a look at that.
14 MR ABBOTT: I will need to have that before I finish
15 my cross-examination.
16 COMSR: I appreciate that, yes.
17 WITNESS D.J. FERGIE ENTERS WITNESS BOX
18 COMSR: Of course, a lot of issues have already
19 been canvassed with this witness.
20 MR ABBOTT: Yes, I know, I have read it.
21 CROSS-EXAMINATION BY MR ABBOTT
22 Q. Do you have your report with you, Exhibit 5.
23 A. I do.
24 Q. Go to p.1, 'Introduction'. You say, in line 3, apropos
25 of your report 'It was commissioned by the Aboriginal
26 Legal Rights Movement to provide an anthropological
27 evaluation of the significance of secret women's
28 knowledge within Aboriginal tradition to that
29 declaration.'
30 A. I see that.
31 Q. Is that the ambit of your report.
32 A. Could you clarify what you mean by 'ambit'.
33 Q. Yes, is that why you wrote the report.
34 A. Yes, that was my understanding.
35 Q. In this report then you are setting out to provide an
36 anthropological evaluation of the significance of secret
37 women's knowledge.
38 A. Under the terms of that Act, yes.

- 1 Q. Under the terms of the Aboriginal & Torres Strait
2 Islander Heritage Protection Act.
- 3 A. That's correct.
- 4 Q. How do the terms of the Act impinge upon an
5 anthropological evaluation of the significance.
- 6 A. The terms of the Act, as I said last week, effectively
7 determine critical terms. For example, the notion of
8 tradition and how I would need to understand that. The
9 Act, it seems to me, determines certain things that I
10 needed to take into account and left others as
11 nonessential items.
- 12 Q. Apart from the definition of tradition, how does the Act
13 impinge upon an anthropological evaluation of the
14 significance of secret women's knowledge. (NOT
15 ANSWERED)
- 16 Q. Can you answer that.
- 17 A. Yes, I shall.
- 18 OBJECTION Ms Pyke objects.
- 19 MS PYKE: If the witness can be given time?
- 20 COMSR: Yes, all right. She is going to be
21 given time, Ms Pyke.
- 22 MR ABBOTT: It is just that she is writing
23 something. I wondered whether she heard the question.
- 24 WITNESS: You asked me, apart from the definition
25 of the concept of tradition, what it was I wanting to -
26 XXN
- 27 Q. No, I was citing your report `... to provide an
28 anthropological evaluation of the significance of secret
29 women's knowledge.' You don't need to write that down,
30 because it is in line 5. I am asking you, apart from
31 the definition of tradition in the Act, what other
32 purpose or effect or input did the Act have to that
33 task.
- 34 A. It affected - it limited the issues that I might
35 otherwise have explored that I didn't need to explore in
36 this context. For example, the matter of continuous
37 association. For example, whether or not I needed as a
38 matter of priority to explore who were traditional

- 1 owners of the area and so on.
- 2 Q. That comes back to my question. Apart from the
3 definition of tradition, the answer that you have just
4 given is referable to the definition of tradition,
5 isn't it.
- 6 A. It certainly has a reference to the word 'tradition',
7 there is no question.
- 8 Q. Your last answer did not deal with my question. My
9 question was, apart from the reference to tradition in
10 the Act, how else did the Act impinge upon the
11 anthropological evaluation of the significance of secret
12 women's knowledge.
- 13 A. The Act required that I explore the significance of an
14 area according to Aboriginal tradition, for example.
- 15 Q. I included that in my question.
- 16 A. I don't believe you did.
- 17 Q. Anything else.
- 18 A. Yes, the Act requires that I - the Act, it seemed to me,
19 framed issues of injury and desecration under Aboriginal
20 tradition.
- 21 Q. So, you had to take into account the anthropological
22 evaluation of the significance of secret women's
23 knowledge and issues of desecration then.
- 24 A. Yes.
- 25 Q. Is that what you are saying.
- 26 A. If you look at the aims of my report, it seems to me
27 that clarifies what you are asking me.
- 28 Q. It doesn't. I am asking you, in what other ways did the
29 Act impinge upon the anthropological evaluation of the
30 significance and the emphasis being on 'the
31 anthropological evaluation'. I know it is a form of
32 what Mr Wooley referred to 'anthro-speak', but
33 evaluation is a plain English word. How does the Act
34 impinge upon your evaluation.
- 35 A. The Act very clearly sets out, it seems to me, a series
36 of relevant issues that any anthropological analysis
37 would have to take into account.
- 38 Q. What issues.

- 1 A. They are primarily the issue of tradition. The issue of
2 the significance of an area according to Aboriginal
3 tradition. In fact, if you could give me the Act, I
4 think I would be much more comfortable answering this
5 question.
- 6 Q. There is nothing else you can recall other than
7 Aboriginal tradition.
- 8 OBJECTION Ms Pyke objects.
- 9 MS PYKE: The witness has asked to be shown the
10 Act.
- 11 COMSR: Yes, Ms Pyke.
12 Do we need to dwell over-long on this?
- 13 MR ABBOTT: No, I am aiming for a straight answer
14 rather than a number of answers.
- 15 MS PYKE: Saying the witness hasn't given a
16 straight answer is inappropriate.
- 17 MR ABBOTT: It is not inappropriate. She is not
18 able to tell us. She wants to look at the Act. I will
19 let her look at the Act and give an answer.
- 20 WITNESS: Very clearly the Act makes the term
21 `Aboriginal tradition' critical. Similarly it makes the
22 issue of Australian waters a significant question and,
23 in this particular case, that was indeed an area of
24 significance to my assessment. Similarly it sets up
25 questions about the significance of an Aboriginal area
26 and it defines in what terms I understand - was to
27 understand interpreted the notion of Aboriginal.
- 28 XXN
- 29 Q. Defines in what terms you were to determine the notion
30 of, what.
- 31 A. Who under the Act can be considered an Aboriginal person
32 and what, for example, might be considered to be
33 Aboriginal remains.
- 34 Q. Just on the definition of Aboriginal, did you attempt to
35 define who was a Ngarrindjeri Aboriginal.
- 36 A. Yes, I did.
- 37 Q. What criteria did you apply.
- 38 A. I applied -

- 1 Q. Just list them for us, would you.
- 2 A. The recognition of a person as an Aboriginal person by
3 other Aboriginal people.
- 4 Q. What other criteria.
- 5 A. That is the primary criteria I applied.
- 6 Q. Again, you may have misunderstood my question, but it
7 was a reference to how you defined an Aboriginal
8 Ngarrindjeri person, not just an Aboriginal person.
- 9 A. What you are asking me is how does a person determine
10 whether an Aboriginal person is a member of a particular
11 named group in Aboriginal custom in Australia and, in
12 effect -
- 13 COMSR
- 14 Q. No, I don't think that was the question.
- 15 MR ABBOTT: No.
- 16 COMSR
- 17 Q. I think the question was, how did you, on this
18 particular occasion.
- 19 MR ABBOTT: Yes.
- 20 WITNESS: By public acknowledgements, in effect.
- 21 XXN
- 22 Q. Public acknowledgements from whom.
- 23 A. From Aboriginal people who were collected together as
24 Ngarrindjeri people at a meeting.
- 25 Q. Public acknowledgement in what form.
- 26 A. Acquiescence that those that were there were
27 Ngarrindjeri people and the constant reference to each
28 other as Ngarrindjeri women.
- 29 Q. If they had done that in reference to Rocky Marshall, he
30 would be a Ngarrindjeri woman.
- 31 OBJECTION Ms Pyke objects.
- 32 MS PYKE: Mr Abbott is -
- 33 COMSR: Ms Pyke, this witness doesn't require
34 constant attention. She is quite able to hold her own,
35 I am sure.
- 36 XXN
- 37 Q. I am just trying to demonstrate the validity of this
38 test. If the women had referred to Rocky Marshall as a

- 1 Ngarrindjeri woman -
2 A. It wouldn't have been an issue, Mr Abbott.
3 Q. You would say that he is a Ngarrindjeri woman, because
4 there has been reference to that fact by the body of
5 other Aboriginal people.
6 A. Your question is a hypothetical one and I suggest to you
7 this would never arise. That Ngarrindjeri people would
8 suggest to me that Rocky Marshall was a Ngarrindjeri
9 woman without asking me on what basis. However, it
10 seems to me that the context in which women were at
11 those meetings and the way in which they acknowledged
12 each other as Ngarrindjeri women quite explicitly was,
13 in effect, an affirmation to me that these were women
14 who not only identified as Ngarrindjeri women, but were
15 acknowledged by each other to be Ngarrindjeri women.
16 Q. Any other criteria.
17 A. No.
18 Q. Did you apply that criteria to Vi Deuschle.
19 A. Yes.
20 Q. She is a Ngarrindjeri woman.
21 A. Vi Deuschle -
22 Q. No, she is a Ngarrindjeri woman.
23 OBJECTION Ms Pyke objects.
24 MS PYKE: Let the witness answer.
25 XXN
26 Q. Can I just have an answer yes or no.
27 OBJECTION Ms Pyke objects.
28 MS PYKE: Not all questions are capable of a yes
29 or no answer.
30 COMSR: Ms Pyke, I don't think you need to be
31 overly anxious about your witness here. She is quite
32 capable, I think, of answering herself.
33 MS PYKE: I object to the witness being
34 interrupted.
35 XXN
36 Q. I want an answer to the question. I asked a simple
37 question: Vi Deuschle.
38 A. Vi Deuschle was identified as a Ngarrindjeri woman at

- 1 that meeting and was accepted as such by the meeting.
- 2 Q. At what was the Graham's Castle meeting of 19 June 1994.
- 3 A. That's so.
- 4 Q. Shirley Peasley.
- 5 A. The same applies to Shirley Peasley.
- 6 Q. Val Power.
- 7 A. Val Power wasn't there.
- 8 OBJECTION Ms Pyke objects.
- 9 MS PYKE: At which time?
- 10 XXN
- 11 Q. I am just saying, Val Power, did you identify her as
- 12 being a Ngarrindjeri woman.
- 13 A. Val Power was identified as a Ngarrindjeri woman at the
- 14 - by other Ngarrindjeri women in the course of my
- 15 enquiries and in the context of a Ngarrindjeri Action
- 16 Group meeting on the Monday.
- 17 Q. Muriel Van Der Byl.
- 18 A. The same applies to Muriel.
- 19 Q. Have you ever examined the genealogy of Vi Deuschle
- 20 and/or Shirley Peasley.
- 21 A. I had not.
- 22 Q. Have you.
- 23 COMSR: The witness answered 'I have not.'
- 24 MR ABBOTT: I thought she said 'I hadn't.' I
- 25 thought she was referring to that time.
- 26 XXN
- 27 Q. From then, or since, have you examined any material
- 28 relating to the genealogy of Vi Deuschle or Shirley
- 29 Peasley.
- 30 A. I have not.
- 31 Q. You don't know whether the apparent recognition was
- 32 spurious or correct.
- 33 A. I think it is important that the Commission understands
- 34 that a genealogy, in effect, is not - in a sense, it is
- 35 not a unitary genealogy of any Aboriginal person, or of
- 36 any person indeed. And that that genealogy, in a sense,
- 37 even if it is a published one, is in no way a test of
- 38 fact or fiction in such a context. In effect, a

1 genealogy when tested explicitly by an anthropologist is
2 an explication of that person's understanding of their
3 connections to others. And quite frequently
4 anthropologists will find that Aboriginal - I mean, for
5 example, me in the field, I have elicited a genealogy
6 which later an informant came back and said `Look, you
7 think I am the real father of those children. I am
8 actually their stepfather and this is the man who is
9 their real father.'
10 CONTINUED

1 Q. Dr Fergie -

2 A. In a sense, if you let me finish -

3 Q. I would rather you answer the questions rather than
4 deliver a speech to the commissioner.

5 MS PYKE: She is endeavouring to answer the
6 question in a particular way to Mr Abbott. She must be
7 permitted to answer.

8 MR ABBOTT: This is an attempt, I submit, to subvert
9 any cross-examination by the witness delivering a
10 lecture to you -

11 COMSR: I am afraid that anthropologists appear
12 to have a tendency to answer at length, and I can't say
13 that this particular anthropologist is different in that
14 respect.

15 A. Thank you. I think really the point is, in a sense,
16 what I am trying to say is that, in effect, a genealogy
17 is no test of whether or not somebody authentically is
18 identified in a particular way. That the best test is
19 the one -

20 Q. That is the answer.

21 A. Yes.

22 XXN

23 Q. Can I put it this way. You would accept then, because
24 it does not fall within your assessment, that Vi
25 Deuschle and Shirley Peasley, if I tell you that neither
26 of them are related in any direct sense to Ngarrindjeri
27 people, you would assert, if I asked you to assume that,
28 that they are still Ngarrindjeri because other
29 Ngarrindjeri women at one meeting appeared to accept
30 them as Ngarrindjeri women.

31 OBJECTION Ms Pyke objects.

32 MS PYKE: There has not been any evidence led of
33 the genealogy of the people Mr Abbott refers to. If he
34 wants to produce a genealogy and let the witness comment
35 specifically on that, let him do it.

36 MR ABBOTT: There has been.

37 COMSR: There has been evidence led.

- 1 MR ABBOTT: Mrs Wilson and Dr Clarke. Mrs Wilson
2 gave evidence that neither Vi Deuschle nor Shirley
3 Peasley were regarded amongst the Ngarrindjeri community
4 as being Ngarrindjeri women.
- 5 COMSR: It is that evidence that is the basis of
6 the question.
- 7 MS PYKE: Let that question be put.
- 8 MR SMITH: And Dr Clarke also.
- 9 MR ABBOTT: And Dr Clarke as well. I will rephrase
10 my question since Dr Fergie has probably forgotten it.
- 11 QUESTION REPHRASED
12 XXN
- 13 Q. It appears obvious then, from what you are saying, that
14 a person without any Ngarrindjeri ancestry at all may,
15 on your definition of a Ngarrindjeri Aboriginal, be one.
- 16 A. May well be regarded as one.
- 17 Q. No, may well be one in your eyes.
- 18 A. It's not my eyes that I'm suggesting are the critical
19 ones.
- 20 Q. Do you remember we started off, what's now become a long
21 line of cross-examination, by asking what were the
22 criteria you applied, and you told me it was the
23 apparent acceptance by others.
- 24 A. Yes.
- 25 Q. That is your interpretation of what you regarded as a
26 Ngarrindjeri woman.
- 27 A. It is my interpretation of other people's
28 identification.
- 29 Q. So when we deal with the Ngarrindjeri women in your
30 report, we are not necessarily dealing with Ngarrindjeri
31 women by descent, we are dealing with Ngarrindjeri women
32 by acceptance.
- 33 A. By identification.
- 34 Q. At one meeting on 19 June 1994.
- 35 A. In respect of the women that you have asked me
36 specifically about, and about which Mrs Wilson has given
37 evidence, and about which Dr Clarke has given evidence,
38 my observations since that time are to the contrary,

- 1 that I have seen those women repeatedly accepted and
2 present themselves as Ngarrindjeri people.
- 3 Q. They might be welcome as political agitators or people
4 who are interested in the empowerment of Aboriginal
5 communities.
- 6 COMSR: What has that got to do with it?
- 7 MR ABBOTT: There might be many reasons for
8 acceptance.
- 9 XXN
- 10 Q. I am asking whether you considered other possible
11 reasons.
- 12 A. Can you explain to me why you think that's of relevance?
- 13 Q. No. I am just asking whether you considered any other
14 possible reasons for their acceptance - for their
15 apparent acceptance.
- 16 COMSR: I would ask persons in the court not to
17 interrupt by talking out while counsel is asking
18 questions.
- 19 MR ABBOTT: I don't mind. I knew there would be a
20 cheer squad for this witness.
- 21 MS PYKE: I ask Mr Abbott to withdraw that
22 comment. It is outrageous.
- 23 MR ABBOTT: It is not a comment. It's true. I can
24 put up with it.
- 25 COMSR: I am trying to put some order in the
26 proceedings. Other people in the body of the court have
27 complained that it is difficult for them to hear when
28 there are persons talking and interrupting. I am simply
29 asking if everyone keeps quiet we will all be able to
30 get on a lot faster.
- 31 XXN
- 32 Q. I return to your concept of what is or what is not a
33 Ngarrindjeri woman. You have told us the criteria that
34 you employ to identify, in your eyes, what is or is not
35 a Ngarrindjeri woman. The question I have for you is,
36 is that a criteria which is either published in the
37 literature - that's my first question.
- 38 A. I believe so.

- 1 Q. Can you point to any literature.
2 A. Not at the moment, no.
3 Q. Secondly, is it a view held by other well regarded
4 mainstream anthropologists.
5 A. Indeed.
6 Q. Sorry.
7 A. Indeed.
8 Q. Which ones. Can you identify any. I am just
9 interested.
10 A. I wouldn't like to put people's names forward before I
11 go back and check my facts, but I think that you would
12 be able to call many anthropologists into this box and
13 get a very similar, if not identical, answer and -
14 Q. Let's go to the aims of your report. You have said that
15 the aims of your report are twofold: to outline the
16 particular significance according to Ngarrindjeri
17 tradition of the area of the proposed Hindmarsh Island
18 Bridge; and to identify any threat of injury or
19 desecration by the proposed bridge.
20 A. Yes.
21 Q. The aims appear to accept as a given that there is a
22 Ngarrindjeri tradition of some significance that relates
23 to the area of the proposed Hindmarsh Island Bridge.
24 A. That's so.
25 Q. Yet, this report does not start off on the basis that
26 the claim of Ngarrindjeri tradition may be spurious,
27 does it.
28 A. But my assessment took that question seriously into
29 account. This is a report of an assessment. It is not
30 the assessment per se.
31 Q. Surely the correct aim - the first aim should be to
32 identify whether there was Ngarrindjeri tradition, or a
33 valid Ngarrindjeri tradition under the Act or not.
34 A. Certainly I saw that as one of my aims. Whether it
35 comes across to you in your reading of my aims is a
36 different question.
37 Q. One of the criticisms that's been made of your report is
38 that the aims appear to assume, as you have admitted,

- 1 the existence of Ngarrindjeri women's business, and yet
2 the view has been put forward that any reputable
3 anthropologist would set out in the aims to identify the
4 validity of the existence or otherwise of Ngarrindjeri
5 women's business. You agree that the report -
- 6 COMSR: There is a lot of evidence concerning
7 this in which the witness has explained the limited
8 nature of her report.
- 9 MR ABBOTT: I know that. I am aware of that, but
10 she hasn't, I suggest, answered that question which was
11 a criticism that was made of her.
- 12 MS PYKE: The witness is endeavouring to draw a
13 distinction between the assessment process and the
14 report.
- 15 XXN
- 16 Q. Do you accept that one of the aims of your report should
17 have been to furnish to the reader the methodology by
18 which you arrived at the process of establishing whether
19 there was or was not, according to Ngarrindjeri
20 tradition, any secret women's business which was site
21 related, i.e., to the Hindmarsh Island Bridge site.
- 22 A. There are a number of contentious proposals in that
23 statement. If you could take me through it one bit at a
24 time I will answer you at each bit.
- 25 Q. I would like an answer to my question as a whole.
- 26 MS PYKE: The witness has just indicated she can't
27 answer the question as a whole.
- 28 WITNESS: I can't answer it.
- 29 MR ABBOTT: The witness doesn't need you to answer
30 for her. I withdraw that, she does need you.
- 31 COMSR: The witness seems quite capable of
32 handling these issues herself. I don't think you need
33 be too anxious, Ms Pyke.
- 34 XXN
- 35 A. There is not a unitary response I can give to that
36 question. There are a number of parts to it and I would
37 answer each part of it differently.
- 38 Q. You cannot at this stage answer the question as a whole.

- 1 A. The questions. What you have put in that statement is a
2 variety of questions.
- 3 Q. I will go to something else if you can't deal with a
4 question like that. I will turn to another one.
- 5 MS PYKE: It is not that she can't deal with it.
6 She can deal with it in a particular way.
- 7 MR ABBOTT: I trust Dr Fergie is listening with due
8 attention to Ms Pyke, because this is not an objection,
9 but merely a form of providing assistance to the witness
10 as and when we go along.
- 11 MS PYKE: That is outrageous.
- 12 COMSR: My assessment of this witness is that
13 she is quite able to speak up for herself and, if she
14 has a problem, make it known, as she has done in this
15 instance.
- 16 MS PYKE: To no avail.
- 17 MR ABBOTT: I don't know what your Honour makes of
18 that remark. I would have thought that it is at least,
19 to some degree, insulting of this commission.
- 20 COMSR: Mr Abbott has indicated he is not
21 pressing the question and he is moving on to some other
22 topic.
- 23 XXN
- 24 Q. You go on to deal with the limited focus of your report,
25 and questions have been asked of you of that limited
26 focus, and you deal, firstly, with the significance.
- 27 A. Could you point me to the page you are referring to?
- 28 Q. Yes, p.2, paragraph 1.2(i), heading `Scope'. Have you
29 got that.
- 30 A. Yes.
- 31 Q. Firstly, the significance of the women's knowledge about
32 the area, secondly, women's beliefs about the
33 consequences, presumably that flow from the construction
34 of a bridge in the area, is that right.
- 35 A. Yes.
- 36 Q. And thirdly, an assessment, in essence, of the way in
37 which the women's knowledge was revealed.
- 38 A. And authorised.

- 1 Q. Yes. And all that again assumes the significance of the
2 women's knowledge, doesn't it.
- 3 A. What it assumes, Mr Abbott, is that I have formed a view
4 by the time I began - by the time I had written that
5 particular part of my report, and indeed I had.
- 6 Q. Namely, that women's secret knowledge existed.
- 7 A. Yes.
- 8 Q. And that it related to the area in which the bridge was
9 going to be built.
- 10 A. That it related to Hindmarsh Island.
- 11 Q. And, in particular, about the area in which the bridge
12 was proposed to be constructed.
- 13 A. I make a distinction in my report between the bridge
14 corridor and the localised area.
- 15 Q. But you'd also formed an opinion in relation to the
16 reference that - what way the women's secret knowledge
17 referred to the area in which the bridge was going to be
18 constructed.
- 19 A. Can you say that again?
- 20 Q. You had also formed the view of the significance of the
21 women's secret knowledge and its referability to the
22 area in which the bridge was to be constructed before
23 you came to write your report.
- 24 A. Yes.
- 25 Q. I will return to what you call the research and
26 consultative process in a little while, but, in those
27 pages from 2 to 8, you basically set out, in an
28 historical fashion, what happened in terms of your
29 involvement with primarily Doreen Kartinyeri, don't you.
- 30 A. No.
- 31 Q. I suggest that deals primarily with Doreen Kartinyeri.
32 Not exclusively, primarily.
- 33 A. No.
- 34 Q. We can all read it. Your view is that it doesn't
35 primarily deal. I will not press that. You then go on
36 to p.8 'Authority and release of secret knowledge'.
37 That deals with the process by which the women
38 authorised the release of the secret knowledge.

- 1 A. To Professor Saunders for the purpose of her inquiry
2 under section 10 of the Federal Act.
- 3 Q. Section 3.2 on p.10 says `contemporary experiential
4 authority.'
- 5 A. That's right.
- 6 Q. What are you intending to convey by that heading.
- 7 A. I think it's fairly straightforward, but what I was
8 trying to suggest was that there was another dimension
9 to people's understanding of the situation, and it
10 didn't just relate to what might, by our more narrow
11 understanding of the notion of tradition, refer to
12 custodianship in the classic sense of someone who has
13 received something from an antecedent. It referred to
14 somebody who had had a personal experience in a
15 contemporary sense. That's why I have used the words
16 `contemporary' and `experiential', which gave them an
17 authority in another dimension of Aboriginal tradition.
- 18 Q. Let us take those three words. `Contemporary' means
19 here and now, or is intended to mean the present time,
20 right.
- 21 A. In a broad sense.
- 22 Q. `Experiential' is meant to mean experiences.
- 23 A. Indeed.
- 24 Q. `Authority', just what it says.
- 25 A. Yes, authority.
- 26 ADJOURNED 1.00 P.M.

- 1 RESUMING 2.16 P.M.
- 2 COMSR: I want to complete the examination of
3 this witness this afternoon because we don't really have
4 a great deal of time at our disposal. We can't afford
5 the luxury of recapitulation.
- 6 MR ABBOTT: Affording to us or me the luxury of
7 recapitulation, I still think I will be longer than
8 that, but I'll try. I was - in view of that, I may have
9 to not put a lot of what I would put about the report to
10 her and just to make submissions which will not be
11 favourable to her, at least in submissions; then again,
12 no doubt Miss Pyke will present what she can in
13 opposition to support the report.
- 14 COMSR: There has been fairly extensive matters
15 in the report.
- 16 MR ABBOTT: I think I've made my views clear in the
17 way I presented the reports.
- 18 XXN
- 19 Q. Let's try something different then. Let's leave
20 contemporary experiential authority in the form of Sarah
21 Millera and go to Mr Rocky Marshall and his letter.
- 22 MR SMITH: Could I interrupt and just apropos the
23 exchange between you and Mr Abbott. If Mr Abbott
24 doesn't go through this report with the witness, the
25 Commission will need to, so I think Mr Abbott -
- 26 COMSR: We have touched on it quite a bit. I
27 just don't want to go back to areas that have been
28 covered.
- 29 MR SMITH: The anthropologists who have given
30 evidence thus far have been cross-examined at length and
31 thoroughly by people at the bar table.
- 32 COMSR: I'm aware of that.
- 33 MR SMITH: This witness must be subject to the same
34 treatment.
- 35 MR ABBOTT: I will let counsel assisting do that. I
36 have only half the day. I will concentrate on the
37 matters I wish to get to.
- 38 COMSR: I don't want to find that rest of

- 1 tomorrow will be taken up with that witness.
- 2 MR ABBOTT: I don't guarantee it, it depends on
3 whether Dr Fergie keeps on noting down every question
4 that I ask before she answers it. That doesn't help
5 with expedition. The batting rate is probably the
6 slowest of any witness.
- 7 XXN
- 8 Q. Looking at Exhibit 37 produced. Could you look at it.
9 I think you have got the cutting from the Advertiser
10 there, have you not.
- 11 A. Yes.
- 12 Q. Have you read that in any form.
- 13 A. I read it on the weekend of the, you know, the weekend
14 preceding 20 July.
- 15 Q. The weekend preceding 20 July.
- 16 A. I read it in the paper the day it was published and I
17 read it on 18 July.
- 18 Q. 1994.
- 19 A. That's so.
- 20 Q. Who was it that drew your attention to it.
- 21 A. My mother.
- 22 Q. Have you carefully considered what is in it.
- 23 A. No, I have not.
- 24 Q. I would like you to carefully consider it now. The
25 letter says in its relevant part 'Grandmother started
26 and ran maternity hospitals at both Tumby Bay and Murray
27 Bridge', 'grandmother' being Catherine Rickaby.
- 28 A. Yes.
- 29 Q. 'Could speak several Aboriginal dialects and she learnt
30 a lot of mid-wifery skills from the black women'. There
31 is the reference to the 'putari'.
- 32 A. No, that's a reference to mid-wifery.
- 33 Q. What is referred to is in line with the putari tradition
34 that you told us about.
- 35 A. I said that a female putari is concerned with issues of
36 mid-wifery. That is not the same as what you put to me.
- 37 Q. 'She told me of the Aboriginal legend covering this
38 Lower Murray area as being a mother figure with the

- 1 Murray Mouth as the vagina, Hindmarsh Island as the
2 womb, Mundoo Island as the egg and the river,
3 surrounding lakes and mainland as a connected part of
4 the whole'. Now, obviously when - this is the first
5 time on 18 June 1994 that you had ever heard of that
6 assertion beings made.
- 7 A. That is so.
- 8 Q. Did you hear that assertion made on 19 June or anything
9 like it.
- 10 A. I did not hear that assertion made on 19 June.
- 11 Q. Or anything like it.
- 12 A. I guess it depends on, you know, how you want to define
13 `anything like it'.
- 14 Q. Let's define it widely. Did you hear anything like it
15 being asserted on 19 June.
- 16 A. Yes, in its broader sense I heard it.
- 17 Q. By whom.
- 18 OBJECTION Ms Pyke objects.
- 19 MS PYKE: This is at the Graham's Castle meeting.
- 20 MR ABBOTT: This is a question about she said she
21 heard something asserted by 19 June. I'm asking her by
22 whom, Miss Pyke.
- 23 XXN
- 24 Q. Can you tell us by whom.
- 25 A. By Doreen Kartinyeri.
- 26 Q. Was she the only person who asserted anything like that
27 on 19 June.
- 28 A. She was not.
- 29 Q. Who else.
- 30 A. In my recollection, Sarah Milera asserted something in
31 the broader sense like that.
- 32 Q. What did Sarah Milera assert that was in the broader
33 sense like this on 19 June.
- 34 A. I can't actually - I've endeavoured to try and recollect
35 precisely what she said and I'm unable to.
- 36 Q. You cannot assist us.
- 37 A. No, I cannot.
- 38 Q. Let's say anyone else other than Doreen Kartinyeri. We

1 can put Sarah Milera aside since you can't remember what
2 she said at all.

3 MS PYKE: That is not what the witness said.

4 MR ABBOTT: On this topic.

5 A. Other people may have put it in these terms. I can't
6 recollect with any clarity.

7 XXN

8 Q. When did Doreen tell you this or mention this in your
9 presence, or something like that, on 19 June.

10 A. On the - as Doreen and I were driving to Rocky
11 Marshall's home, she mentioned this letter.

12 Q. Did she mention what I read out, or anything like what I
13 read out.

14 A. She talked about what Rocky Marshall said in the letter.

15 Q. What did she say about it.

16 A. She said he had no right to say that.

17 Q. Did she mention what I read out to you that the

18 Aboriginal, the claim of the Aboriginal legend covering
19 the Lower Murray as being a mother figure with the
20 Murray Mouth as the vagina, Hindmarsh Island as the
21 womb, Mundoo Island as the egg, the river, surrounding
22 lakes and mainland as a connected part of the whole.

23 Did she mention that aspect or those aspects, or any of
24 them, when you were driving towards Rocky Marshall's
25 house.

26 A. I can't - I can't say with any precision. She, in the
27 most general terms, referred to these kinds of issues
28 and she made it clear that Rocky Marshall wasn't right.

29 Q. Did she say why Rocky Marshall wasn't right.

30 A. No, she just said that he wasn't.

31 Q. Did you ask her.

32 A. No, I didn't.

33 Q. Was it mentioned again at any other time on 19 June,
34 anything like this or any of those aspects.

35 COMSR: I haven't got an answer of the witness.

36 Q. When you say she said that Rocky Marshall wasn't right,
37 do you mean in the sense that what he said wasn't
38 correct, or in the sense that it wasn't right for him to

- 1 have done what he did.
2 A. I think in both senses.
3 XXN
4 Q. Any other time on 19 June, did you hear Doreen
5 Kartinyeri make any claim in relation to the Lower
6 Murray area as being a mother figure.
7 A. No.
8 Q. Not at all in any way, shape or form.
9 A. Look, I think the context of a phrase like `mother
10 figure' is so broad that -
11 Q. Maybe. Maybe, but do you remember her making any claim.
12 A. She made no claim about a mother figure.
13 Q. I don't want to be hung up on semantics. Is it if I
14 change `mother figure' to `mother earth'.
15 A. Then you would absolutely be wrong, without a question.
16 Q. Did she use the word or a phrase like `mother' with
17 reference to what she was saying to you.
18 A. Not that I can recall.
19 Q. This - you agree what is in the letter to the Advertiser
20 is a claim that there is a some correspondence in some
21 way between the Goolwa/Hindmarsh Island area and women's
22 reproductive organs, wouldn't you.
23 A. Yes, it would seem so. It's certainly in other cultural
24 themes it would be the case.
25 Q. Was a similar claim articulated by Doreen Kartinyeri in
26 your hearing on 19 June.
27 NOT ANSWERED
28 Q. Do you have some difficulties answering, or are you
29 trying to remember.
30 A. Both.
31 Q. Take your time then, we have got all afternoon.
32 A. Doreen Kartinyeri, at the meeting on 19 June, made
33 reference to the relationship between the geography of
34 that area and a human body.
35 Q. That is not my question. It's part of my question.
36 This is a claim - I'll read it out, say it again to you
37 so you can understand and think a bit more. My question
38 to you was whether or not on 19 June 1994, Doreen

- 1 Kartinyeri made a claim to the effect that there was a
2 correspondence between the area of Goolwa and Hindmarsh
3 Island and its environs and female reproductive organs.
4 A. And a female body.
5 Q. What do you mean by that answer.
6 A. Just what I've said, and a female body.
7 COMSR
8 Q. Both female reproductive organs and a female body.
9 A. And a female body in a more general sense.
10 XXN
11 Q. She made reference to a correspondence between the area
12 we are talking about and female reproductive organs and
13 a female body; is that what you are saying.
14 A. No, that is not what I'm saying.
15 Q. What are you saying then.
16 A. I'm saying that she made - she drew a relationship, a
17 correspondence. She drew a cultural relationship
18 between that geographical area and a woman's body.
19 Q. What was the correspondence between Hindmarsh Island and
20 the woman's body.
21 A. In all honesty, I can't recall with any - precisely and
22 I'm not trying to be evasive.
23 Q. Did she mention a correspondence between Hindmarsh
24 Island and a woman's body.
25 A. She certainly did.
26 Q. You can't remember what it was.
27 A. No.
28 Q. I suggest that you are telling us a big fat lie.
29 A. No, I'm not. What actually - there was a
30 correspondence between a number of dimensions of a
31 woman's body that Doreen drew my attention to and other
32 people's attention to. And in all truth, I cannot tell
33 you with any sense of certainty which bit was which bit,
34 frankly.
35 Q. Could you tell us the bits of the female body which she
36 mentioned and we will try and draw any correspondence.
37 A. No. I said that that would be entirely misleading and
38 I'm not prepared to be involved in that kind of

- 1 discussion.
- 2 MR ABBOTT: I ask that she be directed to tell which
3 parts of the female body.
- 4 COMSR: It may be a bit misleading and it is a
5 question of what use I could make of it.
- 6 A. I think people would take some large level of offence if
7 I actually started talking about bits of bodies in that
8 particular way, and I really truly cannot - I know what
9 it sounds like, I really truly cannot tell you with any
10 real certainty, and most particularly since I looked at
11 that, which bits she related to which bits, I can't
12 actually see that it takes us anywhere anyway.
- 13 Q. Perhaps if you can tell us the bits first of all without
14 trying to relate it to anything in particular. Is there
15 something offensive about the bits she mentioned.
- 16 A. I don't think it would - it would not be appropriate in
17 this open context. I'm not suggesting that it is a s.35
18 question, but it's an issue of some cultural sensitivity
19 that I -
- 20 Q. You would say that this is material that you could
21 mention, say, in a private hearing but not in a public
22 hearing.
- 23 A. Yes. But I still cannot see where it would get us
24 because I can't -
- 25 MR ABBOTT: Maybe she can't, but you are not asking
26 the questions, I am.
- 27 XXN
- 28 Q. Is this the information you won't nominate or tell us
29 which bits of the female body Doreen Kartinyeri spoke of
30 unless it is in a closed hearing.
- 31 A. I guess I would like it that way. I think some
32 Aboriginal people would take offence to me doing it in
33 this context.
- 34 Q. You won't tell us which bits of the female body Doreen
35 Kartinyeri was referring to 19 June 1994 unless it is in
36 a closed hearing.
- 37 A. I would certainly prefer that it were.
- 38 MR ABBOTT: I ask that the court being cleared and

- 1 we get on with it, unless you think it is appropriate to
2 proceed in open hearing.
- 3 COMSR: I don't know what the answer is going to
4 be. I can't say. I have to rely on the witness. She
5 is an anthropologist and will take this as being an
6 assessment.
- 7 MR ABBOTT: We will find out how much of an
8 assessment it is.
- 9 WITNESS: I say there is a real problem with this
10 in the sense that, at best -
- 11 MR ABBOTT: Can I ask you to wait. I ask that we
12 have the excuse made in the closed hearing and not in
13 the open hearing. It would be wrong to have the excuse
14 in open hearing and the evidence in closed hearing.
- 15 COMSR: I think in the circumstances, as the
16 witness indicated that she thinks its inappropriate to
17 mention the matters that she proposes to in public
18 hearing, that we now go into a private hearing in which
19 counsel and parties may remain, but the public -
- 20 Q. What about anthropologists that can remain.
21 A. I don't see a problem with that.
- 22 COMSR: With the exception of the
23 anthropologists who are in the public hearing.
- 24 MR ABBOTT: While the room is being cleared, I seek
25 permission to have access to the cross-examination of my
26 client, Dorothy Wilson, that was taken in the session,
27 restricted session, as counsel assisting me suggests
28 that it's appropriate that an application should now be
29 made in view of the course of cross-examination. I have
30 been told no more than that.
- 31 COMSR: That may be - which pages are you
32 referring to?
- 33 MRS SHAW: There is a reference at p.1113 of this
34 specific topic. When the room is cleared, I will look
35 at it.

- 1 COMSR: Perhaps if I can determine now who is
2 it who is remaining in the body of the court here, the
3 hearing room. Are there any persons who are not parties
4 and witnesses who are in the body of the room? Who else
5 do we have here?
- 6 MR ABBOTT: Can we find out their names?
- 7 MR STEWART: Peter Stewart.
- 8 MS COOMB: Melanie Coomb.
- 9 MR ABBOTT: I would suggest that this is not - this
10 should be restricted to anthropologists who have
11 business, not just any old anthropologists.
- 12 COMSR: The anthropologists I had in mind are
13 those who have given evidence during the course of the
14 hearing.
- 15 MR SMITH: Mr Miller has been allowed in.
- 16 COMSR: This information so far has been
17 restricted to women only.
- 18 MR ABBOTT: Women counsel only, and Mrs Chapman who
19 sat in as an honorary counsel.
- 20 MR MEYER: Who hasn't had a transcript and had to
21 hand her notes back in.
- 22 COMSR: I recall this. Perhaps if I can get Mrs
23 Shaw to say why she considers -
- 24 MR ABBOTT: I haven't yet reached this point. Can
25 we just go on a little way further until we get to it?
- 26 HEARING CONTINUES IN CLOSED SESSION

Closed Hearing

1 November 1995

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